THE 7TH AUSTRALASIAN CONFERENCE ON CHILD ABUSE AND NEGLECT

KEYNOTE ADDRESS

COURT MANAGEMENT OF CASES INVOLVING CHILD ABUSE ALLEGATIONS

by

The Honourable Justice Alastair Nicholson AO RFD
Chief Justice
Family Court of Australia

2:00pm
19 OCTOBER 1999
PERTH

Introduction

I thank the conference organisers for the opportunity to address you today. They are to be congratulated for bringing together a most impressive program and I hope that my presentation on the Family Court's management of cases involving child abuse allegations will be of practical assistance as well as interest.

By way of introduction, I would stress at the outset that the Court appreciates that child abuse is one element of the broader rubric of family violence, a social harm that so frequently affects adults as well as children who are clients of the Court. We have specific, albeit not foolproof, family violence policies in place that time does not permit me to canvass. I would, however, invite you to browse through the papers on the Family Court of Australia website to gain a fuller appreciation of the integrated manner in which we have sought to tackle these dangers.[1]

Secondly, I would like to acknowledge that our efforts in respect of child and adolescent abuse mirror a broader international trend. Family courts are increasingly concerned about the increased incidence of such allegations in private law disputes and the ways to best manage them. In Australia, and elsewhere too, the efforts of courts have been within, and I think it is fair to say, part of a culture. That culture has been criticised as too ready to construe child abuse allegations in private disputes about children (usually between separating parents) as false, motivated to gain a tactical advantage, or as being a hysterical outpouring of one disgruntled parent engaged in a war of attrition with the other.[2]

Locally, that perception has been challenged by two Australian studies that have independently concluded that the false allegation rate in Family Court matters is approximately 9%, a proportion equivalent as that for all abuse

[1] See http://www.familycourt.gov.au/html/violence.html

allegations.[3] In respect of her team's studies, Professor Thea Brown observed that:

> *"*[t]*he nature of the abuse allegations were serious, more serious in some regards than the profile of abuse allegations notified to state child protection authorities. There, the most common form of abuse alleged is neglect, whereas little neglect was alleged among the family court cases. The most common form alleged in the Family Court was multiple forms of abuse, particularly physical abuse and or sexual abuse and witnessing violence. The Family Court profile of abuse was more typical of the profile of abuse that the state child protection authorities move on to the Children's Court."* [4]

The Family Court of Australia has taken these findings very seriously and the approach we are continuing to develop does **not** proceed from an assumption of scepticism. We appreciate that child abuse cases are a "core business" of the Court. We consider it troublesome, however, is that so many child abuse allegations surface for the first time in private law proceedings and have been previously undetected. This suggests, not only that child abuse is more widespread than existing protective methods detect, but that there must be many other instances that never surface.

I do not pretend to have the answers but I think that there is a warning for all of us – that we have a larger problem than we perhaps think.

We accept our responsibility as a key Court in child abuse matters notwithstanding that it is in the **children's** courts of each of Australia's eight States and Territories, not in the **family** courts that protection applications must be brought by protective investigators pursuant to the differing child

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2 Brown, T. 'Focussing on the Child', Paper presented to the Third National Family Court Conference, October 1998, Melbourne, at http://www.familycourt.gov.au/papers/fca3/BROWN3.PDF

3 Brown, T, Frederico, M., Hewitt, L. and Martyn, R. (1995) *The Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia : The First Report*, a paper presented to the Vth European Congress of the Prevention of child Abuse and Neglect, Oslo, Norway examined 30 cases; Hume, M. (1997) *Child Sexual Abuse Allegations and the Family Court*, Thesis for Masters of Social Science (Research) Faculty of Humanities and Social Sciences, University of South Australia examined 50 cases.

abuse laws of the States and Territories. That disjunction is a key domestic problem.

Before turning to focus on the central topic of this address, I think it may helpful to remind you and to inform our overseas visitors, of some background facts about the Family Court of Australia and the constitutional framework in which it exists. An understanding of these matters will be important to the detail and arguments I will present this afternoon.

Relevant Background Information

1. The Family Court of Australia is a federal court and a superior court of record.[5]

The Family Court of Australia commenced operation in 1976 following the passage of the *Family Law Act* 1975 by the Federal Parliament. It has both first instance and appellate jurisdiction throughout Australia save for two exceptions.

First, the *Family Law Act* 1975 provided for the establishment of State family courts,[6] and Western Australia alone took up that option. As a result the Family Court of Western Australia is an autonomous State court hearing first instance matters.

Secondly, the Family Court of Australia is the appellate court for appeals from the Family Court of Western Australia, again with a significant relevant caveat: the Full Court of the Supreme Court of Western Australia hears appeals concerning children whose parents never married.

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4 Brown, T. 'Focussing on the Child', Paper presented to the Third National Family Court Conference, October 1998, Melbourne, at http://www.familycourt.gov.au/papers/fca3/BROWN3.PDF

5 Sub-s 21(2) *Family Law Act* 1975.

6 Section 41 *Family Law Act* 1975.

There is a further layer of complexity that I should mention. State and Territory courts of summary jurisdiction - known variously as magistrates' courts or local courts - may also make orders in private family law children's matters in certain circumstances, most notably where the parties consent. Each is part of the court system of the relevant State or Territory.

I will speak a little more about the difficulties posed by these and other aspects of our court system at a later point in my address. For the purposes of our focus upon abuse allegations, there are three points I would ask you to bear in mind:

- First, it can be generally said that abuse allegations present in comparable ways to the various family courts save that courts of summary jurisdiction do not have the social science trained counsellors as do the Family Court of Australia and the Family Court of Western Australia;
- Secondly, resource limitations mean that generally speaking, abuse allegations cannot be tested at interim hearings because there is a priority placed upon bringing proceedings to a conclusion. The resource orientation is necessarily, but unsatisfactorily, oriented towards final rather than interim hearings; and
- Thirdly, the current existence of three different family court systems presents challenges for co-ordinated and congruent responses, even leaving aside the eight different State and Territory child protection systems and children's courts.

2. The Family Court of Australia has a limited private law jurisdiction.

This means there are limitations on the types of matters about which the Court has an authority to adjudicate.[7] The Australian Constitution divides legislative powers between the Federal Parliament on the one hand and the various

State and Territory Parliaments on the other hand. The Federal Parliament is given power to legislate in respect of specific matters identified in the Constitution, with State and Territory Parliaments empowered to legislate without such restrictions, providing their laws are not inconsistent with any federal law.[8]

The Australian Constitution **does not** contain a power permitting the Federal Parliament to make laws concerning children or their protection - what may be generally termed "public family law matters". Such matters are left to the States and Territories which have developed their own children's courts and laws governing child protection and juvenile justice.

The Constitution **does** provide that the Federal Parliament may legislate in respect of what may be termed "private" family law matters, that is: marriage, divorce and related parental rights, custody and guardianship of infants.[9]

Prior to 1976, the relevant Federal legislation was the *Matrimonial Causes Act* 1959. It was described as "primarily a divorce Act"[10] and dealt with matters relating to children only as ancillary to that primary purpose. Although the Constitution provides for the establishment of Federal courts in addition to the High Court of Australia, none existed during the life of the *Matrimonial Causes Act* 1959 and cases under the Act were dealt with in the individual State and Territory courts.

The Federal Parliament's passage of the *Family Law Act* 1975 established both the Family Court of Australia and the principal law under which cases would be decided by it. Although the Court's jurisdiction was originally limited to children of a marriage, it now extends to private family law matters

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7 Northern Territory of Australia v GPAO and Ors [1999] HCA 8 per Gleeson CJ and Gummow J at para 87, per McHugh and Callinan JJ at para 162. As to the distinction between "jurisdiction" and "power" see Harris v Caladine (1991) FLC 92-217 per Toohey J at 78,493.

8 The Australian Constitution s109.

9 The Australian Constitution s 51 (xxi), (xxii).

10 Dickey, A. *Family Law* (2nd ed. 1990) 25.

concerning children whose parents never married,[11] but not to the making of orders under State and Territory child protection laws.[12]

As a result of the changes introduced by the *Family Law Reform Act* 1995 amending act, Australian family law has discarded the proprietary language of "custody", "access" and "guardianship" in favour of terminology which seeks to connote parental responsibilities to children on matters such as, residence, contact and the "care welfare and development" of the child in respect of day to day or long term matters.

3. The Family Court of Australia is a service provider.

A landmark feature of the *Family Law Act* 1975 was its far-sighted appreciation of the importance of providing the community with more than just adjudicators. The Court was envisaged as a specialist forum for deciding family disputes, and equally important, as a **service**.

The enthusiasm in the 1970s for new solutions to family disputes gained unexpected support. Perhaps the support was too great. With the rise in the breakdown in family relationships, such courts became not only expensive but repugnant to the idealised concept that most politicians like to project of society.

Over time, by reducing funds to such courts, and by failing to recognise these problems, it became easier to blame systems which embraced the new approach, rather than dealing with them. Most particularly, blame was sheeted home to the courts for the consequences of social changes, especially the

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11 The States referred their powers in this regard to the Commonwealth between 1986 and 1990.

12 The Family Court also lacks jurisdiction to determine financial disputes between unmarried persons arising under State laws and damages claims arising from intra-familia violence as a result of the High Court's decision in Re Wakim; Ex parte McNally (1999) 73 ALJR 839 which declared certain aspects of the legislation concerning the cross-vesting of jurisdiction between Federal, State and Territory courts to be invalid.

rise in marriage breakdown rates, rather than facing the causes of such problems.

The problem is not confined to family courts but also to the State and Territory courts dealing with child protection issues. We have seen this in entrepreneurial States such as Victoria where huge sums have been lavished on casinos and other bread and circus projects, at the expense of core values that should be associated with the furtherance of children's well-being. Given such an environment, it is remarkable that courts dealing with sensitive children's matters both in Australia and New Zealand have managed to preserve such a high degree of professionalism.

In the nearly quarter century of its operation, the Family Court has lived up to and, I might say, surpassed its original expectations. It has developed international renown for not just its caselaw but its service arm - the dispute resolution services provided by its social science trained counsellors and mediators, and its legally trained registrars.

For some time now, only about 5% of cases in the Family Court of Australia proceed to trial with the remainder settling at different points within the case management pathway.

4. The paramount issue to be decided in children's matters under the *Family Law Act* 1975 is what orders will be in the best interests of the child.[13]

In circumstances where the Court's essential jurisdiction is one of private law whereas the jurisdiction of State and Territory children's courts' is one of public law, child protection matters do not present to the Family Court as a result of a protection application being brought before it for determination.

[13] Decisions concerning child maintenance are not governed by the paramountcy principle.

Child protection issues come to light in the context of a private dispute in which one or more parties have approached the Court seeking orders relating to their children.

In this regard, it is important to appreciate the High Court has held that the resolution of abuse allegations in private family law proceedings:

> *"is subservient and ancillary to the court's determination of what is in the best interests of the child. The Family Court's consideration of the paramount issue which it is enjoined to decide cannot be diverted by the supposed need to arrive at a definitive conclusion on the allegation…*
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> *No doubt there will be some cases in which the court is able to come to a positive finding that the allegation is well founded. In all but the most extroadinary cases, that finding will have a decisive impact on the order to be made. There will be cases also in which the court has no hesitation in rejecting the allegation as groundless. Again in the nature of things there will be many cases in which the court cannot make a finding* [that abuse has occurred]" [14]

Remembering that the Court is a service provider as well as an adjudicatory forum might lead you to expect that the Court takes some form of investigative action when allegations come to light. In fact, this is not the case.

Court staff do not conduct forensic investigations of child abuse allegations or suspicions. It was never intended that they should play such a role although I would note in passing that a substantial number of our counsellors have previously worked in child protection services.

The nature and function of the Court's counsellors is quite different to their colleagues in child protection services who carry out investigations. The work of our counsellors is directed at short-term interventions and preparing assessment reports to aid the Court in fulfilling its responsibility to make orders that are in the best interests of the child.

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[14] M v M (1988) 166 CLR 69 at 76.

Naturally though, the Court takes proper steps when abuse matters are raised or suspected.

Administrative Responses to Child Abuse Allegations in the Family Court of Australia

Allegations may arise in the affidavit material which is filed by a party or a witness.[15] They may take the form of statements made in the presence of Court staff in the course of dispute resolution conferences or during the interviews that take place when a Family Report is being prepared by a Court Counsellor for a hearing.[16] It may also be the case that no allegation is actually made but a member of the Court's staff has reasonable grounds for forming a suspicion that a child has been or is at risk of being abused.

Since 1991,[17] the Act has contained a definition of the meaning of "abuse" which is as follows:

> *" (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*
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> *(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."*[18]

The definition was introduced at the same time as mandatory and voluntary reporting provisions were inserted into the Act.[19]

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15 See Brown, T, Frederico, M., Hewitt, L. and Sheehan, R. (1998) *Violence in Families - Report Number One: The Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia*, Department of Social Work and Human Services, Monash University, Chapter 4 for further details about the nature and source of allegations.

16 Section 62G *Family Law Act* 1975.

17 *Family Law Amendment Act* 1991.

18 Section 60D, *Family Law Act* 1975.

Where the allegation or suspicion meets this definition, the *Family Law Act* 1975 mandates that information about the allegation or suspicion **must** be transmitted to the protective authority of the State or Territory. The obligation upon Court personnel is accompanied by explicit protection against criminal or civil liability or a claim of ethical breach.

Other circumstances while not meeting this definition may nonetheless constitute "ill-treatment" or the child's exposure or subjection to "behaviour which psychologically harms the child". These latter expressions are not defined in the Act and do not attract the statutory obligation to make a report.

However, where the suspicion does not concern abuse, but relates to ill-treatment or psychological harm, Court personnel **may** make such a notification to the relevant authority without risking liability or breaching professional ethics.[20]

In the last financial year, 706 notifications issued from the Court Counselling Services of the Family Court of Australia and the Family Court of Western Australia to child welfare authorities.[21]

These notification provisions in the Act are complemented by protocols involving the Family Court of Australia and the relevant State or Territory authorities. Protocols are currently in place in Victoria, South Australia, Queensland and the Northern Territory, with drafts under consideration in New South Wales, Tasmania and the A.C.T.

These are quite lengthy and detailed documents which address the complexities that may arise when the authority and the Court are dealing with the same families. Each is slightly different to take account of different nomenclature, systems and arrangements. However all seek to facilitate

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19 *Family Law Amendment Act* 1991.

20 See ss 67Z - 67ZB, *Family Law Act* 1975.

contact and information sharing between the organisations and to clarify procedures and decision-making processes in order to lead to better outcomes for children.

There have been, however, gaps between the laudable aims of the protocols and their effectiveness. The research of Professor Thea Brown and her team in respect of the Victorian protocols identified problems in their operation such as:

- Different definitions of abuse used by the Court in comparison with the framework used by protective services;
- Inadequate feedback to the Court from protective investigators concerning the outcome of the notification;
- Lengthy and variable investigation times. [22]

As each protocol comes up for review, I expect that improvements will be informed by the Victorian research findings and also by the special pilot case-management program that I would like to now mention.

The Magellan Pilot Program

The problems detected by the research also called into question the ways in which the Court processes cases involving child abuse allegations. Particular concerns were raised about the time taken to resolve disputes involving child abuse allegations and the number of interventions for children that was a feature of such cases.

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21 Family Court of Australia (1999) *Annual Report 1998-1999*, p. 60. Of these 667 notifications were made by the Family Court of Australia and 39 were made by the Family Court of Western Australia. Notifications made by courts of summary jurisdiction are not known.

22 See Brown, T, Frederico, M., Hewitt, L. and Sheehan, R. (1998) *Violence in Families - Report Number One: The Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia*, Department of Social Work and Human Services, Monash University, Chapter 6.

It was also found that a number of current practices were effective in resolving disputes involving child abuse allegations,[23] namely:

- Clear substantiation of the alleged or suspected abuse by protective investigators;
- Presentation of a Family Report by the Court's Counselling Service;
- The combination of a pre-hearing conference associated with a Family Report and a legal representative for the child.[24]

These findings, verified by our own concerns, prompted me to establish a Melbourne committee to pilot new strategies for dealing with these troublesome and often tragic cases. This is what is known as the Magellan pilot program.[25]

The Magellan pilot involves 100 cases filed in either the Melbourne or Dandenong registries in which serious sexual or physical abuse allegations have been raised. Such cases are managed within the Court by a designated team of 2 judges, together with a registrar and two counsellors.

The matters are placed in a special mention list within two to three weeks of their identification and at the first mention before the Judge:

- A legal representative for the child is appointed;
- An order is made for the prompt production of a thorough and informative report by the investigating child welfare authority; and
- The investigating authority's file is subpoenaed to arrive at Court several days before the next mention (scheduled some six weeks later).

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23 Ibid.

24 Legal representatives for children in family law proceedings frequently play an "honest broker" role between the parties. They do not act on instructions but are somewhat like a counsel assisting the Court by drawing out evidence and making submissions based on the child's best interests.

25 Dessau, L. 'Children and the Court System', Paper presented to the Australian Institute of Criminology Conference, June 1999, Brisbane, at http://www.familycourt.gov.au/papers/html/body_dessau.html

At the second mention, the Court ensures that there has been compliance with the previous orders and further orders that a Court Counsellor prepare a family report which is to be available within seven weeks so that there are at least three weeks for consideration of the report before the next step in the process, the pre-hearing conference.

The pre-hearing conference, conducted 10 weeks after the second mention is conducted by both a counsellor and registrar. It provides a further settlement opportunity based on the information which has been collected. If resolution of the case does not occur, directions are made for the hearing which will be listed to take place between six to 20 weeks later.

Such special case management amounts to a 'front-loading' of resources and has involved considerable co-operation with the Commonwealth Attorney-General's Department and Victoria Legal Aid in respect of the funding of legal representatives for children, and the Victorian Department of Human Services which undertakes protective investigations.

Early evaluation data and statistics that were canvassed in Professor Brown's session today are suggesting distinct benefits for the families involved, for the Court and for legal aid resources. Cases are resolving much sooner in the case management process on the basis of better information at that earlier stage, with few proceeding to defended final hearings.

My most recent advice is that, at this stage, 66 cases have been settled, 11 are listed for a final hearing and 7 have gone to judgment. The pilot is drawing to a conclusion and we await the final evaluation report with great interest.

Based on the results observed to date, the Court has decided that the program pilot should be replicated in another registry in another State. The final decision as to the location of the additional pilot will depend upon there being a similar degree of co-operation as we had in Victoria so far as child representation and protective authority responsiveness is concerned.

Medical Abuse

I would like now to turn our attention to the role of the Court in an area of abuse that does not automatically come to mind when we think of child abuse: the medical violation of children and their right to bodily integrity. The most stark example is the illegal sterilisation of adolescent girls with an intellectual disability. It is a matter that directly concerns the family courts.

The entitlement of parents to consent to or refuse medical treatments for their children has long been recognised by the common law as a incident of parenthood. Under the *Family Law Act* 1975 (Cth), it applies to children under 18 years of age and is regarded as an element of the bundle of duties, powers, responsibilities and authority which are deemed by law or conferred by court order.[26] However, as children approach legal adulthood, the capacity of parents to make decisions for them is supplemented and eventually overtaken by the capacity and right of children to make their own choices and give a valid consent to treatment.[27] This principle known as the "Gillick principle" will be particularly familiar to our guests from the United Kingdom.

The scope of parental authority is also curtailed for some **types** of medical procedure. In the landmark 1992 decision in *Secretary, Department of Health and Community Services v JWB and SMB* ("*Marion's case*"),[28] the Family Court had been presented with an application for the sterilisation of a 14-year-old teenager with a severe intellectual disability and lack of capacity to give or withhold consent. The procedure was sought for the purpose of "preventing pregnancy and menstruation with its psychological and behavioural

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[26] See ss 61B, 61C and 61D of the *Family Law Act* 1975.

[27] As to the common law where legislation does not apply, see the decision of the majority of the High Court in *Marion's case* (1992) 175 CLR 218 at 237-238 and Deane J's comments at 290-294. The majority there expressly approved the House of Lords decision in *Gillick v West Norfolk and Wisbech Area Health Authority* ("*Gillick's case*") [1986] AC 112. The right may also be recognised by statute: for example, see *Minors (Property and Contracts) Act* 1970 (NSW) s 49 and *Consent to Medical Treatment and Palliative Care Act* 1995 (SA) ss 6 and 12.

[28] (1992) 175 CLR 218.

consequences".[29] Due to differing views in the Full Court of the Family Court of Australia as to the question of whether parents could consent to such a procedure, the matter went before the full bench of the High Court.

A majority of the High Court held that parental consent is ineffective where a proposed intervention such as sterilisation is invasive, permanent and irreversible, and not for the purpose of curing a malfunction or disease. Their Honours further held that courts exercising jurisdiction under the *Family Law Act* 1975 have a special responsibility to approve such medical procedures, a jurisdiction which can coexist with courts and tribunals exercising a statutory jurisdiction,[30] or the ancient *parens patriae* or "wardship" jurisdiction.

Authorisation may only be given as a matter of law if the Court is satisfied that the procedure is the step of last resort. To this end, the Court has been developing case management protocols with key stakeholders that have been operating for a number of years in Victoria and Queensland with a further set under formulation in NSW. Time does not permit me to detail their contents, but in essence, the protocols entail two components.

- The first aspect of the protocols is diversionary by creating early processes for case conferencing that seek to ensure that resources which could avert the application are identified, proposed and marshaled; and
- The second element of the protocols lays down a framework for the timely progress of an application that cannot be met with diversionary responses, through to the point of determination by designated judges.

The establishment of protocols has been accompanied by the design and dissemination of information guides which attempt to explain the issues in

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29 *Marion's case* (1992) 175 CLR 218 at 229.

30 Such as the New South Wales Guardianship Tribunal, which is specifically granted jurisdiction by s175 *Children and Young Persons (Care and Protection) Act* 1998 (NSW) to consent to the carrying out of a "special medical treatment".

plain English and educative attempts to engage with medical and allied health professionals.[31]

The importance of complying with the requirement of authorisation cannot be over-emphasised. Absent a valid authorisation, the carrying out of a sterilisation procedure on a minor unable to consent for herself is a violation of the right to bodily integrity. It is also an assault giving rise to criminal and civil liability. It is plainly a form of child abuse, both as a matter of common sense and within the terms of the definition of "abuse" under the *Family Law Act* 1975 to which I referred earlier.

I therefore find it extremely disturbing that recent evidence points to non-compliance with the law requiring authorisation.

Nearly two years ago, former Federal Disability Commissioner, the late Ms Elizabeth Hastings released a report commissioned by Human Rights and Equal Opportunity Commission that had been prepared by Susan Brady, an experienced advocate in the field of disability and Dr Sonia Grover, a consultant gynaecologist appointed to the Royal Children's Hospital in Melbourne. Their review and analysis of data from the Health Insurance Commission and the Australian Institute of Health and Welfare found as follows:

> *"Court and tribunals have authorised a total of 17 sterilisations of girls since Marion's case. Meanwhile, data collated by the Health Insurance Commission shows that at least 1045 girls have been sterilised over the same period, and this figure only counts those sterilisations which qualify for a medicare benefit and for which a claim has been processed. It excludes sterilisations carried out by hospital doctors on public patients in public hospitals."*[32]

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31 *A Question of Right Treatment* is available from the Publications Unit of the Family Court of Australia.

32 Brady, S and Grover, S, *The Sterilisation of Girls and Young Women in Australia – A Legal, Medical and Social Context*, HREOC, December 1997, p. 58. The Health Insurance Commission data excludes services provided by hospital doctors to public patients in public hospitals; Ibid p. 50.

Given the rarity of reproductive tract disease for girls and young women in the under 20-year-old age group (including those with intellectual disability),[33] the authors concluded that *"without any doubt most were sterilised unlawfully"*.[34] Moreover, the authors referred to *"persistent anecdotal evidence that some sterilisation procedures may be disguised as other procedures (with appendectomy being recorded as the principal procedure, for example)"*.[35]

Although these figures were disputed by the Federal Minister for Health, Dr Michael Wooldridge, the Minister appeared to accept that 202 sterilisations took place in the relevant period – 185 more cases than the 17 procedures that had been found to be authorised. In contrast, last August, the Federal Parliament's multi-party Joint Standing Committee on Treaties reported on the United Nations Convention on the Rights of the Child and would seem to have accepted Brady and Grover's estimates.[36]

The Minister's response to the report indicated that no investigations would be conducted into the recognised discrepancy and I can only endorse the harsh assessment expressed by the late Ms Hastings at the time. She said:

> *"A world in which government cannot be bothered to investigate potential illegal medical assault on nearly 200 of its citizens, in which those with no authority feel free to make decisions which are blatantly against the law and to carry out serious and irreversible procedures on those with little or no capacity to give or withhold consent, is a world in which people who have disabilities can have no certainty or confidence about their human being or their future."*[37]

I still adhere to what I said in the 1989 case of *In re Jane*, a view that would seem to have been shared by the majority in *Marion's case*. In *In re Jane* I said:

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33 Ibid, pp. 23-24.

34 Ibid, p. 58.

35 Ibid, p 50.

36 That *"[t]here have been 1200 minors who have undergone hysterectomies and sterilisations in Australia since 1992."*:Joint Standing Committee on Treaties *Executive Summary: United Nations Convention on the Rights of the Child (17 th Report)* (1998) Parliament of the Commonwealth of Australia, Canberra at p 46, tabled in Parliament on 28 August 1998.

37 Hastings, E, *The Right to Right Treatment,* A Keynote Address to launch *A Question of Right Treatment,* University of Melbourne, 28 March 1998, p 5.

> *"Like all professions, the medical profession has members who are not prepared to live up to its professional standards of ethics and experience teaches that the identity of such medical practitioners becomes known to those who require their assistance and their services are availed of. Further, it is also possible that members of that profession may form sincere but misguided views about the appropriate steps to be taken."* [38]

With the passage of time since the decision in *Marion's case* and attention to it, the latter explanation has become less credible as a defence against both criminal and civil liability.

That is not to say that I favour the use of the criminal law to enforce compliance with the legal requirement of authorisation. Bringing criminal proceedings is fundamentally problematic because:

> *"*[p] *arents would frequently be knowingly involved in the by-passing of authorisation. As a result, they too would be liable for prosecution, with severe likely consequences for the particular child's relationships and quality of life.*" [39]

Consistent with my concern in *In re Jane* as to the ethics of the medical profession, I share the view that a significant deterrent effect would be achieved through:

> *"encouraging a stronger and more proactive stance by allied health and personal care staff who might be "whistleblowers" and medical boards in the imposition of sanctions."* [40]

The Court's protocols concerning special medical procedures have not previously covered such matters and in my view they should. I am therefore pleased that the current protocol development process in NSW stewarded by Justice Colleen Moore is providing an opportunity to explore the logistics and

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38 (1989) FLC 92-007 at 77,257.

39 Sandor, D. (1999) 'Sterilisation and Special Medical Procedures on Children and Young People - Blunt Instrument? Bad Medicine?' in Freckelton, I. and Petersen, K. (Eds) *Controversies in Health Law*, The Federation Press, Sydney, p. 19.

40 *Ibid.*

practicalities of such an extension and it is doing so with the benefit of participation by a representative of the Committee of Presidents of Medical Colleges.

There must also be, I think, a broad and well-informed professional base for supporting what I would characterise as a controversial approach to non-compliance. I would therefore urge the relevant disciplines and organisations represented at this conference to initiate or revisit attention within their professional structures, to the issue of unauthorised sterilisations. In doing so, I would encourage you to have in hand the benefit of advice as to:

- the criminal and civil liability that may attach to direct and also indirect involvement in an unauthorised procedure; and
- the statutory consequences of not fulfilling mandatory reporting requirements in respect of "abuse".

Brady and Grover's data suggest there is a liability timebomb waiting to explode.

Conclusion

One common thread to the Court's concern about intra-familial child abuse and medical abuse to children is that our systems divide the powers and jurisdiction to deal with such cases across a range of authorities and courts at State, Territory and Federal levels. Our inter-agency protocols and the Magellan pilot program of special case management represent attempts to minimise the potential for children to suffer systems abuse as a consequence of this jigsaw puzzle.

These attempts must operate within an environment where the resources of the Family Court of Australia are finite and have been gradually eroded while its workload is steadily increasing. As the Full Court explained in C and C,[41] interim applications are particularly numerous and impose a considerable

[41] (1996) FLC 92-651.

burden upon the Court's resources. As a matter of practice and procedure, there is a discretion to permit the calling of evidence and cross-examination at interim hearings but the Full Court said that as general rule, this should not be permitted.

One significant consequence of such limitations is that all too often, evidence as to child abuse allegations cannot be properly tested at the interim hearing stage of proceedings leaving the Judge or judicial officer having to make an assessment based on the quality of the written material that is before him or her. That assessment has to be made in light of the expectation in the *Family Law Act* 1975 that

> *"...except when it is or would be contrary to a child's best interests:*
> *...*
> *(b) children have a right of contact, on a regular basis with both their parents and with other people significant to their care welfare and development."*[42]

This situation highlights a conflict within the legislation which in the one hand requires the Court to ensure of the child's right to contact with both parents and on the other the Court's responsibility to protect the children from abuse both direct and witnessed.[43] One outcome of the twin obligations identified by the small-scale empirical research into the *Family Law Reform Act* 1995 conducted by Professors John Dewar and Stephen Parker has been that:

> "*decisions at interim hearings were generally likely to preserve contact if possible, and thus to favour the non-resident parent.*
> *...*
> *This is not to imply any criticism of the judges and judicial registrars who have to make decisions at the interim stage – far from it. Their task is an unenviable one, and it is understandable that they should err on the side of caution. Rather, it is a function of a system that is unable to accord matters the close attention they deserve at what is often a critical stage."*[44]

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42 Paragraph 60B(2)(b) *Family Law Act* 1975 inserted by the *Family Law Reform Act* 1995.

43 See paragraphs 43(ca) and 68F(g), (i) and (j) *Family Law Act* 1975.

44 Dewar, J. And Parker, S. (1999) 'The Impact of the New Part VII Family Law Act 1975' Vol 13 *Australian Journal of Family Law* at p. 110.

These findings appear to accord with another empirical study which has found that since the introduction of the *Family Law Reform Act* 1995, there has been an increased reluctance on the part of Judges and judicial officers to refuse contact at an interim stage of proceedings despite strong allegations of child abuse.[45]

A makeshift solution might lie in measures such as the Magellan pilot program that I have discussed today. However, this is resource intensive – a feature not recognised by government funding authorities.

The fact is that the Family Court receives over 20,000 interim applications each year of which half require a determination by a Judge or judicial officer.[46] Many others are resolved in running but occupy judicial time.

There are 48 Judges in the Family Court of Australia, 7 Judicial Registrars and more recently 21 Senior Registrars. However one divides this workload, the practical difficulties are enormous and obvious and the upshot we cannot avoid is that there are unacceptably long delays to a final hearing – especially from a child rather than adult-centred perspective.

In my view, what is really needed is unified family court system which brings together private and public law matters, especially concerning children. My colleague, Justice Linda Dessau has described the concept eloquently:

> *"it is clear that if one were blessed with the luxury of starting with a blank canvas, the only sensible way to ensure the most streamlined and best outcome for children, would be to design one single unified family court. To avoid duplication and fragmentation, that is the optimal design.*

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45 Rhoades, H., Graycar, R. and Harrison, M. *The Family Law Reform Act" Can changing legislation change legal culture, legal practice and community expectations? Interim Report*, The University of Sydney and the Family Court of Australia, April 1999, available at http//:www.familycourt.gov.au.

46 Family Court of Australia, *Response of the Family Court of Australia to ALRC Discussion Paper 62 entitled "Review of the Federal Civil Justice System"*, October 1999 available at www.familycourt.gov.au.

> *It should be a national court with the integrated services presently existing in the FCA. It should incorporate all care and protection matters, adoption and civil and criminal cases where children are victims. But a unified family court must also include juvenile crime. Otherwise, those children charged with offences would be dealt with as the junior part of an adult criminal justice system. To follow that course would be to marginalise those children, who in reality are mostly indistinguishable from the children who are in need of care and protection or suffering family breakdown, family violence or other family problems."*[47]

Regrettably, the Federal Government would seem to be heading in a contrary direction through its proposal to establish a fourth court system to deal with private family law matters, including children's matters.[48]

Let me make it plain that there is no disagreement as between the Federal Government and the Court that it would be desirable to have federal magistrates that are able to determine certain matters in a summary fashion. At present, decisions under the *Family Law Act* 1975 made by judicial officers other than Judges are open to be reviewed as a matter of right and such a review is a rehearing anew of the original case.[49] In contrast, a party dissatisfied by a decision of a federal magistrate would have to appeal and demonstrate that the decision involved an error of law.

The sharp point of disagreement is that the Federal Government proposes the establishment of yet another separate court, with its own administration and own rules instead of attaching the new magistrates to either the Family Court or the Federal Court.

Contrary to some offensive suggestions, the Court's preference has absolutely nothing to do with empire building. We have made it clear that the system operating here in Western Australia would achieve similarly desirable

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47 Dessau, L. 'Children and Family Violence Laws in Australia' Paper presented to the conference In the Mainstream: Contemporary Perspectives on Family Violence, September 1999, Belfast.

48 The Federal Magistrates Bill 1999.

49 Such judicial officers are Registrars or Judicial Registrars of the Family Court of Australia and State and Territory magistrates.

ends for clients.[50] Under that model, magistrates are collocated within the Family Court of Western Australia and in practice directed by the Chief Judge of that Court.

Australia's family law system is already overly fractured and difficult to co-ordinate without that adding yet a further tier of courts to the landscape. To increase that complexity is, in effect, providing new fertile ground for systems abuse, and not just for the children I have been discussing today.

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[50] The Court's submission to the Senate Legal and Constitutional Legislation Committee is at http://www.familycourt.gov.au/html/magistrates.html