Children, young people and federalism

By Patrick Parkinson

Children's lives are not divided neatly into state and federal aspects, and nor are the lives of the families of which they are a part. The federal system of governance in Australia has presented some challenges in providing a regulatory framework for family life in Australia and providing a ready means for the resolution of disputes. There has nonetheless been a great deal of cooperation between the states and the Commonwealth on resolving these problems.

Most aspects of children's lives that are the subject of laws are matters of state and territory responsibility. This starts with issues around conception and birth—the regulation of assisted reproduction and the recording of parenthood on birth certificates are both state matters. The states and territories have responsibility for most other aspects of children's lives as they grow up—the regulation of child care centres, the provision of schools and health services, the child protection system, foster care, adoption, juvenile justice and the regulation of children's employment. The states and territories also provide a regulatory framework for the network of councils that provide other services such as children's play areas in parks and library facilities. These services are to a greater or lesser extent funded by the federal government, but not always in rational ways. In particular, the funding of Australian schools defies sensible explanation.

Federal responsibility for children derives from the Constitution to regulate marriage, divorce and matrimonial causes and in relation thereto, parental rights and the custody and guardianship of infants. 'Infants' in this context, means children under the age at which the status of adulthood is conferred, which is currently 18 years of age. Intially federal responsibility for children was closely connected with marriage and divorce, and this led to many complexities in terms of family disputes where the parents were not married at the time of birth of their child. If the child was born to parents in a de facto relationship, or the parents had not lived together at all, the state courts had to resolve the matter. In a case where there were children in one family born in different circumstances, for example, one child born ex-nuptially to the mother from a teenage relationship and the other the child of the marriage of the husband and wife, the complexities were even greater.

These issues were largely resolved in the late 1980s by a reference of powers from all the states except Western Australia over the custody and guardianship of ex-nuptial children. Western Australia did not need to make such a reference as it has a state court—the Family Court of Western Australia—which is able to exercise both state and federal jurisdiction. That cooperation between the states was extended to child support. The consequence is that, since the late 1980s, there has been an effective national approach to parenting disputes and child support operating at the federal level through the *Family Law Act 1975* and child support legislation. This is an outstanding example of cooperative federalism.

Child protection and adoption, however, remain matters for the states. While there have been issues concerning the regulation of intercountry adoption, and a recent move to take over that area by the Commonwealth, few problems have been encountered in leaving the regulation of adoption with the states.

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The major problem of federalism in relation to children is child protection. The states and territories have responsibility for the child welfare departments. If there are concerns about the safety and wellbeing of children, it is the state child welfare department or the state police that will conduct an investigation. If the problems are in the family—then a range of services—mostly provided by the states—may be involved in providing support. These include drug and alcohol treatment services, supports for parents with mental illness or an intellectual disability, financial counselling and gambling addiction services, and other forms of family support. If legal action is needed to remove the children from the care of the parent or to put in place a supervision order, that matter will be heard by the Children's Courts in the various states and territories applying the state or territory child protection laws.

Where then is the interface with federal responsibility? There are two issues. The first is overlap between state and federal responsibilities. A case may be running in the family courts federally concerning the parenting arrangements for a child. At the same time, a case may be running in the Children's Court to remove parental responsibility from the parents or from one of them due to abuse or neglect. There have been cases where inconsistent orders have been made in the state and federal proceedings—or cases where parenting disputes have been determined in the Family Court of Australia and because the state child welfare department was not satisfied with the outcome, it went to the Children's Court to overturn the federal court's order and to remove the child from the care of the parent. The federal family courts cannot make orders that interfere with the authority of the state courts to give parental responsibility of a child to the government.

The greater problem however, is when neither state nor federal system operates effectively to protect children. It is very common indeed for serious child protection concerns to be raised in family law proceedings run in the Family Court or the Federal Magistrates Court. These are private law proceedings. That is, the dispute is between the parents or a parent and grandparent. The state has no involvement unless it intervenes specially. If the case were being brought in the Children's Court of a state or territory, then the government would have the responsibility for marshalling the evidence and would bear the expense of bringing the matter to trial. In many cases, a parent who is seeking to protect a child from the other parent would be only too pleased for the state to take responsibility for running the case. However, state child welfare departments, hard-pressed to prioritise between different cases, may well take the view that as long as there is one parent prepared to protect the child from the other one, the Family Court can sort it out, or it may decide that the concerns about the child's safety, while serious, are not as pressing as other serious cases.

Often, cases get to the federal courts—the Family Court or Federal Magistrates Court—where there has been no effective investigation by state or territory child protection authorities, perhaps because there is no current risk of abuse. The Department may take the view that because the alleged abuse occurred while the parents were living together, and no new incidents have occurred since separation, there is no current risk to the child. The issue of future parenting arrangements can be left to the federal courts to determine.

And there is the Catch 22 of child protection. The Family Court and the Federal Magistrates Court have no capacity to investigate cases of child abuse or domestic violence. The courts can only respond to the evidence that is presented to them. That depends in turn on whether the parents can afford to litigate the matter through to trial, to commission expert reports and to have legal representation in the proceedings. Using private lawyers to run family law cases often costs $30,000-$40,000 for each parent. Child protection cases can be particularly complex, requiring more court time and therefore more expense. That is unaffordable for many parents who have serious concerns about their children's safety. If they cannot get Legal Aid, they may not be able to take the case to court at all. If the child welfare department has investigated the matter thoroughly and is prepared to make its report available to the court, then it can help resolve issues and avert the need for litigation. In many cases, the matter has not been investigated by the child welfare department because the case has not been given priority in relation to other matters.

When the responsibility for investigating child abuse concerns is with state authorities, and the resolution of disputes about child abuse is with federal courts, there is plenty of opportunity for cost-shifting and for cases to fall between the cracks.

An initiative of the Family Court, with the support of the federal government, has helped to improve the handling of child abuse cases. The Magellan program involves cooperation with state child protection authorities, who provide a brief written report to the court on the outcomes of any investigation that may have been conducted concerning allegations of child abuse in families who have disputes in the court. This has greatly improved the level of cooperation between the two systems, but the program only operates in the Family Court, and the Federal Magistrates Court—which is now the largest trial court in family matters—and does not have quite the same arrangements. The Magellan program improves cooperation and information sharing where there has been an investigation by the child welfare department, but there remain many cases where for one reason or another there has either been no investigation or the information on the file is very limited.

In 2002, the Family Law Council recommended a more comprehensive reform. It proposed the establishment of a Federal Child Protection Service to investigate child abuse concerns arising in family law proceedings where there had been no investigation of the matter by other authorities. The cost of such a service would be modest, since the Family Law Council recommended that the court itself act as a scrutineer of the need for such an investigation and it would only request such a report when it was really required. The Council also recommended the establishment of better protocols between state governments and the family courts to ensure that only one court dealt with the matter.

The report met with some resistance at the federal level because of the argument that child protection was a matter for the states. A state government, considering the issue might say equally that the resolution of parenting disputes in federal courts is a matter for the Commonwealth. The Labor government now has a fresh opportunity to examine the issue.

More than a century after Federation, the cost-shifting and buck-passing continues—but this should not overshadow the positive ways in which state and federal governments have worked together to improve the lives of children over the last thirty years.