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Inconsistencies in and the inadequacies of the family counselling and FDR confidentiality and admissibility provisions: The need for reform

This article discusses issues arising from counselling and family dispute resolution (FDR) in relation to confidentiality and admissibility, such as whether an admission of abuse to a child, or a threat to harm the other parent, can be disclosed by the counsellor or family dispute resolution practitioner (FDRP) and used in court proceedings. It is found that the admissibility provisions in the Family Law Act 1975 (Cth) are far more narrowly defined than the confidentiality requirements and have been interpreted strictly by the courts. There are competing policy considerations: the strict "traditionalist" approach that people can have absolute faith in the integrity of counsellors and mediators and in the confidential nature of the process must be balanced against a more "protectionist" stance, being the individual rights of victims to have all relevant information placed before the court and to be protected from violence and abuse. It is suggested that legislative reform is required to ensure that courts balance these considerations appropriately and don't compromise the safety of victims of abuse and family violence.

INTRODUCTION

Unfortunately, not all parenting cases that are referred to family counselling or family dispute resolution (FDR) end in resolution.[1] Some involve parents in high conflict where disputes must ultimately be resolved by family courts. In a small number of cases judicial officers have been asked to decide legal issues in relation to confidentiality and admissibility that have arisen subsequent to these processes. In the past it was common practice for family counsellors and family dispute resolution practitioners (FDRPs) to declare at the outset that everything said during the counselling or FDR session would be confidential,[2] but this statement is no longer accurate. There are specific provisions that govern confidentiality and admissibility, being the counselling provisions (ss 10D and 10E) and the FDR provisions (ss 10H and 10J) of the *Family Law Act 1975* (Cth).[3] Since their inception, judicial officers have been required to interpret the intricacies of these provisions in the context of legal issues arising subsequent to counselling and mediation.

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[1] In this article the terms "family dispute resolution (FDR)" and "mediation", and "family dispute resolution practitioners (FDRPs)" and "mediators" will be used interchangeably.

[1] Prior to the 2006 amendments to the *Family Law Act 1975* (Cth) a family and child counsellor and community mediator were required to take an oath of secrecy under ss 19 and 19K (however this was subject to s 19N, that will be discussed later in this article). They also had immunity under s 19M.

[1] These provisions were inserted in the 2006 amendments to the *Family Law Act 1975* (Cth) by the *Family Law Amendment (Parental Responsibility) Act 2006* (Cth).

This article discusses some of the recent cases that have shed light on how judicial officers have interpreted these key provisions. It will focus on whether statements made by parties, while a counsellor is conducting counselling or a FDRP is conducting FDR, such as: admissions of abuse; information that may give rise to a risk of abuse to a child; or threats to harm the other parent, are confidential and inadmissible or fall within the exceptions. For the latter issue there are not yet any FDR cases.[4] However, judicial consideration of cases concerning statements made in counselling sessions can provide guidance to both family counsellors and FDRPs.

These cases reveal some inconsistencies in approaches and some concerning practical issues in relation to the operation of these provisions. In particular, they raise concerns in relation to how courts have balanced the competing policy considerations. It is be argued that the traditional approach, that people can have absolute faith in the integrity of counsellors and mediators and in the confidential nature of the process, must be balanced against a more protectionist stance, being the individual rights of victims to have all relevant information placed before the court and to be protected from family violence and abuse. It is suggested that legislative reform is required to ensure that the safety of the victims of abuse and family violence is not compromised.

FAMILY COUNSELLING AND FAMILY DISPUTE RESOLUTION

"Family counselling" is defined as a process in which a family counsellor helps:

(a) one or more persons deal with personal and interpersonal issues within a marriage; or

(b) one or more persons (including children) who are affected, or likely to be affected, by separation or divorce to deal with:

[4] Note, however, the case of *Rastall v Ball* [2010] FMCAfam 1290 in which Reithmuller FM held that Intake was a separate phase of FDR from the conducting of FDR and that all of the Intake process was not confidential. This article will focus on the stage of the process where the FDRP is conducting FDR and the counsellor is conducting counselling, not on Intake.

[4] *Family Law Act 1975* (Cth), s 10B.

[4] *Family Law Act 1975* (Cth), ss 11A-11G. For a more detailed discussion of the definition of "family counselling" see Chisholm R, "Confidentiality and 'Family Counselling' Under the Family Law Act 1975" in Hayes A and Higgins D (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (AIFS, 2014) p 185, available at http://aifs.gov.au/institute/pubs/fpl/index.html.

[4] *Family Law Act 1975* (Cth), s 60I.

[4] *Family Law Act 1975* (Cth), s 10G.

[4] *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth), regs 4-11.

[4] *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth) at [105]-[106]. Discussed in Harman J, "Confidentiality in Family Dispute Resolution and Family Counselling: Recent Cases and Why They Matter" (2001) 17(3) *Journal of Family Studies* 204 at208.

[4] *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth), reg 25. For a detailed discussion of Intake see Kochanski L, "Family Dispute Resolution – The Importance of Intake" (2011) 1 Fam L Rev 164.

(i) personal and interpersonal issues; or

(ii) issues relating to the care of children.[5]

A family counsellor is a person accredited or authorised under s 10C of the *Family Law Act*. For the purposes of this article, family counsellors are those people who provide services outside of court settings and do not include family consultants who are involved in reportable processes.[6]

In contrast "family dispute resolution" (FDR) refers to a mediation process where there are parenting issues and, at the conclusion of the process, the mediator may issue a certificate stating whether both parties have made a "genuine effort" to negotiate.[7] It also refers to a process where the FDRP is independent of the parties.[8] To be eligible to issue certificates the mediator must be an accredited FDRP and be registered with the Commonwealth Attorney-General's Department.[9]

Although both family counselling and FDR processes can be used to assist parents make appropriate post-separation parenting arrangements, they can be distinguished from each other. For example, "Family and child counselling" is concerned "both with the psychological health and relationships issues" of the family and parents.[10] They are also different to the extent that FDRPs have a clear legislative obligation to conduct what has been termed an "Intake and Assessment" prior to organising FDR.[11] There are multiple purposes to Intake. First, family mediators must ensure that the particular case is suitable for mediation. For example, if there is extreme urgency, or certain issues are still being investigated, such as child protection allegations, FDR may not be appropriate.[12] The practitioner must then make

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[6] *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth), reg 25(1)(b).

[6] *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth), reg 25(2).

[6] *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth), reg 25 and 29.

[6] *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth), reg 28.

[6] *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth), reg 28(b).

[6] *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth), reg 28(c).

[6] The counselling provisions are not identical to the FDR provisions but the exceptions in relation to confidentiality and admissibility, which are focused on in this article, are the same.

[6] *Family Law Act 1975* (Cth), ss 10D(1), 10H(1).

[6] *Family Law Act 1975* (Cth), ss 10D(2)-(4), 10H(2)-(4).

an assessment of potential power imbalances and whether each parent will have the capacity to "negotiate freely" during a mediation process[13] and, if so, gather information about the parties and their issues and ensure that the mediation is structured in an appropriate way.[14] The FDRP is also required to provide certain information to the parties about the FDR process and his or her qualifications and fees. [15]

Included in the information that FDRPs must disclose to parents during Intake is an explanation of the confidentiality[16] and admissibility[17] provisions under ss 10H and 10J of the *Family Law Act*. Counsellors should also discuss the equivalent counselling provisions, ss 10D and 10E, with their clients. These provisions are examined below.

SECTIONS 10D AND 10H: CONFIDENTIALITY

Confidentiality of communications in counselling and FDR is dealt with in ss 10D and 10H of the *Family Law Act*.[18] Those provisions set out that, generally, a counsellor or FDRP must not disclose a communication made while conducting family counselling or FDR, except in certain exceptional circumstances.[19] The exceptions that are relevant to the discussion in this article are as follows:

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[12] And Registrars, lawyers and Independent Children's Lawyers and arbitrators. *Family Court Act 1997* (WA), s 160.

[12] *Children Youth and Families Act 2005* (Vic), s 182.

[12] *Children Youth and Families Act 2005* (Vic), s 184

[12] *Children Youth and Families Act 2005* (Vic), s 162

[12] *Children's Protection Act 1993* (SA), s 11.

[12] Defined as sexual, physical, emotional abuse or neglect, *Children's Protection Act 1993* (SA), s 6.

[12] *Children, Young Persons and Their Families Act 1997* (Tas), s 13.

[12] *Children, Young Persons and Their Families Act 1997* (Tas), s 14.

[12] That is, the person or persons who have parental responsibility in relation to the child, *Family Law Act 1975* (Cth), s 10H(3)(b).

[12] The Parliament of the Commonwealth of Australia, The Senate, Family Law Amendment (Shared Parental Responsibility) Bill 2005, *Revised Explanatory Memorandum* at [493], [518].

[12] Australian Law Reform Commission (ALRC), *Family Violence – A National Response*, Report 114 (2010), Chapter 22: Confidentiality and Admissibility at [22.28]-[22.32], http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114. For a description of coercive and controlling violence see Kelly JB and Johnson MP, "Differentiation Among Types of Intimate Partner Violence: Research Update and Implications For Interventions" (2008) 46(3) *Family Court Review* 476 at 481-484.

[12] Most submissions responding to the ALRC's proposed amendments supported these suggested amendments. ALRC, n 31 at [22.24].

[12] ALRC, n 31 at [22.23].

(2) A [family counsellor/FDRP] must disclose a communication if the [counsellor/practitioner] reasonably believes the disclosure is necessary for the purposes of complying with a law of the Commonwealth, a State or a Territory.

(3) A [family counsellor/FDRP] may disclose a communication if consent to the disclosure is given by:

(a) if the person who made the communication is 18 or over – that person; or

(b) if the person who made the communication is a child under 18:

(i) each person who has parental responsibility (within the meaning of Part VII) for the child; or

(ii) a court.

(4) A [family counsellor/FDRP] may disclose a communication if the [counsellor/practitioner] reasonably believes that the disclosure is necessary for the purpose of:

(a) protecting a child from the risk of harm (whether physical or psychological); or

(b) preventing or lessening a serious and imminent threat to the life or health of a person; or

(c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or

(d) preventing or lessening a serious and imminent threat to the property of a person; or

(e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or

(f) if a lawyer independently represents a child's interests under an order under section 68L – assisting the lawyer to do so properly.[20]

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[20] ALRC, n 31 at [22.20]-[22.22]. The amendments to the *Privacy Act* to remove "imminent" and to include "serious threat to the life, health or safety of any individual" were made in the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

[20] ALRC, n 31 at [22.26].

[20] And family consultant; Independent Children's Lawyer, arbitrator and certain other court Registrars.

[20] Pursuant to *Family Law Act 1975* (Cth), s 67ZB if a FDRP makes a notification under s 67ZA he or she will be immune from liability in civil and criminal proceedings and not considered to have breached any professional ethics.

[20] *Family Law Act 1975* (Cth), ss 10E(1) and 10J(1). These sections also state that generally anything said, or any admission made, by or in the company of a person to whom a counsellor or FDRP refers a person for medical or other professional consultation, while the person is carrying out professional services for the person is inadmissible, subject to the exceptions set out in ss 10E(2) and (3) and 10J(2) and(3). Note that this article only discusses admissibility in relation to counsellors and FDRPs and will not extend to discussing it in relation to these other professionals.

[20] This is a certificate evidencing that a person who is under 18 and is wanting to marry has had counselling with a family counsellor.

[20] *Family Law Act 1975* (Cth), ss 10D(7), 10H(6).

In summary, the counsellor or FDRP *must* disclose a communication if it is required by law. In some States and Territories practitioners have mandatory reporting requirements to child safety authorities in relation to abuse of children. In Western Australia, counsellors and FDRPs are required to make a notification where they have reasonable grounds for suspecting that a child has been or is at risk of abuse, ill treatment or psychological harm.[21] In Victoria, registered psychologists[22] are required to report if they believe on reasonable grounds that a child is in need of protection[23] due to concerns that they have suffered or will suffer harm as a result of sexual, physical or psychological abuse and ill health.[24] Social workers and psychologists[25] in South Australia must notify if they suspect on reasonable grounds that a child has been or is being abused or neglected.[26] Tasmanian psychologists[27] must report where they know, believe or suspect on reasonable grounds that a child is suffering, has suffered or is likely to suffer abuse or neglect or that an unborn child will be likely to suffer abuse or neglect or require medical treatment or intervention as a result of the behaviour of the mother.[28]

Under ss 10D and 10H counsellors and FDRPs *may* disclose a statement if there is consent by the adult participant who made it, or where a child made a relevant statement, with the consent of the parents or the court.[29] Further, a communication can be revealed if it is essential to protect a person or property from harm, to prevent the commission of an offence or if necessary to assist the Independent Children's Lawyer. The Revised Explanatory Memorandum to the *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth) stated that there was intended to be a clear delineation between "the circumstances in which disclosure is mandatory from those circumstances in which disclosure may occur".[30]

While disclosure is permitted where there is a "threat to the life or health of a person", the threat is currently required to be "serious and imminent". The need for the threat to be

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[20] *Family Law Act 1975* (Cth), ss 10E(3), 10J(3).

[22] *Children Youth and Families Act 2005* (Vic), s 182.
[23] *Children Youth and Families Act 2005* (Vic), s 184
[24] *Children Youth and Families Act 2005* (Vic), s 162
[25] *Children's Protection Act 1993* (SA), s 11.
[26] Defined as sexual, physical, emotional abuse or neglect, *Children's Protection Act 1993* (SA), s 6.
[27] *Children, Young Persons and Their Families Act 1997* (Tas), s 13.
[28] *Children, Young Persons and Their Families Act 1997* (Tas), s 14.
[29] That is, the person or persons who have parental responsibility in relation to the child, *Family Law Act 1975* (Cth), s 10H(3)(b).
[30] The Parliament of the Commonwealth of Australia, The Senate, Family Law Amendment (Shared Parental Responsibility) Bill 2005, *Revised Explanatory Memorandum* at [493], [518].

"imminent" has been criticised as potentially compromising the safety of victims of violence, particularly due to the coercive controlling nature of some forms of family violence. It was proposed by the Australian Law Reform Commission (ALRC) in its 2010 report, *Family Violence: A National Response*[31] that ss10D(4)(b) and 10H(4)(b) of the *Family Law Act* be amended to remove the requirement for a threat to be "imminent" and to add "safety" to "life or health" as a ground for disclosure.[32] This would mean that counsellors and FDRPs could disclose communications where they reasonably believed it was necessary to prevent or lessen a serious threat to a person's life, health or safety.[33] The ALRC suggested that such amendments would bring these provisions into line with proposed amendments to the *Privacy Act 1988* (Cth) in relation to permitted disclosure of personal information in particular situations.[34] Also, the ALRC suggested that family counsellors and FDRPs should make immediate referrals to services such as the police, crisis counselling and legal assistance and develop safety plans in conjunction with the person or persons at risk.[35]

Although ss 10D and 10H set out some exceptional circumstances in which certain types of statements *may* be disclosed, the use of the word "may" leaves such disclosure to the discretion of the counsellor or practitioner. Also, the provisions do not specifically designate to whom the counsellor or mediator may disclose the statements and leaves this question open. Sections 10D and 10H can, however, be read together with s 67ZA of the *Family Law Act*. That section sets out that a family counsellor and FDRP[36] *must*, as soon as practicable, make a notification to the relevant child safety authority in the particular State or Territory, if he or she has "reasonable grounds for suspecting that a child has been abused or is at risk of abuse".[37] There is no room for discretion in s 67ZA. It creates a clear obligation on counsellors and practitioners.

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[31] Commonwealth of Australia, Family Law Council, *Family Law and Child Protection: Final Report* (2002), Chapter 7: Confidentiality of Disclosures of Child Abuse. Referred to in Parkinson P, *Australian Family Law in Context: Commentary and Materials* (5th ed, Thomson Reuters, 2012) p 278.

[31] Commonwealth of Australia, Family Law Council, n 48 at [7.17].

[31] National Alternative Dispute Resolution Advisory Council, *Primary Dispute Resolution in Family Law, A Report to the Attorney-General on Part 5 of the Family Law Regulations* (Canberra, March 1997).

[31] Which may have contained information concerning abuse of a child of the marriage.

[31] *Relationships Australia v Pasternak* (1996) 133 FLR 462 at 471; [1996] FLC 92-699.

[31] At that time s 19N did not contain the exceptions to admissibly for disclosures that revealed abuse or a risk of abuse.

However, this leaves statements, such as threats of harm, to be disclosed at the discretion of the counsellor or practitioner. It is argued that this is a flaw in the provisions, as it means that a counsellor or FDRP is not required to inform the person against whom the threat has been made, potentially compromising that person's safety. Under ss10D and 10H, the other people that a practitioner may need to notify of a disclosure of abuse or a threat of harm, could include the other parent and the potential victim of the threat (if the victim is not the other parent). It is suggested that ss 10D and 10H should be amended so that the counsellor or practitioner *must* disclose the communication, particularly where a threat of harm is made to a child or another adult.

Sections 10E and 10J: Admissibility

Sections 10E and 10J deal with admissibility and state that generally anything said or any admission made, by or in the company of a counsellor or FDRP while conducting counselling or FDR, will not be admissible in a later court or tribunal hearing, unless it falls within certain exceptional circumstances.[38] The exceptions relevant to the current discussion are as follows:

> (2) Subsection (1) does not apply to:
>
> (a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or
>
> (b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;
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> unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

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[38] *W v W* (2001) 164 FLR 18; [2001] FLC 93-085 at [99]. For a discussion see the report of the Commonwealth of Australia, Family Law Council, n 48, pp 102-103.

[38] Commonwealth of Australia, Family Law Council, n 48.

[38] *Family Law Amendment Act 2003* (Cth). For further reasons behind the amendments see Family Law Amendment Bill 2003, Bills Digest No. 12 2003-2004, Passage History, Disclosure About Allegations of Child Abuse, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0304/04bd012.

[38] *Family Law Legislation Amendment (Family Violence and Other Measures Act) 2011* (Cth).

[38] *Family Law Act 1975* (Cth), s 4AB.

[38] *Family Law Act 1975* (Cth), s 4(1).

[38] *Family Law Act 1975* (Cth), s 60CC(2A).

[38] Family Law Courts, *Family Violence Best Practice Principles*, Edition 3.1 (April 2013), http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/fv_best_practice_for_flc.

[38] Altobelli T and Bryant D, "Chapter 19: Has Confidentiality in Family Dispute Resolution Reached its Use-by Date?" in Hayes and Higgins (eds), n 6, p 200. Note that 49 (52%) of family consultants surveyed responded to the survey.

[38] Altobelli and Bryant, n 62, pp.203-205.

There are also provisions that permit information necessary for the FDRP to give a certificate regarding attendance at FDR under s 60I(8) or for a counsellor to provide a certificate under s 16(2A)(a) of the *Marriage Act 1961*(Cth)[39], to be disclosed[40] and admissible in court.[41] Apart from this, only statements made that reveal that a child has been abused or may be at risk of abuse will be admissible in court.

These exceptions in relation to admissions of abuse or risk of abuse were derived from the former admissibility provision in the *Family Law Act*, s 19N.[42] There is a further restriction in that, if in the opinion of the court, there is sufficient evidence of an admission or disclosure from another source, the communication will not be admissible. [43]

It is evident that the exceptions in the admissibility provisions are much more narrowly construed than those contained in the confidentiality provisions. When read together, there are some important distinctions in scope and effect that create stark differences between what can be disclosed by counsellors or FDRPs as compared with what information will be admissible in court. If applying the provisions to a particular fact scenario, such as where one parent makes a threat to harm the other parent during counselling or mediation, ss 10D and 10H make clear that such a threat will not be confidential.[44] As the provisions are silent in relation to whom the communication may be disclosed, the practitioner could notify the potential victim, being the other parent, and the police. However, both provisions provide that the practitioner "*may* disclose a communication" so such notifications are at the discretion of the practitioner. Also, although the threat falls within the definition of "family violence" in the *Family Law Act*,[45] such behaviour is not included in the exceptions to inadmissibility. Consequently, the counsellor or mediator could not be subpoenaed to court to give evidence in relation to the threat and any notes taken during the session will be inadmissible.

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[39] Reich JB, "A Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure" (2001) 2 *Journal of Dispute Resolution* 197. This article is cited in Altobelli and Bryant, n 62 at p 197.

[39] *Degraves v Searle* [2013] FCCA 660 at [19].

[39] *Family Law Act 1975* (Cth), s 10E(2)(a).

These differences between the confidentiality and admissibility provisions are strengthened by ss 10D(6) and 10H(7) which state that:

> Evidence that would be inadmissible because of section [10E/10J] is not admissible merely because this section requires or authorises its disclosure.

This reinforces the fact that the exceptions to inadmissibility in FDR and counselling are narrowly defined and limited to admissions or disclosures of abuse or risk of abuse of children under 18.

The ALRC, in its 2010 report, considered whether ss 10E and 10J should be amended to add another exception so as to render disclosures of family violence admissible in court. After weighing up the competing arguments the ALRC were of the view that:

> the arguments in favour of making disclosures about family violence admissible do not outweigh the public interest in protecting the integrity and ability of FDR and family counselling to secure safe outcomes for family violence victims and those at risk of family violence.[46]

The ALRC decided that the public interest in absolute confidentiality of the process outweighed the benefits to victims in ensuring that all relevant information could be placed before courts. The relevance of this view subsequent to the 2011 amendments to the *Family Law Act*[47] is questioned below, when the competing public policy considerations and the recent case law relating to disclosures of child abuse and family violence made in counselling are examined.

COMPETING POLICY CONSIDERATIONS

Before turning to the recent case law, it is helpful to discuss the opposing policy considerations which are at play and also to examine how such concepts have evolved with time. In the 2002 report, *Family Law and Child Protection: Final Report*,[48] the Family Law

[46] *Degraves v Searle* [2013] FCCA 660 at [78].

[46] *Degraves v Searle* [2013] FCCA 660 at [79].

[46] That set out that the court must take prompt action in relation to allegations of child abuse or family violence, particularly after the filing of a notice under *Family Law Act 1975* (Cth), s 67Z92) or s 67ZBA(2).

[46] Family Law Courts, n 61.

[46] *Degraves v Searle* [2013] FCCA 660 at [88].

[46] *Family Law Act 1975* (Cth), s 10D(4)(b).

[46] Letter Family Law Council to Commonwealth Attorney-General (12 October 2010).

[46] Law Council of Australia, *Integrity of ADR Processes*, Submission (26 August 2010).

[46] "Protect Children and the Mediation Process", *The Sydney Morning Herald* (26 February 2010), http://www.smh.com.au/federal-politics/editorial/protect-children-and-the-mediation-process-20100225-p5ti.html.

[48] *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

Council dealt with the competing policy arguments. The public interest grounds for confidentiality and a prohibition on admissibility of statements made in counselling, which could be described as a strict, traditionalist approach, were explained as follows:

> The rationale for maintaining such a sweeping exclusionary provision is to be found in a concern not to compromise the ability of parties undergoing counselling to discuss in a free and frank manner their relationship difficulties. The provision, it is argued, allows parties to explore possibilities for improving relationships in as confidential a framework as possible, without feeling that they must carefully watch what they say in case it is subsequently used against them in criminal, family, or civil proceedings.[49]

This report also contained a summary of the public policy reasons for statements made in mediation being confidential and inadmissible, which was extracted from the National Alternative Dispute Resolution Advisory Council's 1997 report, *Primary Dispute Resolution in the Family Court*:[50]

Mediators consider the prohibition on calling evidence to be essential to the integrity of the mediation process for the following reasons:

- the participants need to feel free to be honest and open and to negotiate freely if disputes are to be resolved successfully. If the participants fear that what they say will later be used as evidence in a court it will constrain their ability to do so;
- if the mediator could subsequently be called to give evidence the informality of the process might be compromised by the mediator's concern to avoid being required to give evidence of what was said in the mediation;
- the possibility that the mediator might be brought before a court to give evidence of what happened would affect the participants' trust in the mediator; and
- the participants may be encouraged to continue the marital fight in court and to draw the mediator (and others) into it.

This strict traditionalist approach was adopted in the 1996 case *Relationships Australia v Pasternak* (1996) 133 FLR 462; [1996] FLC 92-699 where the Full Court of the Family

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[48] Chisholm R, *Family Courts Violence Review* (27 November 2009), p 79.

[48] Chisholm, n 77, pp11-12.

[48] *Unitingcare Unifam Counselling Mediation v Harkiss* (2011) 252 FLR 309; [2011] FamCAFC 159 at [2].

[48] *Unitingcare Unifam Counselling Mediation v Harkiss* (2011) 252 FLR 309; [2011] FamCAFC 159 [2].

[48] *Harkiss v Beamish* (2011) 251 FLR 412; [2011] FMCAfam 527 at [4]-[5].

[48] *Harkiss v Beamish* (2011) 251 FLR 412; [2011] FMCAfam 527 at [11]

Court set aside an order of the trial judge allowing inspection of documents from counselling[51] by legal advisors. At that time the Full Court was of the view that maintaining the confidence of statements made in counselling "trumped" the paramountcy of the welfare of the child and stated:

> Accordingly, in balancing the public interest in the paramountcy of the welfare of the child against the public interest in the maintenance of the confidence of statements made in the course of marriage counselling, we consider that the scales come down squarely in favour of the latter.[52]

There are obviously strong arguments for communications in counselling and mediation to be confidential and not able to be used in court. However, in the alternative, the opposing view has also been clearly represented and there are persuasive reasons for the admission into evidence of information that will assist courts to protect the safety of victims of abuse and family violence. This could be described as a more protectionist approach.

An example of this alternative view was expressed by the Full Court of the Family Court in the case of *W v W* (2001) 164 FLR 18; [2001] FLC 93-085 per Nicholson CJ and O'Ryan J. The facts were that an affidavit of a counsellor containing alleged admissions by the father of inappropriate sexual behaviour was deemed inadmissible due to then s 19N.[53] The Full Court of the Family Court of Australia dismissed an application for leave to adduce fresh evidence. However, the court criticised the drafting and operation of s 19N and highlighted the policy considerations aimed at protection of the rights of the individual:

> In our view, it is most unfortunate that the legislation contains no exception to the legislative prohibition to the giving of such evidence in circumstances where its non-receipt may impinge on the best interests of children. This means that a court that is required to make decisions treating the best interests of children as the paramount consideration in determining issues such as residence and contact must do so without having any knowledge of important and relevant facts that could affect such a decision.[54]

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[51] *Harkiss v Beamish* (2011) 251 FLR 412; [2011] FMCAfam 527 at [41].
[51] *Trappe v Vonne* [2009] FMCAfam 497 at [14]-[15].
[51] *Trappe v Vonne* [2009] FMCAfam 497 at [34].
[51] *Trappe v Vonne* [2009] FMCAfam 497 at [31].
[51] *Family Law Act 1975* (Cth), s 4(1).

Concerns were raised in the Family Law Council *Family Law and Child Protection: Final Report* about the outcome of *W v W* and the impact of s 19N.[55] Subsequently, s 19N was amended to include exceptions to admissibility for statements regarding abuse or the risk of abuse to a child,[56] which were then adopted in the current admissibility provisions.

More recently, the amendments made to the *Family Law Act* in 2011[57] indicate that, in parenting proceedings, courts should place increased weight on the protection of children from harm and abuse. This is reinforced by the broadened definitions of "family violence"[58] and "abuse"[59] and the requirement for the court to prioritise protection from harm over meaningful relationships.[60] A different climate now exists in the family law system subsequent to these amendments and the focus on protection of victims. This has been reinforced by the Family Court of Australia, *Family Violence Best Practice Principles*[61] which direct judicial officers to prioritise the safety of victims of violence and abuse and specifically state that:

> The courts aim to protect children and family members from all forms of harm resulting from family violence and abuse.

It is suggested that, in light of the 2011 amendments and the implementation of the Family Court's *Best Practice Principles*, the confidentiality and admissibility provisions need to evolve accordingly. Consequently, it is now open for judicial officers to interpret these provisions of the *Family Law Act* in a more liberal, protectionist manner.

Further, recent research questions the fundamental basis for a strict, traditionalist approach, ie the assumption that clients will be less honest and open if they are aware that their counselling or mediation process is not confidential. In a recent Family Consultant's Confidentiality Survey a total of 94% of respondents reported that parents "never" or "rarely" expressed concerns about the absence of confidentiality when participating in the s 11F

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[56] Reithmuller FM also took into account that the wife had not filed a risk of child abuse.

[56] This followed the approach of Carmody J in *Relationships Australia (Qld) v M* (2006) 204 FLR 440; [2006] FLC 93-305.

[56] Reithmuller FM also ordered that the wife pay Lifeworks costs (at [48]).

reportable family consultant processes.[62] The authors reported that "admissions are routinely made in s 11F conferences" and that the research cast doubts on the view that confidentiality is integral to processes such as counselling and FDR.[63] This is supported by previous research where patients' willingness to disclose information to their psychotherapists was not impacted by whether the process was confidential.[64]

In recent times judicial officers have been asked to interpret the confidentiality and admissibility provisions in the context of cases that have occurred in counselling. The following discussion sheds light on whether the courts have been taking a strictly traditionalist approach to the provisions or a more protectionist approach, focusing on the rights of individuals to safety. It is demonstrated that the drafting of the provisions has created some unfortunate blocks to judicial officers taking a more liberal approach and raises concerns as to the impact of the operation of these provisions in practice.

THE RECENT CASE LAW

Degraves v Searle [2013] FCCA 660 highlights the stark differences between the confidentiality and admissibility provisions. The parties had been involved in ongoing parenting proceedings and had been ordered by the court under s 13C of the *Family Law Act* to attend the Unifam *Keeping in Contact* program. As part of the court process a Family Report had been prepared and issued, but the parents continued to try to resolve their parenting matters. To assist with this they persisted with their involvement in the *Keeping in Contact* program until an incident occurred that led the counsellor to terminate their involvement in the program.

This incident was communicated when the counsellor telephoned the mother and informed her that the father had made certain threats against the mother in one of his solo sessions and that, in her view, both parents could consequently no longer participate in the program. Subsequently the mother applied to the Federal Circuit Court of Australia for various restraining orders seeking personal protection for herself and the children against the father. She sought to include the statements made to her by the counsellor in her affidavit

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[62] Altobelli T and Bryant D, "Chapter 19: Has Confidentiality in Family Dispute Resolution Reached its Use-by Date?" in Hayes and Higgins (eds), n 6, p 200. Note that 49 (52%) of family consultants surveyed responded to the survey.

[63] Altobelli and Bryant, n 62, pp.203-205.

[64] Reich JB, "A Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure" (2001) 2 *Journal of Dispute Resolution* 197. This article is cited in Altobelli and Bryant, n 62 at p 197.

material. The sections of the mother's affidavit relevant to the issues that came before the court were as follows:

> On 10 April 20113 [sic] after attending about 6 appointments with Unifam I received a telephone call from Ms C from Unifam where she said words to the effect: "In a session with me [Mr Searle] made several statements that could be construed as a threat against your life".
>
> On 17 April 2013 I received a telephone call from Ms C from Unifam where she said words to the effect: "The Keeping in Contact Program is now finished because of what [Mr Searle] did the other day".[65]

His Honour Judge Harman was required to decide whether these paragraphs in the mother's affidavit should be struck out as they related to conversations between the counsellor and mother and were potentially inadmissible under s 10E of the *Family Law Act* which does not contain any exceptions so as to render threats made towards the other parent admissible.

Judge Harman initiated an investigation into whether the only possible exception available under s 10E could apply, which was whether the statement made by the father constituted, "an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse".[66] His Honour examined whether the alleged threat by the father towards the mother constituted "abuse" to the child of the relationship in that, if the threat was carried out, it could result in serious psychological harm to the child in being exposed to family violence. His Honour noted that the definition of "abuse" in s 4(1) of the *Family Law Act* included, "causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence".

His Honour then went on to state that:

> On the above basis a risk of abuse may be established if a clear threat were made by one parent with respect to the life of the other (as the carrying out of that threat would likely cause serious psychological harm to the child if the child were so exposed thereto and adopting the broad interpretation of "exposure" implied and inferred by the definition of family violence in section 4AB). However, the paragraphs sought to be relied upon by Ms

[65] *Degraves v Searle* [2013] FCCA 660 at [19].
[66] *Family Law Act 1975* (Cth), s 10E(2)(a).

> Degraves do not contain evidence of any specific statement by Mr Searle but purely a construction or interpretation of a statement by Mr Searle.[67]

Judge Harman explained his decision that the content of the affidavit material in question was inadmissible as he did not consider it indicated "abuse" by the father:

> Thus I am not satisfied that the exception contained within section 10E(2) as to a risk of abuse could be made out even if one adopted such a broad interpretation of the term "abuse".[68]

Unfortunately it appeared that, as the counsellor had not recounted to the mother the specific words of the threat, the paragraphs in the mother's affidavit material did not set out precise enough details of the threat for it to be determined "psychological abuse" to the child.

Judge Harman went on to reject the mother's lawyer's alternate submissions that the threats should have been admitted into evidence on public policy grounds due to the principles of protecting litigants under s 67ZBB[69] of the *Family Law Act* and the Family Court's *Family Violence Best Practice Principles*.[70] Judge Harman stated that, in his view, "public policy" required a very narrow interpretation of the confidentiality and admissibility provisions and stated:

> To the extent that it might, thus, be suggested that there is a "*public policy*" consideration raised in this case, it is more relevantly directed to the exclusion of evidence from sources otherwise legislatively protected as confidential and inadmissible and supportive of a narrow interpretation of the exceptions (and balanced against the Court's obligations pursuant to provisions such as section 67ZBB).[71]

Therefore His Honour took a traditionalist, strict view of the public policy considerations. However, Judge Harman condoned the counsellor's disclosure of the threat to the mother, as it was permissible under the broader exceptions to confidentiality in s 10D(4)(b), as being necessary in "preventing or lessening a serious and imminent threat to the life or health of a person".[72]

This case highlights the severe limitations of the admissibility provisions. Unlike the confidentially provisions, they do not contain exceptions so that information about family

[67] *Degraves v Searle* [2013] FCCA 660 at [78].
[68] *Degraves v Searle* [2013] FCCA 660 at [79].
[69] That set out that the court must take prompt action in relation to allegations of child abuse or family violence, particularly after the filing of a notice under *Family Law Act 1975* (Cth), s 67Z92) or s 67ZBA(2).
[70] Family Law Courts, n 61.
[71] *Degraves v Searle* [2013] FCCA 660 at [88].
[72] *Family Law Act 1975* (Cth), s 10D(4)(b).

violence, including threats made to the life or health of a person, can be put before the court. This is a concerning limitation and a call for amendments to these provisions was made by the Family Law Council in 2010.[73] The issue was also considered by the Law Council of Australia in its Submission to the National Alternative Dispute Resolution Advisory Council (NADRAC) inquiry into the *Integrity of ADR Processes*.[74] This submission highlighted that the Chief Justice of the Family Court of Australia, Diana Bryant, had suggested that consideration be given to waiving non-admissibility in family violence cases so that judges can access all relevant information when making their decisions.[75]

It is clearly concerning that in *Degraves v Searle* the mother was unable to admit into evidence threats made to her by the father and was therefore unsuccessful in her application for restraining orders for personal protection against her former partner. Unfortunately, even though the *Family Law Act* was amended in 2011 to strengthen its protection of victims of violence and abuse, no amendments were made to ss 10H and 10J.[76] This was despite the report of Professor Richard Chisholm, *Family Courts Violence Review*, which provided the impetus for the 2011 reforms, in which he stated:

> in my view the court's ability to conduct a risk assessment process, and its capacity to protect the children and families that come before it, would almost certainly be enhanced if it had access to relevant information held by external agencies, including dispute resolution agencies.[77]

Chisholm's report even contained a recommendation for amendments to the *Family Law Act* in relation to these issues:

> *Recommendation 2.5*
>
> That the Government consider amending provisions of the Act relating to the confidentiality of information held by agencies outside the court, including dispute resolution agencies, so that information relevant to the assessment of the risks from violence or other causes could be more readily available to the courts.[78]

[73] Letter Family Law Council to Commonwealth Attorney-General (12 October 2010).
[74] Law Council of Australia, *Integrity of ADR Processes*, Submission (26 August 2010).
[75] "Protect Children and the Mediation Process", *The Sydney Morning Herald* (26 February 2010), http://www.smh.com.au/federal-politics/editorial/protect-children-and-the-mediation-process-20100225-p5ti.html.
[76] *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).
[77] Chisholm R, *Family Courts Violence Review* (27 November 2009), p 79.
[78] Chisholm, n 77, pp11-12.

Therefore, Chisholm appeared to be recommending that the regulation of confidentiality and admissibility surrounding dispute resolution, at the very least, be relaxed, so that relevant information could be available to the court. It is therefore perplexing as to why these problematic provisions were not amended at such an opportune time.

Another case that raises similar concerns, however, in relation to the admissibility of information regarding the risk of abuse to a child is *Unitingcare Unifam Counselling Mediation v Harkiss* (2011) 252 FLR 309; [2011] FamCAFC 159. Unifam had refused to comply with a subpoena arising out of a counselling session, citing ss 10D and 10E and public policy grounds, "because family counselling is undertaken on the basis of an assumption of confidentiality, and that there is a substantial public interest policy in maintaining confidentiality in family counselling".[79] The subpoena requested that the following information be made available to the court:

> All records in relation to [MS BEAMISH] AND [MR HARKISS] including any reports or allegations, counselling notes, referrals, and file notes.[80]

The subpoena had issued as the mother's lawyers were seeking to admit into evidence notes taken by the counsellor. The mother alleged that the father had made admissions about his conduct during counselling which may have led to the conclusion that the child was at risk of abuse. The father strenuously denied that he had made such admissions. Both parents consented to the counsellor's notes being produced.

Federal Magistrate Altobelli, in the first instance decision *Harkiss v Beamish* (2011) 251 FLR 412; [2011] FMCAfam 527, noted that s 10D(3(a) sets out that a family counsellor *may* disclose a communication, if consent to the disclosure is given by the person who made it and they were over 18.[81] In this case the father had made the alleged statement and consented to the information being disclosed. Altobelli FM consequently held that Unifam had to comply with the subpoena. In obiter His Honour stated, "that the confidentiality is that of the parties to family counselling not the provider of family counselling"[82] and therefore if the parents consented to disclosure it was not for Unifam to object to this.

Unifam appealed this decision and was ultimately successful as Coleman J of the Family Court of Australia took a different view and set the subpoena aside. His Honour held that s 10D(3) stated that the family counsellor *may* disclose a communication and, because of the

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[79] *Unitingcare Unifam Counselling Mediation v Harkiss* (2011) 252 FLR 309; [2011] FamCAFC 159 at [2].
[80] *Unitingcare Unifam Counselling Mediation v Harkiss* (2011) 252 FLR 309; [2011] FamCAFC 159 [2].
[81] *Harkiss v Beamish* (2011) 251 FLR 412; [2011] FMCAfam 527 at [4]-[5].
[82] *Harkiss v Beamish* (2011) 251 FLR 412; [2011] FMCAfam 527 at [11]

use of the word "may", the counsellor was not obliged to disclose the father's statements. Coleman J took the view that there was nothing in s 10D(3) or in s 10D generally, or in s 69ZX that had empowered Altobelli FM to order the family counsellor to disclose the communications made by the father.

In relation to the reasoning behind his decision Coleman J stated:

> Section 10D of the Act creates and defines the privilege attaching to communications made to a family counsellor in the conduct of family counselling, and articulates the circumstances in which that privilege may, or must be waived. Given the absence of legislative constraint upon the persons or entities to whom, or to which disclosed communications may be published, failure to observe the legislative imperatives of s 10D could have quite unintended consequences, and potentially adverse implications for the welfare of children referred to in, or connected with such communications.[83]

His Honour also dealt with whether s 10E(2) had empowered the trial judge to compel Unifam to produce the documents. His Honour held that the exception to admissibility under s 10E(2)(a), being where there is "an admission by an adult that indicates that a child under 18 is abused or is at risk of abuse", may have empowered Altobelli FM to make his order. However, as the subpoena was not drafted narrowly in the terms of this provision, ie it was not only directed to information relevant to a possible admission of abuse and was widely framed, it deprived the court of that power.

In that case Coleman J obviously took a very strict, traditionalist view of the public policy considerations. This was particularly so as the father, who had made the alleged statements, had consented to production of the file notes. It seems that it was clearly open to His Honour to take a different path to order the production of information limited to admissions in relation to abuse of a child or a risk of abuse.

Another relevant case is *Trappe v Vonne* [2009] FMCAfam 497 where a party was seeking to subpoena information from a counselling organisation and it refused to comply. The wife had issued a subpoena to Lifeworks for the production of documents in relation to counselling sessions between her and the husband. She alleged that the husband had an addiction to sex and pornography and that he would discuss sexual matters in front of their children. She also alleged that he had been physically and sexually violent and verbally abusive towards her, at times in front of the children. Her subpoena had been issued on the basis that the husband had made admissions about this behaviour in counselling sessions.

[83] *Harkiss v Beamish* (2011) 251 FLR 412; [2011] FMCAfam 527 at [41].

Whether the husband had made admissions to the counsellor was considered relevant to the wife's credit in the proceedings.[84]

Federal Magistrate Reithmuller examined ss 10D and 10E. His Honour decided, for similar reasons to Coleman J in *Unitingcare Unifam Counselling Mediation v Harkiss* that, due to the use of the word "may", s 10D(4) provided a discretion to the counsellor as to whether or not to disclose the information. The counsellor was therefore not obliged to make disclosure and the court did not have a general power to control the exercise of the counsellor's discretion.[85]. His Honour also noted that, as the wife had communicated the alleged assaults by the husband to the police, there was no obligation on the counsellor to communicate this information to anyone as the wife had already done so.[86]

The Federal Magistrate also examined whether the information would be admissible under s 10E. However, the difficulty was that, at the time the case was considered, the definition of "abuse" in the *Family Law Act* was very limited and did not include the behaviour alleged. Today, with the new, much broader, definition of "abuse" the husband's behaviour would fall within the definition as, "causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence". [87]

As the alleged behaviour of the husband was not caught under the previous definition of "abuse", His Honour determined that the information would not be admissible under s 10E.[88] However, Reithmuller FM went even further and took the view that, because of the further provision in s 10E(2) that states that if evidence could be obtained about the disclosure from another source, the information would not be admissible, the subpoena issue could not be determined until the final hearing. His Honour was of the view that this issue should be considered on a voir dire at trial[89] as it was only at that point in time that the court could be aware of the other available evidence and make a decision as to whether independent evidence on that point was available from another source.[90]

Again the judicial officer in question took an extremely restricted, traditionalist view of the operation of s 10E. The difficulty for the wife with this approach was that she would not

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[84] *Trappe v Vonne* [2009] FMCAfam 497 at [14]-[15].
[85] *Trappe v Vonne* [2009] FMCAfam 497 at [34].
[86] *Trappe v Vonne* [2009] FMCAfam 497 at [31].
[87] *Family Law Act 1975* (Cth), s 4(1).
[88] Reithmuller FM also took into account that the wife had not filed a risk of child abuse.
[89] This followed the approach of Carmody J in *Relationships Australia (Qld) v M* (2006) 204 FLR 440; [2006] FLC 93-305.
[90] Reithmuller FM also ordered that the wife pay Lifeworks costs (at [48]).

have been able to assess her prospects of success at a final hearing without knowing whether the counselling notes supported her contentions and whether the notes would be admissible in the final hearing.

The application of the confidentiality and admissibility provisions in these cases highlight clear concerns for victims and potential victims of violence and abuse. It is suggested that legislative reform is timely so that judicial officers can admit into evidence all relevant information to ensure that their decisions can be fully informed.

CONCLUSION

The discussion in this article demonstrates the inconsistencies in and the inadequacies of the current confidentiality and admissibility provisions of the *Family Law Act.* An outstanding concern is the current use of the word "may" in the confidentiality provisions, leaving it within the discretion of FDRPs and counsellors as to whether they inform potential victims or authorities of threats of harm. A further issue is the much narrower construction of the admissibility provisions, and their obvious failure in the cases outlined above, to enable courts to have access to all relevant information, particularly in relation to allegations of abuse and family violence. This obviously operates to the detriment of the victims of child abuse and family violence. It seems an unfortunate oversight that the 2011 amendments, that were explicitly aimed at strengthening the *Family Law Act* provisions to further protect such vulnerable parties in the family law system, did not address these deficiencies.

Proposed amendments

1. The following amendments are suggested: That the word "may" in ss 10D(3) and (4) and 10H(3) and (4) be amended to "must" so that the provisions state that:

A family counsellor/family dispute resolution practitioner *must* disclose a communication…

2. That ss 10D and 10H be altered so that their wording is less restrictive as follows:

A family counsellor/ family dispute resolution practitioner *must* disclose a communication to an appropriate person or authority (for example, the victim, intended victim, parent of the victim or intended victim, owner of property, independent children's lawyer, prescribed child welfare authority and/or the relevant police) if the practitioner reasonably believes that a statement has been made:

(a) that indicates that a child has been abused or is at risk of abuse; or

(b) that indicates that a serious threat to the life, health or safety of a child or adult has been made or that the life, safety or health of a child or adult may be compromised due family violence; or

(c) that reveals the commission or likely commission of an offence involving violence to a person or a threat of violence to a person; or

(d) that reveals that there is a threat to the property of a person; or

(e) that reveals the commission or preventing the likely commission of an offence involving intentional damage to property of a person or a threat of damage to the property of a person; or

(f) that is made by a parent that is necessary to disclose to the independent children's lawyer under s 68L to assist that lawyer represent the child or children properly.

3. That the following exceptions be inserted into the admissibility provisions, ss 10E and 10J:

Subsection (1) does not apply to statements:

(a) that indicate that a child has been abused or is at risk of abuse; or

(b) that indicate that a serious threat to the life, health or safety of a child or adult has been made or that the life, safety or health of a child or adult may be compromised due family violence; or

(c) that reveal the commission or likely commission of an offence involving violence to a person or a threat of violence to a person; or

(d) that reveal that there is a threat to the property of a person; or

(e) that reveal the commission or prevent the likely commission of an offence involving intentional damage to property of a person or a threat of damage to the property of a person; or

(f) that is made by a parent that is necessary to disclose to the independent children's lawyer under s 68L to assist that lawyer represent the child or children properly.