ALRC 73

For the sake of the kids - Complex contact cases and the Family Court

Contents

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The Australian Law Reform Commission was established by the *Law Reform Commission Act 1973*. Section 6 provides for the Commission to review, modernise and simplify the law. It started operation in 1975.

Participants

The Commission

Division

The Division of the Commission constituted under the *Law Reform Commission Act 1973* (Cth) for the purposes of this reference consists of the following:

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Abbreviations

ADR	Alternative Dispute Resolution
AJAC	Access to Justice Advisory Committee
AJAC report	Access to Justice Advisory Committee *Access to Justice an Action Plan* Commonwealth of Australia 1994
ALRC	Australian Law Reform Commission
ANZACAS	Australian & New Zealand Association of Childrens' Access Services
DPP	Director of Public Prosecutions
FLA	*Family Law Act 1975* (Cth)
FLC	Family Law Council
FOC	Friend of the Court (Michigan)
Government response to JSC	The Hon Michael Lavarch *Family Law Act 1975.* report *Directions for Amendment, Government Response to the Report by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975* December 1993
IP	ALRC Issues Paper 14 *Parent Child Contact and the Family Court* Australian Law Reform Commission 1994
JSC	Federal Parliamentary Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act
JSC Report	Report of the Joint Select Committee on Certain Aspects of the Operation of the Family Law Act *The Family Law Act 1975. Aspects of its Operation and Interpretation* Australian Government Publishing Service Canberra November 1992
LACS	Legal Aid Commissions
NLAAC	National Legal Aid Advisory Committee

Summary of recommendations

Principles and issues in complex contact cases

Recommendation 2.1

The principles in any matter concerning a child, including contact between a child and a parent, should be

- the bests interests of the child are the paramount consideration
- a child has a right to contact with both parents unless her or his best interests require otherwise
- a child has a right to be heard, and to have her or his views taken into account to the extent appropriate having regard to the child's age and maturity, on any matters affecting her or him
- parents should be encouraged and assisted to make appropriate arrangements for care of and contact with their children and the Court should intervene as little as possible unless the best interests of the child require otherwise.

Recommendation 2.2

The federal government should consider establishing a comprehensive inquiry into complex contact cases not dealt with by the Family Court. This could be undertaken by the Australian Law Reform Commission, the Family Law Council, the Australian Institute of Family Studies or the Family Services Council, or a combination of these bodies.

Recommendation 2.3

In determining the best interests of the child, the Court should have regard to any history of violence in the parents' relationship. Violence is not only physical but also extends to verbal, emotional, psychological, sexual and financial abuse.

In determining the best interests of the child, the Court should have regard to any continuing conflict between the parents including the causes of the conflict, for example, violence and unresolved separation issues.

Recommendation 2.4

The Family Court should establish a task force to examine gender bias in family law.

Recommendation 2.5

The Family Law Act should provide that the Court in determining the best interests of the child must consider the need to protect the child from physical or psychological harm caused, or that may be caused, by being directly or indirectly exposed to abuse, ill treatment, violence orr other behaviour which is directed against a third party or which affects or may affect a third party.

Recommendation 2.6

Any legislation which refers to the child's right of contact with parents and significant others should be qualified by the proviso 'where it is in the child's best interests'.

Recommendation 2.7

The Family Court should be more robust in refusing to make contact orders where it is not in the best interests of the child to order contact. Refusal of contact may be particularly inappropriate where there is a history of violence in the parents' relationship, where there is continuing conflict between the parents or

where the child opposes contact. In considering whether the child opposes contact the Court should consider, among other factors, the age and maturity of the child and any parental influence.

Recommendation 2.8

Magistrates Courts with the assistance of the Family Court should develop guidelines on the use of ex parte orders in family law matters. As a general rule ex parte orders affecting contact should only be made in cases of emergency, for example, where there is a possibility of immediate harm to the child, and for a short period. They should be reviewed by the Court in a hearing, notice of which has been given to the other parent, as soon as possible after the orders are made. Wherever possible orders should be made only after notice has been given to all interested parties, even if the time between service and hearing is greatly reduced.

Recommendation 2.9

Any resources required to implement recommendations in this report should not be taken from the Family Court's existing budget and resources.

Recommendation 2.10

The proposed Australian Legal Aid Commission should review the adequacy and fairness of legal assistance provided to both custodial and contact parents in the full range of contact cases, including original orders and enforcement applications.

Managing complex contact cases

Recommendation 3.1

Complex and potentially complex contact cases should be identified as early as possible.

The complex case designation in the Family Court's case management guidelines should be retained and applied to complex contact cases. The guidelines should be amended to make it clear that the designation includes potentially complex contact cases in addition to those that are already complex.

The Family Court should review the current use of the complex case designation in each of its registries and ensure that it is being used appropriately and consistently.

Recommendation 3.2

The Family Court's counsellors, registrars, judicial registrars and judges should be able to identify complex and potentially complex contact cases. It should be made clear that counsellors are able to recommend that a case be considered for designation. The forms which counsellors complete after a confidential counselling session should allow them to indicate in a simple fashion, for example by a tick, whether they consider that a matter is complex or potentially complex.

Recommendation 3.3

There should not be a formal checklist of factors to be taken into account in identifying complex contact cases. Identification should involve an assessment of the case as a whole by the responsible officer of the Court. Officers should be aware, however, of four key indicators arising from the research into complex contact cases

- continuing conflict between the parties
- children under 2 years at the time of separation
- allegations that the children refuse or oppose contact

- restraining order application as part of the initiating application.

Recommendation 3.4

Each complex contact case should be assigned to a judicial officer (that is, a judge, judicial registrar or registrar or a combination of these, where appropriate) and counsellor as soon as possible after identification. There should be consistency in the Court personnel handling each case unless the particular circumstances of the case require otherwise. The Court should review and monitor the implementation of the present guidelines for consistency. Training and instruction should be provided to Court staff.

Recommendation 3.5

A separate legal representative for children should be appointed as early as possible in every contact case identified as complex unless the court determines in a particular case that an appointment would not be in the best interests of the child. Such a finding would be exceptional.

Recommendation 3.6

The Family Court should consider and, if appropriate, trial at different registries a case team approach and a 'child interests co-ordinator' approach. Their effectiveness and costs should be compared. In either approach the separate legal representative of the children should take an active role in the case management of particular matters where the Court and the representative consider it appropriate.

Recommendation 3.7

The Family Court's case management guidelines should be amended to allow greater discretion in the timing, content and number of family reports. If there were to be a case team appointed then the guidelines should specify that the case team managing a complex contact case will, if appropriate, recommend to the Director of Court Counselling the type of family assessment most suitable for the case, who should provide it and when, to meet the best interests of the children in the case. If a 'child's interests co-ordinator' were to be appointed then that person should prepare a report or direct its production as she or he considers it appropriate in the child's best interests. The children should be involved in the family assessment and their position and views included in any report unless their involvement is clearly not in their best interests. The assessment should inquire whether there are allegations of violence in the relationship or abuse of the children. The team or the co-ordinator should also consider the views of the separate representative and if appropriate the views of the parties and their legal practitioners on decisions as to the most appropriate and effective form of assessment.

Recommendation 3.8

The Family Court or other appropriate agency should review the provisions in the *Family Law Act 1975* (Cth) requiring confidential counselling to determine whether they remain necessary or desirable.

Recommendation 3.9

There should be a range of options available to respond to complex contact cases, including alternative dispute resolution (ADR) methods such as arbitration, counselling, therapy and mediation. The Family Court, particularly through case teams or 'child's interest co-ordinators', should determine what options have merit and what response is appropriate in a particular case.

The Family Court, particularly through a case team or 'child's interest co-ordinator, legal practitioners and other professionals providing services and the parties themselves should decide what particular approaches are suitable for a particular case. A decision to use a particular option in a particular case should take into account the paramount concern of the best interests of the child, the likelihood of an option being successful in the particular case and the expenditure of resources involved.

In complex contact cases where the most appropriate response will be an adjudication by the court the court should decide whether or not a particular case should be 'fast tracked' to hearing.

Any program of ADR should include appropriate guidelines for identifying and assessing cases where ADR is unsuitable because of violence, unequal bargaining power or a lack of a capacity for rational decision making. Those providing assessments require appropriate training and qualifications. Compliance by Family Court personnel with the Family Court guidelines on violence should be monitored effectively. Organisations and individuals providing ADR services independently of the Court should also be subject to review in relation to their methods of identifying and dealing with violence and power imbalances.

Recommendation 3.10

The Family Court's Counselling Service should not provide medium or long term therapeutic services, that is, as a guide, services extending beyond 18 months. It should identify external therapeutic services to which those needing medium and long term therapy can be referred and offer and provide liaison with and referral to these services.

The Government should review the level of Medicare rebate for psychiatrists and the provision of Medicare rebate for psychologists.

The Family Court should have a program for contacting children and parents involved in complex contact cases after orders or protracted litigation and offering them referral to appropriate agencies and individuals for grief and post hearing counselling and therapy.

Recommendation 3.11

Mediation should be offered in appropriate complex contact cases as early as possible before the parties have become entrenched in litigation. It should be provided by appropriately trained and qualified mediators. There should be proper screening procedures to ensure that mediation is not attempted inappropriately, for example, in cases involving violence, abuse and severe power imbalances. The Family Court should further evaluate the potential scope for mediation in complex contact cases.

Recommendation 3.12

Joint conciliation with a counsellor and registrar should be one of the options available to case teams when considering the management of complex contact cases. The Family Court should evaluate its effectiveness for different types of complex contact cases.

Recommendation 3.13

The Family Court should evaluate the effectiveness of pilot projects using the impasse model, particularly for the children involved, and its costs. The projects should have guidelines about identifying and addressing domestic violence and abuse and about making proper assessments of the suitability of particular cases for these programs. The Court should consider whether the service of an arbitrator, Court registrar, Master or 'child's interest co-ordinator' would be useful as part of the program.

Recommendation 3.14

The Court should not be required to scrutinise consent orders and agreements routinely in complex contact cases. It should issue a practice note directing the Court, counsellors, mediators and legal practitioners to consider whether a consent order or agreement in a case designated complex requires closer scrutiny. As part of this scrutiny the Court and the professionals should consider whether the parties would benefit from counselling or mediation, the use of an interpreter or some other appropriate intervention. The parties should be assisted to understand the nature of the orders and agreements and the obligations they impose.

Recommendation 3.15

Legal practitioners, counsellors, mediators and arbitrators, particularly in complex or potentially complex contact cases, should attempt to ensure that agreements and contact orders are clear and specific, especially about the practical working arrangements for contact. Agreements should contain effective and fair dispute resolution clauses and take proper account of the age and likely development of the children concerned. The

Court should also take these considerations into account in any review of agreements. The Court, legal professional associations and other groups should co-operate in the development of appropriate guidelines and precedents.

Recommendation 3.16

The Family Court and the Child Support Agency should consider developing a protocol for exchange of information for cases where at least one of the parties is attempting to link contact and maintenance.

Recommendation 3.17

The Family Court should review the level of payment of experts under Order 30A to determine whether the present level is significantly deterring external practitioners from providing service to the detriment of the Court's capacity to assist in the fair and effective resolution of complex contact cases. The review of the payment of Regulation 8 counsellors should consider whether the level of payment is affecting the quality of service to the detriment of dealing effectively with complex contact cases.

Support services in complex contact cases

Recommendation 4.1

Contact supervision services should be child centred. They should see themselves as providing a service to children, not primarily to parents. Their primary concern is the best interests of the child.

The Commonwealth should fund contact centres in an extensive pilot project, external to the Family Court, to assist in providing appropriate contact in complex cases. These services should include handover assistance and supervised contact.

The funded contact services should be the subject of evaluation including review of children's responses, the length of average use for cases and their effect on subsequent contact arrangements.

The Family Court and centres should enter into protocols governing liaison and reporting. In cases involving the Court, the centres should provide factual reports to the Court on their supervision of the contact, including the nature of the parent child relationship. As a general principle centres should not be actively involved in the conduct litigation. There is no immediate need for legislation on this issue.

Contact centres should generally assist a case on a short term basis, say for a maximum of six months. After that period the future of contact should be reviewed by the Court. Where handover or supervision is likely to be necessary on a long term basis and the Court is involved, the Court should consider whether an order for contact is in the best interests of the child. The Court may consider any report from the contact centre in reviewing its orders.

The interim standards being developed by the ANZACAS should be tested and evaluated before there is any consideration of legislating to ensure quality service in contact centres. Standards, quality control and evaluation of service should be linked to funding. Legislation on accreditation, guidelines for conduct and the quality of service and supervision should be considered after services have been operational for a period and evaluated.

The centres should employ appropriately qualified persons to undertake the supervision.

Recommendation 4.2

There should be further research on the need for a contact compliance program similar to the Manitoba Access Assistance Program. It should also examine the extent to which current avenues of assistance are effective and appropriate. This should include consideration of the assistance provided by legal aid commissions, by the Family Court Counselling Service and by other bodies external to the Family Court. This research should be co-ordinated with the FLC's research project on the imposition of penalties for

breach of orders. If it is considered that there is a need for a contact compliance service the Commission recommends the introduction of a pilot program that is independent of the Family Court.

Enforcing contact orders in the Court

Recommendation 5.1

The FLA should be amended to provide for two alternative procedures for enforcement. An applicant should elect which procedure to take but should not be able to take both on the one set of facts. A respondent should not be liable to orders under both procedures on the one set of facts. Both procedures should provide that the Court may consider at any time before or during proceedings whether counselling, or further counselling, or some other form of alternative dispute resolution would be appropriate and may adjourn the proceedings to allow that action to take place.

The simpler procedure should

- place a civil onus of proof on the balance of probabilities only on the applicant
- place the onus of proving reasonable excuse on the respondent
- confine the orders available to compensatory contact and to those that secure compliance
- enable a Court to require the respondent to undertake to comply in the future
- permit the Court to order costs.

The stricter procedure should be confined to cases where the applicant is seeking

- a fine
- imprisonment
- orders under s 112AP, which requires a flagrant challenge to the authority of the Court
- punishment for a breach of a previous recognisance
- community service orders or periodic detention or other similar orders for attendance at community based programs
- any of the orders available in the less strict procedure
- costs as ancillary to any of these.

In the stricter procedure the applicant should continue to carry the onus of proving beyond reasonable doubt all elements of the breach, except absence of reasonable excuse. The respondent should bear the onus of proving a defence of reasonable excuse according to the balance of probabilities.

Recommendation 5.2

The Family Court should explore using a small claims jurisdiction to deal with enforcement actions for relatively minor breaches of contact orders or variations of them.

Recommendation 5.3

The Family Court should review those Orders relevant to enforcement of contact with a view to ensuring that procedures are as simple as possible, particularly in the light that self representation by parties is reasonably common in enforcement cases. The Court should consider whether there should be provision to allow it in

appropriate circumstances to waive some formal requirements. The Court should also consider the level and quality of the current assistance it provides to those who are representing themselves in contact enforcement, for example, assistance provided by counter staff.

Recommendation 5.4

The best interests of the child should be the paramount consideration in any decision made in the course of any litigation regarding contact, including enforcement proceedings. Counselling and diversion from litigation should be encouraged by the Court and by legal practitioners. The Court's discretion as to the appropriate penalty should be maintained but the Court should give greater consideration to the circumstances where community service orders and periodic detention may be appropriate. Imprisonment should continue to be a sanction of last resort only.

The Family Court judiciary and its judicial registrars should consider developing informal guidelines on the imposition and quantum of sanctions, perhaps in the manner of a tariff, and in particular should consider those circumstances where fines, periodic detention and community service orders would be appropriate.

Recommendation 5.5

The Commonwealth and New South Wales as a matter of urgency should enter an arrangement so that the Family Court when sitting in New South Wales can impose the sanctions available in the other States and the Territories such as periodic detention and community service orders.

Recommendation 5.6

The FLC, as part of its project on penalties, should consider whether the FLA should be amended to provide a statutory right for both custodial and contact parents to recover their costs incurred due to unreasonable non-compliance by the other party, for example, travel costs, child care and loss of income. In deciding whether to make an order for compensation and as to its terms the Court should have as its paramount consideration the best interests of the child.

Recommendation 5.7

The Family Court should be more robust in declaring a party in a complex contact case to be a vexatious litigant and in adhering to a declaration when a vexatious litigant seeks leave to commence proceedings, unless the best interests of the child require otherwise. The FLA s118 should be amended to allow the Court to make an order of its own motion. It follows from such an order that the Court should also consider making an order for costs against the applicant. The Family Court should develop guidelines to promote national consistency in approach to these cases.

Recommendation 5.8

The Family Court, perhaps with the assistance of the legal aid commissions and the National Legal Aid Advisory Committee (NLAAC), should review the extent to which duty solicitors are providing assistance in complex contact cases and whether the assistance should be increased or changed in any way.

Information, education and training

Recommendation 6.1

There should be a comprehensive review of the current training programs for the Family Court judiciary and personnel, including judicial registrars, registrars, counsellors and mediators, with a view to setting priorities, promoting quality and consistency in the level of training and avoiding any duplication of services. Training should provide information in particular on the effects of violence and conflict on children, with a focus on the fact that children may be very adversely affected by violence even if they are not directly subjected to violence or present when violent incidents occur. Training needs should be examined by the Court, perhaps in consultation with the Australian Institute of Judicial Administration and the Family Services Council.

Recommendation 6.2

Magistrates and Magistrates Court staff dealing with family law matters should receive training and education about the FLA and its procedures, including about domestic violence, the use of ex parte orders and the potential difficulties involved in consent orders for complex contact cases. There should be an effective network for the exchange of information between the Family Court and Magistrates Courts. Information about, and access to, counsellors and alternative dispute resolution methods should also be available to Magistrates Courts. The use of modern technology should be considered.

Recommendation 6.3

The current training of children's separate legal representatives should be evaluated by the legal aid commissions and the Family Services Council, with particular regard to training in the areas of child abuse, child development and communicating with children in providing information.

Recommendation 6.4

The Law Council of Australia and the legal professional associations should co-ordinate a review of education and training programs for lawyers to ensure information and assistance for lawyers in dealing with complex contact cases in the Family Court. The associations should also conduct specialist courses on these issues for family law practitioners. Consideration should be given to the desirability and practicality of a national training and education program.

The Law Council of Australia and the legal professional associations should also consider the introduction of national accreditation for specialist family lawyers.

Recommendation 6.5

The Commission supports the proposal of the Access to Justice Advisory Committee that the federal Government establish a body to advise on issues concerning alternative dispute resolution (ADR) with a view to developing a high quality, accessible, integrated federal ADR system. As part of that process the Family Services Council should be requested to review the current levels of training and expertise in existing government and non-government bodies and individuals providing counselling and other services to people in contact cases.

Recommendation 6.6

Every service providing information, education and training programs on parenting and family relationships should be child focused and child friendly.

The various types of education and training assistance currently offered to parents and children by the Family Court, State and federal government departments and agencies and non-government bodies should be reviewed and co-ordinated to ensure more effective service provision. This review should include written materials available from the Court and elsewhere, current parent and child information and training programs and the provision of telephone counselling, advice and information services. Consideration should be given to using in the most effective way different forms of technology and media, for example, videos and interactive computer programs.

While the Family Court should have an important part in parent and child programs the focus should be on a national and community response and early prevention of difficulties outside the Court. Greater priority should be given to information, education and training programs immediately before and immediately after separation. In each of those cases services would be more appropriately provided other than by the Family Court.

No child should be compelled to attend any program. Generally courses and programs for parents should not be mandatory. However, where programs focus on parenting information, education and skills there may be cases where compulsory attendance might be justified, depending on the nature of the program and the circumstances of the particular case.

Recommendation 6.7

The Commission recommends the establishment of a contact register for children of separated parents. The Family Court and the federal Government should consider the best way of providing a register. Agencies providing similar registers for adopted and fostered children should be contacted to see whether they may be interested in extending their services to cover contact cases.

1. Introduction

The Inquiry

Background to the Inquiry

1.1 ***The original reference.*** The Family Law Council (FLC) was given a reference by the then Attorney-General, Mr Michael Duffy in late 1990 to examine and report on legal aid costs and related issues in repetitive access applications coming before the Family Court. The reference was a response to the common perception among family law professionals of a relatively small number of access cases categorised by heavily entrenched conflict and protracted litigation. These cases have adverse consequences for the children involved and use very high levels of Court resources, including the Court Counselling Service. They also often involve legal aid resources through the appointment of separate legal representatives to act on behalf of the children, a service primarily funded by legal aid commissions, and through those commissions also providing legal assistance to parties.

1.2 ***Joint project.*** In 1991 the FLC asked the Australian Law Reform Commission (the Commission) whether the Commission could assist in conducting the research for the reference. After some further discussions the FLC and the Commission decided in late 1992 to recommend to the Attorney-General that the reference become a joint project. The Attorney-General agreed and the Commission and the FLC then constituted the Inquiry under a Joint Steering Committee of representatives of the Commission, the FLC and the Family Court. The Commission has provided the staffing, research support and administrative infrastructure for the Inquiry and met the costs of the research conducted by external consultants.[1]

1.3 ***This report is a Commission report.*** The Commission prepared a draft report for the consideration of the FLC at the latter's meeting on 6-7 April 1995. At that meeting the FLC decided that it preferred to give the report further consideration at its next meeting in June 1995. It wished to consider matters which appeared to bear significantly upon some of its other projects including penalties for breaches of Court orders and its work on involving and representing children in the Family Court. It may provide the Attorney-General with a supplementary advice on this report. It also advised the Commission that it was inappropriate for the FLC to claim joint ownership of the report when the consultative process, the research and the drafting of the report fell almost exclusively to the Commission. In those circumstances it was also agreed that this report should be regarded as a report of the Commission. The FLC has advised the Attorney-General of each of these developments.

Purpose of the Inquiry

1.4 ***The reference.*** Under the terms of reference given by the Attorney-General the Inquiry's primary purpose is to identify the characteristics and causes of difficult contact cases[2] and develop recommendations to reduce the adverse effects of conflict and repetitive litigation on children and families and to save Family Court and legal aid resources.

1.5 ***The costs of litigating contact cases.*** The adverse effects of complex contact cases on children, the parents and the community are discussed in detail in chapter 2. Conflict and protracted or repetitive litigation in contact cases can result in unknown, incalculable human suffering, police time for domestic violence orders, loss of earnings for litigants and health related costs. The litigation also has direct financial costs for the Family Court and the legal aid commissions. A submission to the Inquiry by the Australian and New Zealand Association of Children's Access Services (ANZACAS) provided an assessment of the costs to the community and parties of litigated contact matters in the Family Court. The Child and Youth Issues Sub-committee of the Law Institute of Victoria collaborated with ANZACAS in that project and assisted in ensuring the accuracy of the costing. The submission estimated that the overall minimum cost of a contact dispute in the Family Court up to and including only the first day of hearing was $47 020:

parties' legal costs	$30 000
children's separate representative costs (legal aid)	$5 500
Family Court operating expenses for one case for one working day	$9 423
Family Court personnel costs	$2 097

On this basis the submission estimated that the 1611 contested contact matters in 1993-94 had a total cost in excess of $75 million.[3] The submission then used other available statistics to estimate that the cost of matters commenced in the Court but settled prior to hearing was another $75 million. The Commission is not in a position to verify the accuracy of these estimates and is unaware of any other efforts to quantify these costs. Moreover, not all these cases are complex contact cases. Nevertheless, the estimates indicate the potential savings to the community and the parties from more effective resolution of contact disputes. The benefits to the children are even greater and more important.

The focus of the Inquiry: complex contact cases

1.6 ***What is contact?*** The *Family Law Act 1975* (Cth) (FLA) refers to custody and access arrangements for children following separation of their parents. These terms are to be replaced by the *Family Law Reform Bill (No 1) 1994* (Cth), now before federal Parliament. The change in terminology is intended to help remove any attitude in the community that a parent has a proprietorial right to a child and to emphasise that parents have responsibilities towards their children.[4] Contact is a term that replaces access. It describes the situation where a person sees, usually on a regular basis, a child who is in the daily care and control of another person.

1.7 ***'Contact' used in this report.*** In keeping with this direction in the law 'contact' rather than 'access' is used in this report to describe these cases. However, 'access' will still appear in this report where it is part of a direct quotation from another source or where there is reference to a specific law that uses 'access'.

1.8 ***Complex contact cases.*** The Inquiry was originally referred to as a research project into intractable access cases. In an Issues Paper, *Parent child contact and the Family Court* published in December 1994 the Inquiry asked what was an appropriate term for describing cases which involve repetitive applications before the Family Court.[5] After considering the response to that question the Commission has decided that 'complex contact case' is the most appropriate term. The reasons for that decision are discussed in chapter 2.[6] This term is used throughout this report to refer to the cases under consideration.

Process of the Inquiry

The research project

1.9 ***The original research proposal.*** Because the Inquiry could find little research or data on complex contact cases it engaged three external social scientists to design and conduct a research project. It expected that an empirical social science study would identify the common characteristics of complex cases and shed light on how the Family Court's approach and intervention affected their development and resolution. It hoped that the data would assist in establishing the effect of the litigation process and any alternative dispute resolution attempted. The data might indicate not only what particular options might assist but also when they should be used. The consultants formulated a six stage plan that was approved by the Inquiry:

1. clarifying the definition of an intractable case
2. (i) identifying and describing the characteristics of selected intractable cases at the Brisbane and Parramatta Family Court registries and
   (ii) producing a profile of intractable contact cases and patterns of case management pathways
3. conducting an intensive study of a representative sample of intractable contact cases by interviewing those involved in the cases, including parents, counsellors, lawyers and judges
4. reporting on the research findings
5. developing solutions through focus groups and consultations
6. assisting with the final report.

The research commenced on 1 September 1992 and was to be completed by 30 July 1993.

1.10 ***Research project re-evaluated.*** The researchers encountered difficulties almost from the beginning. The Court files were even more voluminous and complex than expected. Sometimes information necessary for the research was missing. By June 1994 the researchers were able to complete in any form only stages 1 and 2. The Inquiry suspended the research for several months and reconsidered options for completion of the work. It decided that the research approach and the data had to be re-evaluated, additional data obtained to attempt to fill gaps in information and the results of the research up to that time analysed. In particular, additional information on the files under examination in the two registries was to be sought from the Court counselling files, from the relevant legal aid commissions and from the Family Court database, *Blackstone*. It was anticipated that this work could be completed by 16 February 1995 and included in this report which was due to be given to the Attorney-General by 31 March 1995.

1.11 ***Further research limited.*** The consultants continued to experience difficulties in obtaining and analysing the data they needed. By the end of February they were able to analyse only the files from the Parramatta registry. The summary of the main findings of this analysis as prepared by the consultants is contained in Appendix 2 to this report. It is discussed in chapter 2 and referred to throughout the report essentially to highlight issues and supplement information and views in submissions and consultations. The Inquiry and the consultants considered that the analysis raises as many questions as it answers. It certainly reflects the extent of demands on Court time made by the cases studied. It also provides an overview of what happens in these kinds of cases. However it does not explain why something happens in these cases, for example, what motivates the parties or causes particular events. It cannot do this without interviews with all those involved in each case, including the parties, their legal advisers, Court counsellors, registrars and judges and possibly many others with knowledge of the case. Even then questions would remain unresolved. Many of the cases have been active for ten years or more. It is doubtful whether it is possible to reconstruct events accurately. The Commission considered the limitations of the research and the fact that it was of only marginal assistance in the development of recommendations for better ways of handling potentially complex contact cases. It was also concerned that while there had been some identification of the data needed from Brisbane, considerable further research on the Brisbane files would be necessary including the physical inspection of files. The Commission decided that, on the basis of the analysis of the Parramatta files, the Brisbane work would take a significant period to complete and that it was unlikely to produce results of particular assistance. In all those circumstances the Commission decided not to proceed further with the Brisbane part of the research. It advised the FLC of these views and offered the FLC access to the research data should the FLC wish to continue with any research.

The Issues Paper

1.12 An Issues Paper[7] was published and circulated in December 1994 as a basis for consultations with those interested in, or with views on, complex contact cases. It presented the major issues and options and invited comments and opinions. It sought responses on the proper scope of the study, the initial research approach, possible strategies for dealing with difficult contact cases and views on suggested options for further work. Copies were sent to every Family Court judge, registrar and counsellor and to relevant interest groups and professionals working in the area, such as lawyers, psychologists, psychiatrists, social workers and mediators. The Commission advertised in the major newspaper in each State and Territory and there were a number of reports about the reference in the media. As a result of these advertisements and media attention the Inquiry received about a further 500 requests for copies of the paper, many from parents who were deeply concerned about contact issues.

Submissions and consultations

1.13 The Commission received over 150 submissions from parents, Family Court judges, registrars and counsellors, family law practitioners, mediators, psychologists, psychiatrists, academics and groups representing contact services, lawyers and parents. Appendix 1 lists the submissions received. The Commission held consultations with judges and Family Court personnel in Adelaide, Brisbane, Melbourne, Parramatta and Sydney and with lawyers, social workers and interest groups. It also sought comments through a talkback session on Radio Triple J from young people affected by contact disputes. The submissions and consultations have been invaluable in the Inquiry's consideration of issues and policy. The Commission thanks each person who contributed.

Overseas inquiries

1.14 The Commission took a number of initiatives to find out about any relevant overseas information and research. It contacted eminent experts and organisations in the United States, Canada, New Zealand and Europe. It wrote to each State jurisdiction in the United States seeking information on any empirical research and responses to difficult contact cases. The Commission received valuable information in reply, particularly from the Michigan Supreme Court, the Ohio Supreme Court, the Supreme Court of British Columbia, the Justice Department of Canada and the President of the Royal Courts of Justice of the United Kingdom. Through the assistance of a Danish legal intern[8] in the ALRC it was able to consider a 1994 report of a Danish review of custody and access law and experience.[9] This report also contained an overview of relevant law and practice in the other Nordic countries. The Commission is grateful for the assistance it received from these organisations and individuals.

Related reviews and initiatives

1.15 ***Other reports.*** The Commission considered a number of other relevant reviews, including the

- ALRC report on contempt which included some examination of the law relating to breach of access orders[10]
- FLC report on access generally[11]
- ALRC report on equality before the law, particularly on the impact of domestic violence on access[12]
- FLC report on patterns of parenting after separation[13]
- Joint Select Committee of federal Parliament on the Family Law Act[14]
- Joint Select Committee on the Child Support Scheme.[15]

These reviews are mentioned throughout the report when relevant to the discussion.

1.16 ***Family Law Reform Bill (No 1) 1994.*** The Commission also took account of the new approach to orders affecting children reflected in the *Family Law Reform Bill (No 1) 1994*. The Bill's philosophy emphasises parental responsibilities and duties of care to children. It attempts to remove concepts which suggest parental rights and powers. It will abolish guardianship and replace the concepts of custody and access, which carry ownership notions and may lead or contribute to the belief that the child is a possession of the parent who is granted custody. It refers instead to parental responsibility, defined as all the duties, powers, responsibilities and authority which by law parents and guardians have in relation to children.[16] Broadly speaking there will be residence orders and special purpose orders instead of custody orders and contact orders instead of access orders.[17] Parents are encouraged to enter into parenting plans rather than to seek an order from the Court and in reaching their agreement to regard the best interests of the child as paramount.[18]

Structure of this report

- Chapter 2 sets out the principles which the Commission recommends should be the basis for resolving complex contact cases. It also discusses the major issues arising in this Inquiry, in particular issues of definition, causation and the Court's resources.
- Chapter 3 deals with the management of complex contact cases. This is a key chapter because it discusses the various strategies the Court might employ to identify and respond effectively to complex and potentially complex cases, if possible before they become entrenched in litigation. It includes discussion of family assessments and reports, the use of separate legal representatives for children, arbitration, counselling and mediation. It recommends several changes to the current case management guidelines of the Family Court and consideration by the Court of a multi-disciplinary team approach to complex contact cases or the appointment of 'child's interests co-ordinators' in these cases.

- Chapter 4 discusses two essentially new services that could play a role in reducing the incidence of complex contact cases. They are contact supervision services, which are often referred to as contact centres, and contact compliance services, which are designed to resolve disputes where there is an alleged breach of a contact order.

- Chapter 5 is concerned with the litigation process for complex contact cases and in particular the enforcement of contact orders under the FLA. It suggests changes to the substantive law and the procedures involved. However, the essential approach should be to focus on strategies that identify and deal with complex or potentially complex cases before they reach the stage of involving enforcement action.

- Chapter 6 examines training and education for professionals working with complex contact cases and for the parents and their children. The main theme is that there should be a review of the currently diverse programs with the purpose of establishing a co-ordinated and systematic approach, preferably on a national basis.

2. Principles and issues in complex contact cases

Introduction

2.1 This chapter first presents the principles that the Commission considers should underlie recommendations and decisions in complex contact cases. The fundamental principle is that all decisions on parent child contact should be made on the basis of the best interests of the child. Other important principles flow from that fundamental premise. The chapter then attempts to describe complex contact cases and to identify indicators for these cases. It stresses that there are many difficult and complex contact cases that are never dealt with by the Family Court. It examines a number of major issues that have arisen in the Inquiry, including violence in family relationships, personality factors and the situations and wishes of children. It discusses two issues concerning Court processes, the making of inappropriate contact orders and the role of Magistrates Courts in contact cases. It makes recommendations to reduce the difficulties that both these issues can cause. The analysis of cases at the Family Court Parramatta registry assists understanding of these matters and is referred to frequently in this chapter.

Principles underlying the Commission's approach

Fundamental principle: the best interests of the child

2.2 The fundamental principle for the Commission is that in any matter concerning a child, including contact between a child and a parent, the welfare of the child is the paramount consideration. This should determine not only the final outcome of cases but also the whole procedure adopted in matters affecting children. This fundamental principle is declared in the United Nations Convention on the Rights of the Child.[19] It is recognised and required by the *Family Law Act 1975* (Cth)[20] and the *Family Law Reform Bill (No 1) 1994*. It is also reflected in the current case law on contact.[21] The overwhelming majority of submissions and of those consulted in the course of this Inquiry supported the proposition that the best interests of the child must be the test to be applied in considering contact issues and individual contact cases.[22]

Other principles

2.3 There are a number of other principles that flow from this fundamental principle. Each principle is drawn from or consistent with the United Nations Convention on the Rights of the Child.[23] These principles underpin the *Family Law Reform Bill (No 1) 1994*. In particular, fundamental to the Bill is the principle of encouraging and assisting parents to make appropriate arrangements about care and contact with minimal Court intervention unless the best interests of the child determine otherwise. These principles are also consistent with the majority of views expressed in the submissions and consultations.

Recommendation 2.1

The principles in any matter concerning a child, including contact between a child and a parent, should be:

- the bests interests of the child are the paramount consideration
- a child has a right to contact with both parents unless her or his best interests require otherwise
- a child has a right to be heard, and to have her or his views taken into account to the extent appropriate having regard to the child's age and maturity, on any matters affecting her or him

parents should be encouraged and assisted to make appropriate arrangements for care of and contact with their children and the Court should intervene as little as possible unless the best interests of the child require otherwise.

The best use of limited resources

2.4 An important concern of this Inquiry is to reduce the disproportionate use of Court and legal aid resources by complex contact cases. It is estimated that probably 80% of the Family Court's resources and time are currently spent on the 20% of cases regarded as complex.[24] This concern for resources must not supplant the promotion of the child's best interests. Generally the two goals should be consistent. Reducing the number of these cases will be in the best interests of the children concerned and will save Court and legal aid resources. Some recommendations in this report, for example, for an increase in the role of separate legal representatives for children and for the use of case teams or a 'child's interest co-ordinator' may require some additional resources in the short term.[25] However, overall any increase in resources as a result of the recommendations should not be particularly significant. The recommendations essentially require a re-allocation of resources from late stages in proceedings, for protracted and repeated applications and hearings, to earlier stages, for contact supervision services, mediation, counselling, therapy and parenting education and training. These measures are likely to be more cost effective in the medium to long term than a reliance on Court adjudication. Where these approaches are inappropriate or unsuccessful the recommendations seek to restrict or eliminate unnecessary litigation, which will also save resources.

2.5 ***Role of the Family Law Reform Bill (No 1) 1994.*** The report has noted that a primary aim of the *Family Law Reform Bill (No 1) 1994* is to encourage parents wherever possible to make their own arrangements about care and contact with minimal Court intervention.[26] One method of achieving this will be through post-separation parenting plans. By reducing unnecessary Court intervention where parents can come to their own agreements, the new legislation will free up Court resources which can be re-allocated to the management and disposition of complex cases where a higher degree of Court intervention is necessary. This re-allocation of resources was one of the aims of the *Children Act 1989 (UK)* in England, on which aspects of the proposed new Australian legislation are based.

2.6 ***Litigation unsuited to contact disputes.*** A number of submissions and many of those consulted considered litigation to a large extent intrinsically unsuited to resolving contact disputes to provide mutually satisfying and lasting contact arrangements. One view was that the quicker people could be diverted from litigation the better.[27] It was commonly said that litigation does not improve the parties' attitudes to each other but is more likely to create further hostility.[28] Litigation could possibly change behaviour but it could not effect attitudinal change and it would rarely deal with the underlying reasons for the dispute.[29]

Benefiting all contact cases

2.7 The Commission has sought to make recommendations that are of benefit beyond contact cases considered complex. The services and procedures proposed, particularly those relating to information, training, education and early counselling, will assist children and parents in many simple contact cases.

Complex contact cases

Terminology

2.8 ***Intractable or difficult?*** At the beginning of this reference the Inquiry focused on contact cases identified as 'intractable'. 'Intractable' is a word quite commonly associated with very difficult contact cases and it is used by professionals working in family law. However, there are significant concerns about this terminology. It can have various implications about the nature of the dispute and the attitude of both parties to it. For example, the term could imply that both parties are 'responsible' for the difficulties when in fact one party may be responding reasonably to very unreasonable actions of the other. In the Issues Paper the Inquiry used the term 'difficult contact' because it was less likely than 'intractable access' to prevent a full and proper examination of alternatives.[30] In the Issues Paper 'difficult contact' referred to those cases that are difficult or impossible to resolve despite the greater than average use of the resources of the Family Court, including its Counselling Service, and/or other legal aid resources. It was a deliberately broad definition used to encourage comment on the range of alternatives. The Issues Paper sought comment on the most helpful term to describe these cases.[31]

2.9 ***Submissions and consultations.*** One submission supported the use of the term 'intractable' in a formal way in the Family Court.[32] Many submissions stated that it should be avoided, particularly in any official documents, because it was a negative label suggesting that cases were impossible to resolve. This would have adverse effects on the parties, the Court and professionals dealing with these cases.[33] Submissions suggested that the term 'intractable' might lead to a belief that both parties were being difficult. This could discourage investigation of the real cause of the intractability, which might be domestic violence or child abuse.[34] Some submissions favoured 'difficult'[35] or 'complex'.[36] Relationships Australia, South Australia suggested simply 'contact dispute'.[37]

2.10 ***Different concept required.*** A few submissions suggested that the elements of the definition in the Issues Paper were too narrow and focused too much on the use of resources. One submission suggested that there should be an additional element, the inability of a parent to perceive the interests of the child or a parent being seen not to be acting in the interests of the child.[38] Another suggestion was that complex cases are the result of a 'range of manifestations of post-separation conflict' where the parties are unable or unwilling to develop child oriented parenting plans.[39]

2.11 ***The Commission's view.*** The Commission prefers the term 'complex contact case'. The term avoids the negative labelling that both 'intractable' and 'difficult' can create. It is consistent with the designation of 'complex matter' in the Family Court's case management guidelines. The Commission proposes this designation should continue to be used in the management of these cases which is discussed in chapter 3. 'Complex contact cases' is used in this report to refer to those parent child contact cases

- that involve repeat applications
- that use considerable Court and legal aid resources or
- in which at least one of the parties has significant difficulties in making and observing contact arrangements that are in the best interests of the child.

Complex contact cases outside the Family Court

2.12 ***Family Court's limited scope.*** Many difficult and continuing contact cases never reach the Family Court. One or both parties may lack the knowledge, resources or support to bring applications. The case may involve child welfare or domestic violence issues that are dealt with under State and Territory legislation by the Magistrates Courts.[40] There are also cases where contact may be frequent but problematic because of violence or inadequate access to the law. A few submissions cautioned that a focus solely on complex contact cases before the Family Court could give those cases disproportionate servicing, funds and attention.[41] It was also suggested that this focus would be misguided because many cases in the Family Court become difficult before they reach that Court. Focusing only on what happens in the Family Court could prevent earlier detection and intervention that would make Family Court action unnecessary.[42]

2.13 ***The Commission's view.*** The Commission's terms of reference require it to focus on complex contact cases before the Family Court. However, in examining these cases and developing recommendations the Commission has borne in mind the potential resource implications for other cases. Those factors are referred to in this report. The report makes a number of recommendations, for example, in relation to the Magistrates Courts' handling of contact cases, that will help to prevent the development of difficult cases before they reach the Family Court. Recommendations about training and education are designed to prevent complex cases developing well before any involvement of any Court. Nevertheless, the Commission agrees that a more comprehensive review of complex contact cases not dealt with by the Family Court would be valuable, particularly in relation to the impact of domestic violence, consent orders and agreements and the relationship between federal and State and Territory legislation, Courts and agencies.

Recommendation 2.2

The federal government should consider establishing a comprehensive inquiry into complex contact cases not dealt with by the Family Court. This could be undertaken by the Australian Law Reform Commission, the Family Law Council, the Australian Institute of Family Studies or the Family Services Council, or a combination of these bodies.

Complex contact cases in the Family Court

2.14 ***Broad and diverse range of cases.*** The nature, causes and dynamics of complex contact cases in the Family Court vary greatly. Many factors influence their development. A common remark, particularly from Family Court personnel in consultations, was that, while there may be some broadly similar characteristics in a significant number of these cases, each case is unique.[43] There is a continuum from simple matters to the very complex. Cases move both ways along this continuum. Cases vary greatly in their difficulty, occupying different places along this continuum. Cases also vary significantly in their difficulty from one time to another. There are cases that involve the Court spasmodically and others that call consistently on Court resources over a long time. The histories and circumstances of the parties are also very different. There are complex cases where the parties have been married for a long period of time and others where the relationship has been fleeting, such as a 'one night stand' that results in a pregnancy. Contact can also be an issue not merely for parents but also for grandparents and other significant people in a child's life.

2.15 ***Some examples.*** In some cases contact is arranged and works reasonably well until there is a change of circumstances. A new partner and an extended or blended family can create new demands and expectations. Or one of the parents can decide to move interstate or overseas. Some cases can become complex when the children develop and their interests change or when they are old enough to make their own demands. For example, a child may wish to play a sport or engage in a hobby on those days when contact has been arranged to take place. In some cases a change of some kind ignites simmering long-standing hostility and leads to the involvement of lawyers and the Court. Cases are taken to Court on issues that are apparently minor, for example, a dispute over how much telephone contact is allowed each week and when it can occur, and on major issues, for example, a complete refusal of contact with unresolved allegations of sexual abuse.[44]

2.16 ***One broad distinction.*** Consultations revealed general acceptance of one broad factor distinguishing two main types of case. In one type, cases are complex and involve high degrees of conflict but they can be resolved over time with, where necessary, appropriate interventions by the Court. These cases may involve unresolved separation issues that precipitate conflict about contact. In the other type of case conflict is already heavily entrenched before the case comes to Court and there is a history of repeat applications. These cases are much more difficult to resolve and some may be insoluble on any basis which allows contact.

2.17 ***Numbers of complex cases.*** The Commission found it very difficult to obtain any accurate indication of how many Family Court contact cases should be regarded as complex. In discussing numbers the submissions and consultations maintained the distinction between repeat application cases and other complex cases. One view was that about 20% of Family Court contact cases are complex but about 1 to 2% were repeat application cases.[45] The consultations suggested that at any time each registry would have about ten repeat application cases in its current Court list and about 50 to 100 cases with a distinct possibility of further repeat litigation.[46] These estimates were based on individual impressions and experience. One counsellor from the Adelaide registry had surveyed the counselling files for that registry in the last year to examine cases that were at least five years old and still active. He calculated that there were 125 cases, constituting 5% of all cases going to counselling. He estimated that the Counselling Service might spend about 10% of its total time on these cases.[47]

2.18 ***Numbers at the Parramatta registry.*** The Commission commissioned an analysis of Court files at the Parramatta registry.[48] Court personnel - registrars, registry managers and counsellors - identified 48 cases as complex on the basis that they were current and either had a high frequency of appearances in Court and/or of counselling or were characterised by an inability of at least one party to agree to or maintain contact orders. The cases were selected in late 1992. They were mostly cases with initiating applications made between 1989 and 1992. Several cases were older, with the first initiating applications made in 1979 (one

case), 1982 (two cases), 1987 (three cases) and 1988 (four cases). This selection process by Court personnel was not empirically tested or reviewed. It suggests broadly the numbers of cases that could involve repeat applications at registries. This of course does not take into account the variations in population sizes which registries might service.

2.19 ***Use of Court resources.*** The research at the Parramatta registry compared the identified complex contact cases with a random sample of 19 contact cases from the registry that were not regarded as complex. These 19 cases made up the control case group. The comparison shows a clear difference between the complex and control cases in the use of Court and counselling resources. The complex cases were in the Court system on average nearly three times as long as the control group cases. They had twice the number of applications and cross-applications by non-custodial fathers and custodial mothers, twice the number of meetings with registrars and deputy registrars and four times as many days in hearings before a judge. They also had significantly more counselling sessions and more family reports.

- There were 10 or more meetings with registrars/deputy registrars in 62.5% of complex cases but in only 36.8% of control cases.

- There was at least one hearing before a judge in 77% of complex cases but in only 42% of control cases.

- There was more than one appearance before a judge in 50% of complex cases and five or more appearances in 25%.

- Court hearings took five or more days in 33% of complex cases but in only 5% of control cases.

- A family report was prepared in 50% of complex cases but in only 31.6% of comparison cases.

These results do not include less formal uses of resources. For example, the consultations suggested that clients in complex cases may have idiosyncratic requirements and would often try to communicate directly and frequently with registrars, counsellors and counter staff. Many would seek assistance on how to complete and file forms.[49] Sometimes these litigants could use at least one Court resource at least once a month.

Characteristics of complex contact cases in the Family Court

2.20 ***The Issues Paper.*** The Issues Paper proposed 43 possible characteristics of complex contact cases and sought comments on them.

Table 1
Possible characteristics of complex contact cases

1. A high degree of continuing inter-parental conflict
2. Inability of one or both parents to resolve their own separation
3. Separation a surprise to fathers
4. Ambivalence about separation (especially fathers)
5. Enforcement proceedings threatened or begun
6. Already numerous Court appearances
7. Already numerous counselling sessions
8. History of physical, emotional or sexual abuse
9. History of abduction or threatened abduction
10. Allegations of domestic violence between the parents
11. Allegations of child sexual abuse by one parent against the other
12. Conflictual hand-overs
13. Rigid contact orders
14. Parents holding strongly held contradictory cultural and social values and beliefs
15. Belief by the custodial parent that the non-custodial parent has no right to see the child
16. Belief by the contact parent that s/he has a right to see the child no matter what

17. Allegations that children refuse to go on contact visits
18. The custodial parent wants no contact whatsoever with the non-custodial parent
19. Belief that the other parent is trying to 'brainwash' the child
20. Allegations of incompetent parenting by the custodial parent against the non-custodial parent
21. Allegations of incompetent parenting by the non-custodial parent against the custodial parent
22. A belief by the custodial parent that the stress of contact is threatening the health and well-being of the child
23. A belief by the custodial parent that the stress of contact is threatening her or his health and well-being
24. Children in the middle childhood age
25. Lack of previous significant relationship between contact parent and child
26. Poor communication skills of one or both parents
27. The involvement of a new partner for one or both parents
28. The involvement of members of the extended family or friends
29. Strong alliance with lawyers, counsellors, extended family (especially by mothers)
30. Problems related to maintenance
31. Disputes over property
32. Disputes over custody
33. Mental ill-health or difficult personality characteristics of one or both parents
34. Substance abuse eg drug or alcohol abuse, by one or both parents
35. Relatively low educational level of the parents
36. History of criminal behaviour on the part of one or both parents
37. History of one or both parties repeatedly changing lawyers representing them
38. Custodial parent in employment at time of separation
39. Non custodial parent is unemployed
40. Relatively long distance between residences
41. Transport costs
42. One parent or both receiving legal aid
43. Delays in the Court process or in the provision of counselling or conciliation

A number of submissions saw this list as an acceptable summary of possible factors although the combinations of factors vary greatly from case to case.[50] Seven factors were seen as not particularly helpful

- children in the middle childhood age
- strong alliance with lawyers, counsellors, extended family (especially by mothers)
- relatively low educational level of the parents
- history of criminal behaviour on the part of one or both parents
- custodial parent in employment at time of separation
- non custodial parent unemployed
- one parent or both receiving legal aid.[51]

2.21 ***Submissions and consultations.*** The Commission was told of a number of allegations often made during complex contact cases

- personality difficulties
- violence or sexual abuse
- the child refusing to go on contact visits
- ineffective or undeveloped parenting skills

- substance abuse
- rigid contact orders
- conflict at handovers
- unresolved separation issues, such as infidelity, anger, sense of loss and grief
- cultural and religious differences between the parents
- influence of extended families or new partners.[52]

J Harrington, a solicitor, submitted that most difficult cases involve

- chronic high levels of conflict
- potential for violence between adults
- child abuse
- significant psychiatric ill health.[53]

The Australian Psychological Society suggested a number of types of situations giving rise to contact disputes

- the father being unreliable or irregular with his arrivals and departures
- hostility of the mother and/or her extended network towards the father and actively thwarting contact
- hostility, expressed as indifference, of the mother and/or her extended network towards the father
- hostility of the father and/or his network towards the mother and the father's use of time with the children to pry, to undermine the mother's efforts or to indoctrinate
- low level, but not continuing, violence towards the spouse, clearly confined to the period surrounding separation
- history of violence towards the wife/mother and/or the children
- allegations of child abuse
- abuse proven or not denied by the father
- the mother reporting stress upon return of the children from time with the father
- the father incompetent or inexperienced as a parent
- mutual spousal hostility.

2.22 ***Possible characteristics of repeat application cases.*** Repeat application cases share many of the characteristics of other complex cases. However, according to the submissions and consultations, they may have some special characteristics that make conflict more intense. The most commonly suggested characteristic is one of the parties, or occasionally both, having some sort of personality or psychological difficulty that in many cases amounts to a personality disorder.[54] It was frequently said that one party can become obsessed with the litigation and that it can become enormously significant in his or her life. This party could be of either sex but tends to be a contact father. The Commission was told that in many of these cases the applications lack any objective merit. Another common feature is many changes in legal

representation followed by self representation. In some cases the litigation is used to maintain contact with or harass a former partner. However, often the obsessed parties do not see the proceedings in that light at all.[55] Rather, they see the litigation as a matter of justice for themselves and their children.

2.23 ***The Parramatta research.*** The research at the Parramatta registry found factors other than use of Court resources that differentiated the complex contact cases from the control cases. Significant factors were

- ongoing conflict in the relationship between the parents
- the presence of children under two years of age at the time of separation
- allegations that the child refuses to go on contact visits
- allegations that the child's behaviour problems are attributable to the disruption caused by contact
- handover difficulties and rigid adherence to contact conditions
- both parents being in a new relationship or fathers not being in a new relationship
- the case being transferred from the Magistrates Court.

Several other factors were only marginally significant or showed trends or patterns that could be tested in further research. They included

- mutual allegations of child sexual abuse or alcohol abuse
- Court counsellors recommending against further counselling.

The researchers tested demographic factors but none appears to be a significant indicator. This is consistent with previous research.[56] The age of the parents, whether they were married or in a de facto relationship, the length of their relationship, where they were born and their employment status did not significantly differentiate the two groups of cases. The research identified a number of good predictors through the technique of logistic regression.[57] Membership in the complex case group or the control group could be predicted with 91% accuracy using four variables together

- continuing conflict
- children under two at the time of separation
- children allegedly refusing access
- restraining application as part of initiating application.

The use of Court resources, including the length of the case, the number of days in Court and the number of meetings with registrars, could also be predicted using four variables together

- handover problems
- conflict
- personality disorders
- mothers applying for legal aid.

Finally, the use of counselling resources, including the number of Order 24 conferences, s 62 conferences and voluntary counselling sessions, could be predicted using two main variables

- whether there were interim hearings
- whether there was rigid adherence to contact conditions.

These factors may be considered to be 'risk factors'. They may be present early in the case and act as 'danger signals' or they may occur later in the progression of the case. They may be cause or effect or both. This analysis is limited, however, by the sample size.[58] In this type of research a small sample size may mean that the research may not recognise trends that could be significant. The report of the research is in Appendix 2.

Effects of complex contact cases

2.24 ***Effects on children.*** Complex contact cases will often have elements of violence and abuse, chronic conflict and adversarial litigation. The potentially devastating effects of violence and sexual abuse on children when they are direct targets are self-evident. There is also significant research on the effect of inter-spousal violence on children, whether or not they witness it or are directly exposed to it.[59] The adverse effects are particularly acute when children witness the violence but there are also serious difficulties when they are less directly exposed to it. They are at significant risk of developing emotional and behavioural problems such as low esteem, depression and anxiety, passivity, self destructive and aggressive behaviour and poor school performance. They are also at risk of taking the violent parent as a role model and continuing the cycle of violence as adults. They can believe that the violence is justified and develop a low regard for the custodial parent. The issue of violence is discussed more fully later in this chapter. High levels of conflict between parents, even without physical violence, can harm children, producing lower self esteem, increased anxiety and a loss of self control.[60] A number of studies indicate that continuing hostility between parents may cancel out any benefits to a child that otherwise might flow from frequent contact with both parents. One study reported that contact with the father is associated with positive child adjustment when interparental conflict is low but with harm to the child's adjustment when interparental conflict is high.[61] Besides the emotional trauma that may be involved protracted, expensive litigation may also mean that the parents have fewer resources to spend on the children's welfare.

2.25 ***Effects on parents.*** Parents who become involved in complex contact disputes are those whose relationships are likely to be filled with bitterness and hostility. A number of people told the Commission that in these complex cases suicide and other acts of violence may be a significant risk.[62] For the custodial parent unsuccessful contact arrangements mean no respite from child care and no extra financial assistance from the other parent. The adversarial nature of the litigation may influence the attitudes of the legal practitioners and the parties. Court room combat encourages further conflict.[63] The adversarial process encourages parents to denigrate each other rather than co-operate in child rearing. Friends, partners and relatives may become drawn into the dispute to the detriment of their well-being.[64]

2.26 ***Effects on the community.*** Bitter and protracted contact disputes can adversely affect the whole community by decreasing the wellbeing and productivity of those involved as parties or witnesses and by increasing demands on health resources, social services, the education system, law enforcement agencies and the legal system. One submission estimated the costs of contact litigation in one year at $150 million.[65] Worst of all these disputes can harm the community as a whole by the harmful effects they have on children, the community's future resource.

Issues in complex contact cases

Introduction

2.27 Submissions and consultations raised three major issues in relation to complex contact cases. One issue was violence and women's inequality. Some submissions suggested this issue is the fundamental cause of complex contact cases. The second issue concerned the personalities of the parents, including unreasonable and unacceptable behaviour. Some submissions discussed these cases from a broad perspective of a psychosocial analysis of conflict. A major theory in this area is the impasse model discussed in chapter 3. The third issue concerned the situation and wishes of children and their best interests.

Violence and women's inequality

2.28 ***Equality before the law.*** The ALRC report *Equality before the law: justice for women* discussed violence and the family law.[66] It defined violence as not only physical but also verbal, emotional, psychological sexual or financial abuse.[67] It said that violence in family relationships has its basis in women's subordination. Women are not adequately protected by the law and do not enjoy equality before the law. The report found that there was inadequate understanding by the Court, its personnel and by many legal practitioners of the dynamics of domestic violence. Many people working in the area continue to believe that violence is only one problem in a relationship, that it will end when the relationship ends and that the woman must have provoked it and can stop it by changing her behaviour. A common view is that if the violence was really serious then the woman would have left or left soon after it began. These beliefs under-estimate the intensity and the repetitive cycle of violence and ignore realities: for example, it may be more dangerous or financially difficult for the woman to leave. The report made recommendations to address these issues. Some of these recommendations are reproduced in Appendix 3 to this report. The Commission in this report endorses and draws upon the analysis and recommendations in the ALRC equality report.[68]

2.29 ***Violence is a critical issue.*** Many submissions, particularly those from individual women and from groups representing women, cited domestic violence as the critical issue in discussing complex contact cases. A number of submissions said that violence should be defined more extensively to include verbal abuse and behaviour that intimidated or humiliated. The Violence Against Women and Children Working Group, Federation of Community Legal Centres (Vic) submitted that violence includes physical, sexual, emotional and financial abuse.[69] Violent behaviour is designed to coerce, control and reinforce power over the other parent. It may include denigrating the other parent in front of the child, influencing the child against the parent. It may include harassing behaviour such as stalking or making repeated vexatious applications to the Court.

2.30 ***Violence and the Court process.*** Many submissions expressed concern that the Court process does not take adequate account of violence against women.[70] In particular the Court may give insufficient weight to a history of violence and fails to understand the dynamics of current violence. In most cases it is not an isolated incident or a few incidents that are at issue but a pattern of conduct, sometimes lasting over many years and that gradually forces many women into a state of resignation. These submissions said that the Court may subject women to the risk of further violence. The Court may assume that the parties are able to negotiate freely and come to an agreement when the woman is intimidated because of violence.[71] It may make consent orders when violence makes true consent impossible. It may order contact in circumstances where contact is inappropriate because of domestic violence.[72] Many women accept contact because they fear retaliation by partners or are pressured to do so by lawyers or by the Court, including its counsellors.[73] In these ways the Court process itself becomes another experience of violence for some women. Violent partners use repeated applications as a weapon against women and their children. Submissions argued that contact should be refused in cases involving sexual abuse or violence.[74] One said that the appropriate response is to prosecute the perpetrator.[75]

2.31 ***Violence or harassment on contact handovers.*** When a contact order is made, violence and intimidation may continue through harassment and physical abuse of the woman particularly at handovers.[76] In these circumstances the children may be reluctant to see the father and the mother may refuse or frustrate contact. These women may be regarded as being difficult and causing the contact problem.[77] The real problem, however, is the continuing violence and intimidation.

2.32 ***Power not contact can be the issue.*** A number of submissions asserted that many men obtain contact orders but then have no contact with their children, even after they have pursued lengthy disputes in Court.[78] They can reject or ignore repeated requests by custodial mothers and the children for them to attend. In these cases the non-custodial parent's use of litigation seems motivated more by a determination to exercise power over the former partner and the children than by any desire for continuing contact. The Women's Legal Resources Centre submitted that in its experience contact parents failing to make contact is a more significant problem than custodial parents failing to provide it. However, media, political and Court attention focuses on the failings of custodial mothers rather than those of contact fathers.[79]

2.33 ***Special problems of women of non-English speaking backgrounds.*** The Women's Refuges Multicultural Service of Western Australia submitted that in assisting women and children of non-English speaking background in cases of domestic violence it has dealt with a significant number of potentially difficult contact cases.[80] A joint submission from the Immigrant Women's Domestic Violence Service, the Domestic Violence and Incest Resource Centre and the Women's Legal Resource Group Inc argued that many women of non -English speaking background are often stereotyped by oppressive traditions and religious fanaticism and are seen as being passive and obedient.[81] The submissions pointed out that these women do not constitute a single homogeneous group. Their situations and needs vary. Cultural factors have to be considered with a gender content. What they often have in common is a limited understanding of the Australian family law system and a difficulty in obtaining access to it. They may agree to contact arrangements without understanding their contents or effect. Some also think it compulsory to take part in counselling and mediation when it is not. They can feel forced to agree to arrangements they do not want.

2.34 ***The Parramatta research.*** The research at the Parramatta registry indicates that allegations of violence are significant in complex contact cases. There were allegations of violence in both the complex cases and the control group cases. Of the 48 complex contact cases 32 had allegations of violence - by the father against the mother in four cases, by the mother against the father in 17 cases and against each other in 11 cases. Applications for restraining orders were significantly higher in the complex cases than in the control cases.[82]

2.35 ***The Commission's view.*** The Commission has considered the evidence in the submissions and consultations in this reference and in the ALRC's reference on women's equality before the law. It has also considered the research data from the Parramatta registry. Clearly there is a significant number of cases where violence and the fear of violence are primary reasons for many difficulties with contact orders. In some of those cases orders for contact may have been inappropriate. In others consent orders were made in the absence of true consent. The ALRC report *Equality before the law: justice for women* made a number of recommendations on dealing with violence in family law. Those recommendations are contained in Appendix 3. The Commission supports initiatives taken by the Family Court to deal more appropriately and effectively with cases in which there are allegations of violence.[83] It recommends that these initiatives be extended in handling complex contact cases.

Recommendation 2.3

In determining the best interests of the child, the Court should have regard to any history of violence in the parents' relationship. Violence is not only physical but also extends to verbal, emotional, psychological, sexual and financial abuse.

In determining the best interests of the child, the Court should have regard to any continuing conflict between the parents including the causes of the conflict, for example, violence and unresolved separation issues.

2.36 ***Gender bias.*** The law's response to women's experiences of violence and inequality is inadequate because the law is infected with gender bias.[84] The Chief Justice of the Family Court, Justice Nicholson, has proposed that the Court establish a fact finding program to ascertain the extent to which gender bias affects family law.[85] This would extend beyond the judiciary and include, for example, an examination of the work and training of the legal profession. Task forces established by Courts in Canada and the United States are conducting similar programs. The ALRC's report *Equality before the law: justice for women* analysed gender bias in the law and referred in particular to issues in family law.[86] The Commission supports the Chief Justice's proposal.

Recommendation 2.4

The Family Court should establish a task force to examine gender bias in family law.

Personality issues

2.37 ***Frustrating contact.*** Many submissions from individuals and some from organisations argued that the primary cause of complex contact cases is custodial parents denying or frustrating contact.[87] Most of these submissions were made by men and most complain about women who are custodial parents. They say that contact is frustrated primarily out of malice, unreasonableness, as a strategy in property and child support disputes or because of mental instability or misguided views about the interests of the children.[88] A number of these submissions saw the Family Court as biased against men and generally undervaluing the role of fathers as parents.[89] Some submissions assert that custodial parents often make false allegations of sexual abuse out of malice or as a tactic, prompted and fuelled by their lawyers, the Court or other agency officials and counsellors.[90] These allegations cause cases to be delayed for up to two years. While an allegation remains unresolved the non custodial parent may be denied any contact, which destroys any potential for satisfactory contact in the future. Other submissions say that some custodial parents constantly move, sometimes interstate, to thwart contact.[91]

2.38 ***Research on child abuse allegations in family law proceedings.*** A recent study of child sexual abuse allegations made in the course of Family Court proceedings has suggested that in the majority of cases where allegations are made they are not the tool of a vindictive parent. In a study of 50 cases where allegations were made there were 21 cases where the outcome of sexual abuse was confirmed, eight cases where there was an inconclusive outcome, five cases where there was a finding of no abuse and in the remaining 17 cases there was no investigation conducted.[92]

2.39 ***Alienating children.*** Another common view was that some custodial parents intimidate and brainwash the children to refuse contact or to be distressed by it. This view argues that this behaviour should be regarded as a form of psychological child abuse.[93] It has been called the Parental Alienation Syndrome and has aroused controversy.[94] Parental Alienation Syndrome is a family dynamic where the child has been the subject of an extensive campaign to alienate the child's affection from the other parent.[95] It does not describe situations where the children themselves decide, often against the wishes of the custodial parent, they do not want contact. This situation is discussed in the next part of this chapter.

2.40 ***Responses from Family Court personnel.*** Many Court personnel agreed that in many cases the custodial parent's actions to thwart or avoid contact are very understandable and in some cases completely justifiable. Custodial mothers may have legitimate reasons such as a genuine and reasonable fear of violence and abuse to themselves or their children. Many women have little trust in former partners who have been violent and continue to use threatening behaviour.[96] Many do not have the resources, the confidence or the verbal skills to challenge the making of contact orders in the first place.[97] However, there are other cases where contact would be in the best interests of the child but the custodial parent for a variety of reasons will not co-operate or assist. These reasons can include the following:

- a belief that contact is being used to try to rekindle the relationship
- the custodial parent has a new relationship and wants to end the old one that is perceived as a nuisance
- there are significant doubts about the parenting skills and commitment of the contact parent
- the custodial parent feels badly treated during the relationship, including infidelities by the contact parent
- lack of financial support from former partners
- the parents never having lived together and never having a sense of family
- psychiatric illness of one parent
- substance abuse
- criminality

- immaturity of one or both parents
- the child refusing to go on contact visits.[98]

2.41 ***Personality disorders.*** A general view in submissions and consultations was that many parties in complex contact cases suffer from some sort of personality disorder, particularly in those cases with repeat applications.[99] This is said to be a prime cause of the complexity and of action to frustrate contact. The Parramatta research did not reveal the reasons why contact might be frustrated. It did, however, find some references to personality disorders in counselling reports, experts' reports and Court reports or decisions. Excluding allegations made by one party against the other, personality disorders were reported in 35% of the complex cases and in 26% of the control cases.[100] There was clearly no significant difference between the complex cases and the control cases and no overwhelming reporting of disorders. However, some consultations suggested that Court personnel, particularly counsellors, are reluctant to comment on personality disorders because they are not appropriately qualified to draw conclusions, they may be later cross-examined on their views and comment may stigmatise, prejudice and antagonise the parties.[101] In this way there may be significant under-reporting of real concerns about the psychological health of some parties. The Commission is unable to comment on the extent to which this may occur.

2.42 ***Responding to personality issues.*** The recommendations in this report address personality issues in their general approach to complex contact cases. If implemented they will assist to identify earlier cases where the custodial parent is unwilling or reluctant to co-operate and to develop responses tailored to the specific needs of each case. Where there is wilful and continuous thwarting of contact orders with no reasonable excuse then enforcement action will be appropriate. That process is dealt with in chapter 5. Where the custodial parent feels threatened by, or unconvinced about, the value of contact visits, options such as counselling, mediation and supervised contact services may be appropriate provided that there are adequate measures to ensure the safety and security of the child and parent. Where there are legitimate doubts about the reliability and parenting skills of the contact parent supervised contact and parenting education would be likely responses. The Commission does not consider that it is possible to make general recommendations about treating personality disorders.

The situations and wishes of children

2.43 ***Children not wanting contact.*** One major indicator of complexity is a child's apparent refusal or reluctance to go on contact visits. This raises very difficult problems in determining the child's real wishes and the causes of the refusal or reluctance. One possible cause is that the custodial parent, whether deliberately or not, contributes to or causes much of the child's anxiety, through her or his own attitudes and behaviour. Two parents may see these issues from completely different perspectives. The custodial parent might see the child as anxious immediately before and after a contact visit but not know that the child enjoys contact. Similarly the contact parent might only see the child happy during the visit but not realise that before and after contact the child is anxious.[102] In any event children simply may not want contact and may have their own reasons for this wish. This is especially true of older children but children of all ages above infancy have their own views. Infants may manifest their feelings through their behaviour.

2.44 ***Children's reasons.*** H Wingate, a Family Court counsellor, submitted that the reasons why the child may refuse contact include

- the child feeling he or she must look after the custodial parent - almost a reversal of the parent-child role
- the child feeling that by refusing he or she is being loyal to the custodial parent
- the child feeling insecure at the loss of one parent and fearing the loss of love of the custodial parent
- problems of sharing and fitting in with new partners and family members.

2.45 ***Right of children to be heard.*** The Commission supports Article 12 of the United Nations Convention on the Rights of the Child that a child who is capable of forming his or her own views should be assured the

right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Causes of complex contact cases

2.46 ***The Commission's view.*** The Commission is unable to draw any firm conclusions about the fundamental causes of complex contact cases. There is no reliable data upon which to do so. The Parramatta research gives insights into a number of factors or 'danger signals' that can help to identify complex and potentially complex cases but it does not explain what causes the difficulties in a particular case or whether factors and allegations are valid or the result of the unreasonableness or 'fault' of one or both of the parties. The Commission's principal conclusion is that each case must be treated on its particular facts, not pre-judged, and it must have its own appropriate case plan.

2.47 ***Role of the legal system.*** One final comment on these issues is warranted. The Commission is convinced that the legal system can play a part in the development and the exacerbation of complex contact cases. The litigation process is unlikely to be able to identify or deal appropriately with the complex family interactions that may have produced the dispute. According to one view it is unable to cope with the process of marital separation and finds it difficult to come to terms with anything other than a win/lose outcome, with a result that the parties become further polarised.[103] The parties may see Court adjudication as the Court choosing the 'better' parent. The adversarial nature of the proceedings could exacerbate their hostility rather than have them focus on parenting responsibilities.[104] One or other party may take contact disputes to the Court out of resentment over separation. Delays in the legal process can heighten the level of dispute between the parties. Inappropriate interventions or interventions at the wrong time can create further difficulties. Legal practitioners who take an unnecessarily adversarial stand can worsen a dispute as can lawyers, counsellors, mediators or arbitrators who fail to identify or respond to relevant issues or who take into account irrelevant issues. The Commission's recommendations in chapter 6 on education and training are important in addressing these factors.

Two major issues concerning Court processes

Introduction

2.48 The submissions, the consultations and the research from the Parramatta registry raise two major issues about Court processes. They are the making of inappropriate orders for contact and the role of Magistrates Courts[105] in contact cases. Both matters are important because they occur at the start of many cases that later become complex. Clearly where a contact order should not have been made the case is very likely to become complex. It is also likely to have very adverse consequences for the child and the parents. The consultations and research indicate that many complex cases begin in the Magistrates Courts and that there are significant problems in that process. There is an urgent need to improve the capacity and effectiveness of Magistrates Courts' responses to those cases. It is difficult to escape the conclusion that difficulties in Magistrates Courts sow the seeds for further hostile and bitter disputes when these cases reach the Family Court.

Inappropriate contact orders

2.49 ***Amendment to the Family Law Act necessary.*** The FLA does not provide explicitly that in considering an application for a contact order the Family Court should take into account violence against another person that physically or psychologically harms the child. According to the Chief Justice of the Family Court, Justice Nicholson, in the past the Court has been overzealous in excluding evidence of family violence when the violence did not appear to have directly affected the children.[106] The FLA was enacted to remove fault from family law. The Court has been concerned that fault should not be being introduced under another guise. However, the Court may have disregarded many relevant issues in its concern to avoid deciding applications on the basis of fault. The Chief Justice considers it now well accepted within the Court that children are detrimentally affected by violence even if it is not directed at them. He has recommended to the Government that the Act be amended to make it clear that the Court may take into account violence against another person which physically or psychologically harms the child.

2.50 ***The Family Law Reform Bill (No 1) 1994.*** The *Family Law Reform Bill (No 1) 1994* (the Bill) takes up this issue. Clause 68 provides that in determining what is in the child's best interests the Court must consider among other things

> (f) the need to protect the child from physical or psychological harm caused, or that may be caused, by
> (i) being subjected or exposed to abuse, ill treatment, violence or other behaviour or
> (ii) being present while a third party is subjected or exposed to abuse, ill treatment, violence or other behaviour
> (h) any family violence involving the child or a member of the child's family.

2.51 ***The Commission's view.*** The Commission endorses the comments of the Chief Justice and the need for the FLA to state clearly that the Court should take greater account of violence. It is concerned, however, about the Bill's requirement that the child be 'present' in paragraph (f). The provision could be interpreted restrictively to those cases where the child actually witnesses the behaviour or is physically present. Research on violence indicates its harm to children even when they do not directly witness it.[107] While paragraph (h) might cover those cases where the child is not actually present the requirement to be 'present' should be removed from paragraph (f) to ensure that there is no possible ambiguity.

Recommendation 2.5

> The Family Law Act should provide that the Court in determining the best interests of the child must consider the need to protect the child from physical or psychological harm caused, or that may be caused, by being directly or indirectly exposed to abuse, ill treatment, violence or other behaviour which is directed against a third party or affects or may affect a third party.

2.52 ***Another change to the Bill necessary.*** Clause 60B of the Bill provides that a principle underlying the Bill is that 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. The Convention on the Rights of the Child qualifies this right by adding 'except if it is contrary to the child's best interests'. The Bill contains no such exception. This may well discourage the Court from treating cases of family violence or chronic conflict as exceptions to the norm. It may discourage a range of measures, such as denying or suspending contact to the setting of strictly supervised contact, when those measures would be appropriate to protect the best interests of the child. The Commission recommends that clause 60 of the Bill should include the proviso 'except if it is contrary to the child's best interests'.

Recommendation 2.6

> Any legislation which refers to the child's right of contact with parents and significant others should be qualified by the proviso 'where it is in the child's best interests'.

2.53 ***Attitudinal change necessary.*** A number of submissions and consultations suggested a common view that the Family Court may still make orders for contact where issues of violence, abuse or chronic conflict make contact problematic or dangerous to the interests of the children and the custodial parent.[108] These views are consistent with the response to the ALRC reference on equality that received nearly 600 written and oral submissions. Many of these submissions argued that the family law system, including the Family Court, was not paying proper regard to these issues. The Issues Paper in this Inquiry[109] noted a great deal of research on the effects of violence on children and some research on the effects of conflict. Some Family Court judges told the Commission that the Court had to pay greater attention to this research. The Court had to be 'more robust' in refusing to make orders for contact in those circumstances.[110] The Commission welcomes the Family Court's very useful initiatives, particularly in training and educating its personnel, to ensure that the Court takes proper account of the nature and effects of violence and the dangers of chronic conflict. The Commission considers further co-ordinated effort desirable, for example, by collating available research and by further conferences and training.

Recommendation 2.7

> The Family Court should be more robust in refusing to make contact orders where it is not in the best interests of the child to order contact. Refusal of contact may be particularly inappropriate where there is a history of violence in the parents' relationship, where there is continuing conflict between the parents or where the child opposes contact. In considering whether the child opposes contact the Court should consider, among other factors, the age and maturity of the child and any parental influence.

The role of Magistrates Courts

2.54 ***Family law in Magistrates Courts.*** Many of those consulted place the origins of many complex contact cases in Magistrates Courts, often in proceedings for domestic violence orders or apprehended violence orders.[111] The Commission was told that Magistrates Courts often lack the expertise, training or resources necessary to deal effectively with complex contact cases. They often have little access to mediation or counselling or are unaware of these services. They do not provide information sessions and their liaison with the Family Court and use of Family Court resources are patchy.[112] Family law matters are listed in Magistrates Court alongside a wide variety of criminal and civil matters. The likely sensitivities of family matters can make this totally inappropriate. The parties can become bewildered when a case is transferred from a Magistrates Court to the Family Court. When transferred to the Family Court it might take two months to be listed.[113] Another problem is that lawyers may forum shop between the Magistrates Court and the Family Court as a tactical means of advancing their client's cause. This can cause delay and expense. The research at the Parramatta registry identified transfer from Magistrates Courts as one of the most significant differences between the complex and the control cases. A significantly higher proportion of complex cases (70.8%) than control cases (42.1%) had been transferred from the Magistrates Court.

2.55 ***Ex parte orders.*** An issue of particular concern was ex parte orders concerning contact made in Magistrates Courts. An ex parte order is an order made by a Court on the application of one party but in the absence of the other. A parent can apply ex parte in Magistrates Court for interim custody and seek and obtain a warrant for the police to take possession of the child. The other parent may know nothing about the application or the order until the police arrive to take the child. That parent may then engage a solicitor, seek a delay in enforcing the orders and appeal to overturn them. A common ex parte order is one which excludes one party from a house and thus prevents contact with a child. A parent might also apply ex parte for contact orders. In these ways ex parte orders in the Magistrates Courts can create enormous friction between the parents and inflame the dispute.[114] Sometimes the Magistrates Courts make ex parte orders on evidence and information that would not satisfy the Family Court.[115] Judges at the Sydney registry suggested that before making an ex parte order a magistrate should consider all possible information and options. If an order is made it should have a very close return date to allow the other parent the opportunity to be heard on the merits as quickly as possible. The order should also permit the other parent to apply to vary the order on 12 hours notice.[116]

2.56 ***The Commission's view.*** The role of Magistrates Courts in family law matters needs urgent reform. The FLC will be publishing a report on magistrates in family law later this year. It is likely to make recommendations about organisation, structure, resources and training to address the problems. However, the Commission considers that some matters concerning complex contact cases require urgent attention. They relate to ex parte orders and training and education of Magistrates Court personnel. An ex parte order made precipitously or wrongly can significantly increase hostility, trauma for the children and the parties and the likelihood of further litigation. The Commission recommends that the Magistrates Courts with the assistance of the Family Court develop guidelines on the use of ex parte orders in family law matters. The other issue of training and education is dealt with in chapter 6.

Recommendation 2.8

Magistrates Courts with the assistance of the Family Court should develop guidelines on the use of ex parte orders in family law matters. As a general rule ex parte orders affecting contact should only be made in cases of emergency, for example, where there is a possibility of immediate harm to the child, and for a short period. They should be reviewed by the Court in a hearing, notice of which has been given to the other parent, as soon as possible after the orders are made. Wherever possible orders should be made only after notice has been given to all interested parties, even if the time between service and hearing is greatly reduced.

Family Court and legal aid resources

Family Court resources

2.57 The submissions and consultations indicated that the Family Court's resources, including judicial, registrar and counselling resources, are currently stretched to the limit. As a result in some cases established case management guidelines are not being followed and there are delays in matters being heard or receiving counselling. For example, the Adelaide registry has too few counsellors available for duty lists and the case management guidelines that require pre-filing counselling in 50% of all matters are not being met - only 42% of cases receive pre-filing counselling.[117] The problems vary in nature and extent from registry to registry. Present initiatives, such as the use of impasse mediation, parents' and children's groups, outreach and pre-filing counselling and education and information groups are not available to the same level at each registry. While this is partly due to individual registries experimenting with different approaches, it also reflects the inability of registries to provide these alternative approaches as they would like because of resources constraints. In these circumstances any resources required to implement recommendations in this report should not be taken from the Court's existing budget and resources.

Recommendation 2.9

Any resources required to implement recommendations in this report should not be taken from the Family Court's existing budget and resources.

Legal aid

2.58 ***Legal aid in family law cases.*** The legal aid commissions in each State and Territory provide assistance to litigants who satisfy the relevant means and merit tests and who have a type of matter for which aid is granted. The commissions are funded jointly by the federal and State and Territory Governments. Community legal services, women's legal services, Aboriginal and Torres Strait Islander legal services and chamber magistrates in New South Wales may also provide legal assistance and advice.[118] In general terms, legal aid commissions assist either by providing legal representation or by arranging to pay a private lawyer to act for the assisted person. They will also pay any expenses of the litigation including Court charges and other fees associated with the litigation. In some cases they may also pay all or part of any costs awarded against an assisted litigant. Most legal aid commissions require an assisted party to make a financial contribution to the cost of the litigation and in some cases to repay all or part of the grant. The legal aid commissions also pay for the provision of separate legal representatives for children.

2.59 ***Lack of legal aid.*** A few submissions said that women were not receiving sufficient legal assistance in custody and contact matters.[119] They argued that many women with serious concerns about custody and access are ineligible for legal aid. They noted that the ALRC's report *Equality before the law: access to justice* found that men have greater overall access to legal aid than women do.[120] One submission stated that some men stall proceedings until the women's grant of legal aid runs out or is stopped.[121] Other submissions claimed that many fathers are unable to obtain legal aid because they are employed and do not satisfy the means test or other guidelines.[122] Many men therefore cannot afford to take action to enforce their contact orders.

2.60 ***The Parramatta research.*** The research at the Parramatta registry collected data on the frequency with which parties applied for and were granted legal aid. Fathers in the complex cases were more likely to seek advice from the legal aid commission than fathers in the control group cases. Mothers were more likely than fathers to apply for legal aid in the complex cases - 66% compared with 50% - but not significantly so. Most mothers who applied were granted legal aid - 92%. Most fathers who applied were also successful but a smaller proportion than mothers - 54%. Legal aid was granted in a range of matters but the small numbers in the study make the statistical tests unreliable. The main trend, however, was for mothers in complex cases to be more likely to be granted aid in matters concerning domestic violence, often in combination with other matters. In some cases legal aid was refused after it had been granted for the same or other matters. This was the case for eight complex cases - two mothers, six fathers - and five control group cases - four mothers, one father.

2.61 ***Changes to legal aid.*** The Access to Justice Advisory Committee (AJAC) recommended that the Commonwealth and the States and Territories should increase funding for legal aid because of identifiable factors increasing demands for legal services.[123] It also reported that there are marked differences in the means tests and eligibility criteria applied by the legal aid commissions in different parts of Australia. It proposed establishing an Australian Legal Aid Commission to ensure national equity and efficiency. The implementation of these recommendations would clearly have implications for legal aid in complex contact matters.

2.62 ***Commission's views.*** The Commission endorses this recommendation of the AJAC and further recommends that the proposed Australian Legal Aid Commission should review the adequacy and fairness of legal assistance provided to both custodial and contact parents in the full range of contact cases, including original orders and enforcement applications. The Commission considers that its recommendations will save legal aid resources in the medium to long term by reducing the number and adverse consequences of complex contact cases and of repeat applications. However, it does not have the necessary information to make more detailed comments on the costs to the legal aid commissions. A full review of the commissions' policies and practices is necessary for that assessment and to determine legal aid priorities.

Recommendation 2.10

The proposed Australian Legal Aid Commission should review the adequacy and fairness of legal assistance provided to both custodial and contact parents in the full range of contact cases, including original orders and enforcement applications.

3. Managing complex contact cases

Introduction

3.1 This chapter discusses strategies to enable the Family Court to identify and respond more effectively to complex contact cases and potentially complex contact cases. The main elements of the suggested strategy are early identification of cases, immediate measures to ensure the protection of children's interests, the development of an individual management plan appropriate to each case and the availability of a range of options that have been properly evaluated as to their effectiveness for particular types of cases. This chapter proposes changes to the Family Court's existing case management guidelines to help to identify complex and potentially complex contact cases earlier. It also suggests changes in approach once cases have been identified. These include greater adherence to the principle of continuity of supervision by Court personnel, use of case conferences or the introduction of, early family assessments and reports and the appointment of separate legal representatives for children as soon as a matter is identified as complex or potentially complex. The chapter deals with four possible non litigious options being arbitration, counselling, therapy and mediation, particularly impasse mediation.[124] Finally the chapter discusses three other issues relevant to case management: scrutiny of consent agreements, content of consent agreements and the relationship between contact and child support.

Early identification

Introduction

3.2 The early identification of complex and potentially complex contact cases enables the Court to take appropriate action to attempt to resolve the dispute in the best interests of the children before the dispute becomes entrenched. Cases that become locked in conflict harm the children and the parents and waste limited Court and other legal resources. The Government has recognised the value of early identification. In its response to the report of the parliamentary Joint Select Committee it supported the Family Court Counselling Service placing a high priority on early intervention counselling in cases where contact may be a problem.[125] Many submissions and consultations emphasised the benefits of early identification of potentially complex cases.[126] Those responses and the research conducted for the Commission at the Parramatta registry indicate that potentially complex contact cases can be identified early and that changes can be made to enhance their management.

Complex case designation

3.3 ***The case management guidelines***. The Family Court has adopted case management guidelines that have the status of a practice direction.[127] They came into effect on 1 July 1993. They require and assist the Court to facilitate the resolution of disputes in a just, timely and economical manner. The guidelines provide for the designation of complex cases. Each registry has a case management committee that may designate a case as complex if it

- has not been finalised despite a previous defended hearing
- is a long defended case
- involves voluminous and/or complex issues or evidentiary material
- involves complicated psychological or emotional issues, or
- involves complex social dynamics.

A case may be classified as complex by a case management committee at any stage of the proceedings. The committees meet regularly and supervise the management of all complex cases. They are to ensure that these cases are individually managed by assignment to a judge, judicial registrar, registrar and counsellor. The committees also provide advice and guidance on the management of the cases. As far as possible complex

cases are listed before the same judge, judicial registrar or registrar for interim and interlocutory procedures.[128]

3.4 ***The Issues Paper.*** The Issues Paper asked whether the complex matter designation was appropriate and effective for difficult or potentially difficult contact cases. In particular, comment was sought on whether a totally separate designation of difficult contact cases with its own procedures and list of risk factors would be preferable.[129]

3.5 ***Submissions and consultations.*** A number of submissions, particularly from those who participate directly in designating complex cases, such as legal practitioners and counsellors, considered the current complex case designation adequate and effective for early identification of potentially complex cases.[130] For example, the Women's Legal Resources Centre stated that the Parramatta complex case system works well and fast tracks cases involving physical or sexual assault. The Centre argued that what was needed was more resources not more systems.[131] Another submission argued that to introduce a separate procedure for complex contact cases would only be an unnecessary complication and administrative burden.[132] If there is a problem it is because the Court lacks the resources to provide a full range of options to respond to these cases.[133] A few submissions advocated a separate structure for complex contact cases. They saw a need for a clear focus on the special needs of complex contact cases rather than dealing with them as part of the more general procedure for complex cases.[134]

3.6 ***Concerns about consistency.*** There was some concern expressed in the consultations about difficulties in ensuring that the complex case designation was being used consistently and effectively at each registry. It was thought that some Court personnel might avoid dealing with very difficult cases and would transfer them elsewhere.[135] It was also suggested that some difficult contact cases might not be designated complex because of a tendency to use the designation where there were complex legal issues, for example, involving trusts and companies.[136] One submission claimed that in one case there were 50 Court appearances but the matter had not been designated complex.[137] The research at the Parramatta registry indicated that only four of the 48 difficult contact cases had been designated complex. Although many of the others were not in a current Court list the finding still suggests the need to review the use of the designation at each registry.

3.7 ***The Commission's view.*** The Commission considers that the current complex case designation should be retained for both complex and potentially complex contact cases. Introducing a special category or procedure is unlikely to make the identification process more effective. It would require further administrative changes in circumstances where there has already been considerable change in the Family Court's case management guidelines and procedures. The guidelines and any instructions on their use should state specifically that they are to be used to identify potentially complex cases and not only those that are complex at the time. The designation should be used properly and consistently at each registry. To ensure that, the Court should make efforts to ascertain how the designation is being used at present for contact cases at each registry.

Recommendation 3.1

Complex and potentially complex contact cases should be identified as early as possible.

The complex case designation in the Family Court's case management guidelines should be retained and applied to complex contact cases. The guidelines should be amended to make it clear that the designation includes potentially complex contact cases in addition to those that are already complex.

The Family Court should review the current use of the complex case designation in each of its registries and ensure that it is being used appropriately and consistently.

The role of counsellors in designating complex cases

3.8 ***Providing specifically for counsellors.*** A number of submissions and consultations suggested that the case management guidelines should specifically provide for counsellors to be able to recommend designating a complex case.[138] The current guidelines do not specify who may make suggestions for designation but in

practice individual counsellors tend not to make recommendations. The counselling service contributes to the process by having the Director of Court Counselling of each registry or some other counsellor as a member of the case management committee but there is no standard practice to encourage individual counsellors who have seen the parties to make suggestions about designations. The research carried out at the Parramatta registry for the Commission indicates counsellors' skills in identifying complex cases. Of the 28 cases in which counsellors recommended against further counselling 23 proved to be difficult ones.[139] Obviously counsellors cannot accurately predict the outcome and development of a case after one confidential counselling session. However, they clearly have skills and insights that would be assist in the early identification of complex cases.

3.9 ***The issue of confidentiality.*** A possible concern with a greater role for counsellors is whether suggesting a designation would constitute a breach of confidentiality. One submission commented that confidentiality would not be a problem as long as the trial judge and the counsellor preparing the family report do not see the information on which the counsellor's designation is based.[140] According to this submission the confidentiality rules are to ensure that no party is prejudiced by a disclosure in the course of counselling. Identifying a case as complex would not prejudice the parties but in fact might help them as it is designed to do so. The Commission recommends later in this chapter that the confidentiality provisions for counselling should be reviewed.[141] However, even if the present confidentiality provision is retained, the confidentiality of the counselling would not be compromised if all the counsellor has to do is tick a box on the counselling memorandum or attach a colour code to it. In that case the counsellor would not be disclosing any information obtained in the course of the counselling but would merely be giving an opinion on the general nature of the entire case.

Recommendation 3.2

The Family Court's counsellors, registrars, judicial registrars and judges should be able to identify complex and potentially complex contact cases. It should be made clear that counsellors are able to recommend that a case be considered for designation. The forms which counsellors complete after a confidential counselling session should allow them to indicate in a simple fashion, for example by a tick, whether they consider that a matter is complex or potentially complex.

A check list for complex contact cases?

3.10 ***The Issues Paper.*** The Issues Paper asked whether there should be a special list of risk factors for difficult contact cases to help determine the cases that should receive special attention.[142] It suggested that the check list could have a rating scale for each factor. A case could be identified as difficult or potentially difficult either because it attained a particular score or because the decision maker, taking into account his or her experience and knowledge, thought the case should be designated. Risk factors could also be given different weight and importance if they are considered to have greater or lesser reliability in identifying difficult cases. The Issues Paper contained a list of 43 possible factors, suggested by relevant Australian and overseas research, that could be included on the check list.[143]

3.11 ***Support for a list.*** A number of submissions supported a list of risk factors to assist the earliest identification of complex or potentially complex cases.[144] They considered it would have cost advantages and health benefits for the children.[145] The Public Policy Assessment Society Inc favoured a checklist because it would help Court personnel to focus on the relevant issues.[146] Some submissions agreed with the concept and proposed amendments to the suggested list of factors in the Issues Paper.

3.12 ***Opposition.*** Some submissions thought that the check list would not be reliable, could cause delays, was overly subjective and would unfairly stigmatise people. For example, the Parent Support Service submitted that many cases may exhibit most, if not all, of the factors, particularly in the early stages of separation, but will quickly settle down as the conflict reduces.[147] Terms such as 'personality disorder' are undesirable because they are artificial and problematic and encourage negative labelling.[148] The ANZACAS submission expressed concern that the parties could argue about what factors applied and that using a checklist risked prejudging the trial or bias.[149] The main disadvantages of the list were

- negative labelling
- subjective judgments
- possible breaches of confidentiality by counsellors
- judgments being made on factors without testing their truth or substance
- the designation being challenged in litigation.

The Law Society of New South Wales considered the list pointless because psychological factors vary from case to case. It argued that a checklist involves making judgments about a case over a wide range of issues without judicial assessment of the evidence.[150] The Violence Against Women and Children Working Group submitted that as the list contains factors that are highly subjective there would be a danger that difficult cases would slip through the net.[151]This submission also argued that Court personnel including judges and registrars required training on the complex nature of violence, which supports the view of the ALRC report *Equality before the law: justice for women*.[152] This submission also pointed to another potential difficulty that in assessing thresholds some cases involving violence would not be included because they did not satisfy other factors or because judgments would be made that the level of violence was not serious enough. All cases involving violence should have priority.

3.13 ***Research findings.*** In the research at the Parramatta registry the Commission's consultants used a preliminary logistic regression to predict group membership of the complex category based upon the factors analysed. In one analysis membership of the complex group was predicted with 91% accuracy using four variables together

- continuing conflict, as assessed and coded by the consultants according to the nature, extent and the frequency of allegations by the parties against each other, including allegations of violence, the quality of their parenting and the wishes of the child
- children under two years old at the time of separation
- children allegedly refusing contact
- a restraining application relating to violence or apprehended violence as part of the initiating application.[153]

This indicates that these four factors, particularly when they occur together, show a strong correlation with a case being or becoming complex. Other significant factors may be highly conflictual handovers, rigid adherence to contact arrangements, for example, both parties or one party insisting that there be no variation or flexibility, transfer from the Magistrates Court and a counsellor recommending no further counselling.

3.14 ***The Commission's view.*** The parties in a complex case are very likely to feel stigmatised by a process involving a checklist. In that case the process itself could well become a source of dispute and actually increase the level of conflict. There could also be a problem of self fulfilling negative expectations for the parties, their lawyers and the Court. Each may tend to respond to the case according to these expectations. A further major problem with a list is that it would inevitably involve value judgments about the psychological states of parties in cases where there has been no formal psychological testing or assessment. These judgments would often be made by people who have no formal qualifications to do so. Completion of a list could also be time consuming and resource intensive, particularly if there was to be any rating and weighting of scores. The Commission considers that there should be no formal check list to rate or assess cases. However, while there should be no formal check list officers of the Court should be aware of the factors identified by the research at Parramatta and take them into account when considering a designation of complexity. The Court could conduct its own research to test further the impact of these factors.

Recommendation 3.3

There should not be a formal checklist of factors to be taken into account in identifying complex contact cases. Identification should involve an assessment of the case as a whole by the responsible officer of the Court. Officers should be aware, however, of four key indicators arising from the research into complex contact cases:

- continuing conflict between the parties
- children under 2 years at the time of separation
- allegations that the children refuse or oppose contact
- restraining order application as part of the initiating application.

The next steps after designation

Introduction

3.15 Identifying a contact case as complex or potentially complex should lead to immediate steps to determine the best means of handling the case to promote successful resolution. This section discusses these next steps. It emphasises the importance of ensuring an individualised approach in management of these cases. While a few steps may be common to all cases most will be adopted to meet the particular needs of the particular case.

Assigning court personnel to the case

3.16 ***The need for continuity.*** Each complex contact case should be assigned as soon as possible after identification to a particular judge, judicial registrar, registrar and counsellor who would generally deal with the case at all stages. Individual management of the case requires this. The present Family Court case management guidelines provide for it and submissions and consultations strongly endorsed it. They see continuity in management as critical to successfully resolving the dispute. For example, Justice Hase submitted that repeat access cases should be dealt with by the same judge for as long a period as possible.[154] This continuity gives clients a sense of consistency and pattern that for many of them is very valuable in periods of crisis. It avoids the need for new judges and Court officers to spend valuable time and resources ascertaining the history of the matter.

3.17 ***Some exceptions.*** While there was general support for the principle of continuity exceptions were suggested. A few submissions and some of those consulted said that in certain cases a new judge could be useful in confirming to clients that an earlier decision of another judge was not the result of bias or prejudice.[155] There may also be circumstances where the best interests of the child require a new judge or counsellor taking a fresh look at a case.

3.18 ***Difficulties in achieving continuity.*** A few submissions suggested that although the case management guidelines already provide for continuity it was not always occurring because of resources constraints.[156] It was also suggested that there may be a tendency at the various registries at times to avoid continuity because of a feeling that no one judge or Court officer should be forced to deal consistently with the same very demanding matter.[157] While this attitude may be understandable in some cases, continuity is of such importance that the Court should ensure it unless the particular circumstances of an individual case require otherwise.

Recommendation 3.4

> Each complex contact case should be assigned to a judicial officer (that is, a judge, judicial registrar or registrar or a combination of these, where appropriate) and counsellor as soon as possible after identification. There should be consistency in the Court personnel handling each case unless the particular circumstances of the case require otherwise. The Court should review and monitor the implementation of the present guidelines for consistency. Training and instruction should be provided to Court staff.

Appointing separate legal representatives for children

3.19 ***The current position.*** The Family Court can order the appointment of a separate legal representative for a child in a family law dispute. A separate representative is appointed to represent the child according to the child's best interests and may do so by appearing in Court and by monitoring the Court's treatment of the case, for example, any supervised contact. The Full Court of the Family Court in *Re K* considered the circumstances in which a separate representative should be appointed.[158] The Court held that as a broad general rule appointments would be made where the Court 'considers that the child's interests require independent representation'. It identified 13 situations where that would be so.[159] Each of those situations can be recognised as a factor which could lead to identifying a complex contact case. This decision has resulted in a significant increase in the number of separate representatives being appointed.[160]

3.20 ***General support for the role.*** The vast majority of submissions and consultations that canvassed the issue expressed the view that separate representatives were very important in complex contact cases. Separate representatives allowed children to be heard and improved the quality of decision making by the Court.[161] They can co-ordinate the necessary investigations in a matter and their advocacy of the child's view can encourage professionals such as school teachers to provide information that they might not provide to a party's lawyers. They also bring independence and impartiality to the presentation of evidence to the Court.[162] The Committee on the Role of Psychiatry in the Family Court submitted that the separate representatives' role in pursuing the child's best interests is pivotal and they co-ordinate the assessment that goes to the Court and any subsequent action.[163]

3.21 ***Increased role considered desirable.*** A number of submissions and consultations supported the greater use and early appointment of separate representatives in complex contact cases. The Community and Health Services, Tasmania submitted that a separate representative should be appointed whenever the initial affidavits indicate a possibility of family violence. Even children as young as four could be interviewed. It argued that there should be a principle of separate representation for all children subject to age and maturity.[164] The need for early appointment was also stressed. There would be particular benefit in cases of allegations of sexual assault because the allegations could be immediately investigated before the issue contaminates the whole dispute.[165] The WA Advisory and Co-ordinating Committee on Child Abuse argued for a procedure for appointing separate representatives earlier in the proceedings.[166] The Chief Justice of the Family Court has proposed to issue a practice direction requiring that where a separate representative is to be appointed the appointment should be made, where possible, at the first directions hearing.[167] He is also considering, subject to resource implications, the assignment of a Court counsellor to the separate representative on appointment to provide the social science expertise which the system currently lacks.

3.22 ***Legislative definition of separate representative's role.*** A common view was that the FLA should give more guidance as to the role and duties of the separate representative and the circumstances of appointment, particularly in cases where the separate representative presents evidence and in circumstances where there are no specific instructions from the child. The separate representative may begin to interpret the child's best interests in a particular way. The Chief Justice has raised this issue of legislative recognition of the separate representative's role.[168] The FLC is to publish a report this year on involving and representing children in family law, dealing with some of these issues. There are two committees currently investigating aspects of the role of separate representatives. One comprising members of the Court, the legal aid commissions and the Family Law Section of the Attorney General's Department is primarily examining training issues. The other is a Family Court committee which is focusing on the role of separate representatives in relation to Court counsellors and registrars.

3.23 ***The Commission's view.*** Separate representatives can play a critical role in complex contact cases. They are integral in promoting decisions that are in the best interests of children. They should be appointed when a contact case is identified as complex unless the Court finds that an appointment would not be in the best interests of a child. Such a finding would be exceptional.

3.24 ***Funding.*** The early appointment of separate representatives in all complex contact cases could require additional legal aid funding to pay for any increase in appropriately trained and qualified separate representatives. However, in some ways this approach merely brings into the case management process and practice the principles established in *Re K*. It may not require resources additional to those already required as a result of *Re K*. Early appointment may also lead to medium to long term cost savings by assisting to settle some cases earlier and in other cases to reduce the issues, affidavits and litigation to a consideration of the primary focus, the best interests of the child.

Recommendation 3.5

A separate legal representative for children should be appointed as early as possible in every contact case identified as complex unless the court determines in a particular case that an appointment would not be in the best interests of the child. Such a finding would be exceptional.

Developing an individual plan for each case

3.25 ***The present approach.*** The Family Court's case management guidelines provide that each registry of the Court should establish a case management committee to manage cases designated as complex. There is one committee at each registry to look after all the complex cases. This approach has been useful in directing more attention to complex cases but it has limitations. The most serious limitation is that it splits decision making about a case from those actually involved in the case. The committee makes the decisions but its members do not necessarily include anyone involved on a day to day basis in the particular case. It assigns the case to a judge, registrar and counsellor but then officers of the Court often do not act as a case team to manage the case co-operatively. This can cause significant difficulties if there is no adequate exchange of information and no co-ordinated plan of action. These problems can be exacerbated where there are a number of federal, State and community agencies and individual professionals involved. This is likely in complex contact cases. The result can be duplication of services, delays and wastage of resources. The Commission has identified two main alternatives to the present approach: a case team for each contact case or one person designated to co-ordinate the management of each case with the focus on achieving outcomes in the child's best interests.

3.26 ***Option A: the case team approach.*** The Commission was told that there should be a new approach to the management of individual cases. Many submissions and consultations, particularly from counsellors and other social scientists, advocated the use of a multi-disciplinary team, for example, consisting of a judge, counsellor and registrar, from an early stage in each complex contact case.[169] The team could consist of those appointed to handle the case. The Committee on the Role of Psychiatry in the Family Court submitted that a multi-professional approach to difficult contact cases was essential.[170] The team's major role would be to organise a management plan for the individual case, monitor and evaluate any developments and liaise with the parties and other professionals as required. A team would evaluate the particular needs of a case and formulate a plan of action for discussion with the parties and their legal practitioners and where appropriate with the children concerned. It would have a similar role to case conferencing teams often used in health and welfare cases, for example in child protection cases.[171] The particular circumstances of each case could determine the exact course of action. Possibilities could include an urgent directions hearing, urgent counselling, attendance at a contact supervision service, an opportunity for family counselling or therapy, mediation or an urgent pre-hearing conference. Another submission considered that where necessary the team could liaise with separate legal representatives, contact supervision services and external health and community agencies and practitioners. One suggestion was that the multi-disciplinary team should make a full and proper assessment of a matter before it officially becomes a difficult case.[172]

3.27 ***How the case team might operate.*** The case management committee at each registry could assign designated cases to a team as soon as possible after designation unless the committee determines that it

would not be in the best interests of the child to do so. The teams could focus skills and experience to produce the most effective plan of action for a case. The composition of a team would need to be considered and should meet the needs of the particular case. Certainly the judge and Court officers appointed to handle the case should be considered as members of the team. The separate representative might also be included. Where they are not formally part of the team they would need an effective flow of information with the team.[173]

3.28 ***Some potential difficulties with case teams.*** The case team approach may involve some difficulties. Problems concerning breaches of confidentiality or ethical standards may arise if counsellors who have provided confidential counselling in the case are included in the case team. If judicial officers are directly involved in the conferences and become aware of information they would not otherwise receive in the usual process of litigation then one or both parties may allege bias or prejudice in any subsequent Court process. Arranging conferences may be time consuming and it may be very difficult to ensure that each relevant person attends. Parties and children may feel intimidated by and excluded from the case teams which may include many professionals. Finally the use of case teams may constitute an overuse of resources in some cases which require one single approach, for example, a Court adjudication.

3.29 ***Option B: The child's interests co-ordinator.*** The FLC in its discussion paper on involving and representing children in family law, which will be released this year, is likely to consider the introduction of a 'child's interest co-ordinator' in family law cases involving children. This person could be appointed in complex contact cases to oversee and co-ordinate the management of individual cases. The role could include developing and producing a family report, discussing matters with the parties and their legal representatives, working with the separate representative, and where appropriate, discussing the case with the child. The 'co-ordinator' would assume responsibility for a role which might currently be performed by a range of professionals including Court counsellors and State welfare officers. A form of accreditation for co-ordinators might be established and the service might be provided by the Family Court Counselling Service or outside professionals.

3.30 ***Some potential difficulties with 'co-ordinators'.*** There may be a number of potential difficulties with having co-ordinators in each complex case. There may be a shortage of people with the level of skill, experience and motivation to undertake a potentially demanding task which might cover a diverse range of legal, medical, health, social science and managerial issues. To train people for such roles might be time consuming and expensive. It may be that a structured case team approach would be more likely than the appointment of a co-ordinator to ensure that every relevant person and agency is able to contribute effectively to the management of a case. The case team approach allows people to pool their knowledge and resources. Finally if judicial officers are not directly included in the management process then there is the risk that the capacity for appropriate and timely intervention by the Court will be reduced. It could mean that co-ordinators may have to try to direct judicial officers about how to manage a case in circumstances where those officers or other judicial officers have had no direct input into the particular case.

3.31 ***Both options could take a needs based approach in complex contact cases.*** Both options could take a needs based approach which ensures that the plan for each individual case is the most appropriate and the most likely to succeed. Certain circumstances may require quite special treatment. For example, a high risk that one party has a mental disorder or illness could suggest therapeutic measures. Violence could require other action such as the suspension of any contact and ADR intervention and setting the matter down for urgent hearing. A primary task would be to discover what stage the parties have reached in the separation process, especially in terms of their emotional adjustment to the separation. This may require joint and separate interviews with them.[174] If there are allegations of sexual abuse, mental illness or substance abuse, the team or the co-ordinator could notify the lawyers for the parties for more information or the Court should investigate these allegations quickly.[175] One point often made was that the Court's response should be tailored to the particular needs of the individual case rather than to the set procedures of the case management guidelines.

3.32 ***The Commission's views.*** The Commission is convinced of the need for a continuing individual approach to complex contact cases after designation. The major issue is which alternative would be more effective and cost efficient. The alternatives are not mutually exclusive. For example, a 'co-ordinator' may decide that a case team approach would be desirable while a case team could determine that it should be led

by a 'co-ordinator'. Both options may have strengths and weaknesses and each constitutes a new approach. In those circumstances the Commission's view is that the Court should consider trialing, evaluating and comparing each option at different registries.

3.33 ***Resource implications.*** Both options would clearly have resource implications for the Court. In general both would require more resources at an earlier point in the management of cases. However, this could be cost effective in the medium to long term. It would help prevent cases proceeding further into litigation where the costs become much higher, with the most expensive being full hearings and appeals.[176] Although additional resources would be required in the short term, in the longer term these options could involve a re-allocation of existing resources rather than more.

Recommendation 3.6

The Family Court should consider and, if appropriate, trial at different registries a case team approach and a 'child interests co-ordinator' approach. Their effectiveness and costs should be compared. In either approach the separate legal representative of the children should take an active role in the case management of particular matters where the Court and the representative consider it appropriate.

Assessing the family

3.34 ***The present approach.*** Under the current case management guidelines a family report is the usual way of assessing a family and its dynamics. A family report is ordered when

- there is a dispute as to the wishes of the child and the child is of sufficient maturity for these to be significant
- there is a dispute about the relationship between a child and either or both of the parties
- a report is the best method of obtaining evidence significant to the welfare of the child
- a child is at risk, that is, where there are allegations of neglect or abuse, either physical (including sexual) or emotional, of the child.

The guidelines provide that reports should not be ordered at the first directions hearing except in exceptional circumstances or in child abuse cases. They are normally ordered at the pre-hearing conference. The guidelines state that they should be ordered no earlier than 12 weeks and no later than eight weeks before a hearing. The guidelines also provide that a duty report, that is, a report for an interim hearing, should only be ordered in exceptional circumstances.

3.35 ***Submissions and consultations.*** The Commission was told in submissions and consultations that family reports are very useful in difficult cases. They give the case form and direction and information often not included in affidavits.[177] Particular issues were highlighted. A number of submissions said that the Family Court Counselling Service faced resources difficulties in preparing family reports with the comprehensiveness, quality and timeliness that are desirable.[178] As a result the availability of reports varied from registry to registry. For example, at Parramatta it is claimed that reports are often not available until the last minute.[179] One submission suggested that counsellors should have sufficient resources to be able to interview the parties at least twice rather than the current practice of only once.[180] One counsellor should have the management of a case instead of many counsellors having some involvement at different times. This continuity would save resources because each new counsellor has to start afresh. One submission suggested that reports should give parents more guidance about parenting.[181]

3.36 ***Timeliness crucial.*** One significant concern raised in many submissions and consultations was timeliness of reports. The National Legal Aid submission urged greater flexibility by allowing earlier, possibly shorter, reports where it could help to resolve the particular case.[182] A number of other submissions also said that reports should be prepared early in the litigation process and that in some cases the old

approach of preparing short form reports would be useful to help some matters settle.[183] Many of those consulted supported much greater flexibility in the content of reports and when they are ordered. They are often a settlement tool. In a number of cases the parents might want to ascertain the children's wishes. If the children's views were expressed in an independent report in a sensitive way then matters could well be settled.[184] However care has to be taken to ensure that early reports do not put undue pressure on children and that they are not used as weapons by the parents.[185] An early report may also mean that further reports will be necessary if the case does not settle.

3.37 ***Special training necessary.*** Another particular issue concerned training for those preparing reports. Reports should be prepared by persons with appropriate expertise to identify problems and suggest appropriate interventions.[186] The Committee on the Role of Psychiatry in the Family Court submitted that where there are allegations of child abuse the person making the report must have expertise in child development and the characteristics of child abuse and abusive families.[187] Training is discussed in chapter 6.

3.38 ***The Commission's view.*** The Commission recognises the need for flexibility and greater discretion in the timing, content and number of family reports. If there were to be case teams then the case management guidelines should enable the team managing a complex contact case to recommend to the Director of Court Counselling the type of family assessment most suitable for that case, who should provide it and when it should be provided. If there were to be a child's interest co-ordinator, then that person might prepare the family report or direct its production. In either case a family report might be provided at an earlier stage than is now the usual practice. It could also mean that a report could be shorter and specifically prepared for an interim hearing, particularly with a view to assisting the parties to understand the wishes of their children. The case team or the 'co-ordinator' should make these decisions with the paramount concern being the best interests of the children. The children should be involved in the family assessment and their position and views included in the report unless their involvement is clearly not in their best interests. The assessment should inquire whether there are allegations of violence in the relationship or abuse of the children. The team or 'co-ordinator' should also consider the views of the separate representative and if appropriate the views of the parties and their legal practitioners on decisions as to the most appropriate and effective form of assessment. In many cases an early report may be very beneficial to the children because it can help to settle potentially hostile and expensive litigation. Nevertheless, decisions as to when a written report is made and its content require careful judgment of the best interests of the children in the particular case.

Recommendation 3.7

The Family Court's case management guidelines should be amended to allow greater discretion in the timing, content and number of family reports. If there were to be a case team appointed then the guidelines should specify that the case team managing a complex contact case will, if appropriate, recommend to the Director of Court Counselling the type of family assessment most suitable for the case, who should provide it and when, to meet the best interests of the children in the case. If a 'child's interests co-ordinator' were to be appointed then that person should prepare a report or direct its production as she or he considers it appropriate in the child's best interests. The children should be involved in the family assessment and their position and views included in any report unless their involvement is clearly not in their best interests. The assessment should inquire whether there are allegations of violence in the relationship or abuse of the children. The team or the co-ordinator should also consider the views of the separate representative and if appropriate the views of the parties and their legal practitioners on decisions as to the most appropriate and effective form of assessment.

3.39 ***Confidential counselling.*** Early family assessment raises issues about the confidentiality attaching to counselling at that stage of proceedings. A few counsellors consulted wanted a review of the confidentiality principle. They considered that it hindered an early and accurate assessment of the family situation.[188] Many initial counselling sessions offered under the FLA are confidential. Evidence of anything said or any admissions made in those sessions cannot be used in any Court.[189] Counsellors who see the parties and the children in confidential sessions are unable to pass on any of that information. The counsellors gain an early, intimate knowledge of the situation but, when the matter advances through the Court system, they have to hand the case on to a counsellor unfamiliar with it. The new counsellor has to take the process from the

beginning. This slows down assessment and appropriate interventions, requires further resources and often frustrates or traumatises parents and children who have to repeat their histories and circumstances a number of times. In any event, many parties might be suspicious about whether the early counsellors keep matters completely confidential from the later counsellors. In this way confidentiality may fail to foster frank and honest views from clients. The JSC report supported the retention of confidentiality because it believed that it encouraged the open disclosure of all relevant issues and that its removal might decrease the willingness of many parties to attend counselling and thereby increase the number of matters which proceed to trial.[190]

3.40 ***Further consideration necessary.*** The Commission considers that this issue requires further and more specific debate. Confidential counselling may not be essential to family law. There are some counties in some States of the United States, for example, where there is no confidential counselling. It may be that the FLA should provide a presumption that counselling is not confidential unless all parties agree to a session being confidential. The Commission is unable to express a concluded view on this issue.

Recommendation 3.8

The Family Court or other appropriate agency should review the provisions in the FLA requiring confidential counselling to determine whether they remain necessary or desirable.

Alternative ways to resolve disputes

General approach

3.41 ***Range of options necessary.*** Many of the consultations and submissions stressed that the Family Court must have available and consider a range of options to resolve disputes. The individualised approach to complex contact cases requires that. The Chair of the Family Services Council submitted that the Court should offer services to assist families as needed, including referrals to contact supervision services, counselling, mediation, group work, parenting skills and education sessions, play therapy, family therapy and advocacy.[191] Alternative dispute resolution (ADR) options are discussed in this chapter and other options in later chapters.[192] Some options, for example, counselling and mediation, are currently available to a varying extent depending on the registry and the level of resources available. Each possible option, particularly any new one, has to be developed, trialled and evaluated for Australian conditions.[193] The Family Court, including the Counselling Service, should determine what options have merit after proper evaluation and comparison of possible responses. Longitudinal studies may be necessary to test the lasting effectiveness of interventions.[194]

3.42 ***Choosing appropriate responses.*** The Court (especially through a case team or a 'child's interests co-ordinator'), legal practitioners and other professionals providing services and the parties themselves must decide the particular approaches that are suitable for individual cases. The case team or the 'child interests co-ordinator' could play a major role in identifying what options are appropriate for a particular case.Each would have an intimate knowledge of the case and the necessary skills and experience to recommend to the parties or to the Court the most effective approach or to decide that additional expert opinion is necessary. A decision to use a particular option in a particular case should take into account the paramount concern of the best interests of the child, the likelihood of an option being successful in the case and the expenditure of resources involved. There will always be a significant number of cases where non litigious alternatives will be inappropriate, ineffective or too expensive. They may include cases where there is a history of violence or where there have already been repeat applications or where at least one of the parties is unable or unwilling to communicate, negotiate or participate in alternative dispute options. In those cases litigation will be the best approach. Decisions then have to be made about whether to 'fast track' the particular matter to hearing and whether to dispense with any steps in the normal litigation route because they are unlikely to assist in resolving the case and are therefore a waste of resources. 'Fast tracking' will not be appropriate for every case that cannot be resolved without a full judicial trial.

3.43 ***Violence and ADR.*** ADR will be inappropriate in many cases involving violence. The importance of identifying cases involving violence, abuse and unequal bargaining power was discussed in chapter 2. Guidelines are necessary to safeguard against the inappropriate handling of cases involving violence. Reports

dealing with alternative dispute resolution have recognised this and the government has accepted it.[195] The AJAC report stated that ADR programs should have appropriate training for mediators and screening processes to identify those parties whose disputes are unsuitable for mediation.[196] The ALRC report *Equality before the law* also addressed this issue.[197] The Commission endorses the comments and recommendations on ADR and violence in these reports. It does not repeat them in the discussion of ADR here.

3.44 ***Family Court guidelines on violence.*** The Chief Justice of the Family Court, Justice Nicholson, has recently issued a direction on Court management of cases involving family violence. These guidelines stress the early identification of family violence and provide a statement of principles, including that family violence should never be condoned and its effect upon participation in conciliation or mediation procedures is not to be ignored. There are also guidelines for the Court counselling service which among other matters require that the safety and protection of clients should have a high priority and that counsellors must be aware of power imbalances. The service must ensure that the Court is made aware of any pattern of abuse and the consequences it has for children. The Regional Directors of Counselling are to ensure adequate and regular training in their region consistent with the needs of staff. An issue that arises is the extent to which counsellors should be able to rely on their individual and professional discretion in identifying and dealing with violence and power imbalances. Some submissions suggest that further training and education of counsellors on these issues is necessary. The Court should monitor compliance with these guidelines and, if necessary, should be given additional resources to achieve this. It is also important to ensure that those agencies and individuals providing ADR external to the Court also have appropriate guidelines to which they adhere.

Recommendation 3.9

There should be a range of options available to respond to complex contact cases, including alternative dispute resolution (ADR) methods such as arbitration, counselling, therapy and mediation. The Family Court, particularly through case teams or 'child's interest co-ordinators', should determine what options have merit and what response is appropriate in a particular case.

The Family Court, particularly through a case team or 'child's interest co-ordinator, legal practitioners and other professionals providing services and the parties themselves should decide what particular approaches are suitable for a particular case. A decision to use a particular option in a particular case should take into account the paramount concern of the best interests of the child, the likelihood of an option being successful in the particular case and the expenditure of resources involved.

In complex contact cases where the most appropriate response will be an adjudication by the court the court should decide whether or not a particular case should be 'fast tracked' to hearing. Any program of ADR should include appropriate guidelines for identifying and assessing cases where ADR is unsuitable because of violence, unequal bargaining power or a lack of a capacity for rational decision making. Those providing assessments require appropriate training and qualifications. Compliance by Family Court personnel with the Family Court guidelines on violence should be monitored effectively. Organisations and individuals providing ADR services independently of the Court should also be subject to review in relation to their methods of identifying and dealing with violence and power imbalances.

Counselling

3.45 ***The value of counselling.*** The primary role of the Family Court Counselling Service in contact cases is to assist the parties to make fair and sustainable arrangements for contact that are in the best interests of the child. The Service does this by helping family members to resolve conflict concerning their relationships and interpersonal difficulties. It has a high rate of success in dealing with contact applications. It plays an integral role in resolving disputes without recourse to litigation. Less than 5% of cases require a judicial determination[198] and 73% of cases for custody or contact which are referred to the Counselling Service prior to their first day in Court are settled.[199] A comment made several times in consultations indicated a need for early counselling in potentially complex cases. The Court Counselling Service would require more resources

'up front' for this. One submission argued that there was a lack of counselling resources to deal with current cases especially emergencies.[200] The NSW Bar Association and the Law Council of Australia submitted that the Service could only be useful up to a point in complex cases because these cases might involve allegations that require expert evidence or a determination of fact. In other cases there were difficulties because one of the parties had a psychiatric disorder or was unreasonable. In these types of cases the Service's main role was to identify and manage the cases appropriately.[201]

3.46 ***The Commission's view.*** The Family Court's Counselling Service plays an integral role in complex and potentially complex contact cases. Counselling may assist in resolving some of these cases, particularly if it is available and used at the optimum time. However, counselling will not resolve every complex case, particularly where the dispute is already entrenched. There will be a significant number of cases that may require more specialised alternative dispute options or a judicial determination. The main service that counselling may provide in those cases is assessment of what other options may be effective. In that sense it acts as a filter to stream the complex cases to their most appropriate paths. In this way the Service plays a central part in the individual management of cases recommended in this report.

Therapy

3.47 ***What therapy involves.*** Therapy can take many forms and may be oriented towards the individual or family. Individual focused therapy tends to concentrate on the individual's development with a general aim of helping the individual gain insight and make personality change. Family therapy involves change for couples in their relationships. Therapy may involve intense and frequent sessions especially in the beginning of the treatment and may continue for several years.

3.48 ***Some submissions support a therapeutic approach.*** A view expressed in submissions and at consultations was that some parents, particularly those bringing repeat applications that objectively have little or no merit, would benefit from some form of therapy which is appropriate for treating those who have a mental illness.[202] Many of these parents were said to display personality disorders, obsessive behaviour or a desire to maintain contact with, or control over, their former partners. However, most of those consulted considered therapy effective only if the person voluntarily accepted it. They also generally agreed that the Family Court Counselling Service did not have the resources and many of its counsellors the necessary qualifications and training to provide therapeutic programs for such people. They said that the cost of external therapists was beyond many Family Court clients because of inadequate Medicare coverage for these services. Many psychiatrists charge more than the Medicare scheduled fee. Psychologists' fees are not refundable under Medicare, which significantly limits their provision of counselling and therapy in family law disputes.

3.49 ***The Commission's view.*** The Commission does not recommend that the Court Counselling Service should provide medium to long term therapy to clients, especially in cases where a party has, or may have, a mental illness. Generally speaking the Service focuses on assisting the parties to resolve their conflict and make arrangements in the best interests of the child, preferably without the necessity of litigation. As a broad guide the Service should not be providing counselling for more than about 18 months, which should be approximately the maximum time from the initiating application to a final judicial decision. While there will be occasions where it is necessary for the Service to provide intermittent assistance to parties over a longer period than that, any further intervention should be an exception to the norm and not part of any formal program. The Counselling Service is part of the Court in its location, structure and function. It is not a separate body. Its services are provided in a judicial setting. The Commission considers it inappropriate for a Court to provide specific therapeutic services whose prime focus is effecting psychological change in individuals. Further, the Counselling Service would require a significant increase in funding and new training to provide any further services. The better strategy is for the Court Counselling Service to establish effective networks with external community agencies and government departments that can provide therapeutic services. It should offer and provide liaison with and referral to these therapeutic services. The choice and form of assistance can be tailored to meet the individual needs of clients.

3.50 ***Post hearing and grief counselling.*** Some parents may need counselling after a hearing and grief counselling, particularly where there are repeat applications. In heavily entrenched disputes children and parents may have great difficulty in adjusting to decisions and the litigation process. The Government has

indicated that it considers it inappropriate for the Family Court to provide continuing grief or settlement counselling.[203] It suggested that these services should be, and are, provided through community agencies, such as the marriage counselling organisations or public health facilities. The Family Court should act as a referral agency to direct these people to these services. The Commission agrees with the Government's view but emphasises that the Court should play an integral role in contacting and referring people to appropriate services.

Recommendation 3.10

The Family Court's Counselling Service should not provide medium or long term therapeutic services, that is, as a guide, services extending beyond 18 months. It should identify external therapeutic services to which those needing medium and long term therapy can be referred and offer and provide liaison with and referral to these services.

The Government should review the level of Medicare rebate for psychiatrists and the provision of Medicare rebate for psychologists.

The Family Court should have a program for contacting children and parents involved in complex contact cases after orders or protracted litigation and offering them referral to appropriate agencies and individuals for grief and post hearing counselling and therapy.

Mediation

3.51 ***Introduction.*** Mediation services are provided by the Family Court, private mediators and community service agencies. The Family Court's conciliation services can be regarded as being under the umbrella of mediation particularly from an international perspective.[204] For that reason the discussion of mediation here includes conciliation. The Family Court also has a mediation pilot project operating at its Melbourne and Sydney registries. The Court expects to open a similar service at the Brisbane registry in 1995-96.[205] The Commonwealth Attorney-General's Department, through Legal Aid and Family Services, funds 13 family mediation services in different parts of Australia.[206] An evaluation of this program and of the Family Court service is due in June this year. It will consist of a comparative analysis including profiles of client populations, cost effectiveness and outcomes. This evaluation should build on an earlier report on the Family Court Mediation Service.

3.52 ***Evaluation of the Family Court Mediation Service.*** The report on the Family Court Mediation Service examined 149 cases mediated between April 1992 and March 1993.[207] It found that there was overall agreement in 82% of cases, with all matters in dispute settling in 71% of cases and at least one substantial matter settling in another 11% of cases. Seventy nine per cent of clients were assessed as experiencing 'moderate to high' relationship conflict, with 92% showing moderate to low levels of communication with their partner. Having co-mediation by a man and woman together was seen as highly desirable. Some 88% of clients reported that having male and female mediators with both legal and social science training made a great deal of difference to the way things were handled. Multiple issue disputes resulted in a higher rate of agreement than single issue cases (88% and 73% respectively). In particular, combined property and child matters demonstrated a higher resolution rate than cases dealing with either of these matters alone. The AJAC report recommended further evaluation of the mediation service to examine whether there were any systemic problems. It suggested that an evaluation should include an attempt to understand why combined property and child matters tended to have a higher rate of resolution than matters raising only one of those issues.[208]

3.53 ***Violence and abuse.*** Associate Professor Hilary Astor submitted that mediation is inappropriate in cases of violence or abuse. It relies on a capacity for honesty, consensuality and a willingness to resolve disputes but those involved in very difficult contact cases may simply lack those qualities.[209] She cautions against too much enthusiasm for ADR in these cases and argues that the first priority must be securing the safety of the children and the caregiver. The Court must have the courage to say that at least some of these difficult cases are not susceptible to alternative methods and need to go quickly before a judge. The

Commission notes the Government's view that mediation is unsuitable where there is family violence or where there are serious power imbalances.[210]

3.54 ***A more supportive view.*** Some submissions thought mediation very useful in fostering communication between the parties. Relationships Australia, South Australia submitted that in its experience mediation may be more useful in difficult cases than might be expected provided it is voluntary and conducted by well trained and experienced mediators.[211] However, it agreed that mediation is inappropriate in cases where one party is intimidated by the other or where there is gross power imbalance or allegations of child abuse.

3.55 ***The Commission's view.*** Mediation may be of value in complex contact cases where there is some capacity for constructive negotiation, particularly where it involves co-mediation with a lawyer and a social scientist. However, appropriate safeguards against the influences of violence, abuse and unequal bargaining power are necessary. The Commission endorses recommendation 9.10 of the ALRC report *Equality before the law: justice for women*.[212] Part IIIA of the FLA should be amended to provide that there should be no mediation where violence has occurred or is occurring unless the parties concerned have made an informed, voluntary choice to be part of this process and enquiries have been made to establish whether any history of violence in the relationship may affect the ability of the parties to negotiate successfully.

Recommendation 3.11

Mediation should be offered in appropriate complex contact cases as early as possible before the parties have become entrenched in litigation. It should be provided by appropriately trained and qualified mediators. There should be proper screening procedures to ensure that mediation is not attempted inappropriately, for example, in cases involving violence, abuse and severe power imbalances. The Family Court should further evaluate the potential scope for mediation in complex contact cases.

3.56 ***Joint conciliation.*** Some submissions and consultations considered that conciliation conferences arranged by the Family Court could be more effective for some complex cases particularly if there was joint conciliation provided by a counsellor and registrar.[213] This model is drawn from the experience of co-mediation with mediators with both legal and social science backgrounds. It is especially successful in dealing with enmeshed issues, such as custody, contact, property and child support.[214] However, conciliation may require a level of negotiation and communication that many clients in difficult cases may not have.[215]

Recommendation 3.12

Joint conciliation with a counsellor and registrar should be one of the options available to case teams when considering the management of complex contact cases. The Family Court should evaluate its effectiveness for different types of complex contact cases.

Impasse model of mediation

3.57 ***The impasse.*** The impasse model of mediation has been developed by Johnston and Campbell.[216] It sees difficult and complex post-separation disputes between couples primarily as the result of a 'divorce impasse'. This means the parties are unable to move forward into a settled divorce but equally unable to move back into a workable marriage. The impasse is due to a combination of factors such as personality disorder ('the intrapsychic level'), ambivalence about separation ('the interactional level') and extended family involvement ('the external social level').

3.58 ***The response.*** Johnston and Campbell have developed a mediation model to deal with the divorce impasse. Impasse mediation is different from therapy because it uses short term intervention of about ten weeks, always involving the whole family. However, it makes use of individual and family therapy to determine what motivates the family to fight an entrenched dispute. The process has three phases: a pre-negotiation counselling phase, a negotiation or conflict resolution phase and an implementation phase. A

counsellor-mediator combines therapeutic and counselling approaches with a primary goal of getting the parents to focus on the needs of their children.[217] Five couples attend seven group sessions with two group leaders. Couples meet in separate but concurrent groups for the first four sessions and then together for the last three sessions.

3.59 ***Outcomes.*** Johnston and Campbell evaluated their program two to three years after the intervention. After two years 82.5% of the families in their study had reached an agreement to resolve their dispute. Two thirds of them were managing on their own and 36% had returned to Court. The researchers concluded that one quarter of the sample was not assisted by their model.[218]

3.60 ***Use of this model in Australia.*** In her submission the Principal Director of the Court Counselling Service referred to an internal report of October 1994 on a pilot project at the Brisbane registry involving a group approach broadly using the Johnston and Campbell model.[219] The project included 13 adults and six children. Of these 13 adults, four were couples and five attended alone. The report records that one couple produced a written agreement to resolve their conflict. Of the remaining 11 people, three who attended alone fully resolved their issues and either withdrew from or decided not to initiate legal action, four others achieved partial resolution and two couples continued litigation.

3.61 ***Support for the model.*** The Principal Director of the Court Counselling Service submitted that the impasse model is the best approach to difficult contact cases.[220] Many counsellors and mediators also supported further use of the model.[221] Johnston and Campbell also said their program seemed to work just as effectively with groups of families as with individual families, which would make it more cost effective. Supporters of the model claim that it deals in a concrete way with the underlying cause of the continuing dispute rather than using measures that deal only with the symptoms, such as litigation might. It apparently has some cost advantages certainly when compared to cases proceeding to hearing. The model can be used for groups and it would probably involve seven sessions over a period of about ten weeks. It would require more resources than the counselling service currently has for its specialised programs.

3.62 ***Some reservations about the model.*** A few submissions commented that issues of violence and safety have no priority in the Johnston and Campbell model when in fact they should be major considerations.[222] Another submission doubted whether the model would be effective in many difficult cases where the problem is an individual with a personality dysfunction for which individual therapy would be more appropriate. In many cases getting the whole family involved as suggested by the impasse model is not feasible or appropriate.[223] A few submissions were concerned with the recorded lack of improvement in child adjustment. According to one submission this suggested that the mediation may have concentrated too much on the parties and not enough on the children.[224] Other reservations were that the approach was based too much on psychoanalytical theory, which itself is the subject of controversy, and not enough on family dynamics. In the United States participation in the program is quite expensive and requires parents to make considerable contributions.[225] Many consulted said that although there was value in pursuing the use of the model it had to be adapted and considered in the Australian context.

3.63 ***Possible use of 'Special Masters'.*** The Principal Director of the Family Court Counselling Service proposed an addition to the model. In some United States jurisdictions a 'Special Master' is appointed after the initial hearing.[226] This person is to decide issues so as to contain the conflict and keep the matter out of Court. Special Masters are often psychologists, social workers or lawyers. The Principal Director of Counselling sees some merit in the appointment of a person to whom the therapeutic team can send the parties for a decision about a minor, but nonetheless destabilising, issue. 'Special Masters' could be appointed in connection with an impasse program.

3.64 ***The Commission's views.*** Many social scientists consider the impasse model the most effective approach to difficult contact cases especially where there is a high level of conflict and the ordinary methods of counselling and mediation have been unsuccessful. The major question is whether it actually reduces litigation in cases where without it litigation would be likely or would continue. A further issue is whether it would work more effectively if an arbitrator or Court registrar was able to provide legal advice and decision making where necessary. Clearly as with all possible interventions and options there is likely to be a group for which it would be inappropriate or ineffective. This could be, for example, where there has been

domestic violence or child abuse or where at least one of the parents has a significant personality disorder or a problem with substance abuse.

Recommendation 3.13

The Family Court should evaluate the effectiveness of pilot projects using the impasse model, particularly for the children involved, and its costs. The projects should have guidelines about identifying and addressing domestic violence and abuse and about making proper assessments of the suitability of particular cases for these programs. The Court should consider whether the service of an arbitrator, Court registrar, Master or 'child's interest co-ordinator' would be useful as part of the program.

Arbitration

3.65 Arbitration involves an independent person appointed by the parties or with the consent of the parties making a decision that is intended to be binding on the parties. On a continuum of ADR processes, arbitration tends to be nearest to judicial adjudication. The submissions and consultations suggested that there is little arbitration of complex contact cases.[227] A number of reasons for this were suggested. Arbitration may require a level of co-operation and negotiation beyond one or both of the parties in complex cases. Arbitration could be relatively expensive. However, some submissions and consultations mentioned the use of the 'Special Master' in the Johnston and Campbell impasse model. This was discussed immediately above.[228]

Other case management issues

Testing consent orders and agreements

3.66 ***Complex cases and consent orders.*** The Issues Paper asked whether complex contact cases involve a high frequency of consent orders.[229] Submissions and consultations said that they do. The research conducted for the Commission at Parramatta registry indicated that complex contact cases tend to have a significantly higher number of consent orders than other contact cases.[230] Of the 48 complex cases examined 14 had three or more consent orders concerning contact whereas there was no case in the control group with that many. There could be many reasons why consent orders in these cases are breached or do not finally resolve a dispute.

- Parties could consent to orders to minimise costs or to avoid the trauma of Court proceedings.[231]
- Changes to the parties' circumstances and the child's needs and wishes could require amendment to consent orders particularly if the parties were in conflict.[232]
- Many agreements are entered for short term considerations, for example, to allow the custodial parent to take the children interstate or overseas.[233]
- Some may feel pressured to consent to orders by their former partners, lawyers, the Court, the counsellors or legal aid (especially through fear of losing a grant of aid).[234]
- There can be new allegations of violence or abuse.[235]
- Some parties may not understand the terms of the order because of language or cultural differences.[236]
- Parties may agree to orders but have little commitment to them. The orders cannot change the underlying reasons for conflict such as unresolved separation issues.[237]

3.67 ***Testing consent orders.*** The Family Court may test requests for consent orders when there is some discernible reason to do so. For example, judges might question a consent order where there have been allegations of sexual abuse but in the consent order the custodial parent agrees to unsupervised overnight

contact.[238] One judge said that he would not make consent orders unless he had adequate written material to consider.[239] Registrars commented that where they have concerns about consent orders they might allow them a trial period with a set time to review them.[240] If a consent order is sought in a case where there have been allegations of sexual abuse affidavit evidence is necessary. The Issues Paper asked whether the Court should undertake more routine testing of consent orders and agreements in complex contact cases, given the greater likelihood in those cases of the parties coming back to the Court.[241]

3.68 ***Some support for more routine testing.*** A number of submissions considered that lack of real consent was a significant problem They argued that if a case is designated complex the Court should oversee the consent orders.[242] The Violence against Women and Children Working Group of the Federation of Community Legal Centres (Vic) argued that violence in some form was involved in difficult cases and therefore testing consent orders was necessary to subject each private agreement to scrutiny in a public forum.[243] Extra resources should be allocated to ensure that this happened.

3.69 ***Strong opposition to more testing.*** There was very strong opposition to more routine testing of consent orders, particularly from the judges and registrars of the Family Court who were consulted and from some members of the legal profession. It was often said that testing orders routinely would be completely inconsistent with the Court's general philosophy of encouraging parties to come to their own agreements and to avoid litigation. To do otherwise was said to be paternalistic.[244] Consent orders were often the result of long and difficult negotiation. The Court had to allow these orders the opportunity to work. Routine testing would also require significant additional time and resources in a situation where the Court's resources are already stretched to their full capacity. Judges and registrars have long lists of matters that require attention. Routine investigation of consent orders would exacerbate delays in other cases. Routine testing might also undo consent orders that could last and might actually prolong some disputes.[245] It would require a mini trial or even a full scale inquisition. The parties would be unlikely to inform the Court about any significant problems even if they existed.[246] The legal aid commissions argued that the Court should usually approve whatever the parties agree upon, unless there appears to be a great likelihood of non-compliance. That might be suggested, for example, by a history of breached orders and agreements.[247]

3.70 ***The Commission's view on routine testing.*** The Commission does not recommend routine testing of every consent order or agreement in every complex contact case. It accepts that the Court would require considerable time and resources to test each case in a meaningful way. Scrutiny could also unravel some agreements that would otherwise be lasting. Moreover, an increase degree of judicial scrutiny would be contrary to the fundamental policy of the *Family Law Reform Bill (No 1) 1994* which is to encourage parents wherever it is in the best interests of the child to come to their own arrangements about care and contact, for instance through parenting plans. However, there is clearly a significant risk in these complex cases of consent orders that have a high risk of being breached. It may be better for the children involved and ultimately for Court resources to address those likely areas of future dispute at that time.

3.71 ***A solution.*** The Commission considers that a sensible approach is a Court practice note that directs Court personnel, counsellors, mediators and legal practitioners to consider whether a consent order or agreement in a case designated complex requires closer scrutiny. In some cases, professionals, particularly legal practitioners, may not be in a position to advise the Court of potential difficulties because of confidentiality requirements to their clients. Nevertheless, there may be cases where they can assist their clients and/or the Court to examine consent orders more closely without breaching confidentiality. The practice note would act as a formal reminder to consider this issue without involving any necessary outlay of resources. It would be a matter for the skill and experience of the professionals involved to determine whether a particular consent order required greater scrutiny. Certainly a history of repeated breaches would be one relevant factor. The Court itself need not carry out the scrutiny. For example, the Court could require the parties to attend a counselling or mediation session, perhaps with a registrar present, to 'reality test' the order. The parties often need assistance to understand the nature of the orders and agreements and the obligations they impose. However, the most effective strategy to deal with potentially problematic consent orders before they reach the Court is to improve the quality and effectiveness of the original contact orders and agreements.

Recommendation 3.14

The Court should not be required to scrutinise consent orders and agreements routinely in complex contact cases. It should issue a practice note directing the Court, counsellors, mediators and legal practitioners to consider whether a consent order or agreement in a case designated complex requires closer scrutiny. As part of this scrutiny the Court and the professionals should consider whether the parties would benefit from counselling or mediation, the use of an interpreter or some other appropriate intervention. The parties should be assisted to understand the nature of the orders and agreements and the obligations they impose.

The nature of orders and agreements

3.72 A number of submissions and consultations highlighted the need for contact orders and agreements to be carefully thought out and drafted. In complex or potentially complex contact cases the orders and agreements have to be as clear as possible and provide specifically for the practical working of the arrangement. A Canadian study indicates that open and vague arrangements about contact sometimes precipitate conflict.[248] It suggests that many people would benefit from a clearer set of norms about what is expected of them and what a reasonable level of contact is in their particular circumstances. It urges judges to encourage parties to meet with a counsellor or mediator after the hearing to establish these more specific guidelines. Consent orders and agreements might have to cover arrangements for the children at Christmas and Easter and on Mother's Day and Father's Day.[249] One lawyer submitted that the parties themselves would value this certainty.[250] They may need to include some inbuilt system of review and effective dispute resolution clauses that focus on ADR methods. The agreements should also take into account the child's development. Arrangements appropriate for young children may be very different from those for older children. For example, toddlers may need greater continuity with the primary caregiver.[251] The Family Court, legal professional associations and other groups could co-operate in developing appropriate guidelines and precedents.

Recommendation 3.15

Legal practitioners, counsellors, mediators and arbitrators, particularly in complex or potentially complex contact cases, should attempt to ensure that agreements and contact orders are clear and specific, especially about the practical working arrangements for contact. Agreements should contain effective and fair dispute resolution clauses and take proper account of the age and likely development of the children concerned. The Court should also take these considerations into account in any review of agreements. The Court, legal professional associations and other groups should co-operate in the development of appropriate guidelines and precedents.

The relationship between contact and child support

3.73 ***Submissions and consultations.*** The Issues Paper invited comment on the relationship between contact and child support or maintenance.[252] A few submissions argued for a formal link between these two issues, particularly so that a custodial parent who breached a contact order or frustrated contact would suffer a corresponding reduction in any child support paid.[253] Other submissions strongly opposed any formal link because the primary concern in both contact and child support is the best interests of the child and that should not be compromised.[254] The Minister for Social Security the Hon Peter Baldwin MP submitted that this issue had been canvassed in the Cabinet Sub-committee discussion paper on child support in 1986 and that the weight of opinion was against any link.[255] His submission pointed to a clear international consensus to this effect because a link would run counter to the child's interests and general welfare. The Commission notes, for example, that in England there is no link between contact under the *Children Act 1989* (UK) and child support under the *Child Support Act 1991* (UK), nor has any been prosed in the recent government White Paper *Improving Child Support*.[256]

3.74 ***The Joint Select Committee's review.*** The Joint Select Committee report on the operation and the effectiveness of the Child Support Scheme considered the link between access and maintenance.[257] Some submissions to the Joint Select Committee argued that where no access is permitted the liability for child support should be reduced or waived completely. The Joint Select Committee was sympathetic to those whose access orders were being breached, particularly when child support was being paid, but it concluded that access should not be linked to the payment of child support.

3.75 ***The Commission's view.*** The Commission agrees that there should be no link, legislative or otherwise, between the payment of child support and contact. Both contact and child support are intended to operate in the best interests of the child. Child support is money provided to ensure that children receive at least adequate material care and comfort. To withhold child support to ensure compliance with contact orders may well harm the welfare of the children concerned. As a matter of principle the Family Court and the law should not encourage contact and child support being used as bargaining chips or as a means of threat by one parent against the other. In practical terms withholding or threatening to withhold child support to ensure contact may well only increase the hostility and intransigence of some parties and increase the risk of further litigation and dispute. However, the Commission recognises that for some parents the two are linked. The Family Court, particularly its mediation and counselling services, is aware that parties may link the two. It should adopt appropriate case management principles to assess whether this a factor to consider and how to deal with it. The Family Court and the Child Support Agency should consider whether they should develop a protocol for the exchange of information about cases where an interconnection is an issue. It may be that a protocol would be useful in only a limited number and could raise privacy issues which would outweigh any benefits. The Court and the Child Support Agency should consider these matters.

Recommendation 3.16

The Family Court and the Child Support Agency should consider developing a protocol for exchange of information for cases where at least one of the parties is attempting to link contact and maintenance.

Expert assessments provided to the Court

3.76 There is no standard fee for the payment of experts such as psychologists who see and provide reports to the Court on parties and the family. There has been discussion that the rates of payment to Regulation 8 counsellors are inadequate and those rates are being reconsidered by the Court and are likely to be increased. One submission also said that the level of payments to experts appointed under Family Court Order 30A is so low as to be a significant disincentive for experts to become involved in family law matters.[258]

Recommendation 3.17

The Family Court should review the level of payment of experts under Order 30A to determine whether the present level is significantly deterring external practitioners from providing service to the detriment of the Court's capacity to assist in the fair and effective resolution of complex contact cases. The review of the payment of Regulation 8 counsellors should consider whether the level of payment is affecting the quality of service to the detriment of dealing effectively with complex contact cases.

4. Support services in complex contact cases

Introduction

4.1 This chapter discusses two kinds of services that can provide support for resolving complex contact cases. The first is contact supervision services which usually take the basic form of a contact centre. Their main purpose is to provide safe and neutral supervision of the handover of children from one parent to the other and/or supervision of the contact visit itself. There are already a few of these services in Australia and many more overseas. The Australian services receive little government funding and their development is still embryonic. Nevertheless, there is a rapidly growing interest in their use. The second kind of service, contact compliance, has not been tried in Australia and has a different focus. These programs operate in different forms in some jurisdictions of the United States and Canada. They are concerned with assisting parties when there is a dispute about enforcement of a contact order and initial counselling and mediation have not been successful. They often combine mediation and legal approaches with an emphasis on alternative dispute resolution (ADR) and developing a workable parenting plan.

Contact supervision services

Informal supervised contact

4.2 There are many cases in which contact arrangements require supervision, either on handover of the child or during the contact, to be successful. These cases include those where contact is in the best interests of the child but there is fear of violence. Sometimes contact handover may occur at specified places other than either parent's residence to reduce the chance of conflict or violence or to re-assure the parent who fears violence. This could occur at the home of a relative or friend or at a public place such as outside a police station or at a fast food restaurant. In a number of cases, contact orders are made conditional or subject to some type of supervision. This may often involve informal third party supervision of the contact visit or handover of children. For example, relatives, friends, religious ministers or social workers may be asked to supervise.[259] These arrangements may not be possible for cases where

- it is difficult to find someone prepared to take on the responsibility of supervision when parents are in conflict
- at least one of the parents lives in an isolated area or is new to the community and has trouble finding people to nominate because he or she is not part of a social network
- possible supervisors nominated by one side are suspected of bias and rejected by the other side.

These problems may make contact impossible or inappropriate. However, even where possible, informal supervision may be quite unacceptable because of

- high levels of conflict at handovers
- allegations of child sexual abuse
- concerns about parental violence
- concerns about possible abduction of the child by the contact parent
- a contact parent who lacks parenting skills or appears unreliable, particularly where the child is very young
- substance abuse or psychiatric disorder on the part of one or both parents
- the child or a parent has a disability

- a lengthy separation between the contact parent and the child or no previous relationship between them.

Formal supervised contact services have developed as a response to the difficulties in no supervised contact or in informal supervision.

Formal supervised contact

4.3 ***Overseas contact services.*** Children's access services have existed for some time in the United States, Canada and Great Britain. There are about 134 centres operating in Great Britain and 150 in the United States and Canada.[260] There may also be some services operating in Europe although details are currently unavailable to the Commission. There have been surprisingly few empirical studies of the effectiveness of supervised contact services, given their number overseas and the growing interest in their use. The only major formal evaluation carried out concerns the Ontario Supervised Access Pilot Project in Canada. Appendix 4 describes that service and reports on the evaluation of it. The Project is a non-profit service that operates from 14 centres across Ontario offering formal supervised access. Some centres charge modest user fees. The centres are generally fairly small and have an average annual budget of about $C74 000 ($A70 000). They provide two primary services. One service, called supervised access visits, permits non-custodial parents to visit their children at a centre. The visit is supervised by trained staff and volunteers. The other service termed an exchange, permits custodial parents to drop off their children at the centre, where they are picked up by contact parents. Visits occur off-site and are not supervised. At the end of the visiting period children are returned to the centre where they are picked up by the custodial parents. The evaluation of the Ontario Project indicates very positive responses from parents, children and family law professionals. Supervised contact was seen as offering a short term workable approach that provided contact and security for both children and parents. Lawyers and judges considered that the service saved the legal system time and costs, reducing Court appearances significantly. However, the evaluation cautioned that there was as yet insufficient data to determine whether this was in fact so.

4.4 ***Australian initiatives.*** There are a number of formal contact supervision services presently operating or being established in Australia.[261] These centres vary as to the nature of the service they provide. Some provide only on site supervision while others offer both on and off site services. Some of the current services are unfunded, others receive some funding from charities and a few receive grants from State or Territory governments. The Corridors of Access project in Brisbane, for example, is an unfunded joint project of Save the Children Fund and the Brisbane registry of the Family Court. It offers on site supervision. The Toowoomba Community Access Service receives some limited funding from the Federal Government. The Federal Government is considering an expansion of these services throughout Australia, including establishing a pilot project to facilitate contact handover under appropriate and supervised conditions.[262]

4.5 ***Role of ANZACAS.*** The Australian and New Zealand Association of Children's Access Services (ANZACAS) was formed in 1994 and acts as an information source and network to promote the development of services in Australia and New Zealand. It has been lobbying for the establishment of a federal funding program for non profit or community based children's access services. It also promotes quality service delivery through access centres. It has prepared and released for consultation Proposed Interim Standards for Children's Access Services. The development of the standards has been sponsored by Legal Aid and Family Services in the federal Attorney-General's Department.

Submissions and consultations

4.6 ***Widespread support for centres.*** The Commission's Issues Paper sought comment on the role and effectiveness of supervised access centres in responding to complex contact cases.[263] Of all possible responses to these cases this one received the strongest and most widespread support.[264] For example, one submission stated that centres would be helpful as many contact parents are unable to provide even effective short term supervisors.[265] Another argued that centres would decrease the volume of disputes handled by the Courts and the numbers of lawyers needed to litigate the matters. This submission suggested that centres should be located in all significant population centres.[266] They provide a safe environment and reduce personal contact between former partners. Many disputes arise simply because of personal contact, for example, lateness for leaving or picking up children - trivial disputes that build up as contact is maintained.

The Western Australian Advisory and Co-ordinating Committee on Child Abuse submitted that specialised supervised access centres may be needed where supervised contact is ordered. These centres could deal with these cases better than the current alternatives of family members, social workers and child care centres. They could provide greater safety and security and better quality supervision.[267] In a number of consultations participants highlighted the unsatisfactory nature of contact occurring outside police stations or in public places, for example, fast food outlets.[268]

4.7 ***Demand already exists.*** Some submissions commented that there is already a wide demand for these services, including from legal aid commissions, community legal centres, State health and community service organisations and welfare agencies seeking a safe protective environment for children.[269] The Law Reform Sub-committee of the Family Law Practitioners Association of Western Australia submitted that there was an urgent need in Western Australia for these services to be funded.[270] A number of submissions endorsed the submission of ANZACAS.[271]

4.8 ***Suggested advantages of formal supervision services.*** According to submissions and consultations supervised contact services can

- significantly reduce hostility, conflict and 'incidents' by removing any direct contact between the parties
- provide direct, on the spot assistance with the management of contact
- provide a comfortable and relaxing environment for children, for example, by having toys, painting and activities available
- allay many of the concerns and fears, whether well founded or not, of custodial parents about abuse, violence or the unreliability of contact parents
- ensure that contact conditions are met, for example, that the contact parent is not affected by alcohol or drugs, that the parties are punctual and that the child's necessities, such as clothing, medicine and food, are provided for
- provide independent feedback on the way contact is working and so assist in targeting other appropriate options, such as counselling and mediation
- assist long term resolution of the dispute by allowing parties to rehearse behaviour that is necessary for independent management of contact
- be used early without any recourse to litigation as a method of preventing difficulties
- reduce the incidence and the costs of litigation by reducing hostility and conflict and by promoting self management of contact
- filter out those parties who want contact as a means of harassment, by removing the opportunity of contact with the former partner.[272]

4.9 ***Some concerns.*** A few submissions and some of those consulted expressed some concerns about the length of supervised contact.[273] They argued that if supervision was necessary on a long term basis contact was probably not in the best interests of the child. Other concerns were about funding, the number of families that could be assisted and the need to ensure the safety and welfare of the children and parents involved. The proposed interim standards issued by ANZACAS deal with each of these matters.

Major issues

4.10 ***Funding and type of service.*** Submissions and consultations pointed out that the effectiveness of supervised contact centres depends on the adequacy of their funding. Many believed that a combination of government, community and charity contributions to funding was the most feasible approach although the

federal and state governments should have primary responsibility.[274] There was also very strong support for the services being independent of the Courts.[275] This would encourage parties to see the services as neutral and independent and prevent them being regarded as closely linked to the litigation process of the Court.

4.11 ***How long should supervision last?*** Some submissions and consultations, particularly with judges, expressed the view that these services should only provide service to any family on a short term basis.[276] The Full Court of the Family Court in *Bieganski*[277] held that supervised contact ought to be regarded as a short term measure and that a requirement or suggestion of a long term need brings into question whether continuing contact is in the child's best interests. The Ontario Project evaluation suggests that the services are used on a short term basis, on average 7.6 months, but that the Courts may have to make appropriate orders in particular cases to ensure that the period is acceptable.

4.12 ***Standards and guidelines.*** Any service must be able to demonstrate that it is ensuring the interests and safety of children and parents. The measures necessary for this may vary according to the type of case being accepted by a particular service. In many cases of alleged child sexual abuse or violence contact is not considered in the child's best interests and is not ordered. Where it is, the supervision would have to be extremely vigilant with monitoring of the children's reactions particularly to observe any indications of distress. Services would also have to have appropriate screening and admission criteria before allowing families to participate. These criteria are necessary to identify the level of risk of violence and/or abuse and the level of conflict and to assess whether the service can safely and effectively deal with the particular case.

4.13 ***Reporting.*** The majority of those consulted considered that supervised centres should not become a routine part of the litigation process by providing evidence for a party or evaluative reports.[278] These functions would significantly reduce their reputation and capacity for neutrality.[279] However, there was a mixed response to the issue of whether they should provide factual comments on what occurs at contact, in the form of brief written reports to counsellors, children's separate legal representatives and perhaps to the Court. These reports would include when contact occurred, compliance and a factual account of any incidents. The ANZACAS submission highlights this as one issue where further consideration is necessary.[280]

4.14 ***Comparing the costs of litigation and of a national contact service.*** The ANZACAS submission provided an assessment of the costs of litigated contact cases in the Family Court and compared them to the costs of establishing and operating a system of contact supervision centres. It estimated that the costs of litigated contact cases and of cases commenced but settled before hearing exceeds $150 million each year.[281] It put the cost of a national contact service, of similar extent and cost to the Ontario Project, at $2 million a year.[282] The submission argued that a 2% reduction in contact matters going to Court would fully fund a national contact service program. It suggested that the services could reduce litigated contact cases by at least 2%.

4.15 ***Ensuring standards***. Contact supervision services should be child centred. This requires that their focus is the well-being of the children they assist and that their services be of high quality. Many submissions commented on the need to ensure standards and quality. A few said that legislation would be necessary to set standards[283] but some argued that the centres should be allowed to develop and evaluate their own standards before they are fixed in legislation. In particular ANZACAS described its standard development process and argued that once interim standards are established they should be attached to government and non government grants as conditions of funding. It proposed that legislating standards should be considered only after interim standards have been tried and evaluated in practice.

4.16 ***Training.*** Adequate and appropriate training for contact supervisors is also essential. Strauss and Alda propose a basic training program for any 'child access monitor': an elementary legal education pertaining to divorce, Court orders for custody and access, and penalties for non-compliance; instruction on the psychological aspects of truculent divorced couples in conflict and the implications for service providers; and practical experience in observing and recording parent-child interactions and in intervening when necessary to protect a child. In addition, monitors who work alone must be able to decide what cases to accept and exclude unsuitable cases, keep adequate records for the Court, testify in Court and make appropriate referrals.[284] The amount and nature of training required will depend upon the role a supervisor is

to play. Obviously less training is required for someone who is to facilitate handover than for someone who is to supervise the entire contact period in a case of alleged child sexual abuse.

The Commission's views

4.17 ***Support for contact supervision centres.*** The Commission supports the introduction of federally funded contact supervision services. These services should be able to assist people who are parties to proceedings in the Family Court and other people who have difficulties with contact with children. Their primary purpose should be facilitating contact. The services should offer assistance to a broad range of people. The submissions and consultations demonstrate that a broad cross section of professionals, including judges, counsellors, legal aid and other lawyers and community legal centres, and many interest groups see a need for these services in appropriate cases. Submissions from parents and other individuals also generally supports them. These services should be available as an option for complex contact cases. They have many advantages particularly in reducing hostility and 'kick starting' workable contact. They have the virtue of being a very practical response to difficulties. They also can be usefully used before litigation has become entrenched. If they reduce the number and duration of contact disputes they will have promoted the paramount objective, the best interests of children. However, the Commission recognises that there is little empirical evidence available on whether they actually reduce litigation and other uses of Court or legal aid resources. The estimates provided by ANZACAS, particularly in relation to litigation costs in the Family Court, are useful but they should be evaluated by the federal Attorney-General's Department and the Family Court.

4.18 ***Length of supervision.*** The Commission considers that contact supervision services should generally be regarded as a short term response. Where the Court is involved continued use of the service for a particular family should be reviewed by the Court after, say, six months. In cases where handover supervision is provided, six months should be sufficient time in which to establish how likely it is that the parties will be able to make their own arrangements and, if so, the time it may require. In cases of supervised contact, for example, where there are allegations of sexual abuse or that the contact parent is unreliable or lacking in parenting skills, six months would also seem to be an appropriate time in which to assess developments. Periodic review of cases where there are allegations of sexual abuse would be essential. The Family Court and the services should establish general guidelines and a protocol for the use of the service in individual cases. The Court can regulate and monitor the use of the services in particular cases by including specific provisions in original orders or ensuring that the Court regularly reviews a referral. In those cases where supervision is not Court ordered or monitored then it will be a matter for the particular service and the parties to determine the appropriate length of attendance. The service should have guidelines for this.

4.19 ***Reports.*** The Commission has carefully considered the complexities in whether the services should report to the Court where the Court has some involvement with the matter. It has concluded that services should provide factual reports to the Court in cases where allegations of child sexual abuse or violence have warranted supervised contact. The protection of the interests of the child must be paramount in each case and must outweigh any concerns that the service may lose the image of neutrality. Matters and events that occur at supervised contact may be very relevant to the Court making informed and effective decisions about continuing contact. The Ontario Project evaluation shows that parties dislike the services making reports but that this did not appear to lower significantly general satisfaction with the services or their use. There is no need at this stage for legislation to deal specifically with reports from contact centres but this issue may need to be reviewed if any problems arise in practice.

4.20 ***Standards.*** Ensuring standards and quality in contact supervision services is important in protecting the welfare and safety of children and parents. It will require statutory regulation to deal with accreditation of services, training and qualifications of staff and operational guidelines. However it would be premature to legislate before ANZACAS has had an opportunity to develop, test and evaluate its interim standards.

Recommendation 4.1

Contact supervision services should be child centred. They should see themselves as providing a service to children, not primarily to parents. Their primary concern is the best interests of the

child.

The Commonwealth should fund contact centres in an extensive pilot project, external to the Family Court, to assist in providing appropriate contact in complex cases. These services should include handover assistance and supervised contact.

The funded contact services should be the subject of evaluation including review of children's responses, the length of average use for cases and their effect on subsequent contact arrangements.

The Family Court and centres should enter into protocols governing liaison and reporting. In cases involving the Court, the centres should provide factual reports to the Court on their supervision of the contact, including the nature of the parent child relationship. As a general principle centres should not be actively involved in the conduct litigation. There is no immediate need for legislation on this issue.

Contact centres should generally assist a case on a short term basis, say for a maximum of six months. After that period the future of contact should be reviewed by the Court. Where handover or supervision is likely to be necessary on a long term basis and the Court is involved, the Court should consider whether an order for contact is in the best interests of the child. The Court may consider any report from the contact centre in reviewing its orders.

The interim standards being developed by the ANZACAS should be tested and evaluated before there is any consideration of legislating to ensure quality service in contact centres. Standards, quality control and evaluation of service should be linked to funding. Legislation on accreditation, guidelines for conduct and the quality of service and supervision should be considered after services have been operational for a period and evaluated.

The centres should employ appropriately qualified persons to undertake the supervision.

Contact compliance programs

Introduction

4.21 A person wishing to enforce a contact order may try to deal with the matter directly with the other party, seek advice from Family Court personnel including counter staff and counsellors, apply for legal aid, see a private lawyer, represent herself or himself or simply give up. These responses are essentially private unsupported actions, except for the possibility of legal aid which is granted according to means and merit tests. Although legal aid may offer some mediation services it is generally restricted to legal advice and representation in litigation. A person seeking compliance with a contact order is therefore left almost entirely to herself or himself. They will usually see their only options as giving up or further litigation. However, further litigation may not be a realistic or desirable option for many parents.[285] It is formal, expensive and time consuming and has costs for the child, the parents and the Court. It may only make resolution of the dispute more difficult.

Some overseas approaches

4.22 ***Contact compliance services.*** Some overseas jurisdictions, particularly in the United States and Canada, offer specialist support programs as an alternative, perhaps more comprehensive response than those currently available in Australia.[286] These programs are designed to assist the parties in dispute over a contact order to come to workable agreements. Services offered may include notification by post of alleged breaches to the other party, supervising and monitoring contact visits, assessments and recommendations for the Court, advice and action on enforcement procedures, telephone contact and counselling, referral for counselling, therapy and treatment for drug and alcohol problems, and mediation. The Commission has obtained information from the United States and Canada about these types of programs, particularly regarding their effectiveness. Two programs provide examples of how these services work.

4.23 ***The Manitoba Access Assistance Program.*** The Manitoba Access Assistance Program began in 1989 as a three year pilot program. It was the first of its kind in Canada. Its primary emphasis is on conciliation through counselling and negotiation. It also has a legal component where a parent refuses to co-operate. A project lawyer will take contempt proceedings in Court on behalf of the other parent. The Program also has a children's group to assist children in the dispute and to assess their attitudes and adjustment to particular issues. During the three years of the pilot phase the Program was funded under a federal-provincial agreement for a total of $C432 000 and was staffed by two counsellors, a lawyer and a half time stenographer. At the end of the three years, between June and September 1992, external research consultants evaluated the Program. The evaluation found that violence was an issue in a large proportion of the relationships and that more than half the services were provided to only 20 of the 169 families using the Program. Improvement in the contact situation was indicated in one-third of the cases. An additional 10% were complying with the original Court order, which can also be interpreted as a positive result. The evaluation had no direct data on the impact on the children but assumed that the resolved cases were resolved to the benefit of the children. The evaluation report recommended better promotion of the Program, more cost effective operation by increasing the caseload and better assessment of the benefit to children. The program is described more fully in Appendix 5.

4.24 ***The Michigan Friend of the Court.*** The Michigan Friend of the Court (FOC) in the United States investigates and enforces Circuit Court Orders, including enforcement of contact, under the FOC Act.[287] The FOC must investigate an alleged breach when it receives a written complaint.[288] If it considers that an order has been breached it may arrange a meeting with the parties to try to resolve the dispute or refer the parties to a mediator. If these options are unsuccessful the FOC may

- apply the local policy on compensatory contact
- bring a contempt action in the Court, where the alleged person in contempt must show good cause for not obeying the order
- petition the Court for a change in the contact order.

There were 2,201 requests for contempt action in 1993 of which

- 660 were resolved by the FOC
- 1633 were resolved by a referee hearing[289]
- 100 were heard by a judge on a referee appeal
- 580 were heard by a judge.

The Michigan FOC scheme is described more fully in Appendix 6.

The Issues Paper

4.25 The Issues Paper asked whether contact compliance services, similar to the overseas services, should be introduced in Australia. It suggested that these services could be established at each registry of the Family Court, with a central co-ordinating body. In particular, it sought comment on whether the services should take an interdisciplinary approach involving law and social science, similar to that of the Manitoba program.[290] The services could also provide a contact hotline for information and advice and a type of Ombudsman to review contact disputes and make recommendations for their resolution without litigation.[291]

Submissions and consultations

4.26 ***General support.*** Most of the submissions and consultations that canvassed this issue considered that contact compliance programs would be very useful. However, few of these commented in any detail on the current avenues of assistance or on the likely cost effectiveness of these programs. A major reason for supporting their introduction was the view that they would reduce litigation and set down a detailed plan for

the child to receive positive, beneficial contact.[292] Many submissions stressed that the primary emphasis should be on mediation and conciliation rather than litigious enforcement. Most of these submissions favoured a program similar to the Manitoba Access Assistance Project.[293]

4.27 ***Some concerns.*** A common concern was that a contact compliance program would be abused by those with trivial or unmeritorious complaints, particularly if there is no fee attached to use of the program.[294] A few submissions suggested other difficulties. ANZACAS expressed some concern about the comparative lack of available evaluation of the overseas programs and suggested in particular that more information is needed about the types of contact disputes accepted by these programs.[295] It also said that differences in the legal contexts in which these services operate have to be taken into account particularly in considering whether they are appropriate for Australia. The Association listed its concerns with the introduction of a program as role confusion, confidentiality issues, duplication of services, particularly the overlap with available legal assistance, cost effectiveness, client satisfaction and whether participation would be entirely voluntary, especially as both parties are involved.

4.28 ***Opposition to these services.*** The National Legal Aid submission questioned the funding needed for a separate program and expressed concern about the quality of advice given by insufficiently experienced staff and about the provision of legal advice over the telephone.[296] It argued that establishing these services would focus too many resources on a narrow type of case. It would prefer to develop programs that divert people into currently available services such as counselling before the initiation of enforcement proceedings. It also stated that the legal aid commissions already provide a service, varying from State to State, to support contact compliance. The Law Reform Sub-committee of the Family Law Practitioners Association of Western Australia submitted that this type of program would add another layer of Court processes where there are already existing avenues.[297]

4.29 ***The location of compliance programs.*** Participants in the consultations canvassed issues of where any compliance program should be located. Some argued that any program should be provided by the Family Court to indicate that the Court takes breaches of its orders seriously.[298] It was also argued that location within the Court would make it easier to co-ordinate the various avenues of assistance and thereby reduce any possible duplication. The Court could avoid a potential conflict of interest if a separate section of the Court enforced contact orders and the lawyers in the program were not involved in other aspects of contact matters, for example, as registrars hearing disputes. The opposing view was that any program should be separate from the Family Court because the matters should be considered with a greater focus on alternative dispute resolution in a community setting.[299] A primary focus on alternative dispute resolution and parental education is likely to be more effective than actually using litigation. This view is supported by the research of Pearson and Anhalt on five innovative programs in the United States.[300] They found that punitive remedies were rarely invoked and that a typical outcome was that orders for contact were given greater specificity.

Commission's views

4.30 ***Overseas data inconclusive.*** The Commission has attempted to obtain more specific information about the effectiveness of overseas programs. However, the information currently available to it is not sufficient to draw any strong conclusions about the value, cost and effectiveness of the programs. The evaluation of the Manitoba Access Assistance Program suggests that there are some specific problems in offering the service. About half the direct assistance was provided to only 20 families. Improvement in contact occurred in only one third of the cases. There is no information on the impact on the children concerned and little follow up on what happened after the clients left the Program, particularly in terms of subsequent re-litigation. The Michigan Friend of the Court resolved 660 out of 2 201 requests for contempt action, about a third. The issue which arises is whether that level of resolution is cost effective.

4.31 ***Issues in Australia.*** One disadvantage of contact compliance services is that they essentially come into play after an order has been made and breached. In some cases the contact difficulties may already be entrenched. Resources might be better allocated earlier in the process when considering the appropriate orders for contact and their practical implications. Nevertheless there may be cases where litigation or the current forms of counselling or mediation fail and contact compliance programs would achieve satisfactory results at a cost effective rate. The Commission has been unable to determine whether this is so and how many cases would be affected. Improving the present system is also relevant to considering whether to

introduce new services. Chapter 5 discusses the use, cost and effectiveness of taking enforcement action under the FLA. It recommends a number of changes to the current enforcement proceedings. If those measures are adopted and improve the process, allocating resources to new contact compliance programs may not be justified. The Commission considers that, if contact compliance services were to be established, they should be located outside the Family Court structure.

4.32 ***Need to review available assistance.*** The Commission sees a clear need to review the adequacy of the current avenues of compliance assistance available in Australia, particularly those provided by the Family Court Counselling Service, the legal aid commissions, community legal centres and private practitioners. The introduction of the Manitoba Program itself was preceded by a study of the need for such a service in Manitoba. The Commission has not received sufficient information to undertake that type of review in the course of this report.

Recommendation 4.2

> There should be further research on the need for a contact compliance program similar to the Manitoba Access Assistance Program. It should also examine the extent to which current avenues of assistance are effective and appropriate. This should include consideration of the assistance provided by legal aid commissions, by the Family Court Counselling Service and by other bodies external to the Family Court. This research should be co-ordinated with the FLC's research project on the imposition of penalties for breach of orders. If it is considered that there is a need for a contact compliance service the Commission recommends the introduction of a pilot program that is independent of the Family Court.

4.33 ***Contact hotline.*** The Issues Paper asked whether a contact compliance program should provide a 24 hour hotline to provide information and advice on contact.[301] Some submissions regarded this as useful as a readily available way to provide assistance and information, an almost immediate response to contact disputes as they occurred.[302] It could allow people to ventilate their feelings and be useful for referrals. One submission suggested that a hotline may be valuable in the Northern Territory because of remoteness and isolation.[303] Other submissions considered that a hotline could develop into a broad lifeline style service and with no fees could be abused.[304] Its value would be limited because it would receive information from only one source in complex and contentious disputes.[305]

4.34 ***The Commission's view.*** The Commission does not regard a contact hotline as being critical to any contact compliance program. The evaluation of the Manitoba Access Assistance Program recommended a crisis line for that service. The question should be considered further if a compliance program is established. The broader issue of telephone crisis and information services relating to family law does require review. There are significant difficulties in providing legal advice on a particular matter by telephone on the basis of incomplete information. However, telephone services can provide information and support, particularly for people in remote areas. The issue of information and educational services is discussed further in Chapter 6.

Contact Ombudsman

4.35 ***Submissions and consultations.*** The Issues Paper also sought comment on whether a Contact Ombudsman should be established.[306] There was some support for an Ombudsman to provide independent supervision of contact cases and the Court process.[307] The Committee on the Role of Psychiatry in the Family Court submitted that there should be an independent Ombudsman with the resources of a multi-disciplinary team.[308] Other submissions argued that the appointment of an Ombudsman would add an unnecessary layer of review and would delay cases without necessarily improving results.[309] An Ombudsman would provide a further avenue for a vexatious litigant to harass the other party.[310] There was also doubt about the role of a Contact Ombudsman because he or she could not review Court decisions or determine disputes but only make recommendations.[311]

4.36 ***The Commission's views.*** The Commission does not support the introduction of an Ombudsman for contact cases that have come before the Family Court. Ombudsmen are of great benefit in reviewing cases, establishing facts and making recommendations to government or to major supervisory bodies in particular

areas of government or commerce. However, it is difficult to establish facts in contact cases and many cases may well be the subject of Court orders, continuing Court review and litigation. The role of an Ombudsman in these cases would necessarily be very limited and is likely to add another layer of review. It would not finally determine matters and perhaps would be unlikely to prevent further dispute.

5. Enforcing contact orders in the Court

Introduction

5.1 This chapter deals with the enforcement of contact orders under the *Family Law Act 1975* (Cth) (FLA).[312] It describes the principles that should underlie judicial enforcement of Court orders and the present legal framework and its limitations. It proposes an alternative way of securing compliance through the Court. Finally it examines penalties for breaching orders. The discussion and proposals are presented in the context of the other recommendations in this report. They assume a system in which contact orders are made where they are in the best interests of the child and not otherwise,[313] complex contact cases are managed within the Court appropriately and effectively[314] and contact support services are available.[315]

Principles for enforcement procedures

A fair balance

5.2 Chapter 2 has set out the principles the Commission considers should form the basis for all actions and decisions affecting parent child contact. There is an additional principle relevant to procedures for the enforcement of Court orders on contact. Enforcement procedures should ensure a fair balance between the rights of contact parents and those of custodial parents. They should assist contact parents to enforce orders where there is unreasonable non-compliance but protect custodial parents, who are not unjustifiably thwarting contact, by preventing vexatious proceedings. Fair procedures are in the interests of the children involved. They assist them to have contact with parents where it is beneficial but reduce the negative effects of actions that are vexatious or frivolous. The legal aid commissions and National Legal Aid Advisory Committee should consider whether their assistance in enforcement matters under the FLA is adequate and fair for both custodial and contact parents.

Litigation as a last resort

5.3 Litigation should be the alternative of last resort for complex contact cases except where the interests of the child require it or there is no reasonable prospect of alternatives to litigation working in a cost effective manner. Special difficulties faced by custodial parents when enforcement matters are frivolous or vexatious are discussed later in this chapter. However the recommendations in this chapter also seek to make the enforcement procedure fairer and more user friendly for those contact parents who have legitimate problems with achieving compliance with contact orders without further litigation. The recommendations include an additional procedure for enforcement that requires only a civil onus of proof, places on the respondent the onus of proving a reasonable excuse and focuses on remedies rather than penalties. The chapter also contains a recommendation that where warranted the Family Court should be more robust in recognising proceedings as frivolous and vexatious and in making declarations of vexatious litigants so that these people require the leave of the Court to institute further actions.

The legal framework of enforcement

5.4 The FLA provides for enforcement of contact orders essentially through a procedure that is basically criminal in terms of proof and possible sanctions but that is brought by the applicant parent and not the State.[316] To establish a breach of a contact order the applicant must prove beyond reasonable doubt that a person has, without reasonable excuse, contravened an order of the Court. A person contravenes an order only if she or he

- has intentionally failed to comply with the order
- has made no reasonable effort to comply with the order
- has intentionally prevented compliance with the order by a person bound by it
- has aided and abetted a contravention by a person who is bound by it.

A reasonable excuse for contravening an order includes a failure, or substantial failure, to understand the obligations imposed by the order and, in the case of a custody or access order, a belief on reasonable grounds that depriving the person of custody or access was necessary to protect the health or safety of another person.[317] The person must not be deprived of custody or access for longer than was necessary to protect the health or safety of the other person.[318] Where an order has been breached the Court may impose a sentence of imprisonment for a maximum of 12 months but imprisonment is a last resort.[319] Other sanctions include a maximum fine for a person of $6 000, weekend detention, community service, recognisance, seizure of all or part of the person's property and an order to give access in the form of compensatory access.[320]

Effectiveness of enforcement action

The Issues Paper

5.5 The Issues Paper suggested that there may be a number of major difficulties with taking action in the Court to enforce orders. Enforcement action shares the inherent problems with using litigation generally in family matters.[321] The particular concerns in enforcement actions may compound these general difficulties in using litigation. The Family Court's dilemma in enforcement cases is that its overriding duty is to give the interests of the children paramount consideration. The merits of a case may suggest a severe penalty for non-compliance with Court orders but concern for the children may suggest a lesser or no sanction. For example, imprisoning a custodial parent is clearly likely to have serious consequences for the well-being of a child. The Issues Paper sought comments on the appropriateness and effectiveness of enforcement action. The responses demonstrate that enforcement action is now, and is likely to remain, of limited value in securing compliance with contact orders.

Submissions and consultations

5.6 Some of those consulted argued that, even if parties comply with orders after an enforcement action, the impact on the quality and value of the contact could be seriously diminished.[322] Custodial parents, whether deliberately or not, can subtly and easily erode the quality of contact, for example, through pressure and inducements. On the other hand, a non custodial parent who succeeded in having a custodial parent imprisoned could consider this a victory in a war and convey a sense of triumph to the children involved.[323] Many Court personnel commented that the Court is unlikely to impose very severe penalties because of its paramount duty to consider the best interests of the child.[324] Another comment was that the parties sometimes have unrealistic expectations about what the Court could do. It was said that 'if people continued to hate each other then the Court could do little to change that'.[325] A few submissions referred to research which suggested that in many cases Court decisions may be ineffective in resolving contact disputes. For example, Smiley and Hirst found that in 50% of contact cases determined by the Court contact ceased totally after a year.[326] They considered that Court decision making may not adequately solve disputes and that it is better to try to reduce the level of conflict by non litigious means. The Chair of the Family Services Council submitted that parents are much more likely to abide by decisions they themselves make, if necessary with assistance and guidance, than those forced upon them by others.[327]

The Commission's view

5.7 The Commission considers that the full hearing and Court adjudication of an enforcement action should essentially be regarded as a last resort. The better strategy is to try to identify and resolve potentially complex contact cases before they involve breaches of orders and enforcement proceedings. Recommendations in this report, if adopted, would make this more successful than it currently is. Nevertheless, enforcement action will continue to be used and in some cases may be the only option or the most effective option. An examination of the current enforcement law and procedures and the available sanctions is therefore essential.

Two types of enforcement procedures

Proposal

5.8 Justice Fogarty of the Family Court proposed to the Commission the provision of a civil enforcement procedure in the FLA. He considered that most applications about breach of contact orders are taken to enforce contact. They ask the Court to confirm the right to contact and make orders to ensure it occurs in the future. The orders sought may involve, for example, more detailed directions for contact or provide compensatory contact.[328] A substantial fine or imprisonment is sought or likely only in a small minority of cases. However, under the current law the whole procedure, with the strict criminal burden of proof for each element, is driven by the possibility of significant punishment. Justice Fogarty suggested that an alternative procedure is necessary. He proposed that the procedures to be applied should depend on whether the applicant is primarily seeking future compliance with the order or punishment of the custodial parent. Where future compliance is the objective the procedure should

- place a civil onus of proof only, that is, proof on the balance of probabilities, on the applicant
- place an onus for proving reasonable excuse on the respondent
- confine the orders available to compensatory contact or to those that secure compliance
- enable the Court to require the respondent to enter a recognisance to comply in the future
- provide for a fine up to $1000
- allow the Court to order costs.

In Justice Fogarty's proposal the stricter procedure would be confined to cases where the applicant is seeking

- a fine in excess of $1000
- imprisonment
- orders under s 112AP of the FLA, which requires a flagrant challenge to the authority of the Court
- punishment for a breach of a previous recognisance
- community service orders or periodic detention or some other similar order for attendance at community based programs
- the lesser orders referred to in the less strict procedure referred to above
- costs as ancillary to any of these.

The criminal onus, that is, proof beyond reasonable doubt, should remain but the civil onus should be placed on the respondent to prove reasonable excuse on the balance of probabilities. Judges and the judicial registrar at the Parramatta registry gave the Commission similar suggestions to those of Justice Fogarty.

The Commission's view

5.9 ***Support for an additional procedure.*** The Commission supports the introduction of an additional procedure for enforcement of contact orders. The new procedure would be directed towards ensuring future compliance and compensation for past non-compliance. It would require a civil onus of proof. The existing procedure would remain and be directed towards cases where there is a very serious and deliberate policy of refusing or thwarting contact orders. The elements of the two procedures as suggested by Justice Fogarty are considered to be appropriate except that the Commission considers that there should be no element of punishment in the civil procedure. It therefore does not recommend that the Court have power to impose a

fine upon a finding of non-compliance under the civil procedure. The benefits of the alternative procedure are many. It would reduce the difficulties of proof for those applicants whose main concern is not punishment but the achievement of compliance. It would assist those with legitimate and meritorious actions to proceed with them. It would reduce legal costs and make self representation more effective because it would involve fewer technicalities. It is likely to reduce demand on Court time and resources because strict criminal proof of each element would not be required. The Commission recognises concern that a simpler procedure could encourage trivial or vexatious applications but suggests that those matters can be best dealt with by proper use of orders of vexatious litigant and orders for costs. The Commission also considers that its recommendations in chapter 2 would ensure that the Court takes proper account of problems of violence and harassment in making the initial orders for contact and in any subsequent litigation.

5.10 ***Applicants to elect procedure.*** Applicants for orders following a breach of a contact order should be able to elect whether to proceed under the existing procedure or under the new procedure. If a party succeeds in an action under the more serious procedure for breaches that are essentially minor the penalty would still be a matter of discretion for the judge and the best interests of the child would remain the paramount consideration. The Court need not, and in most cases would not, impose a heavier penalty merely because the stricter procedure was taken and the case proved. In exercising its discretion as to costs the Court should consider whether the applicant ought in all the circumstances to have brought an action under the alternative procedure.

Proof in the existing procedure

5.11 ***The present law.*** The FLA[329] requires the person bringing an action for breach of an order to prove each element of the offence according to the criminal burden of proof, that is, proof beyond reasonable doubt. That requires proving the existence of the order, the fact that the respondent was aware of its existence, that the breach occurred as alleged and that the respondent had no reasonable excuse to contravene the order. Proof of this last element has been the cause of controversy. It has been said that it places too great a burden on applicants.

5.12 ***The Joint Select Committee recommendation.*** The Joint Select Committee (JSC) recommended that the onus for proving a reasonable excuse should be changed to be on the respondent. It noted that this was the view of the Family Court in its submission and it cited the comments of Justice Smithers.

> The requirement that the applicant adduce evidence that the respondent did not comply with the access order does not normally give rise to much difficulty. However, proof of the requirement that in breaching the order the respondent had no reasonable excuse is often likely to be difficult. In many cases the access parent will know only that he or she did not obtain access. Any matters relevant to the issue as to reasonable excuse will be partly or solely in the knowledge of the respondent.[330]

The JSC also argued that reversing the onus would help to reduce the costs for the applicants in these proceedings. The Government accepted this recommendation by the JSC.[331]

5.13 ***Parramatta registry.*** The consultations revealed some differences of view about this requirement. A view put strongly by some judges and the judicial registrar at the Parramatta registry was that the current onus on the applicant helped to make the provision a 'technical minefield'. On this view the burden on the applicant to disprove the existence of a reasonable excuse meant that the provision was harder to prove than offences under the Commonwealth *Crimes Act 1914* which require, if there is an exception to an offence, that it is for the defendant to prove its existence on the balance of probabilities. It was said that respondents in an enforcement action could quite easily put forward excuses that are difficult for an applicant to disprove, such as that the child was unwell or refused to go on a contact visit.

5.14 ***Other consultations.*** Other consultations did not reveal the same level of concern about this requirement. One registrar at the Adelaide registry advised that in his view the summary procedure for contempt seems to be adequate in substance and procedure. He suggested that the problem is not these technical matters but the belief of many applicants and lawyers that the penalties imposed are too low. Given the paramount concern for the best interests of the child, contact parents perhaps expect too much that the Court would take a very strong and immediate stand against the other party. The registrars consulted at the

Melbourne registry expressed the view that some contact parents find the procedure too technical if representing themselves and too costly if using a private legal practitioner.

5.15 ***Other possible arguments.*** An alternative argument is that because the Court can impose penalties of imprisonment and significant fines under s 112AD, the procedure must follow the usual principle of criminal law that the prosecution must prove each element of the offence beyond reasonable doubt. A further concern is that easier technical requirements would encourage those contact parents who want to harass or maintain contact with their former partners to bring unmeritorious enforcement actions. Finally, a change in the burden of proof could increase the potential legal costs for respondents.

5.16 ***The Commission's view.*** The Commission recommends that the onus of proof for proving reasonable excuse should be placed on the respondent under both procedures for enforcement. It would seem that the current requirement places an unfair burden on the applicant which goes beyond the normal requirement for defences of reasonable excuse. It is clear that it is relatively easy for applicants to have a range of excuses which would be extremely difficult for respondents to disprove. Moreover, the provision is not regarded as a normal criminal prosecution[332] and while imprisonment or heavy fines are possible they are rarely if ever imposed. If there are concerns about applicants merely using enforcement to harass ex partners that should be dealt with in those cases by use of appropriate orders as discussed later in this chapter. The additional costs for respondents of having to prove reasonable excuse on the balance of probability is unlikely to be very significant in most cases. The Commission was interested in the different views on this issue at different Family Court registries. The consultations suggested that the Parramatta registry had more enforcement applications than any other registry. The FLC in its project on penalties could examine the number and type of enforcement actions taken at different registries to establish the extent to which there are differences not explained by population sizes and the possible reasons for these divergences.[333]

Recommendation 5.1

The FLA should be amended to provide for two alternative procedures for enforcement. An applicant should elect which procedure to take but should not be able to take both on the one set of facts. A respondent should not be liable to orders under both procedures on the one set of facts. Both procedures should provide that the Court may consider at any time before or during proceedings whether counselling, or further counselling, or some other form of alternative dispute resolution would be appropriate and may adjourn the proceedings to allow that action to take place.

The simpler procedure should

- place a civil onus of proof on the balance of probabilities only on the applicant
- place the onus of proving reasonable excuse on the respondent
- confine the orders available to compensatory contact and to those that secure compliance
- enable a Court to require the respondent to undertake to comply in the future
- permit the Court to order costs.

The stricter procedure should be confined to cases where the applicant is seeking

- a fine
- imprisonment
- orders under s 112AP, which requires a flagrant challenge to the authority of the Court
- punishment for a breach of a previous recognisance
- community service orders or periodic detention or other similar orders for attendance at community based programs
- any of the orders available in the less strict procedure
- costs as ancillary to any of these.

In the stricter procedure the applicant should continue to carry the onus of proving beyond reasonable doubt all elements of the breach, except absence of reasonable excuse. The

respondent should bear the onus of proving a defence of reasonable excuse according to the balance of probabilities.

An alternative jurisdiction

5.17 Justice Nicholson, Chief Justice of the Family Court, has suggested that setting up a 'small claims' jurisdiction within the Family Court should be explored.[334] Significant matters affecting children should generally be handled by a judge. However, a small claims tribunal could enable very minor matters of enforcement and variations of contact orders to be dealt with in a less expensive, more informal, less adversarial manner. This would reduce costs for both parties and the Court. It would also mean that judicial resources could be targeted more effectively on the complex cases. Enforcement in small claims jurisdiction could be restricted to the recommended civil procedure with no provision for fines or other penalties. Matters could be dealt with by a family law magistracy or possibly registrars. The FLC will be reporting this year on whether there should be a two tiered structure of the judiciary and a magistracy in the Family Court. This report will be considered by the federal Government.

Recommendation 5.2

The Family Court should explore using a small claims jurisdiction to deal with enforcement actions for relatively minor breaches of contact orders or variations of them.

Other changes to Family Court Orders and procedures

5.18 Justice Fogarty has also suggested that consideration should be given to amending Order 34 to the FLA, which provides the procedural rules for contempt, to make it clear that strict compliance with procedural requirements is not essential or may be dispensed with by the Court in appropriate circumstances. The Commission is not in a position to review the FLA Orders but recommends that the Court consider this issue in the course of its review of Orders. The Court has already begun the process of simplifying its rules and forms. Several forms, including the divorce application form, have already been simplified and are in use. The remainder are in draft form and are awaiting the enactment of the *Family Law Reform Bill (No 1) 1994* and the *Family Law Reform Bill (No 2) 1994*[335] for the inclusion of the changes in terminology and other amendments that those Bills will introduce. The Court will be introducing simplified rules and procedures and the remaining forms possibly early in 1996. That is the expected time because the Bills are likely to be enacted in June or July 1995 and there will be an intervening six month period before they commence operation. This will allow the amended forms and procedures to reflect the new legislation and give the judiciary, Court personnel and the legal profession sufficient time to become familiar with the new legislation, rules, forms and procedures.

Recommendation 5.3

The Family Court should review those Orders relevant to enforcement of contact with a view to ensuring that procedures are as simple as possible, particularly in the light that self representation by parties is reasonably common in enforcement cases. The Court should consider whether there should be provision to allow it in appropriate circumstances to waive some formal requirements. The Court should also consider the level and quality of the current assistance it provides to those who are representing themselves in contact enforcement, for example, assistance provided by counter staff.

Penalties for breaching contact orders

FLC review of penalties

5.19 In April 1995 the FLC will commence a project to collect and monitor Family Court data on penalties and to establish a database for the information collected. The purpose of the project is to consider the level and consistency of treatment and sanctions imposed throughout Australia. The project will include information about results of enforcement actions commenced in the Family Court for a period of one year. The Commission regards the collection and analysis of this data as significant in any examination of enforcement actions particularly in respect of penalties. It therefore makes recommendations in this report only on a small number of issues raised in the submissions and consultations that should be addressed more urgently.

General principles

5.20 ***Best interests of the child.*** The best interests of the child should be the paramount consideration in all matters affecting children. This is the fundamental principle and standard for any provision or procedure under the Act, including litigation to enforce contact orders.[336] The Court must continue to judge the appropriateness of sanctions and their quantum in a particular case by that standard.

5.21 ***Submissions and consultations.*** Some submissions argued that the Court should take a tougher stand against those breaching contact orders and that, while gaol may only be a proper penalty in the most extraordinary cases, fines and orders for costs should be more seriously considered. Sanctions may not change attitudes but they can change behaviour.[337] A major problem arises in cases where the access parent misses out on the odd day but spends thousands of dollars to obtain compensation.[338] Other submissions considered that while the threat of sanctions has to be available their actual usefulness is limited especially as the paramount concern has to be the interests of the child in the particular case.[339]A few submissions argued that the Court has to consider the possible greater use of periodic detention, community service orders and compensatory contact.

5.22 ***Issue of deterrence.*** One of the Family Court judges at the Parramatta registry described two major views on deterrence in these cases. One is that if the Court made an example of a few recalcitrant custodial parents this would significantly deter others. The other view is that there is no evidence that this would indeed happen and that the real problem with using 'examples' is that the children in those particular cases may well be very badly affected by a severe penalty on the custodial parent. It would be difficult to justify disadvantaging these children so that their cases would serve as a general deterrent. Some Court personnel argued that the current penalties may be effective in a number of cases. They referred to anecdotal evidence that parents given a recognisance, which was a typical result, take the penalty seriously and their matters do not tend to come back to Court. However, it cannot be assumed that enforcement action has been successful in securing compliance simply because a case does not come back before the Court. The contact parent may not pursue non-compliance further because of financial difficulties, lack of legal aid or a belief that further action is ineffective. It is also possible that enforcement ensures compliance only at a cost to the children involved because of the bitterness and conflict between the parents. The FLC project on penalties may shed some light on these issues.

5.23 ***The Commission's view.*** The FLA should continue to provide that imprisonment is only a last resort because clearly the imprisonment of a custodial parent may have serious consequences for a child. These consequences are not only psychological harm but practical issues of who could and would provide the child with suitable care and protection while the parent is in prison. Imprisonment or the threat of imprisonment may also be ineffective. It may not deter some parents who are deeply committed to acting in a particular way and who believe that their actions are for the good of their children. Severe fines on a parent may also harm the child by affecting material comfort and standard of living. Heavy penalties generally may only place greater burdens on children and destroy forever any possibility of shared parenting. The Court's discretion as to penalty now available to it under the FLA should be maintained to ensure that the best interests of the child are protected in each case. The Court should be encouraged to make use of this wide discretion. The Commission also supports the current provision that requires the Court before imposing penalties to ensure that the parties have attended counselling.[340] Finally the Commission recommends efforts

by the Court to encourage greater consistency in the application of penalties. The development of informal guidelines on sentencing would be a valuable initiative.

Recommendation 5.4

The best interests of the child should be the paramount consideration in any decision made in the course of any litigation regarding contact, including enforcement proceedings. Counselling and diversion from litigation should be encouraged by the Court and by legal practitioners. The Court's discretion as to the appropriate penalty should be maintained but the Court should give greater consideration to the circumstances where community service orders and periodic detention may be appropriate. Imprisonment should continue to be a sanction of last resort only.

The Family Court judiciary and its judicial registrars should consider developing informal guidelines on the imposition and quantum of sanctions, perhaps in the manner of a tariff, and in particular should consider those circumstances where fines, periodic detention and community service orders would be appropriate.

NSW to have full range of penalty options

5.24 During consultations, judges and registrars, at the Parramatta registry in particular, stressed the need for the Family Court when sitting in New South Wales to have available to it the full range of sentencing options available in other States and the Territories. This would include periodic detention and community service orders now currently unavailable to the Court in that State because the Commonwealth and New South Wales have not entered an arrangement for the provision of those remedies. There appears to be no justification whatever for these options not being available in that State. They should be available as soon as possible to ensure some national consistency of treatment in the Court.

Recommendation 5.5

The Commonwealth and New South Wales as a matter of urgency should enter an arrangement so that the Family Court when sitting in New South Wales can impose the sanctions available in the other States and the Territories such as periodic detention and community service orders.

Recovery of losses incurred

5.25 The Issues Paper asked whether there should be a statutory right for custodial and contact parents to recover any loss incurred due to non-compliance by the other party, for example, travel costs, child care and loss of income. Most of the submissions that mentioned this issue supported this right.[341] However, one submission cautioned that it should only arise where there is a proven unreasonable failure to comply.[342] The FLC should consider this issue in its review of penalties under Part XIIIA. On the principle that the Court should have the broadest range of appropriate penalties available to it this proposal would seem to have merit.

Recommendation 5.6

The FLC, as part of its project on penalties, should consider whether the FLA should be amended to provide a statutory right for both custodial and contact parents to recover their costs incurred due to unreasonable non-compliance by the other party, for example, travel costs, child care and loss of income. In deciding whether to make an order for compensation and as to its terms the Court should have as its paramount consideration the best interests of the child.

Reversal of custody

5.26 ***A possible sanction?*** A number of submissions argued that in the case of serious breach of contact orders the Court should seriously consider and, where warranted, order a change in custody from the parent in breach to the other parent. They said that the mere threat of a change in custody may be sufficient to change behaviour.[343] These submissions considered that the Court is overburdened with the immediate welfare of children rather than their long term good and that in some cases a long term view would justify a change of custody.[344]

5.27 ***JSC and Commission views.*** The JSC considered that reversal of custody would be inappropriate as a specific penalty for breach of contact orders.[345] It found the penalties already available under s 112AD sufficient to provide a range of appropriate sanctions. Indeed reversal of custody may not be a real sanction in any case. Often the contact parent will not want custody or will not be in a position to have it. If repeated breach of a contact order raises questions about the appropriateness of custody arrangements the contact parent can apply for reversal of custody. It would then be a matter for a judge to determine in accordance with the bests interests of the child. The Commission agrees with these views. It would be very undesirable for the Court to threaten a person in an enforcement action with loss of custody. Applications for changes in custody should be considered on their merits and after proper consideration of the best interests of the child.

Vexatious litigant orders

Protecting custodial parents

5.28 The Court must be concerned not only to promote compliance with its orders, including contact orders. It must be concerned also to protect a custody parent from vexatious litigation by the other parent as a means to intimidate and harass. Parents who have been subjected to violence or threats of violence in particular require this consideration by the Court. A number of submissions and consultations suggested that there may be a significant number of cases where the application for enforcement or for variation of contact or a custody application is without merit and frivolous.[346] These cases can have adverse effects upon the children involved. They may cause deep distress to the other party. They waste considerable Court and possibly legal aid resources, particularly if the other party has to seek and obtain legal aid assistance to oppose them.

Existing powers

5.29 The FLA gives the Family Court power to make a number of orders if it is satisfied that the proceedings are frivolous or vexatious.[347] The Court can dismiss the proceedings. It can make an order for costs as it considers just.[348] If it considers it appropriate, on the application of a party to the proceedings, it can order that the person who instituted the proceedings shall not, without leave of a Court with any jurisdiction under the FLA, institute any proceedings under the FLA of a kind specified in the order.[349] The use of these orders was often mentioned in consultations as a potential response to repeat applications that completely lack merit and could be regarded as an abuse of the Court process. The Commission was told that this order is made only very occasionally in contact cases.[350] Some suggested that the Court should consider using it more often and more rigorously. For example, the Women of the West for Safe Families for Support and Social Action submitted that parties using litigation to harass should be declared vexatious after six to ten applications and not the 30 as it currently appears.[351]

The Commission's view

5.30 The Commission considers that the Court should use this power more robustly and more often. The FLA s 118 could be amended to provide that the Court can make the order of its own motion, that is, without need for an application by the other party. Once the Court is satisfied that an action is completely without merit or frivolous it should contemplate making the order. The Court should adopt a consistent approach to cases of this kind. There should also be a consistent approach to applications for leave to commence proceedings once an order has been made. A party to receive leave should be required to demonstrate that there has been a relevant and significant change in circumstances to justify leave. Once again the paramount consideration should be the best interests of the child. Family Court judges, judicial registrars and registrars should develop guidelines to promote national consistency on these issues.

Recommendation 5.7

> The Family Court should be more robust in declaring a party in a complex contact case to be a vexatious litigant and in adhering to a declaration when a vexatious litigant seeks leave to commence proceedings, unless the best interests of the child require otherwise. The FLA s 118 should be amended to allow the Court to make an order of its own motion. It follows from such an order that the Court should also consider making an order for costs against the applicant. The Family Court should develop guidelines to promote national consistency in approach to these cases.

Other issues

Costs rules in family law proceedings

5.31 In family law cases the general principle is that each party bears his or her own costs.[352] The rationale for this is that people should not be discouraged from pursuing or defending a claim because of the risk of an adverse costs order if unsuccessful. However, the Court may make an order for costs if circumstances justify it.[353] When considering whether to make a costs order the Court must take into account

- the financial circumstances of the parties
- whether any party is being assisted by legal aid
- the conduct of the parties
- whether the proceedings were necessitated by the failure of a party to comply with an order of the Court
- whether any party has been wholly unsuccessful
- any settlement offer in writing that has been made by a party
- other matters the Court considers relevant.

A few submissions and some of the consultations argued that the Court should be more willing to exercise its discretion to award costs.[354] This might include an order to pay all or part of the costs of a child's separate legal representative.[355] The Commission is currently examining whether any changes should be made to the way costs are awarded in proceedings before Courts and tribunals exercising federal jurisdiction. A final report is due by 30 September 1995. That report will make recommendations that will be relevant to costs in family law proceedings. The Commission therefore makes no recommendations on this issue in this report.

The role of Director of Public Prosecutions

5.32 ***The issues paper.*** At present parties themselves bring enforcement actions in the Family Court. The Issues Paper asked whether a third party such as the Director of Public Prosecutions (DPP) should conduct enforcement action to ensure that meritorious actions do not fail merely because of technical deficiencies.[356] A few submissions supported the introduction of the DPP.[357] These submissions wanted quicker action and harsher penalties against those in breach, to deter breaches. However, a number of submissions expressed opposition because the use of the DPP would 'criminalise' the procedure and exacerbate family tensions.[358]

5.33 ***Submission by the Commonwealth DPP.*** The DPP considered it inappropriate to play a role in proceedings to enforce orders under the FLA.[359] The DPP stated that proceedings under s 112AD are civil contempt proceedings and are not commenced or investigated as criminal prosecutions. The parties bring actions. It would be anomalous for the DPP to play a part as it could not be a party nor could it be said to prosecute on behalf of a party. The DPP also submitted that the proceedings under the FLA are unique and decisions to apply a sanction are based on very different considerations from decisions to prosecute offences

under Commonwealth laws. The FLA has an overriding principle of considering the welfare of the child as paramount and s 112AD(5) provides that a Court shall not make an order imposing a sanction unless the parties have attended for counselling.

5.34 ***The Commission's view.*** The Commission considers that the DPP's views on this issue should be given considerable weight. It accepts that enforcement proceedings under the FLA are significantly different from other proceedings for breach of Court orders and that it would not be appropriate to introduce public prosecutions. The DPP should not have a role in prosecuting these proceedings.

The role of duty solicitors

5.35 The Issues Paper asked whether there should be a duty solicitor available at each registry to advise and appear for those involved in enforcement actions who are unrepresented.[360] A few of the submissions and some of the consultations have indicated that duty solicitors are already available at some registries and may assist in enforcement actions. There may be some variation in the provision of this service from State to State.[361] One submission suggested that duty solicitors may have significant problems in providing assistance to those involved in complex contact cases.[362] These solicitors have long lists to manage and may not have the appropriate time to consider complex cases particularly in terms of considering technical matters of procedure and proof. The Commission recommends that the Family Court, perhaps with the assistance of the legal aid commissions and the National Legal Aid Advisory Committee (NLAAC), should review the extent to which duty solicitors are providing assistance in these cases and whether the assistance should be increased.

Recommendation 5.8

> The Family Court, perhaps with the assistance of the legal aid commissions and the National Legal Aid Advisory Committee (NLAAC), should review the extent to which duty solicitors are providing assistance in complex contact cases and whether the assistance should be increased or changed in any way.

6. Information, education and training

Introduction

6.1 Most people involved in family law, whether as professionals or as clients, would benefit from further information, education and training in relation to contact issues generally, but particularly in relation to complex contact cases. This emerged as a strong theme in submissions and consultations in this reference. Two distinct areas of need were identified - services for professionals working in the area and services for parents, children and others affected by or relevant to a dispute, such as new partners and grandparents. At present there are many services providing information, training and education in one or both of these areas of need. However, the extent and quality of these services vary. Different programs may be offered by the Family Court, community services, professional associations and federal and State agencies. A systematic and co-ordinated review of these services, preferably on a national basis, is required. It would assist people to know what is available. It would also help to rationalise and target programs and resources better and avoid duplication and wastage. For example, some training courses and programs could be useful for each group of professionals. Better information, education and training will be particularly necessary when the *Family Law Reform Bill (No 1) 1994* is passed. This Bill changes the FLA's whole approach to parenting.[363] Its primary aim is to move parents away from proprietorial attitudes to children and from regarding children as prizes in win-lose litigation. Shared parental responsibilities is a new concept in family law. It needs to be properly explained to the community, to parties in custody and contact disputes and to family law professionals. The likely passage of the Bill gives added urgency to the recommendations in this chapter.

Recognising the need

Joint Select Committee report

6.2 The report of the Joint Select Committee on Certain Aspects of the Operation of the Family Law Act (JSC) made a number of recommendations on information and education that would clearly improve the quality of outcomes for a broad range of contact cases.

- There should be greater direct public access to the Family Court through more printed material and personal advice. Some material could also be provided through the legal aid commissions.[364]

- Counsellors should have the opportunity to update regularly their skills in domestic violence, child abuse and cross cultural awareness.[365]

- The Court Counselling Service should play a more active role in educating clients on the availability and value of counselling services.[366]

- There should be greater opportunity for staff exchanges between the Court Counselling Service and community agencies.[367]

- Access to counselling and mediation services should be broadened especially in rural and remote areas.[368]

- Efforts should be made to raise employer awareness of the cost benefits of making counselling services available to employees.[369]

- Consideration should be given to education programs to raise community awareness of alternative dispute and counselling services.[370]

- The Government should consider funding for programs on effective parenting, communications and dispute resolution skills, anger management and the rights and responsibilities of marriage and parenthood.[371]

- There should be a regular exchange of information between Federal and State police and the Family Court on enforcement orders.[372]

Access to Justice Advisory Committee report

6.3 The report of the Access to Justice Advisory Committee (AJAC) recommended that the Commonwealth explore with the States the possibility of establishing an independent judicial education centre.[373] The centre's primary function would be to provide courses and other educative material for judges, magistrates, members of dispute resolution tribunals and any other person performing judicial or quasi judicial functions. The AJAC report also recommended the development of continuing education programs for the judiciary and relevant Court staff on gender and cultural issues. These should include training programs for Court officers and the judiciary in the use of interpreters.[374]

Government responses

6.4 The federal Government has already accepted many of these recommendations for improving training, information and education.[375] They will require appropriate additional funding but they will prove very worthwhile particularly for complex contact cases. They will improve the quality of outcomes in some of those cases and may save resources in the medium to long term by emphasising early identification and appropriate non litigious responses. This will reduce the need for litigation and the expenditure of resources when matters become entrenched in conflict. In that sense the initiatives are cost effective. They will contribute to parents being better able to understand the needs of their children, to work at their communication skills and to understand the problems and costs involved in continuing conflict, especially through litigation. Training and educational programs for professionals will assist them to identify potential complex contact cases earlier, to understand better the reasons for the conflict and to tailor responses more effectively to the needs of the particular case. The present response is encouraging but further initiatives are required.

Training professionals

The Family Court

6.5 ***Some existing programs.*** The Family Court is already conducting some special training programs including on issues relating to domestic violence and on gender awareness. These programs have seminars and information kits. There are also developments in awareness programs on Aboriginal and Torres Strait Islander and multicultural issues.[376]

6.6 ***Submissions and consultations.*** One submission suggested that judges need training in basic issues of mental illness, intellectual disability, brain impairment, child development and substance abuse.[377] Another suggested that Court counsellors should have specialist post-graduate training in areas such as family dynamics and personality dysfunctions.[378] A further view was that all Family Court personnel need training on child abuse.[379] The Legal Aid Commissions submitted that stress management courses and courses dealing with people in crisis should be provided to all professionals working in this area.[380] Other suggestions were training in communicating with children and information about children's rights.[381] A Family Court counsellor submitted that there needs to be national meetings of counsellors to exchange ideas and experience.[382] There also needs to be combined meetings of judges, registrars and counsellors to foster understanding and common purpose.[383]

6.7 ***The Commission's view.*** These proposals from submissions and consultations are worthy of further consideration within an integrated training package for the judiciary and Court personnel. Providing information of the effects of violence and conflict on children is particularly important. It should focus on the fact that children may be very adversely affected by violence even if they are not directly subjected to violence or present when violent incidents occur. The Australian Institute of Judicial Administration is already conducting education programs for the judiciary. Its role could be expanded to provide further assistance and services.

Recommendation 6.1

There should be a comprehensive review of the current training programs for the Family Court judiciary and personnel, including judicial registrars, registrars, counsellors and mediators, with a view to setting priorities, promoting quality and consistency in the level of training and avoiding any duplication of services. Training should provide information in particular on the effects of violence and conflict on children, with a focus on the fact that children may be very adversely affected by violence even if they are not directly subjected to violence or present when violent incidents occur. Training needs should be examined by the Court, perhaps in consultation with the Australian Institute of Judicial Administration and the Family Services Council.

Magistrates Courts

6.8 Submissions and consultations said that magistrates and Magistrates Court staff who deal with family law matters have the same need as Family Court personnel for training and education programs and that they should have the same access to these programs.[384] Many complex contact cases in the Family Court begin in Magistrates Courts.[385] The report has discussed the problems that may arise as a consequence of ex parte orders and the lack of counselling and alternative dispute resolution mechanisms in family law matters in Magistrates Courts.[386] There is a widely held view that many magistrates and Magistrates Court personnel are dealing with family law matters without the benefit of knowledge and understanding of developments in family law or of special training in family law.[387] One comment was that some rural magistrates do not even have access to a copy of the FLA.[388]

Recommendation 6.2

Magistrates and Magistrates Court staff dealing with family law matters should receive training and education about the FLA and its procedures, including about domestic violence, the use of ex parte orders and the potential difficulties involved in consent orders for complex contact cases. There should be an effective network for the exchange of information between the Family Court and Magistrates Courts. Information about, and access to, counsellors and alternative dispute resolution methods should also be available to Magistrates Courts. The use of modern technology should be considered in providing information.

Training for children's separate legal representatives

6.9 Separate legal representatives can play a critical role in ascertaining the wishes of children and representing their views.[389] They are therefore central to the successful handling of complex contact cases. They need special training in matters such as child abuse, child development and communicating with children. There are already some training programs for them. These should be evaluated by the legal aid commissions and the Family Services Council.

Recommendation 6.3

The current training of children's separate legal representatives should be evaluated by the legal aid commissions and the Family Services Council, with particular regard to training in the areas of child abuse, child development and communicating with children.

Legal practitioners

6.10 A number of submissions argued that lawyers ought to be trained to identify potential cases early.[390] They emphasised that lawyers can play a significant role in ensuring that their clients are properly advised about the law and its application to their cases. In particular they should be clear that the law's primary

concern in contact cases is the best interests of the child. In this way they can influence their clients' views on what the likely results of litigation could be and what is in the best interests of their children. The NSW Bar Association submitted that as each case is different little is gained by having any special training.[391] Other submissions, however, said that lawyers need training in recognising and dealing with these cases as much as other family law professionals.[392] The same point was made repeatedly in many submissions to the Commission in its reference on equality before the law.[393] Education and training programs could be linked to the introduction of a scheme for national accreditation of specialist family lawyers.

Recommendation 6.4

The Law Council of Australia and the legal professional associations should co-ordinate a review of education and training programs for lawyers to ensure information and assistance for lawyers in dealing with complex contact cases in the Family Court. The associations should also conduct specialist courses on these issues for family law practitioners. Consideration should be given to the desirability and practicality of a national training and education program.

The Law Council of Australia and the legal professional associations should also consider the introduction of national accreditation for specialist family lawyers.

Training for arbitration, counselling and mediation services independent of the Family Court

6.11 There are many counselling, arbitration and mediation services operating independently of the Family Court. Marriage counselling and marriage education organisations can be approved under the FLA.[394] The JSC report recommended that a diploma with appropriate practical experience should be required as the base qualification for mediators.[395] The Government has agreed that mediators should be appropriately qualified. It has referred to the Minister for Employment, Education and Training the basis for implementing the JSC recommendation.[396] The AJAC report proposed that the federal Government establish a body to advise on issues concerning alternative dispute resolution (ADR) with a view to developing a high quality, accessible, integrated federal ADR system.[397] The Commission supports this proposal.

Recommendation 6.5

The Commission supports the proposal of the Access to Justice Advisory Committee that the federal Government establish a body to advise on issues concerning alternative dispute resolution (ADR) with a view to developing a high quality, accessible, integrated federal ADR system. As part of that process the Family Services Council should be requested to review the current levels of training and expertise in existing government and non-government bodies and individuals providing counselling and other services to people in contact cases.

Informing and educating parents, children and the extended family

6.12 ***Submissions and consultations.*** The Family Court at various times and at different registries has conducted special group programs for parents and children. External bodies and agencies also provide different educational services and programs. Submissions and consultations urged the further development of these programs both in the Family Court and outside it. There was strong support for these programs being offered on a wider community basis rather than being focused on the Family Court.[398] For example, Relationships Australia, South Australia Branch, submitted that the need for programs for children should be met through Child Health Services and Child Mental Health Services rather than the Family Court.[399] The legal aid commissions identified the problem that many service providers are unaware of existing programs and unable to refer appropriately.[400] The Family Court Counselling Service in some registries offers some children's groups but present resources are inadequate for greater use of these groups.[401] The NSW Bar Association supported these programs but added that they should be made available before a matter becomes so entrenched that it is intractable. It also submitted that the educative process should be available to members of the wider family.[402]

6.13 ***Major issue: voluntary or mandatory.*** One major issue was whether educational programs for parents should be mandatory and, if they should, to all parents or only to some. Submissions and consultations expressed mixed views on this.

6.14 ***Support for mandatory programs.*** Some submissions favoured mandatory attendance at parental education programs for parents involved in complex contact cases. They argued that the public interest and the needs of the children require training and education for the parents. Parenting requires appropriate skills and behaviour which many people may not have. One submission supporting mandatory programs argued that failure to comply should attract no particular sanction but that the Court may draw its own inference from a failure to attend.[403] The Family Law Practitioners Association of Western Australia submitted that special education and parenting skill courses should be compulsory and offered at any stage of the process. It proposed in particular that attendance in a course should be a pre-filing requirement except in the case of urgent disputes.[404] The Committee on the Role of Psychiatry in the Family Court argued that parents in designated complex contact cases should be involved in mandatory educational programs.[405]

6.15 ***Arguments against mandatory programs.*** Opposition to mandatory attendance in parenting programs is based both on principle and practice. A fundamental contrary argument is that compulsion infringes a person's liberty. A person should not be forced to undergo treatment unless convicted of a criminal offence or found under mental health legislation to have a mental disorder requiring treatment. Even in these circumstances, it is argued, the compulsion should arise only under a Court order and with strict supervision. The other major argument is that participation is beneficial only when it is voluntary and willing.[406] Further, it is said that having coerced people at group programs will adversely affect the experience for those who attend voluntarily. ANZACAS submitted that ordered attendance should only occur if the parties have been assessed as suitable for the particular program.[407]

6.16 ***Submission from the Principal Director of the Court Counselling Service.*** The Principal Director of the Court Counselling Service considered that parenting programs should not be mandatory in all divorce cases because resources are scarce. Available resources therefore should be focused on the complex cases.[408] She said that there are many parenting programs in the United States and that in some counties courses are mandatory. She reported that the Family Court Counselling Service is increasingly using group parenting programs and programs for children in the more difficult cases. She submitted that Court ordered attendance would be useful in some cases.

6.17 ***The Commission's view.*** The Commission considers that therapeutic programs should not be mandatory. Therapy is unlikely to be effective where there is no commitment to the process. However, where a program is offering parental information, education and skills the issue of compulsion is more complex. Whether compulsion is warranted may depend on the nature of the program and the particular circumstances of the case. Where attendance at a course would significantly promote the best interests of the child, compulsion might be justified. However, no child should be compelled to attend any program. Research comparing the effectiveness of voluntary and mandatory programs would be useful.

Recommendation 6.6

Every service providing information, education and training programs on parenting and family relationships should be child focused and child friendly.

The various types of education and training assistance currently offered to parents and children by the Family Court, State and federal government departments and agencies and non-government bodies should be reviewed and co-ordinated to ensure more effective service provision. This review should include written materials available from the Court and elsewhere, current parent and child information and training programs and the provision of telephone counselling, advice and information services. Consideration should be given to using in the most effective way different forms of technology and media, for example, videos and interactive computer programs.

While the Family Court should have an important part in parent and child programs the focus should be on a national and community response and early prevention of difficulties outside the

Court. Greater priority should be given to information, education and training programs immediately before and immediately after separation. In each of those cases services would be more appropriately provided other than by the Family Court.

No child should be compelled to attend any program. Generally courses and programs for parents should not be mandatory. However, where programs focus on parenting information, education and skills there may be cases where compulsory attendance might be justified, depending on the nature of the program and the circumstances of the particular case.

A contact register

6.18 One submission from a Family Court counsellor suggested that a contact register should be developed to provide children of separated parents with a similar service to that provided to adopted children through adoption contact registers.[409] The register would allow children who have lost contact with one parent for a period of time to gain access to information about that parent and the parent's current whereabouts. The Commission recognises the importance of contact to many children who have lost touch with a parent and the success of adoption contact registers. It considers that a similar service would be valuable to many children of separated parents.

Recommendation 6.7

The Commission recommends the establishment of a contact register for children of separated parents. The Family Court and the federal Government should consider the best way of providing a register. Agencies providing similar registers for adopted and fostered children should be contacted to see whether they may be interested in extending their services to cover contact cases.

Appendix 1: List of submissions and consultations

Submissions

M Abbs Submission 45
M Abu-Arab Submission 86
Advisory & Co-ordinating Committee on Child Abuse (ACCCA) Submission 125
PJ Ashton Submission 8
Associate Professor H Astor Submission 96
Australian & New Zealand Association of Children's Access Services (ANZACAS) Submission 97, Submission 119
The Australian Psychological Society Ltd Submission 115
JLA Azar Submission 40
LM Bainbridge Submission 21
The Hon P Baldwin MP, Minister for Social Security Submission 140
MJ Bateman Submission 80
SS Berns Submission 23
M Billington Submission 102
C Blakers Submission 124
D Bowen, Counsellor, Family Court of Australia Submission 88
S Braid Submission 31
J Bridge, NSW Ministry for the Status & Advancement of Women Submission 142
Dr C Brown, Principal Director of Court Counselling, Family Court of Australia Submission 146
GK Burnett Submission 13
J Burrows Submission 117
CD Byrne Submission 28
P Callaghan Submission 39
P Champion Submission 22
Child Protection Service, Flinders Medical Centre Submission 133
Children's Interests Bureau (SA) Submission 130
K Collins Submission 91
Committee on the Role of Psychiatry in the Family Court, affiliated with The Royal Australian & NZ College of Psychiatrists Submission 55
Commonwealth Department of Human Services & Health Submission 112
Commonwealth Director of Public Prosecutions Submission 106
Confidential Submission 48
Confidential Submission 104
Confidential Submission 116
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Copelen Child & Family Services Submission 128
Council of Single Mothers & their Children Inc Submission 111
The Country Women's Association of WA (Inc) Submission 150
G Cox Submission 57
B Darveniza Submission 107
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T De Gennaro Submission 36
Department of Community and Health Services (Tas) Child Family and Community Support Program Submission 59
Department of Health and Community Services (Vic) Submission 138
Department for Family & Community Services (SA) Submission 129
Department of Family Services and Aboriginal & Islander Affairs Submission 99
Domestic Violence Interagency - ACT Submission 69
GA Dyer Submission 136
Elizabeth Women's Community Health Centre Submission 51
Faculty of Child Psychiatry (Qld) Submission 53

Family Law Injustice Group Helping Together (FLIGHT) Submission 64
Family Law Practitioners Association Submission 120
Family Law Reform Association Submission 100
Family Services Council Submission 122
WJ Finger Submission 33
The Hon Justice J Fogarty, Family Court of Australia Submission 145
EF Fowke Submission 25
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T Gee, Mediator, Family Court of Australia Submission 84
S Ghavami Submission 61
MRM Golding Submission 77
IA Goldsmith Submission 113
M Green QC Submission 19
A Guy Submission 50
Dr AE Gyory Submission 15
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J Harrington Submission 92
The Hon Justice PB Hase, Family Court of Australia Submission 118
M Hawton, Counsellor, Family Court of AustraliaSubmission 5
R Hawthorn Submission 109
D Heath Submission 3
N Hocking Submission 76
J Hoffman, A/Director of Court Counselling, Family Court of
Australia Submission 70
G Horman Submission 78
W Ibbs, Mediator, Family Court of Australia Submission 154
Joint submission by Immigrant Women's Domestic Violence Service, Domestic
Violence and Incest Resource Centre and Women's Legal Resource Group Inc Submission 127
Ipswich Women's Shelter Submission 83
M James Submission 20
RW James Submission 16
D Johnson Submission 147
G Johnston Submission 4
H Joiner Submission 32
GW Jones Submission 137
P Kachel Submission 6
N Karmichael Submission 95
E King Submission 62
Dr M King Submission 114
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Law Council of Australia Submission 149
The Law Society of NSW Submission 132
F Lindsay Submission 49
R Logue Submission 42
Lone Fathers' Association Australia Submission 141
S McArthur MP Submission 103
B McLeod, Deputy Community Advocate Submission 134
A Macvean, Counsellor, Family Court of Australia Submission 58
Magarey Institute Submission 82
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Maroondah City Council (Croydon Office) Submission 79
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E Miles Submission 46
J Morrison, Director of Court Counselling, Family Court of Australia
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National Children's & Youth Law Centre Submission 63
National Legal Aid Submission 44
The NSW Bar Association Submission 68
NSW Department of Community Services Submission 108
NSW Ministry for the Status & Advancement of Women Submission 151
JC Norton Submission 110
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EC Orr Submission 93
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V Papaleo Submission 27
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P Parkinson Submission 17
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The Public Policy Assessment Society Inc Submission 10
R Rana Submission 7, Submission 9
Relationships Australia (SA) Submission 89
E Renouf Submission 12
Rockhampton Domestic Violence Network and The Rockhampton Sexual Assault Reference Group Submission 54
MD Shepherdson Submission 11
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JL Taylor Submission 52
C Thackray Submission 143
Toowoomba Community Access Centre Submission 72
Townsville Community Legal Service Inc Submission 41
J Van Grootel Submission 90
Violence Against Women & Children Working Group (Federation of Community Legal Centres Inc Vic) Submission 121
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B Wilson, Registrar, Gosford Court Submission 2
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H Wingate Submission 37
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Women's Refuge Referral Service Submission 135
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Consultations - February 1995

Legal Aid

Family Law Section Leaders from State and Territories, meeting at NSW Legal Aid Commission

NSW

Sydney Registry

Judges
Counsellors
Mediators

Parramatta Registry

Judges
Registrars
Counsellors
Registry Manager

Queensland

Brisbane Registry

Judges
Registrars
Counsellors
Registry Manager
Womens Legal Service, Brisbane
Toowoomba Community Access Centre

Victoria

Melbourne Registry

Judges
Registrars
Counsellors
Mediators
JN Turner, S Pittman, L Oakley, OZ Child
J Pearce and C Monet, representatives of Australian & New Zealand Association of Children's Access Services (ANZACAS)

South Australia

Adelaide Registry

Judges
Registrar
Counselling
Registry Manager
J Rushton, Solicitor, A Rudzitis, Family Court Counsellor and F Clark.

Appendix 2: Analyses of cases and case management: Parramatta registry

This report prepared by the consultants and received by the Commission in February 1995 presents, according to the consultants, a brief summary of the main findings of the analysis of the Parramatta data and not a full report on that research nor a complete analysis and interpretation of the data.

Summary of main findings

The aim of the analysis of case files was to identify, describe and analyse the common features of 'difficult access cases' which differentiate them from cases not defined as 'difficult' or intractable.

Definition of intractability

Cases were defined as difficult or intractable if they were characterised by either

- a high frequency of appearance in Court and/or high utilisation rates of court counselling services and/or

- an ability to agree to (*or accept*) or maintain (*or comply with*) court orders in relation to access.

Sample of cases

Two groups of cases were selected by Court personnel (registrars, registry managers and counsellors). They included

- recent cases identified by court personnel as calling upon considerable Court and/or counselling resources and current cases characterised by an inability to agree or to maintain access orders (n = 46);[410]

- a random sample of current cases not included in the above category(n = 21).

The cases were selected in late 1992, and mostly included cases in which the initiating application was made between 1989 and 1992. Several difficult matters were 'older', with the first initiating application made in 1979 (one cases), 1982 (two cases), 1987 (three cases) and 1988 (four cases). The initiating applications for all the control cases were made between 1990 and 1992 and were fairly evenly spread across the three year period.

Methodology

The files were first examined and summary data sheets were completed in early to mid 1993. They were examined again in January 1995 and the required information was updated and checked. Two cases in which there had been considerable activity since the first examination and coding were then classified as difficult rather than comparison cases because of their length and complexity. The final sample therefore included 48 'difficult' cases and 19 comparison cases.

Coding focused on the following:

1. Utilisation of court resources (eg length of case, number of meetings with registrars, the number of court appearances, counselling, family reports).
2. Individual and family characteristics.
3. Relationship characteristics (nature of the dispute/conflict etc).
4. Nature of orders.
5. Characteristics of the case as presented by the parents (eg applications, supporting evidence, allegations against the other parent).

6. Qualitative judgments about some critical factors that previous research indicates may be involved in maintaining the dispute.

Utilisation of court resources (eg length of case, counselling, family reports)

Information on the involvement of Registrars/Deputy Registrars and Judges in these cases was obtained from the files. This included the length of time involved in the case (from initial application date), the numbers of applications and cross-applications, affidavits, meetings with Registrars, hearing days before a judge and orders. Table 1 presents the mean utilisation of court resources for the difficult and comparison cases, and the results of statistical tests indicating significant differences between the two groups of cases. Figures 1 to 4 show the degree of separation and overlap of the two samples in relation to the length of the case, the numbers of meetings with registrars, days in court and counselling sessions.

Table 1

Mean utilisation of court and counselling resources

	Difficult (n = 48)		Comparison (N = 19)		Test of significance		
	Mean	sd	Mean	sd	t	df	p
Length of time (months)	44.0	30.5	15.9	9.7	5.7	63.3	.0001
Number of applications/cross applications							
Mother (Custodial parent)	3.2	2.0	1.8	0.9	3.38	52.2	.001
Father (Non-custodial parent)	4.9	3.2	1.7	1.2	5.26	54	.0001
Number of affidavits							
Mother	4.7	3.9	2.3	1.5	3.68	64	.0001
Father	5.2	4.2	2.1	1.5	4.40	63.2	.0001
Number of meetings with registrars	15.9	8.6	7.9	4.1	5.10	62.5	.0001
Number of court appearances	4.1	6.9	0.7	1.1	3.30	52.3	.002
Number of days in court	5.4	6.5	1.2	1.8	4.23	61.1	.0001
Total number of counselling sessions	2.2	.9	1.5	.8	2.67	63	.01
Number of Family Reports	1.2	1.1	0.32	.5	4.49	64.7	.0001

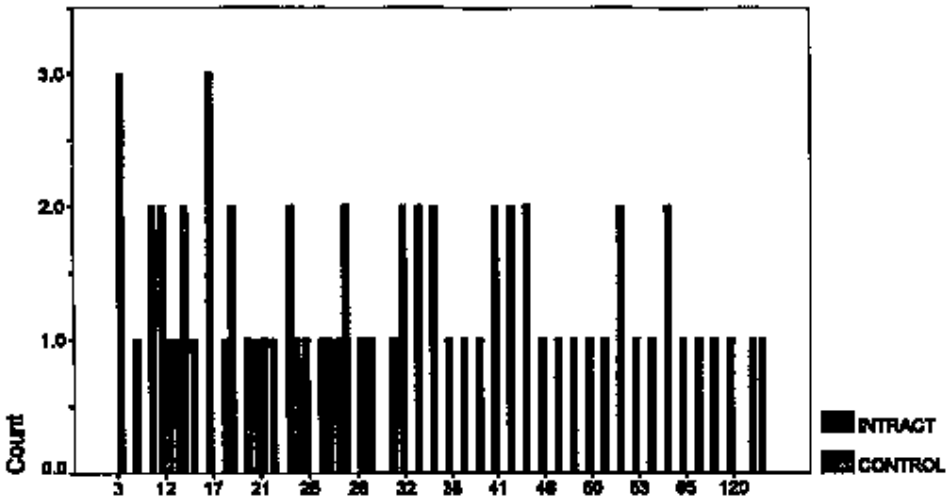

Figure 1. Length of case (months) by type of case.

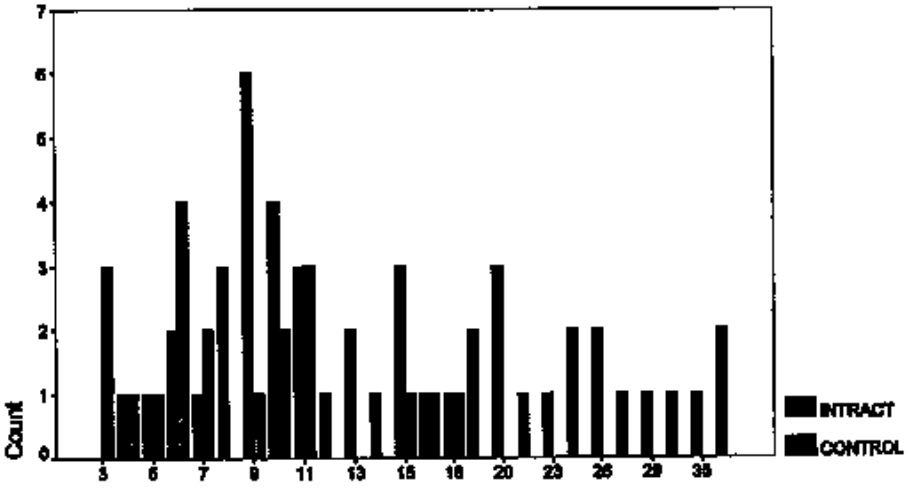

Figure 2. Number of meetings with registrars/deputy registrars by type of case.

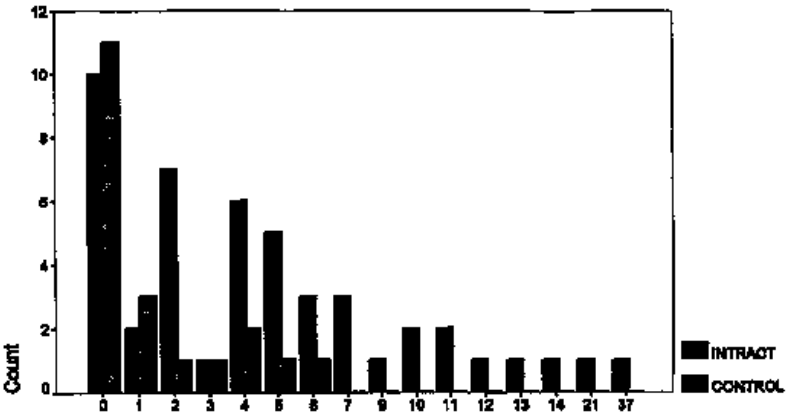

Figure 3. Number of days in court by type of case.

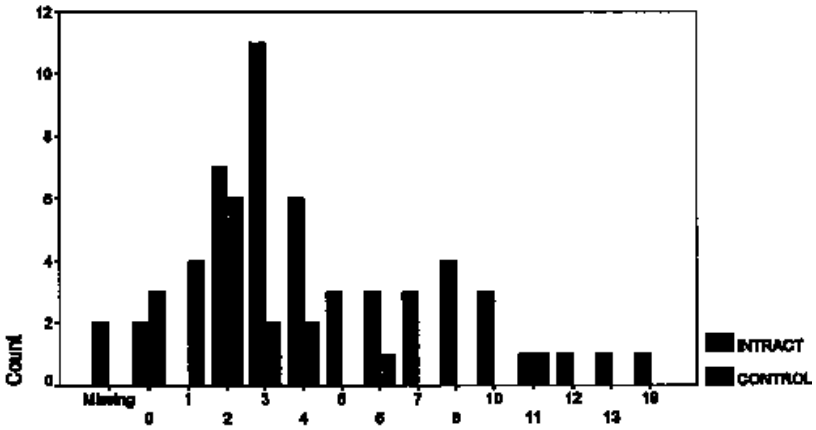

Figure 4. Total counselling sessions by type of case.

These figures show a clear difference between the difficult and comparison cases in the use of court and counselling resources. It is evident that the cases classified as difficult were indeed high users of court resources. They were on average nearly three times as long as comparison cases, involved twice as many applications and cross-applications by non-custodial fathers and custodial mothers, twice the number of meetings with registrars and deputy registrars and four times as many days in court before a judge. There were also significantly more counselling sessions and more family reports in difficult cases compared with comparison cases. The high use of court and counselling resources is further reinforced by the following summary:

- In 62.5% of cases, there were 10 or more meetings with registrars/deputy registrars compared with 36.8% of comparison cases.
- Seventy seven percent of difficult cases went to at least one hearing before a judge compared with 42% of comparison cases.
- Fifty percent of difficult cases involved more than one appearance before a judge, and 25% involved five or more appearances.
- Thirty three percent of court hearings took five or more days for the difficult cases compared with only one (5%) comparison case.
- A family report was prepared in 50% of difficult cases but in only 31.6% of comparison cases.

Characteristics of the parents and the marriage

Table 2 presents a summary of demographic characteristics of the parents and the marriage. None of these features was significantly different between the difficult and comparison groups, although there is a trend for men in the difficult group to be more likely to be employed than those in the comparison group. The length of the marriage, the age of the ex-partners and ethnicity did not differ between the two groups. It appears then that background personal characteristics (as recorded on the files) do not differentiate the difficult cases from the comparison cases.

Table 2

Characteristics of parents and marriage

	Difficult (n = 48)		Comparison (n = 19)		Sig p <
	Mead	sd	Mean	sd	
Age at initiating application (yrs)					ns

Mother	30.1	6.7	31.1	7.5	
Father	33.2	6.3	35.0	5.6	
Mean length of marriage (yrs)	6.7	4.1	7.1	3.5	ns
Time between separation and initiating application (yrs)	0.7	.98	1.2	1.7	ns
	n	%	n	%	Sigp <
Married	35	72.9	14	73.7	ns
Number of years married[411]*					ns
0-5 years	21	46.7	6	33.3	
6-10 years	15	33.3	9	50.0	
11 or more years	9	20.0	3	16.7	
Blended family prior to separation	9	18.8	4	21.1	ns
Born in Australia					
Mother	37	77.1	11	57.9	ns
Father	37	77.1	11	57.9	ns
Employed					
Mother	11	22.9	4	21.1	ns
Father	36	75.0	11	57.9	ns

In the 67 families, there were 117 children: 83 in difficult cases and 34 in the comparison group cases. Table 3 presents various characteristics of the children. About half of each group were the only child in the family and just over half were males. Most of the children were 10 or younger (91.6% of the difficult cases, 87.9% in the comparison cases) and their average age was 4.6 years (difficult) and 5.3 years (comparison). The only significance difference was the greater proportion of children two years of age and younger in the difficult compared with the comparison cases (difficult, 24.4%; 6.1%, comparison) (at the time of the initiating application). Indeed, of the 22 children two years of age and under, only two were in the comparison group.

Table 3

Characteristics of the children

	Difficult (n = 48)		Comparison (n = 19)		Sig p <
	n	%	n	%	
Total number of children	83	70.9	34	29.1	ns
Number of children in family					ns
One	24	50.0	9	47.4	
Two	15	31.3	8	42.1	
Three or more	9	18.8	2	10.5	
Ages of children at separation					
Under two years	20	24.4	2	6.1	.05[412]
Two to four years	26	31.7	16	48.5	
Five to nine years	30	36.6	11	33.3	
Ten and older	6	7.3	4	12.1	
Missing	1		1		

Mean age of children (yrs)	4.6 (2.8)	5.3 (2.7)			ns
Gender of children					ns
Female	36	43.4	16	47.1	
Male	47	56.6	18	52.9	

Relationship characteristics: current status, nature of the dispute/conflict etc

Table 4 presents details about the separation and post-separation period.

Table 4

Characteristics of separation and post-separation period

	Difficult (n = 48)		Comparison (n = 19)		Sig p <
	n	%	n	%	
Current custodial parent					ns
Mother	39	81.3	13	68.4	
Father	6	12.5	3	15.8	
Both	2	4.2	3	15.8	
Other	1	2.1	0		
Was the separation a major surprise?					ns
To the mother	7	25.9	2	14.3	
To the father	14	51.8	9	64.3	
To neither party	21	43.8	5	26.3	
Could not tell from the file	6	12.5	3	15.8	
Who moved out of the family home?					ns
Mother	26	57.7	11	57.9	
Father	19	42.2	8	42.1	
Could not tell	3		0		
New partners					.05[413]
Mother only	11	22.9	6	31.5	
Father only	8	16.7	7	36.8	
Both	12	25.0	1	5.2	
Neither	17	35.4	5	26.3	
Mother as custodial parent	20	41.7	3	15.8	
Children from new relationships					
Mother	7	14.6	2	10.4	
Father	5	10.4	2	10.4	
Both	3	6.3	1	5.2	

In most cases in both groups of cases, the custodial parent was the mother (difficult, 81.3%; comparison, 68.4%). There was a non-significant trend for joint custody to be more common in the comparison group

(15.8%) compared custody to be more common in the comparison group (15.8%) compared with the difficult group (4.2%).

Mothers were a little more likely to move out than fathers and the separation was more likely to come as a surprise to fathers than mothers, especially, though not significantly in the comparison group. The only significance difference was that in difficult cases (25.0%) both parties were more likely to be in new relationships than in the comparison group (one case only, 5.2%); fathers in the comparison group (36.8%) were also more likely than those in difficult cases (16.7%) to be in new relationships when their former partners were not. 'New' children in those relationships were about equally likely in the two groups.

The quality of the relationship

Table 5 presents the frequencies of various aspects of the relationship between the parents, including various types of allegations against the other parent. The clearest difference between the difficult access and comparison cases was the evidence of a history of hostility and conflict in the relationship before separation. Most of the difficult cases (78%) were characterised by conflict between the parties whereas there was evidence of conflict in only 15% of comparison cases. Although the small numbers involved precluded statistically significant differences between the groups in the number of restraining orders and allegations of abuse, inadequate parenting, personality disorder or drug or alcohol abuse, several patterns are evidence (see in Table 5)

- most of the restraining orders occurred in difficult cases in 11 of the 14 cases in which such orders were sought;
- all of the cases in which restraining orders were sought only against fathers were in the difficult group;
- all the cases in which allegations of child abuse were made against both parties were in the difficult group;
- all but one allegation of sexual assault against fathers (either alone or in joint accusations) were in difficult matters; this included cases in which both parents accused the other;
- all three cases in which both parents accused the other or the other's new partner of sexually assaulting one of the children were difficult cases;
- all three cases in which each parent accused the other of drug or alcohol abuse were difficult cases;
- most of the cases in which a parent (mothers: 12 out of 16; fathers: 8 out of 10) was alleged in a Family Report, expert report or by the judge to have a personality disorder were in the difficult group but allegations made by the other parent were just as likely to occur in comparison cases (50%) as in difficult cases (47.0%)
- all the cases in which there were allegations made by one parent against the other about inadequate parenting but these allegations were not matched by or included in the family report, expert report or the judge's comments were in the difficult group; in three cases the allegations were against mothers, in six against fathers and in two against both parties.

Table 5

Aspects of the quality of the relationship

	Difficult (n = 48)		Comparison (n = 19)		Sig p <
Conflict/ hostility ongoing	34	78.3	3	15.8	.001[414]
Allegations/reports of violence					

Mother only violent	4	10.4	1	5.2	ns
Father only violent	17	35.4	7	36.8	
Both violent	11	22.9	4	21.1	
Application for restraining/domestic violence order					ns
Against mother	1	2.1	1	5.2	
Against father	8	16.7	0	0.0	*
Against both	2	4.2	2	10.4	
Allegations of parent abusing children*					
Against mother alone	5	10.4	2	10.5	
Against father alone	9	18.8	5	26.3	
Against both	6	12.5	0	0.0	*
Allegations of sexual assault by parent/partner					ns
Against mother/partner	0	0.0	0	0.0	
Against father alone	4	8.3	1	5.2	*
Against both	3	6.3	0	0.0	*
Allegations of inadequate parenting (in reports)					ns
Against mother alone	4	8.3	1	5.1	
Against father alone	6	12.5	3	15.8	
Against both	16	33.3	5	26.3	
Allegations of drugs/alcohol abuse					ns
Against mother	4	8.3	1	5.2	
Against father	8	16.7	4	21.1	
Against both	3	6.3	0	0.0	*
Allegations of personality disorder					ns
Against mother	9	18.8	3	15.8	
Against father	5	10.4	1	5.2	
Against both	3	6.3	1	5.2	

Court process and counselling

There were few significant differences between the difficult and comparison groups relating to the initiating application. As Table 6 shows, fathers were slightly more likely than mothers to make the initiating application in both groups (fathers, just over 50%; mothers, just under 50%). There was a non-significant trend for *non-custodial* parents in difficult cases to be more likely to make the initiating application than non-custodial parents in the comparison group (difficult, 56.3%; comparison, 36.8%).

Most initiating applications concerned either custody or access (59 cases, 88.1% of cases) or both custody and access (30 cases, 44.8%). Of these, five also involved an application for guardianship (four difficult, one comparison) or an application for property (10 difficult, six comparison) or maintenance (six difficult, three comparison) or both. All except three cases where an application relating to access was not part of the initiating application involved an application for custody (nine difficult cases, three comparison cases; three concerned the dissolution of the marriage only).

- Access enforcement or restraint applications were part of the initiating application in 11 cases (seven difficult, four comparison cases). In the difficult group, three cases involved fathers initiating enforcement proceedings against mothers, two involved mothers seeking restraining orders against fathers in relation to violence and one mother and a grandmother sought warrants for the return of the child from the father. Three comparison cases also involved warrants for the return of the child two against fathers and one against the mother.

The main significant difference between the difficult and the comparison cases was, however, in their likelihood of being transferred from the Local Court. A significantly higher proportion of difficult cases had been transferred from the Local Court (70.8%) compared with 42.1% of comparison cases.

Table 7

Features of Initial Application

	Difficult (n = 48)		Comparison (n = 19)		Sig
	n	%	n	%	
Who made the initial application					ns
Mother	21	43.8	8	42.1	
Father	25	52.1	11	57.9	
Other (grandparent)	2	4.2	0	0.0	
Custodial parent*	21	43.8	12	63.2	
Mother	17	35.4	6	31.6	
Father	4	8.3	6	31.6	
Other (grandparent)	1	2.1	0	0.0	
Non-custodial parent	27	56.3	7	36.8	
Father	21	43.8	7	36.8	
Mother	5	10.4	0	0.0	
Other	1	2.1	0		
What was the initial application about?					
Custody	33	68.8	13	68.4	ns
Access	29	60.4	13	68.4	ns
Property	11	22.9	6	31.6	ns
Maintenance	8	16.7	3	15.8	ns
Divorce	1	2.1	3	15.8	ns
Restraint/enforcement	7	14.6	4	21.1	ns
Transferred from Local Court	34	70.8	8	42.1	.03[415]
Who was mainly responsible for initiating court action?					ns
Custodial	12	25.0	6	31.6	
Non-custodial	28	58.3	11	57.9	
Both	5	10.4	1	2.1	

*Note: Numbers may add to more than 48 (difficult) and 19 (comparison) because there were five cases (two difficult and three comparison) where both parents had custody (joint/shared custody) at the time of the initiating application. Similarly the numbers in relation to the initiating application add to more than 48 and 19 and the percentages to more than 100 because initiating applications frequently concerned more than one matter.

Counselling

In most comparison cases (16, 84.2%) and nearly all the difficult cases (46, 95.8%) one or both parties attended Family Court counselling. Difficult cases were more likely to have been involved in both voluntary and s 62 counselling than comparison cases but less likely to have been involved in Order 24 counselling. Family reports were also more likely to have been prepared for difficult cases than comparison cases, and while 18 difficult cases involved two or more family reports, no comparison cases did so.

Table 8

Use of counselling resources by type of case

	Difficult (n = 48)		Comparison (n = 19)		Signif	
	n	%	n	%		p <
Parties attend counselling	46	95.8	16	84.2		ns
Voluntary counselling	25	54.3*	4	25.0*	4.15	.05
S 62 counselling	39	84.8*	10	62.5*	4.32	.04
Order 24	9	19.6*	9	56.3*	4.31	.04
Family Reports					11.02	.005
One	14	29.2	6	31.6		
Two	13	27.1	0	0.0		
Three or more	5	10.4	0	0.0		
No further counselling recommended	23	53.5	5	31.3		.10**

* Percentages calculated as proportion of cases in which parties attended counselling.
** Marginally significant trend.

In a number of cases, counsellors recommended that no further counselling would be useful. Although this was more likely in difficult cases (53.5%) than in comparison cases (31.3%) the difference was only marginally significant. It is worth noting, however, that while the 'miss' rate was fairly high (20 intractable cases not predicted by this recommendation), when the recommendation was made, 23 out of 28 times, the case involved was a difficult case.[416],[417] Such a recommendation was not, however, significantly related to evidence of a personality disorder in one or both parents. In fact, evidence of a personality disorder was noted (in a family report, expert report or in the judge's comments) in 17 cases, but no further counselling was recommended in only 10 of these cases (58.8%); conversely a recommendation of no further counselling was made in 18 or 42 cases (42.9%) in which no such evidence was found.

Expert reports

External reports from experts were prepared and submitted in 23 cases, mostly in the difficult group (n = 21). Just over half (n = 12) included two or more reports, but none of these were comparison cases. Expert reports were prepared in all the cases involving child sexual assault allegations and all but one of these cases involved at least two expert reports. Most (69.6%) of cases in which expert reports were prepared also involved separate representatives.

Legal representation

Table 9 presents the frequency of appearances by mothers and fathers at which they were and were not legally represented. This included meetings with registrars and deputy registrars. Just over half the mothers in the two groups (difficult cases, 56.2%; comparison, 52.7%) and just under half the fathers (difficult cases,

45.9%; comparison cases, 47.4%) were legally represented on at least half their appearances. There was no significant difference *between the groups* in the proportion of appearance for which mothers or fathers were legally represented. Nor was there any difference between *mothers and fathers* in either the number or the proportion of appearances for which they were legally represented. It is significant, however, that as the later section on enforcement shows, several contempt proceedings initiated by unrepresented fathers were dismissed on a technicality and, in some, costs were awarded against the fathers.

Table 9

Frequency of legal representation by type of case

	Difficult (n = 48)		Comparison (n = 19)		Signif
	n	%	n	%	p <
Proportion of appearances legally represented					
Mothers					ns
0%	15	31.3	8	42.1	
1 to 50%	6	12.5	1	5.2	
51 to 75%	10	20.8	4	21.1	
76 to 96%	17	35.4	6	31.6	
Fathers					ns
0%	15	31.3	7	36.8	
1 to 50%	11	22.9	3	15.8	
15 to 75%	8	16.7	5	26.3	
75 to 97%	14	29.2	4	21.1	
Correlation between numbers of appearances (paired) for which mothers and fathers:					
• Legally represented	80	p<.001	.87	p<.001	
• Not legally represented	54	p<.01	.07		ns

Legal Aid

Tables 10, 11 and 12 presents information about the frequency with which parties applied for and were granted legal aid in the two groups of cases.

The only significant difference between the two groups in their applications for legal aid was that fathers in the difficult group were more likely to seek advice from the Legal Aid Commission than fathers in comparison cases. Mothers tended to be more likely than fathers to apply for legal aid in the difficult access group (66% compared with 50%) but not significantly so.

Table 10

Frequency of applications for legal aid

	Difficult (n = 48)		Comparison (n = 19)		Signif
	n	%	n	%	p <
Mothers					ns
Applied	30	66.0	13	68.4	
Not applied	13	27.1	6	31.6	
Advice only	5	10.4	0	0.0	
Fathers					.04[418]

Applied	24	50.0	11	57.9
Not applied	15	31.3	8	42.1
Advice only	9	18.8	0	0.0

Table 11

Frequency of matters for which parents legally aided

	Difficult (n = 48)		Comparison (n = 19)		Signif
	n	%	n	%	p <
Mothers					
Total granted/ applied	23	76.7	12	92.3	ns
Access	1	4.3	1	8.3	
Domestic violence (DV)	2	8.7	1	8.3	
Property/ maintenance	2	8.7	1	8.3	
Custody/ guardianship/ access	9	39.1	7	58.3	
Custody/access and property maintenance	2	8.7	1	8.3	
Custody/access and DV	7	30.4	1	8.3	
Fathers					
Total granted/applied	15	60.0	6	54.5	ns
Access	4	26.7	1	16.7	
Enforcement	1	6.7	1	16.7	
Property/ maintenance	1	6.7	0		
Custody/ guardianship/ access	7	46.7	4	66.7	
Custody/access and property/ maintenance	2	13.3	0		

Most mothers, and to a lesser extent, fathers who applied were granted legal aid (54%-92%). Fathers in comparison cases tended to be less successful in their applications than mothers in those cases (92% compared with 54%). The matters for which parents were granted aid covered the range of matters but the small numbers mean that statistical tests are not very powerful and may be unreliable. The main trend, however, was for mothers in difficult cases to be more likely to be granted aid in relation to matters concerning domestic violence, often in combination with other matters.

In some cases legal aid was refused for some matters after it had been granted for the same or other matters. This was the case for eight difficult cases (two mothers, six fathers) and five comparison matters(four mothers, one father).

Separate representation of children

Separate representatives were appointed in 24 cases, most of them difficult cases (21 difficult, three comparison). This difference was statistically significant ($X^2 = 4.63$, 1 df, $p < .03$). Separate representatives were appointed in all cases in which allegations of sexual assault were made against fathers or mothers and/or their partners. They were also more likely to be appointed when allegations of abuse ($X2 = 7.97$, 3 df, $p < .05$) and inadequate parenting were made if the allegations of inadequate parenting were matched by evidence in family or expert reports or by judges' comments ($X2 = 12.43$, 3 df, $p < .006$). It is also clear that the cases in which separate representatives were appointed were generally more difficult, although they were

not significantly longer (separate representative appointed, average of 40.5 months; none appointed, 33.5 months). They involved more meetings with registrars and deputy registrars,[419] more days in court,[420] more applications by both parents,[421] and more custody and access orders.[422]

What was the nature of the orders made in court?

The frequency of orders for the two groups of cases is presented in Table 12. Several types of orders show significant differences or trends between the two groups. The number of access orders by judgment and by consent are both significantly higher in difficult cases than in comparison cases. So also is the number of times that access was varied. The average number of access orders by judgment was 1.1 for the difficult group and 0.4 for the comparison group (t (64.9) = 3.00, $p < .004$); the corresponding figures for consent orders were 2.2 and 1.2 (t (63.2) = 3.16, $p < .002$) and the average number of times access was varied was 1.96 for the difficult group, and .74 for comparison cases (t (65) = 3.44, $p < .001$). The main difference between the two groups, however, was in the number of cases in which there were two or more access orders by judgment (14 cases in the difficult group, 29.2% and none in the comparison group), three or more consent orders for access (14 difficult cases, 29.2%; again, no comparison cases) or two or more variations to access orders (31 difficult cases, 64.6%; two comparison cases, 10.5%). A total of 21 cases involved *either* two or more judicial orders or three or more consent orders; seven cases had both and five of the six ongoing matters were included in this group. It is clear then that difficult cases are likely to feature more judicial orders, more consent access orders and more variations to access orders than comparison cases and that te presence of such orders in these cases does not necessarily signal the end of the case, although about half the difficult cases (and the comparison cases) finally ended with consent orders or settlements (see later section).

Another significant difference between the groups was the higher proportion of difficult cases than comparison cases that involved interim orders (*with several of these being changed later either by consent or by judgment*).

Table 12

Characteristics of orders

	Difficult (n = 48)		Comparison (n = 19)		Signif	
	n	%	n	%		p <
Access orders by judgment					7.09	.03
None	21	43.8	11	57.9		
One	13	27.1	8	42.1		
Two or more	14	29.1	0	0.0		
Access orders by consent					7.58	.055
None	2	4.2	2	10.5		
One	19	39.6	11	57.9		
Two	13	27.1	6	31.6		
Three or more	14	29.2	0	0.0		
Number of times access varied					18.24	.001
None	7	14.6	11	57.9		
One	10	20.8	6	31.6		
Two	16	33.3	0	0.0		
Three or more	15	31.3	2	10.5		
Custody orders						ns
None	4	8.3	3	15.8		

One	31	64.6	13	68.4		
Two or more	13	27.1	3	15.8		
Change of custody orders	12	25.0	3	15.8		ns
Maintenance orders					4.99	.08
None	23	47.9	15	78.9		
One	18	37.5	3	15.8		
Two or more	4	8.3	0	0.0		
Property orders						ns
None	24	53.3	11	52.6		
One	18	40.0	6	31.6		
Two or more	3	6.7	2	10.5		
Interim orders	34	72.3	6	31.6	9.37	.002

The frequency of other types of orders such as custody, property and maintenance orders and changes to custody orders did not differ significantly between the two groups, although there was a trend for a higher proportion of maintenance orders in difficult cases compared with comparison cases.

Enforcement action and proceedings

Table 13 presents the frequency of cases in the two groups in which there were enforcement applications. While the majority of cases involving enforcement applications were difficult cases (37 out of 46, 80.4%), the only significant difference between the two groups of cases was for contempt applications; all but one contempt application occurred in difficult cases. Twelve of the 14 cases in which there were applications for warrants for the return of children were difficult cases, but the difference was not statistically significant. Nine of the 11 cases (81.8%) in which parents made applications for enforcement or restraining orders against each other were also difficult cases but again the difference was not statistically significant.

Table 13

Enforcement applications by type of case

	Difficult (n = 48)		Comparison (n = 19)		Signif	
	n	%	n	%		p <
Contempt*	21	43.8	1	5.2	7.48	.006
Warrants for return of children	12	25.0	2	10.4		ns
Restraining orders re access	3	6.3	0	0.0		ns
Restraining orders re other	3	6.3	3	15.8		ns
Restraining orders re violence						
Against mothers only	1	2.1	1	5.3		ns
Against fathers only	8	16.7	0	0.0		.06
Against both	2	4.2	2	10.4		ns

Total number of cases	37	77.1	9	47.4	5.58	.02

*In all cases (all difficult) there were multiple contempt applications, ranging from 2 to 9.

Contempt of access orders

Twenty two matters (21 difficult, one comparison) involved proceedings regarding enforcement of access orders against custodial parents; all except one were mothers. Eleven cases (all difficult) involved multiple applications for enforcement. In seven cases (all except one of which was in the difficult group), the contempt proceedings were reciprocated by action on the part of mothers who also applied for warrants for the return of the child/ren (two cases), injunctions (one) or restraining orders against father's violence (four cases).

Table 14

Outcome of enforcement proceeding

	n = 22 cases	%
Proven	2	9.1
Prima facie case not proven	6	27.2
Withdrawn by applicant	9	40.9
Dismissed for want of prosecution	3	13.6
Dismissed on technicality	3	13.6
Struck out	2	9.1

In both cases where penalties were imposed, the penalties were fines of $1,000 with the fine suspended on condition that mothers enter into recognisances on their own security that for a period two years they obey the lawful orders of the court. These penalties were imposed after 25 January 1990 when the wider range of sanctions under Part XIIIA Family Law Act became available. In both matters where the breaches were proven, the applicants were represented and costs awarded in favour of the applicant fathers. In one other case, although the breaches were not proven, the mother was warned that penalties could be imposed if the access orders were breached again.

The most common outcome of actions for contempt were that the applications were withdrawn. The reasons for withdrawal were not always evident. In three matters, withdrawal followed mothers giving undertakings to deliver the children for access as part of consent orders regarding access. Two matters were struck out, one after a short report from a counsellor regarding the wishes of the teenage son who refused to see his father; costs were awarded against the father. The other matter was struck out following the father's failure to file affidavit material in support of the application. Several other cases were dismissed on a 'technicality' because correct procedure was not followed. For example, in one, there was no evidence of service and in others, affidavits were not filed or not properly drafted. Several of these fathers were unrepresented and had costs awarded against them. In one, there was a costs application against the father's solicitor. This case was dismissed 'in all the circumstances', although the judge was of the view that the mother did breach the orders without reasonable excuse. In another case where a prima facie case was made out regarding nine occasions of alleged breach, the breaches were not proven because the judicial registrar held that the father had deliberately lied to the Court and left reasonable doubt about proof of the alleged breaches of the access order; the father was ordered to pay mother's costs.

Warrants for return of the child/ren

- Fourteen cases included applications for warrants for the return of the child/ren 12 in the difficult group and two in the comparison group. In six matters (five difficult, one comparison), the mother was required to return the child/ren and in eight (seven difficult one comparison), the father had removed the child/ren.

Restraining orders regarding removal of children

Three matters contained applications to restrain the apprehended removal of the children, one from the Sydney metropolitan area and the other two, from Australia. In one matter, the children were removed from Australia by their mother and subsequent warrants were issued which remain in force nearly two years after the initial order.

Restraining orders/enforcement re other matters

Six cases (three difficult, three comparison) involved applications for orders restraining matters other than access. In the difficult cases, the orders concerned payment of maintenance. One concerned spousal maintenance/property division and the other two, child maintenance. In the comparison group, three applications concerned the payment of maintenance (one case), maintenance and exclusive occupancy (one case) and restraint of school enrolment (one case). In all the cases involving maintenance orders, the parties separated before 1 October 1989 when the provisions of the Child Support (Assessment) Act 1989 came into effect.

Restraining order concerning violence

Fourteen cases (11 difficult and three comparison) involved applications for restraining orders against violent conduct and/or contact by one or both parents. The main differences, which was marginally significant ($p < .06$), was that all eight cases in which applications for restraining orders were made against fathers only were difficult cases. There were in addition three cases in each group in which the applications were against mothers only or both parents specifically for restraint of violence. In over half the cases (nine), however, the other parent also made an application for some form of restraint or enforcement, not specifically restricted to restraint of violence.

Access orders and access disputes

Several features of the access arrangements and of the reactions of the parties and others differentiated the difficult from the comparison cases. Table 16 presents the frequency of such features and others that were not significantly different in the two types of case. For example, difficult cases were more likely than comparison cases to be characterised by handover difficulties, by allegations that the child has behaviour problems that are caused by access, by indications that the child has aligned with the custodial parent in resisting access and to a lesser extent by rigid adherence to the access conditions. Supervised access was also more common at some stage in difficult cases than in comparison cases. In most cases (76.7%) the children were under five and a third were under two; all were 10 or younger.

Another significant factor was the reported refusal of children to go on access visits.[423] Evidence included in the files indicated that in 66.7% of the difficult group and 31.5% of the comparison group, one or more children expressed a preference for not wanting to see their non-custodial parent, or refused to do so. Most of the children (78.1%) who reportedly refused access were five years of age or older (20 difficult cases, all six comparison cases) and there was evidence in 19 files (17 difficult, two comparison) that suggested that one or more children had aligned with the custodial parent and were resisting access. Twelve children under five, all in difficult cases, reportedly refused access; four were under two and eight were between two and four years of age. Nine of the 12 were only children and in nine cases, the custodial parent indicated that the children's behaviour was negatively affected by access. (Allegations that children's behaviour problems were caused by access also occurred for older children.) In all these cases, the separation came as a surprise to one partner (seven cases) or one parent was in a new relationship (five cases) or was reported to have a personality disorder (four cases: three mothers, one father).

Table 15

Features of the access arrangements by type of case

	Difficult (n = 48)	Comparison (n = 19)	Sig p <

Handover difficulties	21	43.8	3	15.8	.02
Child refuses	33	68.6	6	31.5	.005
Alleged behaviour problems caused by access	24	50.0	3	15.8	.02
Child aligns with custodial parent and resists access	15	31.3	1	5.3	.05
Supervised access	19	39.6	3	15.8	.05
Rigid adherence to conditions	9	18.8	0	0.0	.10
Mother moves	11	22.9	2	10.5	ns
Father moves	2	4.2	0	0.0	ns
Extended family involvement	22	45.9	6	31.6	ns
Protracted custody dispute for either/both parents	13	27.1	5	26.3	ns
Protracted maintenance dispute	12	25.0	5	26.3	ns
Protracted property dispute	9	18.8	5	26.3	ns

There was also a trend for one parent in the difficult cases to move some distance away (eg interstate). Eleven mothers (22.9%) and two fathers (4.2%) in difficult cases moved, as did two mothers in the comparison group (10.5%). In both cases where fathers moved, difficulties in access occurred after the move, not before it. For mothers in the comparison group, there were problems with access before, for one and after the move for the other. For mothers in the difficult group, about two-thirds (seven out of 11) of the moved followed problems with access; in the other four cases, problems started after the move.

Two factors that were expected to be significant on the basis of previous research the involvement of members of the extended family and the presence of other issues such as custody and property and maintenance were not.

Preliminary content analysis of the affidavits in the initiating applications indicated that disputes about access covered a wide range of issues. The two main issues referred to by custodial parents were the incompetence or abusiveness of the non-custodial parent (17 difficult cases, four comparison cases) and violence (15 difficult cases, four comparison cases). For non-custodial parents, the main issues were the obstructiveness and vindictiveness of the custodial parent in preventing or subverting access (23 difficult cases, seven comparison cases) and the adequacy of care provided by the custodial parent. Other major issues were

- the disruptiveness and irregularity of access
- the children's unwillingness to go on access visits
- accusations that the other parent is undermining the relationship with the child
- the level of flexibility/rigidity (eg one parent wanting more flexibility with the other wanting to stick rigidly to the detail of the order)
- problems with access handover
- issues associated with the involvement of a new partner.

Outcome of the cases

The frequencies of the various outcomes by type of case are presented in Table 17. There were no significant differences between difficult and comparison cases in outcome. About half the cases in both groups settled or ended with a consent order, according to the last notation on the file. Just over 20% of cases in both groups ended with a judicial determination and the remaining 15% of apparently finalised difficult cases and 26% of comparison cases were withdrawn or dismissed. Six difficult cases are still ongoing and it should be noted that the outcomes outlined here are not necessarily final. A case may appear to be settled but then become active again after, for example, a move by one parent. [Final report will provide some example here.]

Table 17

Features of the access arrangements by type of case

	Difficult (n = 48)		Comparison (n = 19)		Sig
	n	%	n	%	p <
Settled/ consent	24	50.0	10	52.6	ns
Withdrawn/dismissed	7	14.6	5	26.3	
Judicial determination	11	22.9	4	21.0	
Ongoing/ appeal	6	12.5	0	0.0	

Summary

The preceding analyses focus on factors which do and do not differentiate difficult cases from comparison cases. These factors fall into two main categories. The first category are those that might be expected to be different because of the way intractable or difficult access was defined and the cases were selected. Cases in the difficult access group were specifically selected to meet the following criteria:

- a high frequency of appearance in court and/or high utilisation rates of court counselling services and/or
- an inability to agree to (*or accept*) or maintain (*or comply with*) court orders in relation to access.

Cases in the comparison group were randomly selected from the cases in which access was an issue. Cases which turned out to be difficult were then included in the difficult group for analysis. The choice of cases was therefore validated by the results which showed that the difficult cases did indeed involve more use of court and counselling resources. They were significantly longer, then involved more meetings with registrars and judicial registrars, more court appearances, more hearing days, more applications and cross-applications by both parties, more affidavits, more family reports and more counselling. Furthermore, there was little or no overlap beyond the mid-range on these features.

The second category of factors which differentiated the two sets of cases may be considered to be indicator or 'risk factors'. They are factors which may be present early in the case and act as 'danger signals' or they may be both or either cause or effect and perhaps occur later in the progression of the case. They include factors such as:

- ongoing conflict in the relationship between the parents
- the presence of children under two years of age at the time of separation
- allegations that the child refuses to go on access visits
- allegations that the child's behaviour problems are attributable to the disruption caused by access
- handover difficulties and rigid adherence to access conditions

- both parents being in a new relationship and fathers not being in a new relationship
- case being transferred from the Local Court.

Several other factors were only marginally significant in the single registry sample or showed trends or patterns which may be able to be tested in further research. The include:

- mutual child sexual abuse or alcohol abuse allegations
- no further counselling recommended.

As indicated earlier, preliminary analysis on the full data set (including Brisbane) indicates that counsellors' recommendations for no further counselling may be an important early 'danger signal'. While such a recommendation 'misses' a number of difficult cases, when it is made, it is generally in the context of cases that prove to be difficult.

Interestingly, none of the demographic factors appear to be significant indicators, in line with the findings of some previous research (Weir, 1985). The age of the parents, whether they were married or in a de facto relationship, the length of their relationship, where they were born and their employment status did not significantly differentiate the two groups of cases.

A further set of factors within the second category includes features of the way the cases were managed by the Family Court and consequences of the difficulty of the cases. For example, difficult cases involved more access orders, both by judgment and by consent, more variations to access orders, more interim orders, more maintenance orders, more supervised access, a greater use of separate representatives for children and more contempt and restrain action than the comparison cases. To some extent, the greater number of orders simply reflects the greater length and number of meetings and appearances at court. At the same time, the greater number of orders etc is an indicator of the court's lack of success with these cases. [Further analysis of the likelihood of a case settling after a consent order or other judicial determination could be included in the full report.]

Predicting difficult by combination of factors

Further preliminary analyses (logistic regression) have been conducted to predict group membership on the basis of their status on a number of factors. In one analysis, for example, group membership (difficult or comparison groups) was predicted with 91% accuracy using the following four variables together:

- ongoing conflict ($p < .004$)
- children under two at the time of separation ($p > .004$)
- children allegedly refusing access ($p < .0035$)
- restraining application as part of initiating application.

Other combinations of variables also predict group membership and this needs to be explored further. These analyses are, however, limited by sample size ($n = 67$). The Brisbane cases would increase the sample size and the power of any analyses.

Preliminary analyses using a crude measure of the number of significant factors involved in each case (eg child refusing access, a child under two, conflict, handover problems, rigid adherence to access conditions, counsellors recommending no further counselling, transfer from the Local Court) indicates that such a composite measure is strongly correlated with the length measures of difficulty.

- Preliminary analyses have also been conducted using various measures to predict the use of court resources (incorporating the length of the case, the number of days in court and the number of meetings with registrars, both multivariately and via factor scores from factor analysis) and

counselling resources (the number of Order 24 s 62, voluntary counselling sessions) rather than group membership. The multivariate analysis yields four factors for court resources whether there were handover problems, conflict, personality disorders and mothers applying for legal aid. Similar analyses for counselling yielded two main factors whether there were interim hearings and whether there was rigid adherence to access conditions. The final report would contain further analyses and interpretation.

Conclusion

Although file analysis is limited by the variable completeness of information on the files, it is clear that these analyses can provide useful information in an area that is noted for its lack of empirical data. It appears that some of the commonly held beliefs about difficult access cases may be upheld and others not supported. The results need to be interpreted with some caution, however, because of the relatively small sample size and their reliance on one registry.

Appendix 3: Relevant recommendations from ALRC Report No 69(I) Equality before the law: justice for women

Access to justice: legal aid

Recommendation 4.1

Legal aid commissions should thoroughly evaluate the gender implications of the alternative dispute resolution processes and adopt best practice guidelines similar to those in the Family Court.

Recommendation 4.2

Legal aid guidelines in all jurisdictions should specifically state that culture and language difficulties affecting an applicant's capacity to cope with the legal system should be considered in determining priority for legal aid. Women's legal services should be funded in consultation with their local communities to target the specific needs of women of non-English speaking background.

Recommendation 4.3

The Commonwealth should take a more directive role in determining legal aid priorities in the interests of women. In particular it should ensure that the needs of applicants in family and civil matters are adequately met.

Recommendation 4.4.

The Attorney-General's Department should undertake a detailed examination of legal aid legislation and guidelines to determine the most appropriate way to achieve this change in priorities. The Attorney-General's Department should determine the changes required to ensure that applicants in criminal, family and civil matters are accorded a minimum level of legal protection and assistance.

Access to justice: specialist women's legal services

Recommendation 5.1

As a part of the National Women's Justice Program funding should be provided by the Commonwealth for an additional women's legal service in each State and Territory. Funding should include a separate component for programs to assist women of non-English speaking background and women in rural areas.

Access to justice: court facilities and processes

Recommendation 7. 2

The Commission affirms its recommendations on interpreters in its report on Multiculturalism and the law.

Recommendation 7.3

In matters involving domestic violence a woman should have a statutory right to appropriate interpreting services when giving evidence and to understand the whole proceedings. The cost of the interpreting service should be borne by the court.

Recommendation 7.4

The Family Court should include in its policy guidelines on interpreters a requirement that its clients be informed of their right to an interpreter and the availability of free interpreting services provided by the court.

Recommendation 7.5

The Commission recommends more funding and training of interpreters to a competent and accredited level. All interpreters should receive gender awareness training and interpreters working within the legal system should be accredited as specialised legal interpreters.

Recommendation 7.6

All courts exercising federal jurisdiction should provide access to child-care facilities, either on site or through arrangement with a local child-care centre. Facilities should include full-time, affordable child-minding services, play areas and suitable toilet and changing facilities. Capital works funds should be provided for capital works to address existing deficiencies on the basis of need. When new courts are built or old ones refurbished, child-care facilities should be included.

Recommendation 7.7

Adequate separate waiting areas and conference areas should be provided to ensure that women are not placed in fear by close proximity with the alleged perpetrator of violence and that they have adequate opportunity to discuss personal matters with their lawyer or support person in private.

Violence and family law

Recommendation 9.1

Family Law Act s 64(1)(bb)(va) should be amended to provide that in considering custody and access orders the court must take into account the need to protect the child from abuse, ill treatment or exposure or subjection to violence or other behaviour, in relation to the child or another person, which physically or psychologically harms the child.

Recommendations 9.2

Family Law Act s 64(1) should be amended to provide that, notwithstanding anything in that section, in making, varying or revoking an order of access by a party to a child, the court must consider whether that party has used or there is a risk that the party will use access as an occasion to expose the child, the other party or any other person to violence, threats, harassment or intimidation.

If the court determines that there has been violence or there is a risk of violence by the non-custodial parent during access visits or on handover, the court must suspend or revoke any existing access order, unless it contains arrangements which the court considers

(i) are in the best interests of the child,

(ii) are not unduly burdensome on the custodial parent and

(iii) minimise the risk of violence.

Before making a further order for access or reinstating an order for access, the court must be satisfied that arrangements for handover and access visits of the child are in the child's best interests, not unduly burdensome on the custodial parent and minimise the risk of violence.

Recommendation 9.3

The Family Court or any court exercising Family Court jurisdiction under the Family Law Act, when making orders for custody and access, must take into account the existence of protection orders made under State or Territory legislation so as to ensure that the protection of women and children is not compromised.

Recommendation 9.4

The Family Law Act should be amended to list the factors to be considered by the court in deciding whether to order separate representation. One of those factors should be in terms similar to section 64(1)(bb)(va), that is, whether the child has been or there is a risk that the child will be abused, ill-treated or exposed or subjected to violence or other behaviour which is psychologically harmful to the child.

Recommendation 9.5

Regulation 16 of the Family Law (Child Abduction Convention) Regulations should be amended to provide that in deciding whether there is a grave risk that the child's return would expose the child to physical or psychological harm or an intolerable situation regard may be had to the harmful effects on the child of past violence or of violence likely to occur in the future towards the abductor by the other parent if the child is returned.

The Commonwealth Contracting Authority should be requested to raise the problem of women fleeing with their children from violent spouses with the monitoring body of the Convention with a view to amending the Convention to make it clear that in deciding whether a child should be returned under sub-regulation (3) the court must take into account the likelihood that the child will be exposed to violence or the effects of violence by one parent against the other.

The Regulations should provide that the child should not be returned if there is a reasonable risk that to do so will endanger the safety of the parent who has the care of the child.

Funds should be provided by the Commonwealth to the Commonwealth Contracting Authority to ensure that in appropriate cases either parent can take action for custody to be determined in the Family Court.

Recommendation 9.8

Court counsellors, Registrars and specialist family lawyers should receive training in the dynamics of family violence, in particular in the disempowering effect on the target of the violence and the effect on the ability to negotiate or reach agreement.

The Family Court should improve procedures to ensure that whether counselling is voluntary or court-ordered, where violence has been a factor in the relationship, counsellors are informed of it before the first appointment.

Where there is a history of violence, the allocation of counsellors should take this into account and the most experienced counsellors should be allocated to the case.

Recommendation 9.9

The Family Law Act should provide that, where the court is considering making an order that the parties attend counselling under s 14(2), 14(2A), 14(4), 14(5), 62(1) and 64(1AA), it shall take into account any allegations of violence or reluctance of a party to attend because of violence, or the need to ensure the protection of a party.

Section 64(1B) should be amended to provide that in considering whether it is appropriate to make an order concerning the custody, guardianship or welfare of, or access to, a child, without requiring the parties to attend a conference, the court shall consider the circumstances relating to violence alleged against a party or found to have occurred.

Recommendation 9.10

Part IIIA of the Family Law Act should be amended to provide that mediation should not take place where violence has occurred or is occurring unless the woman has made an informed choice to be part of this

process and enquiries have been made to establish whether violence has been a factor in the relationship which may affect the ability of the parties to negotiate successfully.

Recommendation 9.11

Sections 70C and 114 should be amended to define the scope of injunctions for personal protection from violence. The definition should include within the scope of injunctions orders for protection from harassment, intimidation, threats and stalking.

Recommendation 9.12

The Family Law Act should be amended to provide that a wilful breach of an order for personal protection under s 70D and s 114 is a criminal offence.

Recommendation 9.13

A 'best practice' model for law and procedure relating to protection orders should be developed by the Commonwealth through the National Women's Justice Program and in consultation with State and Territory agencies.

Training about the dynamics of violence against women in the home should be required for police, court officers, lawyers and members of the judiciary and magistracy when dealing with family law and violence matters.

The National Women's Justice Program should promote and coordinate data collection and research about violence against women in the home, including ongoing evaluation of the effectiveness of protection order.

Appendix 4: The Ontario Supervised Access Pilot Project

The Project

The Ontario Supervised Access Pilot Project operates 14 non-profit centres across Ontario offering formal supervised access. These centres are generally fairly small and have an average annual budget of about $C74 000 ($A70 000). Some centres charge modest users' fees. An evaluation of the Project was undertaken and its report published in July 1994 to provide an empirical base for decisions of the Ontario Attorney-General on the future of the Project.[424] This description of the Project reports on the results of the evaluation.

Services provided

The centres provide two primary services. One service, called supervised access visits, permits non-custodial parents to visit their children at a centre. The visit is supervised by trained staff and volunteers who are required to observe the visit at all times on site and to maintain a neutral stance. Notes describing factual aspects of the visit are written up after each visit. The other service, termed an exchange, permits custodial parents to drop off their children at the centre, where they are picked up by non-custodial parents. Visits occur off-site and are not supervised. At the end of the visiting period children are returned to the centre where they are picked up by the custodial parent.

Number of families

There is considerable movement of families in and out of the centres. Averaged across all agencies, about 30 families were in each program at any time.

Reasons for using services

Many parents (61%) reported that they had used other types of access arrangements prior to their contact with the supervised access centre. The most common reasons given for using supervised access included concerns about abuse of the child, fear of abduction, unresolved conflict between the ex-spouses, wife assault and the parenting ability of the non-custodial parent.

Duration

Overall, participants spent an average of 7.76 months at a supervised access centre, confirming supervised access as a short-term program for most clients. However, the evaluation suggests that the composition of clients changes as programs are in operation for longer periods of time and increasingly consists of longer duration clients. This reduces the ability of the centres to serve short duration clients. According to the co-ordinators of the centres arrangements tend to be of short duration when children are being re-introduced after an absence and when there is conflict between the parents. Arrangements of longer duration are more likely if there are psychiatric disabilities that cannot be managed, alleged or proven sexual, physical or emotional abuse, drug or alcohol abuse or fear of abduction. However, the evaluation also suggests that if judges view supervised access as a short-term measure the longer duration arrangements may be curtailed. Some judges may be inclined to order a change in the access arrangement if a family remains in supervised access for a long time or they may restrict the time that the family will use the service in the original court order.

Safety issues

Relative to the number of visits, critical incidents (that is, where there is possible child abuse or violence) occur very infrequently. In 1993, the period for which there is a good record of visits, 21 critical incidents were reported in a total of 14 812 visits. Agencies took a number of precautions to ensure safety, including careful supervision of visits by staff trained in intervention and conflict resolution strategies, the use of locking doors, alarm systems, security necklaces worn by staff, staggered arrival and departure times for custodial and non-custodial parents, escorts to car, direct electronic access to police and separate entrances for custodial and non-custodial parents.

Client satisfaction

Over 90% of custodial parents and 70% of access parents were satisfied or very satisfied with supervised access. In contrast, only 30% of custodial parents and 11% of non-custodial parents were satisfied with the legal system and 33% of custodial parents and 63% of non-custodial parents were very dissatisfied with the legal system. Both custodial and access parents were satisfied with almost all aspects of supervised access. Over 80% of parents were satisfied with the facilities, staff neutrality, safety for child, safety for parent and staff.

Reporting on visits

One area that seemed to give parents difficulty was reporting on visits. This concern did not vary by type of parent. Only 48% of parents were satisfied, 25% were neutral and 26% were dissatisfied with this feature of supervised access.

Interviews with children

The majority of children, 58%, could not give any account of why they came to the centre and a further 17% had only a minimal understanding. The overall impression from the interviews was that most children were happy with the arrangement of going to the centre and did not experience any significant difficulty in relation to their visits. Although distressing events were relatively uncommon, few children had an understanding that supervised access was required because of the need to supervise the non-custodial parent in the interaction with the children. Most of the children were aware that the staff were there to watch them but they had not specifically related this to the parent needing supervision in the interaction with them. For some it did not seem to matter that they were being watched. They gave the impression that this helped them to feel protected or contained. They showed no evidence of anxiety about why they were being monitored by staff. For others, however, the awareness of being watched, without really understanding why, seemed to be a source of anxiety. For some children, the lack of clarity over why they are visiting the centre can create difficulties.

Post supervised contact

Twenty two of the 121 respondents to the evaluation reported that they had stopped using the centres. Thirteen had moved to an access arrangement that was unsupervised and three to informal supervision. The remaining nine had no access arrangement. Parents were not asked why they were no longer visiting the children.

Impact on legal system

The Project's impact on the legal system was investigated by interviewing 14 lawyers and 13 judges who were experienced in family law and familiar with the Project. Both groups were very satisfied with the program and believed that without it informal supervised access arrangements would be used more frequently. They reported that those arrangements were often unsatisfactory. In addition, without the program the number of parents unable to have any access to their children would increase. Ten judges said that they ordered supervised access more frequently since the Project commenced, two said they did not and one indicated he/she did not know. The usual reason given for ordering more supervised access was that it offered a short-term workable solution that provided a sense of security to those involved. Before the centres began operating cases would have to go to trial or no access would be ordered. However, now that centres were operating, lawyers for both parties were in some cases meeting with each other and, if they came to an agreement, by-passing the court system altogether and approaching a centre directly.

Do the centres reduce litigation and court costs?

The lawyers and judges interviewed also believed that the centres may save the legal system time and money. When asked if court appearances would have increased had the families not used the centres, ten judges said they would. Often, when parents meet over access it becomes a flash point that results in conflict. Using the program had a calming effect on the dispute. Twelve judges interviewed said without supervised access cases would have taken up more court time and nine felt the cases would have involved more

hostility. Judges reported that it was very difficult to find and maintain appropriate informal supervisors for visits. Hostility can be heightened when there are allegations of bias against the supervisor and cases often end up back in court if the supervision arrangement breaks down. According to the judges, the centres act as a safety valve, a diffuser of hostility, and provide an opportunity to move towards a more normalised access arrangement.

Some caution necessary

The evaluation expressed that it was not yet possible to determine whether the Project will save the government money. It suggested that caution was necessary because the views expressed by the judges and lawyers interviewed were not based on systematically collected data. The lawyers and judges in asserting cost savings may have taken into consideration their own savings in time but probably did not consider the costs of operating the Project. Further, some lawyers and judges said the very presence of formal supervised access arrangements increased the number of families requiring the service. Increased use of supervised access might be desirable because there may be cases where contact would not have been given a reasonable opportunity to work but for the centres. In the end it may cost the legal system on average less money to have a family in formal supervised access compared to an informal supervised access arrangement. However, introduction of supervised access could increase costs to government in the short term.

Appendix 5: The Manitoba Access Assistance Program

The Program

The Manitoba Access Assistance Program was established in 1989 as a three year pilot program. It was the first of its kind in Canada. Its aim is to provide a child centred service of assistance to families in resolving their contact problems. It has two service components - conciliation and legal. The primary emphasis is on conciliation, consisting of counselling and negotiation. The legal component becomes significant if after conciliation a parent refuses to co-operate. Then a project lawyer can take contempt proceedings on behalf of the other party. The Program also has a children's group to assist children in the dispute and to assess their attitudes and adjustment to particular issues. External consultants evaluated the Program between June and September 1992.[425]

Funding and staffing

The Project was funded for three years under a federal-provincial agreement for a total of $C432 000. It was staffed by two counsellors, a lawyer and a half time stenographer. The budget enabled access to psychological consulting services and to a program of using volunteers.

Client characteristics

The families referred to the program often have many problems and there is considerable hostility between the access and custodial parents. About half the clients reported a history of violence in the family and more than a third recalled a history of alcohol abuse. Criminal charges were indicated in almost one-quarter of the families - the majority were for spouse abuse. Almost one-third of these parents had been issued a restraining order; more than two-thirds of these involved the access parent only and one-quarter of them were issued against both parents.

Client numbers

There were 169 families involved in the total number of contacts made with clients but the staff identified 99 families they considered to be 'real' clients. The other families either refused the opportunity to become involved in the Program (31) or were found to be unsuitable (39). More than half the direct services provided by the Program were provided to only 20 families. The average cost per client is about $C3 484. It is almost always the access parent who contacts the program, not the custodial parent.

Little supervised contact

Less than 20% of the client families used the Program's supervised access service. The Program does not provide long-term supervision and does not accept cases that require only supervised access. However, most of the key informants indicated that the need for supervised access far exceeds the current availability of this service.

Results

Improvement in the contact situation was indicated in one-third of the cases. An additional 10% were complying with the original court order, which can also be interpreted as a positive result. About one-third of the cases were not satisfactorily resolved and about 10% were referred back to clients' lawyers for a variation in their order. However, there is no way of knowing whether they in fact returned to court, as there was no tracking of clients after they left the Program. Clients' satisfaction with the Program can only be inferred by the results of cases, since the forms designed to measure this aspect were not completed. The few that were completed tended to indicate general satisfaction. However, the clients hostile towards the Program were least likely to have responded. The consultants had no direct data on the impact on the children but assumed that the resolved cases were resolved to the benefit of the children. Opinions of professionals about the Program were varied. There was general agreement among most that the client families needed professional assistance to help them deal with child contact issues.

Observations of the participants

Contact disruption sometimes occurred because of specific and serious concerns about contact, such as the contact parent having a history of violence or alcoholism. For the most part, however, according to most key informants, contact problems are related to unresolved interpersonal difficulties between the custodial and contact parent. The evaluation report considered that the Program could be more effective if it is recognised by statute. As it stands now, when the Program takes a case to court it must proceed in the name of one of the parents. This may be seen as the Program 'siding' with one parent rather than being in a more neutral position to act on its own behalf in the best interests of the child. Program staff maintained that thorough intake screening and assessment help to ensure children will not be at risk as a result of the intervention. Although some custodial parents (usually mothers) may feel threatened by the Program, the staff expressed doubt that the Program compromises their safety. Further, although there is the potential for a parent to attempt to misuse the Program, there are protective devices built into the Program, including screening and pre-service processes, that would prevent inappropriate use of the service. Key informants suggested the establishment of a system to attend to contact disputes at the time they occur, for example, through a 24-hour crisis line.

Evaluation report recommendations

The evaluation report made the following key recommendations.

- The Program should increase its profile in the community and its referral base.
- A strategy should be developed to encourage referrals of custodial parents as well as contact parents. Custodial parents need to be informed of the Access Assistance Program's services.
- Program staff and management should study the cost of operating the Program as it now functions and determine whether caseloads can be increased to make the Program more cost effective.
- The Program should review the level of service provided to high-demand clients to assess whether standards should be established to limit access to service.
- As a child-centred service, it is necessary to know the impact of Program intervention on children. To accomplish this, service outcome measures must be obtained.
- The children's program is acknowledged as a vital component and requires a commitment by staff for the continuing development of skills and knowledge in this area.
- Consideration should be given to expanding the supervised access component. This would include increasing the number of volunteers in the Program.

Appendix 6: The Michigan Friend of the Court

The program

The Michigan Friend of the Court (FOC) has power to investigate and enforce Circuit Court Orders, including enforcement of contact, under the FOC Act.[426]

Contact enforcement

The Friend of the Court must investigate an alleged breach when it receives a written complaint.[427] A party has a right to request the FOC to assist in preparing this complaint. If the FOC believes that the order has been breached it may arrange a meeting with the parties to try to resolve the dispute or refer the parties to a referee as mediator. A referee may hold hearings into enforcement cases and recommend orders. A party can appeal against the recommended orders to a judge who will hear the case de novo. If these options are unsuccessful the FOC may

- apply the local policy on compensatory contact
- bring a contempt action in the court, where the person allegedly in contempt must show good cause for not obeying the order
- petition the court for a change in the contact order.

Grievance procedures

Any grievance about the performance of the FOC may be raised with the Complaints about the Domestic Relations Legal System. However a grievance cannot be used to object to an FOC recommendation or to disagree with a decision of a judge. The FOC must investigate and respond to a grievance within a reasonable period of time, usually 30 days. There is an appeal to the Chief Circuit Court Judge who is the last tier of the grievance procedure.

Effectiveness of the FOC

In 1993 there were 2 201 requests for contempt action for breach of contact orders which were dealt with as follows:

- 660 were resolved by the FOC
- 1633 were resolved by a referee hearing
- 100 were heard by a judge on a referee appeal
- 580 were heard by a judge directly.[428]

Table of Cases

Table of Legislation

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1 There were three original consultants, Dr Graeme Russell, Dr Judy Cashmore and Ms Nicola de Haas. Dr Russell ended his consultancy in May 1994.

2 The term 'contact ' is used instead of 'access ' and is discussed in para 1.6. Other matters of terminology are discussed at para 2.8-11.

3 Number of cases taken from the Family Court Annual Report of 1993-94, being the sum of 1489 contested contact cases in the Family Court of Australia and 122 contested contact cases in the Family Court of Western Australia.

4 The Bill is discussed further at para 1.16.

5 ALRC IP 14.

6 para 2.11.

7 ALRC IP 14.

8 K Gredsted.

9 Council on Parents *Fælles forældremyndighed, samværsvanskeligheder, børnesagkyndig rådgivning*, Report No. 1279, Justice Department, Copenhagen, 1994.

10 ALRC Report 35 *Contempt* AGPS Canberra 1987 ch 13. The *Family Law Amendment Act 1989* (Cth) implemented some of the ALRC's recommendations, including additional sentencing alternatives such as community service orders and weekend detention.

11 FLC *Access - Some options for Reform* AGPS Canberra 1987.
The FLC examined issues relating generally to access. It proposed reform to the substantive law of access and dealt in passing with difficult access cases. It considered that detailed research was necessary to determine more exactly the volume and extent of problems surrounding contact.

12 ALRC Report 69(I) *Equality before the law: justice for women* considered contact from the perspective of violence and family law but did not examine difficult contact cases as such.

13 FLC *Patterns of parenting after separation. A report to the Minister for Justice and Consumer Affairs* AGPS Canberra April 1992. This report recommended a number of changes to the legal terminology of the FLA, including the removal of the terms 'custody' and 'access' and the introduction of parenting plans.

14 The Joint Select Committee of the federal Parliament undertook a reference on certain aspects of the operation and interpretation of the FLA. It reported in November 1992.

15 The Joint Select Committee on Certain Family Law Issues (the Price Committee) has considered the issue of the child support scheme. A report was tabled on 5 December 1994. It makes some reference to the possible relationship between the Child Support Scheme and contact. This is discussed at para 3.73 -5 of this report.

16 cl 61B.

17 cl 64B.

18 cl 63B.

19 Art 9(3). Australia signed the Convention on 22 August 1990 and ratified it on 17 December 1990. The Convention entered into force on 16 December 1991. The Convention creates binding obligations in international law but it is not automatically part of Australian domestic law.

20 s 64(1)(a).

21 eg *In the Marriage of Brown and Pedersen* (1991) 15 Fam LR 173.

22 eg meeting with OZ Child members February 1995; meeting with Family Court judges at the Brisbane registry February 1995; National Children's & Youth Law Centre *Submission 63*; Department of Family Services and Aboriginal and Islander Affairs (Qld) *Submission 99;* R James *Submission 16;* National Legal Aid *Submission 44;* H Joiner *Submission 32;* V Papaleo *Submission 27.*

23 The Convention recognises a number of rights and protections for children, including
- children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together (art 7(1))
- 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, except if this is contrary to the child's best interests (art 9(3))
- parents share duties and responsibilities concerning the care, welfare and development of their children (art 18(1))
- parents should agree about the future parenting of their children (art 34)
- children have a right to protection against sexual abuse and abuse or neglect (art 9(1))
- children have a right to be heard in matters that concern them (art 12(2)).

24 Comment made during a meeting with Family Court mediators at the Sydney registry February 1995.

25 para 3.25-33.

26 para 1.16.

27 Meeting with Registry Manager of the Brisbane registry February 1995.

28 Meeting with Family Court judges at the Brisbane registry February 1995; H Wingate Family Court counsellor *Submission 37;* National Children's & Youth Law Centre *Submission 63;* Magarey Institute *Submission 82.*

29 Meeting with Family Court judges at the Parramatta registry February 1995; G Burnett *Submission 13*.
30 IP 14 para 1.10.
31 id 1.12.
32 W James *Submission 16*.
33 eg National Legal Aid *Submission 44*.
34 Women's Legal Service (Brisbane) *Submission 60*.
35 eg FLIGHT *Submission 64*.
36 eg Parent Support Service *Submission 126*.
37 *Submission 89*.
38 Department of Family Services and Aboriginal and Islander Affairs (Qld) *Submission 99.*
39 Meeting with Family Court counsellors at the Sydney registry February 1995.
40 National Legal Aid *Submission 44*.
41 National Legal Aid *Submission 44*; ANZACAS *Submission 97*.
42 ANZACAS *Submission 97*.
43 Meeting with Family Court counsellors at the Brisbane registry February 1995; meeting with Family Court counsellors at the Parramatta registry February 1995; meeting with Family Court registrars at the Melbourne registry February 1995.
44 Comment made at a meeting with Legal Aid Commission Family Law Section Leaders February 1995.
45 Meeting with Family Court mediators at the Melbourne registry February 1995; meeting with Family Court mediators at the Sydney registry February 1995.
46 Meeting with Family Court registrars at the Parramatta registry February 1995; meeting with the Registry Manager of the Parramatta registry February 1995; meeting with Family Court judges at the Adelaide registry February 1995; meeting with Family Court judges at the Melbourne registry February 1995; meeting with Family Court registrars at the Melbourne registry February 1995.
47 Meeting with A Rudzitis Family Court counsellor Adelaide registry February 1995.
48 See Appendix 2.
49 Meeting with Family Court registrars at the Melbourne registry February 1995; meeting with Family Court registrars at the Parramatta registry February 1995.
50 P Parkinson *Submission 17;* the Public Policy Assessment Society Inc *Submission 10;* Committee on the Role of psychiatry in the Family Court *Submission 55.*
51 Joint submission by Immigrant Women's Domestic Violence Service, the Domestic Violence and Incest Resource Centre and the Women's Legal Resource Group Inc *Submission 127;* meeting with Family Court registrars at the Melbourne registry February 1995; P Champion *Submission 22.*
52 These allegations were often mentioned at consultations and in some submissions. E Renouf *Submission 12*.
53 *Submission 92*.
54 E Renouf *Submission 12*; New South Wales Bar Association *Submission 68*; Law Council of Australia *Submission 149 ;* meeting with A Rudzitis Family Court counsellor Adelaide registry February 1995; meeting with Family Court registrar at the Adelaide registry February 1995; meeting with Family Court counsellors at the Adelaide registry February 1995; meeting with Family Court judges at the Sydney registry February 1995; meeting with Legal Aid Commission Family Law Section Leaders February 1995; meeting with Family Court registrars at the Brisbane registry February 1995.
55 Comment made at a meeting with Family Court registrars at the Sydney registry March 1995.
56 eg R Weir *Access patterns and conflict. A study of access patterns between three groups of separated families differing in their level of post-separation conflict* Counselling Section, Family Court of Australia August 1985.
57 Logistic regression is a statistical technique used in the research project to predict group membership using a combination of characteristics.
58 The number of cases in the sample was 67.
59 ALRC No 69(I) *Equality before the law: justice for women* para 9.16-20.
60 D Demo & A Acock 'The impact of divorce on children' *Journal of Marriage & Family* (1988) Vol 50 619, 642, quoted by A Shepherd 'War and PEACE: a preliminary report and a model statute on an interdisciplinary educational program for divorcing and separating parents' *University of Michigan Journal of Law Reform* (1993) Vol 27 (1) 140.
61 J Healy, J Malley & A Stewart 'Children and their fathers after parental separation' *American Journal of Orthopsychiatry Vol* 60 531-543 quoted by P Amato 'Contact with Non-custodial Fathers and Children's Wellbeing' Australian Institute of Family Studies *Family Matters* December 1993 No 36 32-34; see also E Heatherington, M Cox & R Cox 'Effects of divorce on parents and children' in M Lamb (ed) *Non-traditional Families: Parenting and Child Development* Lawrence Erlbaum Hillsdale New Jersey 233-288 quoted by P Amato 'Contact with Non-custodial Fathers and Children's Wellbeing' Australian Institute of Family Studies *Family Matters* December 1993 No 36 32-34.
62 Comment made at a meeting with Legal Aid Commission Family Law Section Leaders February 1995.
63 A Shepherd 'War and PEACE: A preliminary report and a model statute on an interdisciplinary educational program for divorcing and separating parents' *University of Michigan Journal of Law Reform* 1993 Vol 27 (1) 140 146.
64 id 148.
65 ANZACAS *Submission* 97 and see para 1.5.
66 ALRC 69(I) ch 9.
67 ALRC 67 *Equality before the law: women's access to the legal system (Interim)* 1994 ch 3.
68 ALRC 69(I) *Equality before the law: justice for women.*
69 The Violence Against Women & Children Working Group, Federation of Community Legal Centres (Vic) *Submission 121*.
70 *Submission 121*.
71 Dawn House Women's Shelter *Submission 81*; A Guy *Submission 50*.
72 Domestic Violence Interagency, ACT *Submission 69*; Women of the West for Safe Families for Support and Social Action *Submission 66*; Tasmanian Community and Health Services, Office of the Secretary *Submission 59*; Rockhampton Domestic Violence Network and the Rockhampton Sexual Assault Reference Group *Submission 54.*
73 The Victorian Community Council Against Violence *Submission 87.*
74 eg the Violence Against Women & Children Working Group, Federation of Community Legal Centres (Vic) *Submission 121*.
75 The Violence Against Women & Children Working Group, Federation of Community Legal Centres (Vic) *Submission 121*.
76 Ipswich Women's Shelter *Submission 83.*
77 Women's Refuges Multicultural Service *Submission 85*.
78 eg Elizabeth Women's Community Health Centre *Submission 51*.
79 *Submission 74.*
80 *Submission 85*.
81 *Submission 127*.

82 The research does not establish the validity or consequences of these allegations and applications or whether violence or intimidation was an issue in cases in which there was no allegation on the Court file.
83 The Hon Chief Justice Alastair Nicholson 'The Family Court - 1994 and Beyond' *Australian Family Lawyer* (1995) Vol 10 (2) 1, 9.
84 ALRC 69(I) ch 2.
85 The Hon Chief Justice Alastair Nicholson 'The Family Court - 1994 and Beyond' *Australian Family Lawyer* (1995)Vol 10 (2) 1, 9.
86 ALRC 69(I) *Equality before the law: justice for women* ch 2, 9.
87 eg Lone Fathers Association *Submission 141*; J Ward *Submission 155*; M Shepherdson *Submission 11*; K Collins *Submission 91*; A Hardy *Submission 14*.
88 Lone Fathers' Association *Submission 141*; G Dyer *Submission 136*; P Muller *Submission 67*; Parents Without Rights *Submission 75*; G Cox *Submission 57;* D Whiting *Submission 56*; J Norton *Submission 110.*
89 eg K Collins *Submission 91;* W Finger *Submission 33;* T De Gennnaro *Submission 36;* Lone Fathers Association *Submission 141;* Parents Without Rights *Submission 75*.
90 eg J Poesner *Submission 24*; P Muller *Submission 67;* Lone Fathers Association *Submission 141;* Parents Without Rights *Submission 75.*
91 eg G Dyer *Submission 136*; FLIGHT *Submission 64.*
92 M Hume *Study of child sexual abuse allegations within the Family Court of Australia* A paper to be presented at the Conference of the Association of Family and Conciliation Courts at Montreal, Canada in May 1995. [One case has been counted twice since one child was assessed as no abuse as having occurred and another child in the same case had an inconclusive finding.]
93 Parents Without Rights *Submission 75*.
94 R Gardner 'The Parental Alienation Syndrome and the differentiation between fabricated and genuine child sex abuse' *Creative therapeutics* New Jersey 1987.
95 K Byrne & L Maloney 'Intractable Access: Is there a Cure' *Australian Family Lawyer* (1993) Vol 8 (4) 88.
96 Meeting with Family Court counsellors at the Brisbane registry February 1995.
97 Meeting with Family Court counsellors at the Parramatta registry February 1995; meeting with Family Court registrars at the Brisbane registry February 1995.
98 Meeting with Family Court counsellors at the Brisbane registry February 1995; B Wilson *Submission* 2; H Wingate Family Court counsellor *Submission 37*.
99 eg E Renouf Psychologist *Submission 12;* New South Wales Bar Association *Submission 68 ;* Law Council of Australia *Submission 149;* meeting with A Rudzitis Family Court counsellor Adelaide registry February 1995; meeting with Family Court registrars at the Adelaide registry February 1995; meeting with Family Court counsellors at the Adelaide registry February 1995; meeting with Family Court judges at the Sydney registry February 1995; meeting with Legal Aid Commission Family Law Section Leaders February 1995; meeting with Family Court registrars at the Brisbane registry February 1995.
100 Allegations of personality disorders made by the one party against the other were made in 47% of complex cases and 50% of the control group cases.
101 Comments made during a meeting with Family Court counsellors at the Sydney registry February 1995.
102 A view expressed at a meeting with Family Court registrars at the Parramatta registry February 1995.
103 L Maloney 'Children and the Family Court. Some limitations of the present system' Paper delivered to the Second Australian Family Research Conference Melbourne November 1986.
104 FLC *Patterns of parenting after separation. A report to the Minister for Justice and Consumer Affairs* Australian Government Publishing Service Canberra April 1992 para 3.17-20, 3.36-46.
105 The report uses the term 'Magistrates Courts' as a matter of convenience to describe the Courts of summary jurisdiction which vary in their titles in the States and Territories. In some jurisdictions such as NSW these Courts are known as Local Courts.
106 The Hon Chief Justice Alastair Nicholson 'The Family Court - 1994 and Beyond' *Australian Family Lawyer* (1995) Vol 10 (2) 1, 9.
107 ALRC 69(I) *Equality before the law: justice for women* para 9.16-22.
108 Meeting with Family Court mediators at the Sydney registry February 1995; meeting with representatives of the Women's Legal Service (Brisbane) February 1995; meeting with Family Court counsellors at the Sydney registry February 1995.
109 ALRC IP 14.
110 Comment made at meeting with Family Court judges at the Sydney registry February 1995.
111 eg meeting with judges at the Melbourne registry February 1995; meeting with judges at the Sydney registry February 1995.
112 Meeting with Parramatta counsellors at the Parramatta registry February 1995.
113 Meeting with the Registry Manager of the Brisbane registry February 1995.
114 Meeting with Family Court counsellors at the Parramatta registry February 1995.
115 Meeting with Family Court registrars at the Parramatta registry February 1995; meeting with the Family Court Registry Manager of the Parramatta registry February 1995.
116 Meeting with Family Court judges at the Sydney registry February 1995.
117 Meeting with Family Court judges at the Adelaide registry February 1995.
118 AJAC report para 9.21.
119 eg WOW Safe! *Submission 66*. Many submissions to the ALRC in the course of its reference on equality for women also made this complaint; see ALRC 69(I) *Equality before the law: justice for women* para 4.16.
120 ALRC 69(I) para 4.4-22.
121 WOW Safe! *Submission 66*.
122 eg Parents Without Rights *Submission 75.*
123 Access to Justice Advisory Committee *Access to Justice An Action Plan* Commonwealth of Australia 1994 Overview xxxvii.
124 Two other non litigious approaches are new support services discussed in chapter 4 and information, education and training programs discussed in chapter 6.
125 Government response to JSC report 6.
126 eg meeting with Legal Aid Commission Family Law Section Leaders February 1995; Dr C Brown Principal Director of the Family Court Counselling Service *Submission 146*; Committee on the Role of Psychiatry in the Family Court *Submission 55*; meeting with Family Court judges at the Melbourne registry February 1995; meeting with Family Court mediators at the Sydney registry February 1995; meeting with Family Court registrar at the Adelaide registry February 1995; meeting with Family Court counsellors at the Sydney registry February 1995.
127 Butterworths *Australian Family Law* Vol 2 *Family Court Practice* para 8050, 24,057.
128 IP 14 para 4.6-10.
129 IP 14 question 4.6.
130 NSW Bar Association *Submission 68*; Law Council of Australia *Submission 149.*
131 Women's Legal Resources Centre (Parramatta) *Submission 74*.
132 J Hoffman Acting Director of Counselling Tasmania *Submission 70*; also Department of Family Services and Aboriginal and Islander Affairs (Qld) *Submission 99*.

133 J Hoffman Acting Director of Counselling Tasmania *Submission 70*.
134 eg G Burnett *Submission 13.*
135 eg comment made at a meeting with Legal Aid Commission Family Law Section Leaders February 1995.
136 Comment made at a meeting with Family Court registrars at the Sydney registry March 1995.
137 C Watson *Submission 47*.
138 eg New South Wales Bar Association *Submission 68;* Law Council of Australia *Submission 149.*
139 See Appendix 2 Table 8.
140 P Parkinson *Submission 17*. FLA s 62A provides that the Court may direct a counsellor or welfare officer to furnish a report in matters relating to a child's welfare. It may be used in evidence. These are known as Family Reports - see Order 25 of the FLA.
141 See para 3.39.
142 IP para 4.11.
143 IP Table 3.
144 eg Department of Family Services and Aboriginal and Islander Affairs (Qld) *Submission 99*; P Champion *Submission 22*; P Parkinson *Submission 17*; Relationships Australia, South Australia Branch *Submission 89*.
145 Magarey Institute *Submission 82*.
146 The Public Policy Assessment Society Inc *Submission 10*.
147 *Submission 126*.
148 eg R Rana *Submission 9*.
149 ANZACAS *Submission 97*.
150 *Submission 132*.
151 *Submission 121*.
152 *Submission 121*. Training and education of judges and Court personnel is discussed in chapter 6 and is also discussed in the ALRC Report No 69(I) *Equality before the law: justice for women* para 9.80. See Appendix 3 of this report for the relevant ALRC recommendation.
153 Appendix 2.
154 *Submission 118*.
155 Legal Aid *Submission 44*; Parent Support Service *Submission 126*; meeting with Legal Aid Commission Family Law Section Leaders February 1995.
156 eg G Burnett *Submission 13*.
157 Comment made at a meeting with Family Court registrars at the Sydney registry; February 1995; comment made by a Family Court judge at the Parramatta registry February 1995.
158 (1994) FLC 92-461.
159
- where there are allegations of child abuse, whether physical, sexual or psychological
- where there is an apparently intractable conflict between the parents
- where the child is apparently alienated from one or both parents
- where there are real issues of cultural or religious differences affecting the child
- where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child's welfare
- where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges in the child's welfare
- where there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the child
- where, on the material filed by the parents, neither seems a suitable custodian
- where a child of mature years if expressing strong views, the giving of effect to which would involve changing a long-standing custodial arrangement or a complete denial of access to one parent
- where one of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practicable purposes exclude the other party from the possibility of access to the child
- where it is proposed to separate siblings
- where in a case affecting children none of the parties are legally represented
- applications in the court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties

These guidelines are not intended to be exhaustive.

160 N Eidelson & V Papaleo 'Separate representation in the light of Re K' *Australian Family Lawyer* (1995) Vol 10 (2) 36. In the eight months preceding *Re K*, the Legal Aid Commission of Victoria received an average of almost eight orders per month for separate representation. In the three months following *Re K* , that Commission received an average of 35 orders per month. This compares with the increase in orders received by the NSW Commission over the equivalent periods being 25 per month before *Re K* to 35 per month after. The Qld Commission received 14 per month before and 15 after and the SA Commission received 15 prior and 17 after.
161 National Legal Aid *Submission 44*.
162 J Harrington *Submission 92*.
163 *Submission 53*.
164 *Submission 59*.
165 eg meeting with Legal Aid Commission Family Law Section Leaders February 1995; Dr C Brown Principal Director of the Family Court Counselling Service *Submission 146*; Committee on the Role of Psychiatry in the Family Court *Submission 55*; meeting with Family Court judges at the Melbourne registry February 1995; meeting with Family Court mediators at the Sydney registry February 1995; meeting with Family Court registrar at the Adelaide registry February 1995; meeting with Family Court counsellors at the Sydney registry February 1995.
166 *Submission 125*.
167 The Hon Chief Justice Alastair Nicholson 'The Family Court - 1994 and Beyond' *Australian Family Lawyer* (1995) Vol 10 (2) 1, 9.
168 ibid.
169 eg meeting with Family Court counsellors at the Sydney registry February 1995; meeting with Family Court mediators at the Sydney registry February 1995; meeting with Family Court counsellors at the Adelaide registry February 1995; meeting with Family Court counsellors at the Brisbane registry February 1995.
170 *Submission 55*.
171 A Macvean *Submission 58*.
172 T Gee Family Court mediator Melbourne *Submission 84*.

173 Issues related to orders for costs and separate representatives are discussed in chapter 5. Their special training needs are discussed in chapter 6.
174 H Wingate Family Court counsellor *Submission 37*.
175 P Champion *Submission 22*.
176 See para 1.5.
177 J Harrington *Submission 92*.
178 eg G Burnett *Submission 13*.
179 Women's Legal Resources Centre (Parramatta) *Submission 74*.
180 IA Goldsmith Psychologist *Submission 113*.
181 ANZACAS *Submission 97*.
182 *Submission 44*.
183 NSW Bar Association *Submission 68*.
184 eg meeting with registrars at the Parramatta registry 2 February 1995.
185 Dr C Brown 'Children - heard but not seen: Family reports' in *Fifth National Family Law Conference* Handbook Burwood Resort Hotel Perth Western Australia 8-12 September 1992, 263.
186 NSW Bar Association *Submission 68*.
187 *Submission 53*.
188 eg meeting with Family Court counsellors at the Sydney registry February 1995.
189 FLA s 62, s 18.
190 JSC report para 3.98-101.
191 D Bagshaw Chair Family Services Council *Submission 122*. Also ANZACAS *Submission 97*.
192 Chapter 4 recommends contact supervision services and chapter 6 suggests a co-ordinated and more extensive system of information, training and education.
193 The Committee on the Role of Psychiatry in the Family Court *Submission 55*; The Australian Psychological Society Ltd *Submission 115*.
194 National Children's & Youth Law Centre *Submission 63*.
195 Government response to JSC report 4.
196 AJAC report para 11.6.
197 ALRC Report No 69(I) *Equality before the law: justice for women* para 9.66-7 and recommendation 9.10. This recommendation is reproduced in Appendix 3 of this report.
198 The Hon Chief Justice Alastair Nicholson 'The Family Court - 1994 and Beyond' *Australian Family Lawyer* (1995) Vol 10 (2) 1, 3.
199 Dr C Brown Principal Director of Court Counselling 'Working with families in conflict' Paper presented to the August 1994 meeting of the Australian Psychological Society.
200 N Karmichael *Submission 95*.
201 NSW Bar Association *Submission 68* and Law Council of Australia *Submission 149*.
202 eg G Burnett *Submission 13*; E Renouf *Submission 14*; the Law Reform sub-committee of Family Law Practitioners of Western Australia *Submission 120;* New South Wales Bar Association *Submission 68*; Law Council of Australia *Submission 149*; meeting with Family Court judges at the Brisbane registry February 1995; Women's Legal Resources Centre (Parramatta) *Submission 74*; meeting with Family Court counsellors at the Sydney registry February 1995; meeting with Family Court counsellors at the Melbourne registry February 1995.
203 Government response to JSC report Recommendation 19.
204 The Hon Chief Justice Alastair Nicholson 'The Family Court - 1994 and Beyond' *Australian Family Lawyer* (1995) Vol 10 (2) 1, 3.
205 ibid.
206 AJAC report para 11.35-8.
207 S Bordow & J Gibson *Evaluation of the Family Court Mediation Service* Family Court of Australia Research and Evaluation Unit Research Report No 112.
208 AJAC report para 11.25.
209 *Submission 96*.
210 Government response to JSC report 4.
211 *Submission 89*.
212 ALRC report 69(I) rec 9.10, para 9.65-7.
213 eg G Burnett *Submission 13*; Law Reform sub-committee of Family Law Practitioners of Western Australia *Submission 120*; National Legal Aid *Submission 44*; meeting with Family Court mediators at the Sydney registry February 1995.
214 H Wingate Family Court counsellor *Submission 37*.
215 D Bowen Family Court counsellor *Submission 88*.
216 eg J Johnston & L Campbell *Impasses of Divorce. The Dynamics and Resolution of Family Conflict* The Free Press New York 1988.
217 ibid.
218 ibid 246. It was found that overall 82.5% of couples initially reached agreements and after six months 70% had kept them. After two-three years, 44% of families had kept the agreements and 16% had renegotiated their own agreements using the original plan as the basis. A small group of 3% had sought another mediator. Thirty six percent had returned to court, half to a mediator and half to a judge after further mandatory mediation had failed. Of these 36%, 23% returned more than once and comprise those who were not able to be helped by impasse-directed mediation. In terms of improvement in the co-parenting relationship there was a marked diminution of expressed hostility and conflict. Both verbal and physical aggression had decreased to levels commensurate with the general population. Children's adjustment measures however, did not show improvement.
219 Dr C Brown *Submission 146*.
220 ibid.
221 M Hawton Family Court counsellor *Submission 5*; J Picton Family Court mediator *Submission 35*; meeting with Family Court counsellors at the Brisbane registry February 1995; meeting with Family Court counsellors at the Parramatta registry February 1995.
222 eg H Astor *Submission 96*.
223 G Burnett *Submission 13*.
224 P Champion *Submission 22*.
225 eg meeting with Family Court Counsellors at the Adelaide registry February 1995.
226 Dr C Brown *Submission 146*.
227 Dr C Brown *Submission 146*; G Burnett *Submission 13.*
228 para 3.63.
229 IP para 4.18.
230 See Appendix 2 Table 12.
231 NSW Bar Association *Submission 68*.

232 ANZACAS *Submission 97*.
233 G Burnett *Submission 13*.
234 eg Relationships Australia, South Australia Branch *Submission 89*; see also para 2.30, 2.33.
235 Law Reform Sub-committee of the Family Law Practitioners Association of Western Australia *Submission 120*.
236 See para 2.33.
237 Unresolved separation issues are discussed at para 3.57-8.
238 Comment made at a meeting with Family Court judges at the Brisbane registry February 1995.
239 Meeting with Family Court judges at the Sydney registry February 1995.
240 Comment made at a meeting with Family Court registrars at the Brisbane registry February 1995.
241 IP para 4.24.
242 eg P Champion *Submission 22*.
243 *Submission 121*.
244 Comment made at a meeting with Family Court judges at the Melbourne registry February 1995.
245 eg ANZACAS *Submission 97*.
246 Comments made during a meeting with Family Court judges at the Brisbane registry February 1995.
247 National Legal Aid *Submission 44.*
248 C J Richardson *Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results. A report prepared for the Department of Justice Canada* February 1988, 37-8.
249 Comment made during a meeting with Family Court registrars at the Melbourne registry February 1995.
250 J Neville Turner *OZ Child* Meeting February 1995.
251 P Champion *Submission 22*; V Papaleo *Submission 27*.
252 IP para 2.9, 4.51.
253 M Shepherdson *Submission 11*; J Van Grootel *Submission 90*; FLIGHT *Submission 64.*
254 Rockhampton Domestic Violence Network and the Sexual Assault Reference Group *Submission 54;* ANZACAS *Submission 97;* Law Reform sub-committee of Family Law Practitioners of Western Australia *Submission 120;* meeting with representatives of the Women's Legal Services (Brisbane) February 1995.
255 *Submission 140.*
256 Cm 2745 1994.
257 The Parliament of the Commonwealth of Australia, Joint Select Committee on Certain Family Law Issues *The Operation and Effectiveness of the Child Support Scheme* AGPS November 1994 para 17.114-19.
258 M Bateman Solicitor *Submission 80.*
259 FLA s 64(5) provides inter alia that access can be supervised by a Court counsellor or welfare officer and that they may give assistance to carry out compliance.
260 ANZACAS *Fact Sheet* Canberra October 1994, 2. Also see in respect of the United States and Canada, R Strauss and E Alda 'Supervised Child Access. The Evolution of a Social Service' *Family and Conciliation Courts Review* (1994) Vol 32 (2) 230.
261 ANZACAS *Submission 97* lists the following as services operating in Australia: Ozanam Village, Lewisham (NSW); Toowoomba Community Access Centre Association (Qld); Corridors of Access (Brisbane); Anglicare, West Perth (WA); ACT IV League (ACT); Salvation Army, Dickson (ACT); Marymead Children's Shelter (ACT) and Sommerville Community Services Access Service (Darwin). It also advises that the following are in the process of being established: Campbelltown Community Service (NSW), Bowden Brompton Access Service (South Australia), New England Access Service (NSW), Bunbury Children's Access Service (WA) and Redland's Children Access Services (Qld).
262 Government response to the JSC report rec 42, 29.
263 IP 14 question 4.18.
264 See Oz Child *Submission 101;* S Berns *Submission 23;* Royal Australian Psychological Society *Submission 55;* Women's Legal Service (Brisbane) *Submission 60;* J Harrington *Submission 92;* Children's Interest Bureau (South Australia) *Submission 130;* meeting with Family Court judges at the Brisbane registry February 1995; meeting with Family Court counsellors at the Sydney registry February 1995.
265 P Friedlander Barrister *Submission 1*.
266 B Wilson Registrar Gosford Local Court *Submission 2*.
267 *Submission 125.*
268 eg meeting with Family Court registrars at the Melbourne registry February 1995; meeting with Family Court registrars at the Parramatta registry February 1995; meeting with judges at the Adelaide registry February 1995.
269 H Lindsay, Social Worker Maroondah City Council (Croydon Office) *Submission 79*.
270 *Submission 120.*
271 eg the Violence Against Women and Children Working Group, the Federation of Community Legal Centres (Vic) *Submission 121*; the joint submission from the Immigrant Women's Domestic Violence Service, the Domestic Violence and Incest Resource Centre and the Women's Legal Resource Group Inc *Submission 127*
272 The Women's Legal Service (Brisbane) *Submission 60*.
273 eg Office of the Status of Women, the Department of the Prime Minister & Cabinet *Submission 131*.
274 ANZACAS *Submission 97*.
275 Meeting with Family Court judges at the Brisbane registry February 1995; meeting with Family Court judges at the Adelaide registry February 1995; meeting with Family Court judges at the Parramatta registry February 1995; meeting with Family Court judges at the Melbourne registry February 1995.
276 Meeting with Family Court judges at the Parramatta registry February 1995.
277 *In the Marriage of M and M Bieganski* (1992-1993) 16 Fam LR 353.
278 ANZACAS *Submission 97*; meeting with Legal Aid Commission Family Law Section Leaders February 1995; meeting with Family Court judges at the Brisbane registry February 1995; meeting with Family Court registrars at the Brisbane registry February 1995.
279 ANZACAS Submission 97; meeting with Legal Aid Commission Family Law Section Leaders February 1995.
280 *Submission 97.*
281 See para 1.5.
282 The submission took the Ontario Project budget and the population of families serviced by it. It argued that a service of similar extent and budget in Australia would be assisting 2 635 families at a cost of $56 for each family for fortnightly contact assistance, a total amount of $2 million a year.
283 eg G Burnett *Submission 13.*
284 R Strauss & E Alda 'Supervised Child Access: the Evolution of a Social Service' *Family and Conciliation Courts Review* (1994) Vol 32 (2) 230, 242.
285 J Pearson and J Anhalt 'Enforcing Visitation Rights' *Judges Journal* Spring 1994 3, 4.

286 See IP ch 3.
287 MCL 552.501.
288 State Court Administrative Office, Friend of the Court Information derived from the *Model Friend of the Court Handbook*, Lansing Michigan.
289 A referee may hold hearings into enforcement cases and recommend orders. If a party appeals against these orders the appeal is heard de novo by a judge.
290 See IP para 3.47-49.
291 IP para 3.39-49, 4.25.
292 Department of Family Services and Aboriginal and Islander Affairs (Qld) *Submission 99.*
293 eg R Rana *Submission 9*; The Public Policy Assessment Society Inc *Submission 10*.
294 G Burnett *Submission 13*.
295 *Submission 97*.
296 *Submission 44*.
297 The Law Reform Sub-Committee of Family Law Practitioners of Western Australia *Submission 120*.
298 This was a view expressed by some Family Court judges at a meeting at the Melbourne registry February 1995.
299 This was a view expressed by a Family Court registrar at the Adelaide registry February 1995.
300 J Pearson and J Anhalt 'Enforcing Visitation Rights' *The Judges Journal* Spring 1994 3.
301 IP para 4.26.
302 eg C Watson *Submission 47*; Copelen Child and Family Services (Family Resource Centre) *Submission 128*.
303 Dawn House Women's Shelter *Submission 81*.
304 G Burnett *Submission 13*; National Legal Aid *Submission 44*.
305 ANZACAS (*Submission 97*) thought that information could be better dispensed by the use of information sessions, legal aid commissions, booklets and pamphlets.
306 IP question 4.17.
307 eg G Horman *Submission 78*.
308 *Submission 55*.
309 eg National Legal Aid *Submission 44*.
310 The Law Reform Sub-Committee of Family Law Practitioners Association of Western Australia *Submission 120*.
311 ANZACAS *Submission 97*; National Children's and Youth Law Centre *Submission 63*.
312 The law relating to the initial granting of contact orders is dealt with in ch 2.
313 See recommendations in ch 2.
314 See recommendations in ch 3.
315 See recommendations in ch 4.
316 s 112AD.
317 s 112AB.
318 s 112AC.
319 s 112AE.
320 s 112AD. The Family Court when sitting in New South Wales does not have all of these sanctions available to it: see para 5.24.
321 See para 2.6.
322 Meeting with Family Court judges at the Brisbane registry February 1995; meeting with Family Court judges at the Parramatta registry February 1995.
323 Comment made at a meeting with Family Court judges at the Brisbane registry February 1995.
324 Meeting with Family Court judges at the Brisbane registry February 1995; meeting with Family Court registrars at the Brisbane registry February 1995; meeting with Family Court registrars at the Parramatta registry February 1995.
325 Comment made at a meeting with Family Court judges at the Adelaide registry February 1995.
326 S Hirst and G Smiley 'The Access Dilemma - A Study of Access Patterns Following Marriage Breakdown' *Conciliation Courts Review* (1984) Vol 22 (1) 41, 49 Table 12. Those cases judicially determined also had the lowest rate of the most satisfactory access arrangement which was 'regular and flexible'.
327 D Bagshaw *Submission 122*. The Family Services Council was established by the Attorney-General in November 1994 to provide advice to the Parliamentary Secretary to the Attorney-General on the Family Services Program.
328 The Hon Justice Fogarty of the Family Court *Submission 145.*
329 s 112AD.
330 JSC report para 7.43-7 quoting Hon Justice A Smithers 'Enforcement in relation to Access and Contempt Issues' Fifth National Family Law Conference Perth September 1992 356.
331 Government response to JSC report 32.
332 See the views of the DPP at para 5.33.
333 In April 1995 the FLC began a project on collecting and monitoring Family Court data on penalties for breach of the Court's orders: see para 5.19.
334 The Hon Chief Justice A Nicholson 'The Family Court and Beyond' *Australian Family Lawyer* (1995) Vol 10 (2) 1, 4.
335 *The Family Law Reform Bill (No 2) 1994* deals with property issues.
336 See ch 2.
337 M Green QC *Submission 19*.
338 G Burnett *Submission 13.*
339 Meeting with Family Court judges at the Brisbane registry February 1995; meeting with Family Court registrars at the Brisbane registry February 1995; meeting with Family Court registrars at the Parramatta registry February 1995.
340 FLA s112AD(5).
341 eg G Burnett *Submission 13*; Magarey Institute *Submission 82;* G Dyer *Submission 136*.
342 Women's Legal Resources Centre (Parramatta) *Submission 74.*
343 eg P Friedlander *Submission 1*; M Green QC *Submission 19.*
344 M Green QC *Submission 19*.
345 JSC report para 7.70-1.
346 Meeting with Family Court registrars at the Brisbane registry February 1995; meeting with Family Court counsellors at the Parramatta registry February 1995; meeting with Family Court judges at the Melbourne registry February 1995; meeting with Family Court registrars at the Melbourne registry February 1995; meeting with Legal Aid Family Law Section Leaders February 1995.
347 FLA s 118; *Family Court Act 1975* (WA) s 82A.
348 FLA s 118 (1)(b).

349 FLA s 118 (1)(c).
350 Meeting with Family Court judges at the Sydney registry February 1995; meeting with Family Court judges at the Melbourne registry February 1995; meeting with Family Court counsellors at the Sydney registry february 1995; meeting with Family Court judges at the Adelaide registry February 1995.
351 *Submission 66*.
352 FLA s 117(1); *Family Court Act 1975* (WA) s 73A(1).
353 FLA s 117(2); *Family Court Act 1975* (WA) s 73A(2).
354 eg G Burnett *Submission 13*; and meeting with Legal Aid Commission Family Law Section Leaders February 1995.
355 *In the matter of P (a child); Separate Representative* (1993) FLC 92-376. Nicholson CJ and Fogarty J held that a separate representative should be treated as or analogous to a 'party' for the purpose of costs after examining the wide power to order costs under the FLA s 117(2) and the wide power of Courts to order costs against non parties. Strauss J dissented on the ground that making the separate representative liable for costs or putting the representative in a similar position to a party may undermine the capacity or the will to achieve what the separate representative is intended to achieve.
356 IP para 4.59, question 4.40.
357 FLIGHT *Submission 64*; Parents Without Rights *Submission 75*.
358 eg R Rana *Submission 7*; National Legal Aid *Submission 44*; Women's Legal Resources Centre (Parramatta) *Submission 74*; National Children's & Youth Law Centre *Submission 63*.
359 *Submission 106*.
360 IP question 4.40.
361 CCH Australia *Australian Family Law and Practice* Vol 2 para 60-010.
362 ANZACAS *Submission 97*.
363 See para 1.16.
364 Rec 12, 13.
365 Rec 6, 8.
366 Rec 16.
367 Rec 17.
368 Rec 21.
369 Rec 22.
370 Rec 23, 24.
371 Rec 25.
372 Rec 50.
373 AJAC report Action 15.4, para 15.97.
374 id Action 2.4, para 2.92-7.
375 Government response to JSC report, 1-6.
376 Family Court of Australia *Annual Report* 1993-94, 5-9.
377 P Champion *Submission 22*.
378 G Burnett *Submission 13*.
379 WA Advisory and Co-Ordinating Committee on Child Abuse *Submission 125*
380 National Legal Aid *Submission 44*.
381 National Children's & Youth Law Centre *Submission 63*.
382 H Wingate Family Court counsellor *Submission 37.*
383 ibid.
384 Comment made by the Registry Manager of the Brisbane registry February 1995.
385 Meeting with Family Court judges at the Melbourne registry February 1995; meeting with Family Court registrars at the Parramatta registry February 1995; meeting with Family Court registrars at the Brisbane registry February 1995; meeting with Family Court judges at the Sydney registry February 1995. See Appendix 2 for the research conducted at the Parramatta registry on the number of complex cases which begin in Magistrates Courts.
386 See para 2.54-6.
387 Meeting with Family Court registrars at the Brisbane registry February 1995.
388 Comment made during meeting with Family Court registrars at the Brisbane registry February 1995.
389 See para 3.19-24.
390 eg R Hawthorn *Submission 109*; The Law Reform sub-committee of Family Law Practitioners of Western Australia *Submission 120*; Women's Legal Resources Centre (Parramatta) *Submission 74*.
391 *Submission 68*.
392 eg ANZACAS *Submission 97*; The Australian Psychological Society Ltd *Submission 115*; The Law Reform Sub-committee of Family Law Practitioners of Western Australia *Submission 120*.
393 ALRC 69(I) *Equality before the law: justice for women* para 9.64, rec 9.8, para 9.80.
394 CCH Australia Ltd *Australian Family Law and Practice* Vol 2 para 58-588.
395 JSC report para 4.59.
396 Government response to JSC report Rec 19.
397 AJAC report Action 11.3.
398 eg National Children's and Youth Law Centre *Submission 63*; G Burnett *Submission 13;* meeting with Family Court judges at the Sydney registry February 1995.
399 *Submission 98.*
400 National Legal Aid *Submission 44*.
401 National Legal Aid *Submission 44*.
402 *Submission 68.*
403 A Macvean *Submission 58*.
404 *Submission 120.*
405 *Submission 55.*
406 eg National Children's and Youth Law Centre *Submission 63*; meeting with Family Court judges at the Adelaide registry February 1995.
407 *Submission 97*.
408 Dr C Brown, Principal Director of the Family Court Counselling Service *Submission 146*.
409 D Bowen Family Court counsellor *Submission 88*.
410 Twenty cases which were selected in a study of 'difficult cases' supervised by Justice Coleman were added to this group.
411 Refers to length of relationship whether married or in de facto relationship.

412 Chi-square (1 df) = 4.67, $p < .04$.

413 Chi-square (1df) = 5.95, $p < .05$.

414 Chi-square (1 fd) = 15.35, $p < .0001$.
* Includes sexual abuse.

415 Chi-square (1 df) = 4.71, $p < .03$.

416 Furthermore preliminary analysis on the full data set (including Brisbane) indicates that counsellors' recommendations for no further counselling is a significant factor ($p < .009$) and may be an important 'danger sign'. Of the 47 cases in which counsellors recommended no further counselling, 39 were difficult cases.

417 The presence or absence of a recommendation for no further counselling was not significantly related to the important length/difficulty measures such as the length of the case, the numbers of meetings with registrars or the number of days in court. This is probably because of the difficult cases that are 'missed' by such a recommendation.

418 Chi-square = 6.61, 2 df, $p < .04$.

419 The mean number of meetings with registrars and deputy registrars was 16.9 in cases in which a separate representative was appointed compared with 11.9 when there was no separate representative ($\underline{t} = 2.46$, 65 df, $p < .01$).

420 The average number of days in court in cases with and without a separate representative was 7.6 compared with 2.3 ($\underline{t} = 3.08$, 28.6 df, $p < .005$).

421 The average number of applications for mothers in cases with and without a separate representative was 3.7 compared with 2.4 ($\underline{t} = 2.91$, 64 df, $p < .005$); for fathers, the corresponding figures were 4.8 and 3.0 ($\underline{t} = 2.34$, 64 df, $p < .025$).

422 The average number of judicial access orders in court in cases with and without a separate representative was 1.4 compared with 0.7 ($\underline{t} = 2.12$, 32.6 df, $p < .05$); for consent orders, 2.5 compared with 1.6 ($\underline{t} = 2.13$, 65 df, $p > .05$); and for custody orders, 1.6 and 1.0 ($\underline{t} = 2.87$, 32.6 df, $p < .01$).

423 Chi-square = 5.47, 1 df, $p < .02$.

424 'Evaluation of the supervised access pilot project' Final Report presented to Ms Rachele Dabraio, Ministry of the Attorney General, Policy Development Division, Toronto, Canada in July 1994.

425 'Evaluation of the supervised access pilot project' Final Report presented to Ms Rachele Dabraio, Ministry of the Attorney General, Policy Development Division, Toronto, Canada in July 1994.

426 MCL 552.501.

427 State Court Administrative Office, Friend of the Court Information derived from the *Model Friend of the Court Handbook*, Lansing Michigan.

428 The total number of actions taken is 2 973 which is more than the number of requests because some of the matters would have had action taken by more than one of these bodies.