Diana Bryant AO, QC

**Question 10:**

**What changes could be made to the family law system,**

**including to the provision of legal services and private**

**reports, to reduce the cost to clients of resolving family**

**disputes?**

I submit that provision of post-order services, particularly in cases where the proceedings have been acrimonious, is lacking and has been for many years.

Section 65L of the Family Law Act 1975 (Cth) (the Act) provides for supervision of orders which goes part way to what I am suggesting. However, where once the use of s65L was common, in the last decade at least, such orders have rarely been made. This is because the requirement is for family consultants to be involved and those employed by the courts did not have the capacity to do this work. Priority had to be given to risk assessment and Family Reports.

In my view many families who have their parenting cases determined by a judge (and potentially many who settle their cases before a hearing) would benefit from assistance from a professional after the orders have been made. It is in my experience, naïve to think that parties who have been in conflict for months and years will suddenly be able to communicate well simply because a judge has made final orders. Usually their conflict has a deeper conflictual basis than just the orders that are in dispute in the litigation; that is one of the things that makes family law litigation so complex.

Hence left to their own devices, disputes arise and one or other party wants to vary orders, or does not comply with orders, giving rise to further litigation. I appreciate that this can occur from changes in the circumstances of the parties’ post-litigation, but without the means of resolving these issues, they will be left to re-commence the litigation, absent reaching agreement.

One solution is the appointment of many more family consultants who could be ordered to supervise orders using s65L. This has two shortcomings however. The first is that it requires the courts to fund all the supervision when the parties ought to be contributing to the cost to the extent they can. Secondly, in the event of a dispute, absent agreement, there is no mechanism for resolving it.

In response to the recognition by family courts and substantial evidence in the empirical and clinical literature that divorce does not end patterns of high parental conflict, some [international] jurisdictions have introduced a practice known as ‘Parenting Coordination.’[[1]](#footnote-1)

In the USA “the courts and family law professionals have recognised for years that high-conflict litigants consume a majority of the court’s time. Reducing the time that these families spend in court has been essential for the [U.S] system and even more so for the children involved.”[[2]](#footnote-2) Parenting Coordination models have been added to the spectrum of ADR processes to provide intensive case management for chronically conflicted child custody situations.[[3]](#footnote-3) These were developed “in response to the frustration of judges that certain families were repeatedly returning to court to handle disputes about their parenting plans, a few courts [in the U.S.A] began to delegate (with the consent of the parents) limited areas of authority over child issues to experienced mental health professionals and attorneys to settle parental disputes in an immediate, non-adversarial, court-sanctioned forum.” [[4]](#footnote-4)

Parenting coordination evolved in response to the needs of family courts overburdened by high-

conflict parents and parties who take advantage of the legal system to resolve their nonlegal child-

related issues.

Parenting coordination evolved in response to the needs of family courts overburdened by high-

conflict parents and parties who take advantage of the legal system to resolve their nonlegal child-

related issues

PART 1 PARENTING COORDINATION MODEL

What is ‘parenting coordination’?

Parenting Coordination developed out of a need to address the problem of children’s exposure to harmful ongoing parental conflict in what [are] commonly termed “high-conflict” case[s].[[5]](#footnote-5)

“Parenting Coordination is a non-adversarial dispute resolution process that is ***court ordered or agreed upon by divorced and separated parents*** who have an ***ongoing pattern of high conflict*** and/or litigation about their children”.[[6]](#footnote-6) “The essential function of parenting coordination is to help families develop, implement and monitor viable ***parenting plans***.”[[7]](#footnote-7)

Parenting coordination is a child-focused ADR process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children’s needs, and with ***prior approval of the parties and/or the court,*** making decisions within the scope of the court order or appointment contract.[[8]](#footnote-8)

Parenting Coordination is designed to help parents implement and comply with court orders or parenting plans, to make timely decisions in a manner consistent with children's developmental and psychological needs, to reduce the amount of damaging conflict between caretaking adults to which children are exposed, and to diminish the pattern of unnecessary re-litigation about child­ related issues. Parenting Coordination is appropriate pre- or ***post-decree, though it is most widely used as a post-decree model of intervention for parents who have demonstrated an inability to resolve their disputes*** through other dispute resolution and adversarial processes such as mediation, initial settlement conferences, and custody evaluations.[[9]](#footnote-9)

Parenting Coordination [is] generally reserved for those high conflict parents who have demonstrated their longer term inability or unwillingness to make parenting decisions on their own, to ***comply with parenting agreements and orders,*** to reduce their child-related conflicts, and to protect their children from the impact of that conflict.[[10]](#footnote-10)

“Sullivan (2013) notes that the execution of a ***parenting coordination agreement*** as the basis for the appointment of the PC is essential, and that it should include the following: the authority for the role (by state statute, rule of court, or other derivation) and a checklist of the scope of PC authority; the term of appointment; the mandated procedures; the authority for accessing necessary information; a process for handling of fees; a grievance procedure; and, if possible, quasi-judicial immunity in performing the role.”[[11]](#footnote-11)

|  |
| --- |
| AFFC Taskforce Definition of Parenting Coordination  Association of Family and Conciliation Courts, 2005, p. 2 |
| Parenting coordination is a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children’s needs, and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.  The overall objective of parenting coordination is to assist high conflict parents to implement their parenting plan, to monitor compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, healthy and meaningful parent-child relationships. Parenting coordination is a quasi-legal, mental health, alternative dispute resolution (ADR) process that combines assessment, education, case management, conflict management and sometimes decision-making. |

It is important to note that, “parenting coordination is ***not appropriate for all high conflict cases***. Parenting coordination is unlikely to be appropriate for cases involving coercive controlling violence, incompetence due to severe mental illness, uncontrolled substance abuse, or ongoing child maltreatment. Other contraindications include the parents having had multiple prior [parenting coordinators], making one or more complaints to a licensing board or engaging in criminal activity, such as vandalism or theft. In addition, cases involving chronic violations of the PC Agreement, parenting plan or orders are unlikely to be appropriate and may require supervision of the court.”[[12]](#footnote-12)

Distinguished from mediation/arbitration

“While parenting coordination and mediation/arbitration processes are similar, there are important distinguishing characteristics. Both involve an impartial third party assisting parents to settle disputes that arise regarding parenting issues through mediation and, if the parents reach an impasse and are unable to resolve their dispute, to arbitrate the dispute and arrive at a binding decision. However, typically, mediation/arbitration is used to resolve specific disputes as they arise and those identified in the mediation/arbitration agreement. In contrast, parenting coordination typically involves an identified duration of service, usually between 18 and 24 months and assists in a more ongoing manner with repeated implementation issues (Fidler, 2012, p. 241). One important distinction is that in mediation/arbitration, the mediator/arbitrator has the authority to make decisions on any issues that were predetermined prior to the start of service. In other words, if the parents have agreed that any issues may be decided by the mediator/arbitrator if the parents cannot reach an agreement, then the issue may be arbitrated. In contrast, a PC’s jurisdiction lies within the bounds of a pre-existing parenting plan or court order. Existing parenting plans or court orders cannot be altered substantially or permanently by a PC (Direnfeld, 2015). Further, PCs cannot make binding decisions on disputes related to relocation of a child, custody, or substantial permanent changes to parenting time schedules (Fidler, 2012).”[[13]](#footnote-13)

Parenting coordinator role

Parenting coordination is a hybrid method that melds both legal and mental health functions (Beck et al., 2008; Fidler, 2012; Fidler & Epstein, 2008), and Parenting Coordinators (‘PCs’) usually come from a mental health background, psychologists, psychiatrists, social workers, or a legal background.[[14]](#footnote-14) A PC is a professional, either agreed upon by both parents or, in some American States, appointed by the court to use mediation and educational methods to help parents whose post-separation relationship is characterized by high conflict implement and adhere to their parenting plans (Higuchi & Lally, 2014).[[15]](#footnote-15) Where mediation and education efforts are unsuccessful, PCs have the power to arbitrate parenting disputes and make binding decisions.[[16]](#footnote-16)

Parenting coordination is typically non-confidential, and PCs frequently solicit the input of third parties such as therapists, teachers, physicians, children’s counsel, or parenting assessors.[[17]](#footnote-17)

PCs function outside the formal family court process, but they are accountable to the court; write and file their decisions as court orders, reports, or arbitration awards; and adhere to court rules and procedures, and their work (decisions and conduct) is subject to judicial and professional review.[[18]](#footnote-18)

Because the Parenting Coordinator (‘PC’) makes ***recommendations and/or decisions*** for the parties and possibly reports to the court, the PC should be appointed by and be responsible to the court. This ***delegation of judicial authority*** is a serious issue and courts should only appoint qualified professionals. The power and authority inherent in the role of the PC are substantial whether stipulated by the parties or assigned by the court. Therefore, it is important that any jurisdiction implementing a parenting coordination program adopt and adhere to guidelines for PC practice and programs.

Based on a review of the AFCC Guidelines, the available literature on parenting coordination, and interviews with PCs, Hayes (2010) identified three major roles of PCs: [[19]](#footnote-19)

1. Implementation of the existing parenting plan;
2. Compliance with the existing parenting plan; and
3. Resolving any issues and disputes that arise in a timely fashion.

“It is important to note that parenting coordination is ***typically a process that occurs once a parenting plan has been developed, with the mandate of the PC to assist the parents with implementation of the existing plan and to recommend the addition of clauses to the plan in order to clarify any implementation issues that may arise*** (Fidler, 2012). It is not the responsibility or role of a PC to create a parenting plan, although a PC can make recommendations to the court for revisions and modifications to existing parenting plans if no agreement can be reached with the parents. The purpose of parenting coordination is to assist parents in managing their conflict so that they can ***implement their parenting plan in the best interests of the children***.”[[20]](#footnote-20)

RESEARCH on EFFECTIVENESS OF Parenting coordination

“Despite the growing interest in and use of parenting coordination in the last several decades, relatively little research has been reported examining the effectiveness of the process, the attitudes of professionals and members of the public towards it, the characteristics of parties who use parenting coordination, and characteristics and qualifications of PCs (Brewster et al., 2011). Most research on the effectiveness of parenting coordination has been anecdotal rather than empirical,”[[21]](#footnote-21) such as the following:

“Judges have observed the reduction in court dockets as their high-conflict cases court ordered to parenting coordination resolve issues outside of their courtrooms; attorneys often chronicle increased cooperation in cases where parents were battling relentlessly before the [parenting coordinator] was appointed; and, mental health professionals sometimes report better adjustment for children when a [parenting coordinator] is involved with the parents.”[[22]](#footnote-22)

For more detailed summaries of surveys, studies and research visit:

* <http://www.crilf.ca/Documents/Parenting%20Coordination%20-%20Dec%202017.pdf> (page 12-18); and

Linda Fieldstone, Mackenzie Lee, Jason Baker and James McHale ‘Perspectives on Parenting Coordination: Views of Parenting Coordinators, Attorneys, and Judiciary Members’ (2012) 50, No.3 *Family Court Review, Association of Family and Conciliation Courts*, pg 441

<<https://onlinelibrary-wiley-com.ezp.lib.unimelb.edu.au/doi/epdf/10.1111/j.1744-1617.2012.01459.x>>

* <https://onlinelibrary.wiley.com/doi/epdf/10.1111/fcre.12326>

PART TWO:

AUSTRALIAN CONTEXT

Constitutional hurdle in austraila

The Australian Constitutional framework places restrictions on judges’ ability to delegate to third parties any judicial or quasi-judicial functions. If family law judges were legislatively permitted to order parties to attend to work with a PC who was delegated determinative decision-making powers, there may be risk of improper delegation, and thereby be unconstitutional.

A conceivable way around this constitutional hurdle, would be to design a parenting coordination model based on creating, rather than determining rights: a model of parenting coordination that can be characterised as administrative rather than determinative, centred around consent and voluntariness amongst parents, so that there is no improper delegation of decision-making powers, conflicting with Chapter III of the Constitution.

To a large degree this is what is envisaged with the Government’s proposal for Parenting Management Hearings. The Explanatory Memorandum states that Parenting Management Hearings will be “a consent based forum” and parties cannot be compelled to participate. Something similar could be setup for Parenting Coordination.

So for example the limits of the decisions the Parenting Coordinator (PCC) could impose would be for example:

* If two or more persons are to have parental responsibility for a child- the form of form of consultations those parties are to have with one another about decisions to be made in the exercise of that responsibility;
* The communication a child is to have with another person or persons;
* any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child;

The powers given to the PCC would enable the variation or suspension (but not complete discharge) of an order relating to a person or persons with whom a child is to live or spend time and the allocation of parental responsibility where there is an order for equal shared parental responsibility.

The variations could be contained in a Parenting Agreement or a Consent Order.

Parenting Coordination is in use in Canada (Ontario and British Columbia), United States and South Africa.

I imagine many of the existing NGOs would be able to provide for Parenting Coordination which could be means tested. Ideally, the Act would make provision for Parenting Coordination as it does with supervision of orders under s65L.

Mediation/Arbitration

This model is also potentially useful in dealing with disputes post-order. As explained above it is more a “one-off’ process rather than an ongoing one but may have its use. Previous proposals to examine it as a model have faltered because of many concerns, but it has been primarily examined as a pre-court form of ADR. Many of the concerns (lack of legal advice; power imbalance; confusion of roles and the like) do not create the same problems for a post-orders regime where there are existing orders and the problems relate to ensuring they are working, or are workable.

**Question 11:**

**What changes can be made to court procedures to**

**improve their accessibility for litigants who are not**

**legally represented?**

**Question 12:**

**What other changes are needed to support people who**

**do not have legal representation to resolve their family**

**law problems?**

The present complex structure of having two courts with virtually concurrent jurisdiction (save for the appellate function) is an impediment to all litigants but more particularly to litigants in person.

Within the existing structure a single point of entry where parties could be directed to the most appropriate court is desirable and could be implemented easily, but needs some adequate resourcing, particularly if Registrars and Family Consultants are to undertake that function.

A number of other measures would assist:

(a) Simplification of Part VII of the Act

(b) One set of Rules for both the FCoA and FCC

(c) One set of forms for both the FCoA and FCC

(d) Revision and renumbering of the entire Act to make it more user friendly

I support the development of specialist clinics to provide pro bono advice and training. They may be best located in legal aid commissions for practical purposes.

**Question 14:**

**What changes to the provisions in Part VII of the *Family***

***Law Act* could be made to produce the best outcomes for**

**children?**

A simplification of Part VII of the *Family Law Act* appears to have overwhelming support.

Whatever the perceived virtue in 2006 of the “legislative pathway” currently mandated under the *Family Law Act,* I submit that the jurisprudence of the past 11 years has established that it is:

confusing for litigants,

unduly legalistic,

results in complexity in the running of hearings,

requires longer judgments, and

is unnecessary to achieve the result of arriving at the best interests of the child.

The last point is so because the parties will inevitably bring to the court for adjudication the issues they want determined. Thus, if equal time is in issue it will be because the parties require the court to decide the matter. Requiring the court to independently “consider” it within the rubric of ‘best interests’ makes no difference to the task of the court.

The principles that ought inform Part VII should retain a child’s best interests as the

paramount consideration. The consideration of best interests should take into account

each child’s age and stage of development. The focus of any legislation must be on

the best interests of the child and not on perceptions of what may or may not be “fair”

to parents.

Separation of parents ought not sever relationships between the child and his/her

parents and other family members important to them. If the child has had the benefit

of a close relationship with both parents then substantial involvement of both parents

in the life of that child post separation should be seen as a benefit. What constitutes

substantial involvement need not be the subject of legislative definition.

Parenting arrangements post separation for children should not expose a child or

parent to harm, abuse or violence or the risk of these occurring. The harm for the child

ought include the harm of being subject to inadequate parenting and/or continuing

conflict between parents including the continuation of court proceedings.

The *Family Law Act* should continue to respect the rights of children as set out in the

United Nations Convention on the Rights of the Child.

Ultimately the family courts need to have a discretion to consider a child’s best

interests following these principles, which can be embodied in a checklist

of factors that may be relevant and provide useful guidance to practitioners, parties and

the Court, unfettered by presumptions that **must** be considered if orders for a sharing of parental responsibility are made.

A simplified version of Part VII was proposed by the Hon Richard Chisolm in his paper

presented at the 2014 National Family Law Conference, “Re- writing Part VII: A

Modest Proposal.” The principles underlying his proposed re-draft and considerations he enunciates are sensible and very workable for litigants and judges.

Consideration may also be given to incorporating into legislation the rule in *Rice v*

*Asplund*, subject to a consideration of best interests, to ensure children and/or carers

are not exposed to abuse through continued applications to Court over the same

issues. Lack of legislative clarity has left it open to litigants in person to argue that the jurisprudence does not survive the 2006 and subsequent amendments to the Act. Given the importance of the ‘rule’, legislative clarity would be helpful.

**Question 15:**

**What changes could be made to the definition of family**

**violence, or other provisions regarding family violence,**

**in the *Family Law Act* to better support decision making**

**about the safety of children and their families?**

Should it be thought necessary to amend the definition, specific types of behaviour that is experienced by mainly one section or sections of the community is referenced in the National Domestic Violence Benchbook.

**Question 17:What changes could be made to the provisions in the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?**

While the efficacy of the broad discretionary system as currently mandated, is questioned from time to time, there is no empirical data, research or systemic case examples that would lend support to the view that the discretionary system for the alteration of property interests should be changed.

The number of cases that settle without the need for a hearing would seem to indicate that to the contrary, that discretionary system of property adjustment has, through the accumulation of over 40 years of case law, developed a system of precedent cases that guide the exercise of the discretion in ways which are widely understood and followed and afford a fair and known system.

A great deal of caution should be exercised in deciding to change the existing system unless it is clear there is likely to be a fair, consistent and understood property regime consistent with Australia’s Property law, Trust law, Bankruptcy law, Corporations law and Revenue law. The existing law and jurisprudence takes all that into account. Importing concepts from other jurisdictions can fail to take account of different laws and imperatives that might have relevance in another jurisdiction but not in Australia.

**Question 20:**

**What changes to court processes could be made to**

**facilitate the timely and cost-effective resolution of**

**family law disputes?**

The current system has two separate courts exercising virtually the same jurisdiction.

One specialist court, servicing the needs of family law clients nationally, with separate divisions would seem to be the best option if structural change is to be implemented. The discussion paper identifies a number of imperatives that would be beneficial:

* The development of a triage approach to court applications
* Teamed dockets that pairs judges with Registrars and possibly family consultants (other than the family consultant responsible for the court appointed family report).
* A greater use of orders diverting litigants to mediation or other dispute resolution services after the commencement of litigation.
* The use of Registrars in Duty lists (as the FCoA used to have) to deal with directions, consents, adjournments and the like, leaving the judge to deal only with matters that required adjudication.

There are many tasks that could be handled by a Registrar, at significantly lower cost to

the system, reserving the valuable time of Federal Circuit Court Judges to hear and determine disputed issues. In circumstances where parties have delays of 2-3 years to obtain a final trial date, and in some registries, 12 months to await an interim hearing, it is a luxury that the system cannot afford to have judges’ time being spent on largely routine, matters which often contain an administrative detail.

Registrars could make an appreciable difference to the disposition of work but only if more are appointed.

The use of qualified, experienced Registrars would allow matters to be triaged at an early date. If a judge’s determination was required, a daily duty judge or judges could be available possibly even by telephone/video-link to other registries where a Judge is available and to overcome the difficulties with single judge registries.

There is merit in introducing a Small Claims List. Such a list would be conducted by a Registrar and would, for example, be:

(a) For matters where the total asset pool (net) was less than (say) $100,000

(b) For parenting matters involving limited areas of dispute and where the parties

consent

Judicial Registrars routinely and very effectively dealt with these kind of matters in the past. Both parties would have the right to a hearing de novo before a judge. History informs us that where decisions were made in a timely way without too much expense, appeals were not common.

**Question 27:**

**Is there scope to increase the use of arbitration in family**

**disputes? How could this be done?**

I consider there is a place for Arbitration both in the disposal of large complex matters and small property claims. The use of Arbitration however is small and it requires a change in mindset of practitioners and judges to promote it.

**Question 34:**

**How can children’s experiences of participation in Court**

**processes be improved?**

In about 2012, I instigated the establishment of a committee with representation from the FCoA and the FCC called ‘The Children’s Committee’. The original aim was to consider how the experience of children’s participation in court proceedings that concerned them, could be improved. Several worthwhile initiatives came from the Committee but its core aim proved to be difficult and elusive. This was in large part because it was difficult to set up a research project that could obtain information directly from young persons who had been involved in proceedings. Ultimately many years later, AIFS has been funded to attempt this task and the research is presently underway.

One initiative I wanted to pursue was the possibility of the report writer discussing a draft of the Family Report in so far as it dealt with the views of the child, with the child before its release to ensure the views were accurately reported and so that the child was aware that the views would be treated seriously and made known to the judge.

Unfortunately, at the time, there were no resources available for this to be advanced.

I was thus interested to learn that a project is underway in Ontario, Canada along these lines. [[23]](#footnote-23)The Abstract by Rachel Birnbaum and Nicholas Bala for *Views of the Child Reports: The Ontario Pilot Project* states:

There is increasing use of Views of the Child Reports as a means of involving children in the resolution of parenting disputes in Canada, but there are significant differences in how these Reports are prepared. This article reports on a study of an Ontario pilot project which provided non-evaluative reports for parenting disputes prepared by social workers based on two interviews with each child about the child’s perspectives and preferences; children were offered confidentiality and the opportunity to review and edit the Report. The majority of professionals and parents found these Reports were helpful for the resolution of the cases, and almost half of the cases settled shortly after preparation of the Report. Most significantly, the children all stated that they appreciated the opportunity to share their views. However, some parents and their lawyers raised concerns that these Reports may not be appropriate for certain cases. We conclude that these Reports are a valuable addition to the ‘family justice toolbox’. We make suggestions for good practices and policy reforms to encourage their appropriate use.

**Question 35:**

**What changes are needed to ensure children are**

**informed about the outcome of court processes that**

**affect them?**

When an ICL is not appointed, or when it is consent orders being made, a family

consultant is likely to be the best person in the current structure of the family courts

to explain outcomes to children.

In cases in which children have already met with a family consultant, report writer or

have an ICL, one of those people should be required to explain orders and answer

questions and, in most cases, the most appropriate person will be the ICL.

Hence, ICL’s should be properly funded to meet with children in an environment that children

are comfortable in, to explain the Orders made and answer questions. Ideally the ICL

will liaise with the family consultant prior to any such meting to obtain advice about

how to explain these matters in a way that is understandable and appropriate given

the age and stage of development of the child.

When explaining outcomes after a contested matter, it is important that children are

reassured that the court knew and understood their views, and if orders were made

contrary to those views that the reason those alternative orders were made are

explained.

That makes it important for the judge to explain in the Reasons for Judgment that he/she has understood the views expressed by the child, and why an order is being made contrary to those views. For an interesting example of how this could be done – see the judgment of Mr Justice Jackson in Re A (Letter to a Young Person)[[24]](#footnote-24)

**Question 36:**

**What mechanisms are best adapted to ensure children’s views are heard in court proceedings?**

Children are entitled have to make their views known and participate in processes relevant to their care *(Articles 9 and 12 under the Convention* *on the Rights of Child)* and that the family courts are bound to have regard to the views of the child when deciding their best interests pursuant to s60CC(3) (a) of the F*amily Law Act.*

The UN Committee on the Rights of the Child stated in General Comment 12 that

while a right to be heard means that a child’s views must be taken into account, it

does not necessarily extend to making decisions consistent with those views. This

reflects the interdependent and complementary relationship between the right to be

heard and consideration of the child’s best interests.

The family courts have developed a range of processes to ensure that parenting

orders are made based on evidence as to the best interests of the child – these include

the preparation of family reports, child inclusive interviews, and parties-only child

dispute interviews; the appointment of ICLs, admission into evidence of evidence

from a family therapist, school social worker, or the like and the development of the

child responsive program. A Judge can also interview a child, however, this is

uncommon.

The concept of judges interviewing children as a routine is raised from time to time. However, the availability of evidence of the child’s views from ICLs and through Family and Expert Reports, the latter providing a multi-dimensional view of the child’s relationships and providing context to their expressed views, has been regarded in Australia as the best form of evidence. The view has prevailed that in general involving children in adversarial proceedings can be harmful to children if not done properly and with a view to the child’s age and stage of development. Extensive training for judges would be necessary were interviews with judges to become the norm. This would of course extend to all new judicial appointments.

It is in the best interests of children that we:

* Reduce court delays so that decisions can be made about children as quickly as possible.
* That we facilitate whatever legislation or information sharing processes are necessary so that family courts can gather information from other agencies like child welfare authorities, the police and other courts with jurisdiction with respect to children and/or domestic violence so that children and their parents do not have to tell their history and circumstances over and over again.
* Family Consultants used to have a liaison role and should be able to be the family’s first point of contact with the court and that they are actively involved in the matter until it concludes so that children and ICLs have a consistent person with whom to liaise. Better funding would allow for a truly collaborative working arrangement between the Family Consultant and the ICL with vital information conveyed by the child being conveyed to the ICL.
* Appropriately fund ICLs so that more experienced practitioners in private practice are willing to do more of this work. Increased funding will also allow ICLs to do more for children and to spend more time on each case. ICL. Training is vital as is standard best-practice throughout Australia whereby the ICL meets with the child or children and explains their role.

**Question 38:**

**Are there risks to children from involving them in**

**decision-making or dispute resolution processes? How**

**should these risks be managed?**

The risks to involving children in decision-making are well known, and as the ALRC

Issues Paper correctly identifies, this create a difficult balancing act for the Courts and

practitioners in shielding children from those risks; but also enabling them to be heard.

Courts regularly hear evidence from Family Consultants and others about the effect

of intra-family conflict upon children. The task of involving children in decision-making processes is fraught with risk if undertaken by someone without a good comprehension of the risks. The Courts are fortunate to available to them Family Consultants who are skilled to do precisely that.

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**Question 39:**

**What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?**

Increasing funding for:

(a) the recruitment of more family consultants and expand their role to allow for

greater contact with children both during the proceedings and for a period post

final orders,

and

(b) the appointment of more ICL’s in matters involving cultural, developmental or

other special characteristics of the child.

**Question 40:**

**How can efforts to improve children’s experiences in the**

**family law system best learn from children and young**

**people who have experience of its processes?**

The Children’s Committee initiated a project with Relationships Australia, *S.A Young People’s Family Law Advisory Group* to run a pilot funded by the South Australian Family Law Pathways Network (SAFLPN) aimed at receiving and learning from children’s experiences. Two key elements were to :

*Obtain a comprehensive array of information from participants about a variety of issues concerning their experiences of all facets of the family law system;*

*Prepare an evaluation of these findings;*

This pilot was due to be evaluated in February 2018.

In addition, AIFS current research into children and young people’s experiences of family law system services in Australian where active recruitment of children and young people to take part in the research has been undertaken. The research will no doubt provide invaluable data to inform policy and improve processes.

**Question 42:**

**What core competencies should be expected of judicial**

**officers who exercise family law jurisdiction? What**

**measures are needed to ensure that judicial officers have**

**and maintain these competencies?**

Encouragement should be given to judges by the chiefs of each court to participate in

continuing legal education events in Australia and with Australian family lawyers and other professionals in the family law system. This would encourage the sharing of knowledge between judicial officers and other professionals and assist in identifying differences in approach or gaps in knowledge.

However, this alone is not sufficient and the National Judicial College of Australia (NJCA) should be funded on an ongoing basis to provide regular workshops and provide relevant speakers on matters specific to the judiciary such as family violence (presently being undertaken), child development, latest research in relation to child development and the effect on children of alienation from a parent. I am currently chairing the *Family Violence in the Court* Planning Committee and Workshops are currently being delivered to judges throughout Australia.

Training is also being delivered to State Magistrates who may be required to hear family law matters.

**Question 44:**

**What approaches are needed to promote the wellbeing of**

**family law system professionals and judicial officers?**

Carly Shriver, currently Judicial Wellbeing Advisor to the Judicial College of Victoria is completing a PhD on Judicial Stress and Wellbeing and is a presenter in the NJCA Family Violence Workshops. It is important that judges are aware of the stresses inherent in their role. It is incumbent on heads of jurisdiction to be aware of any problems arising for their judges and to ensure a manageable workload and that judges take their leave.

At the NJCA Leadership Workshop in October 2018 for heads of jurisdiction, a session will be devoted to this issue and what role the head of jurisdiction should play.

**Question 45:**

**Should s 121 of the *Family Law Act* be amended to allow**

**parties to family law proceedings to publish information**

**about their experiences of the proceedings? If so, what**

**safeguards should be included to protect the privacy of**

**families and children?**

Parties do now publish information about their experiences of the proceedings. Section 121 does not prohibit publication as long as the parties and children, witnesses and experts are not identified. However, those accounts are usually a one-sided account, and even if there is a judgment, which has been anonymised and could be referred to, there is a reluctance to do so. This has the effect of preventing the other party from responding, and the Court from cross referencing the matters being alleged to a judgment.

It is often alleged that parties are disadvantaged because of s121. My experiences with publication of their experiences is that it is the Court and the other party who are disadvantaged.

However, what should be avoided at all costs, is the opportunity for the parties to be identified and to each publish their accounts of the proceedings and their allegations against each other. No benefit to the children involved could come from this. It remains open to parties to give an account of their experiences of the proceedings by reference to the pseudonym given to the case. I have never understood why the real names of the parties needs to be released.

In any event, it remains open for parties to seek from the Court an order that publication be permitted and from time to time in the public interest that has occurred.

1. American Psychological Association (ASA), ‘Guidelines for the Practice of Parenting Coordination’ (2012) 67, Vol 1, *American Psychological Association,* pg 64 ‘Introduction’

   <<http://www.apa.org/practice/guidelines/parenting-coordination.aspx>> [↑](#footnote-ref-1)
2. Linda Fieldstone, Mackenzie Lee, Jason Baker and James McHale ‘Perspectives on Parenting Coordination: Views of Parenting Coordinators, Attorneys, and Judiciary Members’ (2012) 50, No.3 *Family Court Review, Association of Family and Conciliation Courts*, pg 441

   <<https://onlinelibrary-wiley-com.ezp.lib.unimelb.edu.au/doi/epdf/10.1111/j.1744-1617.2012.01459.x>> [↑](#footnote-ref-2)
3. Ibid, pg 246 [↑](#footnote-ref-3)
4. Ibid [↑](#footnote-ref-4)
5. Megan Hunter and Bill Eddy ‘Parenting Coordination and Skills for High Conflict Families’ (2015) *High Conflict Institute,* pg 2

   <<https://static1.squarespace.com/static/5707d49f37013bb703041a49/t/58b4567d20099ed495a842e3/1488213630439/Parenting+Coordination+and+Skills+for+High+Conflict+Families.pdf>> [↑](#footnote-ref-5)
6. American Psychological Association, above n 6, ‘Definition’; Lorne Bertrand and John-Paul Boyd ‘The Development of Parenting Coordination and an Examination of Policies and Practices in Ontario, British Columbia and Alberta’ (2017) *Canadian Research Institute for Law and the Family,* pg 2

   <<http://www.crilf.ca/Documents/Parenting%20Coordination%20-%20Dec%202017.pdf>> [↑](#footnote-ref-6)
7. Christine Coates, above n 10, pg 247 [↑](#footnote-ref-7)
8. Association of Family and Conciliation Courts (AFCC) ‘Guidelines for Parenting Coordination’ (2005) *The AFCC Task Force on Parenting Coordination,* pg 2

   <<https://www.afccnet.org/portals/0/afccguidelinesforparentingcoordinationnew.pdf>> [↑](#footnote-ref-8)
9. American Psychological Association, above n 6, ‘Definition’ [↑](#footnote-ref-9)
10. Association of Family and Conciliation Courts (AFCC), above n 14, pg 2 [↑](#footnote-ref-10)
11. Lorne Bertrand and John-Paul Boyd ‘The Development of Parenting Coordination and an Examination of Policies and Practices in Ontario, British Columbia and Alberta’ (2017) *Canadian Research Institute for Law and the Family,* pg 11 [↑](#footnote-ref-11)
12. Ibid, pg 4 [↑](#footnote-ref-12)
13. Ibid, pg 6 [↑](#footnote-ref-13)
14. Ibid, pg 3 [↑](#footnote-ref-14)
15. Ibid, pg 9 [↑](#footnote-ref-15)
16. Ibid, pg 9 [↑](#footnote-ref-16)
17. Ibid, pg 3 [↑](#footnote-ref-17)
18. Christine Coates, above n 10, pg 247 [↑](#footnote-ref-18)
19. Lorne Bertrand, above n 17, pg 3 [↑](#footnote-ref-19)
20. Ibid, pg 10 [↑](#footnote-ref-20)
21. Ibid, pg 12 [↑](#footnote-ref-21)
22. Ibid [↑](#footnote-ref-22)
23. International Journal of Law, Policy and The Family, 2017,0, 1-19

    doi: 10.1093/lawfam/ebx008 [↑](#footnote-ref-23)
24. [2017] EWFC 48 [↑](#footnote-ref-24)