FAMILY COURT OF AUSTRALIA

REVIEW OF THE FAMILY LAW SYSTEM BY THE AUSTRALIAN LAW REFORM COMMISSION

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Introduction

1. The Family Court of Australia ("the Family Court" or "the Court") welcomes the opportunity to contribute to the review by the Australian Law Reform Commission ("ALRC" or "the Commission") of the family law system.

2. I provide this submission in my capacity as Chief Justice of the Family Court of Australia, and the views expressed herein have been developed in consultation with a small committee chaired by Justice Strickland, the Judge responsible for advising me on matters of law reform, and with input from several other Justices. Whilst they do not purport to represent my views specifically, those of all or any Family Court Justices, or the Court as a whole, I anticipate that these views would be widely accepted by the judges.

3. The aim of this submission is to provide the Commission with background information relevant to its review, discuss the issues raised and, in some instances, make recommendations. To that end, this submission will respond to the majority of the questions in the Issues Paper.[1]

Overview

4. The family law system comprises many components of which the Family Court is only one, but plainly a significant one. However, it is suggested that it is important to avoid falling into the trap of treating the family law system and the Family Court as one and the same, and to tar the Court with the criticisms of the system. A prime example of falling into that trap is in paragraph 66 where the Issues Paper commences the section on "Culturally and linguistically diverse clients" with the conclusion by the House of Representatives Standing Committee on Social Policy and Legal Affairs[2] that "'the family law system is not currently accessible, equitable, responsive' to culturally and linguistically diverse families, nor is it one which 'prioritises the[ir] safety'." It is just not accurate to say that about the Court.

5. It is important not to forget that the Family Court is a superior court of record and it is not a social service agency. Thus, not only are there significant limitations on what the Court can and should do, but that must be at the forefront of any suggested reforms.

6. It is a mistake to approach the Review from the position that all aspects of the system need change. It is suggested that many aspects of the system are working well and in the interests of the users of the system. Further, if there is to be any change introduced, that change can only be worthwhile if it creates a better system.

7. It has obviously been important for the ALRC to seek stories from users of the system. However, in relation to the Court, any changes that rely upon such stories need to be evidence based, and in that context the stories need to reveal all information. It is important not to forget that there are usually at least three sides to every story; that of the

[1] Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper No 48 (2018).

[2] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those affected by family violence* (2017).

person relaying the story; that of the other party; and that of the Court (through its judgment).

8. There are a number of elephants in the room. One such elephant is that it must be recognised that many of the difficulties apparent with the system, and particularly with the Family Court, can be solved by an injection of funds, and particularly into legal aid, as recommended by the Productivity Commission in its final report into Access to Justice Arrangements.[3]

9. An even larger elephant in the room is the Federal/State constitutional divide where responsibility for family violence and child protection is with the States and family law is with the Commonwealth. This needs to be closely examined.

10. There is a misconception apparent in the Issues Paper that the case management system of the Family Court for both parenting and property matters is a one size fits all. That is simply not the case.

11. Many of the criticisms of the system, and of the courts, have been canvassed in previous Reports and Inquiries over the years, a number of which are referred to in this submission.

12. It is important to bear in mind that the process of marriage or relationship break up is a traumatic experience for all involved and it is naïve to think that anyone can create a system that will provide a happy experience or outcome for all involved.

13. Although the task of the ALRC is to review the family law system and make recommendations, it is equally important to consider the transition and implementation of any recommendations that are made.

[3] Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014).

Objectives and principles

Role and objectives of the family law system

Question 1 - What should be the role and objectives of the modern family law system?

14. The Family Court is a specialist superior court of record, hearing and determining the most significant and complex family law cases. It also has its own Appeal Division which not only hears all appeals from the judges of the Family Court, but also all appeals in family law from the judges of the Federal Circuit Court of Australia (the "Federal Circuit Court").

15. As such, the Court occupies a unique position in the family law system. It is not a social service agency; it is not an NGO; and it should not be seen as being able to provide all the services that a modern family law system needs to provide. Its quintessential role is to hear and determine cases that are brought before it.

16. Certainly, the Family Court has been a pioneer amongst family courts around the world in many respects, and in particular in having in-house family consultants, and introducing alternative dispute resolution in the form of conciliation conferences, but that should not be seen as changing its core function; indeed, those facilities enhance the ability of the judicial officers of the Court to undertake that function.

17. The Family Court can only provide the service that it was set up to provide if it is adequately funded, and it always has the requisite number of judges, registrars, family consultants and staff to enable it to carry out its core function. That has not always been the case, and in particular there has often been a delay in replacing judges. This results in delay and negatively impacts the community.

18. To assist in understanding the Court's role and objectives attached hereto as **Appendix 1** is the Family Court's Corporate Plan[4] which sets out the background, the goals, the performance measures and the strategies and priorities of the Family Court.

19. The jurisdiction of the Court as set out in the Court's annual reports to Government is as follows:

    - Parenting cases involving a child welfare agency and/or allegations of sexual abuse or serious physical abuse of a child (Magellan cases); family violence and/or mental health issues with other complexities; multiple parties; cases where orders sought would have the effect of preventing a parent from communicating with or spending time with a child; multiple expert witnesses; complex questions of law and/or special jurisdictional issues; international child abduction under The Hague Convention on Civil Aspects of International Child Abduction; special medical procedures; and/or international relocation.
    - Financial cases that involve multiple parties, valuation of complex interests in trust or corporate structures, including minority interests, multiple expert

[4] Commonwealth of Australia, *Corporate Plan 2017-2018*, Federal Court of Australia (2017).

witnesses, complex questions of law and/or jurisdictional issues or complex issues concerning superannuation.

20. The Court also has original jurisdiction under certain Commonwealth Acts, including the:
    - *Marriage Act 1961*
    - *Child Support (Registration and Collection) Act 1988*
    - *Child Support (Assessment) Act 1989*
    - *Bankruptcy Act 1966,* and
    - *Corporations Act 2001*

The international framework for court excellence (IFCE)

21. The Court is always looking to improve its performance in meeting its objectives, and in 2008-2009 the then Chief Justice announced the Court's endorsement of the IFCE.

What is the IFCE?

22. The IFCE was put together by an international consortium consisting of groups and organisations from Europe, Asia, Australia and the United States and was originally launched in 2008. The goal of the Consortium's effort has been the development of a framework of values, concepts and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration they deliver no matter where the court is based.

23. An attraction of this framework is that it has been conceived for courts by courts. As a result, it is not a managerial system superimposed on judges. Rather, it is a model refined for the unique elements of judicial administration. Crucially, the principle of judicial independence is fundamental to it.

24. The framework provides a resource for assessing a court's performance against seven detailed areas which are thought necessary for a court to be truly excellent. It provides clear guidance for courts intending to improve their performance and it provides a model methodology for continuous evaluation and improvement that is specifically designed for use by courts. It also builds upon a range of recognised organisational improvement principles while reflecting the special needs and issues that courts face.

Self-assessment

25. In 2013, the Court conducted an IFCE self-assessment which was issued to all judges and staff. The survey results were analysed and published – an interim report in 2014 and a final report in 2015.

26. Implementation of the self-assessment recommendations commenced in 2015 and most are ongoing.

Achievements

27. Some of the major achievements to date include:
    - greater allocation within the Court's budget to the Appellate Division
    - court governance model reformed

- technological improvements to judicial support and public services
- improved training for judges particularly regarding technology
- better judicial induction process/judicial welfare emphasis
- national case management review
- investment in staff development, and
- a new more responsive website.

Challenges and learnings

28. Challenges identified by the Court in implementing the IFCE include:
    - implementation takes time in such a busy court
    - the process must be regarded as long term and not a 'quick fix'
    - keeping the momentum going is a challenge
    - work needs to be integrated into the mainstream business of the Court and not be a 'special project' off to the side, and
    - scarce public funding, competition for funding and the bedding down of a series of significant changes resulting from the Court's changed administrative structure are contextual factors for the Court.

29. Interest in the ICFE continues to grow both domestically and internationally.

30. The Court's publications on this implementation work are now available through the International Consortium Resources website at: http://www.courtexcellence.com/Resources/Other-Resources.aspx

31. Further initiatives are in the area of access and inclusion.

International Framework for Court Excellence – a reflection

32. The Court continues to develop and implement plans under its access and inclusion framework. The framework aims to ensure all clients, particularly vulnerable and disadvantaged clients, receive the assistance they need to access the Court.

33. The framework acknowledges that justice begins well before a litigant has their first court event, and that a client's capacity to participate in court processes is significantly influenced by the quality of information and the level of administrative support they receive.

34. Linking to the IFCE, the framework also takes a broader view across the shared infrastructure needed to support the delivery of accessible services (e.g. information technology, training and performance development) as well as identifying the links, approaches, synergies and principles that affect justice as a whole.

35. The plans under the framework were:
    - Multicultural Plan
    - Family Violence Plan, and
    - Indigenous Action Plan.

Adversarial?

36. In the last dot point in paragraph 36 of the Issues Paper, a question is raised about "the appropriateness of adversarial processes, and the ethics of adversarial practices, in a system concerned with the wellbeing of children".

37. The assumption is that the processes adopted by the Court are "adversarial", (although we note that that is not defined), and that these processes are not suited to resolving disputes about what is in the best interests of children.

38. The Court does not accept this assumption and points to many of the provisions of the *Family Law Act 1975* (Cth) ("the Act") including Division 12A, and the case management processes in the *Family Law Rules 2004* (Cth) ("the Rules"), as demonstrating that the Court has the ability and the flexibility to manage how proceedings, and particularly parenting proceedings, are run.

Principles to govern the redevelopment of the system

Question 2 - What principles should guide any redevelopment of the family law system?

39. The Family Court of Australia should not be equated with the family law system; the family law system is far broader than the Family Court.

40. Section 43 of the Act provides the principles that must be applied by the courts in the exercise of jurisdiction, and not the principles to guide the system as a whole. Thus, for example, the suggested "additional principles" in paragraph 44 of the Issues Paper are relevant to the system and are not principles to be applied by the courts.

41. Section 43 of the Act needs to be amended and updated. It is anachronistic and at the very minimum it needs to reflect the people and the relationships addressed by the Act. Perhaps the principles can be forged from what appears in the Court's Corporate Plan, the stated main purpose of our Rules (r 1.04), and our goals as set out in our Annual Reports. In other words, and for example:
    - to ensure that each case is resolved in a just and timely manner at a cost to the parties and the Court that is reasonable in and proportionate to the circumstances of the case; and
    - to assist families by deciding matters according to law, promptly, courteously, and effectively.

Access and engagement

Access to information and navigation assistance

Question 3 - In what ways could access to information about family law and family law related services, including family violence services, be improved?

Question 4 - How might people with family law related needs be assisted to navigate the family law system?

42. An overview of the information already provided by the Family Court is set out in the table below, noting that this table is relevant to all of the questions under the topic of access and engagement:

Source of information	How accessed	Comments
Family Court of Australia website	Via internet from any computer/iPad/tablet/ smartphone	The website provides a user friendly and comprehensive guide to the Court and the services it provides. In particular it has a 'drop down box' entitled 'How do I …?" which provides step by step guides. In the 2017 calendar year there were 866,740 unique visitors to the Family Court website.
National Enquiry Centre ("NEC")	Telephone/email/online live chat	The NEC is based at the Parramatta Registry and receives on average 916 calls per day and 189 emails per day / sends 237 emails per day and engages in 358 online live chats per day. The NEC employs 21.2 full time equivalent staff. There has been no increase to staff numbers for five years. The average wait time for telephone calls in April 2018 was 16.03 minutes. In 2017 it was 8.56 minutes. The significant increase is due to greater assistance being required in relation to the Commonwealth Courts Portal. The NEC has taken on a triage role in relation to the Portal, ensuring that all callers who are not already registered for the Portal are registered over the

Source of information	How accessed	Comments
		phone, and for those callers who are already registered, ensuring they are linked to their file on the Portal and have information on how to use the Portal. Referrals are made by the NEC to numerous agencies e.g. Family Relationships Advice Line (legal advice); Domestic Violence Services; Women's Legal Services; Legal Aid officers, Police, etc. Many of the staff are bilingual and if interpreting services are required immediate three way calls are organised with the Telephone Interpreter Service. The NEC have over 400 template emails with step by step instructions on accessing the court services. Although the Centre is only able to provide procedural advice in family law matters, the reality is that in a typical day it also provides a counselling service for people who are often highly distressed. The operator can access the file online and provide substantial information to the caller including taking them through the steps to complete, file and serve their documents. It is absolutely essential that the Centre be supported and maintained. The impact that the Centre has in assisting the general public and in saving immeasurable hours for the staff in the Court's Registries Australia wide cannot be overstated.
Registries	In each family law registry	Targeted signs are prominently displayed in all public areas, providing information and advice to clients. The signs include advice about safety and family violence, about services for disabled clients and about services

Source of information	How accessed	Comments
		provided by other agencies, both on Court premises and elsewhere. Brochures are available in every Registry, including brochures advising services available if there are safety concerns.
Registry staff	In each family law registry	Nationally the Court dealt with 199,696 counter enquiries in 2016/17. At the time of filing documents in a Registry advice and assistance is provided. The Court's staff are available to walk clients through their forms.
Indigenous liaison officer	Cairns Registry	The Cairns Registry indigenous liaison officer (Dennis Remedio) is the only remaining indigenous liaison officer and he is employed on a casual basis. Prior to 2006, the Court employed 6 Indigenous Family Liaison Officers who assisted the Court in meeting the needs of Aboriginal and Torres Strait Islander clients. However since the 2006 Commonwealth Government decision to establish Family Relationship Centres to undertake the early intervention and voluntary dispute resolution, this role has shifted to community-based agencies.[5] And those officers (apart from Dennis Remedio) are no longer available to the Court.
Communications from the Court	Mail/email	When a case is due to come to court each party is advised that if they have concerns about their safety they can call the Court so a safety plan can be implemented
Case co-ordinators	Telephone/email	The Court currently has 16.6 FTE case co-ordinators who manage cases and provide management and access advice.

[5] Commonwealth of Australia, *Indigenous Action Plan 2014-16* (3 November 2014) Family Court of Australia <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/fcoa_pr_ia_plan#footnote-251-4> n 4.

Source of information	How accessed	Comments
		There are dedicated case co-ordinators in the Melbourne, Adelaide, Sydney, Parramatta, Brisbane and Canberra registries. In registries where there is no dedicated case co-ordinator the work is undertaken by a Senior Client Service Officer along with their own duties.
Interpreters and translators		The Court provides nationally accredited interpreters and translators for court hearings. The total interpreter expense for the Family Court in 2016/17 was $196,851 and for the Federal Circuit Court (in family law matters) was $939,349; making a total of $1.136 million. In a recent case all four parties were deaf. The trial took 7 days and required AUSLAN interpreters at a cost of approximately $880 per day per interpreter. As each interpreter required a break after 30 minutes the total cost of interpreters for the trial was $36,000.

Aboriginal and Torres Strait Islander Communities

Question 5 - How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

43. The barriers to accessibility to the legal system for Aboriginal and Torres Strait Islander people have long been recognised. The Federal Civil Justice System Strategy Paper, published by the Commonwealth Attorney-General's Department in December 2003 stated:

> *Many Indigenous Australians face both cultural and language barriers in dealing with the federal civil justice system, as well as difficulties accessing services where they live in regional, rural or remote parts of Australia.* [6]

44. In relation to family law, the 2001 report of the Family Law Pathways Advisory Group, "Out of the Maze",[7] provided a comprehensive overview of the family law system and

[6] Commonwealth of Australia, *Federal Civil Justice System Strategy Paper* (2003).

[7] Commonwealth of Australia, *Out of the Maze: Pathways to the future for families experiencing separation*, Family Law Pathways Advisory Group Report (2001).

the legal needs of Australians, with a specific reference to Indigenous disadvantage. The report concluded:

> *The current family law system presents particular problems for Aboriginal and Torres Strait Islander people. These problems, which are not experienced by the wider community, affect the ability of indigenous peoples to access and benefit from the family law system.*[8]

45. As to the barriers to Indigenous people accessing justice in the family law system, the Pathways report noted:

> *Indigenous peoples face historical issues such as the effect of policies of previous governments that still adversely affect communities and individuals. It is therefore not surprising that Indigenous Australians have not felt sufficiently confident to utilise the services offered by courts and other service providers that deal with the residence of and contact with children, as well as other family law matters.*[9]

46. While the problems have been identified, solutions have been harder to find. In consultation with members and representatives of the indigenous communities, the Family Court has developed relationships with some of those groups, and some expertise in judicial officers and staff in issues relevant to the members of those communities. Key initiatives include:

- Formal liaison commenced between judges and court officials and representatives of indigenous groups in 1992-1993;
- Aboriginal and Torres Strait Islander representatives attended and made presentations at the Court's first national conference in July 1993;
- A committee was formed in 1993 to prepare a plan of action for the Court and to improve liaison with Aboriginal and Torres Strait Islander people;
- Arrangements were made for judges and staff regularly working with indigenous people to attend awareness programs at Bachelor College in the Northern Territory;
- It was noted that few Aboriginal people in the Northern Territory commenced proceedings in the Family Court. Liaison with the Aboriginal community revealed that the reluctance to engage with the Court was in part due to the absence of Aboriginal people on the staff of the Court and the unsuitable design of court rooms;
- In September 1994 judges and staff visited the Torres Strait and consulted with community members. Subsequently judicial circuits were conducted which dealt on occasion with traditional adoption practices[10] among the Torres Strait Islander community;
- In 1994-1995 four Aboriginal family consultants commenced work in the Northern Territory registries to assist Aboriginal clients and to facilitate liaison with the Aboriginal community;
- In 1995-1996 a court room in Darwin was renovated in accordance with a design developed by a local Aboriginal advisory group;

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[8] Ibid 45.

[9] Ibid.

[10] Kupai Omasker is a customary or traditional practice in Torres Strait islander communities under which children may be permanently transferred from one family to another.

- In the years after those measures were implemented, the representation of Aboriginal and Islander people among Court clients improved significantly in the Northern Territory;
- The Aboriginal and Torres Strait Islander Family Consultant program was co-ordinated from Darwin[11] and was expanded with an appointment to Far North Queensland for the benefit of Aboriginal and Torres Strait Islander communities in that region and throughout Australia;
- One of the courtrooms in the new Adelaide Registry opened in 2005 was developed and designed in consultation with the local Aboriginal community;
- In 2006 the Commonwealth Government introduced Family Relationship Centres run by community-based agencies to undertake the early intervention and voluntary dispute resolution. With that role went the funding for the Court's Aboriginal and Torres Strait Islander Family Consultant program to the point where, as noted in the response to questions 3 and 4 of the Issues Paper, in 2018 the Court employs only one part-time consultant, based in Cairns;
- Of course, issues persisted for indigenous Australians in relation to access to the family courts;[12]
- The Family Court developed and promulgated an Indigenous Action Plan 2014-2016 to address the barriers that exist for Aboriginal and Torres Strait Islanders when accessing the Court;
- The Family Court has an Aboriginal and Torres Strait Islander Committee which is currently chaired by Justice Robert Benjamin. That committee is now settling a revision of the Court's Reconciliation Action Plan (RAP). There is support within the Committee for a single RAP for the federal courts and for the Family Court and the Federal Circuit Court to join in creating less adversarial and less complex case management structures. There is also support for the Courts to adopt some of the trauma informed processes used by former Judge Robyn Sexton in the pilot Indigenous Court operated in the Federal Circuit Court out of Sydney, and now by Judge Charlotte Kelly in Adelaide;
- It is noted that the Commission has referred to the 2012 report of the Family Law Council "Improving the family law system for Aboriginal and Torres Strait Islander clients".[13] It is suggested that the recommendations of that report be implemented, as also recommended by the House of Representatives Standing Committee on Social Policy and Legal Affairs in their report, "A Better Family Law System to Support and Protect Those Affected by Family Violence"[14] (recommendation 24).

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[11] Stephen Ralph held the role of National Coordinator (Indigenous Programs) in the Family Court from 2002–2008. He is now a forensic psychologist in private practice, a member of the Australian Indigenous Psychologists Association and has been a member of the Australian Institute of Judicial Administration's Aboriginal Justice Committee. When he was with the Court Stephen Ralph would arrange culturally sensitive family reports in matters involving Aboriginal and Torres Strait Islander litigants.

[12] See Stephen Ralph, *Indigenous Australians & Family Law Litigation: Indigenous perspectives on access to justice* (Commonwealth of Australia, October 2011).

[13] Commonwealth of Australia, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, Family Law Council Report (2012).

[14] Above n 2.

47. There is no panacea but a respectful engagement and funding priority has been the hallmark of past successes in this area.

Culturally and linguistically diverse clients

Question 6 - How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

48. The Issues Paper notes concerns raised when Culturally and Linguistically Diverse (CALD) clients engage with the family law system (paragraph 69). Such concerns include the availability and quality of interpreting services, the availability of culturally appropriate services, and the levels of cultural competency among professionals in the family law system.

49. The Court aims to demonstrate substantive equality and respect for diversity, as well as improving efficiency and access to justice for clients from CALD backgrounds.

50. The Court has developed an online eLearning package 'Let's Talk: Cultural Competency', specifically designed for staff who provide services to people from CALD backgrounds. This package was recently re-launched and comprises modules on understanding culture, intercultural communication, using plain English, and working with interpreters and translators.

51. The package aims to improve the individual cultural competency of staff by increasing cultural self-awareness and literacy, and provides tools for staff to negotiate cultural differences and work more effectively with CALD clients.

52. Improving cultural competency enables the Court to provide more tailored and culturally responsive services and reduce any barriers to accessing justice.

53. The Court aims to review the content of the cultural competency package annually to ensure currency with best practice.

54. The Issues Paper also refers to the recommendations made in the House of Representatives Standing Committee on Social Policy and Legal Affairs *Family Violence Report*,[15] relating to improving the family law system for CALD clients. Such recommendations include the use of interpreters in the family law system. The Family Court and the Federal Circuit Court have developed protocols for the use of interpreters in the courts. These guidelines aim to ensure that court users are made aware of their right to an interpreter, are asked whether they need an interpreter, and are provided an appropriate interpreter where necessary. The guidelines also cover how interpreters are to be engaged so that the cultural safety of clients is maintained. A large part of the budgets of the Family Court and the Federal Circuit Court is spent on interpreters ($1.5 million in 2016-17).

[15] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017)

55. Interpreters engaged by the Court are bound to act in accordance with the code of ethics of the Australian Institute of Interpreters and Translators. Interpreters are provided where required for both court events and the provision of registry services.

56. All interpreter service providers are contractually obligated to provide an accredited interpreter at either NAATI (National Accreditation Authority for Translators and Interpreters) levels 3 or 2. To the extent possible, interpreters engaged by the Court also have experience in legal settings and in dealing with family violence issues.

57. It is noted that the Commission has referred to the 2012 report of the Family Law Council "Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds". It is suggested that the recommendations of that report be implemented.

People with disability

Question 7 - How can the accessibility of the family law system be improved for people with disability?

58. The Court can do no better than provide the Commission with a copy of the submission of the former Chief Justice dated 17 January 2014 to the ALRC Issues Paper 44: Equality, Capacity and Disability in Commonwealth Law. That submission is attached hereto as **Appendix 2**.[16] Of particular importance is the continuing inability of the Court to be able to make effective orders for the appointment of case guardians. It is recommended that a properly funded panel of qualified persons be established to undertake that role.

59. The final report of the ALRC was tabled on 24 November 2014.[17] To our knowledge, none of the recommendations have been implemented.

60. The Court does not accept the comment in paragraph 81 of the Issues Paper, suggesting that "[t]he level of understanding of disability held by judicial officers [in the Family Court of Australia] … may also act as a barrier to access to justice", and submits that a perusal of the cases set out in the submission demonstrate otherwise.

61. Likewise, the Court does not accept the suggestion in paragraph 82 of the Issues Paper that, "[t]here may be concerns about the extent to which these children are supported to express their views and to be heard in the court process", and again refers the Commission to the cases set out in the submission.

62. It is understood that one impediment to statutory authorities accepting an appointment as a case guardian is the perceived risk of a costs order being made against the authority. However, at the request of the Court, the Civil Law and Justice Legislation Amendment Bill 2017 (currently before the Federal Parliament) would insert into the Act a provision to prohibit the Court from making an order for costs against a guardian unless the Court

[16] Chief Justice Bryant, Submission No 22 to the Australian Law Reform Commission, *Equality, Capacity and Disability* (17 January 2014).

[17] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

is satisfied that an act or omission of the guardian is unreasonable or has unreasonably delayed the proceedings.

63. The Issues Paper notes concerns raised when people with a disability engage with the family law system. Included in suggestions that have been made to address access to justice issues for people with a disability is training and accreditation for family law system professionals to enhance their competency in working with parents and children with a disability (paragraph 83).

64. The Court has developed an online eLearning package 'Let's Talk: Access to justice for people with disability', specifically designed for staff who provide services to people with a disability. This package was launched in November 2017 and comprises modules on:
    - Disability in Australia
    - Disability, family law and family violence
    - Myths and stereotypes versus facts
    - Human rights
    - Respectful and effective communication
    - Making justice accessible for people with a disability

65. The Court provides a range of services and facilities to assist clients who have a disability, as detailed on the Court's website – http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/getting-help/disabilities/people-with-disabilities.

Lesbian, Gay, Bisexual, Transgender, Intersex and Queer Clients

Question 8 - How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

The Family Court's jurisdiction relating to treatment for gender dysphoria and intersex children

66. The Issues Paper has noted the engagement of transgender and intersex children in the family law system in the exercise of the Court's welfare jurisdiction pursuant to s 67ZC of the Act (paragraph 90) where approval is sought for medical intervention related to gender identity. On 30 November 2017 the Court handed down the landmark decision in *Re Kelvin,*[18] in relation to decisions about treatment for gender dysphoria. The Court found that court authorisation is no longer required for hormonal treatment for young people with gender dysphoria, where there is no dispute between parents, medical practitioners and the young person, and where the treatment to be administered is in accordance with published best practice guidelines. This removed a significant barrier facing young transgender people and their families.

[18] [2017] FamCAFC 258.

67. In *Re: Matthew*,[19] delivered on 16 March 2018, Rees J found that court authorisation for stage 3 treatment for gender dysphoria in circumstances where there is no controversy regarding the application, and it is agreed that the child is *Gillick* competent,[20] is not required. This was on the basis that the proposed treatment was therapeutic in nature as it was for the purpose of treating a psychiatric condition.

68. In relation to intersex children (paragraph 89 of the Issues Paper), the child in *Re Carla*[21] was aged five years, and plainly was not *Gillick* competent. Further, a review of the decisions in this area such as *Re: Sean and Russell (Special Medical Procedure)*,[22] *Re Lesley (Special Medical Procedure)*,[23] *Re: Sarah*,[24] *Welfare of A Child A Between: Mother Applicant and the Public Advocate Respondent*,[25] *Re: Dylan*,[26] *Re: Sally (Special Medical Procedure)*,[27] do not demonstrate concerns about the opportunity for the children in those cases to participate in the process. However, the recommendation of the Senate Standing Committee on Community Affairs *Inquiry into involuntary or coerced sterilisation of people with disabilities in Australia*[28] in 2013 is supported. (See also the response to question 14).

Changes to forms following the recognition of same-sex marriage

69. The Issues Paper notes in paragraph 86 that access issues for LGBTIQ people need to be contextualised within an understanding of the recent legal recognition of same-sex marriage. The Court has moved to implement changes required following the *Marriage Amendment (Definition and Religious Freedoms) Act 2017*, which amended the *Marriage Act 1961* to generally recognise existing and future same-sex marriages solemnised overseas under the law of an overseas country where the marriage is valid under the foreign law. It has made arrangements for the alteration of court forms, including to update references to 'husband' and 'wife' and to replace references to gender to now include 'female', 'male', and 'X' (the 'X' to conform to the Australian Government Guidelines on the Recognition of Sex and Gender). References to 'Husband' or 'Wife' are generally changed to refer to 'Applicant' or 'Respondent'.

Recognition of same-sex parenthood

70. As highlighted at paragraph 89 of the Issues Paper, the recognition of same-sex parenthood is complex in relation to parenting matters. Complexities relating to recognising same-sex parenthood extend broadly including to matters involving

[19] [2018] FamCA 161.

[20] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.

[21] [2016] FamCA 7.

[22] [2010] FamCA 948.

[23] [2008] FamCA 1226.

[24] [2014] FamCA 208.

[25] (1993) FLC 92-402.

[26] [2014] FamCA 969.

[27] [2010] FamCA 237.

[28] Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013).

surrogacy. For example, the case of *Bernieres and Anor & Dhopal and Anor*,[29] concerned a child born as the result of an international surrogacy arrangement. The Full Court considered the operation of s 60H (children born as a result of artificial conception procedures), s 60HB (children born under surrogacy arrangements) and s 69VA (declarations of parentage) of the Act. The Court found that s 60HB specifically addresses the position of children born under surrogacy arrangements, leaving section 60H to address the status of children born by means of conventional artificial conception procedures. In finding that s 60HB covered the field and s 60H did not apply, the Court found that neither ss 69VA nor 69ZA were available to make a declaration of parentage. The unfortunate result of that conclusion was to leave the parentage of the child in doubt (at [64]).

Co-mothers

71. The Court does not accept the claim made in the article referred to in footnote 72, that courts "continue to treat co-mothers as secondary figures in their children's lives."

72. The test apparently used to make that statement was for the authors to look at the outcomes of the cases under consideration. They found that a significant number of co-mothers were denied equal shared parental responsibility, orders for equal time were extremely rare, and in the vast majority of cases the children were to spend with the co-mother was limited. However, when each of those cases is analysed, there were reasons given for those outcomes, and none of those could be said to be because the co-mothers had some lesser entitlement than the birth mother. They were the usual sorts of reasons that one finds in cases where the dispute is between a mother and a father for example.

73. As was said by the Full Court in *Yamada & Cana*, "It is not parent*hood* which is crucial to the best interests of the child, but parent*ing* – and the quality of that parenting".[30]

People living in rural, regional and remote areas

Question 9 - How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

74. This is not a question about which the Family Court can say very much given that the Federal Circuit Court now undertakes all circuits throughout Australia, save and except to Launceston, and of course in Western Australia the Family Court of Western Australia is responsible for circuits in that State.

75. However, litigants from rural, regional and remote areas obviously access the Family Court of Australia, and the Court enables that access through various forms of communication technology. Plainly, telephone attendances are facilitated as well as attendance via the Internet. Parties are able to use a home computer to attend a hearing. That video conferencing technology is known as Cisco Jabber.

[29] [2017] FamCAFC 180.

[30] *Yamada & Cana* [2013] FamCAFC 64 [27].

76. Further, parties are able to e-file their documents thus avoiding the need to physically attend a Registry.

77. Making greater use of communication technology is reality.

78. It is suggested though that accessibility would be improved if the Court and litigants were readily able to access technology available in other agencies in locations remote from the Court including State facilities, and for example, those of Centrelink and the Australian Taxation Office.

Costs and access to the family law system

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?

79. The question of costs of family law proceedings is governed by s 117 of the Act (orders for and in relation to costs). The Rules contain a schedule of costs applicable to party/party costs and for those cases in which a client has not entered into a fee agreement. Prior to 2004, the Rules provided for some court oversight and regulation of fees charged by solicitors and counsel to their clients. However, those Rules were removed once there was in place a national system of costs assessment by professional cost assessors which, together with the capacity of an aggrieved client to complain to the relevant professional body, provided a satisfactory check and balance on fees charged. Simply stated, there was no need for the Family Court to add a further layer of complexity to what is a sophisticated system.

80. However, the Court is mindful of the costs of litigation and by r 19.04, a solicitor is required to provide cost disclosure letters before specific court events; for example, the conciliation conference and the first day of trial. The Rule is designed to ensure that clients consider the utility of the litigation and undertake a serious cost benefit analysis before proceeding further. It is consistent with the approach to "unbundling" legal services in the sense that clients can assess the cost and benefit of each step. That said, it is the Court's experience that too often there is a failure to comply with r 19.04, and it is accepted that greater attention could be given by the Court to ensure compliance with that rule.

81. As to the commentary at paragraph 105 of the Issues Paper, that "expert reports can cost many thousands of dollars, depending on the experience and reputation of the report writer", it must be born in mind that generally the parties themselves retain the expert. It is hardly surprising that highly qualified professionals with relevant experience in the field are more expensive than those with less experience. The quantum of fees will change with the qualification of the expert. For example, the fees of a forensic psychiatrist are likely to be greater than those of a social worker. The fee itself is a matter of private contract and it is not accepted that this style of work is amenable to a standard fee schedule to regulate the costs of private expert reports. Indeed, one of the dilemmas facing the Court is the shortage of people with the requisite expertise to undertake this particularly

challenging work. From a systemic perspective, the Commission might consider what could be done to encourage more experts to agree to give expert evidence in the courts. The Commission does not say, and nor is it the Court's experience, that the fees charged by experts are disproportionate to the amount of work involved in the investigation and preparation of reports in, what are, inevitably, the most complex cases in the Court. Nor, does the Commission suggest, and nor is it the Court's experience that the fees charged by experts for work undertaken for family law proceedings are inconsistent with those charged by experts appearing in other courts.

82. As to the other matters identified in paragraph 105, it is accepted that court delays and multiple court hearings can contribute to the high costs of litigation. It is well understood that the longer a family is embroiled in litigation, the higher the costs of litigation. Where the available court resources are insufficient to meet demand, the consequence is delay and its associated cost. The question of family dispute resolution is addressed elsewhere, but the Commission is reminded of the consequences of the fragmented system, and the need for more publicly funded legal services and legal aid. That would go a long way to alleviate the difficulties highlighted in paragraph 106 of the Issues Paper.

83. Part 1.2 of the Rules (Main Purpose of Rules) was introduced in 2004 and comprises a suite of provisions designed to "ensure that each case is resolved in a just and timely manner at a cost to the parties and the Court that is reasonable in the circumstances of the case." The powers are extensive and underscore the Court's commitment to expeditious and cost proportionate justice. It is accepted that it would be useful for the entire family law system to operate by these standards and thus consideration could be given to the insertion of Part 1.2 into the Act. The same could be said about the *Civil Dispute Resolution Act 2011* and for that Act to also apply to family law proceedings. An obvious effect of doing so is that the entire family law system would be required to adopt pre-action procedures along the lines of those contained in the Family Law Rules.

84. Savings to litigants could be made if the system had the capacity to provide more court funded family reports by Child Dispute Services (both 'in-house' and 'Regulation 7' family consultants), including earlier in the case management process.

Self-represented parties

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?

85. The Issues Paper proceeds on the basis that 'Court procedures are designed for the use of legal professionals' [113]. This statement is incorrect. A simple comparison of the current Rules compared to those in operation pre-2004 should demonstrate the Court's commitment to the use of plain language and the use of the Rules to describe process in as accessible a manner as possible.

86. The Court constantly reviews its forms which are specifically designed to ensure that the Court receives information essential to the establishment of jurisdiction, and which unrepresented parties may not appreciate needs to be provided. That said, if the point the Commission sought to make in paragraphs 110-116, notwithstanding the very substantial steps the Court has taken to simplify its forms and processes with unrepresented litigants in mind, is that undertaking a complex family law case without legal representation is difficult, this point is accepted. The Court has commented again and again about how difficult it is for unrepresented litigants and the costs involved for the Court in bringing these cases to a proper outcome. For example, in the Court's 2016-2017 Annual Report at 40-41 the Court said:

Social justice and equity impacts

Unrepresented litigants

The Court monitors the proportion of unrepresented litigants as one measure of the complexity of its caseload. Unrepresented litigants present a layer of complexity because they need more assistance to navigate the Court system and require additional help and guidance to abide by the Family Law Rules and procedures.

Figure 3.17 shows litigants who had representation at some point in their proceedings and Figure 3.18 shows the proportion of litigants who had representation at the finalisation of their trial. The proportion of the Court's cases and trials involving legal representation remains relatively steady for the past five years.

Note: The Court has revised its counting rule for these figures and as such the values in this section differ from those published in previous reports. The figure now excludes cases that did not have a first court event (i.e. withdrew or discontinued before appearing at court) and so they had not proceeded beyond filing. The information about legal representation in these cases was often incomplete as the parties had not provided this information at the time of filing.

Figure 3.17: Representation of litigants' finalised cases, 2012–13 to 2016–17

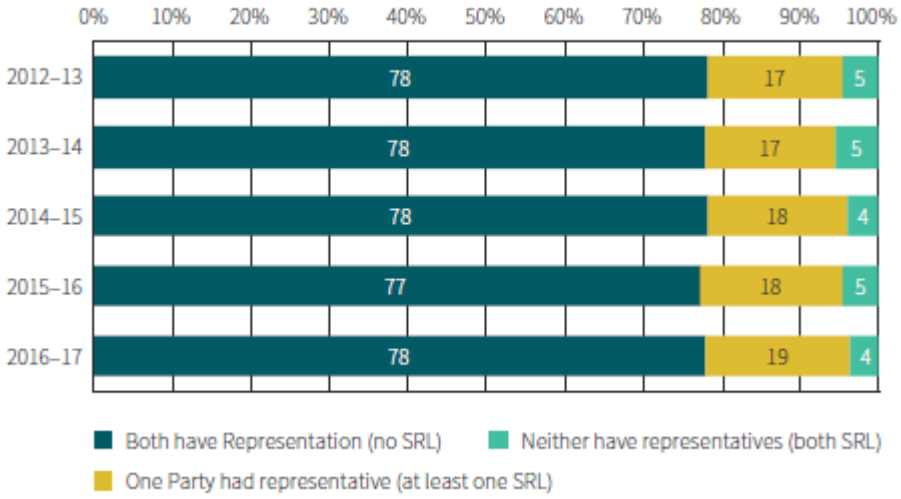
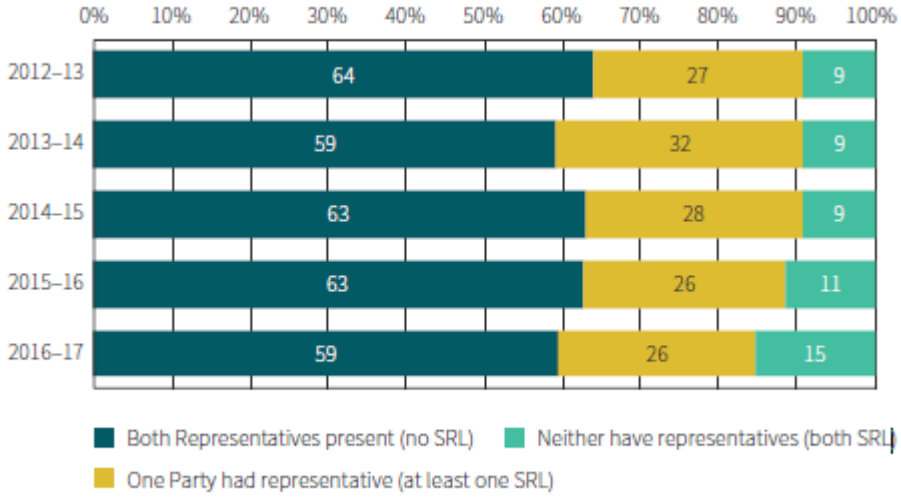


Figure 3.18: Representation of litigants at trials, 2012–13 to 2016–17



87. The second table highlights that the percentage of cases at trial where neither party has legal representation, is in fact on the increase.

88. If the information about median personal income for separated parents identified at paragraph 104 of the Issues Paper is accepted, it is not difficult to understand why so many litigants cannot afford even modest costs of litigation. This then becomes a policy consideration for governments concerning access to legal aid. Otherwise, the heads of jurisdiction of the Family Court and the Federal Circuit Court have committed to harmonising rules in an attempt to streamline court processes and make the court system easier to navigate.

89. Turning then to the recommendations at paragraph 117:
    - The specialist clinics resonate with the information sessions previously conducted by the Court. These were available free of charge to all litigants and were conducted by a counsellor (family consultant) and registrar. The demise of this service was the direct result of costs pressures, and the removal of all pre-filing services to the Family Relationship Centres. The service could be re-established with an injection of funds which would enable the Court to recruit additional family consultants and registrars. Otherwise, the Canadian National Self-Represented Litigants Project is well known and a service of that type should be well accepted.
    - Reference has already been made to the use of plain English in court forms and court publications. This is an area of constant review and improvement.
    - This is addressed elsewhere.

90. It cannot be stressed enough that Legal Aid Commissions should be sufficiently resourced so that they can provide a duty solicitor service to all courts exercising jurisdiction under the Act.

The Court environment

Question 13 - What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

91. The first and most obvious comment to make is that without an injection of funds the Court cannot address many of the concerns expressed in this part of the Issues Paper. For example, even if the Court could reconfigure the internal layout of the building to create more "safe rooms", it is the servicing of those rooms by providing a security presence, duress alarms, signage, facilities, CCTV, and communications where significant funds are required; CCTV alone is horrendously expensive.

92. Again, more entrances and exits, even if they can be made available, require far more resources in terms of personnel and electronic security.

93. The question that arises from the Issues Paper is, apart from the funds required, where does the Court find the space needed to provide more waiting and other rooms? Plainly there is no difficulty when a building is being planned, and that is demonstrated by the fact that in Townsville and in Adelaide the Court has Indigenous courtrooms, but it is nigh on impossible to change the layout of a building subsequently.

94. That highlights the inadequacy of a number of Registries, including Newcastle, where urgent attention is required.

95. To respond to some of the other "concerns" raised in the Issues Paper:
    - In relation to a lack of security outside the Court, that is the responsibility of the State Police; court security have no jurisdiction outside the building.
    - All of our major court buildings have adequate facilities for people with disabilities.
    - It is not considered practical by the Marshal of the Family Court and the Federal Circuit Court to have separate entry and exit points for applicants and respondents. However, it is always possible to prevent contact between applicants and respondents by, for example, staggering entry and exit times. That can be addressed in a safety plan.
    - All of our major court buildings have child minding facilities, but we do not understand the call for "child-friendly" courts. Children are only permitted to be in a courtroom if leave is given, and, understandably, leave is rarely given.

96. Court security is a vital component of the operations of a court such as the Family Court. The nature of the jurisdiction gives rise to powerful emotions and there is an unavoidable level of threat which merits constant vigilance and attention.

97. For a long time the Australian Federal Police provided the necessary court security, including a police presence, but cost considerations led to that service being withdrawn, and the need for the Court to then rely on contracted private security officers, and different strategies to provide the minimal level of security that the courts now have.

98. In fact, there was a need to introduce the *Courts Security Act 2013* (Cth) to provide the private security guards with sufficient powers to carry out the duties that are required.

99. Interestingly, the Commission may be aware that not so long ago the Chief Justice of the High Court complained to Government about security for that Court, and the Court has now been provided with a police presence. That is what is needed for the Family Court.

100. It must also be remembered that State police will not attend the Court unless an offence has been committed; they will not attend for anything less, but that is what is usually required.

101. The courts have a very limited budget for court security, and as a result, regional registries suffer. For example, in Cairns there is only screening on one floor, and there is no security for Child Dispute Services on the floor that they operate on. As for Dubbo, security is almost non-existent, and in Launceston judges and litigants are required to use the same lifts. Further, major court buildings are not exempt. There is a dire need for second screening points in Melbourne and Brisbane.

102. The table at **Appendix 3** indicates the number of people passing through security by location in 2017; the figure in red is the number of dangerous items removed, the blue number is the number of occasions where security was required in the courtroom, and the purple figure is the number of escorts performed assisting people to move from place to place.

103. The inappropriateness of the suggestion of replacing the usual "airport-style" security at the court entrance with roaming security guards, is demonstrated by the appalling number of dangerous items that are continually detected and removed from people arriving at the courts. The attached document comprises a representative sample of some of the detections made in 2017 (see **Appendix 4**).

Legal principles in relation to parenting and property

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?

104. At [130] the Issues Paper raises a number of concerns about the framework of Part VII of the Act. Question 15 asks a specific question about the provisions concerning family violence and this question is dealt with separately. The treatment of the views of children is also dealt with elsewhere. The remaining questions are about:
    - Complexity and repetition in Part VII;
    - The presumption of equal shared parental responsibility; and
    - Whether parents should be required to make joint decisions.

The complexity and repetition within the decision-making framework and associated cost issues for clients and productivity issues for the courts

105. The core provisions of Part VII are s 65D(1), which provides that in proceedings for a parenting order the court may make such parenting orders as it thinks proper, and s 60CA which provides that the court must regard the best interests of the child as the paramount consideration.

106. Part VII is currently too complex and repetitious. This has two consequences. Firstly, it is difficult for a lawyer, let alone an unrepresented litigant, to work their way through the pathway established by Part VII. Secondly, it creates difficulties for judicial officers trying to deliver judgments promptly, but which are comprehensible to ordinary people while not open to appeal.

107. This is still the case, even though the pathway provided in *Goode & Goode*[31] has been ameliorated by subsequent Full Court authorities, such as, *Korban & Korban*,[32] *SCVG & KLD*,[33] *Perry & Perry*,[34] *Segers & Tacason (No. 2)*,[35] *Banks & Banks*,[36] *Blanding & Blanding*,[37] and *Ulster & Viney*.[38]

108. This makes judgments, and particularly judgments in interim parenting matters, harder to compose and contributes to delay experienced by other families in having to wait to have their cases heard.

109. If the Commission is satisfied that the current provisions are not well understood, then consideration could be given to drafting a clearer and simpler suite of provisions.

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[31] (2006) FLC 93-286.

[32] [2009] FamCAFC 143.

[33] (2014) FLC 93-582.

[34] (2015) FLC 93-669.

[35] [2015] FamCAFC 173.

[36] (2015) FLC 930637.

[37] [2016] FamCAFC 21.

[38] (2016) FLC 93-722.

110. Accordingly there is support for a rewrite of the central parts of Part VII of the Act and, subject to comments set out below, that rewrite might be along the lines of the proposed draft of the Honourable Richard Chisholm in the article, 'Re-Writing Part VII Family Law Act: A modest proposal'[39] (see **Appendix 5**).

111. There is no mention in the Issues Paper of the need to rewrite Chapter VII, however it is relevant. There is reference to Richard Chisholm's article at footnote 135 on page 43, but it is not referred to in this context. In relation to the issue of a rewrite also see the paper presented by Professor Helen Rhoades to the 2014 National Family Law Conference entitled "Rewriting Part VII of the Family Law Act" (**Appendix 6**),[40] and see the paper given by O'Brien J in his Honour's previous capacity as Deputy Chair of the Family Law Section of the Law Council of Australia at the Second Family Law System Conference in July 2010[41] (**Appendix 7**).

112. There is one aspect of what Richard Chisholm has suggested that is not supported. Although the footnotes to Richard Chisholm's article do not make it clear, given his discussion under the heading "Should those who share parental responsibility be legally obliged to cooperate?" it seems he intended that the Act be amended to:
    - Eliminate the definition of major long-term responsibility;
    - Repeal s 65DAC; and
    - Repeal s 65DAE.

113. Section 65DAC and s 65DAE draw a distinction between an issue in relation to a child in respect of which a decision has to be taken that is a major long-term issue and one that is not a major long-term issue.

114. Section 65DAC currently deals with the position in relation to major long-term issues affecting a child. These are defined in s 4 and include education, health, religion, the child's name and ability to relocate. When the court is asked to make a decision as to whether or not a parent can solely make decisions about one or more of these issues, or whether or not those decisions are to be made jointly, absent a presumption, the court makes that decision (given that it is a parenting order) having regard to the paramountcy principle (s 60CA) and by considering the matters in s 60CC(2), (2A) and (3).

115. Section 65DAE is a codification of *VR v RR*[42] which said that the court should only interfere with, or diminish the responsibility of, either parent to care for a child in the manner that that parent deems appropriate where the court is of the view that the welfare of the child will clearly be advanced by the making of such an order. Accordingly, when children are with one parent or the other, most day to day decisions are not a matter for the court's intervention.

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[39] Richard Chisholm 'Re-Writing Part VII Family Law Act: A modest proposal' (2015) 24(3) *Australian Family Lawyer* 17.

[40] Helen Rhoades, 'Rewriting Part VII of the *Family Law Act*', Paper presented at the 2014 National Family Law Conference, Sydney 2014.

[41] Justice Rick O'Brien, 'Simplifying the System: Family Law Challenges – can the System Ever be Simple?', Paper presented at the Family Law system Conference, Canberra 20-21 July 2010.

[42] [2002] FLC 93-099.

116. Currently the provisions about shared parental responsibility are somewhat scattered throughout Part VII[43] and the definition of major long-term issues is in s 4 of the Act. Support is given for the consolidation of these sections into one part of the Act that deals with the issue of parental responsibility holistically.

117. Currently s 61B defines parental responsibility in relation to a child as meaning all of the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

118. Section 61C(1) provides that each of the parents of a child who is not 18 has parental responsibility for the child. That is, unless an order is made, each parent can jointly, with the other parent or severally, make decisions about major long-term issues and day to day issues affecting the child. It is not sought to interfere with that as a starting point. It is efficacious for parents who are not involved in the court system and who are able to work cooperatively with one another in parenting their children after separation.

The presumption of equal shared parental responsibility

119. It is submitted that the current presumption that there should be equal shared parental responsibility if the court is making a parenting order is fraught with conceptual misunderstandings including the following:
    - The word "equal" in the expression "equal shared parental responsibility" perpetuates the misconception amongst some that the Act contains a presumption of equal time and this is reinforced by the connection between the presumption and s 65DAA(1)(c).
    - There is residual confusion as to whether or not the presumption itself triggers the need to consider equal time and if not, substantial and significant time where the Act provides that only an order or a proposed order for equal shared parental responsibility creates that trigger (that misunderstanding was discussed in the Full Court's judgment in *Goode & Goode*).[44]

120. Notwithstanding the presumption, whether the court allocates parental responsibility, and in what manner, is ultimately a matter of discretion in an individual case based upon best interests considerations (see *Bondelmonte v Bondelmonte*).[45]

121. A question thus arises as to the removal of the presumption of equal shared responsibility. If the Commission is satisfied that it is poorly understood the Commission should explore whether that is appropriate or not.

122. When the court has made an order or is to make an order for equal shared parental responsibility, the provisions of s 65DAA apply.

123. The structure of s 65DAA(1) and (2) has created uncertainty as to its meaning.

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[43] *Family Law Act 1975* (Cth) s 61 (and in particular s 61DA), s 64B(2)(c), s 65DAC and s 65DAE.

[44] (2006) FLC 93-286.

[45] (2017) 259 CLR 662 [31]–[32].

124. The High Court in *MRR v GR*[46] held that these sections were expressed in imperative terms which obliged the court to consider the questions contained in them as a statutory condition which must be fulfilled before the court has power to make a parenting order of that kind ("It is a matter upon which power is conditioned much as it is where a jurisdictional fact must be proved to exist"[47]).

125. The court, when considering competing proposals by parents or others exercising parental responsibility will consider equal time or substantial and significant time if one of the parties proposes it (or of the court's own motion provided procedural fairness is given to the parties). There is no utility in considering either equal or substantial and significant time otherwise.

126. There is significant overlap between the matters to be considered pursuant to s 65DAA(5) as to whether or not a particular proposal is reasonably practicable and whether or not that same proposal is in a child's best interests. It is axiomatic that if a proposal is not reasonably practicable then it will not be in a child's best interests when regard is had to the reality of the child's situation.

The scope for escalation of conflict associated with the requirements that parents must jointly make decisions

127. As indicated, it is inferred that Richard Chisholm advocates the abolition of s 65DAC. This section provides that an order for shared parental responsibility is taken to require the decision to be made jointly by those persons (s 65DAC(2)). The section also provides that if an order is made for shared parental responsibility, the order is taken to require each of those persons to consult the other in relation to the decision to be made about that issue and to make a genuine effort to come to a joint decision about that issue (s 65DAC(3)).

128. Richard Chisholm comments that there is no good reason for the legislation to create such an obligation:

> *While such co-operation is of course generally desirable, in cases coming to the family courts it is often problematical, and in some cases dangerous. Also, it is impossible to identify the specific obligations entailed by such a principle. Under the present law, although the legislative allocation of parental responsibility creates no legal obligation to co-operate, an order for equal shared parental responsibility automatically creates an obligation to cooperate, and to make joint decisions. Incidentally the latter obligation makes little sense, since it does not specify what each party has to do; indeed, if taken literally it seems to mean that if no agreement is reached, both parties are in breach of the law! It is preferable, in my view, to have a system in which if the court wishes to create such responsibilities, it does so by spelling out what each party is required to do. Then people know where they stand.*[48]

[46] (2010) 240 CLR 46.

[47] (2010) 240 CLR 461 [13].

[48] Richard Chisholm Re-Writing Part VII Family Law Act: A modest proposal" (2015) 24(3) *Australian Family Lawyer* 17.

129. First, the requirement to make a joint decision only arises once a court, on best interest principles, has made a shared parental responsibility order.

130. Secondly, it may be that s 65DAC(2) needs to be slightly redrafted to avoid Richard Chisholm's interpretation, but it is submitted that the better interpretation of that section is that neither parent is free to act on a decision about a major long-term issue that is taken severally in circumstances where there is an order which requires that decision be taken jointly by them. The only recourse, if they are unable to reach a joint decision, is to have a court determine what the decision should be about that major long-term issue.

131. It is submitted that it is useful to retain and/or set out in the Act:
- The current definition of major long-term issue (although move it out of s 4);
- What the effect is of a court making an order for shared parental responsibility of all or any major long-term issue;
- What is the situation (unless there is an order) about day to day parental responsibility when a child is spending time with one parent; and
- A requirement when making an order about parental responsibility to spell out what the requirements are on each parent for consultation and making a genuine effort to reach a joint decision if a shared parenting order is made or what, if any, conditions are placed, for example consultation, on a parent who has sole right to make the final decision about a major long-term issue.

The welfare jurisdiction – a new Division to Part VII?

132. The Issues Paper raises the Court's welfare power in the context of the sterilisation of young persons, including ones with an intellectual disability, in circumstances similar to those existing in *Marion*'s *case*.[49] The Issues Paper at paragraph 135 notes the submission of the former Chief Justice in February 2013 to the Senate Standing Committee on Community Affairs 2013 *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* that it is increasingly rare for any such applications to be brought to the Family Court.

133. The Senate Standing Committee on Community Affairs 2013 Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia (at pages 83 to 96) discusses the issue as to whether or not sterilisation of people with a disability should be banned unless their free and informed consent can be obtained.

134. The Committee recommended that for a person with a disability who has the capacity to consent or to consent where provided with appropriate decision making support, sterilisation should be banned unless undertaken with that consent. The Committee further recommended that, for a person with a disability for whom it may be reasonably held that they may develop a future capacity to consent, irreversible sterilisation should be banned until either the capacity to consent exists, or it becomes reasonably held that the capacity to consent will never develop.

135. The Committee went on to recommend that in circumstances where there can be no consent or there is no reasonably likelihood of consent, then the occasions when

[49] (1992) 175 CLR 218.

sterilisation is permissible is narrowly circumscribed based upon the protection and advancement of the rights of the person.

136. The Committee noted that in 1994 the Family Law Council recommended that there should be a new division of the Family Law Act regulating sterilisation of young people and that the Council of Australian Governments oversee the development of uniform model legislation to regulate the sterilisation of persons with disabilities.

137. In relation to intersex children, the Issues Paper raises concerns about their ability to participate in decision making about their gender identity. The Issues Paper specifically cites *Re Carla*,[50] a decision of Forrest J. In that case the applicants were the parents of a 5 year old girl who had a genetic disorder. The parents sought an order authorising them to consent to the child undergoing certain medical procedures including a gonadectomy. This procedure would result in the child being infertile. Forrest J held that the proposed surgery involving the bilateral removal of the child's gonads could be authorised by Carla's parents. His Honour also held that Carla's parents may authorise consequential procedures. The Issues Paper refers to criticisms of this decision by human rights advocates on the basis that these procedures were carried out to Carla without her consent. In that regard, reference is made to the response to Question 8. Further, to repeat, the Senate Committee in 2013 recommended that all proposed intersex medical interventions for children and adults without the capacity to consent should require authorisation from a civil and administrative tribunal or the Family Court. It is accepted that if this approach is adopted the Family Court is the appropriate body to consider whether or not the proposed intervention should be approved.

138. In relation to these matters, it is instructive to refer to the entirety of the submission of the former Chief Justice to the Senate Committee Inquiry, and the same is attached hereto as **Appendix 8**.[51]

139. Finally, the Issues Paper also acknowledges the recent appeal decision in *Re Kelvin*.[52] As outlined in the Court's response to question 8 of the Issues Paper, there has subsequently been the decision of Rees J in *Re Matthew*[53] in respect of stage 3 treatment (in that case chest reconstructive surgery) where her Honour's decision was that in the case of a *Gillick* competent child who had the capacity to consent to the recommended treatment and in the absence of a controversy, consistent with the decision of the Full Court in *Re Kelvin*, court authorisation was not required.

Section 68LA

140. There is no text accompanying the reference to this section in the Issues Paper, and the Court is unaware of any concerns with it.

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[50] [2016] FamCA 7.

[51] Chief Justice Bryant, Submission No 36 to the Senate Standing Committee on Community Affairs *Inquiry into The involuntary or coerced sterilisation of people with disabilities in Australia* (22 February 2013).

[52] [2017] FamCAFC 258.

[53] [2018] FamCA 161.

141. The section was inserted into the Act in 2006 to clarify the role of the Independent Children's Lawyer following a number of Full Court decisions relating to this issue. This section should be retained without amendment.

Division 12A

142. The principles contained in this Division frame the ability of the Court to be receptive and flexible in conducting and managing primarily parenting proceedings in order to provide the best outcome for families, and in particular children. It is essential that this Division remains unamended.

Division 13A

143. Contravention proceedings can be a pivotal point in parenting proceedings. A person in whose favour a parenting order is made is entitled to have the expectation that they will receive the benefit of those orders.

144. Whilst contravention proceedings remain civil proceedings they are quasi-criminal given the penalties that can be imposed. This means that the respondent has a right to silence which can be a difficulty if there is a pending interim or final parenting hearing.

145. The current version of Division 13A is complex and contains a number of anomalies.

146. Examples of its labyrinthine nature include:
    - The distinction between less serious contraventions and more serious contraventions
    - The difference in the standard of proof necessary depending on what penalty is imposed (s 70NAF)
    - The difficulties in respect of procedures when a party fails to enter a bond

147. There should be some focus in any enforcement proceedings under Division 13A on what the applicant is actually seeking to achieve as an outcome. Usually the answer is compliance with the existing orders and that would normally mean the applicant is seeking that the respondent be placed on a bond to encourage compliance.

148. Any redrafting of Division 13A should consider the following features of these types of applications that occur regularly:
    - Contravention applications that are brought in the midst of parenting proceedings which will ultimately be heard by the court where the court might decide that the arrangements which are in the best interests of the children are different from those upon which the contravention application has been based.
    - Contravention applications that are brought as a point-scoring exercise either in response to a contravention application by the other parent or for some other forensic purpose.
    - Contravention applications that contain large numbers of counts going back a considerable period in time. When considering what outcome the applicant is seeking to achieve, the question has to be asked whether or not that outcome will be different if 3 counts are dealt with as opposed to 27.

Rules governing the making of consent orders

149. The gravamen of the current r 10.15A is that a party or a party's lawyer must advise the court whether the party considers that a child concerned has been or is at risk of being subjected or exposed to abuse, neglect or family violence, or whether or not a party has been or is at risk of being subjected to family violence and if so, must explain to the court how the consent orders attempt to deal with the allegations.

150. Attached hereto is **Appendix 9** comprising the submission of the Court of 3 May 2017 to Term of Reference 2 of the Inquiry by the House of Representatives Standing Committee on Social Policy and Legal Affairs into a Better Family Law System to Support and Protect Those Affected by Family Violence.[54] That submission may be helpful in this context.

151. It is suggested that r 10.15A be retained unamended.

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?

152. As a superior court dealing with the most complex family law cases, it is accepted there is a significant likelihood that the litigant parents and their children may be affected by trauma arising from exposure to family violence or abuse. A review of the Court's judgments given at interim and final hearings demonstrates the point, as does the fact, that in the year ended 30 June 2017, of cases finalised that year, a notice of child abuse or risk of family violence was filed in 23.8% (Annual Report, page 43). There is thus vast experience in the court of dealing with victims and perpetrators of family violence and their children.

153. The first point raised concerns **the definition of "family violence"** which is contained in s 4AB of the Act. The definition was recently amended (*Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*) and gives effect to recommendations made by the ALRC and NSWLRC report 'Family Violence – A National Legal Response' ("LRC's).[55] By these amendments the core definition was changed in the manner recommended for all states and territories (Ch 5.167). However, although the LRC's were satisfied that in so far as the definition should include a non-exhaustive list of examples of types of physical and non-physical behaviour that may fall within the definition (which was recommended), the failure of governments to agree on the model definition proposed in the 1999 Domestic Violence Legislation Working Group "Model Domestic Violence Laws Report", suggested that expecting agreement in relation to the examples would be a triumph of hope over experience (Ch 5.170-174). In any event, this was the first time examples of conduct which "may constitute family violence"

[54] Family Court of Australia, Submission No 44 to the Standing Committee on Social Policy and Legal Affairs, *Parliamentary inquiry into a better family law system to support and protect those affected by family violence* (3 May 2017).

[55] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response,* ALRC Report No 114 (2010).

were included in the Act (s 4AB(2)). The examples are comprehensive and, as the provision makes clear, are non-exhaustive.

154. For the reasons given by the LRC's, it is accepted that provided the core components of the definition are shared across State and Territory legislation, it does not matter that the examples included in the Act may differ from the examples included in other legislation.

155. Although it is acknowledged that litigation can be used to harass a person, careful consideration will need to be given to whether of itself (that is absent any other conduct which would satisfy the definition) this could properly be categorised as family violence. Absent other behaviour which coerces or causes fear, is this behaviour that should be relevant to parenting arrangements or justify an injunction pursuant to ss 68 or 114? If the view is taken that it is, the wording contained in s 102QB of the Act might provide an example for amendment to s 4AB(2) along the lines of "institute proceedings in a court to harass, to cause delay or detriment, or for another wrongful purpose". That said, as will be explained in response to question 25, ss 102QB and 118 are not sufficiently comprehensive to properly contain the use of family law litigation to harass a former partner.

156. As to the removal of the presumption of equal shared parental responsibility (s 61DA), much has been written about the confusion it has created in the community about the approach to parenting arrangements against a background of family violence. Although the presumption does not apply in cases of family violence or child abuse as set out in s 61DA(2), the Commission should explore, if possible, the extent to which that important qualification is understood. If it is not well understood, then consideration could be given to its repeal or replacement with a clearer and simpler presumption, or even just having no presumption. Again, a review of the cases identifies that the interplay of s 61DA and s 65DAA (court to consider equal time or substantial and significant time with each parent in certain circumstances) often lengthens submissions and judgments with concomitant additional costs to parties and tax payers.

157. It is not accepted that the "best interests of the child" (s 60CC) requires clarification so as to "clearly prioritise the protection of children from physical or psychological harm". When ss 60CC(2)(b), 60CC(2A) and the definitions of abuse (s 4) and family violence (s 4AB) are read together there can be no doubt that in applying the test of best interests of the child as the paramount consideration (s 60CA) to what parenting order should be made, the judge must prioritise the protection of children from physical or psychological harm (see also s 60CG – Court to consider risk of family violence).

The Family Law Act and injunctions

158. In addition to making a parenting order which restrains contact with the child, ss 68B and 114 give courts exercising family law jurisdiction power to grant injunctions, including restraint against approaching, entering or remaining in premises where the child, a parent of the child, and others (s 68B(1)(b)) live or spend time. Sections 68C and 114AA(1) enable the court to give police the power to arrest without warrant the person to whom the injunction is directed if the conditions in the sections are established. Although orders of this type are made frequently, the powers of arrest appear to be rarely used.

159. It is obvious that the personal protection afforded by these injunctions can also be achieved by a family violence order made under state and territory legislation. The combined effect of ss 114AB(1) and Reg 19(a) of the Family Law Regulations 1984 is that ss 68B and 114 do not exclude or limit the operation of the state and territory family violence legislation. This may explain why the powers of arrest referred to are rarely used.

160. Another explanation is that the power of arrest pursuant to ss 68C and 114AA(1) only operates where the police officer believes on reasonable grounds that the injunction has been breached by:
    (i) Causing, or threatening to cause bodily harm to the protected person; or
    (ii) Harassing, molesting or stalking that person.

161. It does not apply to the breach of an injunction, for example by simply entering premises, whereas if a state or territory family violence order prohibits entry on particular premises, a person can be arrested for doing so. If a recommendation for an amendment of the Act along these lines is considered, it is important to recognise that family violence orders made under state and territory legislation are time limited whereas injunctions made under the Act generally are not. It is possible, and indeed reflects the Court's experience, that an injunction under the Act could be in operation for many years and its existence forgotten by those affected by it. So as to avoid unintended consequences, it may be appropriate that the "reasonable belief" power of arrest provisions operate for a period stated in the order and if no period is identified, then by operation of the Act for two years from the date of the order.

162. Pausing there, currently before Parliament is the Family Law Amendment (Family Violence and Other Measures) Bill 2017. Relevantly, that Bill criminalises breaches of family law injunctions made for personal protection. Currently these injunctions are enforceable only by civil action brought in the family law courts. The new offences will relieve the burden on family violence victims of bringing a private application for contravention of the injunction. Instead, breaches will be enforceable by the police through criminal action.

163. On 23 April the Senate Legal and Constitutional Affairs Committee released its report on this Bill. The majority of the Committee supported the Bill, but Labour Senators recommended the excision of the provisions criminalising breach of personal protection injunctions leaving those provisions to be revisited as a matter of priority as soon as the Report of the ALRC Review of the Family Law System has been released.

164. Section 68R of the Act empowers a state or territory court when making or varying an intervention order to revive, vary, discharge or suspend a parenting or other order (s 68R(1)(a)-(d)) to the extent that the family law order requires or authorises a person to spend time with the child. The power is exercisable on application by any person or on the initiative of the court but requires that the court has before it material that was not before the court that made the family law order or injunction. Thus, for example, a police prosecutor or a victim could activate s 68R. Section 68T deals with interim orders and currently provides the suspension or variation will operate for 21 days. The intention is that within 21 days, the revival, variation or suspension will be further considered by a

court exercising jurisdiction under the Family Law Act. Thus, the court with the most recent evidence about the family has the power to address the effect of an elevated risk of exposure to family violence.

165. However, in the Family Law Amendment (Family Violence and Other Measures) Bill 2017 referred to above, s 68T will be amended to remove the 21 day time limit. On the assumption that the Bill will be passed, it remains to be seen what impact this amendment will have.

166. In any event, to continue, anecdotally, the power contained in s 68R is not used. Perhaps this is because the application for a family violence order is often the first contact a family has with the court system and thus there is no order under the Act which needs consideration. Another possibility is that the volume of state and territory family violence order applications is so substantial that police and state courts do not have the capacity to do more than solely address that application. Unless the state/ territory order is expressed to be subject to the order made under the Family Law Act, there is thus the potential for inconsistency between state/territory family violence orders and orders made pursuant to the Act. The risk is that this may cause confusion about which orders prevail and whether or not the person subject to a state order can approach their child and/or former partner. The Commission may care to examine the extent to which state and territory courts exercise powers conferred by ss 68R and 68T and any barriers to those powers (particularly s 68T in its proposed form) being used effectively.

167. If the powers conferred by ss 68R and 68T were to be extensively exercised by state and territory courts, there are obvious resource implications for the Family Court (and the Federal Circuit Court). This is because, these Federal Courts do not have the capacity to readily absorb an increase in their caseload because of family law orders made by state courts, particularly in respect of work which must be dealt with urgently.

168. For completeness, it is noted that s 68P operates somewhat similarly to s 68R. In essence, it enables the court exercising family law jurisdiction to make orders inconsistent with a state family violence order. It is understood that the power contained in s 68P is not used often; the Commission may care to consider whether the responses to the Issues Paper raise any concerns in relation to its operation.

Question 16 - What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?

169. It is self-evident, as is noted in the Issues Paper, that Australia has seen increasing numbers of step-families, blended families, sole-parent families and same-sex families, as well as a growing number of kinship-carer arrangements.

170. Support is given for a rewriting of the provisions of Part VII and particularly s 60B, s 60CC(2) and (3) to better reflect the diversity of families in which children are cared for and to better support decision making by the courts in cases where the children are living in non-traditional families, by extending sections that refer to a parent to any other person concerned with the child's care, welfare or development.

171. In the Family Law Council's 2013 Report on Parentage and the Family Law Act,[56] recommendations were made to amend the Act to enable it to provide a consistent approach to decision making for all children regardless of their family form. For example:

> **Recommendation 1**
>
> The Australian Government should conduct a comprehensive review and revision of the decision making provisions of Part VII of the *Family Law Act* to ensure that it provides a consistent approach to decision making for all children regardless of their family form.
>
> **Recommendation 2**
>
> Given the evidence of family diversity and children's views about who is a parent, the reference to 'both' of the child's parents should be removed from s 60B(1) of the *Family Law Act* and s 60CC(2)(a) of the *Family Law Act*.
>
> **Recommendation 3**
>
> The definition of a parent in s 4 of the *Family Law Act* should be amended to make it clear that for the purposes of determining parenting orders in accordance with Part VII of the *Family Law Act*, the term parent is inclusive and not limited to parents recognised under the law.
>
> The definition should reflect the empirical evidence of family diversity and children's perspectives of family.
>
> The definition should include a provision that recognises that a parent 'may include a person who is regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom.'
>
> **Recommendation 4**
>
> In determining the best interests of an Aboriginal child, s 60CC(3)(h) of the *Family Law Act* should be amended to include 'the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the benefit to that child to enjoy that culture with other people who have the responsibility to pass on that culture).'
>
> **Recommendation 5**
>
> Part VII of the *Family Law Act* should make specific provision for the making of orders in favour of one person or more than two persons were that supports the child's best interests.

[56] Family Law Council, *Report on Parentage and the Family Law Act*, (December 2013).

Property Adjustment

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?

172. First, the research by the Australian Institute of Family Studies ("AIFS") in 2016 referred to in footnote 172 on page 48 of the Issues Paper which found that 62% of litigants thought that their property arrangements were fair, should be highlighted. That does not suggest the need for wholesale changes to be made, such as moving to an entirely different system. It is even more complimentary of the existing system when it is realised that the overwhelming majority of separating married or de facto couples resolve their financial issues in the shadow of the law, without resorting at all to filing any application in court.

173. The one area highlighted as needing attention in the Issues Paper, is the outcomes for parties affected by family violence, or other risk factors. It is submitted though that there is no basis for suggesting that the introduction of a less discretionary approach, or a community of property approach, will provide a better outcome for these parties. As for a change to the current system to cater for this, that will be addressed shortly.

174. In relation to a number of the suggestions raised in paragraph 152 and elsewhere in the Issues Paper, it is noted that the idea that the provisions in the Act governing property division need to be amended "to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes" was expressed by the Productivity Commission in its 2014 Inquiry Report, Access to Justice Arrangements.[57]

175. However, the following points are noted:
    - It is difficult to obtain reliable hard data about the percentage of separating couples (both married and de facto) able to resolve, by agreement, their financial issues following the breakdown of their relationship without resorting to filing any application in either the Court or the Federal Circuit Court. However, it is the Court's experience that at least the majority of such couples are able to so do.[58] As the Productivity Commission Report itself notes in this context "…very few family law disputes are resolved through the Courts…"[59]
    - In the 2014-2015 financial year, the Court finalised 3028 final orders applications.[60] Thirty per cent of the applications for final orders relate solely to parenting orders, the remainder relate to financial (55%), parenting and financial (13%) and other (2%)[61] comprising Hague Convention proceedings, contempt, contraventions, child support appeals and enforcement summons.

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[57] Above n 3.

[58] 13,457 Applications for Consent Orders were filed in 2014-2015 Family Court of Australia, *Family Court of Australia Annual Report 2014-15* (Commonwealth of Australia, 2015) 52, fig 3.2 ("Annual Report 2014-2015").

[59] Above n 3, 873.

[60] Annual Report 2014-2015, above n 57, 51.

[61] Ibid, p 53, fig 3.3 (Issues sought on Final Order cases filed, 2014-15).

- Of those applications, 15% required a final judgment.[62] In respect of financial only applications, less than 7% required a final judgment.
- Taking into consideration the attrition rate, and the number of matters that are resolved by the making of consent orders without the need to file an application for final orders, the number of families who have not been able to resolve their dispute with the assistance of the Court and proceed to final determination as set out above, is quite small.

176. These statistics demonstrate:
    - The existing law and system is sufficiently understood, simple, fair and predictable to enable the majority of separating married or de facto couples to achieve resolution of financial issues either without resort **at all** to the filing of any application in court or, in that minority of such cases where an application is filed, without ultimately requiring a judicial determination.
    - The current system operates to achieve the desirable outcome that in the vast majority of cases separating couples neither seek nor require a judicial determination to resolve their financial issues.
    - There is no basis for the claim that the financial dispute provisions as they currently stand have resulted in a complicated, and sometimes unpredictable, decision making process.

177. It is a mistake to assume that the only 'guidance' as to how the statutory provisions apply is to be gleaned from the Act itself. There is now almost forty years of jurisprudence emanating from the High Court of Australia and the Full Court of the Family Court as to the manner in which the "core financial dispute provisions" of the Act apply and the manner in which the discretion these confer is to be exercised. Plainly, the "guidance" provided by that jurisprudence contributes to the statistics earlier referred to and the high rate of matters which are resolved without the need for any judicial determination of them.

178. It necessarily follows that it must be recognised that any fundamental change to the Act or to the definition of "property" carries the inherent risk that the accumulated jurisprudence referred to is rendered partly or wholly obsolete. In turn, questions necessarily arise as to whether that which is achieved in the current system under the current law, namely a majority of cases being resolved by agreement without a court determination, is placed at risk.

179. Turning then to some of the specific suggestions made. First, should there be a prescriptive approach to determining financial disputes?

180. The rationale for Australia having adopted the discretionary approach in its legislation was articulated by Gibbs CJ in *Mallet v Mallet* in terms which continue to resonate today:

> *The Family Law Act was passed at a time when great changes had occurred, and were continuing to occur, in the attitudes of many members of society to marriage and divorce, but when it was (as it is now) difficult, if not impossible, to say that any one set of values or ideas is commonly accepted, or approved by a majority of the members of society. Conflicting opinions continue to be strongly held as to the nature of marriage, the*

[62] Ibid, p 54, fig 3.4 (Attrition and Settlement rates in the Court's caseload).

economic consequences of divorce and the effect, if any, that should be given to the fault or misconduct of a party when a Court is making the financial adjustments that divorce entails. It is not surprising that given this diversity of opinions the Parliament did not require the power conferred by sec. 79 to be exercised in accordance with fixed rules. On the contrary, it has conferred on the Court a very wide discretion to make such order as it thinks fit when it is satisfied that it is just and equitable that an order should be made (see subsec. (1) and (2) of sec. 79) although there are some broad principles to which the Court is required to give effect, and some circumstances which it is required to take into account.[63]

181. Plainly, not only does that rationale still apply today, but the considerations referred to by Gibbs CJ apply even more so now that the Act also governs property disputes between de facto couples.

182. It is quintessentially a policy matter for Government as to whether a discretionary approach designed to achieve individual justice ought to give way to a prescriptive legislative approach in the law to be applied.

183. However, whatever side of the debate one takes on that policy question, it ought not to be assumed that "clarification" of the definition of "property" in the Act, and attempts to delineate or narrow the category of "property" available for division as applies in other jurisdictions (for example "relationship property" in New Zealand), brings simplification or certainty to the process which does not exist under current Australian law.

184. For example, one only needs to give some consideration to the definition of "relationship property" in s 8 of New Zealand's *Property (Relationships) Act 1976* (NZ) ("PRA"), and to s 9A of that Act which provides for "when separate property becomes relationship property", to understand why those provisions have provided fertile ground for litigation of disputes concerning what is, or is not, "relationship property" within the meaning of that Act. Those provisions are as follows:

> **8 Relationship property defined**
>
> (1) Relationship property shall consist of—
>
> (a) the family home whenever acquired; and
>
> (b) the family chattels whenever acquired; and
>
> (c) all property owned jointly or in common in equal shares by the married couple or by the partners; and
>
> (d) all property owned by either spouse or partner immediately before their marriage, civil union, or de facto relationship began, if—
>
> (i) the property was acquired in contemplation of the marriage, civil union, or de facto relationship; and

[63] (1984) 16 CLR 605, 607.

(ii) the property was intended for the common use or common benefit of both spouses or partners; and

(e) subject to sections 9(2) to (6), 9A, and 10, all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began; and

(ee) subject to sections 9(3) to (6), 9A, and 10, all property acquired, after the marriage, civil union, or de facto relationship began, for the common use or common benefit of both spouses or partners, if—

(i) the property was acquired out of property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; or

(ii) the property was acquired out of the proceeds of any disposition of any property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; and

(f) *[Repealed]*

(g) the proportion of the value of any life insurance policy (as defined in section 2), or of the proceeds of such a policy, that is attributable to the marriage, civil union, or de facto relationship; and

(h) any policy of insurance in respect of any property described in paragraphs (a) to (ee); and

(i) the proportion of the value of any superannuation scheme entitlements (as defined in section 2) that is attributable to the marriage, civil union, or de facto relationship; and

(j) all other property that is relationship property under an agreement made under Part 6; and

(k) any other property that is relationship property by virtue of any other provision of this Act or by virtue of any other Act; and

(l) any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (k).

(2) In proceedings commenced after the death of one of the spouses or partners, this section is modified by section 83.

9A When separate property becomes relationship property

(1) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part) to the application of relationship property, then the increase in value or (as the case requires) the income or gains are relationship property.

(2) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part, and whether directly or indirectly) to actions of the other spouse or partner, then—

(a) the increase in value or (as the case requires) the income or gains are relationship property; but

(b) the share of each spouse or partner in that relationship property is to be determined in accordance with the contribution of each spouse or partner to the increase in value or (as the case requires) the income or gains.

(3) Any separate property, or any proceeds of the disposition of any separate property, or any increase in the value of, or any income or gains derived from, separate property, is relationship property if that separate property or (as the case requires) those proceeds or the increase in value or the income or gains are used—

(a) with the express or implied consent of the spouse or partner that owns, receives, or is entitled to them; and

(b) for the acquisition or improvement of, or to increase the value of, or the amount of any interest of either spouse or partner in, any property referred to in section 8(1).

(4) Subsection (3) is subject to section 10.

185. Recent New Zealand case law highlighting the complexities involved in these statutory provisions include *Clayton v Clayton*[64] and *Thompson v Thompson*.[65] Summaries of these cases are set out in **Appendix 10**.

186. It is noteworthy that in many other jurisdictions, discretion is incorporated in one form or another; for example:

Singapore

187. The Singaporean Court has power, when (or after) granting a divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the Court thinks just and equitable[66].

188. In deciding if (and if so, how) to exercise these powers the Court is to have regard to all the circumstances of the case, including the following specific matters:
- the extent of the contributions made by each party in money, property or work towards acquiring, improving or maintaining the matrimonial assets;
- any debt owing or obligation incurred or undertaken by either party for their joint benefit or for the benefit of any child of the marriage;

[64] *Clayton v Clayton* [2015] NZFLR 233.

[65] *Thompson v Thompson* [2015] NZFLR 150.

[66] *Women's Charter* (Singapore, cap 353, 2009 rev ed) s 112(1)).

- the needs of the children (if any) of the marriage;
- the extent of the contributions made by each party to the welfare of the family, including looking after the home or caring for the family or any aged or infirm relative or dependent of either party;
- any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce;
- any period of rent-free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party;
- the giving of assistance or support by one party to the other party (whether or not of a material kind), including the giving of assistance or support which aids the other party in the carrying on of his or her occupation or business, and
- the matters referred to in subsection 114(1)[67] so far as they are relevant.

Scotland

189. Under Scottish law, the net value of the matrimonial property should be shared fairly between the parties to the marriage,[68] and shall be taken to be shared fairly when shared equally unless other proportions are justified by special circumstances.[69] The Scottish Act provides that "special circumstances", without limiting the generality of the words, may include:
    - an agreement between the parties on the ownership or division of any of the matrimonial property
    - the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the income or efforts of the parties during the marriage
    - any destruction, dissipation or alienation of property by either party
    - the nature of the matrimonial property, the use made of it and the extent to which it is reasonable to expect it to be realised or divided or used as security
    - the actual or prospective liability for any expenses or valuation or transfer of property in connection with the divorce.[70]

190. The Scottish Act sets out five principles the Court is to apply when deciding what order (if any) to make:
    - the net value of the matrimonial property should be shared fairly between the parties to the marriage
    - fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family
    - any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties

[67] These matters include the future income and earning capacity of the parties, the financial needs and responsibilities of the parties, the standard of living enjoyed before separation, the duration of the marriage, any disability of either party, and contributions made to the welfare of the family (*Women's Charter* (Singapore, cap 353, 2009 rev ed) s 114(1)).

[68] *Family Law (Scotland) Act 1985* (UK) s (1)(a).

[69] Ibid s 10(1)

[70] Ibid s 10(6).

- a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable the party to adjust, over a period of not more than three years from the date of decree of divorce, to the loss of that support on divorce
- a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve the party of hardship over a reasonable period.[71]

191. Under the Scottish Act, when an application is made in relation to matrimonial property, the Court is directed to make such order as is justified by these principles, and reasonable with regard to the resources of the parties.[72]

California

192. The Californian Family Code requires that community property be divided equally between the parties.[73] This requirement does not hold if the parties have made a written agreement to the contrary[74] and in certain other circumstances.[75]

193. Despite the clear legislative statements governing ownership and equal sharing in the Californian legislation, a discretionary element is provided for in the determination of spousal support. However, even with this discretionary element there is still significant criticism that the Californian legislation tends to disadvantage women.[76]

Ireland

194. The Irish approach to the division of matrimonial property is to provide the broadest judicial discretion to consider the circumstances of every case and tailor the decision to suit those circumstances.

195. The Irish legislation is set out in very broad terms, not dissimilar to those under the Australian legislation. The Irish judiciary has steered away from developing its own principles to fill any gap left by the broad drafting of the Irish legislation, and has instead focussed on having regard to the particular circumstances of the case.

196. As for New Zealand, some further aspects of that law need to be addressed.

197. The relevant legislation is the *Property Relationships Act 1975* (NZ), and properly considered, the history of that legislation reveals that when first introduced in 1976 the legislation was highly prescriptive. By necessary inference, inequities or unfairness

[71] Ibid s 9(1).

[72] Ibid s 8(2).

[73] *California Family Code* s 2550.

[74] Ibid s 2581.

[75] Ibid ss 2600-2604.

[76] Louise Crowley, 'Dividing the spoils on divorce: rule-based regulation versus discretionary-based decision' (2012) *International Family Law* 388, 391.

produced by that system led to very substantial amendments made in each of 2001[77] and 2005[78] respectively.

198. The consequences of those amendments are that an initially highly prescriptive approach has been substantially modified to a significantly discretionary one. Apart from s 13 which was in the original Act, there is now within the New Zealand legislation many provisions providing for a discretionary approach. Without being exhaustive, we refer to ss 14, 15, 15A, 16, 17, 17A and 18.

199. It is sometimes claimed that the New Zealand approach results in a high degree of certainty of outcomes, but that is not necessarily the case as revealed in an article in 2008 by Professor Nicola Peart, a leading New Zealand family property academic, the abstract of which reads:

> When the Matrimonial Property Act 1976 was introduced, Tony Angelo and Bill Atkin analysed the Act in conceptual terms and welcomed the change from a purely separate property regime to a community property system. It steered an acceptable middle course between competing demands. The Act operated as a deferred community property regime on separation, which was relatively simple and predictable for most couples. This paper analyses the changes made by the Property (Relationships) Amendment Act 2001 and concludes that it has changed the conceptual basis of the property sharing regime, but not in a coherent or principled manner. While the community property system is strengthened in some respects, it is weakened in other respects and overall it introduces an undesirable level of uncertainty and unpredictability.[79]

200. Next, it is noted that if there is a change to a prescriptive regime that would have an impact upon de facto couples which is not readily recognised. It is observed as follows:

- It is axiomatic to say that married couples know they are married, and that there is a specific legal system which will determine their financial dispute when and if required. However, many partners who reside together do not know or do not appreciate that they are in a de facto relationship until sometime after the breakdown of the relationship when a court declares that they were in a de facto relationship. Indeed, many people choose to not get married to avoid the consequences of that status. It is then one thing to apply the current discretionary system to determine their financial dispute, but plainly it would be an injustice to apply a rule-based system to those couples which in effect prescribes what property is in and what property is out; that would be a great surprise to many of these couples.

- It is instructive that of all the alternative jurisdictions mentioned above, only New Zealand treats de facto couples in the same way as married couples. Attached in

[77] *Property (Relationships) Amendment Act 2001* (NZ) (2001 No 5).

[78] *Property (Relationships) Amendment Act 2001* (NZ) (2005 No 19).

[79] Nicola Peart, 'The Property (Relationship) Amendment Act 2001: A Conceptual Change' (2008) 39 *Victoria University of Wellington Law Review* 813.

Appendix 11 is a summary of how de facto couples are dealt with in those other jurisdictions.

201. It is also well known that the proposition that a prescriptive system should be introduced was firmly rejected by the Australian Law Reform Commission in 1987. The Commission's report on matrimonial property, known as the Hambly Report made the following recommendation:[80]

> *Financial adjustment on breakdown of marriage.*
>
> *Property adjustments.*
>
> *1 No "fixed entitlement" system. The economic effects of the breakdown of a marriage upon the parties and their children are significant factors that should be taken into account when property is re-allocated on the breakdown of a marriage. Accordingly, a strict "fixed entitlement" system, under which parties are entitled only to a specified proportion of the property available for re-allocation, should not be introduced in Australia* (paragraph 270–7).

202. This recommendation applies equally today.

203. In support of their recommendation, at paragraph 271 of the Hambly Report, the Commission said this:

> *The Commission's research and consultations have led it to conclude that the post-separation circumstances of the parties and their children must continue to be a factor in the allocation of property. This matter is of such importance as to be decisive in the determination of the way in which the law should strike a balance between flexibility and predictability. The need to take account of post-separation circumstances makes a high degree of flexibility essential. An assessment of the economic effects of marriage and its breakdown upon each of the parties and their children must be based on the particular facts of each case. It cannot be precise and it cannot be controlled by a general legislative formula.*

204. Further, this appears at paragraph 272 of the Hambly Report:

> Implications of equality: conclusions from the research projects. *The equal status in marriage of husbands and wives would not be adequately reflected in a regime which adopted a general rule of equal sharing of property at the end of the marriage without regard to the spouses' post-separation circumstances. As noted earlier, the introduction of such a regime in recent reforming measures overseas was seen as an advance from the previous law in those jurisdictions in the protection of financially vulnerable women. In contrast, the findings of the research projects summarised in chapters 5 and 6 show that the introduction of such a regime in Australia would aggravate the economic inequality that often arises from the differing effects of marriage and child rearing upon the spouses. It would substantially change the outcome of many cases from that reached under the Family Law Act, primarily to the detriment of custodial parents and women whose earning capacity has been impaired by their marriage. Such a change would also conflict with the overwhelming weight of public opinion, as revealed in submissions to the Commission and in the answers given by divorced people to questions on issues of matrimonial property law in the survey reported in chapter 6. Those answers strongly*

[80] The Law Reform Commission, *Matrimonial Property*, Report No 39 (1987).

supported the proposition that arrangements for the care of children after separation should continue to be a determinant of property allocation. A preference was expressed by 80% of women and 66% of men for a system which takes account of 'the particular situation of the couple concerned, even if that means uncertainty and some extra cost or delay', over a fixed entitlement system.

205. It is not apparent that there has been any shift in public opinion away from this view, and the economic effects of marriage breakdown continue to fall unequally. That renders s 75(2) of the Act as important today as it ever was. Thus, the view is firmly held that the abandonment of the current system will be at the expense of women whose earning capacity has been impaired by their marriage, and children.

206. Although the economic consequences of marriage breakdown have not changed, there have been two significant amendments to the Act since 1987 which support the argument for the retention of the current system. First, parties can opt out of the discretionary system by entering into a binding financial agreement. Secondly, a superannuation splitting system has been introduced which avoids the difficulties of equitably taking account of the parties' superannuation interests.

207. There is also a third topic of importance, namely the current system having been extended to de facto couples; the inequity has been identified in imposing a prescriptive system on those couples.

208. It is also curious why the search is on for an alternative system. The abandonment of the current system would come at the expense of women and children, who still benefit most from the implication of s 75(2) of the Act. Although there has been greater workforce participation by women and a greater involvement by some men in child rearing, we are a long way from achieving equality, either in the workforce or the home. The economic effects of marriage breakdown continue to fall unequally, and the ameliorating effect of s 75(2) is as important now as it was in 1987 when the ALRC concluded that any departure from the current system "would primarily work to the disadvantage of custodial parents and women whose earning capacity has been impaired by their marriage" and would also "conflict with the overwhelming weight of public opinion".

209. It is also important to recall that the Hambly Report found that 80 per cent of Australian women and 60 per cent of Australian men preferred a system which "takes account of the particular situation of the couple concerned even if that means uncertainty and some extra cost or delay over a fixed entitlement system". While any family law system will attract many complaints, we are unaware of any shift in public opinion away from the previously recorded view strongly supporting individual justice.

Family Violence

210. The Judges of the Court are generally supportive of legislative change to make family violence an explicit consideration to be taken into account in family law property proceedings.

211. However, it is this Court's firm view that it should neither be a threshold issue nor a consideration which allows for compensation/damages; that is for the State civil courts.

Consistent with *Kennon & Kennon,*[81] it can only be a factor to be taken into account in determining the respective contributions of the parties.

Other matters

- *Amendments to allow greater use of court orders for the split or transfer of unsecured joint debts and liabilities.*

This was a recommendation made by the House of Representatives Standing Committee on Social Policy and Legal Affairs.

However, s 90AE of the Act provides for a Court to make orders "for the split or transfer of unsecured joints debts and liabilities". The court cannot and should not make such orders under its own motion. It is up to a party to apply for an order under this section and no amendment can, per se, encourage the greater use of that section.

Sub-sections 90AE(3) and (4) do provide the conditions that must be present and the factors that must be taken into account for an order to be made, but they are all necessary conditions and factors from not only a practical sense, but also to ensure procedural fairness, and not the least to ensure that the Constitutional power being relied on is not offended.

- *Suggestions that the requirement to regard the best interests of the child as the paramount consideration should also apply to adjustment of property.*

The property regime is necessarily party-focussed and not directly child-focussed. Apart from the fact that the litigants may not have any children, it is unclear how "the best interests of children" being the paramount consideration, can apply to the adjustment of property interests of the parties. For example, does it simply mean that the property distribution depends on the time the children spend with each party, and if so, what will the criteria be?

- *Suggestions that the Act's complex superannuation splitting provisions be simplified.*

This is another recommendation by the House of Representatives Standing Committee on Social Policy and Legal Affairs. However, the Constitutional restraints on the Federal Parliament, and the requirement for procedural fairness where third parties are involved, in this instance superannuation funds, must not be overlooked.

The legislation (including the Regulations) is required to be as it is, and the Forms follow the requirements of the legislation. The Forms were also drafted with the specific input of the superannuation industry.

- *Suggestions that the property provisions for married and unmarried couples be merged and any remaining inconsistencies resolved.*

No Inquiry or Report or academic article is referred to by the Commission in identifying the suggestion. In any event, subject to some minor differences which are of no material effect, the property provisions are precisely the same, and there are no relevant inconsistencies. The area where there is a major difference is at the first stage; i.e. a de facto relationship has to be established where there is no similar requirement for married

[81] (1997) FLC 92-757.

couples; they just have to be married. However, that is not an inconsistency that can be overcome.

That said, putting aside the jurisdictional facts that must be present for the exercise of de facto powers, it would be possible to merge the financial provisions to avoid duplication.

Question 18 - What changes could be made to the provisions in the Family Law Act governing spousal maintenance to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

212. The question makes the assumption that the clarity and comprehensibility of the spousal maintenance provisions in the Act need to be improved to provide fair outcomes. However, there is no research, empirical evidence or data cited in support of that assumption.

213. The only point made in the Issues Paper is the suggestion that there should be "a greater consideration of spousal maintenance orders in cases involving family violence". In particular, it is suggested that family violence be included as a relevant factor in determining needs for the purposes of spousal maintenance applications. As is plain, that says nothing about the need for clarity and comprehensibility to promote fairer outcomes.

214. Indeed, leaving aside the issue of family violence, it is submitted that, save and except in relation to one issue, the Act is clear and comprehensible, and no improvement is necessary.

215. The one issue that could be addressed is the circumstance that the factors in s 75(2) of the Act, and s 90SF(3) for a de facto relationship, are the factors that a court is required to take into account when dealing with both property settlement as well as spousal or de facto maintenance. It is plain that some of the factors are not relevant to property settlement, and some are not entirely relevant to maintenance, and this can be confusing for litigants and can sometimes cause judges difficulty in writing judgments. The remedy would be to have separate sections for property settlement and for spousal or de facto maintenance.

216. As for the actual thrust of the question, the Court would not oppose the introduction of family violence as a factor to be considered, but it must be remembered, that spousal maintenance is about the need for support and the ability to pay. Plainly, where family violence is established, as opposed to being alleged, that can readily be seen as a factor affecting need, but the ability to pay must still be established.

217. Finally, some unnamed "stakeholders" have proposed the development of a system of administrative determination of spousal maintenance. Plainly, that would be a matter for Government, but two comments are made. First, the making of orders for spousal maintenance are rare, and are always dependent on, the orders for property settlement. Secondly, every child needs financial support, but not every litigant does.

Question 19 - What changes could be made to the provisions in the Family Law Act governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

218. This is a question that it is inappropriate for the Court to respond to. The reason for that is an obvious one, namely, the Court will inevitably be called upon to interpret and apply any changes to the Act relating to Binding Financial Agreements.

219. However, the Court does make two comments as follows:

    1. In 2015 the Government introduced into Parliament the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015. That Bill comprised substantial amendments in an attempt to address many perceived difficulties with the Act in the treatment of Binding Financial Agreements as demonstrated in a number of decisions by the Full Court. Although requested to do so, as with this question, the Court made no submissions in relation to these proposed amendments. However, this Bill lapsed upon the dissolution of Parliament on 9 May 2016, and it has not been reintroduced. There were other provisions in the Bill that have been included in subsequent Bills such as the Civil Law and Justice Legislation Amendment Bill 2017, but still not the provisions relating to Binding Financial Agreements.
    2. The recent High Court decision of *Thorne & Kennedy*[82] is an important one, but it highlights the need to consider what the rationale of Binding Financial Agreements should be into the future. In other words, should it remain the original intention of enabling parties to settle their financial affairs in whatever way they wish without reference to the courts, or is an element of fairness and/or comparison to what might happen if a decision is made by a court to be a guiding principle in the enforcement or the setting aside of a Binding Financial Agreement.

Resolution and adjudication processes

Question 20 - What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

220. The Family Court of Australia pioneered case flow management in Australian courts. From its establishment in 1976 the Court was faced with particular challenges that acted as a catalyst for that work. They included:
    - the fact that as soon as it commenced operation the Court was immediately presented with an excessive case load;
    - the fact of being the first high volume, national court; and
    - the conciliation services built into the original design of the Court had to be integrated with the case management system.

[82] [2017] HCA 49.

221. Importantly, careful thought, a very substantial application of resources, decades of experience within the Court, from jurists[83] and administrators in other Australian courts and from international experts have been invested in the Court's case management systems. No one system will perfectly meet what at times are the competing needs of court users, administrators, the judiciary and executive government. A system that is adequate at one time may need to be changed to meet future demands. That said, any significant case management changes must be carefully assessed before they replace the results of the hard won lessons of the past.

222. Rarely has a year gone by without some change to the case management procedures of the Family Court, but some of the milestones are:

- The Court commenced operation on 5 January 1976 in commercial premises which were unsuited to Court proceedings, with a skeleton staff, few judges and a backlog of cases[84]. As the first high volume federal court it faced the novel challenge of designing procedures for a national[85] court and implementing them in the context of the various State and Territory local legal cultures.
- By 1980 there were unacceptable delays in many registries and cases were "lost" in the system. Costly and potentially unnecessary affidavits were filed with the initiating process and multiple affidavits were filed in many proceedings.
- In part to ensure that cases did not fall into abeyance, case tracking software[86] developed for the United States Tax Court was purchased and adapted for use by the Family Court. It was enhanced to support word processing and the family law environment and over the years, with changes of legislation and case management requirements, it ultimately became unrecognisable from the original software. It was replaced in more recent years with software called Casetrack which in turn has been developed and refined and has ultimately been adapted for the use of the three federal trial courts.
- In 1984 a formal case management system was designed and expressed in the first set of judge made rules[87] and Case Management Guidelines. The new regime commenced on 1 July 1985 and was largely implemented by registrars to whom procedural and later, quasi-judicial powers were delegated. The system relied heavily on the teachings of the US experts in the fledgling discipline of case flow management such as Ernest Friesen, Harvey Solomon, Maureen Solomon and Barry Mahoney.

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[83] Among others, Justice Davies of the Queensland Court of Appeal.

[84] The very significant change in Australian family law created by the *Family Law Act 1975* meant that many involved in family breakdown over the years leading up to the new regime waited until it commenced before instituting proceedings. It took 20 years for the number of files created in 1976 to be equalled in any one year.

[85] The first instance work in Western Australia is undertaken by the Family Court of Western Australia and the specialist Family Law Magistrates attached to that Court. Appeals from the exercise of federal jurisdiction in Western Australia are heard by the Family Court of Australia. Appeals from the exercise of state jurisdiction in Western Australia are heard either by the Supreme Court of that state or (if an interlocutory decision of a Family Law Magistrate, including all parenting decisions) by Judge of the Family Court of Western Australia.

[86] Blackstone.

[87] The *Family Law Rules 1984*.

- In 1985 the Family Law Council published a report "Administration of Family Law in Australia". While approving of the expeditious determination of some proceedings and the development and refinement of conciliation processes for parenting and financial proceedings, the report raised concerns about the procedures and delay in the hearing of contested matters. The report highlighted a concern about different levels of case-control in different registries and an unacceptable lack of uniformity. The report recommended the development of uniform statistical collection of information about cases.
- A Court-created Committee on the Standardisation of Practices and Procedures issued a report in July 1985. The Attorney-General's Department funded Professor Ian Scott[88] as a consultant to the committee. That report recommended standardised procedures across the Court and the integration of traditional case management with the conciliation processes of the counsellor and registrar arms of the Court. The report was relied on in several later initiatives.
- In 1988 and 1989 the Family Law Rules were amended to require that the evidence in chief relied on for final hearings was to be contained in one affidavit from each deponent and parties could no longer rely on affidavits filed in interlocutory proceedings.
- In 1989 and with the support of the private profession, the judges decided to introduce a system of pleadings. The intention was that the parties were obliged through the initiating application (in the style of a statement of claim) and response, each supported by affidavit, to identify the issues in dispute at an early stage of proceedings. In part the reforms were intended to discourage the filing of lengthy affidavits which often bore little relation to the issues of fact before the Court. The Family Law Rules were amended and seminars were conducted around the country for practitioners.
- Responsibility for the administration of the Court's finances and staff passed from the Attorney-General's Department to the Court in January 1990. In anticipation of the Court becoming administratively independent from executive government, in late 1988 a review was commissioned into the Family Court. The review was jointly commissioned by the Court and the Attorney Generals Department with a view to recommendations being made about the required services, the effectiveness and efficiency of the Court's existing operational arrangements and structures and the making of a detailed costing of those recommendations. The report of the working party on the review was published in September 1990. Again, Professor Ian Scott was a consultant to the review working party in relation to case management. Among many recommendations the working party recommended that case management committees be established at national, regional and registry levels; that a statement of case management principles be adopted and included in the Case Management Guidelines; that the Case Management Guidelines be extended to address the pre-filing phase and establish time standards for each phase

[88] Dean of the Faculty of Law, University of Birmingham and editor of the White Book containing the sources of law relating to the practice and procedures of the courts of England and Wales responsible for civil litigation being the High Court of Justice and the County Court.

of the litigation pathway. This report promoted differential case management, targeting procedures to types of cases. Effectively, all of the case management recommendations were adopted by the Court.

- In 1992 a committee was established by the Chief Justice to report on the simplification of procedures in the Family Court. The purpose of the committee was reinforced by a report published in November of that year by a Parliamentary Joint Select Committee Enquiring into Certain Aspects of the Operations and Interpretation of the Family Law Act. That report concluded that the introduction of pleadings had itself caused an increased complication of proceedings.
- The report of the Simplification Committee was published in May 1994. The simplification of procedures initiative was prompted by the fact that only about 5% of applications seeking parenting or financial orders were concluded by a judgment following a trial. The aim of an ideal procedure for the Court was said to be:
    - To provide access to the Court with as little cost or complexity to the litigants as possible.
    - To offer all litigants and prospective litigants the opportunity to determine their dispute by a dispute resolution method other than trial.
    - To provide a procedure tailored to the 95% of applications which will settle.
    - To ensure that those matters which do proceed to trial do so in a fair, equitable and timely fashion.

  Among many recommendations the simplification committee recommended the expansion of the provision of Information Sessions for parties to new proceedings; proposed a procedure to encourage the lodging of applications for orders to be made by consent; that the system of the formal pleading of causes of action be abolished, it having itself become costly and confusing; the provision of specific application forms for particular types of relief, and the streaming of similar cases for hearing. A further committee was established to implement the recommendations of the simplification committee.
- In August 1997 a committee appointed to evaluate the implementation of simplified procedures reported to the Chief Justice. That committee made a number of recommendations to refine the practical aspects of the simplification design.
- In 1998 the Magellan program for the management of cases involving serious allegations of sexual or physical abuse of children commenced with a pilot in Melbourne. Magellan involves interagency collaboration between the Court, legal aid and the state welfare departments. Based on the successful pilot project, Magellan has been rolled-out across the Family Court of Australia since 2003. An evaluation of the program was conducted by the Australian Institute of Family Studies and in a 2007 report, among other findings, that evaluation found:
    - Magellan cases had greater involvement of the statutory child protection departments.
    - Magellan cases had an average of 6.2 Court events, compared to 10.9 for Magellan-like cases.

- Magellan cases were dealt with by 3.4 different judicial officers on average, compared to 5.7 for Magellan-like cases.
- Magellan cases were more likely to settle earlier.
- Magellan cases are resolved more quickly:
- The total duration of cases, from the date of application to finalisation was shorter by an average of 4.6 months.
- From the date the Court was advised of the allegations to the case outcome, Magellan cases were resolved 3.4 months faster.
- Although there are opportunities for making improvements and assessing the impact on children and families, Magellan is a successful case-management process for responding to allegations of child abuse in parenting matters.

- In late 1998 the Chief Justice appointed a committee within the Court "to take advantage of and integrate the recommendations from a number of recent reports and to initiate, support and monitor projects which focus on the improvement of the efficiency and effectiveness of court services". The committee was known as the Future Directions Committee. Again Professor Ian Scott was a consultant to the committee and he was joined as a consultant in relation to case management issues by Justice Moynihan[89]. The committee reported in July 2000. Particular themes and principles were identified in the committee's report including proportionality; achieving joinder of issue in a timely fashion; the dedication of types of cases suited to particular types of intervention; self-represented litigants; seeking out partnerships with others involved in the justice system, including litigants, members of the public, the private legal profession, other courts, legal aid bodies and, related government and non-government agencies; seeking out local solutions; and the need for continuous improvement. While acknowledging the need for reform the committee's report noted that:

  > *Over more than 24 years and through a number of iterations, the Family Court has developed a sophisticated case management system that has largely met the needs of the court and its clients. It is a system which:*
  >
  > - *delivers 70% of proceedings to settlement within four months of filing*
  > - *requires an average of three appearances at court or related events and*
  > - *produces the least delay, at the lowest private cost, while managing the largest workload in the Federal justice system.*[90]

- The Federal Magistrates Court of Australia (now the Federal Circuit Court) was established in 1999 and commenced operation in June 2000. It has grown to a complement of about 65 judges. The majority of those judges sit on family law cases. As at 2018 about 88 percent of family law cases are determined in the Federal Circuit Court.

[89] a Justice of the Supreme Court of Queensland.

[90] Commonwealth of Australia, *Future Directions Committee Report*, Family Court of Australia (July 2000) 29.

- Since 2000 the Family Court has been reduced in the number of judges[91] from about 46 to about 33. Over those years the first instance work of the Family Court has been increasingly focussed on complex cases and cases with an international aspect.
- There was a growing concern that existing procedures in the adversarial model of litigation were not the most effective for parenting proceedings. A period of development including an exploration of European approaches to litigation in 2003, lead in early 2004 to a pilot program called the Children's Cases Program which was implemented on a voluntary basis in the Sydney and Parramatta Registries. The program introduced a less adversarial (more inquisitorial) format for parenting hearings. Ultimately that Court designed program was mandated by the legislature in the form of Division 12A of Part VII of the Act.
- In about 2009 the Court changed from a centralised listing system to a system of individual judicial dockets with judges being increasingly involved in all aspects of proceedings once the resolution phase is concluded. As the Federal Circuit Court grew, the Family Court contracted, resulting in the number of cases before the Family Court being reduced while there was a corresponding increase in the level of complexity of that case load. The result has been that more and more cases require individual case management by a docket registrar and or judge.
- Since that time some registries reintroduced elements of a centralised listing system in an effort to achieve greater efficiency in the listing of hearings.
- Changes are regularly made to the *Family Law Rules* 2004 to accommodate changes in primary legislation and to assist in the efficient and effective management of cases through changes to practice and procedure.

A change for the better?

- As is readily apparent the current family law system has two separate courts exercising virtually the same jurisdiction. The transfer of matters between the courts is entirely a matter for the court from which a transfer is sought, and there is no appeal from that exercise of discretion.
- It has long been the view of the Family Court that as the Superior Court of Record, that court should have the power to uplift matters from the lower court. Further, some time ago the judges of the Family Court determined what they considered should be the subject of the discrete jurisdiction of the Family Court. In this regard, the Court attaches as **Appendix 12** a document headed "Matters for discrete jurisdiction of the Family Court of Australia and Transfers."

[91] Excluding for this purpose the judges of the Family Court of Western Australia who also have commissions on the Family Court of Australia.

Question 21 - Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

223. In paragraph 171 of the Issues Paper a number of possible reform strategies are set out. However, these are all strategies that the Court employs in any event:

- The Court undertakes a triage approach to court applications to ensure that urgent cases are identified and dealt with expeditiously and that families are referred to a resolution pathway which is appropriate to their needs. The Rules provide in r 12.03 for a case assessment conference to be held before a registrar. Then there is the Magellan program for management of cases involving serious allegations of sexual or physical abuse of children. That said, the Court of course could do far more in this area with more registrar and family consultant resources.
- The Court utilises a case management model which involves a teamed docket system comprising judicial officers, registrars and case co-ordinators.
- In recent years the Court has moved away from practice directions and notes, and prefers to include all the case management processes in its Rules of Court, given that that is what Rules of Court are for.
- The Court addresses delays caused by parties by imposing costs penalties, and a failure to meet Court deadlines can result in a matter proceeding undefended. Although it is not open to the Court to set budgets, the practice of the Court, and particularly with its costs disclosure rules is to ensure that the litigants are aware of the costs of the process at each relevant stage.
- There is ample evidence of the Court diverting litigants to mediation, and other dispute resolution services.
- Both the Family Court and the Federal Circuit Court have made representations to Government to amend the Family Law Regulations (Regulation 15A) to provide for leave to appeal all interim orders (i.e., including in child welfare matters), however, Government is yet to progress such amendments. Recently the Appeal Division of the Family Court has developed a protocol for the efficient handling of applications for leave to appeal which can also be employed in the event that Government does take up this proposal.

Small property claims

Question 22 - How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

224. Once again, this question is premised on a false assumption, namely that the Family Court has a "one pathway for all" approach to court proceedings. A perusal of the Rules, and an understanding of our case management processes demonstrate otherwise. They provide the flexibility for hearing and determining a matter dependent upon the nature and

complexity of the dispute. Further, they provide a pathway for single issue disputes, and where there is a need to determine one aspect of the dispute, for example, a valuation issue. Further, the Court has for many years successfully employed a Magellan program, designed to ensure that the cases which are the most resource intensive, and which involve the most vulnerable children are dealt with as effectively and efficiently as possible.

225. An alleged concern is a lack of options for property matters that involve small asset pools. However, what must be remembered is that those matters are the work of the Federal Circuit Court, and not the Family Court. Nevertheless, if such a matter did come before the Family Court, together with say a complex parenting dispute, as identified above, our Rules and case management processes provide the flexibility to deal appropriately with such a property dispute.

226. In relation to the suggestions for change in paragraph 175, they are addressed seriatim as follows:

- Extending the requirements of s 60I of the Act to financial matters is unnecessary in the Family Court because the Court's Rules provide pre-action procedures which must be complied with. Indeed, our pre-action procedures were the basis for the enactment of s 60I in relation to parenting matters.
- As identified above, this is not directly relevant to the work of the Family Court, but, as indicated, the Rules, and our case management processes are flexible enough to enable the early resolution of such property matters from a procedural point of view. However, the Court is unsure what "simplified … evidentiary requirements' are being referred to. Whether it is a complex or a small property dispute any decision can only be based on the evidence that is presented.
- It must also be acknowledged that the experience of the Court is that some cases with small asset pools can provide the most hard-fought and complex litigation.
- This issue is addressed in the Family Law Amendment (Family Violence and Other Measures) Bill 2017, which is currently before Parliament.
- This is a matter for the Federal Circuit Court.
- The Rules were amended recently to promote the greater use of private arbitration, but the take-up is a matter for the litigants and the legal profession.

Question 23 - How can parties who have experienced family violence or abuse be better supported at court?

227. Paragraphs 177-178 of the Issues Paper address client concerns about the adversarial nature of court processes and the potential impact on parties who have experienced family violence or abuse. As explained in the response to Questions 1 and 29, proceedings under the Act concerning children are not strictly adversarial, as that term is used to describe court processes. It overlooks that there are many provisions of the Act and the Family Law Rules which allow the Court to tailor the hearing to the needs of the parties. For example, the Court is not restricted to the proposals made by parties about their children

and, subject to procedural fairness, must make an order in the best interests of the child (s 60CA) (*AMS v AIF*;[92] *Bolitho & Cohen*).[93]

228. Division 12A of Part VII of the Act is a powerful reminder of the tools available to a judge, to ensure a less adversarial trial. That said, it is accepted that even a less adversarial trial can be stressful and the processes inherent in determining where the truth lies when an allegation of family violence is denied, has the potential to re-traumatise a victim who is telling the truth.[94]

229. Further, whatever process is in place, there is a need for the family law system to be appropriately funded and resourced. In particular, an essential component of better support for litigants, is the injection of adequate funds.

230. The proposition at paragraph 183 of the Issues Paper, that victims of family violence or abuse would benefit from greater support as litigants, particularly when they do not have legal representation, is also accepted. The key suggestion for addressing these trauma concerns by "embedding specialist family violence workers in the family courts" is not new and is also accepted. It is a matter of record that in response to the 2016 "Safety First in Family Law – A Five Step Plan" published by Women's Legal Services Australia, the Family Court (and the Federal Circuit Court) embraced the suggestion of embedding domestic violence specialists in the courts and called for modest funding to allow this to occur. Embedding this person in the court structure has the obvious advantage of limiting fragmentation. It was understood that this role would be in addition to the work undertaken by family consultants and court staff, for example in undertaking risk assessments, preparation of safety plans, providing information and evidence of family violence or abuse to the court and making soft referrals. The role envisaged in paragraph 184 would undoubtedly complement the assistance offered by the courts to parties who have experienced family violence. However, additional funding has not been made available.

231. In responding further to this question, it is relevant to set out the Court's submission to Term of Reference 1 of the 2017 Parliamentary Inquiry into a Better Family Law System to Support and Protect those Affected by Family Violence. That term of reference read:

> How the family law system can more quickly and effectively ensure the safety of people who are or may be affected by family violence, including by:
>
> a. Facilitating the early identification of and response to family violence; and
> b. Considering the legal and non-legal support services required to support the early identification of and response to family violence.

[92] (1999) 199 CLR 150.

[93] (2005) FLC 93-224.

[94] Commonwealth of Australia, *Family Violence Best Practices*, Family Court of Australia and Federal Circuit Court of Australia (December 2016) 16.

232. The Court's submission was as follows:

> 3. Together with the Federal Circuit Court, the Family Court has implemented a Family Violence Plan ('the Plan')[95] to respond to clients affected by family violence. The aim of the Plan is to effectively address family violence issues before the court and to provide a safe environment in court for all parties. The Plan encompasses the administration of the court, judicial decision-making and the work of legal practitioners and service providers within the family law system. The priority areas and goals are:
>
> - Area 1: Information and communication
>   - Goal: Make the courts' diverse client base, stakeholders and system participants aware of the courts' responses to family violence.
> - Area 2: Screening and risk assessment
>   - Goal: Adopt best practice risk assessment tools to better address risks to safety or wellbeing for families who are separating or separated.
> - Area 3: Operational processes, including safety at court
>   - Goal: Ensure the courts' physical layout, processes and practices support client safety while on the premises.
> - Area 4: Staff awareness and capability
>   - Goal: Give staff the awareness, skills and resources required to ensure all persons experiencing family violence are dealt with appropriately and their safety assured.
> - Area 5: Community engagement
>   - Goal: Understand the unique issues for particular communities in relation to family violence and use this information to inform administrative practices
>
> 4. The Family Court and the Federal Circuit Court are currently in the process of updating the Plan.
>
> 5. The courts have also developed Family Violence Best Practice Principles ('the Best Practice Principles') (Annexure A).[96] These are maintained by the joint Family Court–Federal Circuit Court Family Violence Committee. After the Family Law Act was significantly amended in 2006, the Best Practice Principles were developed in order to assist decision-makers. Later, the Principles became a tool aimed more broadly at providing practical guidance to courts, legal practitioners, service providers and litigants in circumstances where issues of family violence or child abuse arise. They contribute to the courts' commitment to protecting litigants and children from harm resulting from family violence and

[95] Commonwealth of Australia, *Family Violence Plan 2014–16: Family Court of Australia and Federal Circuit Court* (31 December 2015) Family Court of Australia <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-andprocedures/ fv-plan>.

[96] Commonwealth of Australia, *Family Violence Best Practice Principles* (December 2016) Family Court of Australia <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/family-violence-best-practice-principles>.

abuse and are applicable in all cases involving family violence or child abuse (or the risk of either) in proceedings before courts exercising jurisdiction under the Act.

6. Where an allegation of child abuse or family violence is made in Family Court proceedings a 'Notice of Child Abuse, Family Violence or Risk of Family Violence' is required to be filed pursuant to s 67Z of the Act and r 2.04D of the Family Law Rules. Upon receipt of this notice, the Registry Manager will notify the relevant child welfare authority pursuant to subs 67Z(3) and sub-r 2.04E(4). In the Federal Circuit Court a 'Form 4 – Notice of Risk' must be filed with an application for a parenting order.[97] As for the Family Court, where a Notice of Risk involves child abuse or risk of child abuse the Registry Manager will notify the relevant child welfare authority.[98]

7. Cooperation and information sharing with relevant state courts and authorities is of course important to facilitate early identification and response to family violence. This is discussed in more detail under Term of Reference 6.

8. The Family Court has also had in place for a significant period of time the Magellan program, a streamlined process for the most serious cases alleging child abuse. The program involves early and rigorous case management, including making appropriate interim orders to protect the child, obtaining information from child welfare authorities, and the appointment of an independent children's lawyer. This program has been assessed as being a successful means of responding to allegations of serious child abuse.5

9. In the context of child-related proceedings, risk assessments are conducted by family consultants appointed by the Court. Family consultants have relevant qualifications and experience in child and family issues after separation and divorce. Risk assessment methods are continuously reviewed and improvements considered. An example of this is the proposed implementation of a preappointment questionnaire based on research conducted on risk assessment practices overseas. This has been successfully trialled in Melbourne and Brisbane, and a decision has been made to roll this out nationally.

10. A further initiative of note is the Family Advocacy Support Service ('FASS'). The Commonwealth Attorney General has funded legal aid offices to establish enhanced services in family law registries nationally, in order to provide support in cases where there are allegations of family violence. Using these funds, Victoria Legal Aid has established FASS, which commenced at the Melbourne Registry on 1 May 2017. FASS consists of:
    - an information referral officer to be located on ground level of the court building;
    - additional duty lawyer services to be delivered by the Women's Legal Service Victoria and Victoria Legal Aid; and

[97] *Federal Circuit Court Rules 2001* (Cth) r 22A.02.

[98] *Family Law Act 1975* (Cth) sub-s 67Z(3).

- the presence of the Men's Referral Service and Safe Steps (which supports women).

We believe that similar services are being planned in other states.

11. In terms of the amount of time that matters take to come on for hearing, it must be noted that current resourcing limits the capacity of the Court to hear matters more quickly. The Court acknowledges that it is unacceptable for matters involving family violence to be maintained in the family law system for a long period of time, as this increases the risk of conflict between parties.

233. The Plan is under constant review and the joint Family Violence Committee is working on a new plan to cover the forward three years.

Question 24 - Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

234. The proposal at paragraph 185 of the Issues Paper for an expansion of legally assisted family dispute resolution (FDR) in cases of family violence or abuse should be given careful consideration and, if the evaluations of the programs identified at paragraph 187 are as positive as one would hope, this obvious gap in the family law system should be addressed. Consideration should also be given to the manner in which children's views and participation are addressed in those cases. A process which excludes them and/or denies them an effective voice would obviously be flawed. There is thus an obvious role for the participation of Independent Children's Lawyers.

235. Any discussion of family dispute resolution however, invites consideration of the extent to which ss 10H and 10J of the Act require further attention. Section 10H deals with the confidentiality of communications in FDR and s 10J is concerned with the admissibility of communications in FDR and in referrals from FDR. Is there any sound reason why the exception to confidentiality (imposed on a FDR practitioner by s 10H(1)) should not be amended so that the FDR practitioner "must disclose", perhaps as a mandatory reporter, a communication about family violence? At present the exceptions to confidentiality are couched in terms of "may disclose" (ss 10H(3), 10H(4)) and the Commission may care to consider whether these provisions go far enough.

236. Screening for family violence is undertaken by FDR practitioners, courts and the like. Much has been written about the importance of a common screening tool and the importance of sharing this type of information. Yet, FDR practitioners do not provide the material gleaned by the screening tool to the courts, and the courts must screen again. It is accepted that the level of risk of family violence or abuse can change and that it is insufficient to simply rely on an initial screening tool. However, the Commission may care to consider whether upon a party approaching a court for orders under the Act, the FDR practitioner previously involved with the family provides the screening tool to the court. This has the obvious advantage of creating an immediate red flag for the court and enhances the court's capacity to manage its processes so as to minimise trauma to victims, for example, to more easily identify that this is a case which requires urgent attention.

237. As to s 10J, again, the question which should be considered is whether the exceptions to the admission of anything said in the company of a FDR practitioner or other professional (s 10J(1)(b)) are too broad. So as to understand the point, it is helpful if s 10J is set out in its entirety:

S 10J Admissibility of communications in family dispute resolution and in referrals from family dispute resolution

(1) Evidence of anything said, or any admission made, by or in the company of:

(a) a family dispute resolution practitioner conducting family dispute resolution; or

(b) a person (the *professional*) to whom a family dispute resolution practitioner refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;

is not admissible:

(c) in any court (whether or not exercising federal jurisdiction); or

(d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties).

(2) Subsection (1) does not apply to:

(a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or

(b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;

unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

(3) Subsection (1) does not apply to information necessary for the practitioner to give a certificate under subsection 60I(8).

(4) A family dispute resolution practitioner who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section

238. It can be seen, that s 10J(2) is reliant on the definition of abuse. The definition of abuse relates to abuse of a child, it does not address abuse of an adult.

239. Abuse, in relation to a child, is defined in s 4 of the Act as follows:

(a) an assault, including a sexual assault, of the child; or

(b) a person (the *first person*) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

240. For the purpose of s 10J, the Commission should consider whether the Act should contain a definition of abuse which also applies to an adult.

Question 25 - How should the family law system address misuse of process as a form of abuse in family law matters?

241. This discussion does not deal with issues around:
- Changing the definition of family violence to include "abuse of process"; and
- Protection of vulnerable witnesses from direct cross examination by unrepresented litigants in circumstances where family violence is involved. The Government is working with the courts and National Legal Aid to settle on appropriate amendments to the Act to protect a party from direct cross-examination, and to avoid the need for a party to directly cross-examine the other party where family violence is involved. There was an Exposure Draft of a Bill released in 2017, and to which draft the Court made submissions. The Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 is on the list of legislation proposed for introduction in the Winter 2018 Parliamentary sittings.

The repetitive instigation of legal proceedings

242. The relevant current legislation is:
- Part XIB of the Act;
- Section 118 of the Act – however, it is noted that the Family Law Amendment (Family Violence and Other Measures) Bill 2017 that is currently before Parliament will repeal this section. In effect though it would be replaced by a new s 45A, ss (4) of which would state:

> The court may dismiss all or part of proceedings at any stage if it is satisfied that the proceedings or part is frivolous, vexatious or an abuse of process;

- Section 123(1)(e) which allows the court to make rules providing for and in relation to the prevention or termination of vexatious proceedings. The rules previously contained r 11.04 which was in the following terms:

> If the court is satisfied that a party has frequently started a case or appeal that is frivolous, vexatious or an abuse of process, it may:
>
> (a) dismiss the party's application; and
>
> (b) order that the party may not, without the court's permission, file or continue an application.

This rule was removed after the commencement of the new Part XIB.

243. Rules 10.12(c) and (d) of the Family Law Rules already permit an application for a summary order to dismiss an application that is frivolous, vexatious or an abuse of process or where there is no reasonable likelihood of success. However, if the Family Law Amendment (Family Violence and other Measures) Bill 2017 is passed, then new s 45A(4) will entrench that rule in the legislation.

244. The current provisions however do not address one core problem. The family law jurisdiction has a small cohort of cases where one party oppresses the other by the repetitive filing of applications and the serving of those applications on the other party requiring that other party to come to court to meet those applications.

245. Often in that cohort of cases the respondent to the application is the primary caregiver of children. This misuse of process can have a deleterious effect on that person's mental status, and consequently their parenting capacity. An example of this problem and the difficulties the Court has in effectively dealing with it can be seen in *Marsden & Winch.*[99] In that case the primary caregiver had developed post-traumatic stress disorder substantially as a result of persistent litigation. The Court found it did not have the power to make an order which required the father, who had been ordered not to spend time with the child, to seek leave before filing and serving any new application upon the mother. The Court needs power which is as extensive as possible to shut down this behaviour by:

- Requiring an applicant to seek leave before filing any application; and
- By restraining the applicant from serving any papers upon the respondent until that leave is granted.

246. That power would be exercised in circumstances where the Court formed the view that service of future process on the respondent may have a detrimental effect on the respondent's mental health and/or parenting capacity.

"Vexatious" and "frequently"

247. Central to the operation of the new Part XIB is the requirement in s 102QB(1) of the Act for a court to be satisfied a person has "frequently" instituted or conducted "vexatious" proceedings.

Vexatious

248. Whilst the definition of "vexatious proceedings" includes abuse of process (definition (a)) and having been instituted or conducted to "harass or annoy, to cause delay or detriment or for any other wrongful purpose" (definitions (b) and (d)), these definitions arguably are not sufficiently wide to cover the type of circumstance that arises in cases such as *Marsden & Winch* because:

- They include a focus on the intention of the applicant and not just the effect on the respondent; and

[99] [2012] FamCA 557 and [2013] FamCAFC 177.

- Although "detriment" might be wide enough to capture the effect on parenting capacity, that is not explicit and is made less so by the inclusion of the words "or ... another wrongful purpose".

"Frequently"

249. In a submission made on 23 January 2012 by the former Chief Justice to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Access to Justice (Federal Jurisdiction) Amendment Bill 2011, her Honour said:

> *I observe that clause 102QB(1) imposes a requirement that the Court must be satisfied that a person has "frequently" instituted or conducted vexatious proceedings before being empowered to make a vexatious proceedings order. The requirement of frequently is not one that presently appears in section 118 of the Act, which means the Court can make an order restraining a litigant from instituting further proceedings without leave in circumstances where there has been only one, or few, proceedings instituted that can be considered vexatious.*
>
> *The Bill contemplates the retention of section 118 in an amended form (which I will discuss below) and the creation of a rule-making power that would enable rules to be made for or in relation to the prevention or termination of vexatious proceedings. This, as I understand it, is the route by which it is contemplated that the Court's existing power to make orders with respect to individual vexatious proceedings will be preserved. It seems to me however that this is an overly cumbersome and circuitous means by which to achieve that end. In the interests of simplicity and conformity with existing practice, my consistent preference has been for the requirement of frequency to be deleted from clause 102QB(1). Were the Committee to so recommend, there would be no utility in retaining section 118 and the Bill could be amended accordingly. However, I generally support the insertion of an express rule-making power in relation to vexatious proceedings in section 123 of the Act and do not recommend any change to it.*[100]

250. In response, the Committee said this:

> *2.31 The Chief Justice also advocated the removal of the word 'frequently' in proposed new subsection 102QB(1), on the basis that the word 'frequently' is not defined, and the provision may limit the Family Court's ability to make an order in cases where a single proceeding is clearly vexatious. In her evidence to the committee, the Chief Justice noted that the retention of part of section 118 of the Family Law Act under the Bill may enable the Family Court to overcome the 'frequency' requirement when issuing orders. She stressed, however, that clarity is of critical importance in legislation which can limit a person's right to institute proceedings, and stated her preference for the provisions in section 118 and proposed new subsection 102QB(1) to be combined into one section – namely, a new subsection 102QB(1) with the requirement of frequency removed.*
>
> *2.33 In response to the suggestion that the word 'frequency' be removed from proposed new subsection 102QB(1), the Department noted that the Bill is intended to capture a course of proceedings that is vexatious, rather than one specific proceeding that is vexatious, and that the court will still be able to make*

[100] Chief Justice Bryant, Submission No 2 to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (23 January 2012) 4-5.

an order regarding a single vexatious proceeding under the provisions which will be retained in section 118. The Department explained:

> *The word 'frequency' is one of the key elements of the SCAG model bill. Section 118, as [the Chief Justice] indicated, currently does not require proceedings to have been frequently instituted under the Family Law Act. However, that provision has two applications…[I]t can apply to one proceeding. Where a proceeding of itself is vexatious, section 118 would apply and the court can make orders staying that proceeding as a consequence. It also has the application to a series of vexatious proceedings….The SCAG model bill considered the two options and said that it was an option for each jurisdiction to determine whether or not they adopted the common law test or the test of frequency. Those jurisdictions that have implemented this legislation have all adopted 'frequency'. We have adopted the same test to be consistent with those jurisdictions and with the SCAG model.*[101]

251. When the legislation commenced in 2013 it adopted the "frequency" test in preference to the common law test of "habitually and persistently".

252. It is suggested that either Part XIB or a restored s 118 of the Act be amended so that it is clear that a court exercising jurisdiction under the Act has power to make an order prohibiting a person from instituting proceedings without leave against another person, if the court, at any time in any proceedings involving that other person, forms the view that the further institution of proceedings against that other person may have a detrimental effect on that person's wellbeing or detrimentally affect that person's parenting capacity.

253. Whilst the exercise of discretion under such a power would often involve a consideration of the history of the litigation, the threshold test of "frequency", whilst it might be relevant in an individual case, would not be a necessary hurdle.

Subpoenas to obtain access to sensitive personal material such as the victim's therapeutic counselling records or sexual assault service records

254. The fundamental purpose of issuing a subpoena is to procure material that might become admissible evidence.

255. It is consequently important to note that the current provisions of the *Evidence Act 1995* (Cth) do not contain provisions similar to those in Division 1A and Division 1B of Part 3.10 of the *Evidence Act 1995* (NSW) (and similar to those in other State Acts). These sections protect professional confidentiality, relationship privilege, and sexual assault communications privilege.

256. Section 126B of the *Evidence Act 1995* (NSW) gives the court a discretion to exclude evidence to protect confidences in a therapeutic relationship if harm would or might be caused and the nature and extent of that harm outweigh the desirability of the evidence being given.

[101] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (2012) 13-14.

257. Those legislative provisions would strengthen the position of a person who raises objections to the issuing or inspection of material on subpoena which is alleged to contain sensitive personal material, and where the sensitivity outweighs its relevance.

258. It is suggested that consideration be given to amend the Family Law Act generally, or alternatively Division 12A of Part VII Family Law Act in parenting cases, to introduce provisions similar to those which exist in Division 1A and Division 1B of Part 3.10 of the *Evidence Act 1995* (NSW).

Non-disclosure of income and assets in property and financial matters

259. The Rules and case law provide a robust regime relevant to a party's obligation to make a full and frank disclosure in a financial case. The law as to the consequences of failure to honour that obligation is well settled. The Issues Paper is silent on any proposed change. None is suggested.

Challenging interim and procedural determinations

260. Reference is made to the response to paragraph 171 in Question 21, namely, and to repeat, both the Family Court and the Federal Circuit Court have made representations to Government to amend the Family Law Regulations (reg 15A) to provide for leave to appeal all interim orders (ie. including in child welfare matters), however, Government has not progressed these amendments. Recently the Appeal Division of the Family Court of Australia has developed a protocol for the efficient handling of applications for leave to appeal which can also be employed in the event that Government does take up this proposal.

Correction

261. In relation to paragraph 194, just to correct a misconception; it is not the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 which includes the provisions therein referred to. Those provisions are contained in the Family Law Amendment (Family Violence and Other Measures) Bill 2017. The Court is supportive of those provisions stemming as they do from the requests by the Family Court of Australia over a number of years to introduce such amendments.

Alternative dispute resolution processes

Question 26 - In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

262. This is not a question for the Court. However, in relation to the suggestion that family dispute resolution (FDR) be mandated for property and financial matters prior to filing an application, the Commission is again referred to the pre-action procedures contained in the Rules.

Question 27 - Is there scope to increase the use of arbitration in family disputes? How could this be done?

263. The Court reiterates that the Rules were amended substantially to facilitate the use of private arbitration.

264. Currently though, arbitration under the Act can only be ordered if the parties consent. There has been a very low take-up rate of arbitration as a form of alternate dispute resolution.

265. The Issues Paper notes that it has been suggested that arbitration processes may offer significant potential to reduce the costs and delays associated with litigated proceedings, particularly in relation to property and financial matters. For that potential to be realised the provision for court ordered non-consensual arbitration would need to be reintroduced into the Act, if that was possible. It is suggested that compulsory court ordered arbitration might be particularly useful in the Federal Circuit Court for financial cases that are selected as suitable for that type of intervention.

266. In May 2007 the Family Law Council issued a discussion paper entitled "The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters".

267. That discussion paper proposed models of court ordered arbitration that might be constitutionally valid. There are serious concerns though about this of court ordered arbitration (*Brandy & Human Rights and Equal Opportunity Commission & Ors*;[102] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia & Anor*).[103] The Commission should seek advice about the constitutionality before recommending any particular model.

Technology – assisted mechanisms to support client-led resolution

Question 28 - Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?

268. This is not a question for the Court.

Question 29 - Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

269. Concerns are raised here about whether the adversarial model (again undefined) is appropriate for families with complex needs, but the model is for Government to

[102] (1994 - 1995) 183 CLR 245.

[103] (2014) 251 CLR 533.

determine, and not the courts. What the Court does say though is that the current court processes are not truly adversarial.

270. Division 12A of Part VII of the Act demonstrates this. That Division of course was born out of the Family Court's less adversarial process, but it has a broader application in providing principles and guidance in determining primarily parenting disputes.

271. As for the Family Court's less adversarial process, there is no denying that its use has waned. However, that could be remedied by Government. A prime reason for its decline has been that the process is resource intensive, requiring much more judge, registrar and family consultant time than otherwise, and with the failure to replace judges and the lack of funds to employ sufficient registrars and family consultants, it has not been possible to maintain the process in its purest form. However, the Court's case management processes allow for the application of Division 12A where it can be done and where it is appropriate.

272. In relation to paragraph 212, the Commission again promotes the misconception, previously identified by the Court, that the Court applies a "single event model of litigation for disputes about the care of children". That is simply not the case. The Court's Rules, case management processes, and Division 12A provide ample flexibility to tailor the process to the nature of the case. Again, the Court's Magellan list is identified as a well-known example of this flexibility.

273. If an application for final orders is filed in the Family Court (as opposed to the Federal Circuit Court) the matter will come before a Registrar for a Case Assessment conference where particular needs are identified and procedural orders made. If there are pressing interim issues that require a decision the case will be heard by a Senior Registrar or a Judge. Children will usually have an independent children's lawyer acting for them (such an order is ordinarily made at a very early stage of proceedings and generally by a judge in the Federal Circuit Court prior to it being transferred to the Family Court). Cases involving serious allegations of abuse or family violence will be allocated to the Magellan List where matters are managed by a Registrar or Judge and given priority hearing.

274. The flexibility of the system, and the processes available to the Court are exemplified by the approach that the former Chief Justice, Alastair Nicholson AO, RFD, QC took in *Re Alex: Hormonal Treatment for Gender Dysphoria*.[104] His Honour set out that process in the reasons for judgment, and they can be found commencing at page 9 in the submissions of the former Chief Justice Diana Bryant in Appendix 8.

275. This question is about whether a problem-solving approach could be adopted by the Court. However, as well intentioned as that suggestion may be, the Court simply does not have the resources to implement such an approach. The less adversarial process and Division 12A are examples of such an approach, but to repeat, the lack of sufficient resources has curtailed the Court's ability to apply these approaches to their fullest extent. The Court simply cannot afford the judge time required to oversight a person's progress in making behavioural changes through the use of part-heard proceedings. That is apart from what is accurately set out in paragraph 219 of the Issues Paper as to the inability of Federal judges because of constitutional restraints to engage in problem-solving

[104] [2004] FamCA 297.

approaches. Nor is it feasible to suggest (as in paragraph 220) that a registrar can undertake the monitoring, because the Court does not have sufficient registrars to permit this.

276. It also needs to be queried whether, in the current climate of legitimate concern about delays in the court processes, a problem-solving approach which will inevitably result in significant delays pending a final decision is an acceptable option.

277. In paragraph 220, the prospect of a non-judicial tribunal is raised, and reference is made to the introduction of Parenting Management Hearings. The Court made a submission to the Senate Committee inquiring into the Family Law (Parenting Management Hearings) Bill 2017, and that submission is attached hereto as **Appendix 13**.[105]

Question 30 - Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?

278. The question raises another non-adversarial model that could be employed by the Court. However, the model outlined is in fact one that the Family Court is able to, and has employed in family law matters involving Aboriginal and Torres Strait Islander children. This was particularly so when the Court employed a number of Indigenous Liaison Officers (as outlined in the response to question 5 of the Issues Paper). They provided the link between the families and the Court, and assisted not only in ensuring that Indigenous communities were aware of the Court processes, but also assisted in ensuring that all relevant members of the child's extended family, as well as the elders, were involved in the planning and decision making around the child's care. However, once the Court lost the services of all but one of its Indigenous Liaison Officers in 2006 with the introduction of Family Relationship Centres, the link was broken and the use of the Court by Indigenous communities waned.

279. Given that experience, the Court wholeheartedly supports the recommendation of the Family Law Council referred to in paragraph 222 of the Issues Paper, and reiterates that the Court's processes are well-equipped to implement that recommendation, with appropriate funding.

[105] Family Court of Australia, Submission No 30 to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Family Law Amendment (Parenting Management Hearings) Bill 2017* (19 February 2018).

Integration and collaboration

Integrated services and partnerships

Question 31 - How can integrated service approaches be better used to assist client families with complex needs? How can these approaches be better supported?

280. The Issues Paper canvasses the need to support collaboration, coordination and integration between the family law system and other Commonwealth, state and territory systems. It highlights some recent Government initiatives. In May 2017 the Commonwealth Attorney-General together with Legal Aid NSW launched a new initiative at the Parramatta Registry of the family courts to provide a coordinated range of front-line integrated legal and social support services. The Family Advocacy and Support Services (FASS) program is delivered by state-based legal aid commissions in family law registries. As noted in the Issues Paper (paragraph 234), it is currently operating on a pilot basis in 23 family law registries across each Australian state and territory.

281. The Court supports initiatives to increase integration, coordination and collaboration. Court officials are active participants in a number of sub-working groups that sit under the Family Violence Working Group established by the Council of Attorneys-General (CAG) on 19 May 2017. The Family Violence Working Group comprises justice officials tasked with developing measures to improve the interaction between the federal family law, and the state and territory family violence and child protection systems. One particular sub-group has been formed to deal with Term of Reference 1 relating to information sharing, with representatives from the Family Court and the Federal Circuit Court.

282. The value of increased integration and collaboration is highlighted in the Court's Melbourne registry. In Victoria, a trial program places a family law liaison officer from the Department of Health and Human Services in the court registry. The presence of the liaison officer has been of considerable assistance to the Court. For example, as recognised in relation to the Court's Magellan program (see the response to Question 33 below), the liaison officer has significantly aided the ability of the Court to follow up and ensure things are done pursuant to the protocol between the Court, state and territory Legal Aid authorities and the departments responsible for child protection.[106] As outlined in the response to question 20, the Magellan program is designed to identify and deal efficiently and effectively with cases involving allegations of sexual abuse or serious physical abuse of a child.

283. There is also the Family Law Council's Report in 2016 entitled "Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems". There was also an interim report in response to the first two terms of reference in 2015.

[106] Family Court of Australia *2016-17 Annual Report*, 64-67.

284. Some of the recommendations made by the Family Law Council have already been implemented, but we commend the Report in its entirety to the Commission.

Engaging with multiple courts

Question 32 - What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

285. This question raises one of the big ticket items that needs to be addressed in this Review. However it needs to be confronted head-on, rather than applying band aid solutions.

286. The Issues Paper highlights the challenges faced by families who engage with the family law system, following proceedings for family violence related orders in a state or territory court, or after contact with a children's court (paragraph 241).

287. As noted at paragraph 243 of the Issues Paper, the family courts have no power to compel the intervention of child protection authorities in family law proceedings to assist families with complex needs. This was recently reflected in the judgment of *Vesey & Lygon*.[107] In that matter the Court found that the children had suffered significant harm in the form of a detrimental effect to their physical, psychological and/or emotional wellbeing due to the actions of both the mother and father. It also found an unacceptable risk of future harm to the children. In making those findings, the Court 'respectfully requested that the Department of Communities, Child Safety and Disability Services (Qld) take all necessary steps to forthwith remove' the children from the mother.

288. As highlighted in the Issues Paper, there are significant constitutional barriers affecting the ability of federal courts to exercise the powers of state and territory courts. Subsections 22(2AG) and (2AH) of the Act provide for dual commissions of judges of the Family Court to other federal courts or the Northern Territory Supreme Court, but not to State Supreme Courts.

289. One option is for a referral of powers in order that mechanisms of the State systems can be available to the federal courts in appropriate cases. The Court assumes that that is the same solution suggested in the second dot point in paragraph 246.

290. The consequences of the fragmented character of the wider justice system that governs the protection of children and families in Australia are accurately set out in paragraphs 230 and 242 of the Issues Paper.

291. One partial solution that is currently before Parliament is in the Family Law Amendment (Family Violence and Other Measures) Bill 2017 which is aimed at expanding the family law jurisdiction of State and Territory courts by:

- Allowing relevant State and Territory courts, such as children's courts, to be prescribed to have the same family law parenting jurisdiction as that held by State and Territory courts of summary jurisdiction under Part VII of the Act, and

[107] [2017] Fam CA 717.

- Providing for an increased total property value to be prescribed in regulations under which courts of summary jurisdiction can hear contested family law property matters without the parties' consent.

292. However, it is understood that one impediment to the States taking up this jurisdiction is the cost involved, and the capacity of their courts to take on the extra work. Further, there is a very real concern at the ability of State and Territory magistrates to undertake family law work. Training courses are proposed, but these are limited and will not be a substitute for the experience and expertise that judges in the Family Courts have.

293. One other proposal is to vest Federal judicial officers with dual commissions, but that would still leave those judicial officers having to interact with two separate and distinct jurisdictions.

294. One of the suggested alternative solutions to the challenges facing families with multiple legal needs, is the development of digital hearing processes to reduce the need for families to physically attend court hearings in different locations. The use of technology is seen by the Court as a valuable tool, but is subject to resourcing requirements. Improvements have already been made, with video-links in place, allowing, for example, parties to attend one location and appear by video in a matter elsewhere.

Cross-jurisdictional collaboration

Question 33 - How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?

295. As highlighted in the Issues Paper there are existing practices involving the Family Court which are underpinned by collaboration and information sharing between the Family Court, the state and territory courts, and the child protection systems (paragraph 248). The Court's Magellan program provides a model for effective and efficient information sharing. Magellan cases (cases involving allegations of physical or sexual abuse of children) are specially case managed and involve coordination with state and territory child welfare and child protection authorities. The Magellan program has been operating in the Family Court since 2003 and is designed to ensure that cases involving the most vulnerable children are dealt with as efficiently and effectively as possible. Independent Children's Lawyers are appointed and reports are sought at an early stage in the proceedings. Case management of a Magellan matter is judge-led with the assistance of a dedicated Magellan registrar, and involves cooperation with all agencies involved, including child welfare authorities. This ensures that information is shared to efficiently manage the case.

296. The importance of information sharing, and the relationships between agencies, and the positive effect that the Magellan program has on this was noted by the Australian Institute of Family Studies in its 2007 evaluation report on the program.[108]

[108] Australian Institute of Family Studies, *Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan case management model*, October 2007.

297. As identified in the Court's 2016-17 Annual Report one of the early steps in a Magellan case is that a 'Magellan report' will be ordered. This report is produced by the relevant child welfare authority and includes details about any investigation undertaken by the agency, any history of prior engagement of the agency including notifications and outcomes, and risk assessment conclusions and the reasoning for those conclusions. The Court has a target time to finalisation of six months for Magellan cases, although noting that any external criminal investigations or preparation of reports by experts such as psychiatrists or forensic psychologists can impact this.[109]

298. A valid question is whether the Magellan program could be rolled out more broadly, and the answer is yes, but for that to occur there would need to be a significant increase in the funding and resourcing of the Court.

299. Recommendation 6 of the Parliament's Social Policy and Legal Affairs Committee report[110] related to information sharing, is also supported, and to repeat, the Court is involved in existing measures aimed at effective information sharing. As noted above, under the CAG Family Violence Working Group, a sub-group has been formed to deal with Term of Reference 1 relating to information sharing.

[109] Family Court of Australia 2016-17 Annual Report, pages 64-67.

[110] Commonwealth of Australia, *A better family law system to support and protect those affected by family violence*, final report, December 2017.

Children's experiences and perspectives

Question 34 - How can children's experiences of participation in court processes be improved?

Question 35 - What changes are needed to ensure children are informed about the outcome of court processes that affect them?

Question 36 - What mechanisms are best adapted to ensure children's views are heard in court proceedings?

Question 37 - How can children be supported to participate in family dispute resolution processes?

Question 38 - Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

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?

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?

300. In every child related matter in the Family Court that proceeds to trial an attempt is made to ascertain (but not coerce) the children's views with the assistance of appropriately qualified psychologists or social workers who also provide expert assessments of the maturity, influence and understanding of the child in question. It is accepted that there will be cases which are resolved without judicial intervention and in which the children's views may not have been ascertained through a report or other means. This is most likely to have occurred because there is no apparent dispute about what the children want. It is important to seek but not force children to express relevant wishes. That evidence is presented to the court in written form (a family report) and parties have the opportunity to ask questions of the expert.

301. The majority of child related cases in the Family Court which proceed to trial will be assisted by an independent children's lawyer ("ICL").

302. The Family Court is required to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. The court may inform itself of views expressed by a child:

- by having regard to a family report;
- by appointing an independent children's lawyer;

- subject to the applicable rules of court, by such other means as the court thinks appropriate (ss 60CC(3)(a); 60CD; 62G(3A); 68LA(5)(b))

303. Until 2010 the Rules made provision for a judicial officer to interview a child who is the subject of proceedings (r 15.02 now repealed). However, it has always been open to a judge to interview a child the subject of proceedings before the Court. The question though is should it be done, and there are conflicting views about that. With effective representation of children, there is no obvious utility to the adjudicative process in judges meeting directly with the children or for judges and children to communicate in writing as per the Scottish F9 Form. These mechanisms are inconsistent with transparency; namely, justice not only being done but being seen to be done. The following cases are examples of cases where children have been interviewed by a judge or involve discussion on the topic: *A & D*;[111] *K & K*;[112] *T & T*;[113] *C & C*;[114] *ZN & YH and Child Representative*;[115] *B v B (Minors) (Interviews and Listing Arrangements)*.[116]

304. A child can start, continue, respond to or seek to intervene in a case by a case guardian or personally if the court is satisfied a child understands the nature and possible consequences of the case and is capable of conducting the case.[117]

305. If a party is given leave to adduce evidence from a child, the child's evidence may be given by affidavit, video conference, closed circuit television or other electronic communication with a support person present with the child when the child is giving evidence.[118]

306. Question 36 invites comments on improvements that might be made to enable children to participate in court proceedings. It is informed by research that reveals varied practices in relation to the manner in which Independent Children's Lawyers ("ICL"s) facilitate children's participation in proceedings.

307. Section 68LA of the Act is the foundational provision concerning the role of the ICL. Although the ICL is not the children's legal representative and is not obliged to act on the child's instructions (s 68LA(4)), the ICL is obliged to ensure any views of the child are fully put before the court (s 68LA(5)). How this is done is critical, as is the fact that the Guidelines for ICLs endorsed by the Family Court, the Family Court of Western Australia and the Federal Circuit Court make it plain that the child is to be given the opportunity to establish a professional relationship with the ICL (guideline 5). Guideline 5.1 points out that the ICL should strive to build a relationship of respect and trust with the child whose interests that person represents.

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[111] (2004) FamCA 879.

[112] (2006) FamCA 126.

[113] (2006) FamCA 130.

[114] (2006) FamCA 701.

[115] [2002] FamCA 453.

[116] (1994) 2 FLR 489.

[117] *Family Law Rules 2004* (Cth) r 6.08.

[118] *Family Law Act 1975* (Cth) s 100B and *Family Law Rules 2004* (Cth) r 15.02.

308. The ethical framework thus becomes a duty to inform, advise, listen and act. The challenge in so doing is to balance the requirement to minimise trauma to the child associated with the proceedings (s 68LA(5)(d)), which implies a duty to protect the child on the one hand and a duty of informing the child in a way which allows the child to express views and preferences and to provide relevant information to assist the ICL to develop a case in the interests of the child (ss 68LA(2), (3)).

309. It needs to be understood, that for many years the Court has been proactive in participating in national training for ICLs undertaken by the Family Law Section of the Law Council of Australia, and now that that function is to be undertaken by National Legal Aid, with that body. The message given in that training that more is required of an ICL than "a single meeting" with the child could not be clearer. Of course, in litigation that may continue for a number of years, the level of engagement must be calibrated so that it does not undermine coping strategies the child may have in place for dealing with the parental dispute.

310. It is beyond doubt that an ICL who fails to fulfil his or her statutory obligations or to comply with the guidelines can be removed by the Court. The child cannot remove the ICL (*In the Marriage of Harris*).[119]

311. If the gravamen of the research identified at footnote 330 of the Issues Paper (Kaspiew et al; Bell) is that some ICLs still fail to adequately engage with their child client, the Court can and will intervene.

312. Finally, it needs to be born in mind that the scale of fees paid by Legal Aid Commissions to ICLs is at best modest, and if it is manifestly inadequate, it has the potential to compromise effective advocacy for children. The system of representation of children ought not to be quasi pro bono work; it is simply too important.

[119] (1997) FLC 96-476).

Professional skills and wellbeing

Core competencies and training

Question 41 - What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

313. In principle, support is given to the notion that there be core competencies expected of family law system professionals. While the specific requirements in relation to these competencies would need to reflect the function that the particular professional group played in the system, broad support would be given to the inclusion of competencies in the areas identified in paragraph 281 of the Issues Paper.

314. In relation to professionals who prepare social science based, forensic reports for use in family law litigation, it is important that it is understood that such report writers are drawn from different sources and, as such, the mechanisms by which core competencies could be established will vary depending on the context that the particular report writer is working in.

315. In some matters litigants commission a privately funded report for the purpose of obtaining expert opinion to assist in the conduct of their matter. In a few locations (primarily Queensland & South Australia) a report on a family is undertaken and funded by the Legal Aid Commission, usually at the request of the assigned Independent Children's Lawyer. In both of the aforementioned contexts the report writer is operating in the role of an expert witness and as such their legitimacy to do this is established solely by their capacity to demonstrate to the Court that they satisfy the definition of an expert as prescribed in the law.

316. In the majority of matters a family report is undertaken by way of an order of the Court under s 62G of the Act. These reports are completed by Family Consultants, a role that requires an appointment by the Courts' Chief Executive Officers. All work undertaken by Family Consultants within the Family Court and the Federal Circuit Court comes under the auspices of the Courts' Child Dispute Services (CDS) and is fully funded by the Court.

317. CDS utilises Family Consultants who are employees of the Courts and private practitioners appointed to the role of Family Consultant under the Family Law Regulations. The selection process for both internal Family Consultants and those appointed under the Regulations is such that applicants must demonstrate that they are competent to undertake the work. CDS requires that all Family Consultants work under the CDS clinical governance framework which is a comprehensive suite of documents outlining the requirements for undertaking assessments and preparing reports within CDS. CDS also undertakes ongoing quality assurance activities which includes the formal reviewing and management of complaints.

318. At paragraph 283 of the Issues Paper the development of a national accreditation program for Family Consultants is proposed. If an accreditation program were to only be for

Family Consultants then such a proposal would be unnecessary as the work of Family Consultants is the responsibility of the Courts and it is the role of CDS to ensure the competency of its workforce.

319. It is recognised, however, that there may be some benefit in there being an accreditation scheme that allows social science professionals more broadly to demonstrate that they are competent to undertake assessments and prepare reports for family law matters. While the Courts have developed a document titled *Australian Standards of Practice for Family Assessments and Report Writing* these standards are an outline of what the Court considers to be good practice and non CDS report writers are not compelled to comply with them. An accreditation scheme which allows parties to ascertain that a private report writer has acquired and maintained the required competencies and works to a high standard could greatly assist both litigants and the Court to which the report would be submitted.

320. If accreditation were to be made compulsory for all professionals who are preparing expert family law reports (including Family Consultants), and required completion of a training program (as was required with the implementation of Family Dispute Resolution Practitioner (FDRP) registration), then such a training program would need to be a formal competency based program that was independently developed and made available for registered training organisations to deliver such as occurred with the Graduate Diploma in FDR. In addition, there would need to be some form of grandfathering or recognition of prior learning (as also occurred with FDRPs) so that highly experienced and competent Family Consultants were not required to undertaken unnecessary training or assessment in order to become accredited. In the context of CDS experiencing challenges in attracting and retaining high calibre staff, brought about at least in part by the opportunities for more financially lucrative work as a private report writer, an additional expectation placed on Family Consultants by way of training or assessment beyond what is already required by CDS may serve to disincline already highly experienced and skilled professionals from continuing to work as Family Consultants. Furthermore, if a compulsory training and accreditation scheme was to be introduced it would be important to establish if such a scheme was designed only for professionals who were conducting family assessments for the purpose of preparing what is generally known as a family report or whether the scheme would also apply to more specialist types of single expert report writers, such as psychiatrists and drug and alcohol specialists. It is considered that the requirement of training and accreditation for this specialist group of report writers would be unhelpful as it would only serve to further disincline these specialist professionals from undertaking the work which, as outlined in the response to Question 10, is already an existing issue for the Court.

321. If, on the other hand, accreditation were to be on an opt in basis by which a report writer can elect to seek and maintain accreditation in order to demonstrate that they continue to meet a high standard of competency, and the accreditation program was administered by an independent body operating under a robust and sufficiently resourced governance structure, then it is considered that there may be benefits of such a program. It is important to understand, however, that suitability to be an expert witness is ultimately for the presiding Judge to determine and would be independent of accreditation.

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?

Question 43 – How should concerns about professional practices that exacerbate conflict be addressed?

322. As can be seen these questions relate to the competencies of judicial officers who exercise family law jurisdiction.

323. The Family Court does not accept that its Judges do not have the requisite skills as judicial officers.

324. It must first be noted that all judges appointed to the Family Court must be by reason of training, experience and personality, a person suitable to deal with matters of Family Law (s 22(1) Family Law Act). Such persons who are appointed have generally had a wealth of experience in Family Law but also in other areas of law and practice. Thus, to this extent, Judges in the Family Court come with considerable experience and knowledge.

325. It is well accepted that it is important for judges to participate in continuing education to maintain pace with legislative reform and advances in social science relevant to the issues involved in Family Law proceedings.

326. All judges appointed to the Family Court attend the New Judges Orientation Program presented by the National Judicial College of Australia (NJCA) and which is designed to assist new appointments make the transition to judicial life. This five day intensive residential program covers such topics as judicial ethics, dealing with unrepresented litigants, cultural awareness and court craft, and contains a strong emphasis on judicial welfare – maintaining resilience and mindfulness.

327. The Family Court has an Orientation Program for each newly appointed judge. The course covers important aspects of judicial life including dealing with colleagues and staff; relationships in and outside of the Court, legal snapshots of topics relevant to the judges such as contempt in the face of the court and applications for recusal. The Orientation Program includes the identification and appointment of a mentor for new judges.

328. The Family Court is strongly committed to providing on-going judicial education, and in providing continuing professional development for its judges. The Court's Education Committee is responsible for developing and implementing education programs. The Court delivers one day of judicial education each year in conjunction with the annual judges meeting.

329. The Court further encourages judges to attend external conferences, such as those presented by the Australasian Institute of Judicial Administration (AIJA) and the NJCA. Judges of the Family Court sit on the Councils of both of those bodies and each takes an active role in the development and presentation of educational courses. Many judges of the Family Court attend the biennial conference held by the Family Law Section of the Law Council of Australia, frequently presenting on topics of interest and relevance to the

jurisprudence. The Court provides financial assistance to each judge to attend a relevant conference every year, although many judges attend far more conferences at their own expense.

330. Judges of the Family Court will soon attend the Family Violence Training Course for judicial officers which is being presented by the NJCA. This national program was developed with the input of the Hon Diana Bryant AO QC and Justice Ryan both of whom are presenters of the course. This course includes information on understanding the perspectives of the complainant and perpetrator of family violence, communication from the bench, and managing the judicial responsibilities of the courtroom. Judicial officers are given the opportunity to engage in discussion on key issues related to family violence.

331. It is also noted that the Family Court and the Federal Circuit Court have implemented a Family Violence Plan to respond to clients affected by family violence. The aim of the Plan is to effectively address family violence issues and encompasses judicial decision-making. One of the priority areas of the plan is staff awareness and training, with a goal of giving staff the 'awareness, skills and resources required to ensure all persons experiencing family violence are dealt with appropriately and their safety assured'. An updated Plan for 2018-20 has been drafted.

332. Initiatives such as the Family Violence Bench Book and Best Practice Principles also provide an important and current resource to strengthen the capacity of judicial officers in matters relating to family violence.

333. The Court also has representatives on the sub-working group established under the CAG Family Violence Working Group to deal with Term of Reference 6, which relates to improving the family violence competency of professionals working in the family law and family violence systems.

Professional wellbeing

Question 44 - What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

334. The only reference to judicial officers appears in paragraph 292 of the Issues Paper where there is a quote from the Report of the House of Representatives Standing Committee on Social Policy and Legal Affairs. To the extent that the quote may be taken to imply Judges make inappropriate decisions in family law cases involving family violence because of their high workload and the nature of those cases, that implication is rejected.

335. There is though wide-spread acceptance that judicial office can be stressful and impact on the health and well-being of the judges.

336. Section 21B(1A)(b) of the Act provides that the Chief Justice must ensure that arrangements are in place to provide judges with appropriate access to (or reimbursement for the cost of):
    (i) Annual health assessments; and
    (ii) Short-term counselling services; and
    (iii) Judicial education…

337. It is noted that these services are in place.

338. The Family Court's Judicial Welfare Committee in conjunction with the former Chief Justice designed and implemented two programs - one which offers all judges a comprehensive annual medical assessment paid for by the Court and at the conclusion of which the assessors can refer judges to appropriate specialists or report directly to the judge and the judge's general practitioner for follow up.

339. The second aspect of this program was the provision of 24 hour, seven days a week counselling and support for judges and their immediate families. The counselling accommodates both emergency or one off incidents and can also offer the judge up to eight sessions of individual counselling with an appropriate referral at the conclusion of those sessions if warranted. The cost of the counselling is met by the Court and the attendance of the judge is confidential and is not revealed to the Court.

340. The benefits of this program are obvious, providing judges with confidential assistance for health and emotional welfare.

341. The Judicial Welfare Committee, again in conjunction with the former Chief Justice, developed an Orientation Program for newly appointed judges. One topic is the mentoring program. A mentor for each judge is identified and the newly appointed judge is encouraged to discuss any issue troubling the new judge with the mentor. It is anticipated that the mentoring system will develop into a valuable resource for the new judge with the mentor making him or herself available to discuss any issue with the new judge. The contact between the mentor judge and the new judge will also allow the mentor judge to identify whether the new judge is struggling with workload, judgment writing or the pressure of the work and be able then to refer the new judge to relevant assistance or to discuss with the new judge ways the mentor suggests through his or her experience, may be of assistance.

342. The establishment of a Judicial Welfare Committee headed by a senior judge has been extremely valuable to the judges of the Family Court because it enabled other judges who may have concerns about the welfare of a particular judge to discuss it with that senior judge and where possible solutions may be advanced without necessarily raising the issue with the Head of Jurisdiction. The nature of the work requires the head of the Judicial Welfare Committee to be astute to difficulties that may arise for particular judges and to be in a position to offer advice and support to the particular judges or to refer the issue to the Chief Justice.

343. The Judicial Education program ties into the issue of welfare and in the past has presented programs on Maintaining Resilience, Wellbeing and Sustainable Performance, Vicarious Trauma, Mindfulness as well as programs designed to assist judges with the pressure of work.

Governance and accountability

Transparency and privacy

Question 45 - Should s121 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?

Question 46 - What other changes should be made to enhance the transparency of the family law system?

344. In order to address these questions it is useful to reflect on the history relevant to transparency and privacy in family law.

Background and Legislative History of Section 121 of Family Law Act

345. Prior to 1959, matrimonial courts were open with virtually unrestricted publicity allowed. For example, there was no restriction on identifying a party by a front page photograph, particularly if it was a photograph of a well-known person (including a politician) who had been named as a co-respondent to a divorce on the grounds of adultery. The Mirror made divorce recording a speciality and their circulation increased 50%.[120]

346. When Garfield Barwick introduced the *Matrimonial Causes Act* in 1959[121] provisions were introduced aimed at curbing the more sensational and unpleasant aspects of the reporting. Restrictions were placed on the ability of newspapers to provide detailed accounts of the daily evidence in cases. There was however still a wide scope for the media to identify parties and publish accounts of proceedings.

347. In 1975, with the introduction of the *Family Law Act*, the courts were closed (s 97(1) of the Act) and s 121 was enacted. Section 121 prohibited the publication of any account of proceedings to anybody except for:

- Proceedings in another court;
- Pursuant to a direction of the court;
- Law court lists; and
- Reports for the legal profession and technical reports for the medical profession.

348. Prosecutions could only be commenced with the written consent of the Attorney-General.

349. After a Joint Select Committee Report in 1980,[122] and the murder of Justice Opas in the same year, the Act was amended in 1983. Section 97(1) was amended so that proceedings

[120] The Hon W P McCall, *Publicity in Family Law Cases* (April 1997) quoting *Davidson High Jinks at the Hot Pool* (1994) Fremantle Art Centre Press, 179.

[121] Commonwealth, *Parliamentary Debates*, House of Representatives 14 May 1959 (Sir Garfield Barwick) 2222.

[122] Joint Select Committee, Parliament of Australia *Report of the Joint Select Committee on the Family Law Act* (1980).

were to be heard in open court. Section 121 was amended so that its primary focus was publication by newspapers, periodicals, radio and television, and in order for an offence to be committed the publication had to be "to the public or a section of the public" not just "anybody". There was a prescribed non exhaustive list of identifying features that could not be published. A first offence was now made indictable. Section 121(9) replaced the previous s 121(5) and added a number of new exceptions which included:

- Disciplinary action against a member of the legal profession;
- To assist decisions by Legal Aid Commissions as to whether or not legal aid would be granted;
- Law reports and technical publications for the use of any profession; and
- For the education of the legal profession and students.

350. In 1991 the ability to bring prosecutions in a local court was removed.

351. In 2000:

- In a tip of the hat to the internet, "radio broadcast or television" had added to it "or by other electronic means". "Electronic means" was defined to include "guided and/or unguided electromagnetic energy".
- The Director of Public Prosecutions replaced the Attorney-General as the person who gave consent for a prosecution.
- Section 121(9) was again expanded to include what some thought were to be two possible loopholes:
  - The display of lists of names in the premises of the court; and
  - Publication of an account of proceedings to a party of proceedings.

352. In 2015, s 121(9) was amended to allow publication to prescribed state and territory child welfare authorities.

353. In 2007 a deliberate policy and strategy was adopted by the Family Court to anonymise and publicise judgments and reasons electronically in the public domain.

354. The aim was to make available to the public and to journalists a detailed account of the work of the court. This has had the demonstrable effect of increasing the number of stories written by journalists about the court's work and has facilitated discussion about the court's work on blogs and social media without the loss of the anonymity for those involved, apart from the Judge, whose anonymity has never been protected.

355. It is to be noted that s 121(3)(a)(i) which prohibits the publication of the pseudonym or alias of a party or person related to the proceeding is a reference to their real pseudonym or alias as opposed to the one given to them by the court which would be covered by section 121(9)(g).

356. In 2012 Part XIA relating to suppression and nonpublication orders was introduced.

The Tension

357. The debate around s 121 has always been about the tension between the privacy of families and, in particular, children on one hand, and open justice on the other.

358. Those who advocate open justice point to the fact that a free press serves a vital role and is a fundamental pillar of a democratic society. Those who argue for unrestricted open justice:
    - Recite common law dicta such as "where there is no publicity there is no justice" (although the common law has always recognised proceedings affecting wards as an exception to that principle); and
    - The fact that children whose parents are tried and/or convicted of a criminal charge or are involved in other civil litigation, are not protected from the glare of publicity around their parents' behaviour and the consequent mocking by their peers at school.

359. On the other hand, the existence of the free press relies upon commercial success. Appealing to prurience increases circulation. This blurs the distinction between a publication being in the public interest and being of interest to the public. Children are at risk of becoming collateral damage. There is no doubt that the inability of the media to enhance a report of a family law case with video footage or a photograph suppresses the interest the media has in reporting a particular story.

360. However, with advances in how people get their news we are no longer captive to whether or not mainstream media will report on what is happening in the Family Court without a photograph.

International Obligations

361. Australia has ratified the International Covenant on Civil and Political Rights 1966 (ICCPR) and The Convention on the Rights of the Child 1989 (CROC). Article 14 of the ICCPR deals with a citizen's right to a fair and public hearing but contains as an exception "where the interests of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children".

362. Articles 16 of the CROC provides:
    1. No child should be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation; and
    2. The child has the right to the protection of the law against each interference or attacks.

363. Section 60B(4) of the Act provides:

> An additional object of this Part (Part VII) is to give effect to the Convention on the Rights of the Child completed at New York on 20 November 1989.

The specific questions raised in the Issues Paper

Should s 121 of the Family Law Act be amended to allow parties to family law proceedings to publish information about their experiences of proceedings? If so, what safeguards should be included to protect the privacy of families and children?

Victims and survivors of violence

364. The issues paper referred to a number of stakeholders raising concerns that section 121 does not provide adequate scope for individuals who use the family courts to share their experiences publicly and that it prevents "victims and survivors of violence from speaking openly of their experiences of the family law system." Only one stakeholder is quoted.

365. Reference is made at paragraph 299 of the Issues Paper to a submission to the ALRC Freedoms Inquiry from the National Association of Community Legal Centres (NACLC). At page 14 of their submission the NACLC referred to s 121 of the Act and state:

> *NACLC considers that this provision restricts victims and survivors of violence from speaking openly of their experiences of the family law system. As a result, NACLC suggests that the ALRC consider this issue further and recommend that review of s 121 be referred to the Family Law Council for inquiry.*

366. The ALRC's Final Freedoms Inquiry Report dealt with the matter by simply saying:

> *Other non-criminal Commonwealth statutes that may limit open justice, often to protect children and other vulnerable people, include:*
>
> *Family Law Act 1975 (Cth) s 121—offence to publish an account of proceedings under the Act that identifies a party to the proceedings or a witness or certain others.*

367. The report also mentions the *Child Support (Registration and Collection) Act 1988* (Cth), the *Migration Act 1958* (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth) as legislation where the identity of participants is protected and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) where a court can order the proceedings occur *in camera* if it is in the interests of justice and the interests of "Aboriginal tradition". The report says that "This chapter focuses on criminal trials, but laws that limit open justice and other fair trial rights in civil trials also warrant careful justification."

368. It would be very difficult to craft an exception to s 121 that on the one hand gave to victims and survivors of violence the right to identify themselves to the media and speak openly about their proceedings in the Family Court from their point of view without opening the floodgates to all, including perpetrators (who will often assert that they are victims of the system), from doing likewise.

369. Section 121 of course does not prevent victims or survivors of family violence from speaking openly, for example to a journalist or their relatives, in relation to their experiences of the family law system and for those experiences being reported. What is prohibited is a reporting of those experiences in a way that would identify who they, and more importantly, who their children are. The current provisions in s 121 strike a fine balance between the ability of persons to tell their stories and protecting vulnerable children from being publicly involved in that telling.

370. The Italian children's case[123] is a good case study of what can potentially happen. A popular newspaper publically campaigned for a mother who had abducted her four daughters from Italy and brought them to Australia. Referring to the court proceedings, it put photographs of the children on its front page for two consecutive days. It ran quotes from the children. The paper and its editor were prosecuted, convicted and heavily fined under s 121. But no law can totally protect the children. In that case, a particular TV channel observed the letter of s 121. One high-rating program told that story from the point of view of what had happened during the Family Court proceedings but without identifying the parents and the children. Another high-rating program told the story by interviewing the parents, the children and other family members on camera without referring in any way to the existence of Family Court proceedings.

Question 46 – What other changes should be made to enhance the transparency of the family law system?

Professional bodies

371. The Issues Paper raises the possibility that s 121 creates uncertainties about the information that regulators of professional bodies, such as those that govern practices of psychologists and social workers associated with a particular court case, may have access to when investigating alleged misconduct of their members. There is currently a dedicated exemption that allows for legal professional regulators to investigate the conduct of lawyers. Subject to possibly one matter, there is no objection to expanding section 121(9)(b) to extend it to the disciplining of the member of <u>any</u> profession (who provided professional services in connection with a particular proceedings). That matter, which was raised by the Australian Psychological Society Family Law and Psychology Interest Group in a submission to the Australian Health Practitioners Regulation Agency ("AHPRA"), relates to the issue of the high number of complaints to psychologist registration boards and professional bodies, not just in Australia but internationally, for psychologists specialised in Family Law report writing. It is the view of that Group that complaints are frequently used by the complainant to pervert the legal process in an attempt to exclude or influence an expert who has provided an adverse opinion in a report. The Group claims that there have been examples of where lawyers have encouraged clients to make complaints as a legal strategy to prevent an unfavourable opinion of their client being admitted into evidence.

372. The Court refers the ALRC to the Report dated May 2017 of the Senate Community Affairs References Committee into the complaints mechanism administered under the Health Practitioner Regulation National Law,[124] and in particular to recommendation 10 in relation to complaints against single expert witness psychologists acting in family law proceedings. In effect the recommendation was that notifications about practitioners acting as a single expert witness be placed on hold until the conclusion of the proceedings

[123] *Department of Communities (Child Safety Services) & Garning* [2011] FamCA 485; *Department of Communities, Child Safety and Disability Services & Garning (No. 2)* [2012] FamCA 353*; Department of Communities (Child Safety Services) v Garning* (2012) 247 CLR 304; *Department of Communities, Child Safety and Disability Services & Garning and Ors (Stay pending discharge application*) [2012] FamCA 699.

[124] Senate Community Affairs References Committee, Parliament of Australia, *Complaints mechanism administered under the Health Practitioner Regulation National Law* (2017).

or leave of the Court is obtained. This recommendation is supported. It is submitted that how the AHPRA handles complaints and what filtering process they have in relation to complaints against professionals who provide opinions in our court system is probably best left to be sorted between AHPRA and the professional bodies.

373. There can however be no reason why a distinction is drawn between a complaint against a lawyer and a complaint against a psychiatrist, psychologists or social worker, a valuer or any other expert.

Cases not involving children

374. The issue paper raises generally the issue as to whether or not there should be a relaxation of s 121 in relation to proceedings that do not involve children.

375. The recommendation by the Honourable Ian McCall AO in April 1997 when he reported to the Attorney-General of the Commonwealth on "Proposals for Amendments to Family Law Act section 121"[125] went further than that. Specifically, he recommended that in children's cases, where a parenting order, a child maintenance order, or an order in the welfare jurisdiction is sought, non-identifying information relating to the case be published. He recommended in all other cases publicity be permitted which includes the names, addresses and occupations of the parties and witnesses, a concise statement as to the nature of the applicant's submissions on the law and the decisions thereon, the orders made and the reasons given, the name of the judicial officer and the legal representatives. This would mean that video and photographs of the parties and the children could be used in property cases. What would not be permitted would be a daily account of the evidence. The Honourable Ian McCall based his recommendations on the notion that the media was the only way of getting information about what was happening in the court system to the public and at that time the restrictions in s 121 meant the media had virtually no interest in reporting of family law cases. The McCall recommendations were not adopted at the time of the 2000 amendments to s 121.

376. It might be possible to consider allowing the full reporting of cases involving parties who have no children. That would lead though to a slightly bizarre circumstance where the proceedings of a high profile person's childless first marriage could be fully reported but his second marriage could not be because there were children of that marriage.

"Whistle blowers"

377. The Issues Paper suggests an exception in s 121 for a "whistle blower" to allow press reporting on matters of genuine public interest.

378. The Issues Paper does not provide any basis upon which that suggestion was made. Any impropriety perpetrated by any person involved in any individual case can be the subject of reporting as long as the parties are not identified. "Improprieties" by individual judges are of course already the subject of public and published review if there is an appeal to the Full Court. The issue of the establishment of a Federal Judicial Commission is

[125] Ian McCall, *Publicity in family law cases: report to the Attorney-General for the Commonwealth on proposals for amendments to Family Law Act, Section 121*, Commonwealth of Australia (April 1997).

discussed elsewhere. In cases where children are involved "a whistle blower" exception has the same difficulties as those previously discussed.

Conclusion

379. Section 121 is seen as a very important safeguard which has been the subject of considerable thought and development over time. It contains flexibility and exemptions. The section allows the court to make orders for media publication where the court believes it is in the public interest.

Question 47 - What changes should be made to the family law system's governance and regulatory processes to improve public confidence in the family law system?

380. The relevance to this Court of this question is in raising the proposal to create a Commonwealth Judicial Commission to conduct independent investigations of complaints of judicial misconduct.

381. In 2012, after extensive consultation, the Government introduced the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 and the Courts Legislation Amendment (Judicial Complaints) Bill 2012. Those Bills were then the subject of Inquiries by the House of Representatives Standing Committee on Social Policy and Legal Affairs and the Senate's Legal and Constitutional Affairs Legislation Committee. The House of Representatives Committee reported in June 2012, and the Senate Committee reported in August 2012.

382. Both Bills were passed on 22 November 2012, and commenced on 11 December 2012.

383. The Bills Digest No. 172, 2011 – 12 dated 26 June 2012 provides a useful summary of the purposes of the Judicial Complaints Bill, its background, the position taken by Government and the reasons for that, and the consideration of the Bill by the two committees. It also explains the key provisions. It can be accessed at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2F1738533%22

384. The Court highlights the following statement as the Government's position and which is still relevant today:

> *The Government has decided against setting up a standing judicial commission primarily because the need to deal with issues concerning the removal of a judge from office occurs so rarely. The Attorney-General's Department elaborated on this, stating that:*
>
> > *Establishing a Commission when one is required is a more practical and efficient approach than a standing Commission as it is difficult to predict when and how often the Parliament may be called upon to discharge its responsibilities under paragraph 72(ii) of the Constitution.*
>
> *The Department further commented in its submission to the Senate Standing Committee on Legal and Constitutional Affairs, that the Australian Law Reform Commission had emphasised in its report in 2000 the 'importance of a process within Parliament, rather*

than creating a commission as a creature of the executive, because of the terms of section 72(ii) of the Constitution.

385. In the absence of a standing Commission such as the Judicial Commission of New South Wales, the Judicial Complaints Bill provides the framework to deal with complaints about judges which are not serious enough to require the attention of a parliamentary commission. In a submission to the Senate Committee, the Gilbert & Tobin Centre of Public Law stated that:

> *[the Judicial Complaints] Bill is perhaps the more significant of the two under examination. It provides a more explicit statutory basis for the heads of jurisdiction to manage complaints against the officers of their courts. In particular, it empowers the creation of a Conduct Committee to investigate those complaints the seriousness of which warrants particular attention, but not necessarily that of the parliament. Two former Chief Justices, Sir Anthony Mason and Murray Gleeson, have cited the lack of a process for complaints based upon conduct falling short of that which would warrant removal as a very real difficulty with present arrangements.*[126]

386. To put the Government's position into focus, by reference to the Report on Court performance for the 2017 financial year in the 2016/2017 Annual Report, the data reveals that there were 26 judicial service complaints comprising 10 complaints about judicial conduct, and 16 complaints about delay in delivery of a judgment. In respect of all of the applications filed numbering 20,741, the total complaints represented 0.125%. If administrative complaints are included then the total rises to 0.23%.

387. The Court supports a continuation of the current position, namely the handling of complaints in accordance with this legislation. The process is open and transparent and readily accessible to members of the public by reference to the Court webpage.

388. A final observation. It is noted that this enquiry has, as its focus, the family law system. The issue of a Commonwealth Judicial Commission is one which is much broader than the family law system. For example, it would need to involve all Federal Courts and Tribunals. Thus, it would seem that this is a matter for a different inquiry.

[126] Gilbert + Tobin Centre of Public Law, Submission No 3 to the Senate Committee on Legal and Constitutional Affairs, *Inquiry into Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 and Courts Legislation Amendment (Judicial Complaints) Bill 2012*, 26 April 2012, 6.

FAMILY COURT OF AUSTRALIA

REVIEW OF THE FAMILY LAW SYSTEM BY THE AUSTRALIAN LAW REFORM COMMISSION

SUBMISSION BY THE HONOURABLE JOHN PASCOE AC CVO, CHIEF JUSTICE OF THE FAMILY COURT OF AUSTRALIA

Appendicies

18 May 2018

ALRC Review of the Family Law System – Issues Paper 48, March 2018

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Appendix 1

FEDERAL COURT OF AUSTRALIA

FAMILY COURT OF AUSTRALIA

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BACKGROUND

The FCoA is a superior court of record established by Parliament in 1975 under Chapter III of the Constitution. The FCoA operates under the *Family Law Act 1975* (Cth) and through its specialist judges and staff, helps Australians to resolve their most complex family disputes.

The FCoA exercises appellate and trial level jurisdiction. At trial level, the Court deals with the most complex parenting and financial cases and hears cases arising under the regulations implementing the Hague Convention on the Civil Aspects of Child Abduction. It has a substantial appellate jurisdiction and hears appeals from decisions of single judges of the Court and from the FCC in family law matters.

The Chief Justice is the head of jurisdiction and is responsible for managing the administrative affairs of the Court. The Chief Justice is assisted by the CEO and Principal Registrar who is appointed by the Governor-General on the nomination of the Chief Justice.

The purpose of the FCoA as Australia's superior court in family law is to:

- determine cases with the most complex law,facts and parties
- cover specialised areas in family law, and
- provide national coverage as the appellate courtin family law matters.

Our vision

An internationally respected, specialist family court.

Our Mission

To assist Australian families in the determination of the most complex family law disputes domestically and internationally, consistent with the rule of law and procedural fairness.

Our values

Innovative, impartial, respectful, efficient and accountable.

We are committed to upholding the Australian Public Service Values and Employment Principles and to comply with the Code of Conduct. We are impartial, committed to service, accountable, respectful and ethical.

GOALS

The FCoA assists Australian families in the determination of the most complex family law disputes domestically and internationally, consistent with the rule of law and procedural fairness. The Court achieves this through effective judicial and non-judicial processes and high-quality judgments, while respecting the needs and sensitivities of separating families.

Our strategic objectives for the next four years:

PERFORMANCE MEASURES

The key outcome measure for the Court is contained in Outcome Two of the Portfolio Budget Statements. That is, to apply and uphold the rule of law for litigants in the FCoA through the resolution of family law matters according to law, particularly more complex family law matters and through the effective management of the administrative affairs of the Court.

The FCoA maintains three goals related to timely completion of cases. Strategies and priorities are designed to support the achievement of these performance goals. Our Annual Performance Statement will report on the success of the plan to achieve timely completion of cases.

This will be measured by the following:

1. clearance rate of 100 per cent
2. seventy-five per cent of judgments to be delivered within three months, and
3. seventy-five per cent of cases pending conclusion to be less than 12 months old.

1 STRATEGIC OBJECTIVE

Ensure best practices in judicial and non-judicial processes

The work of the FCoA is extremely demanding, with judges hearing the most complex and difficult family law matters involving allegations of family violence and/or child abuse; questions of international family law (relating to the Hague 1980 Child Abduction Convention and/or 1996 Child Protection Convention); applications related to special medical procedures (such as stage two treatment for gender dysphoria in children); and complex property matters including those involving accrued jurisdiction and third parties.

Whilst the Government has been proactive in amending the Act to provide better protection and broaden the definition of family violence, the FCoA's ability to manage workloads in order to provide timely hearings and well informed outcomes requires considerable management attention in a very tight fiscal environment. Identification and allocation of resources to address these issues are a priority.

Strategies to address family violence issues are a priority for the FCoA. Family violence features in a significant proportion of matters filed. It is a complex issue which is further complicated by a range of scenarios:

1. The intersection of parenting orders made by the FCoA and family violence orders, including apprehended violence orders or intervention orders and criminal sanctions made in other jurisdictions.
2. The consequence of a victim of family violence having to be involved in private litigation with their former partner following an acrimonious separation, particularly if there has been a history of violence.
3. The need to make interim parenting orders which may have to last more than 12 months before a final hearing can be provided and where there are contentious issues about safety which cannot always be readily determined at an interim hearing.
4. The crucial need for adequate risk assessment at the earliest opportunity when an application has been filed.
5. Where the alleged perpetrator cannot afford a lawyer and is ineligible for legal aid, the need to manage cross-examination of the alleged victim sensitively whilst according procedural fairness to both parties.

OUR STRATEGIES OVER THE NEXT FOUR YEARS

1. Enhance and strengthen the role of the FCoA as a specialist court for complex family law matters.
2. Review and enhance the role of registrars so they are specialists in their field.
3. Enhance strategies to address family violence in complex family law disputes.

PRIORITIES FOR 2017–18 ▶ *ensure best practices in judicial and non-judicial processes*

In 2017–18, the FCoA will undertake the following projects and deliverables:

Objective	Deliverable	Target
Family violence risk screening	• Continue to evaluate and implement the family violence risk screening tool	June 2018
Review and enhance the role of Family Court registrars	• Review the role of registrars to ensure they provide specialist services to families with complex family law needs	June 2018
	• Maximise the role these Family Court registrars play in assisting Australian families with complex family law issues to resolve their disputes	Ongoing

2 STRATEGIC OBJECTIVE

Efficient and effective dispute resolution of complex family law matters

Our strategy recognises that services need to be accessible and tailored to the needs of a diverse range of users. These may include unrepresented litigants, those from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islanders, and those who present with complex issues related to family violence, mental health and/or drug and alcohol issues. To this end, the FCoA will continue to focus on providing efficient and effective services to a broad range of litigants involved in complex family law disputes.

OUR STRATEGIES OVER THE NEXT FOUR YEARS

1. Continuously look for efficiencies and business improvements in processes and operations.
2. Enhance the efficiency of the Court through digital innovation.
3. Improve processes in dealing with complex family law matters, with a particular focus on appeals, child safety and family violence.

PRIORITIES FOR 2017–18 ▶ *efficient and effective dispute resolution of complex family law matters*

In 2017–18, the FCoA will undertake the following projects and deliverables:

Objective	Deliverable	Target
Enhance the efficiency of the FCoA through digital innovation	• Staged roll-out of an electronic court file starting with the Appeal Division • Investigate the use of Sharepoint as a means of improved communication and information sharing for specialist FCoA registrars and judges of the Appeal Division	Ongoing June 2018
Look for efficiencies and business improvements in court processes	• Investigate and implement digital processes for the efficient resolution of consent orders • Develop and implement a web-based application for online electronic consent orders	Ongoing June 2018
Improve processes in dealing with complex family law matters	• Engage and collaborate with other jurisdictions, agencies, and service providers to improve and enhance services provided to Australian families with complex family law matters	Ongoing

Appendix 2

Chambers of the Hon. Diana Bryant AO

Chief Justice, Family Court of Australia

Submission in Response to the Australian Law Reform Commission

Issues Paper 44: *Equality, Capacity and Disability in Commonwealth Laws*

17 January 2014

Introduction

I welcome the opportunity to make a submission as part of the Australian Law Reform Commission's ("ALRC's") Review of Equal Recognition Before the Law and Legal Capacity for People with Disability. This submission is made in response to Issues Paper 44, *Equality, Capacity and Disability in Commonwealth Laws* ("the Issues Paper"), which was released on 15 November 2013.

I note that paragraph 286 of the Issues Paper is entitled 'Family law' and states as follows:

> *A range of potential issues that may affect people with disability being recognised as equal before the law, or exercising legal capacity, arise in the context of family law. The ALRC seeks stakeholder feedback on these issues which may, for example, relate to:*
>
> - *assessment of capacity where incapacity is either alleged by another party, or the court has concerns about the legal capacity of a party;*
> - *legal representation and issues around the giving of instructions, discussed above at paragraph 191;*
> - *case and litigation guardians, including issues of appointment, costs and exposure to liability;*
> - *expert reports;*
> - *primary and secondary considerations in parenting matters, including for example, assessment of capacity to provide for the needs of the child;*
> - *spousal maintenance, including considerations of future need; and*
> - *property orders.*

The paragraph concludes with 'Question 40', which asks:

> *What issues arise in relation to family law that may affect the equal recognition of people with disability before the law and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to family law to address these issues?*

There is reference in the list of family law related issues in paragraph 286 to an earlier discussion of case and litigation guardians in paragraph 191. Paragraph 191 states:

Capacity to give instructions and participate in litigation

A person's capacity affects their ability to engage with the justice system at a broad level, but also to start or defend proceedings, to give instructions, or to settle a matter. As a result, in considering the ability of people to access justice a number of issues arise, including:

- *the relevant standard of capacity;*
- *appropriate approach in circumstances where capacity is an issue in the course of proceedings and the role of legal practitioners representing a client who may lack capacity, as well as opponents in circumstances where the person is self-represented;*
- *appointment of litigation or case guardians, including the involvement of Public Guardians and Trustees and associated costs implications; and*
- *capacity and authority to give instructions to legal representatives.*

The two most significant issues raised in this submission concern funding for case guardians' legal costs and nomination of case guardians by the Attorney-General.[1] Although they have both been vexed issues for the Family Court of Australia ("the Court") for a number of years, they are becoming increasingly pressing, as the Court's case load is now comprised of the most difficult and complex disputes; many of which involve a party or parties with physical and/or mental disabilities.

I will also discuss the approach the Court takes in children's cases where a parent with a disability is seeking to spend significant time with their child, and I do so cognizant of ill-informed criticisms that the *Family Law Act 1975* (Cth) ("the Act")) and courts exercising jurisdiction under it discriminate against disabled parents. I intend to then briefly refer to some select decisions in the areas of property, spousal maintenance and adult child maintenance which may be of interest to the ALRC. Finally, as sterilisation is a matter referred to by the President of the ALRC, Professor Rosalind Croucher, in the podcast dated 17 December 2013, I will refer to my submission on that topic made to the Senate Community Affairs Committee as part of its inquiry into the involuntary or coerced sterilisation of people with intellectual disabilities.

I make this submission in my capacity as Chief Justice of the Family Court of Australia and the views I express herein, which have been developed in consultation with the Court's Law Reform Committee, do not purport to represent those of other Family Court judges or of the Court as a whole.

Issues of relevance to the Family Court of Australia

Case guardians

Case guardians are governed by Part 6.3 of Chapter 6 of the *Family Law Rules 2004* (Cth) ("the Rules").[2] With the exception of rule 6.13, which is discussed in more detail later in the submission, the rules pertaining to case guardians are in similar terms to those contained in the *Family Law*

[1] The *Family Law Rules 2004* (Cth) use the term "case guardian", as compared with "litigation guardian" which is used in the *Federal Circuit Court of Australia Rules 2001* (Cth).

[2] Part 6.3 of Chapter 6 of the Rules applies only to proceedings in the Family Court of Australia. Case guardians in family law proceedings conducted in the Federal Circuit Court of Australia are governed by Chapter 1, Part 11, Division 11.2 of the *Federal Circuit Court of Australia Rules 2001* (Cth).

Rules 1984 (Cth), which were superseded by the 2004 Rules.[3] The Dictionary to the Rules states that "*case guardian* means a person appointed by the court under rule 6.10 to manage and conduct a case for a child or a person with a disability, and includes a next friend, guardian ad litem, tutor or litigation guardian." According to the Explanatory Statement for the Rules, "[t]he term "case guardian"…is considered to be more user friendly than the others."

Rule 6.08 of the Rules requires the appointment of a case guardian for any party who is a person with a disability. Specifically, sub-rule 6.08(1) provides that:

> *A child or a person with a disability may start, continue, respond to, or seek to intervene in, a case only by a case guardian.*

The Dictionary to the Rules defines a "person with a disability" as one who, because of a mental or physical disability, does not understand the nature or possible consequences of the case or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the case.[4] Rule 6.10 provides that a person may apply for the appointment, replacement or removal of a person as a case guardian of a party. An application can be made by a party or a person seeking to be made the case guardian or by a person authorised to be a case guardian. Procedurally, an application is made by way of an Application in a Case and supporting affidavit. Additionally, rule 1.10 of the Rules enables the court to make an order on its own initiative in relation to any matter mentioned in the Rules and thus the court can appoint a case guardian on its own motion, provided that the relevant provisions of the Part 6.3 of the Rules are met (see discussion below).

Rule 6.09 extends the former rule by providing that a person may be a case guardian if the person:

(a) is an adult;
(b) has no interest in the case that is adverse to the interest of the person needing the case guardian;
(c) can fairly and competently conduct the case; and
(d) has consented to act as the case guardian.

Rule 6.11 enables the court to request that the Attorney-General nominate, in writing, a person to be a case guardian if, in the opinion of the court, a suitable person is not available for appointment as a case guardian of a person with a disability. The appointment is automatic and occurs without the need for a court order, provided that the conditions of sub-rule 6.11(2) are met, ie. that the person files a consent to act, a written nomination and a Notice of Address for Service.

Rule 6.13 sets out the requirements for the conduct of a case by a case guardian. Pursuant to sub-rule 6.13(1), a person appointed as a case guardian of a party:

(a) is bound by the Rules;
(b) must require anything required by the Rules to be done by the party;
(c) may, for the benefit of the party, do anything permitted by the Rules to be done by the party; and
(d) if seeking a consent order, other than an order relating to practice and procedure, must file an affidavit setting out the facts relied on to satisfy the court that the order is in the party's best interests.

[3] This is significant insofar as case law which predates the 2004 Rules, such as *Kannis & Kannis* [2002] FamCA 1150 on the role of case guardians, may continue to be relevant.

[4] Sub-rule 1.16(3) provides that the Dictionary forms part of the Rules.

Sub-rule 6.13(2) provides that the duty of disclosure applies to a case guardian.[5]

The role of case guardians and their significance to the outcome of litigation

I have set out above the terms of rule 6.09, which concerns who may be appointed as a case guardian, and rule 6.13, which discusses the conduct of proceedings by a case guardian.

In the decision of *Kannis & Kannis* [2002] FamCA 1150, the Full Court of the Family Court (Nicholson CJ, Buckley and Kay JJ) confirmed that the overarching role of the Next Friend (as the Full Court then described it) is to conduct litigation and provide appropriate instructions to do so. The Full Court also said that the appointment of a Next Friend is necessary to enable a decision to be given which will be binding on the person under a disability (at [59]). The Full Court then referred to the decision of *Read & Read* [1944] SASR 26 at 28-9, where the Supreme Court of South Australia said:

> [A] person who accepts the duties of guardian ad litem does not do so…as a matter of form. A guardian ad litem on behalf of an insane person or an infant represents that person before the Court, and it is his duty to see that every proper and legitimate step for that person's representation is taken. He has got to give his mind to it, and decide for himself upon the material put before him what course of action to take…

More recently, the Full Court of the Federal Court in *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432 (Black CJ, Moore and Finkelstein JJ) said that, in substance, the purpose of appointing a case guardian is "to protect plaintiffs and defendants who would otherwise be at a disadvantage, as well as to protect the processes of the court" (at [25]).

It is a role that has been described as:

> …an invidious one in the sense that the person is taking on the decision-making responsibilities of the litigant whilst having to ensure that their own interests do not conflict with those of the litigant. That means that the case guardian has to make decisions which are often unpalatable to the individual litigant.[6]

The Full Court of the Family Court in *Forster* & *Forster* [2012] FamCA 47 emphasised the importance of ensuring that orders for the appointment of a case guardian not be made without due regard to the "very serious" consequences which may flow from that appointment. The Full Court opined that "…to relieve an adult person of the right to conduct his or her own litigation is a serious step and a serious deprivation of a fundamental right" (at [135]). The Full Court of the Family Court's decision was cited with approval in the recent case of *Merrickson & Padmore* [2013] FamCA 916, where the trial judge, Loughnan J, said (at [26]):

> The appointment of a case guardian is not discretionary. It goes to the integrity of legal proceedings that parties before the court have the capacity to present their case or to instruct a lawyer to do so, on their behalf.

The serious consequences of appointing a case guardian are illustrated by the case of *Forster* [2010] FamCAFC 205, a decision of Strickland J exercising the Court's appellate jurisdiction as a single judge. In the context of long-running litigation, the father had filed an application to extend time to file a Notice of Appeal against parenting and property orders made by a federal magistrate, and

[5] Rule 13.01 of the *Family Law Rules 2004* (Cth) sets out the elements of the duty of disclosure.
[6] See *Anton & Malitsa* [2009] FamCA 623 at [2].

against an order appointing a litigation guardian for him. The application for an extension of time was filed during the tenure of the case guardian's appointment. Strickland J, in reliance on the Full Court's decision in *Willshire & Willshire* [2009] FamCAFC 130, found that the father had no standing to file any application, including a Notice of Appeal, while there was a litigation guardian appointed for him. The only exception was a challenge to the appointment of the litigation guardian itself.[7] Strickland J noted that, separate to the application before him, there was a further extant notice of appeal that had been filed by the father while a litigation guardian was appointed. Strickland J said that that Notice of Appeal, and the balance of the application before him, save for the appeal against the orders appointing the litigation guardian, had to await the outcome of the application seeking an extension of time and the outcome of the appeal, if the application was granted. Strickland J ultimately granted an extension of time and, as discussed below, the father's appeal was upheld.

"Disability", competence and the importance of medical evidence

A fundamental principle in decisions as to whether or not to appoint a case guardian is that litigants are assumed to be able conduct their own proceedings and the party asserting otherwise bears the onus of establishing lack of competence to the court's satisfaction. As the Full Court of the Federal Court said in *L v Human Rights and Equal Opportunity Commission* [at 26]:

> There is a presumption of competence unless and until the contrary is proved; that is, there is a presumption that a litigant of full age is competent to manage his or her affairs: *Masterman-Lister* at [17] per Kennedy LJ; *Murphy v Doman*
>
> (2003) 58 NSWLR 51; [2003] NSWCA 249 at [36] per Handley JA. When it is alleged that a person is incompetent, the onus of proof is on those so asserting: *Masterman-Lister* at [17] per Kennedy LJ; *Dalle-Molle v Manos* (2004) 88 SASR 193; [2004] SASC 102 at [17] per Debelle J; *Andreapoulou v Nowak* [2002] VSC 462; *Pratt v Dickson* [2000] QSC 314.

This passage has been cited with approval in appellate and first instance decisions of the Family Court.[8]

It is well accepted by the Family Court that that the mere fact that a party may be conducting litigation in a way that appears to be inimical to their interests is not a sufficient legal basis upon which to appoint a case guardian. The Full Court of the Family Court in *Forster* said (at [126-7]):

> It is the common experience of courts that many self-represented litigants appear to act against their interests, file voluminous documents and file many applications, some of which, at least at first blush, would enjoy no prospect of success.
>
> As the Full Court of the Federal Court made clear in *L v Human Rights and Equal Opportunity Commission*, conduct that might on its face appear to be against the interest of a litigant does not compel the conclusion that the person is in "need" of a litigation guardian. At [34], the Court said:
>
> > …the fact that a litigant has put forward a case that reveals no reasonable cause of action may say nothing at all about the litigant's capacity to present such a case…

[7] See *Forster & Forster* [2010] FamCAFC 205 at [3].

[8] See *Forster & Forster* [2012] FamCAFC 47; *Merrickson & Padmore* [2013] FamCA 916.

The difficulty that may attend the conduct of litigation in which a party who may have a form of disability is self-represented also does not of itself establish a need for a case guardian. The decision in *Materanzi & Suskain (No 2)* [2011] FamCA 276 is an example. In that case, the mother sought to have a case guardian appointed in parenting proceedings to which she was a party, on the basis that she was not able to adequately conduct or give adequate instructions for the conduct of the case. The trial judge, Forrest J, found that it was "abundantly clear" that the mother had a serious hearing defect that affected her ability to hear and understand the proceedings in which she was involved, and to speak and communicate with others. Nevertheless, in the absence of evidence that the mother was unable to properly participate in the proceedings, Forrest J declined to grant the application. Forrest J expressed his regret that the mother's legal representatives withdrew from the case and that her counsel intended to do so also if the application to appoint a case guardian was refused, but went on to state that (at [18]-[21]:

> I understand and appreciate that participation in litigation by the mother, with or without legal representation, is difficult for her. I am not though, satisfied simply because I appreciate the difficulty of it, that she is not capable of adequately conducting or giving adequate instructions for the conduct of the case.
>
> …
>
> [T]he lack of legal representation, as difficult as that makes the mother's case, particularly in circumstances where she is alleging that the subject child…has been the victim of sexual abuse by the applicant father, and also that she was subject to significant domestic violence at the hands of the father will make this a very difficult case indeed.
>
> That said, I am not satisfied that the grounds upon which I would be entitled to order the appointment of a case guardian are indeed present in this particular case.

The validity of the appointment of a case guardian is not dependent upon medical evidence as to the party's capacity being before the court. The Full Court of the Federal Court in *L v Human Rights and Equal Opportunity Commission* said that the means by which the court will determine whether a guardian should be appointed can vary from case to case. The Full Court went on to say that there will be cases where no medical evidence will be available, such as where a litigant refuses to submit to a medical examination, and there will also be cases where the lack of capacity is so clear that medical evidence is not called for. However, the Full Court of the Family Court in *Forster* & *Forster* [2012] FamCAFC 47 said that appointing a case guardian in the absence of relevant medical evidence is a step that "should be approached with extreme care" (at [141]).

In that case, the father, who was a party to property and parenting proceedings, successfully appealed a decision of a federal magistrate to appoint a litigation guardian for him[9] in circumstances in which the father had refused to attend a psychiatric assessment and there was no other medical evidence before the court. The Full Court found that the order requiring the father to undergo psychiatric assessment was not made on any proper grounds as it was intended to "complete his Honour's already held view that [the father] was not competent". To then go on, as the Full Court found the federal magistrate did, and infer that failure to comply with the order for assessment made the appointment of a litigation guardian appropriate, was "fundamentally flawed" (at [137]-[8]).

[9] The *Federal Circuit Court of Australia Rules 2001* (Cth) use the term 'litigation guardian', as compared to 'case guardian' in the *Family Law Rules 2004* (Cth).

The Full Court concluded that there nothing in the material before the federal magistrate or in the federal magistrate's reasons that supported the appointment of a litigation guardian (at [136]).

By way of contrast, the decision of O'Reilly J in *Salanger & Maxwell* [2011] FamCA 1248 is an example of a case in which a case guardian was appointed despite the party who was the subject of the appointment refusing to attend for psychiatric testing. O'Reilly J emphasised that her own observations of the party for whom an application to appoint a case guardian had been made would be insufficient to found such an appointment, because she would not, as a judge, be qualified to make that assessment. However, in circumstances in which the mother persistently refused to attend for a psychiatric evaluation O'Reilly J concluded that her own observations of the mother, her management of the case over a five-year period, and an earlier diagnosis of mental disability was a sufficient basis upon which to find that the mother could not conduct her case or give adequate instructions for the conduct of her case. Thus, although there was no current psychiatric report before the Court there was nevertheless medical evidence that had been tendered throughout the lengthy history of the proceedings that O'Reilly J was able to take into account.

Funding for case guardians' legal costs

One of the most significant, if not the most significant, issue that arises in any discussion of case guardians is the availability of funds from which to meet the case guardian's legal costs. As Cronin J observed in *Grierson & Grierson* [2009] FamCA 114, one of the considerations in the appointment of a case guardian is that the person who accepts that role must be objective and have no pecuniary interest in a personal sense in the matter. The availability of adequate funds to meet a case guardian's legal expenses is therefore critical to their suitability for appointment if the circumstances so warrant.

Rule 6.14 of the Rules provides that the court may order the costs of a case guardian to be paid by a party or from the income or property of the person for whom the case guardian is appointed. *Salanger & Maxwell* is an example of a case where the legal costs of the case guardian appointed for the mother in parenting and property proceedings were to be met from the mother's income and property.

However, in circumstances where it would not be appropriate to make an order that costs be met by the party, or where a litigant is impecunious, serious problems arise. Experience shows that the absence of a fund to meet legal costs is likely to act as a powerful disincentive to potentially suitable case guardians accepting an appointment. This is particularly so where the case guardian needs to instruct a legal practitioner, because the case guardian is personally liable for the costs and expenses of the legal practitioner. It may be possible to secure a grant of legal aid to fund a case guardian's legal costs, but such grants can be difficult to obtain, particularly in property proceedings, and the process of seeking legal aid is itself time consuming.

In the case of *Modra & Modra* [2007] FamCA 1590, a long-standing parenting dispute involving serious allegations of child sexual abuse, Strickland J accepted medical evidence that the father required a case guardian to continue the parenting proceedings. Although the Public Advocate for the State of South Australia was prepared to act as a case guardian if appointed, that acceptance was conditional upon a grant of legal aid being made in his favour to enable him to instruct a solicitor. If a grant was not forthcoming, the Public Advocate would not be able to continue to act as the case guardian. Strickland J granted the request made by counsel for the independent children's lawyer for an adjournment so that the matter of legal aid funding could be explored. In so doing however, Strickland J expressed and repeated his concern about how long the process was taking and the

effect that the delay must be having on the mother and children. A grant of legal aid was ultimately forthcoming but that did not occur until May 2007, approximately 16 months after Strickland J first became concerned about the apparent state of the father's mental health.

As this case illustrates, the need to identify a reliable source of funds from which to meet case guardians' legal costs can result in significant delays in the resolution of family law disputes. If a suitable case guardian cannot be found, then the proceedings cannot progress and the court will have no choice but to dismiss the application or applications, or stay the proceedings indefinitely pending the appointment of a case guardian. That has potentially very serious consequences for the families involved and particularly for children who may be the subject of or affected by disputation.

The Full Court of the Family Court (Finn, Thackray and Strickland JJ) observed in *Willshire & Willshire* [2009] FamCAFC 130 that it is a common occurrence for there to be no person, entity or authority available to take up appointment as a case guardian. The Full Court said that although State entities such as public trustees or public advocates are the obvious choice to take up such appointments where there is no other alternative, their ability to accept appointments was, the Full Court presumed, related to the question of costs. As I will discuss in the next section, which concerns the allied issue of the Attorney-General nominating case guardians, it would be highly desirable if discussions could take place between the Commonwealth and State governments as to establishing a pool of funds from which to meet case guardians' legal costs where they cannot be paid by the party themselves. I believe there would be considerable advantages in having such funds administered by State and Territory legal aid agencies, not least of which would include utilising existing expertise and maximising administrative efficiencies.

Nomination of case guardians by the Attorney-General

The final matter I wish to discuss, which is related to the issue of funding for case guardians, is nomination by the Attorney-General. As I stated earlier, rule 6.11 provides that the court may request that the Attorney-General nominate a suitable person in writing to be a case guardian if, in the opinion of the court, a suitable person is not available for appointment. Although the Court does not keep dedicated statistics on requests for nomination under rule 6.11, and responses to those requests, I arranged for a search to be undertaken of the Court's internal judgment database to identify those cases where a request had been made. Although I recognise this is an imperfect search technique, I was able to locate a number of judgments involving requests for nomination. Unfortunately though, it does not appear that a nomination was forthcoming in any of those cases. One of the cases, *Connor & Hulett* [2011] FamCA 196, deals with the issue of nomination in some detail and I propose to quote extensively from that decision in my submission.

Before turning to *Connor & Hulett* I wish to refer to the matter of *Salanger & Maxwell*, which I believe amply demonstrates how the timely resolution of proceedings can be compromised where a suitable case guardian cannot be found and where a request for nomination under rule 6.11 is not responded to expeditiously, or indeed at all. As recorded by the trial judge, O'Reilly J, the matter had a long history, commencing by way of an application for parenting and property orders issued in 2003. On 15 May 2006 O'Reilly J made orders pursuant to rule 6.11 which her Honour hoped would result in in the appointment of a case guardian by the Attorney-General. O'Reilly J said in her judgment at [19] "[u]nfortunately, my endeavour for appointment of a case guardian in 2006 via the Attorney-General failed", resulting in the trial dates set down for June 2006 being vacated. The proceedings were stayed pending the determination of the father's application for the appointment of a guardian and/or administrator for the mother under state legislation. In November 2006 the father's application was dismissed. The two Tribunal initiated applications for guardianship were

dismissed in April 2008, with there having been little progress in the proceedings before the Family Court. Those proceedings were stayed in September 2008 until further order.

By June 2010, after having periodically checked on progress with the case, O'Reilly J said she had become "increasingly concerned that the matter had languished and needed freshly to be brought to trial and finalised" (at [34]). Trial directions were made at that time. In October 2010 the mother filed an application seeking interim residence orders, with O'Reilly J delivering reasons for judgment in December 2010 whereby she said that she was not prepared to hear and determine the mother's application until she attended for psychiatric assessment and report. Following the mother's refusal to attend a psychiatric appointment, and with further trial dates having been vacated, in June 2011 the independent children's lawyer filed an application for the appointment of a case guardian for the mother. The application came before O'Reilly J on 15 July 2011, and upon being satisfied that a suitable case guardian had been located who met the criteria contained in rule 6.09, an appointment was made. This occurred more than five years after an unsuccessful request for nomination had been made to the Attorney-General.

In orders made on 5 February 2010 in *Connor & Hulett* [2010] FamCA 103, Murphy J directed that a case guardian be appointed for the father and, by reason of no suitable person being available for appointment, requested that the Attorney-General nominate a person to so act. At [39] of the Reasons for Judgment, Murphy J expressed himself to be "profoundly concerned that the process contemplated by that appointment should not delay these proceedings." That, unfortunately, did not come to pass.

I intend to quote at some length from Murphy J's Reasons for Judgment delivered on 16 March 2011 (*Connor & Hulett* [2011] FamCA 196), which incorporate his Honour's Reasons for Judgment delivered on 1 November 2010 (*Connor & Hulett (No 2)* [2010] FamCA 1013), as they detail the ultimately futile efforts made by the Court to secure a nomination of a case guardian by the Attorney-General. Murphy J said:

> 50. I am profoundly disappointed and saddened that the process contemplated – a process designed to assist a person with a disability, namely a mental illness – has, indeed, delayed these proceedings. In reasons delivered on 1 November 2010 I said:
>
> > 19. I sought to make the point then, both orally to [the father] when he appeared before me and in the ex tempore reasons which issued subsequently, that the issue before the Court was both [the father's] capacity to properly represent himself and thus maximise his best chances as it were in the parenting proceedings and obtain orders which might be seen to reflect the caring and loving relationship that undoubtedly exists between the father and [the child].
> >
> > 20. This is a point which I have again sought to emphasis to [the father] on more than one occasion during the proceedings before me today.
> >
> > 21. Since the making of that order there has transpired what can only be described as extraordinarily unfortunate circumstances that have seen in the space of about nine months no progress whatsoever having been made toward the appointment of a case guardian to [the father].
> >
> > 22. The Court's processes, including the legislation and rules which govern it, contemplate a process whereby the Attorney-General appoints a case guardian so as to obviate the very sorts of difficulties that have occurred in this case. The difficulties encountered by the independent children's

lawyer…in having a case guardian appointed in this case in accordance with the Court's rules are deposed to in an affidavit by [the independent children's lawyer] filed in these proceedings.

23. Those difficulties culminated in correspondence passing between [the independent children's lawyer] and the Attorney-General's Department and more recently in a letter dated 21 September 2010 addressed the Assistant Secretary of the Family Law Branch of the Attorney-General's Department by this Court's principal registrar, Ms Filipello. That letter sets out the difficulties attached to the appointment for case guardian in this case and annexed for ease of reference a transcript of the proceedings before me…that sought to appoint a case guardian for [the father].

24. The principal registrar said in that letter:

> From the Court's perspective this matter cannot progress any further until such time as a case guardian is in place. In effect it means that [the father] will not be able to spend [unsupervised] time with his child. I note that the order was made by Murphy J in February 2010 and I would ask that now the Attorney-General has taken up his portfolio the request made for the appointment of case guardian be expedited.

25. On 7 October 2010 a letter was received from the Assistant Secretary of the Family Law Branch of the Attorney-General's Department which I have marked as exhibit A in these proceedings.

26. I will quote the letter in full. It says:

> Dear Ms Filippello, Thank you for your letter of 21 September 2010 regarding the Court's request for the Attorney-General to nominate a case guardian in the matter of [Connor] and for your offer of assistance in the development of the processes. The Department is not in a position to provide a nominee case guardian for the Attorney-General at this time as new arrangements for the nomination process for case guardians in the Family Court of Australia are currently being put in place. I understand the Attorney-General will provide the Court with further information as soon as possible and we look forward to working with you on this important area of family law policy.

27. Whatever new arrangements may or may not be put in place by the Attorney-General's Department as indicated in that letter they are of cold comfort to [the father] (and to the independent children's lawyer in this matter) each of whom have now had to wait nine months before finally receiving an answer that a case guardian would not be appointed.

28. The ramifications of this for this matter and ultimately a resolution of it and the making of orders ultimately considered to be in [the child's] best interests perhaps do not need to be dwelled upon in the course of these reasons. I simply pause to observe that it is very unfortunate that the case has not been able to progress by reason of that fact.

51. No doubt governments at both state and federal level would be able to advance many reasons which they would presumably suggest as good reasons why no arrangements have been put in place so as to avail people with a serious debilitating illness such as mental illness from having a case guardian appointed for them in parenting cases before this Court. Whatever might be the merits (or demerits) of any such argument, what is at least clear is that, as at today, there are still no arrangements in place whereby case guardians can be appointed efficiently and effectively so as to allow people with a disability including specifically mental illness, which deprives them of the capacity to conduct proceedings on their own behalf.

52. That this is tragic for those individuals is one thing. That it has consequent tragic consequences for children is quite another.

53. I say no more than that it concerns me profoundly that those arrangements are not in place, and all the more so in circumstances where the most recent Australian of the Year, Professor McGorry has spent a considerable proportion of his time in that role attempting to educate the community with respect to mental illness and the tragedy of youth suicide in particular.

54. That there should have been a confluence of circumstances that have prevented the final determination of these proceedings in the period between July 2009 is to say the least tragic and profoundly disappointing.

55. That there should have been a delay of 12 months while a case guardian was sought is to say the very least extremely unfortunate, and, it needs to be said, tragic for the child, particularly in light of the orders which will ultimately be made in these proceedings today.

I am not aware of any new arrangements for the nomination of case guardians in the Family Court having been put in place. It is abundantly clear to me that the current system is not working effectively and I encourage the Attorney-General and his Department to give urgent consideration to funding for case guardians' legal costs generally, where those costs cannot be met by the party, and to instituting a nomination process that enables case guardians to be quickly appointed where a suitable candidate is not available. I return to the comments of the Full Court in *Willshire*, where it was said:

54. We cannot leave this appeal without commenting on the circumstance of the husband's own solicitor being appointed as the case guardian. That is highly unusual and indeed concerning, but it was brought about by the absence of any other person or any other relevant entity to take up the appointment. A request had been made by the registrar to the Attorney-General pursuant to Rule 6.11 of the Family Law Rules but no nomination had been made.

…

56. It would be highly desirable, in our view, if the Attorney-General was able to initiate discussions for arrangements between the Commonwealth and State Governments which provide for a suitable case guardian to be appointed for a person in the position of the husband here where there is no alternative available. It is entirely unsatisfactory that the husband's own solicitor should be placed in the position where he is appointed as the husband's case guardian. They have entirely different roles in the conduct of the litigation.

I strongly endorse the Full Court's comments.

Decision making involving a parent or parents with a disability

I now wish to briefly discuss the approach the Court takes to making decisions about parental responsibility and time spent by a child with a parent who has an intellectual disability. I raise this issue in response to an article in *The Age* newspaper on 15 December 2012 entitled 'A child taken, a mother grieves'.[10] According to that report, the case concerned 'Rebecca', the mother of an eight year old child. Rebecca suffered from a mild intellectual disability. It would appear that relatives of Rebecca's former partner and the father of the child applied to the Federal Magistrates Court for orders that the child live with them and also orders regarding parental responsibility. The article states that as a result of an order made by consent in the Federal Magistrates Court, in circumstances where a litigation guardian had been appointed for Rebecca, Rebecca only spends time with the child every second weekend and during part of school holidays. The decision is described as one which has "deeply concerned lawyers and human rights workers, who believe Rebecca is the victim of an inflexible Australian Family Law Act that discriminates against disabled parents in breach of United Nations conventions protecting the rights of the disabled and children" and which, for some, has "disturbing parallels" with the 'stolen generations'. Rebecca's litigation guardian is quoted as saying:

> The [Family Law] [A]ct assumes the parties are normally the natural parents and where that is not the case it doesn't give preference to a natural parent. And it does not give protection to someone with a cognitive disability. It treats disability as a barrier to parenting just like drug addiction is a barrier.
>
> If she didn't have a mild intellectual disability, I am sure that her child would still be living with her. It is wrong at every level.

On the same day an opinion piece authored by Ms Colleen Pearce, the Victorian Public Advocate, was published in the *Sydney Morning Herald*.[11] There, Ms Pearce said that the Federal Magistrates Court (now the Federal Circuit Court) or Family Court can remove children from a parent under the Family Law Act to a "better parent", or where it is deemed in the best interests of the child. Ms Pearce is then quoted as saying "I am increasingly concerned that children are being removed from parents with a disability principally due to that disability and not because the cases meet the relevant tests."

It is not appropriate for me to comment on individual decisions and certainly not on one that was made by consent in the former Federal Magistrates Court. However, insofar as it is being suggested that the Act discriminates against parents with an intellectual disability, or that the presence of an intellectual disability is of itself a disqualifying factor in an application in which a parent is seeking to spend substantial time with their child, I believe those views are misconceived.

In any case where parenting orders are sought, whether they be orders for the allocation of parental responsibility, or time spent with a child, or any other order concerned with the care, welfare and development of a child, the best interests of the child is the paramount consideration.[12] The Act makes no reference to a "better parent" test – the focus is unequivocally on the child's interests and who is best positioned to meet the child's needs.

[10] Mark Baker, 'A child taken, a mother grieves', *The Age*, 15 December 2012, http://www.theage.com.au/victoria/a-child-taken-a-mother-grieves-20121214-2bfd9.html, accessed 7 January 2014.
[11] http://www.smh.com.au/federal-politics/political-opinion/disability-no-bar-to-good-parenting-20121214-2bf75.html (accessed 7 January 2014).
[12] *Family Law Act 1975* (Cth), s 60CA.

How a court determines what is in a child's best interests is by considering the matters contained in section 60CC of the Act. These include both 'primary' and 'additional' considerations. Relevantly, the two primary considerations are:

- the benefit to the child of having a meaningful relationship with both parents; and
- the need to protect the child from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence.[13]

The additional considerations include:

- the nature of the relationship of the child with each of the child's parents and other persons, including grandparents and other relatives;
- the capacity of each of the child's parents and any other person, including grandparents and other relatives, to provide for the needs of the child, including emotional and intellectual needs; and
- the attitude towards the child and to the responsibilities of parenthood demonstrated by each of the child's parents.[14]

The court can consider any other fact or circumstance that it thinks is relevant to the decision of what orders would be in a child's best interests.[15]

I confirm that neither the primary nor the additional considerations make specific reference to whether or not a parent suffers from a disability, or how the presence of a disability may affect the outcome of parenting proceedings.

The following Family Court decisions, all of which involve a parent with an intellectual disability, may be of assistance to the ALRC in gaining insight into the Court's reasoning process. I believe that they refute any suggestion that the mere presence of an intellectual disability, regardless of its severity and independent of any other factors, will be determinative of the outcome of an application for parenting orders. A summary of some relevant cases follows:

> *Turnbull & Meagher* [2013] FamCA 184
>
> This matter involved an application by the mother for sole parental responsibility for her four children and that the children live with her, as they had been doing for the 15 months prior to hearing. It would appear that the father originally sought that the children live with him, or at least there was a disagreement between him and the mother as to the children's residence, but the father abandoned the proceedings a few months prior to the matter coming on for final hearing and thus the trial proceeded in his absence. The evidence before the Court was that the mother had an intellectual disability and that the father had a chronic medical condition. The evidence of the family report writer was that, during the time that the parties lived together, the children has been severely neglected, leading to significant developmental delays.
>
> The trial judge, Austin J, found that apart from the father's deteriorating health, he also lacked insight into the children's emotional needs. In particular, the father had chosen to disengage from the children without satisfactory explanation. Austin J also had residual concerns about the mother's parenting capacity and the potential for her "intellectual delay" to compromise her ability to cater to the children's intellectual needs as they aged and matured, evidenced by the children's past delay in reaching developmental milestones.

[13] Ibid s 60CC(2).
[14] Ibid sub-ss 60CC(3)(b), (f), (i).
[15] Ibid sub-s 60CC(3)(m).

Austin J then said (at [57]):

> That aside, the previous shortcomings in the mother's parenting capacity, evident from the children's delay in reaching milestones, are fortunately showing progressive improvement. With assistance from both the maternal grandmother and caseworkers from a non-government agency…the quality of the mother's care for the children in all respects has markedly improved.

Austin J concluded (at [58]) "the evidence demands a conclusion that the mother is better suited than the father to provide for at least the children's physical and emotional needs."

Simon & Harvey [2012] FamCA 401

This matter involved an application by the mother to vary orders made in 2005 that she spend supervised time with her younger child. The mother sought that the requirement for supervision be discharged. Evidence was before the court, by way of family reports, that the mother suffered from an intellectual disability, a severe speech impediment and a hearing defect. There was also evidence of past allegations of abuse and neglect of the children made against the mother, of involvement by child welfare authorities, and of the children having been placed in foster care on earlier occasions, prior to them living with the father.

At trial, the mother asserted that there was no medical evidence before the Court as to whether she had an intellectual disability and the extent of any such disability. Taking into account earlier family reports and his own questioning of the mother, the trial judge, Kent J, said he was "comfortably satisfied" that the mother had some intellectual disability, although he found that its extent was unclear. Kent J found that there was "an abundance of evidence, historical and otherwise, to indicate very significant limitations in the Mother's capacity to provide for the physical, intellectual and emotional needs of her children if her time with them is on an unsupervised basis" (at [77]). Kent J referred to evidence from 2008 when the child spent supervised overnight time with the mother and to the report of the supervisor of the visit, which provided "no comfort" to Kent J that the mother had any improved capacity to provide care than that which existed when the order for supervision was made in 2005.

In conclusion, Kent J said (at [95)]:

> I find that there is little factual or objective information to support the Mother's claims that a change in the time arrangements and the requirement for supervision would be in the child's best interests. To the contrary, I find that such a change would be adverse to the child's best interests. In this respect, I accept [the] assessment that removing the structure and support of supervised time might be setting the Mother up to fail, given the limitations consistently identified in respect of her interactions and relationships with each of her children.

Accordingly, Kent J declined to accede to the mother's application for unsupervised time.

Heath & Heath [2007] FamCA 148

This matter involved a dispute between the parents of three young children as to with whom the children should live and how much time should be spent (if any) with the parent with whom the children were not principally residing. During the course of the trial, the issues in dispute were whether two, or all three, children should live with the mother and whether time spent with the father should be supervised. Allegations of family violence, sexual abuse and emotional neglect were in issue.

> The trial judge, Brown J, referred to expert medical evidence in which the mother was described as having a mild intellectual disability resulting in "dull normal intelligence, together with dependent personality features." The evidence was also that the mother had an adjustment disorder with associated anxiety and depressive features. The assessing doctor's evidence was that the mother would need to be guided from time to time in discharging her parental obligations but was capable of providing a reasonable level of parental care. Brown J's observation of the mother in the witness box was consistent with that evidence. Brown J said that "in general, [the mother] understood questions and did her best to respond although she became confused at times and it was easy to see how she could be led to give a particular answer if a question were posed in a particular way."
>
> The expert medical evidence with respect to the father was that he had been diagnosed with a personality disorder and mild adjustment problems, mild anxiety and depression, which were not amenable to treatment. Brown J found that the father has no insight into the effect of long-standing family dysfunction on the three children. In considering the capacity of each of the children's parents to meet their needs, Brown J said (at [57]) "[t]he evidence is that, despite her intellectual disability, the wife has the capacity to parent the children well, and that she is open to accepting advice and support from community services."
>
> Brown J ordered that the three children live with the mother, that the children spend supervised time with the father and that the mother have sole long term decision making responsibility for the children's health, education and residence, with responsibility for other decisions being exercised jointly with the father.

In conclusion, I note that the article in *The Age* states that the decision involving care arrangements for Rebecca's child cannot be appealed and, more generally, that consent orders cannot be the subject of legal challenge. That is not the case. There is no barrier, statutory or otherwise, to a party appealing a parenting order made by consent, or to applying for variation of the order if there has been a change in circumstances. That article also asserts that "Rebecca's advisers believed they could not resist a decision in favour of her former partner's family and accepted a consent order…based on potential legal liability and restrictions on the role of a litigation guardian…". As I earlier stated, if the proceedings had been heard in the Family Court, rule 6.13(1)(d) would have required the case guardian to file an affidavit setting out the facts relied on to satisfy the court that the order was in Rebecca's best interests.

Examples of cases: property, spousal maintenance and adult child maintenance

The ALRC has included 'spousal maintenance' and 'property orders' as issues upon which stakeholder feedback could be sought and provided. I consider 'adult child maintenance' is also an issue with potential relevance to the ALRC's inquiry.

At this juncture I merely wish to draw the ALRC's attention to the relevant legislative provisions concerning the making of property and spousal maintenance orders (de jure and de facto), and those which pertain to adult child maintenance. I will also refer to some decisions in which a party's physical and/or mental health was in issue and how those health issues were accommodated. My discussion is confined to adult parties with a disability, although if the ALRC is interested in

obtaining information about financial provision for parents with care-giving responsibilities for young people with physical and mental health conditions, I would be happy to provide additional material upon request. Although it was written in 1993, the ALRC may also be assisted by an article entitled 'Disability and the Financial Impact of Matrimonial Breakdown' by Kay Maxwell, published in (1993) 23 *Queensland Law Society Journal* 565. For convenience, a copy of the article is attached.

Property and spousal maintenance

Part VIII of the Act enables a court exercising jurisdiction under the Act to make orders with respect to property, spousal maintenance and maintenance agreements of parties to a marriage, save for financial matters or financial resources covered by a binding financial agreement.[16] Part VIIIAB concerns property, financial resources, maintenance and financial agreements between de facto couples.

Property

Although parties with a disability are entitled to the same considerations under section 79 (de jure couples) and section 90SM (de facto couples) as any other litigant, there are certain matters that are likely to assume particular significance. These arise most prominently in the assessment of what are essentially prospective factors, which are usually taken into account after consideration is given to the composition and value of the parties' asset pool and their respective contributions to that pool. These factors include the age and state of health of the parties, the physical and mental capacity for gainful employment and the parties' needs. Issues of disability may also arise in other areas, such as (as will be discussed by reference to Full Court and High Court judgments in *Stanford*) the physical separation of parties because of health reasons and the jurisdiction of the court to make a property settlement order in such circumstances, the assessment of the parties' respective contributions, and consideration of the justice and equity of the proposed order.

As prospective factors arising under section 75(2) and section 90SF(3) are also an integral part of applications for spousal maintenance, I intend to discuss them when I turn to the topic of spousal maintenance itself.

The following two cases provide examples of some of the issues that can arise in the assessment of contributions when one of the parties has a disability.

- *O'Brien & O'Brien* (1983) FLC 91-316 at 78,148: where, upon the husband becoming permanently disabled in a motor vehicle accident, including suffering post traumatic cerebral disorder, the wife's homemaker contribution in the three year period between the accident and the receipt of damages arising from a civil suit was assessed as being "significantly greater" than the financial contribution of the husband. The trial judge found that not only did the wife have the responsibility of managing the house and caring for the children, she also had the "heavy burden" of caring for and nursing the husband, on account of which she ceased part-time employment.

[16] Ibid s 71A.

- *Coad* [2011] FamCA 622: where the husband's attempted murder of the wife was found to have resulted in "sustained residual and life long disabilities" which caused her pain, interfered with her capacity to work and "presumably" made it more difficult for her to care for the child. The trial judge was satisfied that the injuries inflicted on the wife by the husband made the discharge of her obligation to care for the child more onerous than it would otherwise have been. Accordingly, in her assessment of the parties' post-separation contributions, the trial judge found that wife's contributions significantly exceeded those of the husband and were made under "extraordinarily difficult circumstances in the months following the husband's attack on her and, thereafter, with permanent disabilities…". The assessment of contributions, which would otherwise have favoured the husband, favoured the wife 60% to 40% as a result of her post separation contributions.

The two Full Court decisions in *Stanford & Stanford* ((2012) FLC 93-495; (2011) FLC 93-483) (Bryant CJ, May and Moncrieff JJ), and the High Court decision (2012) 247 CLR 108), are of particular interest in the context of the ALRC inquiry. The appeal before the Full Court and in turn before the High Court raised what the Full Court described as (2011 FLC 93-483 at 85,964):

> …the question as to whether and if so in what circumstances, the Court should make an order for property settlement pursuant to s 79 of the *Family Law Act 1975* (Cth)…where a marriage is still intact but where a physical separation has been forced upon the parties by reason of one of the parties' health.
>
> The question has particular relevance in contemporary Australian society. The parties are aged. The wife must have high care in a nursing home because of her frailty, both physical and mental. The husband wishes to remain in their home which is within his ability. The wife's family wish that the house be sold so that money can be spent on care for their mother. The evidence before the Magistrate was this would only be possible if the house was sold.

In *Stanford*, the husband and wife had a long-standing marriage and had lived in the same home together for in excess of 35 years. They were aged 89 (wife) and 87 (husband) years respectively at the date of hearing. In 2008 the wife suffered a stroke and was admitted to residential care. The wife also suffered from dementia. Although physical separation was forced upon them, it was the husband's case that the parties were still in a marital relationship. The husband continued to provide for the wife and had placed $40,000 into an account for her use, as well as visiting her three times a week at the care facility.

The husband wished to remain in the matrimonial home. The wife (through her daughter as case guardian) initiated proceedings for property settlement seeking the sale of the former matrimonial home and equal division of the assets between the parties, on the basis that the proceeds of sale could be spent on care for the wife. The order made by a magistrate of the Family Court of Western Australia necessitated the sale of the property. The father appealed.

The Full Court allowed the appeal and set aside the magistrate's decision. On the issue of the power to make a property settlement order in respect of an intact marriage, the Full Court (as confirmed on appeal to the High Court) found that there was no real doubt that the court has jurisdiction to make property settlement orders where the parties have not separated.

The Full Court concluded that the magistrate had erred in a number of respects. The Full Court observed that the magistrate had not sufficiently considered the effect of her orders on the husband, including the sale of the home in which he lived, and the fact that it was an intact marriage, in considering what was "just and equitable". In particular, the Full Court found that the wife did not

have a need for a property settlement as such and that her reasonable needs could be met in other ways, particularly by way of a maintenance order.

The Full Court said in conclusion (at 85,992):

> In our view it is important…to be clear that there is no requirement that the Court make a final order for property settlement in such cases that would alter the interests of parties in property on a final basis especially when the marriage itself is not at an end. There are a number of provisions in the Act…which give the court power to make interim orders, make orders for maintenance and to adjourn the proceedings rather than to determine them on a final basis if the justice and equity of the case requires it.

On appeal, the High Court said that the Full Court was right to conclude that the magistrate had erred in making the property settlement order that was made, and was right to find that the magistrate did not consider factors that bore on whether it was just and equitable to make a property settlement order.[17]

Spousal maintenance

The Act provides that each party to a marriage is obliged by s 72 and s 90SF to maintain their spouse, to the extent they are reasonably able to do so, if the other party is unable to adequately support themselves because of:

- having the care and control of a child aged under 18;
- age or physical or mental incapacity for appropriate gainful employment; or
- any other adequate reason.

The court can have regard to the list of matters contained in section 75(2) and section 90SF(3) in determining what maintenance order can be made. These factors are also considered in property settlement proceedings.

Sub-section 75(2)(a) and sub-section 90SF(3)(a) concern the age and state of health of the parties. Sub-section 75(2)(b) and sub-section 90SF(3)(b) concern physical and mental capacity for appropriate gainful employment. There is substantial overlap between the two provisions.

Some examples of cases involving the state of health of the parties and physical and mental capacity for gainful employment follow.

> In *Tye and Tye (No 2)* (1976) FLC 90-048, the parties had been in a relationship for five years and were married for approximately two of those years. The marriage ended suddenly. The shock of the separation, in part, caused the wife to enter a "severe anxiety state" and to nearly have a nervous breakdown. The wife was unable to work as a result. The trial judge found that the wife did not, at the time of hearing, have a mental capacity for gainful employment. The trial judge ordered periodic maintenance for the time the wife expected to be unable to work and for a further period in which to obtain employment. Lump sum maintenance was also awarded, in part for the wife's medical expenses. The husband's appeal against the order was dismissed.

[17] The appeal to the High Court was allowed on grounds largely unrelated to issues discussed in this submission and concerned the effect of the subsequent death of the wife and the requirements of section 79(8) of the Act.

In *Barkley & Barkley* (1977) FLC 90-216, the wife was born with a 30% to 40% hearing deficiency in one ear. Following an assault by the husband, the wife lost all hearing in her other year. An operation to improve her hearing was deemed to be too risky. The trial judge found that the wife's loss of hearing should be taken into account as an aspect of her state of health and as an element of her physical and mental capacity for appropriate gainful employment. The trial judge found that the wife's "defective hearing" could seriously affect her earning capacity in the future. Counsel for the husband contended that there was no evidence before the court that the wife's hearing loss had affected her earning capacity or the extent to which it had been affected. The trial judge said:

> If the law requires evidence to show that in a labour market where jobs are scare a half-deaf person is not as readily employable as a person of sound hearing then the law is indeed asinine.[18]

In *Finnis & Finnis* (1978) FLC 90-437, the parties were married for 32 years. The wife had suffered many serious illnesses throughout the marriage and was in a poor state of health. The wife sought that the husband transfer his interest in the former matrimonial home to her, as well as his interest in the furniture, and a lump sum payment. The trial judge found that the wife was in a poor state of health and that the type of epilepsy from which she suffered was likely to cause periodic memory deterioration and disorders of awareness. The trial judge found that the state of the wife's health was such that she would be unable to engage in any gainful occupation following the expiration of her employment as an academic tutor. In discussing the wife's application for the husband's interest in the former matrimonial home to be transferred to her, the trial judge said that, given the uncertainty about the wife's future health and her "advancing years", the house was too spacious for the wife and "it will not be long before it will be a burden upon her." However, in light of various factors including the wife having resided in the home for 23 years, the proximity of friends and family, and that the husband had no need for a home of his own, the trial judge found it just and equitable in all the circumstances to transfer the husband's interest in the property to the wife.

In *Dow-Sainter & Dow-Sainter* (1980) FLC 90-890, after 13 years of marriage, the wife was diagnosed with multiple sclerosis. By the time the marriage ended in 1979, the wife had impaired functioning in both legs. The trial judge found that the wife was for all practical purposes incapable of earning a wage and that she should live in a house involving minimal use of stairs. The trial judge ordered that the former matrimonial home be sold and that the wife receive two-thirds of the proceeds of sale. The wife's application for lump sum maintenance was adjourned sine die. The wife appealed. The Full Court found that the house was appropriate for the wife's needs as it did not have stairs and was accessible to shops and transport. The Full Court also found that, in light of the wife's inability to earn an income due to her medical condition, it was appropriate for the husband to make a payment to her by way of lump sum maintenance. The Full Court allowed the appeal and, upon re-exercise, transferred the whole of the husband's interest in the former matrimonial home to the wife by way of property settlement and lump sum maintenance.

[18] At 76,325.

Adult child maintenance

Section 66L(1) of the Act provides that the court must not make an order for the maintenance of a child who is 18 or over unless it is satisfied that the maintenance is necessary either:

(a) to enable the child to complete their education; or
(b) because of a mental or physical disability of the child.

The matters that are to be taken into account in determining what is necessary are set out in s 66J. Section 66J requires consideration of the income, earning capacity, property and financial resources the child has and the "proper needs" of the child. Section 66J(2) requires the court, in taking account of the proper needs of the child, to have regard to:

(a) the age of the child;
(b) the manner in which the child was "educated or trained"; and
(c) any special needs of the child.

Section 66VA(a) provides that a child maintenance order stops being in force if the child, inter alia, ceases to have a disability.

There is a greater onus of proving that maintenance is necessary if it is because of the child's mental or physical disability rather than in order to enable the child to complete their education.[19]

Following are two cases in which awards of adult child maintenance were made.

> *Re: AM* (2006) FLC 93-262
>
> In *Re: AM* there was an application by a 28 year old for periodic and lump sum maintenance. The evidence was that the applicant suffered from a rheumatic condition called urticarial vasculitis arthritis, a rare degenerative and possibly permanent disease. The first respondent, the father of the applicant, denied legal liability for maintenance on the basis that the applicant's condition had not manifested itself until after the applicant had turned 18 years of age, at which date the father said his legal duty to provide financial support ceased. The father asserted that he was meeting any moral or social burdens stemming from the applicant's condition by way of voluntary support payments. The trial judge, Carmody J, found that the language of section 66L was "plain and unambiguous." Carmody J said that if the drafters intended for the section to apply only to childhood disabilities, the section would state that in clear terms. Carmody J further said that there was no reason why section 66L should not apply to temporary as well as permanent disabilities, and to partial as well as total disabilities. Carmody J ordered that the respondent father pay maintenance of $525 per week and the respondent mother pay $975 per week for five years, with a prospect of a further review.
>
> Should the ALRC be assisted by commentary on the decision, the following two articles may be of interest:

[19] See *FM &FM* (1997) FLC 92-738.

- 'Is There a Need for Nexus of Disability and Dependence in Adult Child Maintenance Cases' (2007) 28(2) *Queensland Lawyer* 70
- 'The 'Nexus of Dependency' and Adult Child Maintenance' (2009) 83(11) *Law Institute Journal* 41

Jamine & Jamine and Anor (No 2) [2011] FamCA 843

In *Jamine* the parties' adult daughter, aged 25 years at the date of hearing, suffered from Downes Syndrome and required "significant levels of assistance in virtually every activity that adults without disabilities accept as the norm." The medical evidence from an expert witness was that the daughter would encounter future problems including early Alzheimer's Disease, cataracts, haematological malignancies and spinal cord compression. The daughter had no income save for her disability support pension (which is disregarded for the purpose of maintenance proceedings) and was unlikely to be in receipt of income in the future. The daughter was being cared for by her mother, who applied for adult child maintenance payable from the parties' joint assets, capitalised for a 12 year period.

The trial judge, Cronin J, said the phrase "necessary" in section 66L (at [184]):

> …must be interpreted to mean that the child cannot support themselves to some measurable standard because of their physical or mental disability without maintenance. For example, there will be adults in the community with a mental or physical disability who are employed in industry or commerce where they are paid. That income must be considered in the context of what is necessary. So too must property and financial resources be considered.

On the question of proper needs, Cronin J said (at [189]):

> "Proper needs" must mean more than just expenditure currently being incurred. It must include questions about what is required to be done to ensure that the "special needs" (referred to in s 66J) of a child are met taking into account the manner in which, in this case [the daughter], has been raised and cared for by her parents.

Cronin J found that, in the circumstances, the maintenance of the adult child should be shared equally. He ordered that the sum of $147,000 be paid out of the parties' assets and held on trust for the maintenance of the daughter, to be drawn at the annual rate of $16,334.

Sterilisation of children and young people with an intellectual disability

I have read the transcript of the podcast interview of Professor Croucher by Ms Sabina Wyn, the Executive Director of the Australian Law Reform Commission. I note that Professor Croucher identified sterilisation as a "very difficult issue" arising in the inquiry.

On 22 February 2013 I made a submission to the Senate Community Affairs Committee as part of its inquiry into involuntary or coerced sterilisation of people with disabilities in Australia (submission no. 36). I did so because of the welfare jurisdiction exercised by the Court and its role in providing authorisation for certain medical procedures to be performed, including undertaking surgery to render a child or young person with an intellectual disability infertile.

I trust the views I expressed in my submission will be of assistance to the ALRC. A copy can be found at the Committee's website:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Submissions

Conclusion

I reiterate that the problems currently associated with the funding and appointment of case guardians in family law proceedings require urgent address. Although I recognise that it is a matter for the ALRC itself, I urge the ALRC to recommend to government that dialogue be entered into between the Commonwealth Attorney-General and the State and Territory governments as to establishing a fund from which to meet case guardians' legal costs where the party for whom the case guardian is appointed is unable to do so. I also urge the ALRC to recommend that the Commonwealth Attorney-General give immediate attention to establishing an efficient and timely process through which to respond to requests made pursuant to rule 6.11.

Appendix 3

Number of people passing through Court security by location in 2017

Melbourne				
Jan	10322	166	5	9
Feb	20707	317	4	12
Mar	26314	480	4	9
Apr	20597	436	12	9
May	25241	442	8	9
Jun	20630	397	12	8
Jul	18573	358	1	8
Aug	25318	466	10	8
Sep	24174	435	14	13
Oct	23916	390	11	10
Nov	27939	411	8	13
Dec	19679	355	10	10
Brisbane				
Jan	8950	448	3	11
Feb	17109	827	9	43
Mar	14230	652	4	31
Apr	11402	459	4	17
May	14302	591	3	51
Jun	11309	484	2	47
Jul	13244	538	3	42
Aug	11227	439	2	26
Sep	13095	506	4	33
Oct	13760	548	5	47
Nov	14253	688	4	44
Dec	9162	363	1	17

Perth				
Jan	15759	100		32
Feb	15545	85		44
Mar	19170	122		22
Apr	15496	88		44
May	20813	101		49
Jun	17992	98		47
Jul	16822	88		44
Aug	19750	124		34
Sep	16297	80		23
Oct	18352	101		42
Nov	19416	114		30
Dec	14978	144		24
Sydney				
Jan	7345	187	5	48
Feb	12397	396	2	75
Mar	15914	506	2	91
Apr	11120	501	4	59
May	11865	477	4	64
Jun	11664	329	2	58
Jul	12399	433	9	91
Aug	13332	353		112
Sep	12448	398	2	92
Oct	14084	475	6	74
Nov	15885	486	6	130
Dec	10728	398	3	66
Parramatta				
Jan	7289	420		21
Feb	11376	721		38
Mar	13440	748		39
Apr	9030	584		24
May	14532	719		33
Jun	11787	641		30
Jul	11625	647	1	27
Aug	11672	737		35

Sep	9932	664	1	30
Oct	11204	722		35
Nov	12377	726	1	49
Dec	8399	600	1	29
Adelaide				
Jan	4355	187		37
Feb	10345	384	1	122
Mar	10688	447		138
Apr	7865	289		104
May	10500	427		113
Jun	9028	332	2	124
Jul	8448	257		89
Aug	8661	380		111
Sep	9368	390	`	144
Oct	8305	328		104
Nov	10289	439	5	131
Dec	7127	263		96
Dandenong				
Jan	2834	20		
Feb	5989	27	2	2
Mar	5914	19	1	3
Apr	5274	25	1	1
May	6104	29	2	
Jun	5179	44		
Jul	4201	41	3	
Aug	5747	31	1	7
Sep	6238	42	1	2
Oct	5848	37	3	3
Nov	6493	34	1	2
Dec	4483	26	1	
Newcastle				
Jan	2733	91		4
Feb	6830	126		10
Mar	7188	109		12

Apr	5367	91		12
May	6923	68		11
Jun	5314	68		10
Jul	6857	85	3	13
Aug	5534	59		4
Sep	5704	98	1	5
Oct	5872	103		5
Nov	6343	164		10
Dec	5670	68	9	
Canberra				
Jan	1122	2		1
Feb	3589	3		
Mar	3494	1		
Apr	3312	1		1
May	3743	3	2	2
Jun	3454	6		1
Jul	3636	2		1
Aug	3313	4		3
Sep	2755	3		
Oct	3679	1		
Nov	3382	4		2
Dec	2607	3	1	

Hobart				
Jan	1842	11		
Feb	1813	6		1
Mar	2374			
Apr	1438	10		
May	2124	12		
Jun	2080	13		
Jul	2671	12		
Aug	2178	13		
Sep	1754	5		
Oct	1761	3		
Nov	1861	5		
Dec	1438	15		
Wollongong				
Jan	1097	71	1	3
Feb	2113	126	2	13
Mar	2384	135	1	6
Apr	1872	76		4
May	2200	141		
Jun	1762	101	2	11
Jul	2469	97	1	4
Aug	2356	166	4	10
Sep	2517	104		9
Oct	2213	134	2	14
Nov	2704	172		20
Dec	1410	97	1	10
Townsville				
Jan	972			
Feb	1462	58		3
Mar	1010	41		3
Apr	874	21		1
May	2019	22		2
Jun	1170	32		1
Jul	1345	40		3
Aug	1544	47		

Sep	1143	35		2
Oct	1654	22	1	6
Nov	1198	25	2	5
Dec	901	20	1	1
Dubbo				
Jan	427	8		
Feb	727	16		
Mar	707	18		
Apr	345			
May	1085	12		
Jun	370	16		
Jul	493	16		2
Aug	365			
Sep	198			
Oct	1114	24		1
Nov	753	29		
Dec	753	29		
Cairns				
Jan	384s/1284ns	5		10
Feb	1537/1809	13	1	11
Mar	1250/783	13		12
Apr	953/613	20	4	16
May	1636/737	25	3	7
Jun	1029/651	20	1	13
Jul	1038/787	25	3	16
Aug	1484/1596	19	7	18
Sep	1014/708	14	3	13
Oct	2472	12	3	7
Nov	1686/930		3	3
Dec	1067/577	4	5	6
Albury				
Jan	516	16		
Feb	2742	62		
Mar	568			3

Apr	502	6		
May	740	14		2
Jun	2239			5
Jul	1165			2
Aug	1024			
Sep	628	4		2
Oct	2422			3
Nov	573	16		2
Dec	2255	53		4
80 William				
Jan	296			
Feb	3384	4	22	
Mar	3054	7	24	
Apr	2057	5	14	
May	3054	7	24	
Jun	2419	2	18	
Jul	2276	3	21	
Aug	2628	11	29	
Sep	2887	10	24	
Oct	2707	9	34	
Nov	3203	21	8	
Dec	2113	7		

Launceston				
Jan	1237	35		1
Feb	1441	9		1
Mar	1431	44	1	1
Apr	1156	12		
May	1615	27	8	10
Jun	1350	48	1	2
Jul	1016	35		1
Aug	1394	7		6
Sep	1205	39	2	
Oct	1379	15	1	
Nov	1240	20	1	
Dec	1095	25		
Lismore				
Jan	1168			
Feb	3343		2	1
Mar	89			
Apr	752			
May	3330		1	1
Jun	1974			2
Jul	893		2	
Aug	987			
Sep	2946			1
Oct	804			
Nov	1643		1	
Dec	2442		1	1

Appendix 4

[Does not include small knives and items commonly detected]

Date	Location	Description	Photo
11/01/17			
Melbourne			
In glasses case			

27/01/17

Parramatta

06/02/17

Wollongong

08/02/17

Parramatta

28/02/17

Newcastle

Dandenong 3 April 17

Pet snake

Brisbane 11/04/17

Newcastle 19/04/17

Newcastle 20/04/17

Parramatta 24/04/17

Dandenong 26/04/17:

Mother with 4 children with:

Newcastle 26/04/17

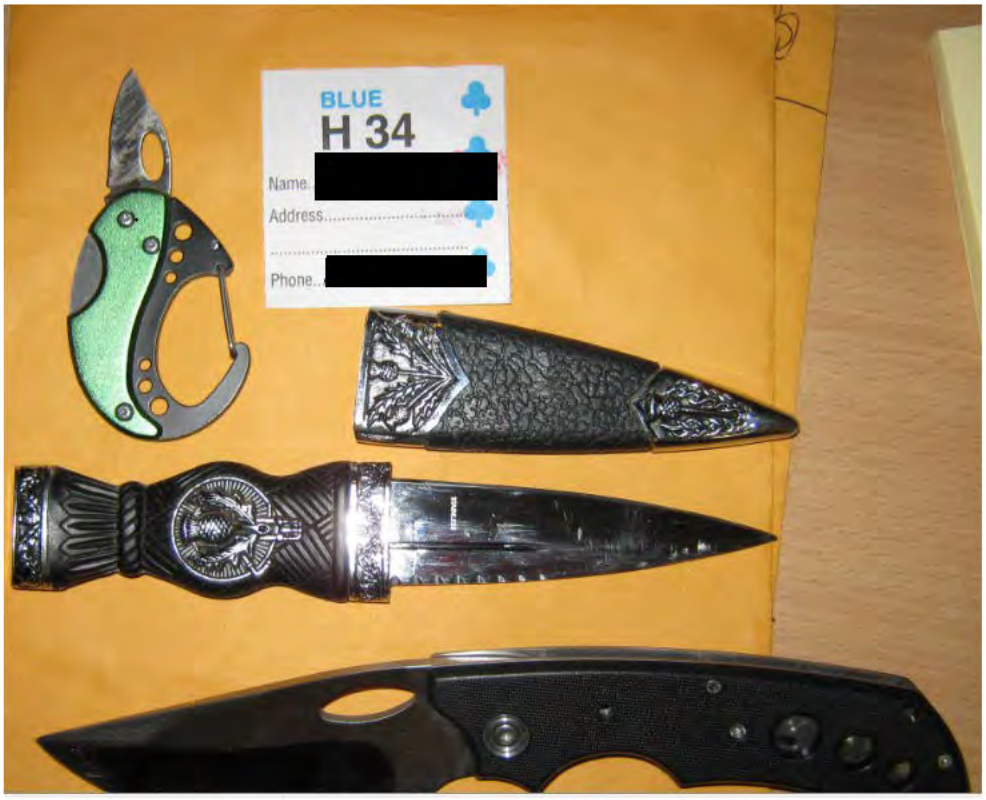
Melbourne 12/05/17

Melbourne 25/05/17

Parramatta 30/05/17

Wollongong 13/06/17

Newcastle 20/06/17



Newcastle 22/06/17

Laser pointer

Wollongong 23/06/17

Newcastle 29/06/17

Wollongong 07/07/17

Newcastle 10/07/17

Parramatta 17/07/17

Dandenong 18/07/17

Wollongong 20/07/17

Dandenong 31/07/17

Melbourne 29/08/17

Newcastle 14/9/17 (fidget spinner with parts removed)

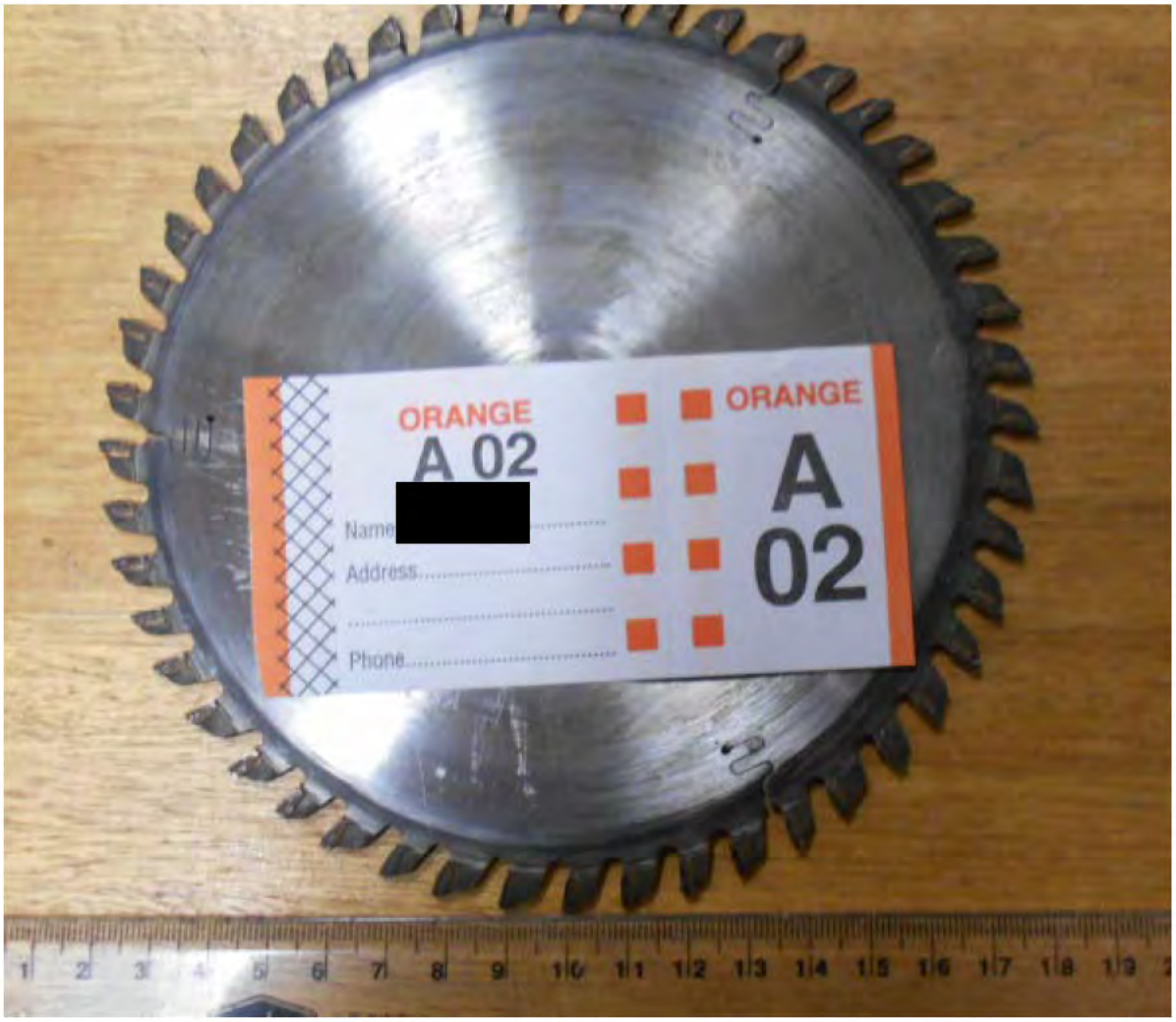
Launceston 15/9/17

Newcastle 21/09/17

Brisbane 25/09/17

Parramatta 27/09/17

04/10/17 Dandenong



Newcastle 05/10/17

Newcastle 09/10/17

Melbourne 16/10/17

Newcastle 14/11/17

Wollongong 16/11/17

Dandenong 22/12/17 (knife for protection)

Melbourne 29/12/17

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Rewriting Part VII of the Family Law Act: A modest proposal

by Professor Richard Chisholm AM

Professor Richard Chisholm AM was an academic at the UNSW Law School specialising in family and children's law from 1970, and later a judge of the Family Court of Australia (1993-2004). He is currently an Adjunct Professor of Law at the ANU College of Law.

Introduction

This article, based on a paper written for the 16th National Family Law Conference in October 2014, proposes a re-draft of the key provisions of Part VII of the *Family Law Act* relating to parenting orders and parental responsibility.[1]

The topic is large and complex, but I have tried to present this paper so that readers can readily grasp the gist and return refreshed and uninjured to their other activities. **Part One** sets out the proposed draft. **Part Two** briefly explains the main features of the draft and each of the new provisions. Dedicated scholars will find plenty of detail about the proposals and the reasons for them in the supporting discussion **(Part Three).**

This is a 'modest' proposal for a number of reasons. It takes a conservative approach, starting with our current law and seeking to revise it by removing problematic features, while keeping most of the main themes of the decisions made in 2006 and 2011. Also, it is offered as a starting point in a process of law reform: a better draft will no doubt emerge from that process. The next section discusses what such a law reform process might be like.

A process for legislative reform

The case for re-drafting Part VII must be, I think, that doing so would be better for children than not doing so. It is not sufficient to say that we would now be better off if the proposed draft had been enacted in 2006. Any major legislative change has its own consequences: people will have to get used to it, and there will inevitably be arguments about what it means, and rulings by the Full Court, before the dust settles. The case for reform must be that the revised legislation will be an improvement big enough to outweigh the inevitable pains of transition. There would need to be a reform process that assessed whether any draft, such as the one offered in this paper, would meet that test. What would such a reform process be like?

The process that led to the 2006 amendments involved a great deal of public consultation, and I acknowledge the valiant and diligent efforts of the Hull Committee and other Parliamentary committees. But their task was difficult: there was a lack of family law expertise among the key parliamentary committees, and although the evidence included some good evidence-based submissions, the process was inevitably compromised by the background of polarised public lobbying.

Further, the government made a number of decisions that did not reflect the views of those who understood family law and children's needs. An example is the decision to have the factors relevant to children's best interests divided into 'two tiers'. Another is the decision to abandon some measures the Hull Committee recommended to protect children from the consequences of prolonged family conflict. A better reform process could reduce the risks of such mistakes in the future.

The reform process I envisage for the future would start with a report by an adequately resourced independent body, such as a law reform commission or the Family Law Council. Parliamentary review is essential, but would be assisted if it could build on an expert report setting out recommendations by qualified people who had studied the topic.

Second, a good reform process would be based on a careful review of the relevant evidence. That evidence would obviously include all the research done to date, including the important AIFS evaluation of the 2006 amendments. It should also draw on the experiences of practitioners and others under the amendments of 2006 and 2011. It should also draw on overseas experience: there has been quite a lot of law reform and review in countries with legal systems similar to our own, and we should learn as much as we can from their experience.

Third, in my view there would be much benefit in 'road-testing' any proposed legislation. What has tended to happen in the past is that there has been public consultation on general principles (such as whether there should be a presumption of equal time with parents), but in the end the impact of the detailed legislation is relatively untested. For example, I believe that the difficulties in applying the complex provisions of the 2006 amendments were more serious than their creators would have anticipated. I would therefore like to see a process in which the proposed draft is systematically tested. For example, a number of factual situations could be designed, and then judges or family law practitioners could work through how the new provisions would apply. The test could involve comparisons between groups who applied the proposed draft, and groups who applied the current law. While that sort of exercise is not common, in my view it could be fruitful, identifying strengths and weaknesses of drafts in advance. We test new drugs before releasing them on to the market - we could also benefit by testing new legislative formulas before putting them into practice.

More could be said about the process of reform, but this sketch will do for now. My hope in this exercise is that the proposed re-draft in this paper (or some refinement of it) will be considered promising enough to warrant a serious and systematic review of the kind I have indicated.

Part One: the proposed draft

Principles Relating to Making Parenting Arrangements

A *Parenting arrangements should be designed to advance the child's best interests, and should be appropriate to each child's age and stage of development.*

B *Children will ordinarily benefit by maintaining relationships with parents and other family members who are important to them. In particular, children who have formed a close relationship with both parents before their parents' separation will ordinarily benefit from having the substantial involvement of both parents in their lives, where such involvement does not expose them to inadequate parenting, abuse, violence or continuing conflict.*

C *Parenting arrangements for children should not expose a child, parent or other family member to abuse or violence.*[1]

D *Parenting arrangements should respect the rights of children as set out in the United Nations Convention on the Rights of the Child.*

Parental responsibility

Section 1 *In this Part, parental responsibility means the legal responsibilities and powers parents have in relation to children.*

Section 2 *Each parent has parental responsibility (and continues to have it despite the parents having separated, divorce¢ or re-married, or any other changes in their relationship), unless this is expressly changed by a court order.*

Parenting orders

Section 3 *The court may make orders ('parenting orders') dealing with any of the following:*

- *any aspect of parental responsibility for a child, including the allocation of parental responsibility to any person or persons;*
- *any aspect of arrangements for the care, welfare or development of the child, including the person or persons with whom the child is to live, spend time, and communicate.*
- *any matters relating to the resolution of disputes about parental responsibility or arrangements for the child)*

Who may apply for parenting orders?

Section 4 *Any of the following people can apply for parenting orders in relation to a child: a parent of the child; a grandparent of the child; any other person concerned with the child's care; welfare or development.*

Presumption of continuing parental responsibility

Section 5 *The court shall presume that it is in the child's best interests that both parents continue to have parental responsibility, unless it considers that this would not be in the child's best interests in the circumstances.*

Child's best interests to be the paramount consideration

Section 6 *In deciding what parenting orders (if any) to make, the court shall regard the child's best interests as the paramount consideration.*

How the court is to determine the child's best interests

Section 7

(1) In considering what parenting orders to make the court shall take into account the following matters:

a) *the need to consider what orders are most likely to advance the child's best interests in the particular circumstances of each case, and (subject to s5) the need to avoid assuming that any particular parenting arrangement is most likely to be in the child's best interests.*

b) *the child's age and current and developmental needs (including safety and wellbeing) and the capacity and willingness of each parent and other relevant persons to provide for those needs;*

c) *any relevant views that the child has expressed and any factors (such as the child's maturity or level of understanding) that the court thinks relevant to the weight it should give to the child's views;*

d) *the nature of the child's relationship with each parent and with other persons (including any sibling, grandparent or other relative of the child);*

e) *any need to protect the child from abuse or ill-treatment, and from exposure to family violence, persistent conflict or persistent litigation;*

f) *any benefit the child is likely to receive from a meaningful relationship with both of the child's parents;*

g) *any benefit the child is likely to receive if each parent regularly spends time with the child on weekdays as well as weekends and holidays, and is involved in the child's daily routine and occasions and events of particular significance;*

h) *any likely effects of changes in the child's circumstances including any separation from either parent and any other person with whom the child has been living;*

i) *any relevant characteristics of the child and family members or other persons, including maturity, sex, lifestyle, background, culture and traditions;*

j) *the Principles Relating to Making Parenting Arrangements; and*

k) *any other relevant matter.*

(2) *In applying subsection (1) the court shall consider any relevant evidence, including evidence*

a) *any benefit the child has received from the child's relationship with a parent or other person;*

b) *any harm to the child caused by a parent or other person;*

c) *whether each parent*

i) *has taken appropriate opportunities to participate in making decisions about the child, and to spend time and communicate with the child;*

ii) *has taken appropriate opportunities to facilitate the other parent to participate in making decisions about the child and spending time and communicating with the child;*

iii) *has taken reasonable measures to protect the child from harm by exposure to family violence or child abuse, or other harmful experiences; and*

iv) *has fulfilled the parent's obligation to maintain the child.*

Additional considerations in the case *of Aboriginal and Torres Strait Islander children*

***Section* 8** *[This would correspond to the current s60CC(3)(h).J*

Part Two: Notes on the draft

These notes briefly explain the key features of the re-draft and comment on the particular provisions. Part Three contains more detail about the underlying reasoning.

Brief reasons for key drafting decisions

General

The overall objective of the draft is to provide rules and guidelines that will contribute towards agreed and adjudicated decisions that advance the best interests of the children involved. It is influenced by my understanding of what the research and common sense indicates is likely to be best for children. It is a development of the proposals in the Family Court Violence
Review, influenced by further thinking and discussions since that time, and by the case law and academic literature.

As mentioned in the Introduction, this 'modest' draft is conservative in that it takes the existing legislation as a starting point, moving away from it only when there seems a good reason for doing so. As explained in Part Three, there are a number of issues it does not address, such as the need to accommodate family diversity.

The draft attempts to avoid prolixity and repetition, and is less than one fifth of the size of the sections it replaces.[2] I hope it achieves this without sacrificing precision.

Particular matters

The draft retains the Jong-standing principle that the child's best interests should be the paramount consideration. This principle, essentially unchallenged in Australia, has been retained.

The draft retains a *'checklist' of considerations supplementing the 'best interests' principle, and the list includes many of the matters in the existing legislation.* Although there is some attraction in leaving the 'best interests' principle uncluttered, I believe such a checklist is desirable, to help decision-makers systematically review the relevant matters, and to give an indication to all, especially litigants in person, of the sort of matters that the court is likely to take into account, thereby making the law more transparent. The proposed checklist has much in common with the existing law, but the main focus is now on the child's present and developmental needs, and on the capacity and willingness of parents and others to meet them.

The draft retains a *rebuttable presumption that it is in the child's interests that the parents continue to have parental responsibility, but the draft differs significantly from the existing*

presumption of equal shared parental responsibility.

The draft does not create any legal requirement that the parents must *co-operate, or jointly make decisions, except where* a *court* so *orders.* The current law automatically creates an obligation to co-operate when the court makes an order for equal shared parental responsibility. The draft leaves it to the court to decide whether there should be an obligation to co-operate, and the terms of such an obligation.

The draft removes the connection between parental responsibility and care arrangements. The draft omits the provisions that connect the allocation of parental responsibility (when the court makes an equal shared parental responsibility order) to what the court must 'consider' in relation to arrangements for the child. That connection is unhelpful, complex and confusing.

The draft does not divide the list of relevant factors into two tiers such as *those in the present law ('primary' and 'additional').* The much-criticised division of relevant considerations into two tiers has been abandoned.

The draft does not privilege or favour any particular parenting arrangements, by way of provisions creating a *presumption, or* a *requirement that the court 'consider' any particular outcome.* The reason for this is simple: the 'paramount consideration' principle logically requires that the weight to be given to any considerations depends on their importance for the child in the particular situation. Giving artificial weight or preference to any particular outcome involves a departure from that fundamental principle.

The draft includes 'Principles Relating to Making Parenting Arrangements' which would replace s60B if it is thought that Part VII should include some *statement of principles.* The question whether there should be such a statement of principles is discussed in Part Three.

Notes on particular provisions Section

1: A briefer version of s61B.

Section 2: A briefer version of to s61C. The word 'expressly' is intended to remove any need for s61D.

Section 3: A briefer version of s64B.

Section 4: A briefer version of s65C.

Section 5: A significantly different version of the presumption favouring shared parental responsibility, discussed in detail in Part Three.

Section 6: Equivalent to s60CA. Here and elsewhere, I prefer the more civilised 'shall' to the currently fashionable 'must' where the Act lays down legal rules or principles. The court has a duty to apply the law: there is no need for the legislature to stamp its foot.

Section 7: This key section sets out the way the court is to determine what is likely to be in the child's best interests. It would replace the current s60CC and certain other provisions.

Paragraph (a) of the proposed section 7 emphasises the need to work out what is best for each child in the particular circumstances of each child, and removes any suggestion that any particular outcome can be assumed to be best for children. This important change is discussed in detail elsewhere in this article.

Paragraph (b) incorporates the substance of old paragraphs (ca) and (f). The new wording emphasises the child's developmental needs and includes safety. It is intended to convey the idea that safety, as much as wellbeing, is a core need of the child. The words 'current and developmental needs' require the court to focus not only on the child's immediate wellbeing, but also on what is important for the child's healthy development.

Paragraph (c) (the child's views etc) is the old paragraph (a), without significant change.

Paragraph (d) is the old paragraph (b). It is arguable that this could be omitted in the interests of brevity, but drawing attention to the child's existing relationships seems useful, and on balance I have left it in.

Paragraph (e) and (f) are revised versions of the old 'twin pillars', in s60B and (in slightly different form) in s60CC(2).

There are four main changes. First, the order of the two paragraphs reflects the priorities embodied in the 2011 (family violence) amendments.

Second, the use of the word 'any', in each paragraph is deliberate. Substituting 'any benefit' for the old 'the benefit' in connection with the child-parent relationship does not change the law,[3] but makes it clearer, I hope, that ultimately the benefits of a meaningful relationship are a matter for evidence about the facts in each case. (The general point that children normally benefit from parents is retained in paragraph B of the proposed 'Principles Relating to Making Parenting Arrangements').

Third, the proposed paragraph (e) adds a reference to the need to protect the child from '... *persistent conflict or persistent litigation'.* The focus on the impact of conflict is particularly important because it is about the child's safety, not about the wrongdoings of parents and others as such. The need to protect children from such conflict seems to be one of the few areas on which all researchers firmly agree. It is consistent with the emphasis in the Hull Report on protecting children from the consequences of persistent conflict. This theme underpins the elaborate and well-funded provisions of the 2006 Act relating to counselling and mediation. Unfortunately, the government of the day departed from the Hull recommendations by omitting reference to 'entrenched conflict' from the matters to be considered in determining what is best for the children.) The reference to the need to protect the child from '... persistent *litigation'* also removes the need for the awkwardly-worded s60CC(3)(l)("whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child").

Paragraph (g) picks up the valuable concept of 'substantial and significant time' from the existing s65DAA(3). While that section has been discarded, this idea emphasises the importance of parenting by both parents, something that is difficult if either parent's involvement is marginalised to a weekend or holiday-only role. That was a big part of the thinking behind both the 1995 and the 2006 amendments.

Paragraph (h) is old paragraph (d).

Paragraph (i) is a slightly revised version of old paragraph (g).[4]

Paragraph (j) indicates that the Principles are relevant to the court's decisions as well as a

guide for families. Of course paragraph U) would be omitted if it were decided to omit such a statement of principles - an issue discussed in Part Three.

Paragraph (k) is the catch-all: old paragraph (m).

Subsection (2) of the proposed section 7 sets out types of evidence that will often be important in assessing those considerations. It mainly echoes existing provisions;[5] but also adds the idea implicit in the amendments of 2011that good parenting may sometimes require a parent to take reasonable measures to protect a child. This is important to avoid any risk that parents who take reasonable measures to protect a child from violent or abusive partners may be seen as failing in their duty to support the child's relationship with such a parent.[6]

Section 8 (Aboriginal and or Torres Strait Islander children) would contain old paragraph (h) (which I have not reconsidered)7 so these important provisions will not distract attention in cases of other children.

Some current provisions not retained in the draft

The current para (i) (parents' attitudes to parental responsibility) is not reproduced, since the emphasis of the draft is on the extent to which the parents and others are likely to benefit the child: the focus is mainly on their track record and willingness and ability to benefit the child (see subsection (2).

Current para (l) is: 'whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child'. As mentioned above, this has essentially been replaced by paragraph (d).

Section 60CG currently provides:

> ***Court to consider risk of family violence***
> *(1) In considering what order to make, the court must, to the extent that it is possible to do* so *consistently with the child's best interests being the paramount consideration, ensure that the order:*
> *(a) is consistent with any family violence order; and*
> *(b)* does *not* expose a *person to an unacceptable risk of family violence.*
> *(2) For the purposes of paragraph (1)(b), the court may include in the order any* safeguards *that it considers necessary for the* safety *of those affected by the order.*

Subsections (1) (and (2) deal with quite different issues, and should not be placed together in one section. Subsection (1) is about the relationship between orders under the Act and State and Territory family violence orders. It belongs in Division 11, which deals with that topic.
Subsection (2) is not specifically about children: it relates to the protection of 'any person'. While it is unexceptionable, it would apply equally to other aspects of jurisdiction under the Act, such as injunctions.[8] It is not appropriately included among the provisions dealing with determining what is in the best interests of children. It might properly be included, perhaps, in s43.

The statement of principles

The decision to include a statement of principles is discussed in Part Three, below. The proposed statement would replace s60B. The reference to 'making parenting arrangements' is intended to cover arrangements whether made by family members or by court order. It is

also intended to keep these principles focused on Part VII issues, rather than to make them appear as some grand universal propositions.

Paragraph A puts the emphasis where I believe it ought to be, on advancing the child's interests in a way that is appropriate for the child's age and stage of development.

Paragraph B is a restatement of the value of parental involvement. By speaking of 'maintaining' relationships, it picks up Patrick Parkinson's point that it is important to distinguish between involved parents and uninvolved parents. Of course there may be circumstances in which it is in the child's interests that a relationship should be *created* with an absent parent, but it seems better to leave such situations to be dealt with on their facts.

Paragraph C picks up the important theme of protection from violence stressed in the 2006 amendments and reinforced in the 2011 amendments. There seems no need to qualify 'violence' by 'family violence' in the context of this sentence. I intend that both 'abuse' and violence' would be undefined in this sentence.

Paragraph D picks up the reference to the UN Convention that was inserted by the 2011 amendments. Referring to 'rights' in this way avoids, I hope, the problems in the existing s608(2).

Part Three: Supporting Discussion

Introduction

This Part provides some discussion to support the recommended re-draft of Part VII. It is impossible to be comprehensive, and I will focus on selected topics that seem of particular importance or interest. I know it looks vain to cite a lot of one's own work, but it seems more merciful than setting out my views at length, so I hope readers will forgive me.

General *principles and* the role *of legislation*

Starting in 1995, the Parliament took the view that there should be a general statement of principles relating to children and parenting, as well as provisions for determining parenting disputes. Such a provision was inserted into the *Family Law Act* in 1995, and has since been amended: s60B.

Problems with s608

The challenge in drafting such provisions, I think, is to ensure that they set out acceptable and useful principles, and that they neither compete with nor duplicate the prescribed guidelines applicable to the courts when deciding contested cases. In my view although it states principles that most people would agree with, s60B falls a little short of these standards. Some of the amendments to it have been improvements, but have made it somewhat clumsy and repetitive. It does not necessarily speak with the same voice as s60CC. For example, subsection (1) contains the 'twin pillars' - the benefit of a meaningful relationship with parents, and protection from violence and abuse. The current s60CC list [9] gives priority to the latter, but this is not reflected in s608(2), which sets out a number of 'rights' that children have: the first two of these elaborate on parental involvement, and there is no mention on children having a *right* to be protected against violence or abuse. Further, s608 overlaps considerably with s60CC, but with slightly different wording: so we have partly overlapping and partly inconsistent guidelines for decision in children's cases in two different places, s608 and s60CC.

The role of legislation

It is unclear whether s6OB has had much influence, either for good or ill, on the way courts have decided cases.[10] But maybe that was not its purpose. Since 1995 the Act has attempted to do more than state rules for the making of parenting decisions. Especially by s6OB, it has attempted to exhort or educate parents.[11] In other words it has attempted to guide parents in the arrangements they should make for their children. Has it succeeded? More broadly, do such general legislative statements have their intended educative effect?

It seems useful to think of three groups of separating families. In the first group, the parents are able to settle the arrangements for the children amicably and will proceed to do so without any need to refer to the law. For these happy souls and their lucky children, the law will be irrelevant. In the third group - a small group at the other extreme - the parents will litigate to the bitter end, and battle out the rights and wrongs of their dispute. They will use the law only as a tool to win the battle. For this third group, too, statements or principles will have little or no significance.

In the middle, however, is a group who may well have difficulties and arguments about the post-separation arrangements, but enough good will or good sense to try to work things out, often with the help of lawyers or community-based mediation services. This group, arguably, may be influenced by a statement of general principles in the legislation, especially if those advising them tell them about it. They will bargain 'in the shadow of the law'. The statement of principles might set a norm, or help them focus on what's best for the children. One argument in favour of principles, I think, is that they might help some families in this middle group to make arrangements likely to be optimal for the children.

Another possible motive might be to encourage parents to remain involved with their children after separation, whether there is or is not a dispute. As Patrick Parkinson puts it, the objective is to 'help shape the way people view what it means for parents to live apart'.[12] Thus the Florida legislature says that it is the public policy of the state "to encourage parents to share the rights and responsibilities, and joys, of childrearing" despite parental separation.[13] Our s6OB says (less Floridly) that parents jointly share their responsibilities for their children, and 'should agree' about their future parenting.

Should we have such a statement of principles at all? Although such statements have been a feature of Part VII since 1995, some might argue that they would be better omitted. For example, it is arguably contrary to the liberal democratic tradition to have legislation that in effect lectures people about how to raise their children: some might think that such task would be better left to the families, or professionals from whom they might seek advice. And any general statement will have to leave a lot out, failing to accommodate, for example, unusual situations and families who are different. Curiously perhaps, we do not seem to have much considered these issues.

Nevertheless, such statements are increasingly common internationally, and in the present 'modest' proposal I have attempted a revised version of s6OB, drawing on the various formulas used in different jurisdictions. If the view is taken that we don't need such a statement, it can easily be omitted.

The 'Twin Pillars'

The current Act gives special importance to two matters: the value of a child having a meaningful relationship with both parents, and children's need for protection from violence and abuse. The prominence of these two matters reflects the lobbying from competing sides in what was a fairly polarised debate: to put it over-simply, the men's groups stressed the first and the women's groups the second. Of course both of these things are important. But if we move away from the political debate and focus on outcomes for children, I think we can see that it is simplistic to treat these two things as inherently the most important.

The first pillar: parental involvement

Let's start with the first, parental involvement. No doubt the majority of children grow up with both parents, have their closest attachments with them, and benefit enormously from their collaborative nurturing. But quite a few children grow up healthy and well-adjusted without a close relationship with both parents. Most obviously, adopted children mainly grow up with little or no involvement by their biological parents. In other cases, one of a child's parents may have died, or have spent little time with the child because of ill-health, or because of a demanding job or requirements to work overseas. Sometimes, both parents are much involved with work commitments and a lot of the care of the child is carried out by others, whether paid carers or relatives. Some children are brought up by same-sex couples. Sometimes grandparents or stepparents carry out much of the 'parenting', and the children's attachment to them may be as close as other children have to their parents. Many of these children will be brought up in loving families, and will do just fine.

The fundamental point seems to be that children need good *parenting.* Although that will normally be carried out by the biological parents, in some circumstances it can be done by others. And parenting can be done very well, or very badly, by whoever is doing it in each child's situation. What benefits the children seems to be (to put it simply) nurturing care and close relationships with one or a few people who are providing good parenting.

Even so, parenting is not the only reason why parents are important. Parents will (usually) share genetic links with their children; they will usually share a surname; they will be known as a family to friends and relations. One's parents form part of that elusive but important thing, one's sense of identity. The importance of family membership is endlessly emphasised in literature and innumerable social conventions (as it happens, I drafted this paragraph the day after Father's Day). Examples come readily to mind: President Obama writing about his own father; adopted children, and children of donor parents, seeking out their biological parents, siblings or other family members. And conversely, parents will normally have a special commitment to the welfare of their children, continuing to support them into adulthood, while others who may have had the parenting task at some time may not necessarily have such an enduring commitment. The law reflects the community when, for example, it provides that children are entitled to child support from parents, and are entitled to claim under family provision after a parent's death.

I doubt if any of this is really controversial. The political pressure for legislative emphasis on the benefit of parents stemmed from the view that the operation of family law tended to marginalise fathers - to see the mother as the important parent, who provided the care and nurturing, the father's main job being to provide economic support for the children and

the mother: see also the discussion below about the origins of the 2006 amendments. I suspect that such views, obvious in the 1950's, had not disappeared by the time of the 1995 amendments. The view that mothers were the ones who really mattered was associated with the common outcome that the mother got 'custody' and the fathers merely 'access'. The 1995 amendments tried to fix this problem by getting rid of the words 'custody' and 'access', and emphasising that both parents retained full parental responsibilities after a family separated. Today, it's more accurate to say that separation marks a 'restructuring of a continuing relationship' ,[14] replacing the norm in which the family effectively terminated when, on separation, one or other parent got 'custody'. The current approach has been characterised by Patrick Parkinson as the 'indissolubility of parenthood',[15] and by Irene Thery as the 'enduring family'.

In my view, therefore, the thinking behind the first of the 'twin pillars' was that the law should emphasise that in general children would benefit if both parents continued to act as involved parents after family separation, and steps needed to be taken to ensure that the parent spending less time with the children was not marginalised. One specific proposal was, of course, that the children should spend equal time with both parents. This arrangement can work very well, but is practicable only in a minority of situations, and even where it is practicable it is sometimes not in the children's interest. It is clearly inappropriate for legislation to suggest that equal or near-equal time with each parent is likely to be the best outcome for most children. And any such guideline can distract us from making arrangements that work best having regard to the children's ages and current and developmental needs.

Where these thoughts lead me is this: that the legislation should emphasise the importance to children of good *parenting* (whoever does it). It should also emphasise that in general children want very much to be involved with both parents, and benefit from a close relationship with them. It should also emphasise that when parents cannot agree, arrangements following family breakdown are to be based on what is best for the child, and the law should discourage any focus on parental entitlement. One problem with giving any particular prominence to equal time is that it resonates with fairness as between the parents, distracting people from working out what might be best for the children.

The second pillar: protection

Now let's look at the second pillar, protection from violence and abuse. This is of a different order to the first. It does not relate to any particular relationship, and in substance it states what is surely a basic need, and right, of a child (and other people). Even so, there are problems in treating it as a single entity, inherently of the gravest importance. There can be differences of degree. Further, good parenting can be compromised by other things in addition to violence and abuse. A parent may be disabled from responding properly to a child's needs by reason of adverse mental health, or physical health. A parent may be indifferent to a child, and leave the child unattended for long periods; or seriously neglect the child. A parent may lack the necessary dedication and skills to respond to the special needs of a severely handicapped child. Parents may each be capable and willing parents in many ways, but the conflict between them might be such as to distress and damage the children. Because of these and many other situations, it

may not be safe to assume that parental involvement will always benefit children in the absence of 'violence' or 'abuse'.

For these reasons it is unhelpful for the law to speak in terms of the twin pillars. All the circumstances must be considered and evaluated in each case. And it is misleading to assume that there are two basic types of case, namely the ordinary case, and the case involving violence or abuse. Thus whether the legislature is setting out guidelines for court decisions or stating general principles, it is better to avoid language suggesting that there are twin pillars.

The presumption that shared parental responsibility is good for children

The draft includes a revised version of this presumption, essentially for the following reasons.

The main practical significance of the presumption was, of course, its significance after the 2006 amendments for the court's decision about parenting arrangements. The drafting seems to have led to confusion on at least two aspects. First, a number of judgments reflect the mistaken view that the presumption itself triggers certain consequences, whereas in fact it is only an *order* for equal shared parental responsibility that does so.[16] More importantly in practice, there is evidence that many people have confused it with a presumption favouring equal *time.* In the proposed draft, as in the pre-2006 law (and as, I believe, in other comparable legislation in other countries) there is no connection between the allocation of decision-making and arrangements for the child's care.

There are three other significant differences between the nature and effect of the proposed presumption and the presumption of equal shared parental responsibility in the present Act.

First, the change of terminology from 'equal shared parental responsibility' is designed to avoid any suggestion of a link with equal time.

Second, the re-drafted presumption applies only when at the relevant time both parents have parental responsibility, and the question is whether the court should *change* that situation. If both parents do not have parental responsibility at the time the matter is before the court, eg because there is a previous order re-allocating it, there seems no reason to have a presumption that it would be in the child's interests for both parents to have parental responsibility. It is arguable that the presumption should be limited to parents who have actually been properly *exercising* parental responsibility. However such a criterion might lead to considerable dispute about what constituted proper exercise of parental responsibility, and I have not taken this approach in this draft, although the question deserves further thought.

Third, the draft does not attempt to spell out the circumstances in which court might find that both parents continuing to have parental responsibility would not benefit the children. There will of course be many circumstances that could lead the court to find that the presumption is rebutted: obviously cases in which there is a risk of violence or abuse, but also, for example, cases where the continued exercise of parental responsibility by both parents is unworkable or disadvantageous, or even dangerous, for the children - for example, in some circumstances involving mental illness or where parents are unable to avoid involving children in their conflict.

There seems no advantage in specifying some of these circumstances, since it is often the seriousness of the problem, rather than the *category* of problem, that is important. And there are several disadvantages in specifying the circumstances in which the presumption will not

apply. To the extent that the specified circumstances involve parental misconduct (eg child abuse or violence), the law might give the impression that the point is about blame - whether the parent has forfeited his or her parental rights by misconduct. But while such an idea has intuitive attraction, under the paramountcy principle the child's interests, rather than parental blame, must be the basis of orders. Also, mentioning some such considerations might misleadingly suggest that others, eg mental illness or continuing inter-parental conflict, could not be, or are inherently unlikely to be, reasons for changing the normal allocation of parental responsibility. Yet another disadvantage is that having any such categories could lead to technical arguments about whether the circumstances fall on one side of the line or the other.

Should those who share parental responsibility be legally obliged to co-operate?

There appears to be no such obligation where each parent has parental responsibility as a result of the Act. There is good reason for this. While such co-operation is of course generally desirable, in cases coming to the family courts it is often problematical, and in some cases dangerous. Also, it is impossible to identify the specific obligations entailed by such a principle. Under the present law, although the legislative allocation of parental responsibility creates no legal obligation to co-operate, an *order* for equal shared parental responsibility automatically creates an obligation to co-operate, and to make joint decisions.17 Incidentally, this latter obligation makes little sense, since it does not specify what each party has to do; indeed, if taken literally it seems to mean that if no agreement is reached, *both* parties are in breach of the law! It is preferable, in my view, to have a system in which if the court wishes to create such responsibilities, it does so by spelling out what each party is required to do. Then people know where they stand.

Problems with the current Act

General

There is a great deal of published commentary on the 1995 amendments, the 2006 amendments, and the 2011 violence amendments. [18] Of course there is a range of opinion. But I think that broadly speaking family law practitioners and academics tend to agree on the main difficulties with the legislation, identified briefly in this paper and in more detail in the *Violence Review* and elsewhere. Expression of these difficulties can be seen not only in published papers but in surveys of legal practitioners, notably the survey of practitioners conducted in connection with the AIFS evaluation[19] and the survey that forms the basis for Professor Rhoades' paper at the 2014 Conference.

Some of the problems with the current Act are complexity rather than ambiguity. Most of the problems that surface in the case law arise from judicial officers stumbling as they make their way through the forest of words. On most points, if you read carefully and work very hard you eventually come up with the correct interpretation, as the Full Court mainly did in the cases I have noted. No doubt trial judges will learn from these decisions and avoid the same errors in future, although this is by no means easy, given the dense texture of the Act and the hectic life of busy trial judges. The glimpses we get from reported cases suggest that many cases that are agreed between the parties might well be the result of bargaining in the shadow of a misunderstood law. In particular, it seems clear that a significant number of people will have gone to the bargaining table believing that the law created a presumption of equal time. A

major objective of my simplified draft is to get rid of such difficulties. If that alone could be achieved, it would be a considerable advance.

On some points, though, there has been real uncertainty. For example Patrick Parkinson and I both tried very hard, but could not agree on what difference the 2006 amendments make in determining relocation cases.[20] And both he and I joined in disagreeing with the High Court's interpretation of s65DAA. [21] I hope the proposed draft will reduce the number of uncertainties about what the law is.

Many reported cases illustrate the way even experienced judicial officers have stumbled over the intricacies of the existing legislation. Here are some examples (with citations of published comments on some of them in the Australian Journal of Family Law):

Aldridge v *Keaton* (2009) 42 Fam LR 369; [2009] FamCAFC 229; [22] *Mulvany* v *Lane* (2009) 41 Fam LR 418; (2009) FLC 93-404; (2009] FamCAFC 76; [23] *Marvel* v *Marvel* (2010) 43 Fam LR 348; 240 FLR 367; [2010] FamCAFC 1 01;[24] *Reid* v *Lynch* (2011) 44 Fam LR 141; (2010) FLC 93-448; [2010] FamCAFC 184; [25] *MRR* v *GR* (2010) 263 ALR 368; 84 AUR 220; [2010] HCA 4; [26] SCVG & *KLD* [2014] FamCAFC 42; Cox v *Pedrana* (2013) 48 Fam LR 651; FLC 93-537(2013]; FamCAFC 48. [27]

The two tiers

The division of relevant matters into two tiers or categories, 'primary' and 'additional', is widely acknowledged to be a defect in the legislation, and can be dealt with briefly. Many of the cases just noted show the confusion it has caused. There are several problems with it. It is enough to say here that perhaps the fundamental problem with such an approach is that it is *incoherent:* if the court is to treat the child's best interests as paramount, it must logically give different matters the weight that is appropriate in relation to the child's best interestsin the particular situations, rather than attach some artificial weighting to some over others. According to rumour the idea of having two tiers originated in the Prime Minister's Office; but it is enough to say here that the contemporary records indicate that it did *not* emerge from the Hull Committee or from any person or body with expertise in family law.

The problematic origins of the 2006 amendments

Some of the difficulties with the 2006 amendments arise from the history of those amendments. The key documents in the history of the 2006 amendments (and the 1995 amendments) are readily available on the Internet, and the background and objectives of the legislation have been reviewed.[28] Many of the issues discussed under the 2006 amendments had also been discussed in relation to the 1995 amendments. [29]

The starting point in the story of the 2006 amendments was the publication of the Hull Committee's report in 2003. [30] That was followed by various reports, government statement s[31] and public submissions leading up to the legislation. In my view the history shows that although the Hull Committee admirably resisted bowing to the pressure of lobby-groups, and was in many ways child-centred, in the end the resulting Australian law can be seen as more of a compromise between competing lobby groups than an assessment of children's needs.
Australia is not alone in experiencing such a 'gender war', as numerous commentators have noted. 32

To summarise briefly an argument made in the Violence Review, in relation to the 2006 amendments I believe that there probably was a problem, but that the 2006 amendments did not quite get the right answer. If one goes to the contemporary documents, although the perceived problem was not precisely stated, I think it was this: that under the previous law there was something of a default answer to parenting arrangements: that the children should normally live mainly with the mother, and spend time with the father on weekends and half school holidays. While that may have been a good arrangement for many families, the problem was that it operated as a default, a norm, so that it was assumed to be the right answer unless there was something remarkable about the case.

This default position - famously misdescribed as the '80:20 rule' - related to the time children should spend with each parent. But it was linked with another outcome, namely that the father's role was seen as marginal - such contact was probably pleasant and even beneficial for the children, and it gave the mother a break, but in the main the mother, not the father, was doing the parenting. The *Jaw,* of course, contained no such presumption or default position: it required the court to work out what would be best for each child in each case, as it does today. But the perceived problem was that this default reaction seemed embedded in the way the law was practised, and that legislative amendments, as well as other measures, were required to change this default position. There were a number of reasons why people felt there needed to be a change. Many mothers, increasingly in the paid work force, very much wanted the fathers to be more involved. There was evidence that many children wanted to see more of their fathers. And of course many fathers felt that the default position unfairly marginalised them, especially, perhaps, as since the late 1980's child support had become much more onerous and much less avoidable than child maintenance had been in previous times. Also, perhaps, times were changing and men wanted to be more involved with their children.

Was there really a problem of this kind? I don't know that there is clear evidence one way or the other. My own view is that the default position had become a bit dated, and perhaps some in the legal profession were relying on it too heavily, or too thoughtlessly. We know now, for example, that over some decades there was a pattern of increased sharing of children, evident well before the 2006 amendments. [33] I don't think the black-letter law was the problem, but there was a good argument for changing the black letter law to jolt the system away from the old '80-20' default position.

The terms of reference for the Hull Committee suggested one answer: a rebuttable presumption that children should spend equal time with each parent. Rightly, the Hull Committee saw that this was not a sensible answer: equal time is practicable only for a minority. It would have been a bad move to substitute a legislated default position of equal time for the 80:20 pattern that had tended to be a routine outcome. The Hull Committee's basic approach, that the law should encourage both parents to be involved, was a sensible one. But by the time the legislation emerged, it was singling out equal time, or substantial and significant time, as a kind of soft default - something the court had to 'consider' in cases where there was no violence or abuse.

In my view although this was better than an out-and-out equal time presumption, it was still the wrong answer. The right answer, I think, is for the legislation to stress that there is *no* default position - which is, in my view, the logical consequence of the 'paramount consideration principle. This is essentially the reasoning that led to what is now section 7 of the draft.

Violence and abuse

On the important topic of violence and abuse, I should explain what has been included in the proposed draft, and what has been omitted. By way of background: in 2009 I was asked to report on how the family law system might respond better to problems of family violence and child abuse, and in the resulting report[34] I took the view that the sense of entitlement generated by some provisions of the 2006 amendments deflected the focus from children's interests and raised the risk of continuing violence; this led to recommendations that amendments such as indicated in this proposed re-draft would be in the interests of children (as well as promoting the safety of family members).

In general, the proposed draft seeks to deal with these matters in two ways.

Firstly, the provisions are crafted to eliminate any sense of parental entitlement, the focus being on meeting the child's needs. This topic was extensively discussed in the Violence Review. The Family Law Section put it very well in a recent submission:[35]

> *The perception of* some *in the community that there is* a *"legal right" on the part of parents to equal (or at least substantial) time with their children, contributes to* a *presumption by* some *that* a *"right" to contact with children is held by the perpetrators of domestic violence or (put another way) that there is* a *presumption that it is in the best interests of the child to maintain* a *relationship even with an abusive parent.*
>
> *There are* cases *where it is simply not in the best interests of* a *child to have* a *relationship with* a *particular parent. While those* cases *have always been difficult, the* 2006 *Reforms (and the public perceptions of their effect) have arguably made them more* so. *The 2012 Reforms provided legislative confirmation that the* safety *of children* was *to be prioritised, but the difficulties associated with the* 2006 *Reforms largely remain.*

Secondly, the draft seeks to 'mainstream' children's needs for protection by including them in the core provisions. Section 7(b) of the draft refers to 'the child's age and current and developmental needs (including safety and wellbeing), and the capacity and willingness of each parent and other relevant persons to provide for *those* needs'. Paragraph (e) refers to 'any need to protect the child from abuse or ill-treatment, and from exposure to family violence, persistent conflict or persistent litigation'. Paragraph (2)(b) now requires the court to consider, among other things, evidence about 'any harm to the child caused by a parent or other person', and also whether a parent 'has taken reasonable measures to protect the child from harm by exposure to family violence or child abuse, or other harmful or highly stressful experiences'.

In the context of this proposed draft, in which children's need for protection is an integral part of the assessment of their interests, it is appropriate to reconsider whether it is necessary to retain some current provisions relating to family violence and abuse.

The first is current s60CC(3)U), which is 'any family violence involving the child or a member of the child's family'. This now seems to be unnecessary, given the provisions referred to above, and in particular paragraph (e) of the draft, 'any need to protect the child from abuse or ill- treatment, and from exposure to family violence, persistent conflict or persistent litigation'.

The next is paragraph (k), which deals with family violence orders. Deciding what Part VII should say about family violence orders is difficult. The various options were well canvassed in

the lead-up to the 2011 amendments. The current law, resulting from the 2011 amendments, essentially requires the court to take into account the *circumstances in which* any family violence order was made. Current para (k) is:

> *if a family violence order applies, or has applied, to the child or a member of the child's family-any relevant inferences that can be drawn from the order, taking into account the following:*
>
> *(i) the nature of the order;*
>
> *(ii) the circumstances in which the order* was *made;*
>
> *(iii) any evidence admitted in proceedings for the order;*
>
> *(iv) any findings made by the court in, or in proceedings for, the order;*
>
> *(v) any other relevant matter;*

There is no logical need for *any* reference to family violence orders in Part VII. The Act rightly has a provision to the effect that the court must be informed about any family violence orders. [36] It also has a provision about receiving evidence given in other proceedings.[37] In principle, the circumstances in which a family violence order was made are simply a part of the evidence - often an important part, because of the child's need for protection, something much emphasized in this proposed draft.

Thus my original position was that paragraph (k) should simply be omitted. However I was persuaded that in the context of the legislation as it was in 2011, omitting any reference to family violence orders might be give the impression that there was a lesser level of concern with family violence, or, perhaps, a view that family violence orders were to be disregarded. So I amended my position to make a submission that is essentially embodied in the present provision of para (k).

This problem of perceptions, however, should not arise in the context of a completely re-drafted Part VII such as is contemplated in this draft. Thus I have omitted existing paragraph (k) from this draft, based on my original view that it is logically unnecessary. If, however, it is considered that some version of paragraph (k) should be retained, then I would propose, consistently with the overall simplification of the drafting, that it simply provide: 'the circumstances in which any family violence order was made'.

Five reasons why this is a modest proposal

There are five reasons why this is a 'modest' proposal. The first reason is that, as mentioned earlier, I propose this draft as something to be considered in the process of reform described earlier. It could well be modified and improved in that process. The second reason, also mentioned earlier, is that the draft includes a statement of general principles, replacing s608. There is room for doubt and argument about whether any such statement is desirable, but this draft continues the existing pattern of including such a statement.

The third reason is that I have not considered radical alternatives to the fundamental principle that the child's best interests should be the paramount consideration. While nearly everyone seems to agree that this should be the purpose *of the legislation,* there are different opinions about whether that objective is best achieved by giving courts unfettered discretion

to work out what is best for the children in each case. The draft continues the familiar approach in Australia - giving the courts a wide discretion, but providing a list of factors to be considered. The 2006 amending Act departed from this approach a little. First, it introduced a presumption of equal shared parental responsibility, which I have adopted in a different form. Second, it gave prominence to certain outcomes - equal and substantial and significant time - by requiring that they be 'considered' in some circumstances. Third, it attempted to rank the importance of certain factors - in the 'two tiers', and in the priority given to safety in the 2011 amendments. My proposed draft does not continue those approaches, but (except for the new version of the presumption in favour of shared parental responsibility) maintains the position of general discretion, with a list of non-exclusive factors to be considered in each case. A complete analysis of this area of law would need to engage with some of the radical alternatives that have been proposed. In recent times, the open-ended discretion to treat the child's best interests as paramount has often been criticized, mainly for being indeterminate, giving too much power to the courts, and producing results that are inconsistent and unpredictable.[38] My own view, incidentally, is that these criticisms are often overstated. None of the various alternatives proposed have yet succeeded in displacing the 'paramount consideration' principle from its pedestal, but the most interesting is probably the American Law Institute's proposal for a presumption favouring the arrangement that most closely resembles the pre-separation pattern of care. This approach has had some influence in the USA, and has been legislatively adopted in West Virginia.[39]

The fourth reason why this proposal is a modest one is that I have not dealt with that elusive but important issue about the application of the 'paramount consideration' principle, namely whether it leaves any room at all for considering anyone else's interests than the child's, or for giving effect to some policy.[40] A recent example is the situation where surrogate parents ask for parenting orders which would give effect to an illegal transaction. [41] Another is whether any weight should be given, in relocation cases, the relocating parent's interests, and rights to freedom of movement.[42] Again, a comprehensive review of the law would need to grapple with this issue.

The fifth reason is that the draft does not deal with the important question how words like 'parent', and any statement of general principle should deal with what we might call non- mainstream families - same-sex parents, parents who are not the genetic parents, and so on. This is a huge and important topic. Family law should be inclusive. As the Family Law Council recently recommended, there should be 'a consistent approach to decision making for all children regardless of their family form'.[43] Both general statements of principle and particular rules for decision-making need to embrace diversity and work well in relation to the very different circumstances of the various family formations. I have not been able to address this important issue in this paper. If the present draft proves useful as a starting point, it will need to be re-examined with this issue in mind.

Notes

1. BA, LLB, BCL; AM; former Judge of the Family Court of Australia. I am grateful to Patrick Parkinson, Tom Chisholm and Helen Rhoades for comments on a draft of this paper, although of course responsibility for it is solely mine.
2. The proposed draft (approximately 880 words) would replace sections 60B, 60CA, 60CB, 60CC, 60CG, 61B, 61C, 61D, 61DA, 61DB, 64B, 65AA, 65B, 65C, 65D (in part), 65DAA, 65AA, 65B, 65C, 65D (in part), and 65DAA (approximately 5,000 words).
3. See eg *McCall v Clark* [2009) FamCAFC 92; (2009) 41 Fam LR 483.
4. Old paragraph (h), which relates to Aboriginal and or Torres Strait Islander children, is now in section 8.
5. Existing s60CC(3)(a), (c), and (ca),
6. This problem - the 'victim's dilemma' - is considered in the Violence *Review.*
7. I note, however, the valuable suggestion of the Family Law Council that the provision should refer to the benefit of enjoying the culture with other people who have the responsibility to pass on that culture: see *Report on Parentage and the Family Law Act* December 2013, Rec 4.
8. It appears, in slightly different form, in paragraph C of the proposed Principles .
9. On the role of s60B see *Maldera v Orbel* (2014) 52 Fam LR 24.
10. Section 60CC(2A), added in 2011.
11. P E Nygh, 'The New Pt VII · an Overview' (1996) 10 AJFL 4; John Dewar, 'The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared - Twins or Distant Cousins? ' (1996) 10 AJFL 18-34; Richard Ingleby, 'The Family Law Reform Act· a Practitioner's Perspective' (1996) 10(1) AJFL 48-52; Juliet Behrens, 'Shared Parenting: Possibilities... and Realities' (1996) 21(5) Alternative Law J 213-216; R Chisholm, 'Assessing the Impact of the Family Law Reform Act 1995' (1996) 10 AJFL 177 -197 .
12. Patrick Parkinson, 'The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience' (2014) 37 Dalhousie L.J. 301-344
13. Fla. Stat. Title VI, 61.13(2)(c)(1); cited in Parkinson, above.
14. Irene Thery, "The Interest of the Child' and the Regulation of the Post-Divorce Family' (1986) 14 *Int' /. J.* Soc. *L.* 341, at 356; Marygold S. Melli, 'Whatever Happened to Divorce?', [2000) *Wis. L. Rev.* 637 , 638; (both cited in Patrick Parkinson, 'The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience' *Dalhousie Law Journal* (forthcoming 2014).
15. Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* (2011).
16. See eg *Cox v Pedrana* (2013) 48 Fam LR 651; FLC 93-537; [2013) FamCAFC 48; discussed in R Chisholm, 'Avoiding appellate errors: lessons from *Cox v Pedrana'* (2014) 28 AJFL 95.
17. Section 65DAC(2).
18. In addition to the LexisNexis and CCH family law services and standard texts and casebooks, recent examples include Bruce Smyth et al., 'Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?' (2014) 77 *Law and Contemporary Problems* 109-149;; R. Kaspiew , M. Gray, L. Qu, and R. Weston, ' Legislative aspirations and social realities: Empirical reflections on Australia's 2006 family law reforms' (2011) 33 *Journal of Social* We/fare *and Family Law* 397; R. O'Brien, 'Simplifying the System: Family Law Challenges - Can the System ever be Simple?'(2010) 16(3) *Journal of Family Studies* 264; H. Rhoades, G. Sheehan and J. Dewar, 'Developing a Consistent Message about Children's Care Needs across the Family Law System' (2013) 27 *Australian Journal of Family Law* 191; The Hon. S. Strickland and K. Murray, 'A judicial perspective on the Australian family violence reform 12 months on' (2014) 28 *Australian Journal of Family Law* 47; and a number of chapters in the valuable AIFS publication edited by Alan Hayes and Daryl Higgins, *Families, Policy and the Law:* Selected Essays *on Contemporary Issues for Australia* (2014).
19. Kaspiew, R, Gray, M., Weston, R., Moloney, L., Hand, K., and Qu, L. (2009), *Evaluation of the* 2006 *Family Law Reforms,* Melbou rne: Australian Institute of Family Studies.
20. R Chisholm, 'Making it Work : the Family law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 AJFL 143; P Parkinson, The values of parliament and the best interests of children - a response to Professor Chisholm' (2007) 21 AJFL 213; M Wright, 'Best Interests, conflict and harm - a response to Chisholm and Parkinson ' (2008) 22 AJFL 72-7; R. Chisholm, 'The harmful impact of parental conflict on children (and the harmful impact of legislative complexity on people trying to help children) - A brief reply to Max Wright' (2008) 22 AJFL 152
21. R Chisholm and P Parkinson, Comment: 'Reasonable practicability as a requirement: The High Court's decision in MRR v GR' (2010) 24 Australian Journal of Family Law 255 .
22. R. Chisholm, 'Did the 2006 amendments downgrade non-parents? *Aldridge v Kea ton'* (2010) 24 AJFL 123

23 R. Chisholm, 'When a "father" turns out not to be, does the Act give priority to the (biological) mother? *Mulvany v Lane'* (2010) 24 AJFL 128 .

24. R. Chisholm, From Goode to Marvel-ous' (2011) 25 Australian Journal of Family Law 153.

25. R Chisholm, 'Reid v Lynch' (2011) 25 Australian Journal of Family Law 73.

26. R Chisholm and P Parkinson , Comment: 'Reasonable practicability as a requirement: The High Court's decision in *MRR v GR'* (2010) 24 *Australian Journal of Family Law* 255 .

27 R Chisholm, 'Avoiding appellate errors: lessons from *Cox v Pedrana '* (2014) 28 AJFL 95 .

28. R. Chisholm, 'Making it work: the Family Law Amendment (Shared Parental Responsibility) Act 2006' , (2007) *Australian Journal of Family Law,* 21. The various Parliamentary reports, easily obtainable from the Parliamentary website , are cited and discussed in this paper.

29. See P E Nygh, 'The New Pt VII - an Overview' (1996) 10 AJFL 4; John Dewar, 'The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared - Twins or Distant Cousins?' (1996) 10 AJFL 1 8-34; Richard Ingleby, 'The Family Law Reform Act - a Practitioner's Perspective ' (1996) 10(1) AJFL 48-52; Juliet Behrens, 'Shared Parenting: Possibilities... and Realities' (1996) 21(5) Alternative Law J 213-216; R Chisholm, 'Assessing the Impact of the Family Law Reform Act 1995 ' (1996) 10 AJFL 177.

30. Family and Community Affairs Committee (2003), *Every Picture Tells a Story: Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Parliament of Australia, Dec 2003).

31. The key Government statements leading up to the legislation of 2006 were 'A New Family Law System: Government Response to Every Picture Tells a Story' (June 2005) ; Discussion Paper, A New Approach to the Family Law System: Implementation of Reforms (10 November 2004 '; and Framework Statement on Reforms to the Family Law System (July 2004) .

32 Marygold S. Melli and Patricia R. Brown 'Exploring a New Family Form - The Shared Time Family' (2008) *International Journal of Law, Policy and the Family,* 231 ; Katharine Bartlett and Elizabeth Scott, Foreword, (2014) 77 *Law and Contemporary Problems.*

33. Bruce Smyth et al., 'Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?' (2014) 77 *Law and Contemporary Problems* 109-149, Fig 1.

34. Family Courts Violence Review: A report by Professor Richard Chisholm (Commonwealth Attorney-General's Department, 27 November 2009). Accessible at: www.ag.gov.au/ FamiliesAndMarria ge/ Families/ FamilyViol ence/ Pages / Researchonsharedcarepa renting and family violence.aspx.

35. Family Law Section of the Law Council of Australia, *Submission to Senate Finance and Public Administration References Committee - Inquiry into Domestic Violence in Australia,* 20 August 201 4.

36 Section 60CF.

37 Section 69ZX(3).

38. See, eg Elizabeth S. Scott & Robert E. Emery, 'Gender Politics and Child Custody: The Puzzling Persistence of the Best- Interests Standard' (2014) *77 Law and Contemporary Problems* 69-108.

39. American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* 2.08 (2002); discussed in Elizabeth Scott, 'Pluralism, Parental Preference and Child Custody', 80 *Calif. L. Rev.* 615 (1992). For a detailed recent discussion, see Katharine T. Bartlett, 'Prioritizing Past Caretaking in Child-Custody Decision making' (2014) 77 *Law and Contemporary Problems* 29-67 (2014) (which issue includes a number of illuminating articles relevant to its theme 'child-custody decision making)' .

40. Discussions include J Crowe and L Toohey, 'From Good Intentions to Ethical Outcomes: The Paramountcy of Children's Interests in the Family Law Act' (2009) 33 *MULR* 391 at 391- 414 ; R Chisholm, 'The Paramount Consideration': children's interests in family law" (2002) 16 Aust J Family Law 8 7-115.

41. Mary Keyes and Richard Chisholm, 'Commercial surrogacy - some troubling family law issues' (2013)(2) 27 *AJFL* 10 5-134.

42. See M Kirby, 'Family Law and Human Rights' (2003) 17 AJFL 6 .

43 Family Law Council, *Report on Parentage and the Family Law* Act *(December* 2013), Rec. 1.

Appendix 6

Rewriting Part VII of the *Family Law Act*

Paper to be presented to the 2014 National Family Law Conference

Professor Helen Rhoades*

Introduction

This paper draws on data collected for a recent research project about the relationship between Part VII of the *Family Law Act* and the day-to-day work of family law system professionals in parenting matters.[1] The project was a response to the various reviews of the 2006 amendments to Part VII, published in 2009, which suggested they were associated with a number of problems for professional practice.[2] These included reports that the complexity of the framework had added to the workload of the courts,[3] and created misunderstandings of the law[4] that needed to be managed by solicitors, sometimes with great difficulty.[5] The project also built on the work of my two esteemed co-panellists, Rick O'Brien, the Chair of the Family Law Section, and the Hon.
Richard Chisholm, who have each responded to this evidence with suggestions for simplifying Part VII,[6] and by highlighting the need for a decision-making framework that is 'clear enough to be used by ordinary people'.[7]

This paper seeks to make a contribution to the debate about the need and possibilities for changes to Part VII by outlining some of the responses of lawyers and judges who participated in the project. The experiences they described indicate that a number of the problems reported in 2009 continue to affect practice, and the suggestions for change they offered suggest there is some strong support for simplification of the legislation within the family law community.

A little bit about the research project

Our study set out to explore two research questions. Firstly, is it possible to develop a more child- focused framework for parenting matters that can support the work of each of the different professional communities in the family law system, including lawyers, judges and family dispute

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* Melbourne Law School, University of Melbourne. A more detailed discussion of the issues in this paper is published in H. Rhoades, N. Lewers, J. Dewar and E. Holland, 'Another look at simplifying Part VII' (2014) 28 *Australian Journal of Family Law* (forthcoming).

[1] The *Children's Needs Project* was conducted by Professor Helen Rhoades and Professor John Dewar with funding from an ARC Discovery Grant. We wish to thank the project's expert advisors, Professor Richard Chisholm, Professor Ann Sanson and Dr Grania Sheehan, and the family law system professionals who participated in the study.

[2] See R. Kaspiew, M. Gray, R. Weston, L. Moloney, K. Hand, and L. Qu, *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies: 2009) (hereafter 'AIFS Evaluation'); R. Chisholm, *Family Courts Violence Review* (2009); Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* (December 2009).

[3] Ibid Kaspiew et al (2009), at 335-336.

[4] Family Law Council, above n 2, at 83-84 (online version); Chisholm, *Family Courts Violence Review*, above n 2.

[5] Kaspiew et al (2009), above n 2, at 212-213.

[6] See R. O'Brien, 'Simplifying the System: Family Law Challenges – Can the System ever be Simple?'(2010) 16(3) *Journal of Family Studies* 264; R. Chisholm, 'Simplifying the Family Law Act: Saying Less, and Saying it Better' (2011) 21(3) *Australian Family Lawyer* 11; R. Chisholm, 'Children's Best Interests, Parental Involvement and Protection from Violence: Reviewing the Family Law Legislation', *David Opas Memorial Lecture 2012*, at 31 (copy on file with the author).

[7] Ibid Chisholm (2011).

resolution practitioners? Secondly, can we reduce the complexity of the Part VII framework without sacrificing its capacity to respond to the particular needs of individual children and families, and secondly? This paper focuses on the second of these questions.[8]

The project was conducted in two stages. The methodology for each stage is described in detail elsewhere.[9] In brief, the project's first stage explored the practices of a sample of experienced family dispute resolution professionals who work in the family law system and the ways in which their approach to settling children's care arrangements resembles and differs from the process of decision-making mandated by Part VII. The second stage of the project, which this paper draws on, explored the day-to-day work of judges and lawyers in parenting matters. This stage centred on a series of in-depth interviews and roundtable forums with 37 participants – 20 experienced family lawyers[10] and 17 judges[11] – from 7 different locations/registries (States and Territories), and a follow-up survey of family law practitioners around Australia (n=110).

The questions for both the roundtables and interviews were structured around three broad questions. Participants were first asked to describe their day-to-day experience of using Part VII to assist clients or make decisions about children's care arrangements. As well as seeking to understand the relationship between the decision-making framework and their work, we were also interested in exploring whether and how participants had adapted their practices to accommodate the problems revealed in the 2009 reviews. In the second part of the roundtables and interviews, participants were asked to identify any problems for them and/or their clients with the current framework, as well as its positive aspects and the parts they would want to preserve if further reforms were enacted. Thirdly, participants were asked to offer suggestions for changes to Part VII to better support their practice.

Respondents to the follow-up questionnaire completed the survey online in late 2013.[12] Like the lawyers who participated in the interviews and roundtables, those who responded to the questionnaire tended to be experienced practitioners: questionnaire respondents had practised family law from between 2 and 41years (*M* = 16.84 years) and parenting matters formed more than 50% of their work.[13] Participants came from a variety of workplaces – including private practice, legal aid, community legal centres and the family law bar – with the majority (70%) working at small law firms with fewer than 10 lawyers. Most respondents indicated their work was based in a capital city (43.6%), with a further 23.6% working in regional offices, 22.3% in a suburban location and around 10% of respondents were rurally based.

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[8] For a discussion of the first research question, see H. Rhoades, G. Sheehan and J. Dewar, 'Developing a Consistent Message about Children's Care Needs across the Family Law System' (2013) 27 *Australian Journal of Family Law* 191; and H. Rhoades, J. Dewar and N. Lewers, 'Can Part VII of the Family Law Act do what is asked of it?' (2014) 4(3) *Family Law Review* (forthcoming). For a discussion of the benefits and limitations of using professional practice experience to inform legislative change, see H. Rhoades, J. Dewar, and G. Sheehan, 'Using professional practice experience to guide family law reform' (2014) 36(2) *Journal of Social Welfare and Family Law* 111-128.

[9] The Stage 1 methodology is described in Rhoades et al (2014), above n 8. The methodology for Stage 2 is described in H. Rhoades, N. Lewers, J. Dewar and E. Holland, 'Another look at simplifying Part VII' (2014) 28 *Australian Journal of Family Law* 114-141.

[10] Each of the lawyers in this qualitative part of the study had practised family law for between 10 and 40 years (*M* = 21 years) and parenting matters formed more than 40% of their work. The sample reflected a mix of workplaces, including private practice (n=11), legal aid and the community legal sector (n=6) and the family law bar (n=3).

[11] Note that the term 'judge' is used here to include Magistrates from the Family Court of Western Australia.

[12] A link to the questionnaire was included in the Family Law Section Online News.

[13] Just over three-quarters of the sample (77.3%) had practised family law prior to the 2006 amendments.

The questionnaire asked respondents about their experiences of using Part VII to give advice to clients,[14] and in litigated matters,[15] and also sought to gauge their support for a range of possible changes to Part VII that had been suggested by the roundtable and interview participants.[16] In addition to these questions, the survey contained two open-ended questions inviting respondents to 'describe any other changes to Part VII that would better support [their] practice' and to 'leave any additional comments about the issues canvassed in the survey or [their] experience of using Part VII'. A separate section asked questions about the 2012 family violence amendments to Part VII.

The remainder of this paper sets out some of the key themes running through the responses that lawyers and judges provided in Stage 2 of our study, including about their experiences of using Part VII in their work and their suggestions for reform.

Conformation of continuing practice problems

Participants' descriptions of their day-to-day work demonstrate the continued existence of practice challenges associated with the legislation, including productivity implications for the courts (such as impacts on interim hearings and judgment-writing), as well as implications for lawyers' advisory and dispute resolution practices and clients' and litigants' understanding of the law. It is important to note at the outset, however, that not everyone assessed the practical effects of the present framework in negative terms. For example, one judge spoke positively of its 'roadmap' function, suggesting it provides a handy guide for delivering *ex tempore* judgments.

Overall, however, even those who identified positive elements of the framework agreed the advent of the 2006 amendments had added to their workload. As the judge who appreciated its 'roadmap' facility said:

> I do find there is more work compared to [before the 2006 amendments], in that youhave to address all of the considerations and whether or not the presumption applies or is rebutted. If an order for equal shared parental responsibility is made it is necessary to consider whether equal time is in the child's best interests and reasonably practicable and if not whether substantial and significant time is in the child's best interests and reasonably practicable. There's just a lot to go through to be absolutely correct according to the legislation in coming to your decision. So yes, I do find it more work. (J13)

A common concern in this regard concerned the degree of repetition in the present framework, and the need to address a number of issues several times in the course of a judgment. This feature was also the subject of criticism by lawyers, in relation to preparing affidavits for trial. For example, one questionnaire respondent commented:

[14] For example, respondents were asked to rate the usefulness of Part VII in advising clients and assisting clients to understand their children's needs. Respondents were also asked to indicate how frequently they saw clients who believed that parents have a right to equal time with their children over three time periods: before the 2006 amendments, immediately after the 2006 amendments, and now.

[15] This section asked respondents about their perceptions of the effects of Part VII on preparing and running litigated matters and its usefulness for self-represented litigants.

[16] Respondents were asked to indicate whether any of the following changes would better support their practice: simplification of the decision-making framework; clearer organisation of the decision-making sections; redrafting provisions in language that parents can understand; framing the best interests considerations from the child's perspective; requiring the courts to assess the impact of parental conflict on the child.

> All relevant principles are valid, it is the overlap in the principles and the way you need to address things more than once (to address different sections) at court that is frustrating.

The descriptions indicate there are two aspects to this issue. One concerns the requirement to re- visit the question of the child's best interests in s 65DAA, having already addressed this in s 60CC. As one judicial officer explained:

> The pathway you have to take is unnecessarily convoluted. By the time you've looked at the primary considerations and the additional considerations you've usually considered the developmental needs of the child and so forth. You've then got to launch into [working] through the presumption and whether it applies, whether it's rebutted and so forth, and then whether [equal time] is reasonably practicable and in the best interests [of the child]. You have generally already reached a conclusion about what the best interests are but you've still got to work through this extra exercise and it's really a bit time consuming. (J5)

The second aspect of repetition concerned what was described by one participant as 'the high level of overlap in the considerations in Section 60CC' (J7). Many people, for example, pointed to the overlapping considerations about safety issues in the primary and additional considerations, as well as the various different provisions about the child's relationships with others. As one judge noted:

> And it's really hard not to be repetitive in [judgments], particularly with the primary considerations and the secondary considerations divided as they are. [With the primary considerations] you are talking about the children's right to a relationship with both parents etcetera and safety issues. But then you also refer to those matters again in more specific terms, or more general terms as the case may be, in the additional considerations. (J14)

A related issue that judicial officers raised concerned the length of judgments that comply with the framework, and the time required to write or deliver a judgment that addresses each of the elements in the decision-making pathway:

> And writing a judgment with all of those things in it is a really big structure … I'm working on one at the moment which is not that difficult but I'm up to page 86 … And a lot of that's not about the child or the parents; it's about how do I try and get through this complex piece of legislation. (J11)

Some judges raised particular concerns about the time needed to deliver a 'pathway compliant' judgment in interim matters, in the context of busy court lists. For example, one judicial officer explained:

> [T]hat can be quite time consuming when you've got a whole lot of matters in your list and where the evidence is often poor, where you've got completely conflictual evidence from one party to the other, and it becomes quite frustrating when you've got to go through that process. … So presuming I have to deliver about four or five judgments, but I still might have to determine some short issues on other matters on the day … it might only be half an hour [to deliver judgment] or it could be up to two hours, just depending onthe

> nature of the matter … and that often means sitting into the night to get through the list. (J1)

As noted, a related concern raised by a number of lawyers suggests the repetition of issues in Part VII has also affected the time taken to draft affidavits,[17] and added to their cost for litigants:[18]

> I think one of the other issues with Part VII is that if you do end up litigating, it's very expensive to prepare an affidavit that addresses each of the considerations —it becomes a very lengthy, detailed and often repetitive affidavit because you're often repeating information that you've already included. (L6)

For their part, judges commented on the potential for the framework's '11 step reasoning process'[19] to distract litigants and counsel from the focus on the child's best interests.[20] One judicial officer, for example, responded to the question about the day-to-day experience of Part VII in court by describing the legislative pathway as 'a byzantine series of steps' that 'allow plenty of opportunity for people to run nonsense arguments and where stark issues about the best interests of children can sometimes get a bit lost' (J8). Other judges offered similar comments about the potential distraction when making decisions. As one such judge said:

> I think it's worthwhile having a shopping list for judges to check off … But if the issue is about a 13 year old who doesn't want to see dad because she's 13 and she's had to put up with the conflict and she's mature, I should be able to say, 'Look, this is really about what weight I should give to the views of that child', and focus on that rather than having to repetitiously to go through the of all of the other often irrelevant sections. (J11)

Reflecting this reference to 'a shopping list', a common feature of the interviews and roundtable conversations was the use of phrases such 'ticking boxes' or 'dotting *i's* and crossing *t's*' to describe the application of the framework when delivering judgments. In addition, some judicial officers noted that their reasoning did not always fit comfortably into the 'template' provided by the framework, and spoke about what one judge called the 'artificiality' of explaining their decision in this way. As one person commented:

> Often you've had to work hard to fit it into the box that's provided by the pathway. Yes, it's a bit of square peg and round hole sometimes. (J9)

Others described the need to engage in a two-step writing process, in which their reasons for decision are first written in a narrative form, reflecting the issues and evidence at trial, and then 'translated' into a form that complies with the language and steps of the legislative pathway. As one judge explained this process:

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[17] Questionnaire respondents were asked about this issue. The majority of questionnaire respondents (65%) agreed or strongly agreed that it is 'time-consuming to prepare an affidavit that addresses the requirements of Part VII', while 22.9% of respondents disagreed or strongly disagreed with this statement.

[18] Note that some lawyers also made similar comments about the cost of letters of advice.

[19] See for this description, the Hon. S. Strickland and K. Murray, 'A judicial perspective on the Australian family violence reform 12 months on' (2014) 28 *Australian Journal of Family Law* 47, at 75.

[20] Note that a research team from the Family Court has recently suggested that the complexity of the legislation may also be 'antithetical to the achievement of the major purpose of the family violence reforms': Ibid Strickland et al, at 75.

> You tick the boxes. And what I do is I write my judgment in a narrative sense and then when I come to what I'm mandatorily required to do, I write rhetoric which draws on the findings that I've made in the narrative. So it's adding time from my perspective. It's not a problem but it's not a really useful exercise. (J12)

For their part, lawyers said this process of 'translation' can be frustrating for clients when reading the court's decision, as they can be left feeling that the judge has not understood their dispute.
For example, one practitioner explained:

> I'm in the middle of a very contested trial at the moment. The way that the evidence has come out is really completely disconnected with the Act, because the flow of the evidence is not "let's address this factor, this factor, and then this factor". The factors in the Act really bear no relationship to the way that I think the judge, in his mind, is making a decision about what's going to be in the best interests of this child. He will go through the factors and … I know that he's going to try and slot the evidence into those factors, but that's not actually the experience of the family or the way that the interests of children are discovered in a case. (L9)

The judicial officers in our study were aware of this issue, and some raised concerns of their own about the 'disconnect' between their desire to deliver an accessible judgment to the parties and the requirement to follow the legislative pathway. As one person noted:

> I think how [the framework] affects the judgment is it makes it unnecessarily lengthy and verbose and … I think from the parties' point of view … I think that it must, for them, they must think, *Well, where is this going?* I mean, you can see every day that parties are nervous, they're in an unfamiliar environment, and then the decision-maker is talking about concepts that bear absolutely no resemblance or relationship to the dispute that they've got, and it's, I don't know, it's almost embarrassing. … I don't think it's good practice. (J16)

Some solicitors raised similar concerns about the way in which the legislation requires them to work with clients. One practitioner, for example, reported that it is no longer feasible to use a 'shadow of the law' approach with clients, given the number of steps in the pathway:

> It used to be very easy to say to them, '*Put yourself in the judge's shoes. This is what the judge is going to have to think about if you ask them to make a decision*'. And they could do that quite easily. There's no way I'd ever have time to get them to try and do that through the current legislation. (L5)

Other lawyers commented critically on the legislation's effect on the nature of the conversations they must engage in with clients. As one person described this effect:

> I think it has become much more difficult to advise clients post the reforms. In my experience, it is a much more legalistic discussion that you have to have with the client, rather than a more holistic discussion about their family and what's in the best interests of the children. (L9)

Reflecting this concern, a number of practitioners noted that clients often find it difficult to follow an explanation of the legislation, as the following comment illustrates:

> The pathway is quite convoluted and it is quite difficult explaining that to clients. I mean I generally start with telling clients that the paramount consideration is what's in the child's best interests and then start going through 60CC as far as primary, secondary issues, and just run through them all with the clients and talk with them about parental responsibility and the presumption in relation to that, but that's when you kind of lose them. … (L17)

As this comment suggests, lawyers tended to single out the presumption of equal shared parental responsibility in s 61DA as a source of confusion for clients. One participant, for example, said:

> I think, from a practitioner's perspective I certainly think the 2006 amendments made things a lot more complex for giving advice, but also for clients understanding it. There was so much misunderstanding about what the presumption meant and a real misunderstanding about equal time versus equal shared parental responsibility that I think even years after 2006 it's still pretty common to see that misunderstanding. … We're here in 2014 and the changes came in 2006 and there's still that common misperception where people think the Act says equal time, that presumption of equal time, where it doesn't. (L14)

Practitioners also tended to describe this provision as having complicated their advice-giving work As one person noted:

> And part of the difficulty, of course, is because there is a presumption that applies to the allocation of parental responsibility and people also have this perception that sharing parental responsibility is effectively sharing custody, and that it actually has something to do with time spent, and so having to clarify that with clients too, that they're actually different things: one is about decision-making and one is about actually spending time. So yeah, I mean it's painstaking to have to go through that with clients. (L17)

Judges, too, said it was not uncommon to see self-represented litigants who are confused about the meaning of equal shared parental responsibility and the difference between this concept and equal time. As one said:

> We all know it's equal shared parental responsibility but people come to court and still are under the impression that means equal time. (J13)

Some judges also noted that scarce court time is often being used to educate litigants who represent themselves about the difference between these concepts. More particularly, a number of participants raised concerns about the difficulties for self-represented litigants associated with the legislation's complexity.[21] As one judge said:

> I think it's reached the point where, for in person litigants, it's as complicated as the Tax Act. We have so many in-person litigants that we deal with in our court. I'm sure it's the same Australia-wide. I don't see how an in-person litigant has any hope of understanding what's going on. They'd have to be well educated and with a lot of time on their hands to

[21] The majority (74.3%) of questionnaire respondents agreed or strongly agreed with the statement 'Part VII is not easy for self-represented litigants to use'.

> be able to work out what's going on. It's a jurisdiction where a lot of people simply can't afford legal advice. It is far too complicated. (J15)

Strategies for managing these issues

As noted above, one of the things we were interested in exploring in the interviews and roundtables was how judges and lawyers are managing the demands of the legislative framework four years after the reports that first highlighted the practice problems associated with its complexity. This section of the paper outlines the strategies that participants described and their limitations as techniques for reducing the workload issues discussed in the previous section.

Bunching

The responses from participants suggest there are few strategies available to judges when it comes to minimising the workload associated with delivering judgments. Central to this situation is a concern that failure to follow the legislative pathway might result in the decision being appealed, with flow-on consequences for the family and children. As one judge noted:

> But certainly the amendments have made life more complicated and I don't know how any judicial officer ventures into doing an *ex tempore* in an interim matter without being mindful of all the provisions and the considerations in [the pathway] because there's an appeal looming if you don't. (J6)

This judge suggested there were realistically only two choices available to judicial officers in this circumstance: 'either sacrifice their performance in court or send people away'. However, some noted an alternative strategy for reducing the length of written judgments. This technique involves a process of what participants variously called 'clumping' or 'bunching', in which judicial officers assess several of the s 60CC considerations together under a single thematic sub-heading. For example, one judicial officer explained:

> I'm a buncher. So if we're talking risk, because it picks up probably four or five considerations between the primary and additional, my heading will be *Risk*, and then I apply [the sections]. … I've got a heading *Relationships*, because that permeates a few things too. So that's how I do it. (J4)

The judges who described this practice suggested it reflected not only their attempt to reduce the time spent on writing judgments but also a concern for litigants who otherwise 'have to wade through' a lengthy judgment to understand the reasons for the decision. In the context of interim hearings and *ex tempore* judgments, it is clear from the reported cases that at times some judicial officers take an even more abridged approach, omitting the consideration of factors or steps that are not relevant to the particular dispute. In a series of recent appellate decisions,[22] the Full Court has attempted to accommodate the need to adapt the decision-making process to the circumstances of the particular case, in recognition that 'urgent interim hearings interposed in busy court lists do not lend themselves to perfection in a judgment delivered immediately'.[23] The judges we spoke to were aware of these authorities. Nevertheless, judicial officers remained

[22] See for example, *Whiteman & Newton* [2013] FamCAFC 127.
[23] *SCVG & KLD* [2014] FamCAFC 42, at para 88.

concerned about the appeal implications of practices that fail to address each of the steps in the legislative pathway. As one person said:

> I mean there are some authorities that suggest that highlighting the relevant bits that affect your decision is an appropriate way to go, but there's also a fear that missing any portion of the pathway may open you up to criticism should it be reviewed. (J9)

It is, of course, important to distinguish the role played by the ruling in *Goode & Goode*[24] from the requirements of the legislation itself in relation to this issue. However, it is also worth noting that the judges who commented on this issue believed the legislative framework was the primary source of the workload issues they face, and that the Full Court has a limited capacity to address this problem absent changes to Part VII. As one said:

> I think the decision in *Goode & Goode* is the correct decision because of the way the legislation is written. You would need, in my view, to amend the legislation to provide for a way in which courts can hear interim hearings without having to deal with all of the provisions. (J1)

Working outside Part VII

It is clear from the descriptions provided by participants that lawyers have much greater freedom than judicial officers do when it comes to managing the complexity of the legislative framework. While practitioners were clearly careful to meet their professional obligations in giving advice to clients, some confessed to otherwise making little reference to the legislation in their day-to-day settlement work unless they needed to prepare for litigation. As one person said:

> And I can honestly say that I have never sat with a client and worked through the sections of Part VII to obtain their instructions. … So I think in my experience, Part VII, it exists, we know what we have to achieve if we're going to court but unless and until it becomes a litigation matter, it really is silent in my day-to-day practice. (L6)

For many practitioners, the decision to work 'outside' the legislative framework when assisting clients to settle a parenting dispute was a response to their experience of clients' confusion about the law. Instead of working through the legislative steps, these participants explained that their emphasis tends to be on the 'best interests' principle, which they suggested was a concept that clients could easily understand:

> It's quite difficult, I think, for clients to get their head around [the legislative framework]. I mean the only thing I think they kind of take away is that the child's best interests is the paramount consideration. I think it's about all they do take away. The rest of it is just too confusing. (L17)

For these practitioners, their descriptions of practice tended to reflect an approach that was very much grounded in a conversation about the child's life and routines, rather than the legislation:

> You know, I regularly start with, you know, there's nothing magic about it but you sit there and you draw out the calendar [and ask] '*What are they doing? What are their routines?*

[24] See *Goode & Goode* [2006] FamCA 1346, especially at paras 71-72 and 81.

> *What are the kindergarten commitments? What are the after-school commitments?*' You learn a lot about these children. (L1)

As this practitioner explained, the use of this approach reflected a view that advice to clients 'is about the practicality of things' and that 'the way our legislation works doesn't necessarily drill it down to those practical things' (L1).

Suggestions for reform

Participants were asked to offer suggestions for changes to Part VII to better support their work. Overall the data indicate strong support for four broad areas of reform. Reflecting the concerns described above, most participants indicated a desire for a less complicated framework that would reduce the current amount of overlap and repetition of issues.[25] As one questionnaire respondent commented:

> The current parenting provisions could be simplified to about 30% their current size and still retain the essence of what is there now.

Included within this was a desire for a reduction in the number of steps in the decision-making process, with many favouring a return to a single list of best interests considerations:

> I think it should all be one list rather than different parts of the Act. That would be a much better way to approach it. (L2)

Secondly, the majority of participants favoured a re-organisation (and rationalisation) of the framework's decision-making sections into what one questionnaire respondent called 'a simple, logical progression'.[26] This reflected complaints about the confusing numbering of the Act. As one respondent explained the need for this reform:

> Various amendments and tinkering with Part VII by Parliament on a piecemeal basis over the years has made it cumbersome and difficult to work with. A complete overhaul of the numbering and order of Part VII would be suitable. (Questionnaire comment)

Thirdly, there was strong support for enhancing the responsive capacity of the courts, including increasing the flexibility of the decision-making framework. As one practitioner suggested:

> In my view judges need a little bit more discretion than they have. A checklist is fine, there's nothing wrong with that, but I think we need to give their Honours the checklist and let them at it. The way that we've got our presumption which does apply or doesn't apply, and can be rebutted, and then you've got to look at equal time and significant and substantial time, and then you've got to think of reasonably practical, but if it's not equal shared parental responsibility then you've got to go to another subsection. And it's just, honestly, I think all that technicality is counter-productive. (L15)

[25] This included support from 72.4% of questionnaire respondents.

[26] This included support from 74% of questionnaire respondents.

This included providing the courts with some added best interests considerations to reflect the day-to-day issues encountered in contested cases, such as an amendment that would require the courts to assess 'the impact of parental conflict on the child'.[27]

Fourthly, the majority of participants indicated support for improving the comprehensibility of the legislation for 'ordinary people'.[28] In particular, a number of participants recommended removing either or both of the words 'presumption' and 'equal' from section 61DA, in an attempt to combat the continuing misunderstanding of this principle by clients.[29] One judicial officer, for example, said:

> I'd get rid of the presumption. I certainly think that the concept of equal shared parental responsibility is a good one, so I'm not saying getting rid of that, but I think the presumption causes problems because I think there's just too much misunderstanding about that and people then assuming that that's a presumption about equal time. (J10)

More generally, many participants suggested the need to simplify the wording of the considerations in the decision-making framework – or as one lawyer expressed this, 'Just put the Act into simple English so the clients can understand it the first time when I explain it to them' (Questionnaire respondent).

In addition to these proposals, some respondents expressed dissatisfaction with the legislation's (and our questionnaire's) failure to distinguish interim from final hearings. Reflecting the workload concerns associated with interim hearings described above, some suggested the need for a dedicated section in Part VII to provide a more summary decision-making process for interim matters along the lines of the *Cowling* approach.[30]

As noted earlier in this paper, we also asked participants in the qualitative part of the study to identify what they considered to be the most positive aspects of the present legislation and the parts of it they would want to preserve. There were two dominant responses to this question, which are captured in the following response by one judicial officer:

> I think mediation was the big ticket item. The recent amendments that have elevated violence I think are necessary and have been very, very important. So if you're asking what's good and needs to be kept I think those things are definitely to be kept. (J6)

In common with this comment, most participants nominated the legislative incorporation of family dispute resolution services into the dispute resolution process as a positive development. Both lawyers and judges offered significant praise for this sector, noting the benefits of its work for clients and the wider family law system. As one judge said:

> We've seen enormous growth of mediation, negotiation. Most people now … whose relationships break up, don't use the courts to find a solution; they find them themselves.

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[27] This included support from 73.1% of questionnaire respondents. There were also calls for greater guidance about the care needs of children at different developmental stages.

[28] This included support from 68.3% of questionnaire respondents.

[29] Some also proposed removing the present link between parental responsibility and time.

[30] *Cowling & Cowling* [1998] FamCA 19. This pre-2006 ruling about interim hearings emphasised the importance of ensuring stability in the child's life pending a full hearing of the evidence. See also *Cilento & Cilento* (1980) FLC 90-847.

> When they go to places like Family Relationship Centres and counselling centres, they find solutions there. (J11)

The other aspect of Part VII that participants were keen to preserve concerned the family violence amendments introduced in 2012.[31] Although the majority of questionnaire respondents did not believe there had been a significant change in the outcomes of family violence cases as yet,[32] many nevertheless identified the 'tie-breaker' principle in s 60CC(2A) as a positive development that better recognises the day-to-day risk management reality of the courts' work.[33] As one judge said:

> I think the 2012 amendments were an excellent step forward in that regard. (J4)

Qualifications and further considerations about reforming Part VII

The various reforms suggested by the lawyers and judges in our study indicate a significant degree of support for both simplification of the framework in Part VII and changes to enhance its comprehensibility for clients and its flexibility for decision-makers. However, a number of participants also expressed views that point to the need for a broader consideration of the purpose and audience for Part VII before any amendments are proposed.

Firstly, while there was a high level of agreement about the challenges for practice posed by the current framework, there were also some indications of reform fatigue. Several respondents, for example, suggested that despite the problems with the present framework, the costs to practitioners of simplification might outweigh its benefits. As one person said:

> The whole thing is unwieldy. But at the same time, you need to be wary of further change: there is already a change fatigue in the legal community and adapting to further change is always difficult/costly and should be avoided unless really necessary. (Questionnaire comment)

In particular, a number of participants suggested the need for any reform considerations to have an eye to 'future-proofing' the Act as far as possible, to ensure what one person called 'a thorough rewriting that will serve us well for some time without the need for further tinkering'.
Some people pointed to more fundamental problems with Part VII beyond the complexity of the decision-making framework, such as the bundling together of matters as diverse as parentage testing, location and recovery of children, registration of parenting plans and applications for maintenance orders in the same Part, and suggested the need to create a more logical organisation of these issues and/or locate them in separate parts of the Act.[34] As one such participant said:

> I think that overall Part VII needs to be looked at holistically and not just parts of it but the whole of Part VII, because I think if they keep packing on things the way they are, the more complex it gets, the more misunderstanding there is. (J10)

[31] See also on this, Strickland et al, above n 19.

[32] 62.5% of questionnaire respondents agreed or strongly agreed with the statement 'The outcomes of cases involving family violence have not changed much since the 2012 family violence amendments'.

[33] This issue is discussed further below.

[34] 61.5% of questionnaire respondents supported removing sections from Part VII 'that do not deal with parenting disputes'.

Others suggested the need to reconsider some of the more basic elements of the framework for parenting orders, such as the present limitation of key provisions to parents:[35]

> I think one of the difficulties with the current drafting of the legislation is so many of the considerations relate to parents and you're not actually dealing with parents often. The dispute might be between a parent, grandparent or an aunt or whatever, and you have to go through this artifice of bringing it in under the "other considerations" banner when you really want to just discuss it in the context of what's best for this child. (J7)

These participants tended to express concerns about the possible piecemeal nature of simplifying the decision-making pathway, which may impose a burden of establishing new practices on judges and lawyers without addressing the broader problems in Part VII.

Secondly, for some participants the question of reform raised a more fundamental question about the purpose of Part VII. Central to this issue was a concern that behind the 2006 amendments was an expectation that they would perform several functions, including an educative (or message-sending) role that would influence societal norms in the area of post-separation parenting.[36] For some participants this issue warrants a larger conversation about the intended audience for Part VII – including a discussion about whether it is possible for legislation to 'speak to' diverse constituencies without creating confusion – before any changes to the current framework are considered. As one judge said:

> Whilst ever you're attempting to use the legislation for two purposes, you're going to have a problem. You're not just legislating for the small number of cases that find their way to courts. If you were, you could do much to strip away many of the messages that are in Part VII. But because it's designed for a far wider audience, then it's difficult. (J17)

At the heart of this problem for these participants was the concept of 'two populations'[37] with different needs, and a concern that the message about collaborative parenting embedded in the current framework was designed for 'couples who can function post-separation in a businesslike relationship as parents',[38] a constituency that rarely appears in the family courts. Within this context, these participants were concerned about the appropriateness of the current framework for the work of the courts, where the profile of parenting matters tends to involve families with multiple and complex needs. As one judge explained:[39]

> In terms of our parenting clientele, there are often not just one risk factor that's identified through our case assessment conference process but sometimes multiple factors. You know, you typically will have the issues of family violence, of mental health issues, of substance abuse, of real ongoing parental conflict. (J15)

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[35] See on this point, Family Law Council, *Report on Parentage and the Family Law Act* (December 2013), at Chapter 1.

[36] See on this, R. Kaspiew, M. Gray, L. Qu, and R. Weston, 'Legislative aspirations and social realities: Empirical reflections on Australia's 2006 family law reforms' (2011) 33 *Journal of Social Welfare and Family Law* 397; Chisholm (2012), above n 6, at 30-31.

[37] L14

[38] J17

[39] A number of the judges suggested that of the three family courts, the Family Court of Australia is dealing with the greater proportion of these cases. However, the perception that litigated parenting matters are increasingly of a complex nature was shared by judicial officers across the sample.

As this comment suggests, these participants suggested that the work of judicial officers is increasingly focused on 'managing risk' rather than encouraging collaborative parenting. In light of this profile, some participants suggested that the present decision-making framework is not well suited to the courts' work, and should be re-fashioned accordingly.

Significantly, it was not just judges who pointed to a shift in their client base in this respect. A number of practitioners, too, reflected that the profile of people needing assistance with parenting disputes had changed more generally since the introduction of the family dispute resolution reforms, and said that many of the clients they now see have complex support needs:

> In my experience, there has been a significant reduction in the amount of, in the number of parenting matters that we're doing, just even as a consultation in our practice, that fewer people in my experience are coming to us for parenting advice. If they do, they might come for a one-off advice and not pursue it further, they go off to FDR or they've already been to FDR. So I think that the parenting work that we're doing is of the much, of a more complicated nature: relocation, violence, alcohol, a parent affected by alcohol. So at the tougher end of the spectrum. (L6)

Together these observations suggest the need to step back and re-think not just the process of decision-making in Part VII but also whether the current legislative principles that underpin decisions about children's care needs are appropriate for this profile of cases, including a consideration of the need for greater guidance about how to assess and manage risk.[40] For some judges who expressed concerns about the limits of their powers to address the risk management needs of children, this meant supplementing the present provisions in Part VII with powers akin to those in child protection legislation, and positioning the family courts as part of a broader integrated service system for vulnerable families.[41] As one judge explained this:

> Well there are very, very limited things that are going to work as a result of a litigation process that ends up in orders. If you have, as every inquiry into child abuse or the system more broadly has concluded, if you're prepared to put a significant amount of money, a significantly greater amount of money than what is currently put into the system, into an integrated system where welfare agencies, crisis care agencies, family relationship centres, counselling services, etcetera, etcetera, all work together and
> co-operatively to try and arrive at sensible, practical solutions, then the outcome might be different. (J8)

Conclusion

Recent years have seen increasing government concern about the costs of the civil justice system, including a growing interest in enhancing access to justice and addressing unmet legal need. A now long list of reviews have considered a range of ways of making the civil justice system less expensive and more accessible for potential users, and of improving the timeliness of resolving legal disputes.[42] Most recently, the Productivity Commission was asked to report on ways of 'constraining costs and promoting access to justice' in the federal civil justice system,[43] prompted by concerns that the system is 'too slow, too expensive, too complicated'.[44] Significantly for present purposes, it is worth noting that the Productivity Commission's Draft Report on *Access to Justice Arrangements* has cited the law itself as 'a source of complexity' in the modern civil justice system, and indicated that 'legislation that is difficult to

read and understand is part of the problem'.[45]

The practice experiences described in this paper suggest that this description could be applied to the present Part VII of the *Family Law Act*. They demonstrate that while some legal practitioners are working comfortably with (or outside) its decision-making framework, there is also a strong desire for its simplification. More particularly, they suggest the need to reduce the level of repetition and overlap in this framework, and to increase its flexibility in the hands of decision- makers. They also point to the importance of ensuring it is clear and comprehensible to separating couples, and that it properly supports the ability of self-represented litigants to engage effectively with the legal system. And they suggest that any future reform to Part VII will need to factor in the evolutionary nature of the family law system, including the shifting profile of the work the courts and practitioners are engaged in and the issues they face.

[42] See for a list of access to justice reviews, Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 6-7.

[43] Productivity Commission, Access to Justice Arrangements Inquiry Terms of Reference, http://www.pc.gov.au/projects/inquiry/access-justice/terms-of-reference [accessed 19 May 2014].

[44] Productivity Commission, *Access to Justice Arrangements: Draft Report Overview* (April 2014), at 5.

[45] Productivity Commission, *Access to Justice Arrangements: Draft Report* (April 2014), at 439.

[40] See also on the need for guidance about appropriate care arrangements when a finding of family violence is made, Strickland and Murray, above n 20, at 78.

[41] See also on this point, the Hon. John Pascoe, 'Litigants with Mental Illness' (2013) 23 *Australian Family Lawyer* 21, at 26.

Appendix 7

SIMPLIFYING THE SYSTEM
FAMILY LAW CHALLENGES – CAN THE SYSTEM EVER BE SIMPLE?

A paper given at the 2nd FAMILY LAW SYSTEM CONFERENCE
CANBERRA, 20-21 JULY 2010

RICK O'BRIEN
DEPUTY CHAIR, FAMILY LAW SECTION
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Abstract: This engaging, often funny, yet hard-hitting paper was first given at the 2nd Family Law System conference, in Canberra this year. The author, Rick O'Brien is deputy chair of the Family Law Section, Law Council of Australia. The paper unpacks the origins of misunderstanding and disappointment with the 2006 Amendments to the Act, from its convoluted layers and associated complexity and delay for decision making processes to the inherent compromise between competing philosophical persuasions that lie at its foundation. In turn the unrealistic expectations created on the part of some parents and ill-informed compromises on the part of others. O'Brien provides a perspective on the process of legislative review, and on what a properly resourced family law system system could achieve.

Life in Australia was simpler back in 1975, when the Family Law Act was drafted. As with many things in Australian culture, sport provided an accurate snapshot of the times. Football finals were uncomplicated. The top 4 teams played in semi finals, and the winners of the semi finals played in a grand final.

Then along came a chap called McIntyre. He was responsible for a number of finals systems, gradually increasing in complexity, culminating in his crowning glory – the McIntyre Final 8 system – introduced in 1994.

That system was as follows – In week one 1st played 8th in the 1st qualifying final, 2nd played 7th in the 2nd qualifying final, 3rd played 6th in the 3rd qualifying final and 4th played 5th in the 4th qualifying final. Naturally to ensure there could be no confusion the 3rd and 4th qualifying finals were often held before the 1st and 2nd qualifying finals. The first ranked team going into the qualifying finals would play in week 3 against the winner of the 1st semi-final in the 2nd preliminary final (unless of course they lost), in which case they played in the second week in the 2nd semi final against the 3rd highest ranked winner from the qualifying finals in the first week. The 2 lowest ranked losers in the qualifying finals were eliminated – so the teams entering the qualifying finals in 4th and 5th spot could lose and still play in week 2 in the semi finals provided the teams ranked 1st and 2nd both won – or they could be eliminated after one loss if the teams above them also lost – and so would end their match against each other (the 4th qualifying final, generally played before the first and second qualifying finals) not knowing whether or not they were eliminated (in the case of the loser) or playing in the semi-finals in week 2 or the preliminary finals in week 3 (in the case of the winner).

So, it's simple.

Not surprisingly that system was abandoned by the AFL in 2000. Perhaps equally predictably it is still used in rugby league.

Mr McIntyre was, of course, a lawyer. One could be forgiven for wondering whether he had any involvement in the drafting of the 2006 shared parental responsibility amendments.

In its first incarnation, the Family Law act 1975 told us that in considering what orders should be made regarding children the welfare of the child was the paramount consideration. It went on to say that where a child was 14 or older the court should not make an order contrary to the child's wishes unless there were special circumstances, and otherwise the court was simply to "make the order it thought proper".

It's worth mentioning that in 1975 the Family Law Act was 80 pages long, and took the radical approach of numbering its 123 sections sequentially – 1 to 123.

It is now just on 700 pages long and sequential numbering has been replaced by an alphabet soup.

In the amending bill of 1995 (coincidentally about the time Mr. McIntyre began to do his best work) various objects and principles designed to assist in the consideration of what was in the best interests of a child were introduced.

They were set out in s 60b (2) which said the underlying principles were that, unless contrary to the child's best interests:
(a) children have the right to know and be cared for by both their parents,
(b) children have a right of contact, on a regular basis, with both their parents and with other significant people
(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
(d) parents should agree about the future parenting of their children.

Then in 2006 with the introduction of the shared parental responsibility amendments we saw a new process, with a rebuttable presumption of shared parental responsibility as the starting point, and a number of not just factors but possible results which the court is mandated to consider.

As Dessau J observed in an ABC radio interview on 20 June 2006 –

> *"all I'd have to do is take into account that the best interests of the child are paramount; I'd have to take into account that there are primary considerations in working out best interests, and then additional considerations; and I'd only then have to look at the fact that I must consider risks of family violence. There's a presumption that it's in the child's best interests for shared parental responsibility, but in some cases, that won't apply, and in other cases it'll be rebutted, and if I do decide that there should be shared parental responsibility, then I'll consider whether there should be equal time, if that would be in the child's bests interests, and reasonably practicable. but if I don't think it should be equal time, then I have to consider whether it should be substantial and significant time, and that's set out for me too in the act, and as to whether it's reasonably practicable, (and then to go round the corner on my notes) after that I've got to remember too, that I have to have regard to the parenting plan. So it's simple".*

If all that sounds convoluted – that's because it is.

A law that cannot be understood by the people affected by it – or worse still lends itself to being actively misunderstood - is a bad law. That is particularly so when we are talking about a law which affects families and children.

There is in the community a significant level of misunderstanding of the actual changes to the law brought about by the 2006 reforms. A significant proportion of the community thinks that the reforms somehow mandate equal shared time with children following separation, or at the very least adopt that position as a rebuttable presumption.

The widespread nature of that misunderstanding has a number of effects. It can lead to agreements being reached between parties where one or both feel that they "have no choice" but to agree to equal time. It can lead to agreements based on a misapprehension that a failure to agree to equal time will lead to an adverse result in court. Logic suggests the level of misinformation must also impact on informal agreements which are reached between separating parents without them ever having "entered the system". That is of concern given the number of parents who appear to make care arrangements post separation without any form of professional advice.

While agreed arrangements are desirable, it is critical that agreement involves informed consent. The level of misinformation in the community about the actual effect of the 2006 reforms raises significant doubt as to the proportion of agreed arrangements which are made on the basis of such informed consent. That in turn raises concerns as to whether the arrangements, though agreed, are in fact delivering better outcomes for children.

There can simply be no doubt that in our community there are a significant number of families where the arrangements for the children are being made because of an active misunderstanding of the law, rather than because of a genuine view as to what is best for the children. Simplifying the legislation would go at least some way towards addressing that.

Then there is the impact on the courts. It needs to be understood that judges and magistrates have to apply the law. They cannot cut corners. If the legislation says that they must follow a particular decision making process in a sequence of steps then that is what they have to do. Bear in mind also that it is a fundamental principle that where parties are involved in court proceedings and a decision is made, the reasons for decision given by the judicial officer must be able to be clearly understood, and must demonstrate the thought process by which the decision was reached. That means that even in the simplest parenting case (if there is such a thing) the judicial officer has to write a careful, detailed and precise judgement demonstrating that he or she has gone through a number of steps in a systematic manner, and in the sequence mandated by the Act. That greatly increases the length of time it takes a judicial officer to write his or her judgement.

In circumstances where at the end of the day the court's mandate is to make the order which it considers to be in the best interests of the individual child, the pathway imposed by the legislation represents a triumph of process over reality. It adds nothing to the quality of the decision made for the individual child.

What it does do, however, is delay that decision. And of course any delay in one case has a ripple effect – while a judicial officer is wading through the task of writing a judgement on one matter, he or she is not hearing the next matter which is waiting for a decision. The family courts all around the country are drowning under their current workloads. The 2006 reforms have not reduced that workload one iota. The redistribution of resources away from the courts into other areas means that the courts are now managing the same workload with fewer resources – which in turn leads to delay.

There can be no question that the impact on children of a relationship breakdown is exacerbated by delay in resolution of parenting arrangements and for that matter financial arrangements. You need only refer to Jenn McIntosh's research - the more protracted the fight, the longer children are exposed to high levels of conflict, parental stress and uncertainty about the future, the worse their outcomes.

That will lead me on to some other points, but to summarise:

• the legislation is convoluted and the decision making process which it mandates is tortuous;
• because the genesis of the amendments included a philosophical and political push towards more "equality" between parents post separation, the legislation reflects compromises between competing philosophical positions, and language designed to placate some while offering concessions to others, rather than a clear articulation of a best practice;
• As a result, the legislation is widely misunderstood. That in turn leads to unrealistic expectations on the part of some parents and ill-informed compromises on the part of others;
• The convoluted nature of the legislation also contributes to a delay in decision making.

All of those factors contribute to poor outcomes for children.

So if we are to consider amendment to the legislation – what would that look like? There are a number of points to be made.

Firstly - the consideration of what parenting arrangements are in the best interests of an individual child in that child's individual circumstances should not be constrained by any presumptions (whether as to parental responsibility or as to time), nor should the process by which a judicial officer determines what is in that child's best interests be artificially constrained by a convoluted legislative pathway.

Rather, it should be acknowledged that individual circumstances require individual approaches, and that, simply put, "every case is different".

The legislation should be simplified so that the task of the judicial officer, while not simple, is at least expressed simply – to make the parenting orders which will best advance the interests of the individual child. There is a lot to be said for revisiting the 1975 Act.

If it is considered necessary to inform that process by reference to guidelines or principles, then those should be in the nature articulated in Professor Chisholm's family courts violence review of 27 November last year, rather than any prescriptive set of requirements.

In that report, Prof Chisholm sets out at recommendation 3.4 some suggested amendments to section 60CC – abandoning the presumptions, abandoning the concepts of primary and other considerations, and setting out in his typically concise and elegant way a list of matters the court should take into account in considering what parenting orders to make. They are consistent with the good bits of the current Act, and as he put it "are more clearly based on promoting the child's interests rather than accommodating notions of parental rights."

That leads me neatly onto another matter I think needs to be ventilated - the unspoken agenda of parental rights.

It is critical that the present review of the 2006 reforms continue to be informed by empirical research rather than philosophical, political or personal agendas. The government is to be applauded for facilitating the evaluation by the Australian Institute of Family Studies.

The 2006 reforms themselves were not, however, borne of empirical research. Rather, they were driven by:

• An entirely appropriate desire to support parents reaching agreed, rather than imposed, arrangements for their children.
• An equally appropriate aim to keep separating parents out of court where possible; and
• A philosophical and political push towards more "equality" between parents post separation.

It would appear to be universally accepted that, in considering parenting arrangements to be made post separation, the paramount consideration must continue to be the best interests of the children.

One of the difficulties with that, however, is this – the legislation goes much further than making the interests of the children paramount. It expressly recognises "rights" of the children, but nowhere is there any acknowledgment of any rights on the part of parents. Rather, the emphasis is on parental "responsibility". Philosophically, that may or may not be sound. It is difficult, however, to explain to a separated parent that he or she in fact has no legal right recognised in the Act to spend time with the children, or to make decisions regarding the children, but that conversely a parent who chooses not to exercise his or her parental responsibility can rarely in practical terms be required to do so.

By way of simple example, the law recognises the right of the child to grow up knowing and being cared for by both parents. The law is incapable, however, of forcing a reluctant parent to spend time with his or her child so that the child might exercise that right. That inability is rationalised by the view that it is contrary to the child's best interests for a reluctant parent to be forced to spend time with that child – but that begs the question.

Similarly, the courts frequently deal with applications seeking to restrain a parent with whom the children primarily live from moving away from the other parent, thereby restricting the second parent's time with the children. But what of the parent who sees his or her children regularly, and then decides to move away from them? Again, the child's "right" to spend time with that parent is unenforceable against that parent.

My point is this – the legislation as it stands does not reflect the reality of those who access it. Parents do not come to my office (nor, I suspect, to yours) saying "I need your help as my kids' rights are being infringed and they are being denied the opportunity to have me provide meaningful input into their lives, and to grow up knowing and being cared for by both parents" . They say – I want to see my kids. Or, I want my kids to live with me. Or, I have a right to have a say in my kid's lives.

From many parents' perspective it <u>is</u> about <u>their</u> rights – even though the vast majority of them will then agree with the proposition that any decision should be made by reference to what is best for the children.

In my view a major reason for the convoluted state of Part 7 of the Act is that the amendments tried to address the perceived need of many in the community for recognition of their rights as parents, but tried to address that without appearing to do so overtly. As a result we have a piece of legislation which is hopelessly compromised.

If (and it is a significant "if") the social and political imperatives which to a significant degree drove the 2006 reforms are still considered to need recognition, that could be more transparently and properly achieved by considering a recognition in the legislation of a number of rights of parents, while making it clear that in each case those rights will always where necessary be secondary to the best interests of the child. That would not in any way be a reversion to the dark ages of treating children as chattels – as there would be no departure from the core principle that their best interests are paramount. It would, however, put the legislation more in step with what most people in the community would consider to be reality, if not legislative reality – that subject only to what is best for the children, parents have some rights.

I appreciate that would open up a whole new debate. But it would be a more honest debate, and lead to a more transparent piece of legislation, which would be free from the constraints of having to be

drafted with an eye to subtle appeasement. That in turn would give us half a chance of people actually understanding the law.

We have talked a lot today about “challenges” – but I prefer to regard the state of the legislation as an opportunity. It’s a little like renovating an old house – while you remain determined to try to fix things by tacking on extra bits, you face nothing but challenges – but once you accept that you need to demolish at least part of the structure, all sorts of opportunities for improvement open up.

Finally - back to delay. Community based mediators, Family Relationship Centres and family dispute resolution practitioners do a good job. Like the courts, however, they are under resourced, which leads to delay. By way of example only, the current waiting time for a Family Relationships Centre near me is 10 weeks to assessment and a further 6 weeks to joint FDR.

Bear in mind that delay is bad, and that parties who need to access the courts cannot do so until they have the necessary certificate from an FDR provider.

Then, of course, the lack of resourcing of the courts creates further delay even once you have a certificate. If you then roll into the equation less adversarial processes within the court, which are of themselves resource intensive, you build in yet a further level of delay.

What is the point of all that? Simply this. We must resist the temptation to add still further layers to the process unless every layer of the process is sufficiently resourced to avoid process driven delay. The pathways are already convoluted enough.

We must find ways in which cases which need determination (because agreement can't be reached) are able to access that determination quickly and efficiently. As always, that comes back to resources, and while that is not really the topic of this session, it underpins everything we are talking about at this conference. Over and above resource issues, it does come back to what is the topic of this session – whether or not the system can be made simple.

Family law problems will never be simple. Anyone who suggests that they are, and that accordingly the system itself can be made simplistic, or that we don’t need judicial officers of the highest possible quality informed by the best possible social science to make decisions about kid’s lives in difficult cases, simply doesn’t get it.

That doesn’t mean that the law, which applies to the resolution of those problems, cannot be more simply expressed, nor does it mean that the system cannot be made more simple. At the very least, we can strive to make sure that the system itself does not make families’ problems more complicated.

Of course, because one size does not fit all, and different families need access to different services and resources, the pathway to resolution will always differ between different families. What a properly resourced system could do, however, is:

• identify those families for whom an agreed resolution is likely to be possible at an early stage, and give them the support they need to achieve that in a timely way, and
• identify at an early stage those families who need to access a decision maker, and give them timely access to that decision maker.

That, after all, is what the government said in 2006 it was hoping to achieve.

FAMILY COURT OF AUSTRALIA

Appendix 8

CHAMBERS OF THE HONOURABLE DIANA BRYANT AO QC
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22 February 2013

Committee Secretary
Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

This letter constitutes my submission to the Senate Community Affairs Committee's ("the Committee") Inquiry into the Involuntary or Coerced Sterilisation of People with Disabilities in Australia ("the inquiry").

I make this submission in my role as Chief Justice of the Family Court of Australia ("the Court"), in consultation with the Court's Law Reform Committee. I wish to emphasise that the views contained herein are my own and may not necessarily reflect the views of all of the other members of the Court.

I understand that the Senate referred the inquiry to the Committee on 20 September 2012. Unfortunately however, as I was not informed that the matter of involuntary sterilisation was before the Committee, the existence of the inquiry only recently came to my attention. This occurred as a result of media reporting around the comments made by Ms Carolyn Frohmader, Executive Director, Women with Disabilities Australia, about a Family Court decision, *Re: Angela* (2010) 43 Fam LR 98, which involved an application for sterilisation of an 11 year old girl with a severe medical condition. The judge in that case granted the application. Ms Frohmader was reported as saying that she found the case "very problematic for a whole range of reasons."[1]

[1] Vince Chadwick, ' Sterilisation the First Option for the Disabled', *The Age*, Melbourne, 2 January 2013 http://www.theage.com.au/nation al/ ste1i lisation-first-option -for-the-disabled-2013010l -2c48m.html (accessed 8 February 2013).

Upon undertaking further enquiries, I learned that the Committee held a public hearing on 11 December 2012 which was attended by Ms Frohmader, Ms Colleen Pearce and Mr John Chesterman from the Office of the Public Advocate Victoria, Associate Professor Sonia Grover from the Royal Children's Hospital, Melbourne, and Mr Jim Simpson from the New South Wales Council for Intellectual Disability. I have reviewed the transcript of that hearing and it is apparent that Ms Frohmader and other witnesses are critical of that decision and believe it to be misconceived.

You would appreciate that it is not appropriate for me to comment on individual cases. Nevertheless, it seems to me that the discussion that occurred at the public hearing was in many respects ill-informed insofar as it pertained to the process of hearing and determining applications to sterilise children with disabilities. I therefore thought it would be of assistance for me to briefly outline the jurisdiction exercised by the Court with respect to special medical procedure applications (including but not limited to sterilisation of minors), the legal test to be applied, and the process for hearing and determining such applications.

I note too from the transcript that certain witnesses have queried whether judges are appropriately or best qualified to preside over special medical procedure applications (see for example at page 2 of the transcript). Some witnesses have proposed that the jurisdiction instead be exercised by a multi-member tribunal. That is of course a matter of policy and one upon which it would be inappropriate for me to trespass, as it is the province of government. I do however wish to speak briefly to the issue of the competence and suitability of the Court's judges to deal with special medical procedure applications.

I would also like to respond to assertions again made at the public hearing that the Court operates in a way that is unduly formal and adversarial, which is inimical to the interests of parties and particularly young people who are the subject of special medical procedure applications. As the Head of Jurisdiction I am naturally discomforted that the Court is perceived in such a way and I wish to point out various features of the Court' s case management system that belie the truth of those assertions.

I understand that the Committee's terms of reference were expanded on 7 February 2013 to include reference to "intersex people". I will make some concluding comments about the sterilisation of people with disorders of sexual development, which in my view differs materially from the sterilisation of people with intellectual disabilities. The most significant point of departure concerns the concept of voluntariness, which in tum invokes consideration of the views of the child and the weight to be accorded to those views.

Background

Non-therapeutic sterilisation of minors is one of a species of cases known as 'special medical procedures'. They are so described because they concern medical treatment that is both invasive and irreversible, and thus falls outside the ambit of the type of medical treatment to which parents can consent on their children's behalf. As the High Court in *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 *('Marion's Case')* observed, there is no clear dividing line between those cases that require court authorisation and those that do not. However, it is clear from the High Court's decision that non-therapeutic sterilisation of children and young people under the age of 18 requires court authorisation. The High Court said (at 249):

> *There are, in our opinion, features of a sterilisation procedure or, more accurately, factors involved in a decision to authorise sterilisation of another person, which indicate that, in order to ensure the best protection of a child, such decision should not come within the ordinary scope of parental power to consent to medical treatment. Court authorisation is necessary and is, in essence, a procedural safeguard.*

As compared with applications concerning children generally, special medical procedure applications are infrequent. Applications to sterilise children and young people with disabilities, and particularly applications to perform hysterectomies, are increasingly rare. In her article entitled 'Making sense of the Family Court's decisions on the non-therapeutic sterilisation of girls with intellectual disability', Linda Steele states:

> *There are 11 publicly available decisions of the court where the welfare jurisdiction has been exercised in relation to sterilisation. These 11 decisions were made during 1988-1995 and the writer is not aware of any decisions of the Family Court that have been made since 1995.*[2]

Although I appreciate it is a somewhat crude measure, I caused a search of the Court's internal judgments database to be undertaken. That search revealed that there are 27 judgments in respect of applications to perform hysterectomies on young people with disabilities. 22 of these were delivered in the 1990s. Since the year 2000, reasons have been delivered in only two such cases; one in 2004 and one in 2010, that being the decision in *Re: Angela* (supra).

Of course, there are other medical procedures that cause children and young people to be rendered infertile. For example, in two instances the Court granted permission for gonadectomies to be performed on children *(Re: Lesley (Special Medical Procedure)* [2008] FamCA 1226 and *Re: Sean and Russell (Special Medical Procedures)* (2010) 44 Fam LR 210). Although these were technically sterilisations, the applications were brought in whole or in part because the gonads were at significant risk of becoming diseased. As far as the decision in *Re: Sean and Russell* is concerned, the trial judge

[2] (2008) 22 *Australian Journal of Family Law* l, p. 3

found that in the circumstances of the case the parents in fact had the capacity to consent themselves to the procedure being performed and that court authorisation was not required (although the trial judge went on to find that the Court had jurisdiction to make the orders sought). *Re: Lesley* involved a four year old child who suffered from a very rare disorder of sexual development. She had been raised as and identified as female but nevertheless had bilateral gonads in the labial area, which presented the risk of virilisation during puberty. In addition, given the location of the gonads, there was a heightened risk of their becoming cancerous (26%), which the trial judge found to be a "further important factor."

Insofar as it is possible to detect trends in such a small number of special medical procedure cases, it appears to me that there has been a significant decline in the number of applications for sterilisations since the 1990s. Concomitantly, it would seem that the most special medical procedure applications now concern children and young people who have been diagnosed with gender identity disorder/dysphoria. Indeed, I note that judgment in such a matter was delivered as recently as 14 February 2013 *(Re: Jodie* [2013] FamCA 62).

Jurisdiction and relevant law

Jurisdiction to make orders in relation to non-therapeutic sterilisation of children, and to make orders with respect to special medical procedure applications generally, is found in section 67ZC of the *Family Law Act 1975* (Cth) ("the Act"). Sub section 67ZC(l) provides that courts exercising jurisdiction pursuant to Part VII of the Act have, in addition to any other jurisdiction courts have under Part VII, jurisdiction to make orders relating to the welfare of children. This is colloquially referred to as the 'welfare jurisdiction' and is the equivalent of the parens patriae jurisdiction exercised by State Supreme Courts. As the High Court in *Marion's Case* explained, it is by virtue of this section that the Court can make orders in respect of the non-therapeutic sterilisation of mmors.

Sub-section 67ZC(2) states that in deciding whether to make an order pursuant to the welfare power, the Court must regard the best interests of the child as the paramount consideration. The matters the Court must have regard to in determining what is in the best interests of the child are contained in sub-sections 60CC(2) (primary considerations) and 60CC(3) (additional considerations). These relevantly include the capacity of each parent to provide for the child, parental attitudes and responsibility, and "any other relevant fact or circumstance". It is important to remember that although the best interests of the child is the paramount consideration, it is not the sole determinant. It is well established at law that all relevant facts and circumstances in each individual case should be taken into account in arriving at an outcome that is in the child's best interests. In some sterilisation cases, the appreciable easing of the burden on the parents as primary carers has been found to be a relevant factor (see for example *Re: Katie* (1996) FLC 92- 659).

I am aware that one witness, Professor Grover, submitted the following in evidence:

> *The question really is: is this a procedure you would do on a non-disabled person? That is the question when we are dealing with these sorts of procedures, not whether it is therapeutic or not therapeutic. We should not be doing a sterilising procedure if we would not be doing it in somebody who did not have a disability.*

As I have explained, that is not the applicable legal test. The test is whether or not it would be in the best interests of the child to have the procedure performed, taking into account all relevant facts and circumstances. Professor Grover is effectively advancing what has been described as the "but for" test. That test has been rejected by the Full Court of the Family Court. In *P & P & Legal Aid Commission of New South Wales & Human Rights and Equal Opportunity Commission* (1995) FLC 92-615 the Full Court said the following:

> *We disagree with the concept of such a test in these cases. While it may be superficially attractive to impose this sort of a test upon the basis that it is non discriminatory and equates the intellectually handicapped person with the non intellectually handicapped, we think that upon analysis it has the opposite effect.*
>
> *To apply it is, in our view, conceptually incorrect. We consider it is both unrealistic and contrary to the intention of the majority judgment in Marion's case to deal with a particular aspect of the child's needs and capacities as though it existed in isolation from other needs and capacities.*
>
> *We are unconvinced that there is any relevant conclusion to_ be drawn with regard to the best interests of a particular child by an artificial exercise which compartmentalises a finding of fact about an immutable characteristic and then hypothesises that it were not so. [The child's} intellectual disability cannot be isolated as a factor and then "subtracted"from the constellation of facts about her, any more than one can simply imagine that she no longer suffers from epilepsy, or that she is infertile, or that she is not a female. Realistically, the effect of each of these factors is interactive and cumulative and it is their combined presence in the child which has led to the application before the Court.*

As far as special medical procedure applications specifically are concerned, Nicholson CJ in *Re Marion (No. 2)* (1994) FLC 92-448 proposed a number of discrete factors to be considered when the Court is faced with an application of that type. They are:

(i) the particular condition of the child which requires the procedure or treatment;

(ii) the nature of the procedure or treatment proposed;

(iii) the reasons for which it is proposed that the procedure or treatment be carried out;

(iv) the alternative courses of treatment that are available in relation to that condition;

(v) the desirability of and effect of authorising the procedure for treatment proposed rather than available alternatives;

(vi) the physical effects on the child and the psychological and social implications for the child of:
(a) authorising the proposed procedure or treatment
(b) not authorising the proposed procedure or treatment

(vii) the nature and degree of any risk to the child of:
(a) authorising the proposed procedure or treatment
(b) not authorising the proposed procedure or treatment

(viii) the views (if any) expressed by:
(a) the guardian(s) of the child;
(b) a person who is entitled to the custody of the child;
(c) person who is responsible for the daily care and control of the child;
(d) the child;
to the proposed procedure or treatment and to any alternative procedure or treatment.

In addition to the relevant provisions of the Act, including Division 12A and sections 67ZC and 60CC, special medical procedure applications are also governed by the *Family Law Rules 2004* (Cth) ("the Rules"); in particular Division 4.2.3. The Rules govern who may make a special medical procedure application, service of the application, and fixing of the hearing date, which is required to be as soon as possible after the date of filing and if practicable, within 14 days. Relevantly, rule 4.09 concerns expert evidence. Sub-rule 4.09(1) states that if a special medical procedure application is filed, evidence must be given to satisfy the court that the proposed medical procedure is in the best interests of the child. Sub-rule 4.09(2) specifies that the evidence must include evidence from a medical, psychological or other relevant expert that establishes a number of matters.

These include:

- the exact nature and purpose of the proposed procedure;
- the particular condition of the child for which the procedure is required;
- the likely long-term physical, social and psychological effects on the child if the procedure is carried out and if it is not carried out;
- the nature and degree of any risk to the child from the procedure;
- if an alternative and less invasive treatment is available, the reason the procedure is recommended instead of the alternative treatment;

- if the child is incapable of making an informed decision about the procedure, that the child:
    - is currently incapable of making an informed decision;
    - is unlikely to develop sufficiently to be able to make an informed decision within the time in which the procedure should be carried out, or within the foreseeable future;
- whether the child's parents or carer agree to the procedure.

Practice Direction No. 9 of 2004 took effect on the same day that the Rules commenced (29 March 2004) and sets out the practice and procedure related to the conduct of special medical procedure applications for children living in Victoria and Queensland. The guidelines and protocols contained in the Practice Direction aim to, inter alia:

- promote positive outcomes for children and young persons;
- promote the care, welfare and development of children and young persons;
- ensure consistent and timely management of applications for a medical procedure for a child; and
- ensure that a Court hearing is of 'last resort' after all other options have been tested or considered and failed to or been assessed as unable to produce a satisfactory outcome.

Special medical procedure applications are sensitive and often involve complex ethical issues around which experts may disagree. I am familiar with the judgments delivered by Family Court judges in respect of special medical procedure applications and I have no hesitation in recording that judges treat these cases with the utmost sensitivity and gravity, and according to their obligations as judges appointed under Chapter III of the *Constitution.* This is not only because of the nature of the applications themselves and the consequences that flow from deciding to make or not make a certain order. It is also because there is usually no contradictor to the application and judges must tread particularly carefully in such circumstances.

Qualifications

As an adjunct to the above, I wish to now tum to the qualifications, skills and experience of Family Court judges in the context of their suitability to determine special medical procedure applications.

An issue that was raised during the public hearing was whether judges are the best qualified people to make decisions about sterilisation of children and young people with disabilities. Whether jurisdiction to authorise sterilisation of children should continue to be vested in Family Court and State Supreme Court judges or whether it should be exercised by members of a Tribunal is a matter for government, with due regard to

Constitutional limitations. To the extent however that the Court retains jurisdiction pursuant to section 67ZC, Committee members may wish to note that sub-section 22(2) of the Act requires that a person shall only be appointed as a judge of that court if he or she has been a judge of another court or enrolled as a legal practitioner for not less than five years and specifically that he or she, by reason of training, experience and personality, is suitable to deal with matters of family law. That of course includes matters arising under the 'welfare jurisdiction'.

Appointees to the bench have, without exception, extensive experience in practising family law and have long negotiated the difficulties and complexities that attend this particular jurisdiction. It is an area of law which demands consideration of a multitude of factors, the attribution of weight to those factors, and the judicious exercise of discretion.

Family law is by its nature inter-sectoral and judges are experienced in dealing with evidence from a variety of disciplines, including medical evidence. Such evidence assumes particular importance in special medical procedure applications. In the case of *Re: Angela* for example, the trial judge had before him evidence from Dr T, an obstetrician and gynaecologist, whose expertise was found to be "beyond question", evidence of Dr C, from whom Dr T obtained a second opinion, and evidence from a third doctor, Dr M, a consultant paediatrician. All medical experts supported the application to have a hysterectomy performed. As recorded by him, the trial judge also had the benefit of the mother's evidence, submissions from the mother's solicitor and those of counsel appearing on behalf of the Director General of the Department of Communities.

As I will discuss shortly, judges are able to make appropriate and necessary directions as to the evidence to be filed. They are empowered to invite the Attorney-General and a state welfare officer to intervene in the proceedings and can grant an application for a non-party to intervene. As to the latter, the Australian Human Rights Commission and/or the Office of the Public Advocate or equivalent have often been granted permission to intervene when a sterilisation is being proposed (see for example *P & P & Legal Aid Commission of New South Wales & Human Rights and Equal Opportunity Commission* (supra)). Where appropriate, judges may also be assisted by an independent children's lawyer and by amicus curiae (a 'friend of the court'). Therefore, it is my personal view that Family Court judges are optimally placed to make informed and responsible decisions about individual special medical procedure applications and to arrive at a decision that is in the best interests of the child in all the circumstances.

Decision making process

In this section I will respond to criticisms of the Court made at the public hearing as being "very... adversarial", which I trust will build upon what I have already said about the use of expert evidence. I also intend to discuss the appointment of independent children's lawyers. I do so in order to correct the misapprehension that at least one witness was labouring under that their appointment is "part of special medical procedures

legislation" and that the trial judge in *Re: Angela* should be "rapped over the knuckles" for not appointing an independent children's lawyer. I say that meaning no disrespect to the witnesses, who is not a lawyer and who does not purport to be, but as a matter of record.

In 2006, the Act was substantially amended. This included the insertion of Division 12A, which contains principles for the conduct of children's cases. It provides that all children's cases (including special medical procedure applications) are required to be conducted without undue delay and with as little formality, and legal technicality and form, as possible. Judges are required to consider the needs of the child concerned and the impact that the conduct of the proceedings will have on the child in determining the conduct of the proceedings. Further, judges are required to actively direct, control and manage the conduct of the proceedings.

Division 12A contains specific provisions relating to evidence, which detail the Court's duties and powers. These include:

- giving directions and making orders about who is to give evidence;
- giving directions and making orders about expert evidence, including:
    - the matters in relation to which the expert is to provide evidence
    - the number of experts who may provide evidence in relation to a matter
    - how an expert is to provide the expert's evidence
    - asking questions of, and seeking evidence or the production of documents or other things from parties, witnesses and experts on matters relevant to the proceedings
- giving directions and making orders about how particular evidence is to be given.

Presumptively, many of the rules of evidence, such as the rule against hearsay, do not apply in children's proceedings unless the Court finds there are exceptional circumstances that warrant their application. The Court is able to give such weight as it thinks fit to evidence admitted as a product of the rules of evidence not being applied.

The Court gives effect to the principles for conducting child-related proceedings contained in Division 12A through the 'less adversarial trial'. The less adversarial trial is more closely directed by the judge than a traditional trial and is designed to encourage the parties to focus on arrangements that are in the best interests of the children. A less adversarial trial is focused on the children and their future, flexible to meet the needs of particular situations, expected to cost less and reduce the time spent in court, and is less formal and less adversarial than a traditional trial.

It may be instructive for Committee members to have regard to the former Chief Justice Nicholson's description of the hearing process his Honour instituted when dealing with a special medical procedure application concerning a young person who had been

diagnosed with gender identity dysphoria and who, through his carer, was seeking permission for the administration of hormone therapy and testosterone *(Re: Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297). In his judgment, Nicholson CJ recorded the following:

> *41 The evidence in. these proceedings was adduced though a hearing process that differed in a number of respects from the traditional form of trial of children's issues in this Court. I think it is fair to say that the court record indicates that the legal representatives and witnesses shared my view that the procedural modifications to the hearing process enhanced the depth and richness of the evidence, and thereby better served the aim of an outcome which will be in Alex's best interests. I consider that a format such as this is usually to be preferred, at least in relation to special medical procedure cases.*
>
> *42 The hearing process was conventional in so far as the evidence in chief was mostly in affidavit form. At the request of the parties, I ordered that all documents including affidavits and exhibits in these proceedings be available to the parties and that the parties be at liberty to provide such material to their expert witnesses.*
>
> *43 The hearing process was, however , different in the following major ways:*
>
> - *The hearing was conducted in an inquisitorial rather than adversarial format. In substance, I indicated the type of evidence that I required and what further evidence was needed, after discussions with the parties' legal representatives and some of the witnesses;*
> - *The hearing was conducted in a private conference room setting around a table using portable recording equipment. Official transcription services were used to ensure a formal record;*
> - *I did not require the aunt and the school principals to give their evidence in chief by affidavit and took such evidence viva voce;*
> - *It was agreed that the hearing would not necessarily follow the traditional course of each party having a single sequential opportunity to cross-examine witnesses one by one but rather that the questioning of witnesses may alternate between the legal representatives, other witnesses and myself as evidence was proffered. Thus, the hearing often took the form of an orderly discussion between witnesses and legal representatives (including, sometimes, instructing solicitors) and myself;*
> - *A distinct benefit of the discussion format from my perspective was hearing witnesses engage in a dialogue in respect of each other's evidence. For example, observations made by Alex's primary school principal were commented upon by his secondary school principal and, on another occasion, there was a very illuminating discussion among medical experts concerning*

the recommended nature and timing of hormonal treatment in which each commented upon the evidence given by others during the course of a telephone link up;

- *The nature of the proceedings lent themselves to more than one hearing date rather than a single continuous fixture. This enabled parties to provide further expert material and for witnesses to consider the evidence of other witnesses and to respond in a considered way to material points of difference. The time taken in hearings was considerably less than would have been the case if a traditional format had been employed;*
- *I was informed that Alex wished to meet with me in private and without objection, indeed with the encouragement of the parties, I did so;*
- *So far as the discussion with Alex was concerned, he requested that aspects of it remain confidential. I have honoured that request and insofar as I have acted upon any of the contents of that discussion, I have only done so after referring relevant aspects of it to the witnesses; and*
- *Given the intricacies of the evidence, I arranged for the production of transcripts following each hearing session. A copy was provided to the parties through my chambers as soon as it became available.*

I adopted the same process in *Re: Alex* (2009) 42 Fam LR 645, which involved an application on Alex's behalf to have bilateral mastectomies performed.

In my view the Court is alert and responsive to the needs of people involved in special medical procedure applications, and particularly affected children. Accordingly, I must reject assertions that the Court operates with undue formality and maintains an adversarial model for hearing and determining such cases.

I also wish to explain for the Committee's benefit how independent children's lawyers are appointed. Such appointments do not occur as of right or by agreement between the parties. Sub-section 68L(l) of the Act states that the court may order that the child's interest in the proceedings be independently represented by a lawyer if it appears to the court that the child's interests ought to be independently represented.

Section 68LA of the Act defines the role of the independent children's lawyer. Principally, an independent lawyer is required to form an independent view, based on the evidence available to him or her, of what is in the best interests of the child, and must then act in what the independent children's lawyer believes to be in the child's best interests in relation to the proceedings.

Although there are some types of cases in which one would expect an independent children's lawyer to be appointed- for example, cases involving allegations of sexual or serious physical abuse of children - the decision as to whether to appoint an independent children's lawyer is made on a case by case basis. There is no 'special medical procedures legislation' that compels the appointment of an independent children's lawyer when such proceedings have been initiated.

Further, independent children's lawyers are funded by the State or Territory legal aid agencies and those agencies are operating within severe budgetary constraints. It would be a profligate use of a valuable resource to appoint an independent children's lawyer where that appointment would serve no purpose or would otherwise not assist the court in deciding what orders would be in a child's best interests. In special medical procedure applications, it may be the case that there is already sufficient evidence before the Court, or that another party (such as the Australian Human Rights Commission, state child welfare agency or public advocate) is serving as contradictor, so that the appointment of an independent children's lawyer would be superfluous. In addition to the decision in *Re: Angela* at paragraphs 36 to 42, where the trial judge clearly explains why he decided not to make an appointment, I also refer the Committee to the decision of *Re: Sally* [2010] FamCA 237, where a similar conclusion was reached.

I also wish to point out that a decision not to appoint an independent children's lawyer is one that is capable of being appealed to the Full Court of the Family Court by any of the parties to the proceedings.

"Jntersex people"

I note the extension of the Committee's terms of reference to include "intersex people" and bring to the Committee's attention three Family Court decisions concerning applications for permission to perform surgery on young people born with disorders of sexual development. They are, in date order:

In the Matter of the Welfare of a child A (1993) FLC 92-402 (per Mushin J)

Re: Lesley [2008] FamCA 1226 (per Barry J)

Re: Sally (supra) (per Murphy J)

In all three cases, a by-product of the surgery was to render the child infertile (although in *Re: Lesley* the trial judge found that the child was already incapable of having children). The cases involved children and young people aged respectively 14 years, 4 years and 14.5 years.

I have discussed *Re: Lesley* earlier in this submission. In that case it was agreed that the child in question was not capable of consenting to the procedure, given that she was only four years old. It is apparent from the decisions involving teenagers however that their views assume considerable significance as compared with matters involving young

children and children and young people with intellectual disabilities (the "views of the child" being a relevant matter as part of the court's 'best interests' inquiry). The concept of 'involuntary' or 'coerced' sterilisation thus sits uncomfortably with these cases as, although neither young person was found to be competent to consent to the procedure themselves, in both instances the young people wanted the surgery to be performed, despite being aware that one of its effects would be to render them incapable of bearing children.

In *Child A,* the trial judge found that A had "an overwhelming expectation and desire to have the operations referred to so that he may assume what he regards as being his right and expectation, that is to become a male in all possible respects." In *Re: Sally*, the trial judge made an order permitting Sally to file an affidavit in which she deposed to her thoughts about the procedure and explained why she wanted to have it performed. The trial judge found that:

> *...[t]here are signs within the material ...that Sally is a mature young woman who has carefully and thoughtfully considered the issues relevant to this application in consultation with her parents and her medical practitioners. She would appear to understand the reasons why the procedure is recommended and also appears to understand that there might be risks associated with it, in both the physical and psychological sense.*

I appreciate that the Committee may be contemplating scenarios whereby permission is sought to perform surgery on a young child to give them the appearance of one sex or another, without the child being of sufficient age and maturity to express a view as to the procedure. I am not aware though of judgment having been delivered in any such case before the Family Court.

I trust the foregoing has been of assistance. I would be pleased to elaborate on any aspect of my submission, although I reiterate that I cannot discuss individual cases, beyond explaining published reasons for judgment where it appears to me that the decision has been misunderstood. Should you wish to contact me, you may do so through my Executive Assistant, Ms Helen Grist, on (03) 8600 4355 or by email helen.grist@familycourt.gov.au. Alternatively, you are welcome to contact my Senior Legal Research Advisor, Ms Kristen Murray, who assisted in the preparation of this submission. Ms Murray can be contacted on (03) 8600 4351 or by email kristen.murray@familycourt.gov.au.

Yours sincerely

Diana Bryant AO
Chief Justice

Appendix 9

Term of Reference 2: the making of consent orders where there are allegations or findings of family violence, having regard to the legislative and regulatory frameworks, and whether these frameworks can be improved to better support the safety of family members, as well as other arrangements which may be put in place as alternative or complementary measures

1. The Rules provide for applications for consent orders to be made in two ways. Where there are current proceedings before the Court, consent orders can be made on an oral application or by lodging a draft consent order.[20] Where there are no current proceedings, consent orders may be sought by lodging an 'Application for Consent Orders'.[21]

2. Where consent orders are sought in a current proceeding each party must advise the Court whether a child or a party to the proceedings has been or is at risk of being subjected or exposed to family violence, and how the consent orders deal with family violence issues.[22] The Court retains discretion about whether or not to make the consent orders as sought, or to make other orders. This discretion will be exercised considering the paramount consideration in parenting proceedings—the best interests of the child[23]—and the need to protect the child from abuse, neglect or family violence.[24] For financial or property proceedings, the Court will not make an order unless it is satisfied in all the circumstances that the orders are just and equitable.[25]

3. The requirements of making a parenting order that is in the best interests of the child or a financial order that is just and equitable apply equally where consent orders are sought by an initiating Application for Consent Orders. These applications are usually considered by a registrar of the Court. The registrar can refer the matter to a judge where appropriate, including to deal with family violence issues. Internal guidelines for registrars draw attention to the decision in *T & N*[26]where Moore J declined to make consent orders that did not take a history of family violence into account. Registrars are also guided by the Best Practice Principles, which include relevant considerations for deciding whether or not to make a consent order where there is an allegation of family violence. These considerations include:

    - the seriousness of the allegations;
    - the extent of the involvement of the child in any incidents of violence or abuse;
    - how the orders address the violence and abuse issues;

[20] *Family Law rules 2004* sub-r 10.15(1)(a).
[21] Ibid sub-r 10.15(1)(b).
[22] Ibid r 10.15A.
[23] *Family Law Act 1975* s 60CA.
[24] Ibid s 60CC.
[25] Ibid sub-s 79(2).
[26] (2003) FLC 93-172

- where provision is made for supervision, the matters referred to in Part F (the final hearing) of the Best Practice Principles;
- whether there is any reason to believe the orders would be used to continue to control or maintain contact with the parent with whom the child lives;
- whether there are other issues such as mental illness, drug and alcohol abuse or serious parental incapacity which would present a risk to the child;
- whether the parties have had legal advice;
- whether the Court can be satisfied that the parties have agreed to the orders without pressure;
- whether the party who alleged the violence or abuse is genuinely satisfied the orders do not present an unacceptable risk to the child or any other person; and
- if an independent children's lawyer has been appointed, whether he or she agrees to the consent orders.

4. The making of consent orders can be of considerable benefit to the parties and children, as it saves costs and the need for parties to appear in court. The Court is also aware that at times consent orders may be agreed by a party for reasons other than the best interests of the child, for example fear of further violence or lack of financial resources to litigate.[13] This is addressed in the process for making consent orders set out in the legislation and in the above considerations contained in the Best Practice Principles.

5. Applications for consent orders comprise approximately two-thirds of filings in the Family Court.[14] As such the ability to deal with these efficiently bears significantly on the resources of the Court. Any legislative changes or alternative measures to address family violence in consent order applications may have a significant impact on the workload of the Court. Any such measures would need to include the provision of sufficient funding for their implementation.

Appendix 10

Clayton v Clayton [2015] NZFLR 233

Discretionary trusts have long been a tool for circumventing the equal sharing regime in New Zealand and, unsurprisingly, they have thus been an enormous source of family law litigation in that country.[27] The powers in the PRA to deal with trusts that deprive a spouse or partner of their relationship property entitlement have been called "wholly inadequate".[28] *Clayton* is what is colloquially known as a "trust busting" case.[29]

The husband and wife separated in 2006 after 17 years of marriage. The husband was a successful businessman. During the marriage, most of the parties' property was owned solely by entities associated with the husband. During the marriage, the husband settled a number of discretionary trusts; after separation, he settled further discretionary trusts.

One of the trusts settled during the marriage was known as the Vaughan Road Property Trust. The husband was the trustee and he, the wife and their two children were "Discretionary Beneficiaries". The children were also the "Final Beneficiaries" of the trust. The husband was nominated in the trust deed as the "Principal Family Member" and in that capacity he held the power to appoint and remove any person as a Discretionary Beneficiary. He also held the power to appoint and remove trustees. The trust deed gave wide powers to the trustees and permitted them to act in spite of a potential conflict between the trustees' interests and those of a trust beneficiary.

During the property proceedings, the wife argued that the trust assets were relationship property subject to the equal sharing regime in the PRA.

The Family Court held at first instance that the trust was "illusory" on the basis that the wide powers granted to trustees under the trust deed negated the ability of the beneficiaries to ever call the trustees to account; further, the manner in which the trust was administered indicated that it was simply a "convenient structure" for commercial purposes which carried few of the "hallmarks of a trust". The Family Court thus regarded the property in the trust as relationship property which was available for sharing in accordance with the PRA.

[27] See generally New Zealand Law Commission, 'Some Issues with the Use of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper' (Issues Paper No 20, December 2010)
[28] Nicola Peart, Mark Henaghan and Greg Kelly, 'Trusts and Relationship Property in New Zealand' (2011) 17(9) *Trusts & Trustees* 866, 871
[29] See, eg, Jeremy Bell-Connell, '*Clayton v Clayton*: Trust Busting' (8 June 2015) *Wynn Williams Lawyers* <http://www.wynnwilliams.co.nz/Publications/Articles/Clayton-v-Clayton-Trust-Building?feed=articlesrss&utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original>; Debbie Dunbar, 'Why Trusts May Not Be as Watertight as Previously Thought … *Clayton v Clayton*' (16 June 2015) *Rainey Collins Lawyers* <http://www.raineycollins.co.nz/your-resources/articles/why-trusts-may-not-be-as-watertight-as-previously-thought-clayton-v-clayton>. On 'trust busting' generally, see Nicky Richardson, 'Trust Busting in New Zealand' [2009] (November) *International Family Law* 266

The husband appealed to the High Court, which agreed that the trust was illusory but for reasons different to those of the Family Court. The High Court did not accept that the terms of the trust eroded the trustees' core obligations owed to the beneficiaries. Rather, it concluded that the husband retained control over the trust assets to such a degree that he was able to deal with trust property as if the trust had never been created. As a consequence, the trust could be considered to be "illusory".

The husband appealed to the Court of Appeal, where it was found that there is no concept of an "illusory" trust separate from a sham trust; rather, an "illusory" trust is merely a sham. With this understanding, the Court of Appeal held, the requirements for the existence of a sham trust were not met in this case and the Vaughan Road Property Trust was not a sham.

However, the Court of Appeal found that the husband's power to appoint and remove trust beneficiaries amounted to relationship property for the purposes of the PRA.

Traditionally, a mere power, such as a power of appointment in a trust deed, has not been regarded as property in itself. In coming to its decision, the Court of Appeal relied considerably on the Privy Council case of *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] 4 All ER 704. In that case, the Privy Council was of the view that the distinction between a power and property has not been preserved in all contexts and for all purposes. It noted that for many purposes the law regards the holder of the power as being the effective owner of the property subject to the power. This enabled the Privy Council to determine that a power of revocation given to the settlor of a trust was "property" for the purposes of applicable bankruptcy laws (with the practical effect that the assets of the trust were available to the bankrupt settlor's creditors).

An important aspect of *Clayton* is that the Court of Appeal noted that the husband held the power to appoint and remove beneficiaries as the nominated "Principal Family Member", not as trustee. This meant that his ability to exercise the power was not fettered by the fiduciary duties that would be applicable if he was exercising the power as trustee. The husband would, then, have been entitled to remove all beneficiaries other than himself and then (in exercise of his separate wide power of distribution of trust assets held as the sole trustee) to distribute all the trust assets to himself.

The Court of Appeal determined that the value of the power was equivalent to the value of the trust assets themselves.

While this is by no means the first "trust busting" case the New Zealand courts have dealt with,[30] its ramifications are potentially significant for other trusts in that jurisdiction. However, the matter is not yet at an end — leave to appeal to the Supreme Court of New Zealand was granted on 18 June 2015.

[30] See, eg, *Harrison v Harrison* (2008) 27 FRNZ 202 (HC); *B v X & CIR* [2011] NZFLR 481

Leaving aside any commentary about the soundness of the Court of Appeal's reasoning or indeed of the underlying desirability (or undesirability) of "trust busting", this case amply illustrates that the New Zealand family law property regime has difficulties and uncertainties of its own.

Thompson v Thompson [2015] NZFLR 150

This case involved the division of assets under the PRA.

The husband and wife married in 1971. In 1984, they established Nutra-Life Health and Fitness Ltd ("Nutra-Life"). In 1989, Health Foods International Ltd ("HFI") was formed, its function being to hold the shares in Nutra-Life and associated entities. Shares in HFI were originally held by the husband and wife but in 1994 they were sold to the ML Thompson Family Trust ("MLT Trust"), one of various trusts established by the parties to hold assets acquired during the marriage. The husband, a solicitor and an accountant were the trustees of the trust.

The parties separated in August 2002. In November 2006, Nutra-Life was sold to Next Capital Health Ltd ("Next"). $72.3 million was paid to the MLT Trust for the business and an additional $8 million was paid to the husband in consideration for him agreeing to a restraint of trade covenant. The issue before the Supreme Court was how that $8 million payment should be classified for the purposes of the PRA — specifically, whether it should be treated as relationship property and thus subject to the equal sharing regime.

The Family Court held at first instance that the payment was the husband's separate property because it was received after separation, and that no portion of the payment should be treated as relationship property. The Judge also rejected an argument that the Court should exercise its power under s 9(4) of the PRA to treat the $8 million as though it was relationship property.

The wife appealed to the High Court, which agreed that the payment was the husband's separate property but then exercised the s 9(4) discretion to treat part of the $8 million payment as relationship property.

The husband's appeal to the Court of Appeal was successful, with that Court finding that the $8 million payment was entirely the husband's separate property and that it would not be right to exercise the s 9(4) discretion to treat it (in whole or in part) as relationship property. The wife was granted leave to challenge both of these conclusions in an appeal to the Supreme Court.

The Supreme Court unanimously held that the entirety of the $8 million payment was relationship property. The sole purpose of the restraint accepted by the husband was, the Court found, to protect the goodwill of the business being acquired by Next in the purchase of Nutra-Life. Referring to previous case law, the Court of Appeal stated that

valuations of businesses should be assumed to include a restraint of trade covenant. The necessary corollary of this approach is that a payment which is referable to the giving of such covenants is relationship property.

If the business had been valued before sale at $80 million on the basis that the husband provide a covenant in restraint of trade, the husband would have had to account to the wife for $40 million, even if he had refused to give a covenant. The Court of Appeal was of the view that it was immaterial that a sale had taken place and a payment made in respect of restraint of trade. If the transfer of the HFI shares to the MLT Trust had never occurred, the restraint of trade payment would have remained relationship property. The transfer therefore reduced the wife's share of the total payout from the sale by $4 million.

The trial Judge had found that the parties had agreed that the assets of the MLT Trust were to be treated as, in effect, relationship property. The Court of Appeal upheld this finding and determined that the only way to implement that agreement was to exercise the discretion under s 9(4) to declare that the $8 million payment was relationship property.

Again, this case clearly demonstrates the lack of predictability that can arise in applying the New Zealand system.

Appendix 11

California

Since 1 January 2005,[31] registered domestic partners have enjoyed the same property rights and obligations as married couples, pursuant to §§297–299.6 of the *California Family Code*.[32] In order to register, domestic partners must meet criteria stipulated in §297 of the Code.

If a couple cohabitates without registering as domestic partners, they are not afforded recognition equivalent to that of a married couple and, correspondingly, the rights and duties attributable to married couples in the event of separation do not apply. Many couples who choose neither to get married nor to register their domestic partnership will enter into cohabitation agreements to delineate how their property will be dealt with in the event of separation.[33] This is because there is no established body of law governing the property rights of those in unregistered, non-marital relationships after separation or death.

New Zealand

Under the PRA, property claims arising after the breakdown of de facto relationships of three years or longer in duration (shorter if there is a child of the relationship)[34] are treated in the same way as claims arising from marriage or civil partnership. "De facto relationship" is defined in s 2D of the PRA and the definition is substantively the same as that in s 4AA of the *Family Law Act 1975* (Cth).

Republic of Ireland

In Ireland, there is separate legislation governing the property disputes of married and cohabitant couples. The *Family Law (Divorce) Act 1996*[35] is applicable to the former and the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*[36] to the latter. The powers granted to the Court under these pieces of legislation differ, and the Court has broader power to make property orders where parties have been married.

Scotland

Prior to 2006, when the *Family Law (Scotland) Act 2006* (UK) was passed,[37] disputes between separating cohabitants in Scotland were decided in accordance with the principles of ordinary property law. Now they are dealt with under the Act.[38] A different

[31] *California Domestic Partner Rights and Responsibilities Act of 2003*, California Assembly Bill No 205, Chapter 421, Statutes of 2003
[32] Available at: <http://www.leginfo.ca.gov/.html/fam_table_of_contents.html>
[33] Roberta B Bennett and Jeffrey W Erdman, 'Choice of Marriage, Registered Domestic Partnership, or Informal Cohabitation' in Jon E Heywood (ed), *California Domestic Partnerships and Same-Sex Marriages: 2015 Update* (CEB, 2015)
[34] See *Property (Relationships) Act 1976* (NZ) s 14A, available at: <http://www.legislation.govt.nz/act/public/1976/0166/latest/DLM440945.html>
[35] Available at: <http://www.irishstatutebook.ie/1996/en/act/pub/0033/>
[36] Available at: <http://www.irishstatutebook.ie/2010/en/act/pub/0024/>
[37] Available at: <http://www.legislation.gov.uk/asp/2006/2/contents>
[38] *Family Law (Scotland) Act 2006* (UK) ss 25–30. See especially at s 28

statute — namely the *Family Law (Scotland) Act 1985* (UK)[39] — governs the entitlements of married couples when they divorce.

When the *Family Law (Scotland) Act 2006* (UK) was introduced, the Scottish Executive produced an accompanying explanatory booklet entitled "Family Matters, Living Together in Scotland",[40] which states on p 2 (emphasis original):

> The 2006 Act has introduced a set of basic rights to protect cohabitants, either when their relationship breaks down, or when a partner dies. **But the law is very clear: couples living together do not have the same rights as married couples and civil partners.** It is very important that you understand this when deciding whether to move in with your partner or to make a formal commitment.

Singapore

There is no legislation in Singapore that governs the division of property for unmarried couples whose relationships break down: *Chia Kum Fatt Rolfston v Lim Lay Choo* [1993] 2 SLR(R) 793. The property and assets of those in de facto relationships are dealt with under ordinary principles of general Singaporean property law.[41]

[39] Available at: <http://www.legislation.gov.uk/ukpga/1985/37/contents>. See especially at ss 8–17
[40] See <http://www.gov.scot/Publications/2006/04/27135238/0>
[41] James Stewart et al (eds), *Family Law: Jurisdictional Comparisons* (Sweet & Maxwell, 2011) 345

Appendix 12

Matters for the discrete jurisdiction of the Family Court of Australia and Transfers

The Family Court has discrete jurisdiction only in the following areas:

- *Civil matters arising under the Corporations legislation pursuant to Section J337C of the Corporations Act;*
- *Leave to adopt [S3/(l)(c)Family Law Act]*
- *A decree of nullity of marriage [subparagraph (a)(ii) of the definition of* ***matrimonial cause*** *in s4(1)Family Lmv Act]*
- *A declaration as to the validity of a marriage, a divorce or annulment of a marriage [subparagraph (b) of the definition of* ***matrimonial cause*** *in s4(J)Family LawAct]*

Jurisdiction of the Federal Circuit Court (FCC) to hear and determine matters transferred to it by the Family Court, where that jurisdiction does not otherwise exist, is conferred by s33B(8A) Family Law Act 1975

Areas of discrete jurisdiction sought:

International Child Abduction (Hague and non-Hague cases)

I. Proceedings under Part XIIIAA FLA and the Family Law (Child Abduction Convention) Regulations.

2. Any application relating to a child who has allegedly been taken or sent from Australia in breach of section 65Y or section 65Z FLA and in relation to a child or children returned to Australia under the Hague Convention on the abduction of children.

International relocation cases

3. Any application where a party proposes that a child becomes ordinarily resident outside Australia

Disputes as to whether a case should be heard in Australia

4. Proceedings in which an issue of forum is raised including applications in which a party seeks an injunctive order against another party to restrain that party from commencing or continuing proceedings in Australia (an anti-suit injunction) because of proposed or pending proceedings outside Australia, or seeks a permanent stay of proceedings in an Australian court because of proposed or pending proceedings outside Australia.

Medical procedures

5. Medical procedures where an order of the Court under the Family Law Act is required

Property matters

6. Property matters to which a party is seeking orders under Part VIII AA of the Act.

7. Matters involving either accrued or associated jurisdiction of the Court.

8. Controversy as to whether or not a court has jurisdiction to hear a financial matter because of the provisions of section 71A or section 90SA of the Family Law Act.

Parenting matters

9. Where Orders sought arise from, or involve a surrogacy arrangement.

Overlapping jurisdiction

The general principle is that where there is overlapping jurisdiction, a superior court controls the matters that come before it.

The matters that should be filed in, or transferred to, the Family Court are:

Property Jurisdiction (general)

10. Matters of sufficient significance to warrant the attention of a superior court involving but not limited to:

    (a) Matters involving multiple patties.
    (b) Valuation of complex interests in trusts, businesses, or corporate structures and superannuation and its valuation.

Parenting Cases (general)

11. Matters of sufficient significance to warrant the attention of a superior court involving but not limited to:
    (a) allegations of child abuse including allegations of sexual or other physical abuse;
    (b) where the matter involves a Child Welfare Authority as a party;
    (c) family violence, mental health and/or substance abuse;

Uplifts and transfers:

12. (i) Any party to an application filed in the FCC, an Independent Children's Lawyer appointed in those proceedings or a person seeking to intervene in the proceedings may apply to the Family Court to have the matter transferred to the Family Court

(ii) The Family Court would then decide whether the matter was an appropriate matter to be dealt with by that Court having regard to the factors in paragraphs 10 and 11 and any other relevant legislative requirements and including whether the resources of the of the Family Court of Australia are sufficient to hear and determine the proceedings.

(iii) Upon the application of either party to a matter in the Family Court the Family Court may transfer the matter to the FCC, having regard to the factors in paragraphs 10 and 11 and any other relevant legislative requirements

(iv) A judge of the Family Court or Registrar exercising delegated powers of the Family Court may transfer a matter on his or her own motion to the FCC

(v) A judge of the FCC or Registrar exercising delegated powers of the FCC may on his or her own motion order a provisional transfer of a matter to the Family Court for the purpose of determining whether the matter should remain in the Family Court or be remitted back to the FCC having regard to the factors in paragraphs 10 and 11 and whether the resources of the Family Court of Australia are sufficient to hear and determine the proceedings

(vi) For the purposes of 12(v) a judge of the Family Court may determine the matter on the papers

(vii) No appeal will lie in relation to uplifts and transfers made by a judge of the Family Court.

FAMILY COURT OF AUSTRALIA

Appendix 13

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

THE FAMILY LAW AMENDMENT (PARENTING MANAGEMENT HEARINGS) BILL 2017 (CTH)

SUBMISSION BY

THE HONOURABLE JOHN PASCOE AC, CVO, CHIEF JUSTICE OF THE

FAMILY COURT OF AUSTRALIA

19 FEBRUARY 2018

INTRODUCTION

1. The Family Court of Australia ("the Family Court" or "the Court") welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee in relation to the Family Law Amendment (Parenting Management Hearings) Bill 2017 (Cth) ("the Bill").

2. I make this submission in my capacity as Chief Justice of the Family Court of Australia. The views expressed herein, have been developed in consultation with Justice Strickland, who has been the Court's representative on the Government's Policy Coordination Committee for Parenting Management Hearings. Whilst they do not purport to represent those of all of the Family Court Justices, or the Court as a whole, I anticipate that these views will be widely accepted by the Judges.

3. I am mindful of the genesis of the proposal and the challenges both the concept and the legislation to support it pose. I appreciate that policy imperatives generally are paramount, but I think it is my duty to continue to raise what I view as matters of concern that may become problematic at a later stage, thereby potentially undermining the policy objective.

OVERVIEW

4. The matters for which Parenting Management Hearings are designed, in accordance with the initial parameters of the proposal, are those kinds of matters which at the present time do not get to the Courts. They are resolved beforehand by negotiation, by family relationship centres, other non-Government organisations, and the private profession.

5. However, the Bill allows the Panel to hear matters that are plainly complex, and thus in my view, not the kind of "non-forensic" matters that it was envisaged a Panel could appropriately hear.

6. I differentiate between "forensic" matters involving complexity and fact finding with the necessity for cross-examination to arrive at an outcome, and "non-forensic" matters which would be matters of discretion where the result is not dependent upon complex fact finding.

7. I instance matters involving allegations of family violence, both physical and psychological, matters where the issue is with whom a child should live, matters involving the care, welfare and development of a child, and matters involving third parties including grandparents, as matters that involve a forensic determination. The history of cases dealt with by the Courts provides a strong evidence base demonstrating that matters involving these issues are highly complex, rendering them unable to be dealt with in a simplified and straightforward manner.

8. I note that the Panel must dismiss an application where allegations of child sexual abuse or risk of child sexual abuse are made. This is clearly appropriate given the complexity of a matter where such allegations are present. However, this highlights the fallacy of allowing the Panel to hear matters where there are allegations of family violence. Plainly where there are such allegations complexity abounds, and in any event, allegations of child sexual abuse and family violence are often so intertwined that it is difficult to see how they can be separated out by the Panel.

9. Transparency becomes a significant issue when questions of fact are being determined by Panel members who have expertise which may not be applied transparently. What social science views for example will be applied by Panel members to the cases before them? Will they be acknowledged and how could they be challenged?

10. Other factors raise considerable concerns. For example, as an extension of the issue of transparency just referred to, in "forensic cases", whereas the Courts have highly experienced judicial officers determining these complex matters, the members of the Panel may not have the appropriate qualifications and experience to decide such complex issues. The Bill allows for Panel members to comprise persons who are not legally trained, including psychologists and social workers. With respect, those Panel members will not have the knowledge or the expertise to determine these matters in the way that is consistent with established jurisprudence. That is important because the Panel will operate side by side with the Family Law Courts, and it would not only be confusing to the public, but frankly indefensible, if parenting determinations made by the Panel are not consistent with orders made by the Family Law Courts.

11. In light of this and other jurisdictional concerns, the Court has consistently recommended that the Panel only be able to hear matters that are referred to it by a Court with the consent of both parties. I reiterate the logic of that approach. It would also avoid inappropriate matters being commenced for Panel determination, and subsequently needing to be dismissed due to complexity, adding additional expense and time for the parties, the Panel, and the Court that will need to ultimately deal with the matter.

12. I understand that one existing process which provided a basis for the Bill and the Panel it seeks to introduce, is a system that has been implemented in Oregon, USA, namely Oregon's Informal Domestic Relations Trial. However, I note that the process there entails applications being lodged with the Court, the parties completing forms specifying whether they consent to a Panel process and, if the Court agrees that the matter is appropriate, it is referred to the Panel. I consider that there is much merit in this approach.

13. As to the powers of the Panel, the Bill provides for the Panel to inform itself in any way it thinks fit in conducting a Parenting Management Hearing. A concern that the Court has consistently expressed is that this departs significantly from the principle of procedural fairness, and that is perplexing, given that a lack of procedural fairness is a prime circumstance allowing for an appeal to the Federal Circuit Court of Australia. The Bill does provide in clause 11LD that a Parenting Management Hearing is subject to the rules of natural justice. However, I am concerned that the parties who appear before the Panel will be unaware of this, and for example will not know that they have the right to see all of the information that will have been gathered by the Panel pursuant to the enquiries made without notice to the parties. As you would be aware, knowing the case you have to meet is a significant requirement of procedural fairness, and not knowing what opinions might be applied by the Panel could well offend those requirements.

14. In relation to the interaction with prior determinations/court orders, the Bill provides that where there is a prior parenting determination, for there to be a subsequent order made by a Court, there needs to be a significant change of circumstances. The Court is opposed to that, and that opposition stems from the fact that a parenting determination will not be decided in the same way that the Courts make parenting orders. The Court should be able to determine the matter afresh regardless of a pre-existing parenting determination. Further, the Court should not be required to treat a parenting determination as if it were a final parenting order of a Court, but that is what the Bill provides. The Panel is not a Court, and to repeat, a parenting determination will not be decided in the same way that the Courts make parenting orders.

15. Further, nothing in the *Family Law Act 1975* (Cth) ("the Act") sets out the way in which a parenting order can be varied, rather the Court applies the discretionary test determined in *Rice & Asplund* (1979) FLC 90-725. Subsection 65(2) of the Act provides that the Court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order, whereas the Bill in new s 65DABA mandates

16. considerations to be taken into account by a Court in revoking a parenting determination and making a parenting order.

17. As the Committee would be aware, there is considerable disquiet about the ability of parties without legal representation to navigate the family law system. In my view the Bill in its current form exacerbates that rather than alleviates it. That of course would not be the case if matters can only come to the Panel by referral from the Courts.

18. I note that the introduction of Parenting Management Hearings and a Panel is expressed to be a Pilot. However, there are two issues that arise from the Bill which raise concerns about that. The first is that rather than have a separate piece of legislation setting up Parenting Management Hearings, the Bill significantly amends the Act. Apart from one concern that I will shortly express, that is not a problem if the evaluation of the Pilot is that the scheme is to continue, but if that is not the outcome of the evaluation, then there will need to be a repeal of all of the amendments that the Bill makes to the Act. Can I suggest that that would be achieved far easier if there was a separate piece of legislation. The other concerns that I have with amending the Act rather than introducing a separate piece of legislation, is that the Act will become far more unwieldy than it already is, and importantly, far more confusing than it already is for parties without legal representation.

19. The second issue is that evaluation of the Pilot is to take place within three years of commencement, but Panel members can be appointed for up to five years. What then is to happen to those Panel members if the outcome of the evaluation is that the Pilot is not to continue?

SPECIFIC COMMENTS (IN ADDITION TO THOSE MADE ABOVE)

Consent requirements

19. It is plainly necessary that the consent of both parties should be required in relation to an application for a parenting determination. However, I reiterate the Court's concerns that the Bill should require the consent of the other parent to be obtained prior to the application being made. Omitting such a requirement will not only create unnecessary work for the Panel and the staff of the Panel, but will result in the applicant having wasted his or her time and effort, given that if the consent is not obtained, the application must be dismissed. On the basis that a key principle underpinning the process is resolving matters in an economical and expeditious way, I consider that it is counter-productive to allow a party to file an application prior to the consent of the other party having been obtained. Further, the party who commenced the proceedings would then have to commence those proceedings in a Court.

20. This issue also highlights once again the appropriateness of the Court's submission that matters should only come to the Panel by referral from the Courts.

How cases come to the Panel – this picks up again the issue just referred to

21. Apart from my comments above eschewing providing for cases to come to the Panel by application of one or both of the parties, limiting the process to referral by a Court solves many of the problems and difficulties that the Court has consistently outlined. For example, the Court would be able to triage the matters that come before it, and in that process the Court will be able to determine what matters are appropriate for referral to the Panel. That will avoid the issue around obtaining consent, and it will also avoid a matter commencing before the Panel, but then subsequently having to be dismissed because it is found to be too complex.

22. Further, the practical effect of adopting that course will conservatively reduce the need for half of the amendments proposed, and will, to a certain extent, overcome the

difficulty referred to above of the amended Act becoming too unwieldy and less able to be understood by parties without legal representation.

23. I confirm though that the preferred option of the Court is still to have a separate piece of legislation setting up Parenting Management Hearings, rather than the far more convoluted outcome resulting from amending the Act.

Interim parenting determinations

24. I note that enabling the Panel to make interim parenting determinations has been maintained in the Bill despite our previous submissions (clause 11JG).

25. The prime circumstances where interim parenting determinations are required are first, matters of urgency, and secondly, matters where a final hearing cannot take place within short compass. Plainly urgent matters should be heard by a Court and not by the Panel, and this also flies in the face of one of the objects of Parenting Management Hearings, namely to provide a prompt resolution of matters involving the parenting of a child.

26. I note of course that as with many of the concerns that I have raised in relation to the Bill, providing for matters to only reach the Panel by way of referral from a Court would solve this particular difficulty.

Interactions between determinations and court orders

27. I reiterate that to provide that determinations of the Panel should be treated the same as final orders by a Court, is greatly troublesome. There should be no limitation on the ability of a Court to vary or discharge a previous determination of the Panel. Further, it should not be possible for a Panel to make a parenting determination in relation to a child who is the subject of a previous court order. Those matters should return to the Court that made the initial order.

Evaluation

28. The Bill provides for the pilot to be comprehensively evaluated. However, there is nothing in the Bill prescribing that evaluation process, and more importantly, the evaluation criteria. I suggest that that should be included in the Bill. Such provision would be consistent with the Exposure Draft of the Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017, which expressly provides for a comprehensive review and evaluation of the operation of the proposed amendments.