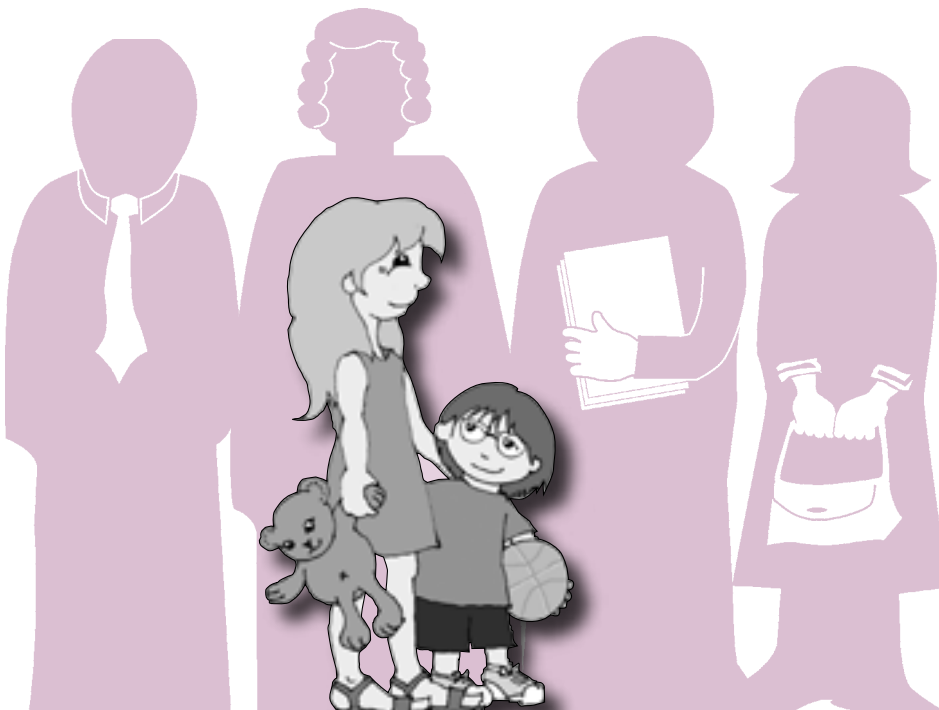




FAMILY COURT OF AUSTRALIA

# *Finding A Better Way*

A bold departure from  
the traditional common law approach  
to the conduct of legal proceedings



April 2007

*Finding a Better Way*

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FAMILY COURT OF AUSTRALIA

# *Finding A Better Way*

A bold departure from  
the traditional common law approach  
to the conduct of legal proceedings

By Margaret Harrison

April 2007

# Acknowledgements

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I have been greatly assisted in the writing of this publication by a number of people who were themselves instrumental in the development and implementation of the Court's less adversarial trial project.

Particular thanks go to former Chief Justice Alastair Nicholson, Justice Stephen O'Ryan and Ms Virginia Buring who gave unstintingly of their time and knowledge and provided me with invaluable information and encouragement. I am grateful also for the assistance given by Justices Dessau, le Poer Trench and Moore, family consultant Ms Ilana Katz and Ms Judith Walker of Legal Aid New South Wales.

Despite the efforts of all involved responsibility for any errors in the text is solely mine.

Both Shirley Lavers and Josie Cox of the Family Court Austin Asche Library at the Melbourne Registry were endlessly patient with my requests for material and always managed to find what I needed.

A valued friend and former colleague, Danny Sandor, died prematurely in early 2006. In his capacity as Chief Justice Nicholson's senior legal associate Danny made an enormous contribution to the development of the new procedures, as he did with so many other initiatives during his time with the Family Court.



**Margaret Harrison**

April 2007

# Foreword



## From the Chief Justice

This publication is an important record of the Family Court of Australia's move away from the traditions of the common law adversarial trial to what is now known as the less adversarial trial (LAT). The approach was developed by the Court in response to a long recognition of the need to provide better ways to decide disputes between separating parents when the best interests of children is the paramount concern. It is a significant change in approach to trial procedures in Australia, the benefits of which were recognised with the passage of Division 12A of Part VII of the *Family Law Act 1975* in May 2006. It was a bold approach that will make immeasurable differences to the lives of those Australians experiencing family breakdown who have been unable to resolve parenting issues and come to the Court for a hearing before a judge.

The Court, under the leadership of the Hon Alastair Nicholson AO, RFD, QC, had embarked on the pilot project, known as the Children's Cases Program (CCP), when I became Chief Justice in 2004. It was obvious to me that it was a major advancement in the ongoing efforts of the Court to more effectively hear disputes about children, and one that accorded with my own experiences about the limitations of conventional adversarial hearings.

The decision to proceed with the pilot had been taken after Justice O'Ryan visited Germany and France in May 2003 to examine European approaches at first hand. He met with many judges, public servants, lawyers and academics while there. Thanks in particular goes to Judge Eberhard Carl who gave so generously of his wisdom, his time and attention both then and during his subsequent visit to Australia in September 2004.

The earliest results of the CCP pilot evaluations confirmed that the Court could not go back. Indeed, it has now been decided to apply the less adversarial approach to all Family Court of Australia hearings and over the next year the Court will be developing its processes to make this happen.

Further, it is my expectation that when other jurisdictions have an opportunity to examine this process over time, they will be encouraged to critically examine whether elements of it can enhance the way that traditional litigation is conducted, particularly in the way in which the judge controls the proceedings. It is also my hope that the less

adversarial approach the Family Court has begun will lead to changes in legal education, at the very least. For example, the importance of communication skills to speak directly to and engage with the parties in the LAT process are skills that the modern judge should usefully possess.

I acknowledge the work done within the Court and beyond. The progress from pilot to legislation has only been achieved through the dedication and commitment of many people.

In particular, I acknowledge the Hon Alastair Nicholson for his vision and passion, and the Hon Geoffrey Davies AO for his early guidance; Justice Stephen O’Ryan accompanied by Virginia Buring who travelled to Europe with an open mind and returned with a new concept, and the six pilot judges at Sydney and Parramatta who volunteered to step outside their comfort zone and try something so new. I also acknowledge the members of the Steering Committee and the organisations behind them (especially the Commonwealth Attorney-General’s Department for the work it did on the legislation, the support of New South Wales Legal Aid Office, Community Legal Centres and the Family Law Section of the Law Council of Australia); Joanna Kalowski, whose training skills and insights helped to move the judges to more inclusive and child focused decision making; the legal practitioners who grasped the challenge with enthusiasm and spread the word to their colleagues; and the litigants who consented to participate in the pilot. Without their cooperation nothing would have been achieved.



**The Hon Diana Bryant**  
Chief Justice of the Family Court of Australia

April 2007

# Acronyms

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CCP Children's Cases Program

CRP Child Responsive Program

FLA *Family Law Act 1975*

LAT Less Adversarial Trial

MCA *Matrimonial Causes Act 1959*

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*‘The adversarial model was premised on the assumption that civil litigation was essentially a private matter. The parties were left to conduct proceedings as they saw fit and according to their own timetable. The judge assumed a passive role, intervening like an umpire only if a non-delinquent party sought the imposition of sanctions.*

*The responsibility was upon the parties alone to identify the issues in dispute, and it was for the party making an assertion to prove it, without assistance from his or her opponent.*

*The judge, being the impartial arbiter, was left with the job of determining the contest according to what was presented to her or him. The judge could not transgress beyond the issues and evidence presented by the parties. All steps in the action were intended to lead up to a climactic trial.’<sup>1</sup>*

G. Davies, *‘Justice in the 21st Century’*, paper delivered at the Family Court of Australia Judges’ Annual Conference, Challenges for the 21st Century (July 2000), at 5.

# Introduction

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In an approach pioneered by the Family Court of Australia, family law has recently undergone the most significant change to the way in which litigation is conducted in this country in modern history. The change, from a traditional common law approach to a less adversarial trial, has significant implications, not only for the conduct of family law litigation but also for the conduct of litigation as a whole. It represents a bold step towards bridging the gap between common law systems of litigation and the European civil law system. So far as family law is concerned, the change received legislative force with the passage of Division 12A of Part VII of the *Family Law Act 1975* (Cth) (hereafter referred to as the FLA) which was inserted by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). The legislation is attached to this publication as Appendix A.

In children's cases, Division 12A swept away restrictive rules of evidence and the control of the proceedings was placed in the hands of the judge, rather than the parties or their legal representatives. The focus is a future looking one, geared to the needs of the child. As a consequence of the new procedures, parties are no longer free to conduct litigation as a forensic war between each other at the expense of the interests of the child. At the same time the best features of the Court's highly developed system for mediation and resolution of disputes has not only been preserved but also enhanced, and the role of what is now called the family consultant<sup>2</sup> has become even more significant. The unique approach retains and relies on the special assistance provided by family consultants, whilst providing a clear child focus underpinned by active judicial leadership and direction. It will no doubt continue to evolve as it develops further (see for example, information about the Child Responsive Program on page 52). It has been accepted enthusiastically by the current Chief Justice, by the judges, court staff and, apparently by many of the families who have participated in it (page 56 has detail about evaluation feedback). The success of the pilot and the introduction of Division 12A in May 2006 enabled the program to be implemented across all registries of the Family Court. It became mandatory for parents filing a child-related application after 1 July 2006.<sup>3</sup>

The Family Court began piloting its new method for the handling of trials involving disputes about children in March 2004. The method has variously been referred to as less adversarial procedures, the children's cases program (CCP) and the less adversarial trial (LAT).<sup>4</sup> The CCP pilot was preceded by several years of jurisprudential development, study and investigation, and its introduction was motivated by a growing concern that the traditional adversarial system of determining such disputes (albeit modified in children's cases, as described below) had failed to provide the optimal method for determining children's best interests, which the Court was statutorily required to do.<sup>5</sup> Both the concept

and development of the system owe much to the pioneering efforts of then Chief Justice, Alastair Nicholson who, with a small group of judges and Court staff, recognised the problems caused by traditional trial methods and sought to find a solution to them. The new procedures evolved during the course of investigations into alternative and better methods of managing family law cases – initially children’s cases.

At this stage property and like proceedings can only be dealt with in a less adversarial manner when both parties consent to their matter being so determined. However, at their 2006 national judges’ meeting, Family Court judges unanimously agreed that a Division 12A approach should apply to *all* family law cases. Such an extension is now proposed to start in the latter part of 2007. This will not enable the Court to dispense with the provisions of the *Evidence Act 1995* (Cth) in the absence of further legislative amendment, but will not prevent it from adopting the same less adversarial approach currently used in children’s cases.

This publication explains the origins of, inspirations for, rationale, influences on and features of the Family Court’s Less Adversarial Trial program. It also examines the program’s development within the context of the Australian family law system, and specifically within the Family Court. Using a wider lens, it also considers how recent criticisms of the common law civil justice system have led to a number of reform proposals, both here and in overseas jurisdictions, which suggest a convergence of various features of the English-based adversarial and European-based inquisitorial systems. The LAT model is an important example of the benefits of such convergence. This publication explains the significant features of both systems, and traces the process by which their respective strengths have been used and developed to produce an innovative approach to the determination of children’s cases.

Substantive changes to Part VII of the FLA came into effect simultaneously with the procedural changes as a result of the *Family Law Amendment (Shared Parental Responsibility) Act*. These seek to encourage cooperative parenting after separation. Neither the procedural nor the substantive changes impact on each other in a way that is relevant to this discussion.

# Part One

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## The origins of Australian family law

The passage of the *Matrimonial Causes Act 1959* (Cth) represented the first major exercise of the Commonwealth's powers over "divorce and matrimonial causes" and in relation to the "custody and guardianship of infants" as set out in section 51 of the Australian constitution.<sup>6</sup> Before that time the Colonies and, after Federation, the States implemented their own separate divorce laws<sup>7</sup> as the Commonwealth chose not to enter the field. These laws were not necessarily uniform, but all had their origins in colonial law, which in turn was heavily influenced by the provisions of the English *Matrimonial Causes Act 1857*. The Matrimonial Causes Act repealed all State acts, unified the law of divorce and associated matters across Australia and set out 14, predominantly fault-based, grounds upon which a divorce might be granted.<sup>8</sup>

The restrictions to Commonwealth power in the Constitution to "divorce and matrimonial causes" and the "custody and guardianship of infants" prevent the Commonwealth from legislating in a number of areas which would in many other jurisdictions – and in common parlance – be considered to be family law matters.<sup>9</sup> Further, although section 75 of the Constitution grants the Commonwealth power to confer jurisdiction on federal courts to resolve "public law disputes", the Family Court (although a federal court) does not have jurisdiction to hear such matters. Its power is restricted to private law disputes<sup>10</sup> although, as both the FLA and the case law recognise, family breakdown frequently has public policy impacts that go beyond the concerns of the parties themselves. As a consequence, neither the States and Territories nor the Commonwealth have exclusive legislative responsibilities in the area of family law. This bifurcation of jurisdiction has had particularly serious impacts on the management and determination of cases involving child abuse, which are primarily the responsibility of the States but are also of significance in many children's disputes that come before the Family Court (see page 22 for information about the Court's Magellan initiative).

Initially, the Commonwealth was also unable to deal with matters involving the children of unmarried parents. However, between 1986 and 1990 all states except Western Australia<sup>11</sup> referred their legislative powers over these children to the Commonwealth, thus giving the Family Court jurisdiction. These referrals did not include powers over State welfare and child protection, juvenile justice and adoption, which remain within the jurisdiction of the States and Territories as do financial disputes between unmarried couples. The Commonwealth has indicated that it will pass legislation conferring a financial jurisdiction on family courts in the case of heterosexual de facto couples, subject

to the appropriate reference of power by the States<sup>12</sup> but it has not accepted references of power about same sex couples. Australian family law, in keeping with the approach of other common law countries, also does not concern itself with the regulation of subsisting domestic arrangements, other than the protection of vulnerable family members from abuse. It is primarily concerned with the breakdown of such arrangements and the consequences that flow from their breakdown.<sup>13</sup>

Under the Matrimonial Causes Act, divorce and all matters ancillary to it were dealt with in State supreme courts, which exercised federal jurisdiction for that purpose. These courts provided no services other than those necessary for the granting of principal or ancillary relief, and family law matters were often handled by non-specialist judges in concert with their usual workload of civil and criminal cases (ie. they provided no counselling or information services). The proceedings were formal, adversarial, expensive and unnecessarily technical.

Parties who applied for divorce under the provisions of the Matrimonial Causes Act were required to come to court “with clean hands”, and (regardless of the ground for divorce relied on) had to disclose to the judge, in a sealed document called a discretion statement,<sup>14</sup> any act(s) of adultery committed by them between the time of the marriage and the hearing of the petition. Such acts might result in the divorce being refused. In addition, proof that an application was tainted by behaviour amounting to either condonation, connivance and/or collusion<sup>15</sup> resulted in an automatic dismissal of the petition. The discretionary nature of the procedure also allowed the Court to refuse to grant a divorce on the ground of separation if to do so would be harsh and oppressive to the respondent or contrary to the public interest, or if the petitioner had not made provision for the benefit of the respondent by way of settlement of property or otherwise.<sup>16</sup> All financial and child-related disputes were required to be finalised simultaneously with the granting of the divorce.

Issues of fault permeated all proceedings, not solely those relating to the divorce itself. The following quotation from a leading textbook of the period explains the approach taken in children’s cases in Matrimonial Causes Act proceedings:

*‘It is not the rule that an innocent party who is entitled to a divorce or judicial separation will, as a matter of course, [emphasis added] in order to prevent his being punished by the exercise of his lawful rights, be granted custody of the children. Such a rule would be inconvenient in its working and far too sweeping. It is true that the court endeavours as far as possible to prevent a party, who is not at fault, suffering by his obtaining a judicial separation or dissolution of marriage and will not permit him to be deprived unnecessarily of the society of his children.’<sup>17</sup>*

The text continues with a reference to the obligation on the court to consider the principle that the welfare of the child is the paramount consideration (the paramouncy principle) and canvasses what would be the optimal outcome for the child. It thus combines, in a rather confused but presumably accurate manner, issues of unjust enrichment, children's welfare and parental rights to their children.<sup>18</sup>

By the early 1970s, the incidence of marriage breakdown had begun to increase,<sup>19</sup> as had concern at the legalistic approach of the Matrimonial Causes Act and the delays, expense and indignity of court procedures. One of the policies of the newly elected Labor Government was divorce law reform. In December 1973, the Attorney-General Senator Lionel Murphy moved the second reading of the Family Law Bill 1973, noting 'that the public attitude to divorce has changed dramatically in the comparatively short time since the 1959 Act was passed.'<sup>20</sup>

The 1973 Bill lapsed but was revived the following year. In October 1974, it was referred to the Standing Committee on Constitutional and Legal Affairs on the Law and Administration of Divorce and Related Matters and the Family Law Bill 1974. In his speech in support of the bill, Senator Everett, a member of the Standing Committee, criticised the excessive legalism that had surrounded divorce law and practice under the Matrimonial Causes Act, and the complex litigation that resulted from the involvement of lawyers.<sup>21</sup> As is now well known, the Senate Committee recommended that fault divorce be replaced by a no fault regime and this ultimately became section 48 FLA. As a consequence, since 1976 in this country a divorce order is made on the sole ground that the marriage has broken down irretrievably, which is conclusively proved by the fact that the parties have been separated for a continuous period of 12 months before the filing of the divorce application.<sup>22</sup> Proceedings ancillary to the divorce, primarily those relating to children and property, are usually heard in separate proceedings, before or after the divorce is granted, or independently of it.

Significantly, the Committee also recommended that Commonwealth family law matters be dealt with by a new Federal superior court of record '*invested with the full jurisdiction of the Commonwealth under s 51 of the Constitution ...and dealing exclusively with family law matters and consisting of judges "chosen for their experience and understanding of family problems"*'.<sup>23</sup> Such a court would act with a minimum of formality, coordinate the work of ancillary specialists attached to the court, encourage conciliation and apply, only as a last resort [emphasis added], the judicial powers of the court.<sup>24</sup> This important feature of Australian family law was however, as Fogarty points out, only achieved after a proposal to give jurisdiction to a division of a proposed Superior Court of Australia was defeated in the Senate on a tied vote.<sup>25</sup>

## Focusing on adversarial and inquisitorial systems

In order to explain the significance of the Family Court's reforms and their particular characteristics, it is necessary here to set out the major "traditional" characteristics of the "adversarial" and "inquisitorial" systems, whilst also acknowledging the inadequacy of these terms,<sup>26</sup> as well as the extent to which the convergence between the two, resulting from cross pollination of common law and European systems,<sup>27</sup> and a recognition of various weaknesses in each, has blurred many of the original significant differences.

### Major characteristics of the common law system (often described as the adversarial system)<sup>28</sup>

As a number of commentators have recently recognised, references to the common law and civil (European) legal systems as being respectively "adversarial" and "inquisitorial" are misleading and over simplistic. Both systems are in a sense adversarial, but in European systems judges actively control most aspects of the litigation process, whereas in common law countries such control is typically exercised by the parties or (more commonly) their legal representatives. This control includes identifying the issues in dispute, initiating the proceedings, and determining both the nature of the evidence relied on to support or refute the claim and who should provide the evidence that is crucial to the outcome. However, in family law identifying issues has consistently proven to be fraught with inherent difficulties because of the wide ranging nature of the inquiry involved in family disputes, the high level of emotion they engender and the lack of objectivity with which they are associated.

In both systems, the judge is unbiased and independent, but the judicial role is a more passive one in common law jurisdictions and is usually restricted to adjudicating on the evidence provided by the parties and ensuring that procedural and evidentiary rules are complied with.

Pre trial processes and written material, pleadings etc are important in preparing the case for trial in the adversarial system. The trial itself is constructed as a one off, public,<sup>29</sup> climactic contest, motivated by an adversarial imperative, and with an outcome heavily reliant on evidence crafted by skilful preparation and tested by the applicant's opponent by way of cross examination. The delivery of judgment concludes this process.

Half a century ago the adversarial system was well summed up in a famous passage by Lord Denning, when he said:

*'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England however, a judge is not a mere umpire to answer the question 'How's that?'*

*His object, above all, is to find the truth and do justice according to the law; and in the daily pursuit of it the advocate plays an honorable and necessary role. Was it not Lord Eldon LC [in Ex parte Lloyd (1822) Mont 70, 72n] who said in a notable passage that 'truth is best discovered by powerful statements on both sides of the question'?....and Lord Green MR who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations?'*<sup>30</sup>

The problem about this approach in a family law context is that it presupposes equally powerful voices on both sides. As is discussed subsequently, this feature is rarely present except between litigants of substantial means. Even in these cases, the means are often in the hands of one rather than in both.

As Chisholm<sup>31</sup> has pointed out, the common law system is not designed (nor is it satisfactory) for cases involving children, whose best interests are ostensibly the focus of the Court's attention but who nonetheless are not parties to the proceedings, nor to any extent participants in them.<sup>32</sup> Similarly, the dangers associated with party self-interest, which adversarialism is accused of fostering, are particularly pernicious in children's cases<sup>33</sup> and it is counterproductive for parties (almost invariably parents), who are urged elsewhere to parent cooperatively for the sake of their children,<sup>34</sup> to engage in a gladiatorial contest which itself exacerbates conflict and from which only one will emerge as the winner.<sup>35</sup> The disadvantages for children's well being are magnified where one or both parties, for whatever reason, are unrepresented or inadequately represented, where the evidence presented fails to bring the child into focus, where one party is in fear of the other, or there are cultural or psychological reasons for their inability to participate effectively in the process.<sup>36</sup>

The increase in self represented litigants in the Family Court in the early 1990s was an important catalyst for the examination of the Court's trial procedures that followed. In an address to a legal aid forum in 1999<sup>37</sup> the then Chief Justice referred to the decline in legal aid funding and availability, from it being considered an essential component of the FLA at the time of its passage to it becoming far less readily available several decades later. He also noted the negative effects of self representation resulting from ineligibility for aid as including increased opportunities for delay, a reduction in settlement opportunities, exacerbation of hostility between the parties and a reluctance to comply with orders or post separation arrangements. He identified increases in the numbers of *appellants* who were obliged to represent themselves as having a negative effect on the formulation of family law jurisprudence. The requirement in an adversarial system that the parties are responsible for putting their case to the court is underpinned by an acceptance that this is the most appropriate way of determining the truth and providing an outcome.<sup>38</sup> Such a requirement also assumes that the parties are capable of discharging the responsibilities imposed on them by the system.

However, a major criticism made of the adversarial system is that the complexity of its procedures presupposes and requires legal representation, and that in family law proceedings this frequently comes at great cost and stress to separated parents who are already financially and emotionally fragile. And as Geoffrey Davies, Lord Woolf and others have commented, the traditional litigation system both assumes and requires the existence of deep pockets if the battle between the opposing parties is to be efficiently fought, Lord Woolf concluding that ‘*The argument for the universal application of the full “red-blooded” adversarial approach is appropriate only if questions of cost and time are put aside*’.<sup>39</sup>

In the early 1990s, it became apparent that the proportion of self represented clients appearing in the Family Court at various stages of the litigation process was increasing. Many were appearing without lawyers because they could not obtain any form of legal aid<sup>40</sup> and were unable to fund private lawyers. Research data and anecdotal information indicated that many of these clients were totally unfamiliar with court procedures, that where there had been an unequal power balance in their relationship (particularly violence) intimidation of one by the other continued into the courtroom, and that others were unable to articulate their case, and/or had cultural, psychological or linguistic difficulties.<sup>41</sup> Such clients can easily be treated as problems but, as Lord Woolf has pointed out, the problem should more appropriately be directed at the *system* and its inaccessible and complex procedures.<sup>42</sup>

The Family Court’s efforts to refine and streamline its procedures (see below), to provide better information to litigants and to emphasise mediation as a means of resolving disputes did not, until recently, extend to changes to the essential nature of the litigation process.<sup>43</sup> Unrepresented clients were therefore exposed to the full impact of the courtroom and its procedures and the mysteries of the rules of evidence once their matter entered the determination phase of the case management process.

In family law disputes one or both parties as well as the child may be represented or unrepresented, depending on the circumstances. Whatever permutation of representational imbalance occurs, there will be a variety of impacts on all parties, plus the lawyers and the judge. The result may well be that the child’s best interests are in some way compromised. Depending on the nature of the case and the personalities of the *parties*, self-advocacy might result in the pursuit of fruitless or frivolous litigation or, conversely, in the abandonment of a sound claim because of a lack of awareness of its merits, or through fear of the process itself. Where one party has access to greater funds than the other, delaying tactics can wear the other down financially. Similarly, a self represented litigant without assets can drain the funds of the other party or exhaust their legal aid entitlements.

Although the testing of evidence by way of cross examination is an essential feature of the civil justice system in common law countries, this presents particular difficulties (in addition to those of a technical nature) in family disputes, which are compounded where there are allegations of family violence, or more subtle imbalances of power, in the

relationship.<sup>44</sup> The value of cross examination is, of course, also constrained by the value of the evidence presented in the first place. There is always a concern in children's cases that the circumstances of the child may not be realistically or objectively conveyed to the court by the evidence provided, and the failure to hear directly from the child may also be a cause of evidentiary distortion.

In circumstances where only one party is legally represented the *lawyer's* role is also made more difficult because of a potential conflict he or she has between the duty to the court and the duty to the client. The *judge* must also perform a very difficult balancing act, and may be perceived to favour one or other party,<sup>45</sup> while attempting to bring about a level playing field and assess the meaning and value of the available evidence.

### **Major characteristics of the European system (often described in common law countries as the inquisitorial system)**

The proceedings are controlled by the judge, whose role is to determine the issues in dispute, the nature of the evidence required to support the claim and the manner of its presentation.

- ▶ The judge has an investigative role and can pursue avenues of inquiry he/she considers relevant, including the appointment of experts.
- ▶ The proceedings are not regulated by detailed procedural or evidentiary rules.
- ▶ The proceedings take the form of an ongoing inquiry rather than a single trial event.
- ▶ Non litigated outcomes are assumed to be the preferred outcome (although, European approaches had not, until very recently, incorporated mediation into their court dispute resolution armoury).
- ▶ The judge's responsibility to ascertain the truth exceeds the responsibility to determine the dispute between the parties.
- ▶ The focus on carefully defined issues encourages the proceedings to be short in duration.

Examples provided by the Australian Law Reform Commission (ALRC), Davies and others illustrate the extent to which common law systems have increased judicial control over the progress of civil litigation,<sup>46</sup> and the Family Court's numerous internally driven reforms, referred to later, indicate the extent to which it constantly sought to rectify the scourges of delay and cost, but found it difficult to do so because of constitutional and other restraints.<sup>47</sup> One of the most persuasive proponents of the need for reform of the Australian civil justice system in the last decade has been Justice Geoffrey Davies, formerly of the Queensland Court of Appeal. In a number of significant articles<sup>48</sup> Davies identified and then deconstructed the features of the common law civil justice system, challenged the assumptions on which it is based, questioned the alleged superiority of its procedures over those of European systems, and suggested a number of areas of possible reform.<sup>49</sup>

Nicholson and Davies have both questioned the applicability of adversary processes, not just because of the costs and delays with which they have been so frequently associated, but also out of concern at their inability to produce fair results and outcomes based on objective truth.<sup>50</sup> In his 2002 paper,<sup>51</sup> Davies challenged (1) the belief that our traditional civil justice system is the best means of ascertaining the truth and achieving fairness, and (2) the perception that European civil systems were so different and inferior to ours that nothing could be achieved by borrowing from them. This tendency to denigrate other approaches to dispute resolution was also identified and rejected by Nicholson in his search for a better family law system: ‘...I reasoned, ... that countries that otherwise represented the cradle of European civilisation could not have consistently got everything wrong since Napoleon’s demise and thought that some insights might be gained from that system.’<sup>52</sup>

Both judges warned that the unfairness of the system is most apparent where the parties have unequal bargaining power (most obviously where one is unrepresented), as the wealthier party can afford the more expensive and better lawyer or can compel the poorer party to engage in time and cost wasting procedures. Nicholson’s concerns were directed at family law matters, and particularly children’s cases. Davies sought solutions to the civil justice system as a whole.

The convergence between adversarial and inquisitorial approaches was also acknowledged in the ALRC’s Discussion Paper which preceded its *Managing Justice* report. The paper noted that the terms “adversarial” and “inquisitorial” lack a precise or simple meaning, and that ‘[N]o country now operates strictly within the prototype models of an adversarial or inquisitorial system. The originators of those systems, England, France and Germany, have modified and exported different versions of their respective systems’.<sup>53</sup>

A recognition of the importance of judicial fairness and the need to achieve balance between the benefits of active judicial management and the assurance of a fair and informed outcome were central to discussions leading to the development of the CCP and later the LAT.

## Characteristics of the Family Law Act and the Family Court – then and now

The 1974 Family Law Bill was finally assented to on 1 June 1975 and the FLA came into effect on 6 January 1976. Various of its provisions, as originally enacted, and as subsequently amended (and on occasions repealed), illustrate how the objectives of informality, privacy and respect for the dignity of separating couples were translated into legislation. These in turn illustrate Parliament's intention to identify and treat family law as being different in character from other areas of civil law<sup>54</sup> because of the emotional and financial consequences of marriage breakdown, and its public policy impacts on the wider society.

Section 43 of the FLA reflects these policy concerns and is an important example of the “reach” of the Act and of its principles, including as it does a requirement that the Court, in exercising its jurisdiction, have regard to considerations which exceed those of the parties to the proceedings before it,<sup>55</sup> namely:

- (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life
- (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children
- (c) the need to protect the rights of children and to promote their welfare
- (ca) the need to ensure safety from family violence,<sup>56</sup> and
- (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.

Sandor has commented that the FLA introduced several inquisitorial modifications to the conduct of private children's proceedings within an adversarial legal culture.<sup>57</sup> There are a number of these modifications, and frequent references to their significance, in the case law. These have long been considered necessary because, as mentioned previously, children are the *subject* of applications for parenting orders, and in such circumstances the Court must regard their best interests as the paramount consideration,<sup>58</sup> but they are neither parties nor (except unusually) witnesses to the proceedings<sup>59</sup> and only in exceptional circumstances does the judge have an opportunity of even seeing them. Evidence about their circumstances, wishes and living arrangements were traditionally provided to the Court by third parties in the form of a family report, via evidence provided by an expert witness, or through the children's independent lawyer.<sup>60</sup>

In one sense the new changes can be seen as a further movement along a previously identified spectrum of less adversarial procedures, although it far exceeds those in its scope and impacts to the point where it should be regarded as a new system.

Of course, concerns about procedural and substantive law are not the sole province of *family* law, and developments in other areas of the civil justice system have resulted from the need to address aforementioned criticisms of the adversarial system, particularly in relation to delays, expense, inappropriate use of private and public resources and unsatisfactory outcomes. An examination of the operation of the law in civil law countries also shows the influence of adversarial procedures in their introduction of various procedural changes, and (as mentioned previously) several judicial commentators have noted the convergence of civil and common law systems. The extent to which the LAT serves as an example of this movement, and also as a catalyst for further reforms in both family law and other areas of the civil justice system, is referred to later in this paper.

The significance of the statutory direction to the Court to consider children's welfare as the primary consideration in parenting disputes was recognised in an appeal of a custody matter in the High Court in the waning years of the life of the Matrimonial Causes Act<sup>61</sup> where Mason, J (as he then was) noted in relation to the paramountcy principle then contained in section 85(1) of that Act that:

*'This provision makes it clear that the nature of the Court's jurisdiction in custody is very different from ordinary inter partes litigation, and that all the rules applicable to that class of litigation are not appropriate to custody proceedings.'*<sup>62</sup>

The establishment of the Family Court as a less formal forum for the determination of family law disputes than had been envisaged under previous Commonwealth and State legislation provided an opportunity to allow greater judicial flexibility in the conduct and management of its proceedings. The relevant provisions of the FLA augmented this flexibility which (particularly in the first years of the Court's operation) produced some interesting and informative case law. As originally enacted, in later amendments and together with its accompanying rules and regulations, the FLA sought to protect litigants' privacy, reduce animosity and costs, to give the Court powers to encourage settlement as an alternative to litigation, and to allow it to rely on the most useful evidentiary material in matters involving children.

Particular provisions of the "original" FLA are significant:

- ▶ All proceedings were to be heard in closed court<sup>63</sup> and neither the judge nor counsel were permitted to robe.<sup>64</sup>
- ▶ The constitutional validity of section 97 (1) and (4) was the subject of two High Court challenges in the first year of the operation of the FLA.<sup>65</sup>
- ▶ The Court was required to proceed without undue formality and to endeavour to ensure that proceedings were not protracted.<sup>66</sup>

In *Russell v Russell* issues arose (inter alia) as to the validity of the FLA, insofar as it required State courts exercising FLA jurisdiction to be closed and prohibited robing. Barwick CJ and Gibbs J held that the closure of the court and the non-robing provisions amounted to an attempt to change the fundamental nature of the court, and were thus unconstitutional, whilst Mason and Jacobs JJ categorised them as procedural issues and upheld their validity. Stephen J held that robing was procedural, but that the closure of the court was fundamental to its performance. This decision did not, however, apply to the Family Court as a federal court and the new Act's provisions continued to apply to it. The first Parliamentary Joint Select Committee report recommended that the Court be open to the public<sup>67</sup> and concluded that public scrutiny of its operations was impossible when only those involved in proceedings before it had access to it (interestingly, many family courts in overseas jurisdictions are still closed to the public). The 1983 amendments to the FLA included the current provision that proceedings shall be held in open court, with section 97(2) allowing the Court of its own motion or on the application of a party to the proceedings to exclude specified persons. Section 121 was amended contemporaneously with section 97(1) to restrict the publication of court proceedings, and to declare an offence against the section to be an indictable offence.<sup>68</sup> Section 97(4) in relation to the prohibition of robing was repealed in 1988.

The interpretation of the provision for the Court to proceed without undue formality was the subject of the second Family Court-related High Court decision in 1976, *re Watson; ex parte Armstrong*<sup>69</sup> and it has been further judicially scrutinised and commented on in subsequent years. At issue was the nature of Family Court proceedings and the extent to which they complied with the constitutional requirement that a Commonwealth court must exercise power judicially, in a manner consistent with Chapter III of the Constitution.<sup>70</sup> Such power is required to be exercised for the purpose of making binding determinations as to rights, liabilities, powers, duties or status.<sup>71</sup> Common law principles also require adherence to the rules of natural justice as to procedural fairness – namely the parties' rights to be heard and the obligation on judicial officers to be free from bias or perceived bias.<sup>72</sup> In a later section of this paper the significance of these requirements in developing the Children's Cases Program, and their constitutional underpinning, will be further explored.

*Re Watson; ex-parte Armstrong* specifically concerned the manner in which the trial judge dealt with *financial* proceedings between the parties. Before the High Court the wife sought to make absolute an order nisi for a writ of prohibition directed against Watson J on the grounds that he was biased against her and had prejudged her credit to her disadvantage. In the course of his judgment, Watson J had described Family Court proceedings as '*being not strictly adversarial, but more in the nature of an inquisition followed by an arbitration*'.

The majority judgment of the High Court (Barwick CJ, Gibbs, Stephen and Mason JJ) said:

*“The judge called upon to decide proceedings of that kind is not entitled to do what has been described as “palm tree justice”. No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down . . . . He must also follow the procedure provided by the law. The provisions of sec. 97(3) of the Act, which require him to proceed without undue formality, do not authorise him to convert proceedings between parties into an inquiry which he conducts as he chooses. The provisions of reg. 108(2), which enable the court “with the consent of the parties to the proceedings” to dispense with such procedures and formalities as it thinks fit, show that without such consent the court has no such dispensing power. A judge can neither deprive a party of the right to present a proper case nor absolve a party who bears the onus of proof from the necessity of discharging it. These remarks are not intended to fetter a judge of the Family Court in the exercise of a proper discretion or to insist upon the observance of unnecessary formality; they are designed to make it clear that a judge of the Family Court exercises judicial power and must discharge his duty judicially.”*<sup>73</sup>

The decision of *Lonard*,<sup>74</sup> decided subsequently in the same year, gave the Full Court of the Family Court an opportunity to consider appropriate procedural requirements in a custody dispute, as distinct from a financial dispute. The Court drew a distinction between the two and indicated that judges would find it necessary to exercise more extensive powers of inquiry in children’s matters. The father in that case sought to have a consent order about custody of a child set aside on the ground that the trial judge had been extremely interventionist during the trial and had conducted himself in a manner that unduly influenced the appellant to consent to the order. The appeal was dismissed, but the Full Court expressed its disapproval of certain aspects of the judge’s conduct in that particular case, in making unrestrained comments and attempting to discourage various lines of questioning, whilst also affirming the right in children’s cases to suggest that additional evidence be called or a particular line of questioning be adopted.<sup>75</sup>

In another child-related case, also decided in 1976, *Wood v Wood*,<sup>76</sup> the Full Court set aside an order of the trial judge which dispensed with both viva voce evidence and cross examination, on the basis that the best available evidence had not been available at first instance which, it noted, was of particular importance in cases involving children.<sup>77</sup>

Over a decade later, Dawson J in the High Court in *Re JRL; ex parte CJL*<sup>78</sup> in a minority judgment clearly enunciated the need for judges to recognise the “special nature” of children’s proceedings whilst continuing to act judicially:

*‘Proceedings in the Family Court in relation to the custody, guardianship or welfare of or access to a child are, in an important respect, not of the ordinary kind.’ ...*  
*‘Thus the jurisdiction being exercised in this case, whilst essentially judicial, was not entirely inter partes because the paramount consideration was the welfare of the child. In this respect it was a jurisdiction analogous to the jurisdiction of the Court of Chancery in wardship cases which was of a special kind, permitting procedures which would not be permitted in judicial proceedings of the ordinary kind. See In re K. (Infants)(1965) AC 201. The very procedure laid down by the Family Law Act with respect to the compilation of reports by court counsellors at the direction of the court where the welfare of a child is relevant (see s.62A (1)) and the reception of those reports in evidence demonstrates the special nature of the jurisdiction arising from the purpose of the inquiry undertaken by the court. In the exercise of such a jurisdiction, some modification at least is required of the ordinary rules of evidence and procedure in order to achieve that purpose. See Sing v. Muir (1969) 16 FLR 211. It follows that the proceedings in this case were different from other proceedings under the Family Law Act, such as proceedings between a husband and wife with respect to property or maintenance, which are truly inter partes and in which the duty to act judicially is of the ordinary kind. Cf. Reg. v Watson; Ex parte Armstrong at pp 257-258. Nevertheless these proceedings remained judicial proceedings. Neither their special nature nor the requirement in s.97 (3) that the court should proceed without undue formality relieved the court of the obligation to observe, where applicable, the procedures which are followed by courts acting judicially in order to ensure impartiality and fairness.’<sup>79</sup>*

This portion of His Honour’s judgment was not inconsistent with the views expressed by the majority.

Two years later a unanimous High Court, in *M v M*,<sup>80</sup> cited *Reynolds* with approval and also stressed the Court’s responsibility to look beyond the interests of the parties in hearing an appeal by a father from a decision of the Full Court of the Family Court which had denied him access because of concerns that he had abused his child:

*‘The Family Court’s wide-ranging discretion to decide what is in the child’s best interests cannot be qualified by requiring the Court to try the case as if it were no more than a contest between the parents to be decided solely by reference to the acceptance or rejection of the allegation of sexual abuse on the balance of probabilities.’<sup>81</sup>*

In *Re P (a child) and the Separate Representative*<sup>82</sup> Nicholson CJ and Fogarty J distinguished property proceedings from those relating to children, saying:

*'Although proceedings in the Family Court in property and maintenance matters are adversarial in their nature rather than inquisitorial – see In re Watson; ex parte Armstrong (1976) FLC 90 059 it is important to note that the remarks of the High Court were confined to property and maintenance. Proceedings in relation to the welfare of children are not strictly adversarial, having regard to the Court's obligation to treat the welfare of the child as the paramount consideration [underlining added]... This overriding principle governs the procedural as well as the substantive issues.'*<sup>83</sup>

The Full Court reiterated this distinction in *D and Y*:<sup>84</sup>

*'It is clear, nevertheless that judges of this court have a wide discretion, subject to affording procedural fairness, as to the conduct of proceedings before them. Further, as the Full Court pointed out in Re P (a child) and the Separate Representative ....., the principles stated by the High Court in the above case were referable to property and maintenance proceedings, whereas in custody proceedings the welfare of the child is the paramount consideration and that therefore proceedings which relate to the welfare of children are not strictly adversarial.'*<sup>85</sup>

In *C and C*<sup>86</sup> the Full Court emphasised the importance of the Court's power to place time limits on the time taken in interlocutory proceedings on the basis that to refrain from so doing would expose litigants to a serious injustice because of increased delays. The wife's appeal against the trial judge's refusal to grant her an adjournment was unsuccessful.

In *Re Lynette* the Full Court said '*...it is well established that proceedings in relation to the best interests of children are not strictly adversarial. The wellspring for departure from a strictly adversarial approach to proceedings is found in the Court's obligation to treat the best interests of the child the subject of proceedings as the paramount consideration.*'<sup>87</sup>

However, there was never any suggestion that a complete departure from the traditional adversarial processes in children's cases would be supported. The issue was always seen as one of balancing procedural fairness with a recognition of the special nature of children's matters. In *Northern Territory of Australia v GPAO*<sup>88</sup> the High Court made it clear that there were limits to the way in which the paramountcy principle of the welfare of the child enabled the Court to depart from ordinary rules of procedure and evidence. In *T and S* the argument that the trial judge had failed to inquire into the mother's allegations of domestic violence was rejected by the Full Court of the Family Court. In so doing Nicholson CJ, Ellis and Mullane JJ commented that, although proceedings involving the welfare of children are not strictly adversarial in the usual sense, they should not be equated with inquisitorial proceedings, and noted that '*the Court and its procedures are simply not equipped to conduct inquisitorial proceedings*'.<sup>89</sup>

Finally, in the High Court relocation case of *U v U*,<sup>90</sup> Hayne J suggested an almost inquisitorial role for the Court in determining whether a particular proposal was in the best interests of the child. He warned that in deciding such cases in the face of competing parental proposals, the Court may overlook the best interests of the child in preference to the particular needs of the parents.

*In these circumstances, it would be quite wrong to treat the decision that is to be made as confined to a choice between whatever may be the particular “proposals” that the parents may make for the residence of, and contact with, the child. So to confine the inquiry would, in this case, have required the Family Court to ignore admittedly relevant evidence that was led about what the mother would do if it were decided that the child should live in Australia rather than India. More fundamentally, it would confine the Court’s inquiry to what the parents suggested would be in the best interests of the child, regardless of whether those suggestions were informed, even wholly dictated, by the selfish interests of one or other of the parents. To confine the inquiry in this way would, therefore, disobey the fundamental requirement of the Act that the Court regard the best interests of the child as paramount. Those interests may, or may not, coincide with what one or both of the parents put forward to the Family Court as appropriate arrangements for residence and contact.*

*‘That is not to say that the Family Court is to embark upon some roving inquiry about the matter, unfettered by any regard for the evidence led and the matters which the parties seek to contest. Due account must be taken of the fact that proceedings in the Family Court are conducted in a framework of adversarial procedure familiar to the common law. (I do not stay to consider how or to what extent that adversarial model has been modified by the Act or rules of court made under it.)’<sup>91</sup>*

Chief Justice Gleeson in his address, “The State of The Judicature”, delivered on 25 March 2007 at the 35th Australian Legal Convention held in Sydney said this:

*‘As its name implies, the Family Court is a specialist court, and in certain respects its procedures are atypical, and tailored to its special role. In particular, disputes concerning children are dealt with in a fashion that is self consciously less adversarial than the ordinary civil trial process. Counselling and mediation play an especially important part in the work of the Family Court.’*

He also said:

*‘It is true, but an over simplification, to say that civil and criminal process in Australia, both at trial and appellate levels, adheres to the common law adversarial model. There are specialist jurisdictions, such as the Family Court, that seek to minimise the adversarial nature of litigation. Even within the mainstream jurisdictions, the adversarial model itself changes.’*

## Statutory provisions illustrating the special nature of children's cases

One of the most significant features of the Family Court of Australia – and one of its greatest strengths – was the establishment of its in-house counselling service as an integral part of the Court's functions. This service was intended to encourage parents to resolve disputes over children without resorting to litigation and with the assistance of Court staff qualified in either social work or psychology. The FLA recognised that children's cases required and could benefit from the skills of such non-legally qualified professionals.<sup>92</sup> This emphasis on settlement has distinguished the Family Court from family and non-family courts in other common law systems, which were traditionally characterised by an assumption that disputes would be resolved by trial and judgment.<sup>93</sup>

The nature of the services the Family Court provides has changed over the years, as has the terminology used to describe those services<sup>94</sup> and the extent to which clients are counselled in house or referred to agencies external to the Court. The role played by family consultants and the many and varied ways in which negotiated settlements are encouraged by the FLA are reflected in a number of provisions which illustrated the movement away from traditional adversarial procedures before the significant amendments introduced by Division 12A in 2006.

As recognised by Dawson J in *Re JRL; ex parte CJL*<sup>95</sup> and frequently elsewhere, family reports are important settlement tools and also sources of valuable information about children's care, welfare or development where matters go to trial.<sup>96</sup> Where appropriate, they also provide an independent vehicle for ascertaining the views of the child and transmitting these to the Court in a manner which protects the child from exposure to court procedures.<sup>97</sup> The Family Court has the power to direct a family consultant to prepare a family report on such matters relevant to the proceedings as the court thinks desirable.<sup>98</sup> The reports have been described as an important modification of the adversary system<sup>99</sup> because they come into existence at the Court's direction, rather than on the initiative of a party, their contents are admitted into evidence by the court regardless of the wishes of the parties, and they are received into evidence in proceedings under the FLA.<sup>100</sup> Furthermore, the *Court*, not one or other of the parties, calls the report writer to give evidence as a Court witness where such evidence is required. It is true that other superior courts have long had the power to appoint and call experts, but it is a power that has been rarely used, whereas it is commonplace in the Family Court and well accepted.

Another important initiative of the FLA was the power given to the Court to appoint an independent children's lawyer in proceedings in which children's best interests or welfare are the paramount or a relevant consideration.<sup>101</sup> The children's lawyer may be appointed on the Court's own motion or on the application of the child, an organisation concerned with the welfare of children, or any other person.<sup>102</sup> In practice, it is almost invariably

the Court that orders such an appointment. The appointment is normally funded by the relevant State or Territory Legal Aid Commission. In the past this has led to difficulties because of funding constraints and bureaucratic approaches by Commissions but more recently these problems appear to have been largely resolved. The initial difficulties commenced as a result of the Full Court's decision in *Re K*,<sup>103</sup> which laid down a wide range of circumstances for the appointment of children's lawyers. This extended the circumstances well beyond the existing practices of most Legal Aid Commissions, and in particular the Victorian Legal Aid Commission. The decision had a profound effect that was not merely financial and caused a rapid development of the role of the children's lawyer. It was also important in furthering the rights of children to have their position taken into account. Division 10 of Part VII of the FLA now spells out in more detail the role of the children's lawyer, making it clear that he or she is not the child's legal representative and is not required to act on the child's instructions,<sup>104</sup> but rather must ensure that his or her best interests are advanced.<sup>105</sup>

Sandor refers in his paper to several FLA provisions and to Court rules which preceded the introduction of Division 12A and which are relevant for incorporating into the Act what he described as 'additional statutory features that are outside the adversarial mould'.<sup>106</sup> His examples are included here [with emphasis added] and updated to include the 2004 Rules of Court:

- ▶ Section 68R – the Court may *on its own initiative* when making a family violence order revive, vary, discharge or suspend an existing order, injunction or arrangement.
- ▶ Section 69V – allows the Court to make an order requiring any person to give evidence material to the question of a child's parentage.
- ▶ Section 69W(2)(a) – the Court can make a parentage testing order *on its own initiative*.
- ▶ Section 102A – provides that where a child has undergone a medical, psychiatric or psychological examination without leave of the court, evidence which relates to abuse is not admissible.
- ▶ Section 102B and Rule 15.38 – the Court may get an assessor to help in the hearing and the determination of proceedings, or any part of them or matter arising under them.
- ▶ Section 123 (ba) – grants the judges' power to make Rules of Court providing for and in relation to trial management.
- ▶ Rules 5.10 – the evidence provided in interim or procedural hearings is restricted and such matters may take no more than two hours to hear.

- ▶ Rule 15.45(1) – the Court may, on application *or on its own initiative*, order that expert evidence be given by a single expert witness.
- ▶ Rule 15.46 – allows the Court to make a variety of orders in relation to the appointment of, instruction of, or conduct of a case involving a single expert witness.
- ▶ Rule 15.71 – the Court may call evidence *of its own motion*.<sup>107</sup>

## Family Court procedural reforms

From its inception in 1976 until it piloted the CCP in 2004, the Family Court introduced a number of significant changes to its procedures, ranging from the introduction (and subsequent removal) of pleadings, the introduction and development of case management guidelines, differential case management, the special management of complex cases and the trial management of child abuse cases.<sup>108</sup>

Some of these measures became necessary because of legislative amendments<sup>109</sup> (the most significant of which relate to Part VII of the FLA which deals with children) or recommendations flowing from external reviews. Many occurred after internal analyses of workloads, responses to delays, increased awareness of issues such as family violence, and a recognition of the impact on the system of increasing numbers of litigants in person. Some measures were reactive, others proactive. Some were innovative, others more “band aid” in approach and intention. Many attracted criticism from the legal profession and litigants, who argued that constant change was confusing, unnecessary and expensive.

Procedures for the conduct and administration of the Family Court were initially minimal and were governed by family law regulations, authorised by the executive<sup>110</sup> and influenced by the statutory exhortation to the Court to proceed without undue formality.<sup>111</sup> In children’s matters, proceedings began by way of an application, supported by a short affidavit in which were set out the proposed arrangements for the child and the facts relied on to support the application. The affidavits gradually and inevitably became longer and more numerous, and when examined were found to contain irrelevant and inadmissible material. Where matters proceeded to trial, interlocutory applications increased as did the number and length of supporting affidavits. Chief Judge Elizabeth Evatt issued a practice direction seeking to reduce the amount of paper work filed and relied on, but this was unsuccessful.

Family Court judges acquired their rule making power in 1983 and the first set of Rules came into effect in January 1985. In the same year case management guidelines were prepared and adopted, following recommendations contained in the interim report of the Court’s Committee on Standardisation of Practices and Procedures. These guidelines, pioneered by the Family Court, were intended to provide a clear statement of the practice and expectations of the Court about the progress of litigation consistent with case

management principles, and to ensure consistency of approach across the court.<sup>112</sup> They were defined as ‘*the supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition, regardless of the type of disposition*’.<sup>113</sup> The emphasis was on early management of cases to achieve early disposition for the great majority which ultimately did not require a judicial determination. The guidelines were described as strictly related to court management, and as having no direct impact on the adjudication of substantive or procedural issues.<sup>114</sup>

Despite these limitations on their significance, the introduction of a system of case management in any court environment inevitably involves a transfer of control from the parties/lawyers acting on their behalf to the court, with the express purpose of containing both costs and the duration of proceedings. Such objectives are frequently supported by court-imposed restrictions on pleadings, discovery, the presentation of evidence and settlement opportunities.<sup>115</sup> They thus represented something of a watershed in transforming the Court’s role into a more interventionist and active one, and providing an opportunity for it to affect the conduct of hearings.

The Family Court’s case management guidelines have been substantially amended several times and are currently identified as the case management directions. Pleadings were introduced in 1989 and were an early attempt to allow the issues in dispute to be identified from the commencement of litigation, and thus contain costs. They required the facts on which the parties relied to be set out in summary form, but the evidence by which they were to be proved was not similarly required to be included. Although a well recognised tool in general civil cases, pleadings proved to be less effective in the family law system. The combination of the profession’s unfamiliarity with this approach and the difficulty of stating and defining issues in family law cases caused new problems or exacerbated old ones, and they were finally abandoned in 1995.

Chief Justice Martin, of Western Australia, recently said: ‘*While pleadings certainly have their role in an appropriate case, in my experience they can consume disproportionate amounts of time and expense, and I am sure there are many cases where the issues can be clearly identified in other more effective ways.*’<sup>116</sup>

Because Court statistics have consistently shown that an average of only 5-6 per cent of applications filed go to trial,<sup>117</sup> case management and other procedural initiatives were historically directed at the vast majority of separated families who resolved their disputes without requiring a judicial determination (using the Benthamite principle of the greatest benefit for the greatest number). The objective was to concentrate on the anticipated experiences of the greatest number of clients by encouraging early negotiated resolution somewhere along the litigation pathway, but without the need for a judicial determination. It was accepted that the chances of reducing the percentage of cases going to trial were very slim,<sup>118</sup> although the tendency of such cases to become more complex over time was producing longer and more technical trials.

Concerns about the complexity of court procedures caused the then Chief Justice to appoint a committee to consider how they might be made more user friendly. The Simplification of Procedures Committee was established in 1992 and its final report was delivered in May 1994. It defined the aims of an ideal procedure to be:

- ▶ To provide access to the Court with as little cost or complexity to the litigants as is 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 per cent of applications that will settle.
- ▶ To ensure that those matters which do proceed to trial do so in a fair, equitable and timely fashion.<sup>119</sup>

The report identified the tension between the Court's (a) advanced alternative dispute resolution system and the associated high rate of early settlement *and* (b) its insistence on the completion of compulsory procedures that assumed matters would proceed to trial, and which therefore required the preparation and filing of material which was very rarely required.

The Committee recommended (inter alia) that:

- ▶ pre filing conciliation should be available on short notice in children's matters and that the counselling service should be resourced to enable it to provide such a service within two weeks of referral, and
- ▶ information sessions with a child and property component be introduced as part of the conciliation service and available for parties prior to the filing of an application or before the first return date.

A mediation unit was subsequently established, first as a pilot in Melbourne and, on a smaller scale, in the Adelaide and Dandenong Registries, with mediations being conducted by a registrar and a counsellor.

The committee also addressed the need for trial management powers, which the second Joint Select Committee (at the urging of the Court) had recommended be granted to the judges.<sup>120</sup> In endorsing the recommendation, it noted that giving judges the power to make additional rules of court would '*enable the Court to make directions for a more structured and more interventionist approach to the management of trials*'.<sup>121</sup> This sowed the seeds for the development of the 2004 rules.

As a result of recommendations made by the Simplification of Procedures Committee and following significant changes made to the Family Court Rules in January 1996, a number of procedural improvements were implemented. Case management guidelines were revised to complement those rules and these came into effect contemporaneously

with the rules.<sup>122</sup> These were revised again and reissued in April 1997.<sup>123</sup> One of the recommendations of the Simplified Procedures Committee was that the effectiveness of its proposals be evaluated during the first twelve months of their operation. This was undertaken by the Evaluation of Simplified Procedures Committee, which reported to the Chief Justice in August 1997. In its report the Evaluation Committee remarked on the considerable legislative and other changes which had occurred between January 1996 and June 1997 and which had impacted in different ways on the Court and its procedures.<sup>124</sup> These included the proclamation of the *Family Law Reform Act 1995* (Cth) which caused workload increases (particularly in interim applications), reduced availability of legal aid, Family Court budget constraints (which resulted, amongst other things, in reducing the Court's counselling service and country circuits), Rule changes effective from mid-1997 and the introduction of filing fees and fees for counselling (which were subsequently disallowed by the Senate). The Evaluation Committee made a number of recommendations for amendments to the FLA and changes to the Court rules, forms and procedures.

The Court developed a strategic plan in 1998 and as a consequence its Future Directions Committee was established in the same year to initiate and co-ordinate a number of improvements to court services. The Committee's tasks included a review of the case management guidelines, the use of expert evidence and proposals for shortening trials and for using judge time more effectively. The Committee reported to the Chief Justice in mid-2000 and as a result of its work a new pre trial case management system was implemented nationally the following year. A major characteristic of this system was the discrete separation of the resolution phase from the determination phase of case management,<sup>125</sup> plus the introduction of new procedures for the preparation and listing of cases for trial, the introduction of a case assessment conference and a prohibition on the allocation of trial dates until all evidence was filed and the case was ready for trial.

Another recommendation of the Future Directions Committee was the introduction of a case summary document prepared by Court staff and the parties' legal representatives. This represented another attempt to refine and identify which issues were settled and which remained in dispute as a matter progressed through the case management pathway. The intention was that a Court staff member would prepare this document in concert with the relevant lawyers and that it would inform the trial judge of the issues that remained in contention. This initiative unfortunately failed and caused Justice Stephen O'Ryan, in July 2002, to comment that, despite the Court's best efforts it had been unable to produce a system which required the parties to identify, at an early stage, the relevant issues which were either genuinely in dispute or agreed, which confined the evidence to the matters in dispute, limited the trial to adjudication of those matters and assisted the adjudicator in the preparation of his/her judgment. He concluded that as a consequence '*at the trial all that has to be done [by the parties and/or their legal representatives] is serve up evidence that provides a "womb to the tomb" version of the marital history and leave it to the judge to attempt to work out what is the relevant history and what are the issues.*'<sup>126</sup>

### **The Magellan Model: an example of differentiated trial management**

The completion of several research projects,<sup>127</sup> in the 1980s and 1990s, drew attention to the vulnerability of children in households characterised by family violence, and the frequency with which Family Court children's cases included allegations of child abuse. Simultaneously the Court was struggling to reduce delays, and children's cases were increasingly taking several years to come to trial. Although, as mentioned earlier, the Family Court has no jurisdiction in care and protection cases (which are the responsibility of State and Territory law), in many litigated residence and contact disputes a central feature of the dispute – and one which is obviously crucial to a determination of a child's best interests – is an allegation that she or he has been subjected to physical, sexual or (less commonly) psychological abuse by a family member. The incidence of such allegations caused them to be described as the core business of the Court.<sup>128</sup> Consistent with this finding, the Family Court's second submission to the Joint Custody Inquiry contained a survey of 91 judicially determined matters, dealt with between January and June 2003. Sixty-seven per cent of these cases involved allegations of physical abuse or risk of such abuse.

In *M and M*,<sup>129</sup> the High Court held that when dealing with such allegations the Family Court is not required to make a finding of whether particular individuals have inflicted abuse or neglect, which is the role of criminal courts. Its task is to determine whether its orders and particularly orders for residence or for contact create an unacceptable risk for the child. However, it is required to assess the facts before it can consider any risk to the child when making orders for residence and contact, and these risks must be balanced against the desirability of a child maintaining contact with both parents. Throughout this process, the Court depends on appropriate and accurate reports, to assist in it determining what is in the best interests of the child.

The then Chief Justice was concerned that research showed that cases involving vulnerable children were being hampered by delays, by a lack of coordination of services and by the adversarial nature of the proceedings (which encouraged adults to seek to clear their names rather than focus on issues relating to the child's safety). As a consequence, with the assistance of a research team from Monash University, he introduced a pilot program in the Court's Melbourne and Dandenong Registries during 1997 in which 100 cases involving serious child abuse allegations were managed differently from other child-related cases. The major characteristic of this project, which was given the name Magellan, was its team approach headed by a judge who actively managed each case through to disposition and who was assisted by a court counsellor. The objective was to reduce both the time to determination and the number of Court interventions, and to ensure a clear child focus to the proceedings. The project acknowledged that the welfare of children was best advanced where the most current and accurate information was available to the Court and provided by all agencies that had been in contact with the families.<sup>130</sup> It also recognised the importance of timelines and the dangers associated with leaving children in potentially dangerous households for any length of time. The judge's

role was proactive and pivotal in ordering the information required of lawyers for the party and the child, the Court counsellor and the State welfare department. As cases were selected into Magellan at the pre trial stage there was commonly more than one court event at which issues in dispute could be identified and possible outcomes other than litigation pursued.

The evaluation of the Magellan project showed that disputes were resolved more quickly and with fewer court events as a result of the hands on judicial management, and that the outcomes were more likely to “stick” than were non-Magellan cases involving similar allegations and characteristics. Although the project was initially resource intensive, the team approach and the control exerted by the judge encouraged an early identification of the issues in dispute and the preparation and presentation of timely and comprehensive information about the child, which in turn assisted with resolution. Few of the cases in the pilot proceeded to trial. Given its positive outcomes the Family Court implemented Magellan across all States, ultimately including New South Wales.<sup>131</sup>

Although the Magellan procedures did not impact directly on the conduct of trials they were an excellent example of the advantages of active judicial management, more client-inclusive procedures and front loading of resources.

### Self represented litigants – catalysts for change

Self-representation is a right. However, the right to be meaningfully heard, the nature of the adversarial system, the need for a legal system which operates efficiently, and the need to redress any power imbalance that may exist in a family relationship, are all arguments in favour of representation by an objective and skilled advocate.<sup>132</sup>

An earlier section of this paper identified the contraction of legal aid and the corresponding increase in self represented litigants as incentives for the development of the LAT as a less complex process. The jurisprudence of the period also illustrates how the Court struggled to provide a level playing field for its clients in the face of the failure of successive governments to provide sufficient legal representation to meet the demand of family law clients and in the face of statistical evidence that litigants in person were disproportionately concentrated in children’s matters as opposed to property matters.<sup>133</sup> In *Johnson v Johnson*,<sup>134</sup> the Full Court set out a number of obligations a trial judge had in such cases, and these were subsequently refined and clarified in *Re F*,<sup>135</sup> formulated, as O’Ryan describes them ‘*in ways more reminiscent of inquisitorial proceedings*’.<sup>136</sup> The obligations/guidelines require a judge to:

1. *ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial*
2. *inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses*

3. *explain to the litigant in person any procedures relevant to the litigation*
4. *generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation*
5. *if a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course*
6. *provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise*
7. *if a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights*
8. *attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated. (Neil v Nott (1994) 121 ALR 148 at 150).*

*‘Where the interests of justice and the circumstances of the case require it, a judge may: draw attention to the law applied by the Court in determining issues before it; question witnesses; identify applications or submissions which ought to be put to the Court; suggest procedural steps that may be taken by a party; clarify the particulars of the orders sought by a litigant in person or the bases for such orders.’*

In late 2000, the Court launched *Self Represented Litigants – a Challenge*, which (inter alia) required the project team led by Justice John Faulks (as he then was) to review court processes and procedures to determine ways of making them clear and understandable. This project developed a suite of information packs and other resources designed to assist self-represented litigants. In 2002, the team conducted a visioning workshop, facilitated by the Hon Fred Chaney AO, and attended by Justice Davies (as he then was), amongst others, which recommended the establishment of a Court assisted litigation model. Although the resource implications of this model ultimately precluded its adoption by the Court, its advantages were described as being its less adversarial format and accessibility for parties who were not trained in advocacy or legal processes, its elimination of complex rules of evidence and formal procedures, and its creation of a more level playing field when one party was unrepresented.<sup>137</sup> It did not, however, really impact on the way a trial would be conducted.

## External scrutiny of the Family Law Act and the Family Court<sup>138</sup>

The operation of both the FLA and the Family Court have, from their inception, been the subject of considerable scrutiny by Parliament and various other bodies. The nature and importance of family law and the publicity it attracts suggests the need for ongoing monitoring and research, and indeed the FLA established both the Family Law Council<sup>139</sup> and the Australian Institute of Family Studies<sup>140</sup> with these functions in mind. Two major Parliamentary Joint Select Committees were, at varying times, required to examine aspects of the law and its administration<sup>141</sup> and between 1992 and 2006 a number of other family law related enquiries were conducted for government or by Parliament or (more commonly) by government funded bodies. Of varying quality and relevance, these were directed at concerns expressed by the media, litigants and professionals about (inter alia) the impacts of the FLA on adults and children, alleged bias in decision-making and the ineffectiveness of court systems. In turn, research projects, commentary and observation were influenced by increasing and increasingly sophisticated bodies of knowledge about children, by increased numbers of Court clients who were more likely to be representing themselves and by the growth in influence of fathers' groups.

### Parliamentary Joint Select Committees

Given the controversy accompanying the removal of fault from divorce it is not surprising that the issue continued to be a source of concern following the passage of the FLA. In 1978, a Parliamentary Joint Select Committee, chaired by Mr Philip Ruddock MHR, was established to consider (inter alia) 'the ground of divorce and whether there should be other grounds'.<sup>142</sup> This was a response both to the increase in divorce numbers in the first year of the operation of the FLA (from 28,308 divorces in 1975 to 66,092 in 1976)<sup>143</sup> and to the community concern allegedly caused by this increase. The Committee's report, tabled in 1980, did not recommend that the 12 month period be extended or that any fault grounds be added to the FLA. However, several committee members expressed opposition to the single 12 month separation provision on the basis that it was too short to provide evidence that a marriage had irretrievably broken down.<sup>144</sup>

In addition to its focus on divorce, term of reference (iv) of the Joint Select Committee required it to consider the organisation of the Family Court and its conduct of proceedings. Given the length of time since the Court had been in operation, it is not surprising that there was little anecdotal – and even less empirical – information on which any analysis could be carried out or conclusions drawn for such an enquiry. The report did little more than note<sup>145</sup> that the establishment of the Court had been an attempt to create a new kind of legal institution by recognising the need for family disputes to be managed by services different from those customarily available to litigants, including the special needs of

children. It made few specific recommendations on the Court's operation or procedures, although the passage of a raft of amendments to the FLA in 1983 was in large part due to its observations on various aspects of the operation of the legislation.

A second Parliamentary Joint Select Committee on Certain Family Law Issues was set up in 1991 chaired by Senator McKiernan and its report, *The Family Law Act 1975 – Aspects of its Operation and Interpretation*, was tabled in the following year. The Committee's eight terms of reference dealt primarily with children's and property matters and included a consideration of:

- (b) the proper resolution of custody, guardianship, welfare and access disputes
- (f) the adversarial nature of proceedings under the Family Law Act.

It received many submissions complaining of the unsuitability of adversarial proceedings in family issues and blaming them for causing damage to the ongoing relationship of the parties, particularly where they were the parents of minor children. Lobbying by separated fathers and the organisations that supported them was instrumental in the establishment of the Committee, which in turn was the catalyst for later significant legislative reforms.<sup>146</sup>

The Committee focused most of its attention on recommending increased mediation as an alternative to litigation, rather than examining possible alternative systems of adjudication, or modification of existing trial procedures. It ultimately recommended<sup>147</sup> that the adversarial system be retained, but that increased emphasis be given to what were then referred to as alternative dispute resolution procedures such as mediation. It also recommended that pre trial procedures be simplified and pleadings abolished, that the FLA be amended to allow the judges to make rules of court in relation to trial management<sup>148</sup> and noted the problems associated with increasing numbers of self represented litigants.

## Other reviews and reports

### 1995 *For the Sake of the Kids: Complex Contact Cases and the Family Court*, Australian Law Reform Commission Report no. 73

A perennial source of disquiet and critical attention amongst family law clients and commentators has been the number and nature of complex contact cases being litigated in the Court, together with the difficulties associated with enforcing such orders following litigation. Although the common perception was that such cases were relatively few in number, they appeared to have a disproportionate impact on the individuals and institutions involved. Many involved protracted disputes and repetitive applications and there was growing concern that these were damaging to the children involved, whilst also depleting Family Court, client and legal aid resources. The ALRC was asked to identify the characteristics and causes of complex contact cases, to recommend how the adverse effects of conflict and repetitive litigation on children and families could be minimised and how Family Court and legal aid resources might be reduced. As part of this inquiry the Commission hired consultants to conduct a file study in an attempt to define complexity and to trace the pathways of complex cases through the court process to assess their duration and manner of disposition. This exercise proved difficult, but the report was able to make a number of recommendations, including that the Court's case management guidelines be amended to assist with early identification of complex contact cases and more timely and effective use of alternative dispute resolution, and "fast tracking" of such cases in the litigation path, increased involvement of the Court counselling service in identifying potentially intractable disputes, and more training of judges and staff to ensure greater recognition of the damage caused to children as a result of family violence.

The report noted:

*'The Commission is convinced that the legal system can play a part in the development and the exacerbation of complex contact cases. The litigation process is unlikely to be able to identify or deal appropriately with the complex family interactions that may have produced the dispute. According to one view it is unable to cope with the process of marital separation and finds it difficult to come to terms with anything other than a win/lose outcome, with a result that the parties become further polarised. The parties may see Court adjudication as the Court choosing the 'better' parent. The adversarial nature of the proceedings could exacerbate their hostility rather than have them focus on parenting responsibilities. One or other party may take contact disputes to the Court out of resentment over separation. Delays in the legal process can heighten the level of dispute between the parties. Inappropriate interventions or interventions at the wrong time can create further difficulties. Legal practitioners who take an unnecessarily adversarial stand can worsen a dispute as can lawyers, counsellors, mediators or arbitrators who fail to identify or respond to relevant issues or who take into account irrelevant issues.'*<sup>149</sup>

**1997 *Seen and Heard: Priority for Children in the Legal Process*, Australian LawReform Commission Report no. 84**

In 1995, the then Attorney-General asked the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) to carry out a comprehensive inquiry into children and the legal process, and their report, *Seen and Heard*, was completed in 1997. It contained 286 recommendations.

The terms of reference for the inquiry were extensive and those most relevant to this paper were directed at:

- ▶ legal advice and access for children and young people and their legal representation before courts and tribunals in the exercise of federal jurisdiction
- ▶ the appropriateness of procedures for pre-trial investigation and taking of evidence from children and young people
- ▶ the appropriateness of rules of evidence for, and procedures for taking evidence in courts and tribunals from children and young people
- ▶ the question of the desirability of children giving evidence in family law and associated proceedings and the appropriate safeguards in such circumstances.

Many submissions to the inquiry commented on the inappropriateness of the adversarial model of litigation in family law matters, particularly those involving children.

The report noted that the focus of family law litigation remains on the parental contest. The processes often do not serve the needs or interests of children or allow their effective participation.<sup>150</sup> It also cited a critique of the adversarial mode as being one that frequently sets the stage for the children to become the battleground and/or weapons in the parental conflict. As victims their lives may become distorted permanently.<sup>151</sup>

The report also recognised that Family Court judges have more latitude than is allowed judges in other jurisdictions and implied that they were under using their powers. It recommended that they be encouraged to intervene appropriately to assist the determination of the best interests of children in children's matters (in the absence of supporting legislation the Court considered such a recommendation to be impracticable). To implement this recommendation the ALRC suggested the introduction of a training program for Family Court judges on more inquisitorial approaches to determining the best interests of the child and the preparation of suitable guidelines to assist judicial officers in this regard.<sup>152</sup>

## 2000 *Managing Justice*, Australian Law Reform Commission Report no. 89

The ALRC presented its long awaited report, *Managing Justice*, to the Attorney-General in early 2000. Much of its content was concerned with discussing and critiquing the practices, procedures and management of the Federal and Family Courts and federal merits review tribunals.

However, its terms of reference had required the Commission to consider the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings before courts and tribunals exercising federal jurisdiction.<sup>153</sup> Although the ALRC did not tackle this critical term of reference directly, the publication of *Managing Justice* provided a useful opportunity to consider relevant material published both in Australia and elsewhere about the strengths and weaknesses of both the adversarial and inquisitorial systems.<sup>154</sup> These materials, together with various reforms in the United Kingdom, and elsewhere, combined with the information gained from observing procedures in a number of European countries, were influential in the development of the LAT initiative and in other areas of court procedures.<sup>155</sup>

In 1999, the ALRC Discussion Paper 62: *Review of the Federal Civil Justice System*, had concluded that: ‘*an adversarial-non adversarial construct was too elusive a basis on which to analyse problems or to formulate change to the system*’. Its rationale for this conclusion was that ‘*Such debate assumes that transplants from different political and cultural systems will function in similar ways when rooted in our legal system, that such change can be engineered, and that it will improve the system rather than introducing a new host of problems*’.<sup>156</sup>

Discussion Paper 62 had also noted that those who advocated the removal of the adversarial system had a tendency to oversimplify its problems and their solution, to attribute criticisms of the civil justice system simplistically to its ‘adversarial character’ and to resolve them by extensively borrowing from civil code systems. In this context the ALRC cited Lord Woolf’s conclusion that litigation problems in England and Wales were largely attributable to the unrestrained adversarial culture of their legal system,<sup>157</sup> and that the solution to such problems was the implementation of active judicial case management. The Commission recognised that this had been an established practice for some time in the United States, Canada and Australia, and concluded that ‘*our civil justice system works best when judicial officers take an active role in managing proceedings from an early stage*’.<sup>158</sup> In an earlier Issues Paper,<sup>159</sup> the ALRC had canvassed the concept of managerial judging which it defined as ‘*forms of procedural intervention used by judges, judicial registrars and registrars in family law proceedings to address problems of delay, cost and unfairness ... judges can act in a “facilitative” rather than an adjudicative manner, that is, by encouraging parties to settle their dispute*’.<sup>160</sup> The Issues Paper had then proceeded to warn that, if taken to extremes, managerial judging could threaten

judicial impartiality, unnecessarily increase judicial power, force parties to abandon lines of argument prematurely and focus on accelerating the process, rather than on improving the quality of decisions.

*Managing Justice* refocussed the discussion by canvassing the arguments in favour of retaining the adversarial system; specifically the importance of an impartial, fair, independent and publicly accountable judiciary, and a bench and bar wedded to the procedures and acquired skills associated with known processes. It also noted criticisms of the European approach which had allegedly failed to reduce costs and delays in the French and German systems which it viewed with considerable trepidation.<sup>161</sup>

As the Family Court has shown, a more considered analysis of European systems provides opportunities for comprehensive reform of the common law system, which is now in the course of implementation. This has in no way compromised the notion of a fair trial, or an impartial publicly accountable and independent judiciary, and it has received strong support from the legal profession. Further there has been no significant increase in expenditure on the court services and it is anticipated that delays will in fact be reduced by the changes.

### **2001 *Out of the Maze*, report of the Family Law Pathways Advisory Group**

The Family Law Pathways Advisory Group, a joint initiative of the then Attorney-General and Minister for Family and Community Services, tabled its report, *Out of the Maze* in July 2001. The Group had been asked 'to provide high level advice to the Government on how to achieve a family law system which would provide effective support for families, coordinate client focused information and services and provide effective and appropriate pathways'.<sup>162</sup> It defined the family law system holistically, to include courts and the service providers and individuals who help families resolve their financial, legal and emotional problems. The report criticised (inter alia) the failure to integrate all family related services, the failure to deal adequately with family violence issues and a lack of sufficient child focus in the system. It described the litigation pathway as being one of three discrete paths, with self help and support pathways necessarily preceding it. The Group recommended that litigation be the course of last resort, but did not comment specifically on possible improvements to trial procedures.

### **2003 *Every Picture Tells a Story*, report of the Inquiry into Child Custody Arrangements in the Event of Family Separation, House of Representatives Standing Committee on Family and Community Affairs**

In late June 2003,<sup>163</sup> the Prime Minister, the Hon John Howard MP, announced the establishment of an inquiry into family law and the Child Support Agency, and soon thereafter the then Attorney-General and then Minister for Children and Youth Affairs jointly referred the task to the House Standing Committee on Family and Community Affairs chaired by Mrs Kay Hull MP. Its terms of reference relevant to this paper required the Committee to inquire into, report on and make recommendations for action:<sup>164</sup>

- (a) given that the best interests of the child are the paramount consideration:
  - (i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and
  - (ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.<sup>165</sup>

Although the Committee was asked to take account of the Pathways report (*Out of the Maze*), it was somewhat dismissive of it for not failing to address ‘*the basic philosophical underpinnings of family law*’, for providing conservative solutions and for not sufficiently consulting with the community.<sup>166</sup>

The inquiry was, to a large extent, set up to address criticisms by separated parents (predominantly fathers) who had expected the 1995 reforms to the FLA to produce a higher incidence of ‘joint custody’<sup>167</sup> but had come to realise that their expectations were not being met.<sup>168</sup> It received many submissions to this effect and subsequently noted considerable dissatisfaction with the legal process, particularly the role played by lawyers. Ultimately, the report emphasised complaints about the process being overly legalistic and adversarial, it concluded that it failed to allow a focus on what was best for children and also failed to allow parents to contribute actively in the decision making process. It made a number of recommendations for reform of the law, its processes and the shape of the wider system.

The first of the Family Court’s two written submissions to the inquiry made reference to the need to move away from the adversarial system in parenting proceedings,<sup>169</sup> mentioned the work then being undertaken in examining the less adversarial approaches that applied in a number of countries in Continental Europe, and foreshadowed the development of a pilot program within several registries of the Court. Judicial officers who subsequently appeared before the Committee discussed the proposals in more detail with

its members and suggested that procedural reforms would be more beneficial to children than would a legislative presumption of joint residence or custody, which the Inquiry was considering. The Committee supported the concept of reducing the adversarial nature of the proceedings, but the report noted: *Change may need to be more radical than diverting people to alternative dispute resolution and making less adversarial changes to court processes alone.*<sup>170</sup>

Ultimately, the Committee rejected the idea of equal shared custody as a starting point under the FLA, but recommended that equal shared parental responsibility be a starting point in most cases to enable both parents to share key decision making, regardless of how much time children spent with each parent. It reacted to criticisms of the Family Court and the legal profession by also recommending the establishment of a Families Tribunal which would have the power to make binding determinations in “child custody” disputes, except for cases involving entrenched conflict, violence or abuse. Lawyers (and, rather surprisingly, interpreters) were to be excluded from this process and decision makers were to be selected from a panel of accredited family relationship professionals. This proposal was subsequently abandoned by the Government. There were doubts about the constitutional validity of such a tribunal, and a reluctance to add an additional tier to the decision making process. In July 2004, the Prime Minister however indicated that the Government would amend the FLA to enable children’s disputes to be managed by the Court in a less adversarial manner, and this in turn led to the passage of Division 12A of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

## Conclusion to Part One

The special nature of children's matters – principally the importance of the paramouncy principle and the child's lack of party status – has been recognised and reinforced in Australian family law legislation and jurisprudence for many decades. Although for 30 years (ie. from the implementation of the FLA until the passage of the Division 12A reforms) such proceedings could validly be described as being hybrid, the essential characteristics of the adversarial system during this period were retained – the onus remained on the parties to define the issues, produce the evidence to support their case and test the resilience of their opponent's evidence by way of cross examination. Judges were constrained from intervening actively, although the boundaries of their permitted trial management role were not explicitly spelt out in the jurisprudence or statutory amendments.

However issues such as the *extent* to which children's proceedings were special and *in what circumstances* the adversary system might be substantially altered, were not confronted until the late 1990s.

There has never been any doubt that the establishment of a specialist Family Court in Australia heralded and permitted a different approach to family law disputes, not only in applications for divorce but also in relation to the resolution of children's disputes. Pre FLA custody cases recognised that the statutory recognition of the primacy of children's welfare "raised the bar" and required courts to be more interventionist in ensuring the availability of the best available evidence. This was accepted, amplified and reiterated between 1976 and 2000 in family law jurisprudence, and supported by various provisions of the FLA. However, until the development of the CCP, the recognition and endorsement of modifications of the adversarial process in children's cases rarely translated into such cases being conducted otherwise than in accordance with the traditional adversary model.

In addition, complaints about the bitterness with which many children's disputes were litigated, the frequency of non compliance with orders, increasing numbers of self representing litigants and the complexity and expense of litigation were placing great strain on the capacity of both the Family Court and its clients to cope. An increasing body of literature documented the extent to which inter parental hostility damaged children's welfare, and there were concerns that court delays were putting some children in danger of physical and emotional harm. The need for a radical reappraisal of children's cases was apparent. The Magellan project provided a valuable template for the judicial management of child abuse cases, but it fell short of changing the inherent nature of the trial and a good deal of work and courage were still required to determine the parameters of change.

It became increasingly apparent that a radical departure from traditional practice was required, and that the modified adversary system<sup>171</sup> was not providing the best environment for determining children's best interests. Whatever may be said about the traditional common law system in relation to other forms of litigation, it is and was apparent that such a system does not lend itself to the determination of cases involving children. This deficiency was exacerbated in recent years by the numbers of litigants who had no legal representation, and underpinned by increasingly persuasive evidence-based research on the damage caused to children by exposure to physical and psychological harm. Given that the FLA required the Court to consider the best interests of children as its primary concern, it could easily be argued that it was failing to fulfil its statutory obligations.

At the same time, the Court recognised that merely transplanting the characteristics of an inquisitorial system into the Family Court's modified adversarial system would create more problems than it would solve.<sup>172</sup>

It was decided that the best reform would be one that recognised and built on the Court's primary dispute resolution procedures, while also providing an environment that facilitated the early identification of the issues in dispute and the methods by which they might be resolved.

In a speech he delivered in May 2002, the Chief Justice gave a strong indication of the reform direction he was considering for children's cases. He said: *'The evidence suggests that where courts adopt a more active and inquisitorial approach in these areas, the more satisfactory results are achieved. I think that this area needs to receive much greater attention than has previously been the case. It is true that a move in the direction of an inquisitorial system would probably require greater judicial resources but I suggest that money so spent may well be saved through minimising the time and expense of litigation within the present, or adversarial, system'*.<sup>173</sup>

# Part Two

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## The countdown to reform: inquiring and exploring

Criticisms of various aspects of the adversarial system have been made in a number of common law countries – in Australia and elsewhere in previous decades.<sup>174</sup> Their frequency is likely to increase as the numbers of self represented litigants, complex disputes and litigation costs also increase – and information about the LAT model becomes more widely disseminated.

Mention has already been made of the pioneering work of the Hon Geoffrey Davies in advocating less adversarial proceedings in the Australian context. In Queensland this led to a number of improvements, including a new and ground-breaking approach to Rules of Court. The Federal Court of Australia, and subsequently the Supreme Court of New South Wales and other courts including the Family Court, made substantial reforms to the law relating to court experts. However, only the Family Court of Australia has taken the radical step of reforming the common law system for the conduct of litigation.

### England and Wales

In 1994, in the “heartland” of the common law, Lord Woolf was appointed<sup>175</sup> to review the rules and procedures of the civil courts of England and Wales. His final report on access to civil justice was released in 1996.<sup>176</sup> It contained more than 300 recommendations designed to improve and streamline the civil litigation process. The Woolf objectives complemented many of those adopted at different times by the Family Court of Australia in its various earlier reforms. They were directed at the avoidance of litigation wherever feasible, but also sought to make unavoidable litigation less adversarial and less costly, the processes less complex, permitting fewer delays and incorporating more definite timelines. They also sought to encourage greater predictability and to include processes which were more sensitive to the need for proportionality in matching costs to the nature and size of the dispute. Most of the Woolf recommendations were adopted and ultimately formed the basis for the United Kingdom Civil Procedure Rules 1999. They were also influential in the Family Court’s evidence reforms which were included in the 2004 Rules of Court,<sup>177</sup> and were yet another catalyst for legislative reform of the FLA. In particular, section 69ZN has its origins in rule 1.4 of the United Kingdom Civil Procedure Rules which provides:

- (1) The court must further the overriding objective by actively managing cases.
- (2) Active case management includes –

- (a) encouraging the parties to cooperate with each other in the conduct of the proceedings
- (b) identifying the issues at an early stage
- (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others
- (d) deciding the order in which issues are to be resolved
- (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure
- (f) helping the parties to settle the whole or part of the case
- (g) fixing timetables or otherwise controlling the progress of the case
- (h) considering whether the likely benefits of taking a particular step justify the cost of taking it
- (i) dealing with as many aspects of the case as it can on the same occasion.<sup>178</sup>

However, the Woolf reforms were not directed specifically at the family law jurisdiction<sup>179</sup> and their objectives and methods were intended to be achieved within what would still be an essentially (albeit streamlined) adversarial system. Whilst seeking to introduce “a new litigation culture”, their major overarching feature, as illustrated by rule 1.4, was active judicial case management, which required judges to assume considerable responsibility for the control of the litigation.

## **New Zealand**

In a paper they delivered at the Australasian Family Courts conference in Auckland in October 1999,<sup>180</sup> Judge Jan Doogue and Dr Suzanne Blackwell also challenged the assumption that strict adversarial common law procedures are appropriate in children’s cases, and suggested that Australian and New Zealand courts lacked the courage to adopt the ‘*significant inquisitorial statutory powers already conferred on them*’. They argued that where children’s best interests and protection are concerned processes need to be more timely, interventionist and judge managed, and referred to the inquisitorial powers conferred by the *New Zealand Mental Health (Compulsory Assessment and Treatment) Act 1992* and English bankruptcy proceedings which share such features. A more active approach would, they stressed, endorse the commitment of Australia and New Zealand to the principles of the United Nations Convention on the Rights of the Child which each had ratified.

The Principal Family Court Judge of New Zealand, Peter Boshier, has been a long standing critic of adversarial proceedings in children’s matters, describing cross examination in such cases as ‘*largely unhelpful and ... often hurtful and destructive*’,<sup>181</sup> and recommending ‘*In a category of cases, and I chose custody and access in particular, I advocate the permissible*

*issues being framed by the judge, and the judge then advising what evidence is required to be provided. Fundamentally, the right to test such evidence by cross-examination of the parties, should be removed. The extent and nature of participation in the hearing would accordingly be defined for the parties and not by them’ [emphasis added].<sup>182</sup>*

Judge Boshier’s concerns mirror those of other critics of the adversarial system, viz the over-dominance of party freedom in children’s matters, overuse of court and client resources, unnecessary costs and delays in justice caused by the involvement of large number of experts, the length of cross examinations and affidavit material and their frequent inclusion of irrelevant and inflammatory information, plus an over emphasis on procedural law at the expense of substantive concerns about the best interests of the children. In his 1997 article,<sup>183</sup> he quoted from an earlier report provided to the former Principal Family Court Judge, Patrick Mahony, which criticised several practical aspects of the adversarial system such as the length of affidavits. He noted that:

*‘The report writers were cautious in dismantling the present adversarial system requiring a Judge to impartially test the evidence. But there was a caveat to that view.*

*‘We are particularly concerned at custody and access cases wherein – the Court has already made a substantive determination, or the issue before the Court has previously been dealt with, prima facie there is no demonstrable reason for the Court’s jurisdiction to once again be invoked, and where it seems reasonably clear that the parties remain locked in personal conflict and that welfare of children is not the prime issue.’*

Judge Boshier has indicated that his objective was not the complete dismantling of the adversarial system in family cases, and its replacement by an inquisitorial system, based on the European model. However neither did he advocate the retention of the present system in its entirety.

Judge Inglis QC also in 1997 highlighted a number of examples of unnecessary adversarialism, in a property judgment, in which he suggested that *‘Today no-one should need to be reminded that matrimonial property proceedings are to a considerable degree inquisitorial in character or that party autonomy lacks the force it may have in civil proceedings.’*<sup>184</sup>

In describing the proceedings before him, Judge Inglis lamented that they had:

*‘...produced a level of adversarial animosity and obstruction out of all proportion to the relatively small amount at stake and have been conducted in a manner abusive of the Family Court’s procedure.*

*‘During the slow progress of these proceedings, that adversarial approach has been allowed to feed on itself so as to squander much effort and time on a variety of interlocutory applications and appearances which, in hindsight, served, at best,*

*no more than marginally useful purposes. The extreme polarisation which was the inevitable result has served only to divert the parties' attention from the primary objective of proceedings under the Matrimonial Property Act. That is to achieve a fair and just division of matrimonial property according to statutory criteria which are by now well understood.*<sup>185</sup>

In an article discussing the problems identified by Judge Boshier, New Zealand legal academic Pauline Tapp questioned whether these were symptomatic of the system itself, or whether the system was being used inappropriately. She argued that a major cause of delayed hearings was a lack of professionalism, an apparent lack of agreement about the purpose of the hearing<sup>186</sup> and the parties' concerns that their personal and relationship issues had not been dealt with and they felt unheard. Geoffrey Davies has elsewhere argued that a major barrier to system reform has been a belief that improvements could be achieved by changing the role of lawyers working within it whilst retaining as much of the system as possible. He has argued that there is compelling evidence that it is the system which is too costly, fails to cope with unequal bargaining power and permits relevant witnesses to be concealed and oral evidence to be given in a partisan way ... *For if one thing is clear it is that it is the system which must change, not just the way in which lawyers operate within it...* [emphasis added].<sup>187</sup>

In July 2004, a delegation led by the New Zealand Minister for Courts visited the Sydney Registry of the Family Court and was briefed by Justice O'Ryan on the CCP, which was then being piloted.

Several months later a delegation of New Zealand judges led by Principal Family Court Judge Boshier, together with counsellors and administrators, visited the Sydney and Parramatta Registries of the Family Court to assess whether the CCP model might be adopted for use in the New Zealand system. Its subsequent report recommended its implementation, with some minor differences of approach to take account of the different case management procedures of the two jurisdictions.

In September 2006, Judge Boshier issued a briefing paper indicating that a pilot program would begin on 1 November 2006 in six registries across New Zealand involving children's cases that were either intractable and had failed to resolve despite counselling or mediation, or involved urgent matters, usually domestic violence.<sup>188</sup> This pilot is currently in operation.

### **The Family Court's implementation program**

Former Chief Justice Nicholson's Blackburn address in May 2002<sup>189</sup> foreshadowed the changes the Court was eventually to make to the management and hearing of children's cases. In late 2002, the Self Represented Litigants Committee chaired by Justice Faulks delivered its report, recommending radical changes to the conduct of litigation.<sup>190</sup>

Although the proposed model was not accepted because of cost and practicability, the recommendation reinforced the need to take steps to reform the litigation process. In July 2002, Justice Stephen O’Ryan highlighted the need to look overseas in order to examine better methods of defining the issues in family law litigation, and shortly thereafter the Court began investigating the operation of the European system of trial management in children’s cases.

In March 2003, it was decided that Justice O’Ryan and staff lawyer Virginia Buring would make contact with judges, lawyers and public servants in several countries and arrange to sit in on trials and discuss the procedures with judges and other participants. They subsequently observed proceedings in Germany and France, in May and June 2003. At the end of the tour Justice O’Ryan advised the Court that he considered the adversarial system approach to be unsuitable for parenting cases because its focus was on the parents’ interests rather than those of the child. He described European hearings as being conducted within a short time after the commencement of proceedings and being of limited duration. Major features were that the judge, not the parties, determined whether a witness was to be called, and normally in Germany and France the parties were the only witnesses. In addition, hearings were limited and driven by the judge (who sought a solution for the future), lawyers’ roles at the hearing were limited, and the judge normally interviewed the child or children involved.

It is appropriate at this stage to discuss in more detail the findings made in relation to the German family law system that influenced the subsequent development of the CCP project.

Justice O’Ryan’s brief for researching approaches in Europe was to examine possible procedural changes for all kinds of cases. However, his conclusion suggested that those relating to children offered the most effective model, and specifically that the German law relating to children’s cases, governed by the Code of Non-Adversary Procedure,<sup>191</sup> would provide the most appropriate “fit” for the Australian family law system.

### **The German process in disputes involving children**

German procedures in children’s disputes proceed as follows:

- ▶ The judge serves a written motion on the other parent, requesting a response.
- ▶ The Youth Office receives the motion simultaneously and is requested to file a report.
- ▶ The judge summonses the parents and children to a court appointment and henceforth endeavours at all stages to bring the parties to an agreement.
- ▶ The judge often talks to the children first, in the absence of their parents, and then together.

- ▶ The judge then discusses the issues with the parents and a social worker from the Youth Office, if present. The content and outcome of the judge's conversation with the children is conveyed to the parents who then explain their respective positions, followed by their legal representatives and the Youth Office representative. If an agreement is reached at this stage it is recorded and is binding unless it conflicts with the child's best interests.

There is also capacity to appoint a guardian for the child who represents the child and works with the Youth Office to find a solution that is in the child's best interest.

The hearing normally takes up to one-two hours, but if the judge cannot reach a final decision, he or she can obtain an expert opinion, as well as other reports from such relevant witnesses as a school or teacher.

There can be a series of hearings, or meetings, if required.<sup>192</sup>

Justice O'Ryan<sup>193</sup> observed that the German proceedings were informal but respectful and took the form of the parents conducting a "dialogue with the court". Direct interaction between the judge and the parties was facilitated by the informality, which was akin to a round table discussion. The nature of the inquiry was on-going and there might be several meetings between the judge and the family over the course of the trial. The focus on the future care of the children meant that little emphasis was placed on the past history of the parties, unless this has relevance to that future care. This future focus also meant that evidence provided by witnesses other than the parents and others involved in their future care became largely irrelevant.

### **The most influential themes which emerged from discussions and observations**

The German family law system thus provides a distinct and less adversarial procedure for disputes involving children. Discussions with a number of family judges clarified its philosophical underpinning, and the balance achieved by recognising that children are the subject of the dispute, but that they may be incapable of advocating their own position, and the responsibility thus clearly rests with the judge to conduct the investigation into what is in their best interests.<sup>194</sup>

The German family judge has complete control of the conduct of the investigation. This involves controlling the court file and convening hearings according to what evidence and expert opinion he or she determines is necessary. The inquiry is based on what the parties have provided in their written claims, together with the oral evidence provided at the hearing. The judge's responsibility is to find the truth. Lawyers do not have a prominent role at the hearing, but they must prepare their clients for the hearing process and respond to the judge's directions for the provision of particular evidence.

As German judges do not have the same access to mediation services as Australian Family Court judges, their own mediation skills are important to achieving agreement between the parties. These skills are also critical to the effective investigation process leading to a determination if an agreement cannot be reached.

Allied to its future focus is the emphasis in the German system on hearing directly from the children about their own needs and views, although the judge makes it clear to the child that the final decision will be his or hers, not the child's. Many courts provide special child friendly environments – called the *Kinderhaus* – in which meetings with the judge can take place. Judges are provided with training in appropriate interviewing techniques.

The German system displays a more inclusive approach to what issues might be relevant to achieving a lasting result than has been the practice in Australia. Several family judges emphasised the need for the court process to provide a proper atmosphere to allow recognition of the significance of the hurt and other emotions stirred up by relationship breakdown. They saw that failing to provide a forum for them to be aired may hinder the parents' ability to focus on the future needs of their children. Although the German legal process is not designed to resolve matters of emotional hurt, it sees the need to recognise them sufficiently to be able to remove them as stumbling blocks and then address the real issues that require the court's intervention.<sup>195</sup>

Observation of the part played by the Youth Office in the family law process was of considerable interest and was later influential in the decision to introduce the Family Court mediator into the first hearing day in the CCP pilot. In the German system the social worker has had an involvement with the family before the judge becomes involved, and participates in the hearing with a dual role of helping find a workable solution for the family and providing expertise and background information to the court. Their interaction with both the judge and the parties during the hearing appeared to provide a valuable contribution to the ability of the judge and the parties to reach an informed solution.

Some German judges sent questionnaires directly to the parties prior to the hearing. Their purpose was to obtain some information from the parties, without the filter of lawyers, through a series of questions, constructed in a way that would tease out both the areas of agreement and dispute, and encourage them to focus on their proposals for the future care of their children. This observed practice was also influential in the development of the CCP pilot.

On their return to Australia, Justice O'Ryan and Ms Buring reported to the Chief Justice and others in June 2003, confirming their views. It was then decided to develop the CCP pilot project, for it to commence in late 2003 or early 2004.

On 26 June 2003, the Prime Minister announced the inquiry by the House of Representatives Standing Committee on Family and Community Affairs into the family law system referred to earlier in this publication. Subsequently, as mentioned, the Court appeared before that Committee twice and, *inter alia*, discussed the forthcoming pilot project.

A very significant contribution to the learning and experience in Europe and to the project as a whole came from Judge Eberhard Carl, a judge of the German Court of Appeal in Frankfurt am Main. Justice O’Ryan and Ms Buring spent some days in Berlin conferring with Judge Carl who at the time was on secondment to the Ministry of Justice of the Federal Republic of Germany. This led to Judge Carl being invited to address the Association of Family and Conciliation Courts Conference in the United States in May 2004. In that address he laid particular stress on the role of the judge in interviewing children in the German system, which he made clear required training and experience in dealing with children.

Judge Carl came to Australia in 2004, where he addressed a national meeting of Family Court judges and also made a presentation at the National Family Law Conference of the Family Law Section of the Law Council of Australia. Judge Carl is a very forceful exponent of the obligation of judges to communicate directly with children and this reflects a development in Germany to recognise that children have a particular right to have a voice in decisions and arrangements that concern them.<sup>196</sup>

One fundamental difference between the Australian and German legal environments recognised by Justice O’Ryan and Ms Buring as a potential constraint to the adoption of the German procedures was the different training and experience of Australian and German judges. Judges in Germany are educated and trained for the judiciary soon after university when they decide to pursue a judicial career. Opportunities for them to develop skills and knowledge for inquiry and decision making, as opposed to advocacy, are therefore significant. In contrast, Australian judges are usually appointed only after they have had extensive experience at the bar, and are therefore steeped in the art of advocacy within an adversarial system. Despite these differences, Australian judges have proved themselves to be adaptable and enthusiastic about adopting new approaches, as the Family Court experience already demonstrates. It is important that they are given ongoing assistance and training to make this task easier. For example, there is no reason why Australian judges could not undertake training in interviewing techniques in relation to children.

## Ensuring valid implementation

In August 2003,<sup>197</sup> a Family Court Working Party was established to decide on the major features of the proposed less adversarial model in light of the Court's reform objectives, its existing mediation procedures and an examination of the features of the German system which it wished to incorporate. The Working Party's task was a momentous and difficult one: to develop a program which maintained the integrity of the Court's child focused services and mediation processes but improved on them, and remained within the constitutional boundaries required of a Chapter III Court by providing informality and flexibility of process, whilst ensuring the continuance of the requirements of fairness and objectivity, and increasing judicial control over the entirety of the trial stage of proceedings.

The Working Party was asked to proceed on the assumption that the new model would remain within the constraints of the then current legislation, and at that time Government had given no indication that relevant amendments would be forthcoming, at least in the short term.<sup>198</sup> Consequently, the Working Party recommended that the new processes should be available only where both parties consented to their application. It further proposed that a pilot be conducted in two New South Wales registries (Sydney and Parramatta), with a built in evaluation to assess its performance, to document the resource and practical impacts for the Court, legal aid, the profession and the parties and to provide a sound basis for decisions about its future implementation. At that stage it was still anticipated that the evaluation would need to examine the question of whether the Court should pursue a less adversarial approach.

By January 2004, the Court had reached an advanced stage in the development of a possible pilot model and it then sought advice on possible issues for implementation from Dr Gavan Griffith QC, former Solicitor General of the Commonwealth. The proposed features as put to Dr Griffith were described in some detail in the brief. They included the means by which potential participants would be provided with information about the program and at what stage, including the opportunity for legal advice.

As explained to counsel, parties would also be required to complete a questionnaire about their current and proposed parenting arrangements before entry. Both parties would have to provide informed consent, including with respect to the non-privileged nature of any mediation that would occur. The judge would make consent orders reflecting the parties' agreement to enter the pilot. The hearing would commence on the first appearance before the judge and would continue with the same judge until completion, and the judge would not be disqualified if findings were made on any contentious issues prior to completion. Proceedings would, as usual, be recorded and the parties administered an oath at the beginning, after which anything said subsequently would become part of the evidence. The judge would proceed to identify contentious issues that required a decision and non-contentious facts through use of the questionnaires and discussion with

the parties. All evidence would be admitted initially and the judge would determine its weight. No objections to any form of evidence would be taken.

The judge could order a family report limited to the identified issues, and appoint a child representative and a report from a court expert when considered necessary. The judge would be able to make findings on some contentious facts and also determine what evidence was required for unresolved contentious facts and the manner in which such evidence would be given. It was envisaged that a case would proceed in this way as an orderly discussion between the parties and witnesses, rather than its relying on the traditional style of cross-examination. The judge would be in control of the manner of examination of evidence on further hearing days if required, including with respect to cross examination. Once the hearing process was completed the judge would make final orders and provide short reasons for judgment. It was envisaged that the parties' rights of appeal would be unaffected, but time would not run until the hearing had reached its conclusion.

The questions to which the Court sought answers in its brief to counsel included:

- ▶ whether the proposed project as described was an exercise of judicial power in relation to the Constitution, the *Evidence Act 1995*, the FLA and the common law
- ▶ whether once parties had consented to enter the pilot and their consent had been embodied in consent orders one or other could withdraw their consent or, conversely, whether the Court could discontinue their involvement
- ▶ whether the parties may also consent to having their property matters dealt with under the pilot process
- ▶ whether the pilot as described adequately safeguarded the parties' right to natural justice/ procedural fairness, and specifically
- ▶ whether findings of fact might be made as a staged event during the hearing without the judge being required to disqualify him or herself at the request of a party for perceived bias
- ▶ whether active engagement by the judge in questioning the parties and witnesses directly made the pilot susceptible to concerns about possible bias or an infringement of the parties right to be heard.

Dr Griffith's opinion was that on the facts provided the pilot scheme was constitutionally valid.<sup>199</sup> Decisions would be made in accordance with the principle that the child's best interests are paramount, and the dispensation with a large part of the rules of evidence neither of itself invalidated the exercise of judicial powers<sup>200</sup> nor was inconsistent with the broader rules of procedural and substantive fairness. He was of the view that, despite its different procedural aspects, the pilot would not change the judges' substantive powers, although he was somewhat tentative about their mediating role because mediation is traditionally not regarded as a judicial function. One of the difficulties in mediating is

that it is undefined in the FLA and there is some controversy about it. In the family law context it would be difficult to argue that a judge who suggests a possible solution to parties is either mediating or acting outside his or her judicial function. There may be difficulty however in setting up a formal mediation process as is done by the Family Court of New Zealand.

In relation to the contemporaneous management of property matters under the umbrella of CCP, Dr Griffith advised caution, given that it is the special nature of children's proceedings which have provided the historical context for, and also the legal acceptance of, a less adversarial approach. He concluded that less adversarial procedures did not compromise issues of fairness, provided that the usual requirements are maintained, ie. that determinations are made impartially, on the basis of all the relevant material which the parties were able to put before the judge, without any pre judgment, and that the parties were given an adequate opportunity to be heard.

Dr Griffith's opinion also made reference to the similarity in nature and effect between the principle that children's best interests are paramount and the ancient protective *parens patriae* jurisdiction which the Family Court acquired as a result of the 1983 amendments to the FLA<sup>201</sup> in the form of a welfare jurisdiction. The jurisdiction has been relied on in a series of High Court cases including *Marion's case*<sup>202</sup> which decided that the approval of the Family Court was required to allow an intellectually disabled teenage girl to be sterilised. Subsequently in *Minister for Immigration and Multicultural and Indigenous Affairs v B*<sup>203</sup> the High Court decided that it could *not* be relied on to allow the Family Court to declare that the detention of an unlawful non citizen minor was invalid. In the Family Court decision of *Re Alex*<sup>204</sup> Nicholson CJ decided that court authorisation was required to permit a young female minor to undergo a course of treatment to change her gender.

The *parens patriae* jurisdiction was originally exercised by the court of chancery and has its historical origins in the responsibility of the sovereign to care for those who were unable to do so for themselves. It is frequently referred to as being ill defined and nebulous, but the best interests principle is central to its operation. Traditionally the rules of evidence did not apply in the *parens patriae* jurisdiction exercised by State Supreme courts.<sup>205</sup> In *Northern Territory v GPAO* Gleeson CJ and Gummow J noted:

*'This important and salutary principle of substantive law, adopted by courts exercising parens patriae jurisdiction for more than a century, was not applied in an adjectival vacuum, although its identification of the principal issue to be tried had important practical consequences for the application of the rules of procedure and evidence, especially where there was a discretion to be exercised, where competing interests were to be weighed in the balance, or where there was a question of dispensing with strict compliance with the ordinary rules.'*<sup>206</sup>

On the basis of the advice received from Dr Griffith the consent-based pilot commenced simultaneously in the Sydney and Parramatta Registries on 1 March 2004. It was underpinned by Practice Direction 2 of 2004,<sup>207</sup> which incorporated modifications to take account of counsel's advice. For example, the issue of judicial mediation in the pilot was clarified to ensure that it was understood by the pilot judges and potential litigants that, whilst the judges were using some skills that were commonly used by mediators, they remained the decision maker and were therefore acting judicially.<sup>208</sup>

The Practice Direction laid out the principles on which the pilot was based and its key features. It confirmed the application of the incoming Rules of Court, the case management pathway including the necessary consent procedures, how hearings would be conducted, the powers of the judge including in relation to evidence, the role of child representatives and the innovative role for the mediators in hearings and the impact of the pilot on the nature of family reports.

Pilot data for evaluation purposes were collected until December 2005. During the course of the pilot the Court decided (with the support of the local legal profession) to continue to offer the CCP model of hearings by consent in both registries beyond its original term. By this stage the Commonwealth Government was well advanced with the development of the legislation to support universal application of less adversarial procedures, and the focus of the evaluation shifted to issues of best practice in such procedures. It was no longer a question of *whether* such changes should be pursued, but rather of *how* they would be effected.

The first four CCP judges received the initial tranche of relevant skills training in early 2004.<sup>209</sup> Information brochures, questionnaires and standard consent orders had by that time been prepared and some promotional initiatives undertaken. The Court provided speakers at a number of workshops, seminars and conferences to explain the purpose and characteristics of the new procedures to members of the legal profession and community based organisations. The path was clear for cases to begin to be accepted into the pilot.

At this point the Court disbanded the Working Party and passed the responsibility for the on-going oversight of the pilot to a newly formed steering committee. Its membership comprised the Chief Justice, representatives of the Court from both within and outside the CCP, the legal profession including the bar, legal aid, Attorney-General's Department and community legal centres, plus the judicial trainer. Its role was to advise the Chief Justice on the progress of the pilot and to address any issues that could not await the results of the evaluation.

The Steering Committee first met in April 2004 and continued to meet regularly and as required until Professor Rosemary Hunter, Griffith University, who was appointed to evaluate the pilot, presented the final results of her evaluation in August 2006. (The Steering Committee has since been disbanded but the work involved in implementing

the LAT across the full range of Family Court work has been transferred to the Court's Case Management Policy and Procedure Committee.) The Committee's objectives were to operate the pilot in a way that enabled it to develop with experience and to provide the mechanism for quality control of its evolution, to ensure consistency where this was critical, but with some allowance for judicial preference and personal style to play their part.

The issues considered by the Steering Committee related to the conduct of the pilot and the support of the evaluation, the impacts on the Court's judges, staff and resources, the pressure from government to proceed to national implementation in advance of the results of the evaluation, and information needs for the community and particularly for the legal profession. A number of sub-committees were formed to undertake more detailed work where required on such elements as judicial training, education of the legal profession, involvement of children and national implementation planning. The Committee's primary focus was to maintain consistency and the core policy that underpinned the conduct of CCP, as far as was possible while recognising resource constraints and the need for judicial independence. This it was effective in achieving.

Details of the significant matters considered by the Steering Committee are set out below in Appendix B. When the pilot had been in operation for 12 months the six judges involved developed a description of the hearing procedures in order to identify its core features. This description identified common practices between them and areas of variation, and appears in Appendix C.

CCP was further implemented in the Melbourne Registry in October 2005 where, with the support of extra funding from the Attorney-General's Department, it was integrated with a pilot of the Child Responsive Program (CRP) developing an expanded role for the family consultant. By July 2006, when the *Family Law Amendment (Shared Parental Responsibility) Act 2006* came into force, the new procedures became available at all registries of the Family Court of Australia, for children's matters filed after 1 July 2006.

## Legislative amendments

As mentioned previously, in July 2004 the Prime Minister announced his support for the continuance of the CCP (although the results of the Hunter evaluation would not be available until 2006) by announcing that the Government would amend the FLA, to allow the pilot procedures to proceed with a legislative basis. This would give it greater constitutional certainty and allow its mandatory application to all children's cases. At the time of this announcement and in light of Dr Griffith's opinion, the Court was of the view that the intended legislative amendments would ensure the validity of the extended CCP in circumstances where the program was mandatory and party consent was therefore no longer required. These were provisions that would:

- ▶ enable the Court to waive the application of the rules of evidence<sup>210</sup> or amend the FLA to confirm that such rules were inapplicable in parenting disputes
- ▶ specifically provide that judges may, at their discretion, interview children and act on the information so acquired and also enable such information to be withheld from the parties where this was considered necessary to protect confidentiality
- ▶ enable the judge to bring about an agreed settlement during the hearing process, plus several areas relevant to issues of natural justice/procedural fairness, such as the powers necessary to give the judge active control over the proceedings, and protecting him or her from allegations of bias raised because the staged nature of the proceedings permits staged decision making.

Subsequently, in its response to the House of Representatives Committee's report *Every Picture Tells a Story*, the Government set out some legislative proposals which included potential support for a less adversarial trial.<sup>211</sup> The response listed some possible measures for amending the FLA to achieve a less adversarial process and in January 2005, the Court provided commentary on the proposals made, which was influenced by nearly 12 months of experience with the CCP pilot. There were subsequent discussions with the Attorney-General's Department, and Chief Justice Diana Bryant, Justice O'Ryan and the Hon Richard Chisholm made submissions to the House of Representatives Legal and Constitutional Affairs Committee. The Court's views were in substance accepted by Government and were influential in the drafting of Division 12A.

The insertion of Division 12A into the FLA in July 2006 gave credence to the CCP, recognised the success of its procedures and gave them vital legislative support. Henceforth less adversarial procedures in children's matter were mandatory for all new matters and were provided in all registries. Division 12A empowered the Court to convert what had been at most a hybrid legal system in children's matters into an active process.

To a large extent the new Division 12A (and specifically sections 69ZN and 69ZQ), together with Practice Direction 2 of 2006 cumulatively encapsulate the objectives of the LAT and the mechanisms required to give those objectives effect. Section 69ZN sets out five principles which the Court is required to follow when hearing children's matters or

where the parties have consented to the application of Division 12A. The obligation on the Court is mandatory and applies *both* to the performance of duties *and* the exercise of powers and in making other decisions about the conduct of child-related proceedings. Regard is to be had to the principles in interpreting Division 12A.<sup>212</sup>

The principles are:

- Principle 1** The Court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.
- Principle 2** The Court is to actively direct, control and manage the conduct of the proceedings.
- Principle 3** The proceedings are to be conducted in a way that will safeguard:
- (a) the child concerned against family violence, child abuse and child neglect; and
  - (b) the parties to the proceedings against family violence.
- Principle 4** The proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.
- Principle 5** The proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

Sections 69ZQ to ZS deal respectively with general duties, powers to make determinations, findings and orders at any stage of the proceedings and the use of family consultants, and subdivision D (comprising sections 69ZT to 69ZX) is concerned with evidentiary matters.

Practice Direction no. 2 of 2006 describes in considerable detail how cases involving “child-related proceedings” must now be managed. The consent of the parties is not required except for matters other than child-related matters. The new procedures apply in relation to matters commenced by an application filed on or after 1 July 2006 (the date of the commencement of the Practice Direction), and which have failed to settle during the Resolution (Pre-trial) Phase of the Court’s case management system. Paragraph 2.1 of the Practice Direction emphasises that the LAT is not a substitute for agreed or mediated solutions and only when such resolution attempts have been unsuccessful or are inappropriate will a case be listed for trial.

LAT procedures may also apply to matters commenced under section 79 of the Act (ie. property matters) in applications filed on or after 1 July 2006 if the parties to the proceedings consent. They may also apply to any proceedings under the Act commenced by an application filed before 1 July 2006, if the parties to the proceedings consent and the court gives leave.<sup>213</sup>

## Other features of the less adversarial trial model

### The involvement of children

Paragraphs 9.1 to 9.3 of Practice Direction 2 of 2006 provide several methods by which children may be heard by the Court in a manner which is consistent with their views.<sup>214</sup> These include the “traditional” methods of evidence being provided by a family consultant or Court expert in the form of a family report, and also<sup>215</sup> (at the discretion of the judge, and in appropriate cases) by means of a judicial interview. This interview will generally occur only with the child’s consent<sup>216</sup> and may be conducted in the presence of other persons, such as the independent child’s lawyer or a family consultant. The judge may provide a report through a family consultant (or by some other means) of the outcome of any child interview so conducted. The content and method of provision of such reports is a matter solely within the discretion of the judge and will be determined having regard to the particular circumstances of the case, the best interests of the child and the interests of fairness to the parties. Rule 15.02 also permits judicial interviewing of a child who is the subject of a dispute, and provides that the interview may be conducted in the presence of a family consultant.

In a paper delivered before the introduction of Division 12A, Chief Justice Bryant remarked on the commonplace nature of judicial interviewing of children in jurisdictions such as Germany, but noted that it had not been embraced in Australia to date<sup>217</sup> because of a lack of training of judges, concerns about the confidentiality of the information provided by the child and about the possible intimidation of children.<sup>218</sup> Former Chief Justice Nicholson has expressed regret that during the pilot program, interviews with children occurred rarely and attracted some criticism when they did. He noted a ‘*long standing aversion to such interviews in Australian courts, but was confident that much of the difficulty could be overcome by giving judges appropriate training*’.<sup>219</sup> The Court has a small committee continuing to develop the best possible circumstances for such interviews if they occur. At the time of writing this publication, Family Court judges were considering a set of draft guidelines to assist them when interviewing children.

### The role of the family consultant

The CCP pilot was designed to give prominence to the Court’s mediators (now family consultants), particularly in the conduct of the first day of the trial. However no specific training was provided and their role developed as they gained practical experience. A more complete appreciation of the value of their contribution only became clearer as that experience developed.<sup>220</sup>

Some of the key features of the role of the family consultant are:

- ▶ **To provide a mediation input and social science perspective, balancing the legal perspective of the judge.** As the pilot progressed it became apparent that this required specific skills both for the judge *and* the family consultant to enable interaction that maintained the authority of the judge and a recognition of the particular expertise of the family consultant. Initially, different practices emerged in the two registries with respect to the family consultant's direct involvement in the courtroom. Once its benefits became clear, the same practice was adopted in both registries, and became a core feature of the Family Court's response to Division 12A in the national implementation of the LAT.
- ▶ **To support the less adversarial dynamic in the courtroom, promoting a collaborative approach to hearing the dispute and thus a positive role model for the disputing parties.** The conduct of the first day can become a respectful three or four way discussion involving the judge, the family consultant, the parties and their legal representatives, including the independent child's lawyer, if present.
- ▶ **To provide neutral, conceptual and evidence-based commentary on the social science perspectives of the issues raised by the parties and their lawyers.**<sup>221</sup> The issues emerged from the documentation on file (which the family consultant would have read prior to court) and, more significantly, from the direct discussions with the judge that took place in court. The expertise and credibility of the family consultant was based on a specialised knowledge base on the impact of high conflict upon children and families in the context of litigation.<sup>222</sup> Additional national training was provided during the course of the pilot to ensure that the information provided on common issues was consistent across the Court. Themes covered included relocation, attachment, alignment-alienation, children's memory, impact of conflict on children, equal time, family violence, impact of mental illness or drug and alcohol abuse on parenting, overnights, appropriate parenting arrangements for various age groups and separation of siblings.<sup>223</sup>

Where appropriate, judges may suggest that parties attempt resolution outside the court with the assistance of the same family consultant (by consent), particularly when the issues had narrowed during the initial discussion. In the early stages of the pilot this resolution attempt was intended to be privileged, but it became apparent that this was often inappropriate, particularly when the family consultant concerned had also contributed to the court hearing. It was also recognised as a substantive part of the determination stage of the trial. Subsequently these attempts became reportable.<sup>224</sup>

► **To facilitate references to community based organisations when parties required ongoing support or confidential counselling.**

If the matter did not resolve at the first day of the trial, the family consultant assisted the judge and the parties to define the issues in dispute and to frame what the family report should address, if one was required. As far as possible during the pilot the same family consultant who participated in the first day of the hearing would also prepare the family report.<sup>225</sup> Where that occurred, he or she then became involved in the final stages of the trial as an expert witness. Many CCP judges found that calling the family consultant at the *beginning* of the final stage of the trial (rather than at the end) focused the parties on the defined issues more effectively.

In the rare cases during the pilot where a judge interviewed children, or was considering doing so, the family consultant could provide expert advice on the possible impact of this on the child. Where such an interview occurred the family consultant would be present with the judge.

The Court's current consideration of guidelines to enable involvement of children includes a significant role for the family consultant as expert adviser and support. The adoption of these guidelines would likely result in judicial interviews always being conducted in the presence of a family consultant.

### **The Child Responsive Program**

The involvement of children is also a feature of the Child Responsive Program (CRP) which, as mentioned previously, was piloted in the Melbourne Registry of the Court for a 12 month period during 2005 contemporaneously with CCP, which it was designed to complement. The CRP allocates a family consultant to a family for the duration of their matter. Children are interviewed separately from their parents at the pre trial phase of the proceedings once intake interviews have been conducted with each parent separately and where it is considered appropriate.<sup>226</sup> A family conference is subsequently held with the children and parents, who are provided feedback. As is the situation in all LAT matters, the family consultant then provides expert advice and information to the judge at the first hearing event, assists the Court with any referrals to community organisations where required and also prepare a family report if necessary. He or she can explain the contents of any orders made, can assist with their implementation and refer the parties to community organisations for any further assistance they may need.<sup>227</sup>

Iterations of the CRP model are currently being trialled in several rural and regional registries of the Court.

## An informal environment

Paragraph 5.1 and 5.2 of the Practice Direction explain that LAT procedures are conducted in an ordinary courtroom, the layout of which is determined by the judge in a manner he/she considers best meets the needs of the case, and paying attention to cultural and family violence issues.<sup>228</sup> There are no formal requirements as to where lawyers, as distinct from parties, should sit.<sup>229</sup> Unrepresented parties may normally have a support person sit with them and the extent of that person's involvement in the trial is at the discretion of the judge, although it is anticipated that the person will be present on the first day.<sup>230</sup> The hearing progresses in the form of a structured discussion involving direct interaction between the judge, the parties, witnesses, the family consultant and lawyers as required. The judge, of course, controls this process. The interaction is less formal than a normal trial but remains respectful. The same judge and family consultant hear the matter to resolution.

## The discontinuous trial

Previous criticisms of the trial in adversary proceedings being a single climactic event which occurs only after the completion of voluminous pre trial material have been addressed in the LAT. Rule 16A was introduced as an amendment to the Family Court Rules in 2006 to complement the Division 12A provisions of the FLA. Rule 16A.09<sup>231</sup> stipulates that a trial is taken to have commenced when the matter first comes before the trial judge or trial judicial registrar. The purpose of this provision is to distinguish the "traditional" trial – which was the *final* event to occur after all interlocutory proceedings had been completed – from the LAT model, in which the trial is considered to begin when the parties first appear before the judge, and finishes at the last event, whenever that occurs. The primary purpose of the first day of the trial is to define the issues in dispute in an informal manner before and with the judge and a family consultant and without reliance on affidavit or other evidentiary material.<sup>232</sup> Thereafter the proceedings may continue at different time periods as a series of events, further procedural directions may be made and evidence may be provided by telephone or video outside the courtroom.<sup>233</sup>

## Evidentiary issues

Once the parties come before the judge, they and the family consultant are sworn in and the parties are encouraged to talk directly to the judge and explain the issues in dispute in their own words. Affidavits/witness statements are only ordered to be prepared once the issues in dispute are identified, and this may not occur until a family report or court expert report is received. Overall there is an emphasis on oral evidence for all but expert witnesses, unless the trial judge determines that notice should be given to the other party of evidence that may be adduced in respect of a discrete issue.

As mentioned, one of the major characteristics of the LAT is the power given to the presiding judge to determine how the hearing will be conducted, which includes what evidence is to be provided and how it is to be treated. Rather than receiving the evidence considered relevant by the parties and then weighing its relevance and value, the judge now plays an active role in determining from the start of the trial what is required. The critical difficulty with cases heard pursuant to the “traditional” rules of evidence was that their technical nature frequently obscured the matters which were really relevant to the case (ie. the best interests of the children), and provided opportunities for objections to be made, thereby adding unnecessary cost and complexity. Affidavits were drafted in a formal and artificial way, and frequently the “real” voice of the parties was obscured and distorted.<sup>234</sup>

The historical differentiation between private and public child-related disputes referred to earlier previously extended into evidentiary issues. State child protection matters were assisted by the conduct of a wide ranging inquiry into issues relating to the circumstances of children. The hearsay rule did not operate and statements given by children were admitted, with appropriate weight being given to their relevance and cogency. In private family law matters before the 2006 amendments, it was much more difficult to get evidence of statements made by other adults and children before the Court (even where they were directly relevant to the case), although the now repealed and replaced section 100A rendered the hearsay rule inapplicable in what were previously described as custody cases. However, the section’s effectiveness was limited, as the provision only applied to statements made by the child.<sup>235</sup> Section 69ZT (which stipulates that the rules of evidence do not apply unless the Court decides otherwise) largely reflects the law in both the United Kingdom and New Zealand in family law proceedings, where it has apparently worked well.

Parties’ consent to their participation in CCP required their agreement to a dispensation of the rules of evidence pursuant to section 190 of the Commonwealth *Evidence Act*. Consequently objections to the evidence of a party or witness, or to the admission of material such as documents, photos or videos, could only be taken on the grounds of either privilege, illegality or some other serious concern. Although the rules of natural justice always had to be adhered to, all evidence was admitted and the judge was then responsible for determining the weight to be given to it. Section 69ZT removes the need for the parties’ consent and reiterates the child focused premise of the LAT. It is intended to eliminate much of the evidentiary complexity that so often bedevils family law proceedings and which may prevent the truth from emerging. It is integral to enabling the parties to speak for themselves.

## Family violence

The frequency with which issues of both child and spousal abuse are raised in Family Court proceedings makes it vital that any procedural changes provide at least the same level of protection to possible targets of violence as did the processes which they replaced. The Court has identified several areas where it considers the LAT model improves the Court's responses:

- ▶ **Early consideration of the issue.** LAT brings cases before the judge earlier than under the standard case management stream. Where allegations of violence are disputed (as they invariably are) early consideration allows the nature and effect of what is alleged to be evaluated quickly and an assessment made of the impact the allegation will have on the outcome, if proved. Early consideration also enables timely decisions to be made about the conduct of the hearing and, in appropriate cases, alerts the Court to the need for vigilance about safety, both with respect to the court environment and the form of orders.
- ▶ **Determination of single issues of disputed fact separately.** LAT allows violence concerns to be determined separately from (and possibly in advance of) the other issues. Consideration can be given to whether it should be dealt with early in the hearing as a single issue. If found to be unsubstantiated when it is affecting parenting arrangements, an early decision on it removes it as an influence on the other issues. If substantiated early, immediate assessment of safety issues for the child and/or carer in the interim period can be made, pending a final decision, or risks associated with pre-existing orders can be assessed and tailored to meet the need to protect from harm. In directing what evidence is to be filed to support a finding of fact on that single issue, consideration can be given to a report from an appropriately qualified expert. In New Zealand,<sup>236</sup> legislation requires issues of family violence and abuse be dealt with before all other issues. While Australian legislation does not require this, it *does* give the judge the option of adopting this course.
- ▶ **Judicial consistency.** People already affected by violent conduct do not have to repeat or re-establish their circumstances at each court event because the same judicial officer is handling the case for its duration. This makes it less likely a case requiring safety measures and needing risk assessment will fall through the cracks. This is relevant both as to safety considerations while parties are at the registry and during the conduct of the hearing in the courtroom.

The direct dialogue between the judge and the parties enables the judge to assess the circumstances of the family without the buffer of formality and, hopefully, without the parties being intimidated or overwhelmed by the courtroom environment.<sup>237</sup> There is a need for care in dealing with such cases particularly where one party may be in fear of the other. A party may well have concerns about speaking freely in the presence of the other party and the judge must be conscious of such a possibility.

Arrangements can include changes to the format of the courtroom, permission to have additional companions present or special arrangements for a party being able to participate by video as is consistent with the Court's family violence strategy.<sup>238</sup> Family consultants may play a significant role in such cases, especially where they have had prior involvement with the family.

### **Evaluation issues**

The Court was, from the outset, aware of the radical nature of its new procedures, and similarly aware that, despite its best endeavours, they may have unintended consequences for some or all participants, including the Court itself. In addition, where the new procedures appeared to fulfil their expectations, it realised that the benefits should be documented and built on. As mentioned previously, when the CCP model began to take shape it was decided to build an ongoing evaluative process into it and to arrange for external evaluation to ensure objectivity.

Professor Rosemary Hunter was contracted to evaluate whether the program was meeting its objectives and to determine its resource impacts, and identify best practice models.<sup>239</sup> Her report was completed in June 2006. As part of the evaluation process, Dr Jennifer McIntosh was separately contracted to examine the impacts of CCP on families and children, and her report was completed in March 2006.<sup>240</sup>

Professor Hunter's methodology is described in detail in her report, but essentially her analysis included a survey of 168 CCP parenting cases finalised in the Sydney and Parramatta Registries and 168 non-CCP parenting cases which went to trial in the same registries during the same period.<sup>241</sup> She also conducted a number of interviews and several focus groups with those involved professionally in all aspects of the CCP process. Professor Hunter's evaluation is comprehensive and detailed and only a brief summary of its most pertinent findings can be included in this publication. However, it should be noted that her research was largely conducted during the early months of the CCP pilot and as it evolved and was monitored by the Steering Committee changes were made to it. As the process is an evolving one, in due course further evaluation will be necessary.

At a presentation given to the project Steering Committee in August 2006, Professor Hunter provided the following findings:

- ▶ The CCP cases had fewer case events, and involved fewer subpoenas, affidavits and expert reports than the control group cases. They were also finalised in half the time taken by the control group, an outcome she attributed to the nature of the court process rather than any differences in the characteristics of the cases, whilst also recognising that speedier processes were partially a result of the listing priority and resourcing given them.

- ▶ The CCP process was less adversarial and better designed to be more child focused than the traditional process for a number of reasons, including the examination of flexible, child-focused solutions, the reduction in adversarialism and early identification of issues, the explicit focus of the judges, input of the family consultant and the enhanced role of the children's independent lawyer. CCP parties were significantly more satisfied with both the process and the outcomes of their cases than were those in the control group. The process was also more friendly to self represented litigants, and the role adopted by the family consultants was described as a 'valuable and effective innovation'.

Nonetheless there were some reservations and several unexpected results. In addition to her concerns about the management of family violence cases, Hunter found that there were no statistical differences between the settlement/determination rates of both CCP and the control group cases,<sup>242</sup> there was no greater "stickability" of outcomes (in fact CCP cases were much more likely to return to court, especially for variation and contravention matters), there were considerable variations in judges' management of cases between the Sydney and Parramatta Registries and by individual judge, and judges' workloads (and that of their associates) was unsustainably high.<sup>243</sup>

Dr McIntosh used telephone interviews with a small group of parents in the CCP and control groups to assess the impact of CCP on parental capacity and children's well-being, parents' perceptions of the court process and of how the arrangements for the children were working. Interviews took place three months after the completion of their matters and involved 45 parents who had participated in CCP and an additional 34 who she described as mainstream (ie. whose matters had been determined in the traditional way).<sup>244</sup>

In summary, CCP parents were far more satisfied with their children's living arrangements at the time of interview, and were also much more likely than the mainstream group to perceive that their children were also happier. CCP parents reported less difficulty with contact problems, and fewer disagreements with their former partner. However there were still high levels of acrimony for both groups, and the inherent stresses of parental separation are obviously persistent and long term, irrespective of the court process itself.

One important area in which the parents in the two groups appeared to diverge was in the awareness CCP parents had about the impacts of their conflict on the children. As to this McIntosh concluded:

*'The dominant experience of parents who participated in the mainstream court process was significantly different in a number of respects: As a group, they experienced the court process as neither reparative nor mitigating of further damage to the co-parental relationship. Indeed, they reported further antagonism to an already damaged co-parental capacity.'*<sup>245</sup>

With respect to conflict, both actual and psychological, three months post court, the CCP group reported significantly lower acrimony, and lower conflict, in contrast to the mainstream court group. Associated with these findings, the CCP group reported better emotional functioning of their children, and far greater satisfaction of parents and children with the post-court living arrangements.<sup>246</sup>

The important roles of both the CCP judges and family consultants in informing and educating parents had had an obvious impact and McIntosh concluded that:

*‘... it appears that the CCP pilot has successfully traversed a middle ground between the application of the ‘black letter law’ and mediation processes which are inherently therapeutic.’<sup>247</sup>*

Both Hunter and McIntosh expressed cautious optimism about the value and future extension of what was then CCP, and both urged the continuance of the evaluation process to enable longer term assessments of the procedures to be made.<sup>248</sup> As they were evaluating a pilot in which parental consent was required, factors influencing that consent were obviously significant both to parents’ participation in the pilot and in the evaluations. The national rollout of LAT, its mandatory application and the extension of the Child Responsive Program as a component all justify additional ongoing monitoring and evaluation. Being a different “animal”, this revolutionary new approach will undoubtedly continue to produce new challenges and will be a focus of attention and interest to a number of other (family and non family law) jurisdictions.

## Conclusion

The revolutionary nature of the changes to family law litigation brought about by the passage of Division 12A of the Family Law Act cannot be over emphasised. The process is an evolving one and as it develops, no doubt further changes will need to be made. One possible area is that of greater interaction between judges and children in family law litigation, as occurs in Germany, and there are no doubt many others.

There is a need for education of students in law schools as to the process and continuing education of judges, magistrates and the legal profession as to the demonstrated opportunities this process offers to deliver real assistance to families and children. It should be recognised that it has the potential to change not only the family law system, but the legal system as a whole.

The role of judges and magistrates has changed and will continue to change as the process evolves. There will be greater pressure on judges and magistrates because of their increased responsibilities to conduct an investigation, and the greater need for them to develop communication skills and a greater understanding of the problems of children. The training of new judges and magistrates will be particularly important, and all judges will need ongoing training.

While at first sight the role of lawyers has changed and may appear to be reduced, they continue to play a vital role. The substantive law remains the same and lawyers have an essential obligation to assist the judge in determining the issues, obtaining relevant evidence and making submissions as to the law. The advice they give their clients is pivotal, and there can be no doubt that a client gains enormously from the objective assessment of a case that only they can provide and the skilled advocacy that they can offer. For this reason the importance of the availability of legal aid cannot be too greatly stressed, and it is to be hoped that it will be extended in the future.

For clients who are unrepresented, the LAT procedures place them, and in particular their children, in a much better position than was the case before, but an unrepresented person will always be at a disadvantage regardless of the system in place.

The role of the independent children's lawyer is one that will continue to develop under the new system. It in fact offers a new opportunity for lawyers and requires considerable and different skills, including an understanding of children and their needs, and the capacity to communicate with the parents in a meaningful way.

Similarly the role of the family consultant has changed and developed to the point where they play a more significant role in the whole process. Their role has always been important, but their new responsibilities enable them to combine the roles of a reporter and a conciliator/mediator in a more meaningful way.

There will no doubt be some pitfalls. Some judges and magistrates may find their changed role more difficult, others may recognise it as being more rewarding, for example because of its greater child focus in parenting cases. In all cases the ability to define issues in a more satisfactory way and get to the substance of the dispute should provide a greater degree of satisfaction to decision makers.

Family law needs to be properly resourced because of its impact upon so many people, and particularly children, and while the effect of Division 12A may not generate more work for courts, it is important that they be properly equipped to deal with their considerable responsibilities under it.

# Appendix A

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## Division 12A, Part VII of the Family Law Act <sup>249</sup>

### Division 12A—Principles for conducting child related proceedings

#### Subdivision A—Proceedings to which this Division applies

##### 69ZM Proceedings to which this Division applies

- (1) This Division applies to proceedings that are wholly under this Part.
- (2) This Division also applies to proceedings that are partly under this Part:
  - (a) to the extent that they are proceedings under this Part; and
  - (b) if the parties to the proceedings consent—to the extent that they are not proceedings under this Part.
- (3) This Division also applies to any other proceedings between the parties that involve the court exercising jurisdiction under this Act and that arise from the breakdown of the parties' marital relationship, if the parties to the proceedings consent.
- (4) Proceedings to which this Division applies are child related proceedings.
- (5) Consent given for the purposes of paragraph (2)(b) or subsection (3) must be:
  - (a) free from coercion; and
  - (b) given in the form prescribed by the applicable Rules of Court.
- (6) A party to proceedings may, with the leave of the court, revoke a consent given for the purposes of paragraph (2)(b) or subsection (3).

#### Subdivision B—Principles for conducting child related proceedings

##### 69ZN Principles for conducting child related proceedings

###### Application of the principles

- (1) The court must give effect to the principles in this section:
  - (a) in performing duties and exercising powers (whether under this Division or otherwise) in relation to child related proceedings; and
  - (b) in making other decisions about the conduct of child related proceedings.  
Failure to do so does not invalidate the proceedings or any order made in them.
- (2) Regard is to be had to the principles in interpreting this Division.

**Principle 1**

- (3) The first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.

**Principle 2**

- (4) The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.

**Principle 3**

- (5) The third principle is that the proceedings are to be conducted in a way that will safeguard:
- (a) the child concerned against family violence, child abuse and child neglect; and
  - (b) the parties to the proceedings against family violence.

**Principle 4**

- (6) The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child focused parenting by the parties.

**Principle 5**

- (7) The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

**69ZO This Division also applies to proceedings in Chambers**

A judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate, who is hearing child related proceedings in Chambers, has all of the duties and powers that a court has under this Division.

**Note:** An order made in Chambers has the same effect as an order made in open court.

**69ZP Powers under this Division may be exercised on court's own initiative**

The court may exercise a power under this Division:

- (a) on the court's own initiative; or
- (b) at the request of one or more of the parties to the proceedings.

## Subdivision C—Duties and powers related to giving effect to the principles

### 69ZQ General duties

- (1) In giving effect to the principles in section 69ZN, the court must:
  - (a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and
  - (b) decide the order in which the issues are to be decided; and
  - (c) give directions or make orders about the timing of steps that are to be taken in the proceedings; and
  - (d) in deciding whether a particular step is to be taken—consider whether the likely benefits of taking the step justify the costs of taking it; and
  - (e) make appropriate use of technology; and
  - (f) if the court considers it appropriate—encourage the parties to use family dispute resolution or family counselling; and
  - (g) deal with as many aspects of the matter as it can on a single occasion; and
  - (h) deal with the matter, where appropriate, without requiring the parties' physical attendance at court.
- (2) Subsection (1) does not limit subsection 69ZN(1).
- (3) A failure to comply with subsection (1) does not invalidate an order.

### 69ZR Power to make determinations, findings and orders at any stage of proceedings

- (1) If, at any time after the commencement of child related proceedings and before making final orders, the court considers that it may assist in the determination of the dispute between the parties, the court may do any or all of the following:
  - (a) make a finding of fact in relation to the proceedings;
  - (b) determine a matter arising out of the proceedings;
  - (c) make an order in relation to an issue arising out of the proceedings.

**Note:** For example, the court may choose to use this power if the court considers that making a finding of fact at a particular point in the proceedings will help to focus the proceedings.

- (2) Subsection (1) does not prevent the court doing something mentioned in paragraph (1)(a), (b) or (c) at the same time as making final orders.
- (3) To avoid doubt, a judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate who exercises a power under subsection (1) in relation to proceedings is not, merely because of having exercised the power, required to disqualify himself or herself from a further hearing of the proceedings.

## 69ZS Use of family consultants

At any time during child related proceedings, the court may designate a family consultant as the family consultant in relation to the proceedings.

**Note 1:** Family consultants have the functions described in section 11A. These include assisting and advising people involved in proceedings, and this assistance and advice may involve helping people to better understand the effect of things on the child concerned. Family consultants can also inform people about other services available to help them.

**Note 2:** The court may also order parties to proceedings to attend appointments with a family consultant. See section 11F.

## Subdivision D—Matters relating to evidence

### 69ZT Rules of evidence not to apply unless court decides

- (1) These provisions of the Evidence Act 1995 do not apply to child related proceedings:
  - (a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re examination and cross examination), other than sections 26, 30, 36 and 41;

**Note:** Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.
  - (b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);
  - (c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).
- (2) The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the Evidence Act 1995 not applying because of subsection (1).
- (3) Despite subsection (1), the court may decide to apply one or more of the provisions of a Division or Part mentioned in that subsection to an issue in the proceedings, if:
  - (a) the court is satisfied that the circumstances are exceptional; and
  - (b) the court has taken into account (in addition to any other matters the court thinks relevant):
    - (i) the importance of the evidence in the proceedings; and
    - (ii) the nature of the subject matter of the proceedings; and
    - (iii) the probative value of the evidence; and
    - (iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

- (4) If the court decides to apply a provision of a Division or Part mentioned in subsection (1) to an issue in the proceedings, the court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of the provision applying.
- (5) Subsection (1) does not revive the operation of:
  - (a) a rule of common law; or
  - (b) a law of a State or a Territory;

that, but for subsection (1), would have been prevented from operating because of a provision of a Division or Part mentioned in that subsection.

### **69ZU Evidence of family consultants**

The court must not, without the consent of the parties to the proceedings, take into account an opinion expressed by a family consultant, unless the consultant gave the opinion as sworn evidence.

### **69ZV Evidence of children**

- (1) This section applies if the court applies the law against hearsay under subsection 69ZT(2) to child related proceedings.
- (2) Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay.
- (3) The court may give such weight (if any) as it thinks fit to evidence admitted under subsection (2).
- (4) This section applies despite any other Act or rule of law.
- (5) In this section:
  - ~ child means a person under 18.
  - ~ representation includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct.

### **69ZW Evidence relating to child abuse or family violence**

- (1) The court may make an order in child related proceedings requiring a prescribed State or Territory agency to provide the court with the documents or information specified in the order.
- (2) The documents or information specified in the order must be documents recording, or information about, one or more of these:
  - (a) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child;
  - (b) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations;
  - (c) any reports commissioned by the agency in the course of investigating a notification.

- (3) Nothing in the order is to be taken to require the agency to provide the court with:
  - (a) documents or information not in the possession or control of the agency; or
  - (b) documents or information that include the identity of the person who made a notification.
- (4) A law of a State or Territory has no effect to the extent that it would, apart from this subsection, hinder or prevent an agency complying with the order.
- (5) The court must admit into evidence any documents or information, provided in response to the order, on which the court intends to rely.
- (6) Despite subsection (5), the court must not disclose the identity of the person who made a notification, or information that could identify that person, unless:
  - (a) the person consents to the disclosure; or
  - (b) the court is satisfied that the identity or information is critically important to the proceedings and that failure to make the disclosure would prejudice the proper administration of justice.
- (7) Before making a disclosure for the reasons in paragraph (6)(b), the court must ensure that the agency that provided the identity or information:
  - (a) is notified about the intended disclosure; and
  - (b) is given an opportunity to respond.

### **69ZX Court's general duties and powers relating to evidence**

- (1) In giving effect to the principles in section 69ZN, the court may:
  - (a) give directions or make orders about the matters in relation to which the parties are to present evidence; and
  - (b) give directions or make orders about who is to give evidence in relation to each remaining issue; and
  - (c) give directions or make orders about how particular evidence is to be given; and
  - (d) if the court considers that expert evidence is required—give directions or make orders about:
    - (i) the matters in relation to which an expert is to provide evidence; and
    - (ii) the number of experts who may provide evidence in relation to a matter; and
    - (iii) how an expert is to provide the expert's evidence; and
  - (e) ask questions of, and seek evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceedings.

- (2) Without limiting subsection (1) or section 69ZR, the court may give directions or make orders:
- (a) about the use of written submissions; or
  - (b) about the length of written submissions; or
  - (c) limiting the time for oral argument; or
  - (d) limiting the time for the giving of evidence; or
  - (e) that particular evidence is to be given orally; or
  - (f) that particular evidence is to be given by affidavit; or
  - (g) that evidence in relation to a particular matter not be presented by a party; or
  - (h) that evidence of a particular kind not be presented by a party; or
  - (i) limiting, or not allowing, cross examination of a particular witness; or
  - (j) limiting the number of witnesses who are to give evidence in the proceedings.
- (3) The court may, in child related proceedings:
- (a) receive into evidence the transcript of evidence in any other proceedings before:
    - (i) the court; or
    - (ii) another court; or
    - (iii) a tribunal;and draw any conclusions of fact from that transcript that it thinks proper; and
  - (b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).

**Note:** This subsection may be particularly relevant for Aboriginal or Torres Strait Islander children.

# Appendix B

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## Steering Committee Issues

The following passage records some of the significant matters considered by the Steering Committee between April 2004 and August 2006:

- ▶ Mediator (family consultant) involvement in the first day of hearing – different practices emerged between the two participating registries, ultimately confirming the model that included the mediator being present in the court.
- ▶ Expansion of the number of judges in the pilot, with an additional two judges at Sydney when it became apparent that there was an element of hesitance in the profession about the limited number available.
- ▶ Concerns raised by the legal profession about insurance consequences of advising clients to participate in the pilot, when this emerged as a reason for cases being withheld from entry. Addressed through a seminar with the profession assisted by Paul Brereton (then a member of the Steering Committee).
- ▶ Concerns of the profession about access to counsel in cases that went beyond day one and the impact of a change of lawyer on the dynamic established on the first day. Emphasis required on the trial commencing from the first day and avoidance of language of “intake” which gave the wrong impression.
- ▶ Concerns about the capacity of CCP to address appropriately cases involving family violence – also related to reluctance to enter the pilot. The documentation that promoted the pilot was reviewed to remove the misunderstanding that a focus on the future meant family violence was not to be raised. In addition, the advances that CCP made in handling this issue were outlined through work with the Court’s Family Violence Committee and it was added as a specific element of judicial training.
- ▶ Related to this was the need to address misconceptions about CCP as a mediation process rather than a determination process. A review of the information brochure and the practice direction to clarify this was undertaken. For some in the profession this misconception meant reluctance to advise entry into the program as cases viewed as being unsuitable for mediation were therefore unsuitable for CCP.
- ▶ Support of the evaluation process – overseeing the collection of data required and ensuring sufficient resources available, monitoring the rate of intake and development of responses re communication about the program. At the end, encouraging the legal profession to be available for interviews with Professor Hunter.

- ▶ Education of the legal profession – from the beginning judges presented at a range of venues to inform the legal profession in Sydney and Parramatta about the pilot. When it became apparent that there was a need to also educate them in the process, the Steering Committee, through a sub-committee largely, developed a practical workshop demonstration of the CCP trial (focused on the first day) in collaboration with the Family Law Section. The first of these was held in Sydney in November 2004. A series was eventually conducted in Newcastle, Hobart, Adelaide and Brisbane as preparation for national implementation progressed. A special one was held in Melbourne before the commencement of the child responsive pilot in October 2005.
- ▶ Monitoring of the progress of evaluations – receipt of interim reports from Dr Jennifer McIntosh and Professor Rosemary Hunter in September 2005. Extrapolating from early findings information that would assist the preparation for implementation in other registries.
- ▶ Monitoring listing practices to maintain priority for children’s cases – even during the pilot the delays from the first day of hearing to the conclusion began to increase. Partly addressed through liaison between the Steering Committee and the mental health profession known for their work in family law matters. This issue also examined the potential for legal aid to expand its panel of experts.
- ▶ Judicial training package development through a sub-committee for the ongoing development of the pilot judges as well as the preparation for national implementation.
- ▶ Close monitoring of the impacts of the pilot on the Court’s resources, including of judges, mediators and administrative staff, to ensure that the Court could put itself in the strongest position for application of the principles of the pilot to all children’s cases in all registries. This led, for example, to allocation of additional mediation resources to enable the continuation of the inclusion of the mediator in the first day of hearing.
- ▶ Ongoing communication strategy – coordinating opportunities for education of stakeholders including self representing litigants, monitoring media attention.
- ▶ Involvement of children – the media interest in the CCP was usually heavily focused on the potential involvement of children in the process. The Steering Committee had a role in management of the level of cooperation with the media and in ensuring that pressure to go down this road did not overtake development of a proper policy and framework for appropriate inclusion of children. The Steering Committee confirmed that the direct involvement of children was not pivotal to the CCP model. An on-going committee within the Court is continuing work on development of guidelines in this area.

- ▶ Auditing of the practice of the judges in CCP to record differences and similarities. Linked to judicial training and to submissions about legislative support.
- ▶ The Steering Committee spent some time early in the pilot considering the best means of inclusion of research into the impact of CCP on the children who were subject of proceedings. Early findings made it very clear to the Steering Committee that the option of retaining the existing traditional adversarial approach was no longer available to the Court.
- ▶ Deciding to continue CCP at Parramatta and subsequently at Sydney beyond the pilot, in response to the support of the profession.

Other benefits of having the Steering Committee included:

- ▶ Legal aid was represented on the Steering Committee from the beginning and was always a strong supporter, with the Steering Committee a valuable forum for feedback from the legal aid perspective. An issue of telephone access for self represented litigants to the duty lawyer advice on CCP, on days when the duty lawyer was not present at court, was resolved through the Steering Committee.
- ▶ The Steering Committee provided a forum for discussion of various ways of conducting the conclusion of hearing stage of the process. It was able to confirm the importance of maintaining the less adversarial dynamic and countering any conception that the final stage was “business as usual”. The order in which evidence is presented (eg. first the family report) and the judge’s control of the cross examination were the most obvious influences on the process that would ensure it was not “business as usual”.
- ▶ It coordinated the visits of judges from New Zealand and Judge Eberhard Carl in September 2004. Their visits provided a valuable opportunity to share views about a less adversarial approach.
- ▶ Responsibility for detailed planning of implementation across the Court was delegated to an internal working party made up of the key court management and judicial decision makers. This occurred late in 2005 as the pilot drew to a conclusion and the role of the Steering Committee became less to examine operational issues and await the outcomes of the final evaluation.
- ▶ It was able to receive the final reports on evaluations by Professor Hunter (August 2006) and Dr McIntosh (March 2006).

# Appendix C

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When the pilot had been in operation for 12 months the six judges involved developed a description of the hearing procedures in order to identify its core features, as set out here. (The description identified common practices between the Sydney and Parramatta Registries, and areas of variation.) Following is that description, reflecting the situation as at January 2005.

## Conduct of a CCP hearing – step by step

### Pre trial

Before the first appearance before the judge to whom the case is assigned for hearing, the parties will have completed and filed a questionnaire which covers background information about the parties, current arrangements for the children and proposals for the future. These questionnaires will have been filed in the Court. The judge will normally have read the file which would include, as well as the questionnaires, the application, the response, a notice with respect to prior confidential counselling and any previous orders made including any documents filed in prior interim proceedings.

An important aspect of the process is that the trial commences the first time that the parties come before the judge.

### The beginning of the hearing - information and setting the scene

There are a number of preliminary steps available to the judge that effectively set the tone for the conduct of the hearing. These are:

- ▶ A video on the impact of conflict on children is available for the parties to watch, prior to the first appearance before the judge or at a later stage.
- ▶ The judge may outline for the parties what steps are involved in the hearing and what the aims are.
- ▶ The judge may introduce the case coordinator explaining the role as the primary point of contact in the court
- ▶ The judge may introduce the mediator and what their role will be in the hearing.
- ▶ The judge may make procedural orders for the ongoing conduct of the hearing. These presently include orders about entry into CCP and party consent.

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The pilot is considering some possible changes to this process which will improve efficiency. Functions the judge is performing that might be better dealt with by a deputy registrar at a prior procedural (directions) hearing have been identified as:

- ▶ Introduction of the case coordinator's contact details.
- ▶ Orders for payment of the hearing fee.

## **After the introductory phase outlined above the hearing proceeds as follows:**

### **Swearing in**

The parties are each sworn in, usually at the bar table. Subsequent to this all that is said by them is evidence in the case.

### **Admission of questionnaires**

The completed questionnaires are entered as exhibits (currently this process includes consent forms) and the judge informs the parties that these have been read.

### **Opening statements**

The parties each have the same opportunity, of about 10 minutes or for such other time as the judge considers appropriate, to tell the judge in their own words what the dispute is about and what their proposals are for the children. The form of this is not prescriptive, as it is something that will depend on the capabilities of the parties themselves. The judge may particularly ask a party to explain why what they propose is in the children's best interests. The judge tells the parties that this is not their last opportunity to speak for themselves.

If the parties have legal representation there may also be discussion with the judge about the case and the proposals of each party.

A court mediator may be present in court to hear the statements from the parties. The judge asks the mediator to respond to what has been said by the parties and or the lawyers, based on their expertise, about issues that are raised, eg. the impact of conflict on children. The mediator is not sworn in and cannot be cross examined at this point.

## The next steps

The next step(s) in the hearing may not happen in any particular order, depending on what the judge considers necessary to meet the needs of the case. The hearing progresses in the form of a discussion between the judge, the parties, their legal representatives, the child representative (if there is one appointed), and the mediator.

The following outcomes must be achieved in the course of this process:

**a. Establishing areas of agreement (non-contentious facts)**

The areas of agreement are clarified and resolved.

**b. Identification of issues in dispute**

The areas of disagreement are clarified and resolved. Issues that require decision by the judge are identified through this discussion. The judge will resolve the issues in respect of which evidence is required and or a family report or expert witness report should address.

At the end of this process a list of issues remaining in dispute is agreed and put in writing – this can either be provided in court at the time or as soon as possible after the completion of this first hearing day.

The list can be subsequently amended, particularly if new issues emerge or if they are narrowed by agreement or the expert/family report.

Issues can also be determined individually as the case progresses. In cases where there is a straightforward issue in respect of which there is no or limited evidence then the judge may proceed directly to hear evidence and determine that issue.

**c. Identification of evidence required and the manner in which it is to be provided**

The judge will explore the following matters in discussion with the parties, their legal representatives, the child representative, if one has been appointed, and the mediator assigned to the case:

- ▶ What evidence is required to resolve the issues in dispute and to enable a decision to be made?
- ▶ What witnesses are required? (The judge may decide not to accept certain witnesses proposed by the parties.)
- ▶ How is the evidence to be presented? Options for this include:
  - ~ by affidavits, which will be kept to the minimum, and usually will be only by the parties
  - ~ by witness statements which outline the evidence a witness is expected to contribute to an issue

- ~ by a family report – the judge, after discussion with the parties and the mediator, makes an order about what issues the report should address. The orders will usually include “any other issues the reporter identifies”. Available dates will be checked with the mediator, and
- ~ by discussion with the parties and or their legal representatives about the need for an expert report on a particular issue or issues.

The judge may discuss with the parties the possibility of interviewing the children.

## Subpoenas

Subpoenas can only be issued with the leave of the judge. How the subpoena is returnable is a matter for the judge’s discretion. Options include:

- ▶ before the judge
- ▶ before a deputy registrar
- ▶ in court or in chambers
- ▶ by teleconference.

The judge, when approving the issue of a subpoena, may order immediate release of documents, provided the recipient of the subpoena has raised no objections.

The aim is to enable management of the inspection of documents appropriately and efficiently and, wherever possible, to avoid unnecessary costs.

## Expert evidence

The family report or the report of a court expert will be made available to the parties at or before the next hearing day. Options for the release of the report include:

- ▶ at an event before the judge in person with all parties and legal representatives present, with the opportunity to discuss its implications for the management of the case
- ▶ without appearances, by order of the judge in chambers, without any discussion, with the parties if the judge does not consider this necessary, or
- ▶ by order after consideration in chambers by a teleconference with the parties and/or their legal representatives.

## Adjudication on contentious issues

When there are remaining contentious issues on which the judge is required to make a decision, the hearing continues in the less adversarial model in a number of ways. Critically, the examination of witnesses is entirely at the discretion of the judge. This means that the judge will decide:

- ▶ the witnesses required for oral examination
- ▶ the order in which witnesses will be questioned
- ▶ the order of cross examination.

The judge may ask the parties to indicate their reasons for wanting to cross examine a witness, and demonstrate the probative value of the cross examination proposed.

The judge will consider what approach is most appropriate to the child's best interests and to maintaining a fair process.

The judge will then inform the parties in advance of this part of the hearing of the format that is proposed.

There are a number of options available to the judge, consistent with a significantly less adversarial process, which are designed to avoid the confrontational aspects of the traditional adversarial model. Many of these are already available to a judge under the traditional system but it might be necessary to clarify or expand the existing powers.

The judge may use any or all of the following strategies to manage a less adversarial hearing:

- ▶ ask questions of clarification (not cross examination) first
- ▶ may request the child representative to ask questions first
- ▶ indicate which issues are to be examined first
- ▶ interrupt cross examination to explore an issue with another witness or party before proceeding (this facilitates the capacity to examine and determine issues separately as the case proceeds)
- ▶ terminate a cross examination that is overly adversarial, aggressive or appears to be irrelevant to the issue in dispute.

## Judgment

A judge may determine particular issues in dispute as the hearing progresses. Reasons may be given at the conclusion of the hearing.

There may be an interim hearing on a single issue during the course of the hearing. There is no requirement for a single judgment at the conclusion of the hearing.

Determination on an issue prior to completion will not of itself disqualify the judge from continuing on the grounds of bias.

Judgments will usually be shorter as they will not need to recite all the agreed facts or address any of the non-contentious issues. The judgments will be specifically directed at the issues on which a decision has been made.

At any stage during the hearing the judge may become aware of and will act upon any opportunity for compromise.

## Follow up – referral to external agencies

If the judge considers it will assist the parties and the children, he or she may make orders referring them to a community based agency. The judge may ask the child representative to make the necessary inquiries about availability and make initial appointments. The manager of the agency may report back to the court about attendance.

The judge may meet with the children to explain the orders made or direct that a mediator meet with them for this purpose.

Where the judge considers it necessary, use will be made of s 65L of FLA to order mediators to have a supervising role for the Court orders.

## Judicial discretion

The above outlines the core features of the CCP approach. It includes a number of areas where there are options available for the judge to consider, in his or her discretion. This is important, to ensure the judge has maximum flexibility to respond to the needs of the parties and the case that is before him or her, but remaining consistent with the framework that is described.

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# Footnotes

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- 1 G. Davies, 'Justice in the 21st Century', paper delivered at the Family Court of Australia judges' Annual Conference, Challenges for the 21st Century (July 2000), at 5.
- 2 This term was introduced by the 2006 amending Act, see section 11A. Initially the term was "counsellor" and subsequently "mediator".
- 3 Although varying across registries, many of the children's matters being heard at the time of writing were started before 1 July 2006. In such cases, where both parties do not consent, matters are heard in accordance with the previous practice.
- 4 For the purposes of this paper the pilot Children's Cases Program is referred to as the CCP and the implemented program as the Less Adversarial Trial or LAT.
- 5 Section 60CA FLA.
- 6 Specifically placita (xi) and (xx).
- 7 For a more detailed discussion see H. Finlay, *To Have But Not To Hold, a History of Attitudes to Marriage and Divorce in Australia 1858-1975*, The Federation Press (2005).
- 8 See also A. Nicholson and M. Harrison 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000), 24, *Melbourne University Law Review* 756 at 763-4.
- 9 Family Law Council, 'The Best Interests of the Child? The Interaction of Public and Private Law in Australia', Discussion Paper no. 2 (2000).
- 10 Family law public law disputes involve the state as a party, eg. child protection and juvenile justice matters. Private disputes involve contests between private citizens, usually parents or other family members – see A. Nicholson and M. Harrison note 8 supra.
- 11 Which had previously established its own State Family Court pursuant to section 41 *FLA*. See section 36 *Family Court Act 1997* (WA).
- 12 As at the end of January 2007, these States had passed legislation referring power to legislate about financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships:
  - ~ New South Wales: *Commonwealth Powers (De facto Relationships) Act 2003* (no 49/2003). Act assented to on 23 October 2003; to commence on a date fixed by proclamation.
  - ~ Queensland: *Commonwealth Powers (De facto Relationships) Act 2003* (no 78/2003). Act assented to 6 November 2003; to commence on a date fixed by proclamation.
  - ~ Victoria: *Commonwealth Powers (De facto Relationships) Act 2004* (no 84/2004). Act assented to on 23 November 2004; to commence on a date fixed by proclamation.
  - ~ Tasmania: *Commonwealth Powers (De facto Relationships) Act 2006* (no 18/2006). Act assented to on 10 November 2006.
  - ~ A Bill accepting these referrals is expected to be introduced into the Commonwealth Parliament in the autumn session of 2007.
- 13 See R. Graycar, 'Law Reform by Frozen Chook', (2000) 24, *Melbourne University Law Review*, 737 at 739.

- 14 Section 41, MCA.
- 15 Respectively, the forgiveness of the commission of a matrimonial offence, behaviour by one spouse designed to cause the other to commit a matrimonial offence; an agreement made by both spouses for one to commit an offence in order to provide a ground for the divorce s39-40 Matrimonial Causes Act.
- 16 Section 37, MCA
- 17 *Joske's Marriage and Divorce* vol. 2, 4th edition, Butterworths (1961) at 512.
- 18 The gendered nature of the language used is characteristic of the period.
- 19 See P. McDonald, *Can the Family Survive?*, Discussion Paper no. 11, Australian Institute of Family Studies (1984).
- 20 H. Finlay (2005), see note 7 supra, at 362.
- 21 Commonwealth, Senate, *Family Law Bill 1974*, Hansard (29 October 1974), at 2056.
- 22 Section 48 (1) and (2) FLA.
- 23 In the traditional adversary system judges are not assumed to have any particular knowledge of the subject matter in dispute but are supposedly provided with all the information they require to determine the matter before them by the parties in written evidence supplemented by oral evidence.
- 24 Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974*, Parliamentary Paper no. 133 (1974) 10.
- 25 J. Fogarty, 'Thirty Years of Change', (2006) 18 *Australian Family Lawyer*, 4 at 5.
- 26 A. Nicholson (2006), 'Family Law Reform - How Much Real Reform is Involved? Does it Take Us Forward or Backwards?' in an address to the ACT Council of Social Service, referred to the pejorative sense in which "inquisitorial" is used in this country (see [http://www.criminology.unimelb.edu.au/staff/alastair\\_nicholson/family\\_law\\_reform\\_conference\\_act\\_august\\_2006.pdf](http://www.criminology.unimelb.edu.au/staff/alastair_nicholson/family_law_reform_conference_act_august_2006.pdf)).  
The Australian Law Reform Commission (ALRC), *Managing Justice, a review of the federal civil justice system, Report no 89 (2000)* (at 90-91) noted that the term "adversarial" has negative connotations, and mentions the frequency with which battle and sporting images are relied on by lawyers, the most common perhaps being their references to "war stories" when talking about their courtroom experiences. See also G. Davies (2002), 'The Reality of Civil Justice Reform. Why we must Abandon the Essential Elements of our System', a paper presented at the 20th annual AIJA conference, which (at 5) argues that both systems are adversarial, but that the European approach is less so as disclosure is not required.
- 27 G. Davies (2002), see note 26 supra at 2. (Davies refers to the convergence of substantive and procedural law and of judicial structures). The effects of globalisation and the extension of the European Union have also contributed to this convergence.
- 28 See R. Chisholm, 'The Adversary System and Family Court Developments', Family Court of Australia National Seminar Papers 47 (1992); D. Sandor, 'Not Strictly Adversarial': Private Children's Proceedings Under the Family Law Act 1975, Procedural Fairness and the Unrepresented Litigant (2003, unpub. paper); S. O'Ryan, 'A Significantly Less Adversarial Approach: The Family Court of Australia's CCP', *Proceedings of the 22nd Annual AIJA Conference* (2004); G. Davies, 'Judicial reform: a Personal Perspective' (1996-97), 15 *Australian Bar Review* 109.
- 29 ie. held in open court, although in many overseas jurisdictions family courts are closed to the public. Australia is something of an exception in this regard.

- 30 *Jones v National Coal Board* [1957] 2 QB 55 at 63.
- 31 R. Chisholm (1992), see note 28 supra.
- 32 Ibid at 55.
- 33 See *U v U* (2002) 211 CLR 238.
- 34 Section 60B (1) and (2) FLA.
- 35 Most recently Chief Justice Martin of the Western Australian Supreme Court has described the conventional view of adversarial proceedings as involving 'an aloof and disinterested judge watching the battle from on high and then presenting a laurel wreath to the winner'. See W. Martin, address to the 2006 Australian National Family Law Conference, Perth 26 October 2006. See also S. O'Ryan, 'The Less Adversarial Trial: the Lighter, more Contemporary and more Fuel Efficient Vehicle', paper presented at the 24th AIJA Annual Conference, *Affordable Justice* (2006).
- 36 A. Nicholson (2006), see note 26 supra.
- 37 A. Nicholson (1999), 'Legal Aid and a Fair Family Law Justice System', address to Legal Aid Forum Towards 2010, Canberra.
- 38 In concert with appropriate procedural rules and a fair and objective decision maker.
- 39 Lord Woolf (1996), Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales, chapter 13, para 6.
- 40 Various surveys conducted by the Family Court and the ALRC put this figure at between 35% and 41% of Family Court matters involved at least one party who was unrepresented somewhere in the proceedings. See J. Dewar, B. Smith and C. Banks (2000), *Litigants in Person in the Family Court of Australia*, Family Court of Australia, research report no. 20; and R. Hunter (1998), 'Litigants in Person in Contested Cases in the Family Court', *12 Australian Journal of Family Law* 171.
- 41 A. Nicholson, (2006), see note 26 supra.
- 42 Quoted in Dewar, Smith and Banks (2000), note 40 supra, at 10.
- 43 Other than in the active judicial management that characterised the Magellan project.
- 44 See *T and S* (2001) FLC 93-086.
- 45 Either appearing to be protective of the unrepresented client and providing suggestions as to how the case should be run, or conversely interacting more with the barrister or solicitor in technical or friendly terms.
- 46 See A. Zuckerman, quoted in the ALRC (2000) see note 26 supra, at 95. See also ALRC, *Review of the Adversarial System of Litigation, Rethinking Family Law Proceedings*, Issues paper no.22 (1997); and G. Davies (1996-97), see note 28 supra.
- 47 See re *Watson; ex parte Armstrong* (1976) 134 CLR 248, and other cases cited in a later section of this paper.
- 48 See G. Davies (1996-97), note 28 supra; (2000) see note 1 supra (2002); see note 26 supra, (2005) Civil Justice Reform: Why We need to Question Some Basic Assumptions, edited version of a paper delivered at the British Columbia Justice Review Task Force Conference; and (2006) Restructuring Justice, and Civil Justice Reform: Some Common Problems, Some Possible Solutions, paper delivered at the Canadian Forum on Civil Justice Conference, 'Into the Future', Montreal (2006).
- 49 See also H. Finlay (1983), 'Towards Non-Adversary procedures in Family Law,' 10 Sydney Law Review 61.

- 50 Ibid at 73. Finlay also notes the argument made by Sir Richard Eggleston that the State has a moral duty to ensure that a right decision is made in each case, even if the parties have not chosen (or presumably were unable) to place all the relevant evidence before the court.
- 51 G. Davies (2002), see note 26 supra.
- 52 Nicholson (2006), see note 26 supra, at 21.
- 53 Australian Law Reform Commission, *Review of the Federal Civil Justice System* (1999), Discussion Paper 62, para 2.24.
- 54 The inclusion of this material relies heavily on papers by D. Sandor (2003), see note 28 supra, and S. O’Ryan (2004), see note 28 supra.
- 55 S. O’Ryan (2004), see note 28 supra, at 10.
- 56 This was added upon the passage of the *Family Law Reform Act 1995* which came into effect in mid 1996.
- 57 D. Sandor (2003), see note 28 supra.
- 58 Section 60CA *FLA*.
- 59 Section 100B(2) *FLA*.
- 60 The LAT model reduces the necessity for affidavits, defers their use until the issues in dispute have been identified and encourages direct dialogue between the parties and the judge as a part of that identification process.
- 61 *Reynolds v Reynolds* (1973) 1 ALR 318.
- 62 Ibid at 323.
- 63 Section 97(1) (2) *FLA*.
- 64 Section.97(4) *FLA*.
- 65 *Russell v Russell* (1976) 134 CLR 495 and *Re Watson; ex parte Armstrong* (1976) 134 CLR 248.
- 66 Section 97(3) *FLA*.
- 67 Commonwealth, *Family Law in Australia: Report of the Joint Select Committee on the Family Law Act (1980)*, vol.1, recommendation 59.
- 68 Section 121(5) *FLA*.
- 69 *Re Watson; ex parte Armstrong* (1976) 134 CLR 248.
- 70 The proper exercise of judicial power was the subject of discussion during the parliamentary debates on the *FLA* in relation to opportunities for the parties to reconcile. An early draft of what eventually became section 14 of the *FLA* allowed a judge, with the consent of the parties, to interview them in chambers with a view to effecting a reconciliation. Lionel Murphy unsuccessfully objected to this on the basis that ‘*the judge ... is really there to decide the things that cannot be resolved. It will be up to the other people to do the counselling. The judge ought not to be getting caught up in counselling the very people whom he may have to assess, evaluate and sit in judgment upon*’. See H.Finlay (2005) note 7 supra at 377.
- 71 *Nicholas v R* (1998) HCA 9.

- 72 In *J v Lieschke* (1987) HCA 4 at 9 (a dispute involving State child protection proceedings) the High Court held that a court must take account of the nature of the jurisdiction being exercised in determining the content of the principles of natural justice to be applied. Brennan J in that case went on to say: *'If an unqualified application of the principles of natural justice would frustrate the purpose for which the jurisdiction is conferred, the application of those principles would have to be qualified: ... In some custody proceedings, some qualification of the principles of natural justice may be necessary in order to ensure paramountcy to the welfare of the child.'*
- 73 *R v Watson; ex parte Armstrong* at 257-258.
- 74 (1976) FLC 90-066.
- 75 *Ibid* at 75,332. See also the later case of *Gibson* (1981) FLC 91-049, in which the husband appealed against a decision that he and his wife have joint custody of their children and against the judge's lengthy examination of a party. The Full Court held that such an examination in a proper case is permitted, provided it does not impede the party's presentation of the case.
- 76 (1976) FLC 90-098.
- 77 *Ibid* at 75,449.
- 78 (1986) 161 CLR 342.
- 79 *Ibid* at 373.
- 80 (1988) 166 CLR 69.
- 81 *Ibid* at 76.
- 82 (1993) FLC 92-376.
- 83 *Ibid* at 79, 896.
- 84 (1995) FLC 92-581.
- 85 *Ibid* at 81,763.
- 86 (1996) FLC 92-651.
- 87 (1999) FLC 92-863 at 86, 203.
- 88 (1999) 196 CLR 553.
- 89 *T and S* (2001) FLC 93-086 at 88,522.
- 90 (2002) 211 CLR 238.
- 91 *Ibid* at 284-285.
- 92 J. Fogarty (2006), see note 25 *supra*, at 10.
- 93 G. Davies (2005), see note 26 *supra*.
- 94 eg. mediation, conciliation, counselling, alternative dispute resolution, primary dispute resolution.
- 95 (1986) 161 CLR 342.
- 96 Section 62G(4) *FLA*.
- 97 Section 62G(3A) and (3B) *FLA*.

- 98 Section 62G(2)
- 99 R. Chisholm (1992), see note 28 *supra* at 56.
- 100 Section 62G(8) *FLA*.
- 101 Section 68L(1) *FLA*.
- 102 Section 68L (2) (4) *FLA*.
- 103 (1994) FLC 92-461.
- 104 Section 68LA(4) *FLA*.
- 105 Section 68LA(2) (a) and (b) *FLA*.
- 106 D. Sandor (2003), see note 28 *supra*, at 8.
- 107 Another example of the Family Court's jurisdiction to initiate proceedings on its own initiative is provided in the Hague Convention case of McOwan (1994) FLC 92-451. In this instance a registrar of the Court, at the request of the Chief Justice, issued a summons notifying the parties and the Victorian Central Authority, that the Court would sit in its welfare jurisdiction to enquire whether proper arrangements had been made for the welfare of two children who had been returned from the UK pursuant to the Convention, but in relation to whom concerns had been expressed about their welfare as their mother, the primary carer, was without funds or accommodation and had failed in her attempts to obtain legal aid in Australia. The matter eventually settled, but Kay J addressed several objections to the Court's initiating powers in the course of his judgment.
- 108 At one time before the introduction of pleadings, the regulations, and later the Rules of Court, had a deemed admission provision which envisaged a type of pleading affidavit. This hybrid was the subject of some criticism: (1992) 66 ALJ 163.
- 109 The number of amending Acts to the FLA since its passage has recently been calculated at 69. See D. Bryant, 'State of the Nation Address to the 12th National Family Law Conference (2006)'. See [http://www.familycourt.gov.au/presence/resources/file/eb001347dd02130/CJ\\_speech\\_Oct\\_2006.pdf](http://www.familycourt.gov.au/presence/resources/file/eb001347dd02130/CJ_speech_Oct_2006.pdf)
- 110 Family Court of Australia, *Report of the Simplification of Procedures Committee to the Chief Justice* (May 1994).
- 111 See section 97(3) *FLA* and the discussion above.
- 112 See Family Court of Australia, 'The Report of the Working Party on the Review of the Family Court', (1990), volume 1.
- 113 *Ibid* page 279, para 12.9.
- 114 *Ibid* para 12.10.
- 115 ALRC (2000), see note 26 *supra*, para 6.3 page 390.
- 116 Transcript of welcome speech, Supreme Court of Western Australia, 1 May 2006.
- 117 Submission of the Family Court of Australia to the Standing Committee on Family and Community Affairs Inquiry into Joint Custody Arrangements in the Event of Family Separation (2003), Part B at 6. <http://www.familycourt.gov.au/presence/resources/file/eb000240ff79dc9/iijca2.pdf>
- 118 Family Court of Australia, *Report of the Simplification of Procedures Committee to the Chief Justice*, (1994), para 7.4 at page 8. However the Committee also sought to ensure that matters going to trial did so in a fair, equitable and timely fashion, para 1.4.4.

- 119 Ibid at 2.
- 120 Commonwealth, *The Family Law Act 1975 – Aspects of its Operation and Interpretation – Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act (1992)*.
- 121 Ibid page 48, para 20.5 (the powers were subsequently granted in 1997 – see now section 123(ba) FLA).
- 122 Practice Direction no. 3 of 1995.
- 123 Practice Direction no. 1 of 1997 and see also the *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee*, 1997.
- 124 Family Court of Australia, *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee*, (1997) pages 3-6.
- 125 The *resolution phase* begins at the commencement of proceedings until it is decided that a matter should be prepared for trial, at which time the *determination phase* begins. See [http://www.familycourt.gov.au/presence/connect/www/home/directions/case\\_management\\_directions/](http://www.familycourt.gov.au/presence/connect/www/home/directions/case_management_directions/)
- 126 S. O’Ryan, ‘A Remaining Problem with Case Management’, (2002, unpub. paper) at page 3.
- 127 T. Brown, with R. Sheehan, M. Frederico and L. Hewitt (1998), *Violence in Families*, Report no. 1 ‘The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia’; A Shea Hart (2004), ‘Children Exposed to Domestic Violence: Undifferentiated Needs in Australian Family Law’, 18 *Australian Journal of Family Law* 170; S. Charlesworth, J. Turner and L. Foreman (2000), ‘Disrupted Families. The Law’, The Federation Press Sydney; and H. Rhoades, R. Graycar and M. Harrison (2000), *The Family Law Reform Act 1995 : The First Three Years*, University of Sydney and the Family Court of Australia.
- 128 T. Brown (ed.) et al, *Violence in Families Report: the Evaluation of Project Magellan, a pilot program for Managing Family Court Residence and Contact Disputes where Allegations of Child Abuse have been made*, (2001).
- 129 (1988) 166 CLR at 69. See also John Fogarty (2006), ‘Unacceptable risk – A return to basics’, 20 *Australian Journal of Family Law*, 249.
- 130 Involvement of the Victorian Department of Human Services in the project was important in ensuring coordination between the State and Federal agencies.
- 131 Implementation was delayed in NSW because there was an initial reluctance by the relevant State welfare department to cooperate. This reluctance has now been overcome to some extent in that the Department of Community Services in NSW is participating in a limited pilot study.
- 132 Family Law Council, ‘*Litigants in Person*’, a Report to the Attorney-General, (2000) at 16.
- 133 J. Dewar, B. Smith and C. Banks (2000), see note 40 supra, page 1.
- 134 (1997) FLC 92-764 at 84,421.
- 135 (2001) FLC 93-072.
- 136 S. O’Ryan (2004), see note 28 supra, at 37.
- 137 Ibid at 39.

- 138 Much other valuable research has been conducted and published by organisations such as the Family Law Council and the Australian Institute of Family Studies and by individual academics since 1976. This publication has only selected for inclusion those projects which were directed at court processes, and particularly those involving children's matters.
- 139 Section 115 *FLA*.
- 140 Section Part XIVA *FLA*.
- 141 Joint Select Committee (1980) see note 67 *supra*, and Joint Select Committee (1992) see note 120 *supra*.
- 142 Joint Select Committee (1980), vol. 1, see note 67 *supra*.
- 143 Australian Bureau of Statistics, Divorce, ABS Catalogue No. 3307.0, 1975 and 1976.
- 144 Joint Select Committee (1980), volume 1, See note 67 *supra*, 37-42.
- 145 *Ibid* at 121.
- 146 H. Rhoades (2006), 'Yearning for Law: Fathers and Family Law Reform in Australia', in S. Sheldon and R. Collier (eds.), *Fathers' Rights Activism and Law Reform in Comparative Perspective*, Hart 125-146; R. Graycar (2000) see note 13 *supra*; and H. Rhoades, R. Graycar and M.Harrison (2000) see note 127 *supra*.
- 147 JSC Committee Report (1992), see note 120 *supra*, chapter 13 and pages xxv and xxvi.
- 148 See now section 123 (ba) *FLA*, introduced in 1997.
- 149 *For the Sake of the Kids*, Para 2.47.
- 150 *Seen and Heard*, page 387.
- 151 LL Schwartz (1994), 'Enabling children of divorce to win', 32 *Family and Conciliation Courts Review*, 80, quoted as footnote 81, *Seen and Heard* at 399.
- 152 *Seen and Heard*, recommendation 141.
- 153 The original Terms of Reference from Attorney-General Michael Lavarch, dated November 1995, were altered by Attorney-General Daryl Williams in September 1997, but still gave priority to the advantages and disadvantages of the present adversarial system of conducting family law proceedings.
- 154 The report reflected the law as at 31 December 1999.
- 155 For example, the expert evidence reforms.
- 156 ALRC (1999), see note 53 *supra* at para 2.32.
- 157 *Ibid* at para 2.22.
- 158 ALRC (2000), see note 26 *supra* at para 1.14.
- 159 ALRC (1997), see note 46 *supra*.
- 160 *Ibid* at para 9.1.
- 161 ALRC (2000) see note 26 *supra* at para 1.131.
- 162 *Out of the Maze*, page v.
- 163 After the Court had undertaken its study tour of European systems and following a decision of the then Chief Justice to proceed with a pilot of a significantly less adversarial approach to the hearing of children's cases.

- 164 Surprisingly, [as the Standing Committee contained no legally trained members], the reference required a consideration of the substantive law, which had not been previously referred to the Pathways Group. However the Committee was not constrained by its lack of professional expertise and its recommendations extended to procedural and systemic – as well as substantive – issues.
- 165 An additional term of reference related to the operation of the child support formula.
- 166 *Every Picture Tells a Story*, para 1.11..See <http://www.aph.gov.au/house/committee/fca/childcustody/report.htm>
- 167 *The Family Law Reform Act 1975* (inter alia) encouraged parents to share the parenting of their children after separation.
- 168 The Committee expressed similar disappointment and concluded that the reforms had ‘been a failure in practice, particularly in court outcomes, to match the expectation of Parliament for shared parenting ...’ *Every Picture tells a Story* (para 2.56).
- 169 Submission of the Family Court of Australia, Standing Committee on Family and Community Affairs, Inquiry Into Joint Custody Arrangements In the Event of Family Separation, 2003, Part A, page 49ff. See <http://www.familycourt.gov.au/presence/resources/file/eb000040ff2391a/iijca.pdf>.
- 170 *Every Picture Tells a Story*, para 4.4.2.
- 171 Which parties were exposed to only after they had experienced a range of sophisticated alternative dispute resolution techniques.
- 172 Writing in 2003, Nicholson noted: ‘*in considering how the system might be improved the Court is very aware that merely grafting on another system’s approach to those cases will not solve the problem – in fact it may well increase existing problems. Similarly, jumping in with untested proposals is a recipe for disaster.*’ See ‘Children and Children’s Rights in the Context of Family Law’, paper presented at the Lawasia Conference, *Children and the Law: Issues in the Pacific Region, Brisbane*.
- 173 A. Nicholson, *Children and Young People: The Law and Human Rights, Occasional Paper*, the sixteenth Sir Richard Blackburn Lecture, Centre for International and Public Law Faculty of Law, Australian National University (2002).
- 174 See for example, Lord Devlin in *The Judge*, a collection of essays published by Oxford University Press (1979), and the New Zealand references cited below.
- 175 Lord Woolf was appointed Master of the Rolls in the same year and became Lord Chief Justice of England and Wales in 2000. He retired in 2005.
- 176 See Woolf (1996), note 39 supra.
- 177 Especially Part 15.5 which requires single joint experts.
- 178 S. O’Ryan (2006), see note 35 supra.
- 179 Which is becoming somewhat less adversarial and in 1991 abandoned the use of the hearsay rule in relation to any evidence adduced in cases involving children. See UK Children (Admissibility of Evidence) Order 1991.
- 180 *How Do We Best Serve Children in Proceedings in the Family Court?*, subsequently published in Volume 3, Part 8, Butterworths Family Law Journal New Zealand (2000).
- 181 See in the matter of C and N (children) FC Otahuhu, FP048/216/98, 9 September 1999, cited in P. Tapp, “Family Law” (1999), 4 *New Zealand Law Review* 443 at 444.

- 182 P. Boshier (1997), 'What's Next After Case Management?', *Butterworths Family Law Journal*, 149 at 152, cited in Tapp 1999. See also P. Boshier, 'Truth or Proof – Evidential Issues in the Family Court Ten Years On', *New Zealand Law Society, Family Law Conference* (1991).
- 183 P. Boshier (1997), see note 182 supra, Note 32 at 152.
- 184 *Findlay v Findlay* Family Court Auckland FP 1448/91, 7 May 1997 at 2.
- 185 *Ibid.*
- 186 P. Tapp (1999), see note 181 supra at 448-449.
- 187 G. Davies (2002), see note 26 supra at 16.
- 188 Parenting Hearings Programme (less Adversarial Children's Hearings), Ministry of Justice, New Zealand, briefing paper, 6 September 2006.
- 189 A. Nicholson (2002), see note 173 Supra.
- 190 Family Court of Australia, *Self-Represented Litigants - A Challenge*, Project Report, (2002).
- 191 Specifically ss 35-70 of the Gesetz uber die Freiwillige Gerichtsbarkeit as amended in 1990.
- 192 Judge Eberhard Carl, 'Conducting Proceedings in Custody and Access Cases before the German Family Court', paper delivered at the *11th National Family Law Conference, Gold Coast, Queensland*, 2004.
- 193 See S. O'Ryan (2004), note 28 supra.
- 194 The legislation takes this a step further by requiring the judge to hear personally from the child and the parents. In particular the judge must meet with children over 14.
- 195 See also Tapp's comment (note 181 supra) that parties need to feel their personal and relationship issues are being heard (1999).
- 196 Judge Carl sources this recognition to German Basic Law (*Grundgesetz*); article 12 of the United Nations Convention of the Rights of the Child and article 8 of the European Convention on Human Rights.
- 197 It met for the first time in October 2003.
- 198 The terms of reference for the House of Representatives Committee indicated nothing relevant to court procedures.
- 199 Although he recognised that the scheme's validity would be uncertain until it was upheld by the High Court and that constitutional uncertainties arise whenever there is an advance into original procedural areas.
- 200 *Sue v Hill* (1999) 196 CLR 553.
- 201 Section 67ZC *FLA*.
- 202 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218
- 203 [2004] HCA 20.
- 204 (2004) Fam CA 297.
- 205 See R. Chisholm, note 28 supra at page 55.
- 206 (1999) 196 CLR 553 at 583.
- 207 Which was subsequently replaced by Practice Direction no. 3 of 2005, effective from 1 January 2006.

- 208 Practice Direction no. 2 of 2004, para 5.11.
- 209 Subsequently two more judges were added at the Sydney Registry and further training and peer discussions with this expanded group took place during the course of the pilot. This included one on one observation and feedback with the trainer, Joanna Kalowski.
- 210 Then required by section 190 of the Evidence Act.
- 211 See <http://www.aph.gov.au/house/committee/fca/childcustody/govtresponse.pdf>
- 212 See also Appendix A.
- 213 As described at the beginning of the paper, Family Court judges have now agreed that a Division 12A approach should apply to *all* family law cases.
- 214 Note also the obligation imposed by article 12 of the United Nations Convention on the Rights of the Child.
- 215 Paragraph 9.2 Practice Direction.
- 216 It is difficult to imagine circumstances which would allow it to occur in the absence of such consent.
- 217 D. Bryant, 'The Role of the Family Court in Promoting Child Centred Practice', (2006) 20 *Australian Journal of Family Law* 127 at 135.
- 218 See also *ZN and YH and the Child Representative* [2002] Fam CA 453 at para 109 per Nicholson CJ.
- 219 A. Nicholson (2006), see note 26 supra at 22.
- 220 See Deborah Fry, *The role of the Mediator in the Children's Cases Program of the Family Court of Australia*. Focusing on Children Conference – Family Courts of New Zealand Association, April 2006.
- 221 During the pilot this was done without the mediator having any prior knowledge of the family. In addition to the changes to reportability in the July 2006 reforms, and where it is in operation, the Child Responsive Model changes this practice so that the same family consultant works with the family through to and including all stages of the trial in all cases.
- 222 Presentation by Deborah Fry, 'The Role of the Family Consultant in Less Adversarial Trials' – judicial training, September 2006.
- 223 Ibid.
- 224 This is now consistent with the fully reportable Child Responsive Model. Parties who need confidential counselling or mediation at any stage of the court process can be referred to agencies external to the Court.
- 225 The Child Responsive Model is consistent with this.
- 226 If the family consultant is satisfied that there are no risk factors present.
- 227 D. Bryant (2006), see note 218 supra.
- 228 Nonetheless, paragraph 6.4 of the Practice Direction makes it clear that this is not intended to detract from the objective of eliciting the truth. Evidence is sworn and disclosure is mandatory where required.
- 229 Para 5.1, Practice Direction.
- 230 Paras 5.4 and 5.5, Practice Direction.
- 231 Para 6, Practice Direction.

- 232 Note that these proceedings are recorded.
- 233 Para 6.18, Practice Direction.
- 234 See Family Court Rule 16A.08 which provides that subpoenas may be issued and applications and affidavits filed or served only with the Court's permission.
- 235 R. Chisholm (1992), see note 28 supra at page 60.
- 236 Section 16B, *Guardianship Act 1968* (as amended in 1995).
- 237 Nonetheless Professor Hunter's evaluation identified several instances where she perceived CCP was failing to take sufficient account of the interests of both women and children who had been the subject of family violence. See R. Hunter (2006), 'Child-related proceedings under Pt VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program Can and Can't Tell Us', 20 *Australian Journal of Family Law* 227.
- 238 For details of the Court's Family Violence Strategy . See [http://www.familycourt.gov.au/presence/connect/www/home/about/family\\_violence/family\\_violence\\_the\\_strategy](http://www.familycourt.gov.au/presence/connect/www/home/about/family_violence/family_violence_the_strategy)
- 239 See R. Hunter, Presentation of findings to the Judges of the Family Court of Australia [http://www.familycourt.gov.au/presence/connect/www/home/about/less\\_adversarial\\_trials/main\\_page\\_less\\_adversarial\\_trials#eval](http://www.familycourt.gov.au/presence/connect/www/home/about/less_adversarial_trials/main_page_less_adversarial_trials#eval)
- 240 The Children's Cases Pilot: an Exploratory Study of Impacts on Parenting Capacity and Child Wellbeing – Final Report to the Family Court of Australia. [http://www.familycourt.gov.au/presence/resources/file/eb000508dcbb97c/McIntosh\\_CCP\\_pilot\\_final.pdf](http://www.familycourt.gov.au/presence/resources/file/eb000508dcbb97c/McIntosh_CCP_pilot_final.pdf)
- 241 In addition, 32 CCP cases were not finalised during the same period.
- 242 Although Hunter recognised that the quality of settlements is a more important criterion than their *quantity*.
- 243 A number of the variations between Sydney and Parramatta judges were addressed and rectified by the Steering Committee. However the very nature and flexibility of the program means that there will be variations in the approach of individual judges.
- 244 McIntosh is careful to emphasise the small sample size which hampers the generalisability of her results. However the richness of her qualitative data gives a powerful message of the strengths of the CCP.
- 245 McIntosh (2006), see note 241 supra at 35.
- 246 Ibid at 36.
- 247 Ibid at 38.
- 248 McIntosh has subsequently evaluated the Melbourne pilot of the CRP which she also helped develop.
- 249 Source [comlaw.gov.au](http://comlaw.gov.au)



# *Finding A Better Way*

A bold departure from  
the traditional common law approach  
to the conduct of legal proceedings