Submission to the Senate Inquiry (Family Law)

By George Potkonyak, solicitor

Successive Parliaments have attempted on numerous occasion to "fix" the *Family Law Act* but, evidently, with little success. Why is that so? I will try to answer that question and illustrate my assertions by several real-life examples.

To begin with, in my opinion, every version of the *Family Law Act* introduced so far has been nearly perfect, including the one currently under review; all it needs is some fine tuning.

Proposed legislative changes

I propose only two legislative changes to the current version of the *Act*: (a) introduction of the rules of evidence; and (b) replacement of the expression "...court may..." with the expression "...court must..." or "...court must not...", as the case may be. Both of these proposed changes deal with the one and the same issue: officially it is referred to as a "discretionary power" of the court, while, in fact, it is an "arbitrary power" given to the decision-makers. *That* is the root of all evil in the Family Law courts.

The expression "...court may..." appears in the *Act* some 300 times (excluding the section headings). If we replace only half of them, even if we do it randomly, with the expression "...court must..." or "...court must not...", combined with the introduction of the rules of evidence, we will end up with quite a high predictability of an outcome of any court proceeding. As the matters stand now, a toss of a coin is as good as an opinion expressed by the best QC.

In order to strengthen the above proposed measures a further measure would be quite helpful, firstly, for the reason of forcing the decision-maker to think deeply of the issues at hand and, secondly, for the reason of helping the litigants and their lawyers in deciding whether to appeal a decision of a lower court.

The *Act* should compel the decision-maker to:

- clearly refer to each issue in question
- give reasons for his or her finding of each fact affecting that issue
- refer to the evidence admitted or rejected in support of the finding of each fact and the reason for acceptance or rejection
- give weight to each fact or factor and the reasons for giving that weight

The above are the only significant legislative changes that I am proposing. However, there is another evil in the Family Law system that needs even more urgent attention.

Expert witnesses

Why on earth have we chosen *psychiatrists* to rule our Family Law courts?! This is not an attack on the psychiatric profession; it is a noble profession and I have come to respect number of them whom I have met. But... I am yet to meet a competent psychiatrist who specialises in being the court expert witness. I find that most of them do not know if they are *psychiatrists*, *psychologists*, *psychics* or *lawyers*. They are 'experts' in the *writing* of the 'expert reports', but none of them ever followed up in order to find out what happened to the family, including the children, in whose cases they were 'expert witnesses'. If they did they would be appalled with the devastation that they left in the wake of their work.

Their job consists of sticking a label on one of the parents and, amazingly, the label is accepted by the courts as being a true reflection of that parent's, normally terminal, mental health condition. There are no mild cases there and no cure for the purported malady that they 'diagnosed'. In addition to their 'expertise' in psychiatry they freely express their opinions that clearly belong to the field of psychology, general medicine, law, evidence, common sense... you name it. They predict future as if they were

prophets or psychics, yet, the courts are not stopping them. Below are some characteristics common to these experts and their work in the Family Law jurisdiction.

Exorbitant fees

It has been reported that the fees charged by these experts go as high as $15,000 for a report. No wonder some of them could not be bothered doing normal clinical work, thus not keeping abreast of the latest developments in their field of expertise.

Witness immunity

The most attractive to the expert witnesses, and the most ridiculous rule governing the involvement of these experts in legal proceedings, is a 400-years old witness immunity doctrine inherited from the English common law and formally accepted in Australia by the decision of the High Court in 1940 in *Cabassi v Vila* [1940] HCA 41.

Surprisingly, nobody ever challenged this doctrine on the constitutional grounds. Section 51(xxxi) of the Australian *Constitution* allows the laws for the acquisition of property but only on *just terms*. The witness immunity doctrine deprives a person, who suffered material (or other) harm or loss due to the negligence or deliberate acts of an expert witness in a proceedings, from recovering the material loss or be compensated for other harm. That is, the person is dispossessed of his or her right to chose in action, which has been ruled as being *property* for the purposes of section 51(xxxi); e.g. *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

However, there are some encouraging recent developments: the United Kingdom Supreme Court by its decision of 30 March 2011 in *Jones v Kaney* [2011] UKSC 13, by a majority of 5:2 ruled that an expert witness is not immune from claims in professional negligence.

Even the two dissenting Lord Justices expressed their opinion that the immunity of (expert) witnesses from civil suit would be better left to the Parliament to deal with. That is exactly what I propose.

The Parliament should enact a provision in an appropriate legislation whereby the expert witnesses can be sued in professional negligence just the same way as they are liable in the ordinary conduct of their professional practice. That would mean that they are liable in negligence for expressing their opinions that falls outside of their expertise. Of course, the opponents to such an enactment would argue that then nobody would want to be an expert court witness. A similar argument prevailed for some 400 years in support of the immunity of the court advocates, however once the immunity was removed there was no exodus from legal profession and no flood of claims in negligence against the advocates.

'Evidence' before the expert witnesses

In addition to the departure from the rules of evidence there is another practice that makes the Family Law courts' decisions even more arbitrary. I am talking about the practice whereby, before a family is interviewed by an expert, the expert is furnished with a load of untested 'evidence', information, allegations and outright lies. Now the task has fallen on the expert to sort out wheat from trash. Normally, the expert will tailor the evidence that will best suit his or her intended 'diagnosis'. When the matter comes before the court the court will accept the evidence of one parent in preference over the evidence of the other parent because the expert has diagnosed the latter one as 'suffering' from so and so disorder, therefore hers or his evidence cannot be trusted. In other words, the expert becomes a trier of fact.

In order to avoid this anomaly the Parliament should change the rules so that the facts first be established in an ordinary manner and according to the rules of evidence, and only then, if an expert opinion is still required, present those facts, as found by the court, to the expert.

Even then expert's opinion could not be certain: it is normally based on an interview lasting about an hour or so which, compared to the normal practice by the same experts in clinical setting, is far below the time it normally takes a professional to come up with a reliable diagnosis.

Some real life examples

The examples of several Family Law decisions below are real life examples with imaginary names. The real names of the players will be supplied to the Committee, if required.

Conclusion

If it were not for the lack of time I could describe several more cases, involving court experts, which are similar to those described above.

Apart from the involvement of the experts in all the above case, one other feature is common: in each instance the parent at the receiving end of the Family Law stick was critical of the Family Law system. Coincidentally, in almost each case, as far as I can recall, the experts made sure that the court's attention was drawn to that fact. Two possible conclusions come to mind: either there is so much criticism of the Family Law system that it is hard to find a litigant who is not critical of it, or, the judicial officers make sure that the dissent is promptly punished.

If it happened to be the latter, in my opinion, the justice would be much better served and the authority of the Family Law courts established if the judicial officers pay more attention to what they are doing – especially where the children's lives are at stake.

We may have as many Family Law reforms as there are days in a year, if the players in the system neglect the rule of law, our children will end up in a social gutter – if not worse.

Sincerely,
George Potkonyak

Note: if so desired, I will make myself available to appear before the Senate Inquiry Committee. There is much more to be said than what I have stated in this short submission.