Gordon Harris

2 April 2020

The Senators
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Senators

Re: Federal Circuit and Family Court of Australia Bill 2019 [Provisions] and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 [Provisions]

1. This submission is made to highlight the serious shortcomings of the two court system and its inability to provide proper legal remedies for participant.
2. Pursuant to Section 121 of the Family Law Act, the name "wife" has been adopted for the wife and "husband" for the husband. The pseudonym used to identify their case in the court has not been used.
3. The parties had a business that was turning over $5,000,000.00 on average each year. The husband was the sole director of the group of companies.
4. The wife and the husband commenced a relationship in 1997 and married in 1999. Reports were made of domestic violence and in one particular serious domestic violence incident, the wife had her arm broken in 2006 and separation followed with the husband filing an application in the Family Court. They appeared before a Registrar who managed their case. They reconciled in 2006 and returned living together.
5. In 2010 the parties separated, with the wife filing an application in the Federal Circuit Court in early 2012. I represented the wife from 2012 until 2016. The wife sought spousal maintenance application which was dismissed because she was on the books of the company and received a wage which was being paid to the husband.

6. An application was made to the FairWork Australia to obtain the wages she had not received. Her application was dismissed because she was not an employee of the company.
7. The wife was evicted and became homeless, living in her motor vehicle and then a refuge. She could not obtain a Separation Certificate because her husband would not provide her one and Centrelink would not accept her status because she was still on the company books because the record showed she was still being paid a salary and paying tax to the ATO. The Child Support Agency account for their child was building and at one stage she owed Child Support in access of $10,000.00 to be paid to the husband.
8. The wife was in no-man's land and it wasn't recognised in the court.
9. The wife moved through the Federal Circuit Court procedures and process. She made in excess of nine (9) spousal maintenance claims. All were dismissed.
10. The wife has been receiving Newstart Allowance from Centrelink, when the husband changed his evidence and said that she had been taken off the company's books a year before.
11. In 2014, the first primary Judge made a decision that was wrong in law, the wife appealed the decision and on the hearing date before the Full Court of the Family Court, the husband conceded the appeal.
12. In 2015, the second primary Judge commenced hearing her case. Over the next three years, an ad hoc approach was made to her case. She had to fight tooth and nail to get the husband to provide disclosure. Finally the second primary Judge saw merit in her case and allowed her to commence interrogatories and discovery because they were not allowed in relation to proceedings in the Federal Circuit Court of Australia unless the Federal Circuit Court of Australia or a Judge declares that they were appropriate, in the interests of the administration of justice, to allow the interrogatories or discovery.
13. By this time the husband had spent over $700,000.00 on his legal team. The wife had run up a bill in excess of $200,000.00.
14. The wife became self-acting and had an intermittent trial over two years. During the course of proceedings she took the second primary Judge on appeal to the Full Court and although her case was dismissed the Full Court Judge told her that the second primary Judge would give her remedies. She had identified in excess of $2,000,000.00 dollars being held in different entities in the husband's corporate empire and sought

spousal maintenance. Her claim for spousal maintenance was dismissed. She had also identified the failure to disclose.

15. In early 2018, the second primary Judge handed down his decision. The wife then filed an appeal but was forced to go back to the Court of Appeal because her Application for Appeal was declared out of time. The Full Court granted her permission to Appeal.
16. In her appeal against the second primary Judge, the Full Court heard and granted her appeal. The Full Court said there was a failure of the primary judge to engage with the wife's case. It should also be noted that the Full Court was divided on the issue of family violence.
17. The matter returned to the Federal Circuit Court in late 2019, with the wife making another spousal maintenance claim. The matter was transferred to the Family Court.
18. The wife learnt that the husband had sold up the company assets, including property held in the Self-Managed Superannuation Fund and was intending to leave Australia for a destination overseas.
19. The wife made an urgent Application to the Court to stop the husband from leaving the country prior to him leaving. The matter sat dormant and the husband left the country. The matter was brought before a Justice in the Family Court to try and mop up the aftermath and mess left behind.
20. The failure of the second primary judge to engage with the wife's case is a very important aspect of the judicial system in Australia. In the Explanatory Memorandum of the Federal Circuit and Family court of Australia bill 2019 the Attorney General of Australia explains:
    a. Article 14(1) of the ICCPR enshrines the right of a person to have a fair and public hearing by a competent, independent and impartial tribunal established by law.
21. In a Public Lecture in 2013, The Honourable Justice Keifel AC, now Chief Justice of the High Court of Australia said:

> What is required of a judge is reflected in the oath taken upon appointment, which is "to do right by all manner of people without fear or favour, affection or ill will."

22. The American Bar Association said that there are many qualities that excellent justices require. First is what is called the judicial temperament; that is, "compassion, decisiveness, open-mindedness, sensitivity, courtesy, and patience, freedom from bias

and commitment to equal justice." Second must be a thorough knowledge of the law. But neither of these are of much use unless the judge shows consistency; consistency in outcomes for similar cases, consistency in the logic used to reach those outcomes, and consistency in what is and what is not allowed to influence the decisions.

23. In the case of *Norbis v Norbis* (1986) 161 CLR 513, Brennan J said:

> The orderly administration of justice requires that decisions should be consistent one with another and decision-making should not be open to the reproach that it is adventitious. These considerations are of especial importance in the administration of the law relating to custody of children, maintenance and property arrangements on the dissolution of marriage. The anguish and emotion generated by litigation of this kind are exacerbated by orders which are made without the sanction of known principles and which are seen to be framed according to the idiosyncratic notions of an individual judge.
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> To avoid that situation it is desirable, if it be possible, to give expression to principles which have yielded just and equitable results in the generality of cases to which those principles have been applied. The function of giving expression to principles thus derived falls naturally to the Full Court of the Family Court.
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> An unfettered discretion is a versatile means of doing justice in particular cases, but unevenness in its exercise diminishes confidence in the legal process. As the Scottish Law Commission commented in 1981 with reference to the financial provisions of the Divorce (Scotland) Act 1976 (U.K.) (Family Law : Report on Aliment and Financial Provision, Scot. Law Comm. no.67, par. 3.37):
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> > " The result of a system based on unfettered discretion is that lawyers cannot easily give reliable advice to their clients. Clients in turn feel dissatisfied with the law and lawyers. The system encourages a process of haggling in which one side makes an inflated claim and the other tries to beat it down. A battle of nerves ensues, sometimes right up to the morning of the proof. By that time it is known which judge will be dealing with the case, and this may become a factor affecting last-minute and hurried negotiations. Such a system does nothing to help the parties to arrange their affairs in a mature and amicable way. It is calculated to increase animosity and bitterness."

24. Since it was incepted in 1999, the Federal Magistrates Court of Australia, now known as the Federal Circuit Court of Australia (FCC) was on a parallel track to the Family Court of Australia (FCA). Like two trains on separate railway lines the two courts hurtled towards a railway junction that was only one railway track, if nothing was going to be sorted out a serious collision would occur. One law, two sets of rules and regulations, with differing policy's and principles have morphed the two courts against each other.

25. The Family Court had, since its beginning laid down jurisprudence enveloping the *Family Law Act 1975.* The existence of the Family Court Rules and Regulations solidified the jurisprudence. Lawyers involved in the Family Court system can give

reliable advice to their clients. The structure of the Family Court with its Justices, Judicial Registrar, Senior Registrar and Deputy Registrars worked efficiently and was able to deliver to the public a service, that whilst it was not without fault worked very well.

26. The Federal Circuit Court from its inception had a much wider jurisprudence, involving family law and general law. At its beginning it was supposed to follow the jurisprudence of the Family Court and the Federal Court. The existence of the Federal Circuit Court Rules and Regulations solidified the jurisprudence in the Federal Circuit Court. The law under the *Federal Circuit Court Act 1999* differed from the law of the Family Court. Examples are that the Family Court required Pre Action Procedures and the Federal Circuit did not require Pre Action procedure. There are some significant differences in the two sets of rules. The Federal Circuit Court was intended by the government of the day that introduced it, to be a cheaper quicker court than the Family Court that being a more specialist court. It is fair to say that not that it is not what has occurred as the Federal Circuit Court did not deal the least complex matters nor are they necessarily the least lengthy matters. The *Federal Circuit Court Act 1999* provides that the Federal Circuit Court is to:
    - operate as informally as possible;
    - use streamlined procedures; and
    - encourage the use of a range of appropriate dispute resolution processes (s 3(2)).
27. There is a protocol between the Family Court of Australia and the Federal Circuit Court to try and ensure that more complex lengthy matters are sent to the Family Court. The rules of the Federal Circuit Court were designed and intended to assist "getting on with the job" with less delay and less formality.
28. In the Explanatory Memorandum presented with the Bill to bring the Federal Magistrates Bill 1999 into existence, the Parliament was told:

> The Federal Magistrates Court will be composed of Federal Magistrates, who will be justices, as required under the Constitution. Federal Magistrates will be selected for their expertise in federal matters, including family law. The jurisdiction to be exercised by the Federal Magistrates Service will generally be matters of a less complex nature that are currently dealt with by the Federal Court and the Family Court. It is intended to provide a quicker, cheaper option for litigants and to ease the workload of both the Federal Court and the Family Court.
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> The Federal Magistrates Service will be as informal as possible consistent with the discharge of judicial functions. It will be up to the Federal Magistrates Service itself

to make its own Rules, which will largely determine issues of practice and procedure. However, the Bill includes provisions designed to assist the Federal Magistrates Service to develop procedures that are as simple and efficient as possible, aimed at reducing delay and costs to litigants. Some examples of these are:

* the Court will have the power to set time limits for witnesses and to limit the length of both written and oral submissions;
* discovery and interrogatories will be permitted only if the Court considers that they are appropriate in the interests of the administration of justice;
* if the parties consent, the Court can make a decision without an oral hearing;
* there will be more emphasis on delivering decisions orally in appropriate cases, rather than parties having to wait for reserved judgments; and
* there will be the power to make Rules to allow Federal Magistrates to give reasons in shortened form in appropriate cases.

The Federal Magistrates Service will complement the Government's initiatives aimed at encouraging people to resolve family law disputes through primary dispute resolution, rather than through litigation.

29. Was it a misnomer to commence the Federal Circuit Court to subordinate the Family Court, when it was totally automatous and outside the norms of the family law which people expected. On the available evidence the Federal Circuit Court cannot operate as informally as possible and it cannot use streamlined procedures as shown in the case of the wife. This structure supports the husband's case, not the wife's case.
30. The below two cases show the complexity of resolving matters in the Federal Circuit Court pursuant to the *Family Law Act 1975.* I apologise for putting large amounts of case law extracts in this submission, but it highlight the hoops and loops that litigants, legal professional, Judges and Justices have to exceed to in solving matters in the Federal Circuit Court.
31. In the matter of *Thompson & Berg [2014] FamCAFC 73,* the Full Court said:

The Rule Making Power

42. Section 123 of the Act gives the judges of the Family Court the power to make rules in relation and incidental to the practice and procedure to be followed in the Family Court and any other courts exercising jurisdiction under the Act. However, by s 123(1A) of the Act, the reference in s 123(1) to "a court exercising jurisdiction under this Act" does not include the Federal Circuit Court. Thus, the FLR prescribe the rules for proceedings in the Family Court and other courts exercising jurisdiction under the Act but not the Federal Circuit Court.
43. The Federal Circuit Court was established by the *Federal Circuit Court Act* 1999 (Cth) ("FCCA"). Pursuant to s 43(1) of the FCCA, practice and procedure of the Federal Circuit Court is to be in accordance with the rules of court made under that act, namely the Federal Circuit Court Rules 2001 (Cth) ("FCCR"). Section 43(1)

of the FCCA is subject to s 43(2) of that act which, in relation to proceedings conducted under the Family Law Act (and certain child support proceedings), permits the application of the FLR if, in relation to a matter of practice or procedure, the FCCR are insufficient. The FCCR are made by the judges of the Federal Circuit Court under rule-making powers which include powers given by ss 43 and 81 of the FCCA. Section 81 extends the rule making power to the conduct of the business of the Federal Circuit Court. Given the provisions of s 43 of the FCCA, it was probably unnecessary for the judges of the Federal Circuit Court to determine by r 1.05(1) of the FCCR that the practice and procedure of that court is principally governed by the FCCR. The point being, that in this regard the rule does the same thing as the statute.

44. In addition to the power contained in s 43(2) of the FCCA to apply the FLR in relation to a matter of practice and procedure where the FCCR are insufficient, by rr 1.05(2) and (3) of the FCCR, the Federal Circuit Court may also apply the FLR in relation to a matter of practice and procedure (but not the conduct of the business of the Court) if the FCCR are inappropriate.

45. Rules 1.05(2) and (3) of the FCCR are set out below:

> (2) However, if in a particular case the Rules are insufficient or inappropriate, the Court may apply the Federal Court Rules or the Family Law Rules, in whole or in part and modified or dispensed with, as necessary.
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> (3) Without limiting subrule (2):
>
> (a) the provisions of the Family Law Rules set out in Part 1 of Schedule 3 apply, with necessary changes, to family law or child support proceedings; and
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> (b) the provisions of the Federal Court Rules set out in Part 2 of Schedule 3, apply, with necessary changes, to general federal law proceedings.
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> Note: These Rules have effect subject to any provision made by an Act, or by rules or regulations under an Act, with respect to the practice and procedure in particular matters: see subsection 81(2) of the Act.

46. It follows that the FCCR is the starting point to establish the rules in relation to practice and procedure to be followed in the Federal Circuit Court. In relation to the FLR which the judges of the Federal Circuit Court have determined apply in the Federal Circuit Court, Schedule 3 of Part 1 of the FCCR is definitive. It is common ground that none of the FLR which the husband said should have been applied by the primary judge is to be found in that schedule. It follows that the rules which underpin his argument about the "illegitimacy" of the hearing below did not automatically apply.

47. Nonetheless, as a consequence of s 43(2) of the FCCA and r 1.05(2) FCCR, if the primary judge was satisfied that the FCCR were insufficient or inappropriate, her Honour was able to apply those FLR which the husband argued should have been applied. In mounting his argument, the husband said that the FLR upon which he relies are "indispensable in a Family Law matter in any court" (Husband's affidavit filed 6 March 2013, [6]). By his use of the word "indispensable" it would appear that the husband argued that the FCCR are insufficient. We will also consider whether the FCCR are inappropriate.

32. In the matter of Peake & Benedict (Costs) [2014] FCCA 272, Harman J wrote:

Pre-action procedures, disclosure and attempts at resolution

48. I propose to briefly touch upon this issue, prior to turning to and dealing with the application for costs by Mr Peake, as it would appear to be a matter of some moment.

49. The Family Law Rules 2004 contain specific pre-action procedures. Those procedures require that parties engage in certain steps and actions so as to make a genuine attempt to resolve issues in dispute or, absent final resolution, limit issues in dispute between them prior to commencing proceedings.

50. I make clear that I do not seek to suggest that such pre-action procedures as are contained within the Family Law Rules apply to proceedings determined by the Federal Circuit Court (formally Federal Magistrates Court). The decision of the Full Court in Thompson & Berg [2014] FamCAFC 73 would provide authority for the converse proposition. However, I identify those pre-action procedures as indicative of the modern approach to litigation adopted within the rules of courts both State and Federal and being focused upon that which is referred to within the various State Civil Procedure Acts as "the overriding purpose" of resolution of proceedings and the efficient conduct of litigation.

51. At a Federal level and applicable to the Federal Circuit Court, one has the Civil Dispute Resolution Act 2011 (Cth). However, proceedings under the Family Law Act 1975 are expressly excluded from the provisions of that legislation and mandated pre-action procedures contained therein.

52. The Federal Circuit Court Act 1999 and Federal Circuit Court Rules 2001 do contain provisions which provide for or at least infer, to a limited extent, pre-action procedures and fulfilment of obligations regarding disclosure.

53. Rule 1.03 of the Federal Circuit Court Rules provides "objects" for the Rules. These are not specifically pre-action procedures but do give some clue as to the Court's preference for negotiated, consensual resolution and especially utilising means of dispute resolution other than litigation. Rule 1.03 is in the following terms:

    Objects

    (1) The object of these Rules is to assist the just, efficient and economical resolution of proceedings.

    (2) In accordance with the objects of the Act, the Rules aim to help the Court:

    - to operate as informally as possible
    - to use streamlined processes
    - to encourage the use of appropriate dispute resolution procedures.

    (3) The Court will apply the Rules in accordance with their objects.

    (4) To assist the Court, the parties must:

    - avoid undue delay, expense and technicality
    - consider options for primary dispute resolution as early as possible.

    (5) If appropriate, the Court will help to implement primary dispute resolution.

54. Section 21 of the Federal Circuit Court Act defines "dispute resolution processes" (without the prefix of "primary" which had been included in the prior Federal Magistrates Act and previously also in the now repealed section 14 of the Family Law Act) as including:

    (a) counselling; and
    (b) mediation; and

(c) arbitration; and

(d) neutral evaluation; and

(e) case appraisal; and

(f) conciliation

55. Neither of the above provisions specifically provide "pre action procedures" and as the rules apply to proceedings before the Court they more specifically apply, absent provision to the contrary, to litigation once commenced rather than litigation that is contemplated and to be avoided. The definition, curiously, does not include a broader category of "negotiation" or the specific subset of "lawyer assisted negotiation".

56. Part 4 of the Federal Circuit Court Act contains extensive provisions regarding dispute resolution for proceedings other than those conducted under the Family Law Act.

57. Importantly, section 42 of the Federal Circuit Court Act provides:

> In proceedings before it, the Federal Circuit Court of Australia must proceed without undue formality and must endeavour to ensure that the proceedings are not protracted.

58. One might infer from the above mandate that the Court might, whether sitting in its family law or general federal law jurisdiction, actively engage and encourage parties to participate in forms of dispute resolution other than litigation, such as, mediation and conciliation.

59. Potentially set against such an inference to engage parties in dispute resolution are provisions of the Family Law Act 1975, under which the Family Court operates but which do not apply to this Court, such as section 90SM(9) which provides:

> (9) The Family Court must not make an order under this section in property settlement proceedings (other than an order until further order or an order made with the consent of all the parties to the proceedings) unless:
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> (a) the parties to the proceedings have attended a conference in relation to the matter to which the proceedings relate with a Registrar or Deputy Registrar of the Family Court; or
>
> (b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order notwithstanding that the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or
>
> (c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

60. Chapter 3 of the Federal Circuit Court Rules, which deals with mediation and alternate dispute resolution, does not apply to proceedings conducted under the Family Law Act 1975 but only general federal law proceedings. Accordingly, within the Federal Circuit Court Rules there are no analogous provisions to those contained within the Family Law Rules requiring the parties to engage in pre-action procedures.

61. In light of the above and as the Family Law Rules (and pre-action procedures prescribed thereby) do not apply within the Federal Circuit Court (see Thompson & Berg [2014] FamCAFC 73) one must look to either the specific legislation applied (the Family Law Act 1975) or the general law to find bases upon which parties might be required to engage in pre-action procedures or addressing the manner in which parties should approach and conduct their litigation.

62. Part VIIIAB of the Family Law Act 1975, under which these proceedings are addressed, does not contain any statement of objects and principles which would be of

assistance as regards the parties' obligations towards dispute resolution or the conduct of litigation generally.

63. Part IIIA of the Family Law Act 1975 does impose obligations upon legal practitioners to advise parties of non-court based services which may be of assistance to them in dealing with and addressing issues arising from their separation. This would, presumably, extend to relevant advice regarding alternate dispute resolution services whether as a corollary to, in place of, or utilised during or prior to the commencement of proceedings.

64. Section 13C of the Family Law Act 1975 permits the Court to refer parties to such non-court based services and, in particular, family dispute resolution (which whilst most commonly referred to and utilised in addressing parenting disputes also allows referral of parties to mediation conducted by a family dispute resolution practitioner to address financial or jurisdictional issues).

65. Principles of general application to all proceedings conducted under the Family Law Act 1975 are contained in section 43. However, none of those principles would be relevant to establishing a general obligation to engage in alternate dispute resolution and/or pre-action procedures.

66. Thus, on the basis of legislative imperative there is no clear obligation upon parties , when conducting Family Law Act 1975 proceedings before the Federal Circuit Court, to engage in any form of pre-action procedure or attempted resolution or definition of issues prior to commencing proceedings.

67. There is a body of case law which addresses the general obligation of parties to ensure the effective use of the Court's resources (and their own) and addressing, without prescribing, the manner in which parties should approach and conduct litigation.

68. For illustrative purposes (I do not propose to suggest that they are in any way binding or determinative in proceedings before the Federal Circuit Court including but not limited to these proceedings) in the United Kingdom the Woolf Report, Access to Justice, recommended the adoption, in civil litigation proceedings, of pre-action procedures:

> ...which enables the parties to a dispute to embark on meaningful negotiations as soon as the possibility of litigation is identified, and ensures that as early as possible they have the relevant information to define their claims and to make realistic offers to settle" and so as to:
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> (a) focus the attention of litigants on the desirability of resolving disputes without litigation;
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> (b) enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or
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> (c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and
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> (d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings.

69. Similarly, the Civil Procedure Act 2005 (NSW) and the Civil Procedure Act 2010 (VIC) provide an overriding purpose being "the just, quick and cheap resolution of the real issues in the proceedings" (section 56 of the Civil Procedure Act 2005 (NSW)). Decisions of the supreme courts of New South Wales and Victoria provide some illumination of the Courts' attitude, when operating under that legislation and the overriding purpose created thereby, towards parties who have departed therefrom.

70. In the recent decision of Bryant v Hawkesbury Radio Communication Co-operative Society Limited [2014] NSWSC 848 Sackar J opined [at 110]:

> In my view, in the modern era and consistent with section 56 of the Civil Procedure Act parties have an obligation to constructively collaborate not just on the issues to be ventilated but on the most efficient methods to do so. As has been otherwise said, litigation is not a game and the expense of the courts to the public is so great that their use must be made as efficient as is compatible with just conclusions.

71. Sackar J further opined [at 157]:

> Whilst the system of justice administered by courts in this state is adversarial, in the modern era in my view parties have a distinct and clear obligation to cooperate with each other and the court to achieve a quick and inexpensive solution to their grievances including in my view good faith settlement discussions.

33. The wife has spent eight (8) years in a courts system that that was supposed to operate as informally as possible and use streamlined procedures. The merry go round of litigation continues because the very legislation and concept of the Federal Circuit Court was not geared to provide the wife a property settlement as there was no engagement in her case by the Judge. There appears to be a mindset in that no matter how complicated the matter is we can do it informally as possibly with streamlined procedures and the enshrined rights of a person to have a fair and public hearing by a competent, independent and impartial tribunal established by law is put to the side.
34. It is estimated that from separation until now the estimated turnover of the money going through the company is estimated at being $40,000,000.00. The wife has been on Newstart Allowance since 2012.
35. I would ask the Senate Standing Committee on Legal and Constitutional Affairs seriously consider the fate of people like the wife when they consider the amendments to the legislation. There can be no compromise in protecting people's rights.
36. I am available to appear in any open or closed inquiry if the Committee so choose. The wife is also available to appear in any open or closed inquiry if the Committee so choose.
37. I have used my private email address with respect to this submission.

Gordon Harris
Solicitor
2 April 2020