

A new family law process

Introduction

- 4.1 It became obvious very early in the inquiry and throughout the committee's deliberations that there was widespread community dissatisfaction with the current family law process. The committee felt compelled to investigate this. To give full effect to its terms of reference the committee could not look at the issues of a rebuttable presumption and child support without also looking at the family law process.
- 4.2 Despite the directions set for the family law system in the Pathways Report, Australia's system for resolving family disputes remains primarily a legal one, based around legal rights and responsibilities, and seeking to resolve disputes with the assistance of lawyers and, if necessary, through litigation. Ever since the Family Court of Australia (FCoA) was established in 1976, there has been an emphasis on alternative (or primary) dispute resolution, but this has mainly occurred within the framework of court proceedings. In recent times there has been a growing interest in, and use of, voluntary diversion from litigation pathways. This was discussed in the Pathways Report and in Chapter 3 of this report.
- 4.3 The litigation system is an adversarial one which has evolved from where it started in England several centuries ago, although modified in family law.¹ It has become very clear to the committee during this inquiry that the dynamics and emotions of family separation make adversarial litigation inappropriate. It does not work because it tends to be uncooperative and

1 Family Court of Australia, sub 751, pp 49-50.

combative at a time when future cooperation for successful shared parenting is so critical. It is predicated on a win/lose outcome.

- 4.4 People who have given evidence in this inquiry appear to have been unwittingly caught up in it. Often this has been through the attitude of their ex partner. It seems that the present system can do nothing about one party dragging the other through drawn out and repeated court battles for purely vindictive reasons. Many within the legal fraternity appear to exacerbate this by their adversarial approach. This experience becomes extremely expensive (over \$200,000 for one witness)² and the process seems to destroy families and escalate disputes rather than enable them to put aside their conflict and concentrate on the interests of the children.
- 4.5 This chapter sets out the committee's conclusions about how to change this experience of family dispute resolution by radically reshaping the system so that cooperation and agreement replace confrontation, decision making in a legal context is non-adversarial and litigation is avoided as much as possible. As the Pathways Report emphasised, the family law system's primary focus should be about empowering family members to make their own decisions that are creative and meet their own and their children's specific needs, and are lasting but flexible.³ Some strategies for achieving this are addressed in Chapter 3. The committee has concluded, however, that only a new non-adversarial administrative tribunal specifically established for determining disputes about future parenting arrangements will bring about any real change to the current domination of lawyers and courts in family disputes.

The current Family law jurisdiction in Australia

- 4.6 There is currently a number of courts doing family law work in Australia. The Family Court of Australia and the Family Court of Western Australia (FCWA) are specialist courts. The majority of work of the Federal Magistrates Court (FMC) is also in family law. Other State and Territory magistrates and children's courts have a limited jurisdiction relevant to family law. There is currently little scope for decision-making bodies other than courts in family law. For decisions about determination of existing

2 Witness 1, transcript, 26/10/03, p 2.

3 Family Law Pathways Advisory Group, *Out of the maze: Pathways to the future for families experiencing separation: Report of the family Law Pathways Advisory Group*, Commonwealth Departments of the Attorney-General and Family and Community Services, Canberra, July 2001, p 3, Recommendation 1.

rights by a Commonwealth body to be binding the Commonwealth Constitution requires them to be made by a judge, appointed under Chapter III, or by delegation from a judge with respect to more minor decisions. Until a constitutional change to the contrary, therefore, courts will continue to play a role in the family law system.

- 4.7 The question for this inquiry has been how can the role of family courts and the decision making process be made more amenable to the particular characteristics of family law disputes.

Courts

Family Court of Australia

- 4.8 The FCoA is a superior court of record⁴ established by the Family Law Act (FLA) as a court under Chapter III of the Constitution with jurisdiction over matters arising under the FLA. A superior court of record is one which is presided over by judges and whose proceedings are recorded and published.⁵ It is comparable to a State Supreme Court. This implies a level of formality and rules about procedure that bring with them additional cost. It was initially conceived as a 'helping court', with its unique in-house counselling and mediation service. Over the years the look and feel of the Family Court has become more formalised. This was partly in response by the Court to violent attacks on the Court and its judges in the early 1980s. The Court has been limited to an extent in its attempts to move to a less adversarial approach by High Court decisions.⁶
- 4.9 The most important feature of case management in the FCoA is the division of its case management pathway into the resolution and determination phases.⁷ In the resolution phase counsellors and lawyers are assigned to assist people to reach mediated agreements. Many disputes are resolved by consent during this stage (see Figure 1.2). Parties can also apply to have consent orders registered which have been negotiated outside the FCoA.
- 4.10 Cases only move into the determination phase and preparation for trial when mediation (or negotiation) has not resolved all the issues in dispute.

4 Family Law Act 1975, subs 21(2).

5 Section 121 of the Family Law Act contains certain restrictions on the publication of Family Court proceedings.

6 Eg. *In re Watson; ex-parte Armstrong* (1976) FLC 90-059, see Family Court of Australia, sub 751, p 50.

7 Family Court of Australia, sub 751, Appendix, p 60.

Trials in the FCoA are still conducted in an adversarial way.⁸ The evidence is controlled by the parties, and strict rules of evidence apply. There are, in effect, competing interests about which a judge has to make a decision.

- 4.11 To effectively manage an application in this formalised legal environment people who wish to access the services of the Court usually need to be legally represented. To benefit from the mediation services available in the Court an application has to be filed. The procedures required to be followed create often significant costs for applicants and respondents both in terms of filing fees and solicitors fees.

Family Court of Western Australia

- 4.12 The Family Court of Western Australia was the only State court established under the FLA. It is presided over by judges and magistrates. It is vested with State and Federal jurisdiction in matters of family law and deals with divorce, property of a marriage or de facto relationship, residence, contact and other matters relating to children, maintenance and adoptions.⁹
- 4.13 Like the FCoA, FCWA trials are adversarial in type. Also like the FCoA, the FCWA has its own specialised in-house counselling service.

Federal Magistrates Court of Australia

- 4.14 The Federal Magistrates Court of Australia was established by the Commonwealth Government in 2000 to provide a faster, cheaper, simpler forum for determination of family law disputes. It is a lower court with federal jurisdiction in a number of federal law areas. 80% of its workload is in family law disputes¹⁰ and it has the same jurisdiction as the FCoA, subject to certain limitations. The FMC does not provide a process for registration of consent orders.
- 4.15 Parents may choose to file an application in the FMC because their dispute is less complex. It is also cheaper than the FCoA to initiate certain proceedings. Otherwise the choice of court is not obvious. Professor Parkinson has said:

In terms of the Federal Magistrates Court and the Family Court, essentially we have two competing courts with overlapping jurisdiction. There is a difference in property but that only matters in Sydney or possibly in Melbourne, where \$700,000 is not

8 Family Court of Australia (Nicholson CJ), transcript, 10/10/03, p 4.

9 Family Court of Western Australia website: www.familycourt.wa.gov.au

10 Federal Magistrates Court of Australia, sub 741, p 2.

uncommon. In other parts of the country they almost have complete jurisdiction. In children's matters they have the same jurisdiction. So we have two rival courts, in a sense, who cooperate well but who are both trying to achieve the same thing.¹¹

- 4.16 The major difference in practice is that the FMC does not list cases expected to last longer than two days. In November 2003, the FMC assumed responsibility for divorces.
- 4.17 The FMC does not exercise family law jurisdiction in Western Australia.
- 4.18 Like the other courts, procedure in the FMC is primarily adversarial. Referral to dispute resolution services is emphasised in its legislation¹² and its clients can access these services either from contracted providers in the community or from the FCoA's mediation service.

State and Territory magistrates courts

- 4.19 State and Territory magistrates courts also have roles in family law disputes. For many separating families in rural and regional areas, local magistrates courts are the most accessible court option. Federal courts tend to be available on irregular circuits and only in selected locations. The jurisdiction of State and Territory magistrates courts is limited by consent of the parties, except for making interim orders.¹³ If they are in dispute the matter is transferred to the Family Court or (after current policy for relevant amendments has been enacted by the Parliament) to the Federal Magistrates Court. State courts have no direct access to mediation or counselling services although referrals could be made to community based family relationship services where they exist. These services are often not available in rural and regional communities.

Division of Commonwealth/State responsibilities for families

- 4.20 Family law jurisdiction dealing with separation, divorce and related matters lies with the Commonwealth, but child protection and domestic violence jurisdiction remains with State and Territory governments. Commonwealth agencies are neither funded nor do they have the expertise to investigate and respond to allegations of child abuse or family violence and yet these are issues that are affecting some families involved

11 Parkinson P, transcript, 13/10/03, p 46.

12 Federal Magistrates Act 1999, Part 4.

13 Family Law Act 1975, subs 69N(3) and (4).

in the family law courts system. Even in the Family Court of Western Australia the jurisdictions have not been effectively fused.¹⁴

- 4.21 Protection against family violence is covered by State and Territory laws which make provision for protection orders (variously named) to be taken out, usually in a magistrates court, when a person is in fear for their safety. Practices vary from State to State, in particular with respect to the way in which the need for urgency is dealt with through orders made in the absence of the other party (*ex parte*).¹⁵ This can remain in place for some time, before the other party can answer the allegations raised in court. The committee heard evidence about the apparent ease with which an apprehended violence order (AVO) can be obtained through this system. Variations across jurisdictions in data collection methods and definitions mean it is not possible to determine from the available data on AVOs what the magnitude of the issue is for family law disputes. However, as an indicator, in New South Wales in 2002, 18,926 domestic violence orders were granted.¹⁶ If an AVO is in place prior to making an application in the FCoA, it is required to be included in the application documentation.¹⁷
- 4.22 Evidence about investigations by state authorities, if any, may or may not be available to courts deciding matters under the FLA, depending on the priority given to the case by the state authorities. Often no report of an investigation by state authorities is available to assist the court. States are responsible for child protection and each State and Territory child welfare authority has responsibility to investigate allegations of abuse. If an allegation is made in the context of a family law dispute there is a requirement for notification to the State body under section 67Z and 67ZA of the FLA. As has been highlighted in a number of previous reports, including the Family Law Council's report on Family Law and Child Protection of September 2002¹⁸, many of these cases are not investigated or only to a preliminary stage. The Council's report has noted:

State and Territory child protection authorities need to prioritise also because in many jurisdictions, the numbers of child abuse incidents reported to the authorities are far greater than their

14 Family Law Council (Dewar J), transcript 17/10/03, p 16.

15 Family Law Pathways Advisory Group, p 64.

16 Bureau of Crime Statistics and Research, Local Courts Statistics, viewed 30/9/03, http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/lc_2002_avo

17 For an example of the problems in this interaction, see Domestic Violence Advocacy Service, sub 513, p 7.

18 Family Law Council, *Family Law and Child protection: Final report*, Commonwealth of Australia, Canberra, Sept 2002, v 113p.

capacity to handle. ... A child protection investigation is intrusive and worrying. It should not be initiated unless there are sufficient concerns about the safety or well being of a child. Even among the cases which do meet this threshold of seriousness, child protection authorities are often reported to be overwhelmed by the numbers of reports and must establish criteria for allocating investigatory resources.¹⁹

4.23 Often when the child protection authority is aware that matters are proceeding in the Family Court they will decide not to investigate, leaving the question to that court to decide on the issues.²⁰ However, the Family Court is not resourced to investigate such matters. The children involved then fall through the jurisdictional gaps.

4.24 The Family Law Council has considered this split of jurisdiction in its Report and made a number of recommendations for addressing the consequences. In evidence the Family Law Council said:

... the split of jurisdiction between the states and the Commonwealth over child and family law matters. We have taken as a given that that split will continue ... We regard the split in jurisdiction as one of the most pressing matters affecting children in Australia. There is evidence suggesting that it can lead to terrible outcomes for children ...²¹

4.25 Effective management of disputes in families living with these issues is made much more difficult by this division of responsibility and requires much greater commitment at a case by case level to cooperation and information and resource sharing across the constitutional boundaries than to date has been achieved, except by the Magellan and Columbus projects in the FCoA and FCWA respectively.²² Justice Nicholson commented:

... There have been cooperative efforts between the states and Commonwealth ... in relation to the reference of powers over ex-nuptial children. I think there is still a significant amount of work

19 Family Law Council, Sept 2002, p 33.

20 Family Law Council, Sept 2002, p 33.

21 Family Law Council (Dewar J), transcript, 17/10/03, p 16.

22 Family Court of Australia, sub 751, p 38 outlines Magellan, which is a special case management pathway for cases involving serious allegations of child abuse. In FCWA Magellan has been adapted through Columbus to include family violence.

that could and should be done to try to have the two systems operating more as a unitary system than we have at the moment.²³

- 4.26 The relationship between a new Commonwealth tribunal and the State based authorities to whom these families may be referred is a complex one and will need to be considered carefully. The committee notes that a Federal Child Protection Service has been recommended by the Family Law Council in its Family Law and Child Protection Report.²⁴ The committee believes that child protection should remain the responsibility of State and Territory governments but is concerned that the services required to protect children are under resourced. The committee strongly supports the development of nationally consistent child protection laws. The committee is aware that the Standing Committee of Attorneys-General has established a working party to look at ways of better coordinating family law and child protection, with particular attention to a principle of one court²⁵ to avoid duplication of legal proceedings.

Conclusion

- 4.27 It has become apparent to the committee that in both the areas of family violence and child protection there are significant risks where gaps and duplication will also emerge when family law issues are involved as well. In the context of its later recommendations for establishing a Families Tribunal the committee believes there are opportunities to address these problems. Implementation must ensure that there is a proper co-operative process for investigation of allegations of family violence and child abuse (including sexual abuse) when they are raised in family law matters. The Tribunal or court must be guaranteed access to the evidence it needs to make its decision. Attaching an investigative arm to the Tribunal is a viable option. However, it should also be clear that the role is limited to family law cases and is not taking anything away from the States' responsibilities for child protection.

Judicial education & accountability

- 4.28 In the current court based system, generally, an adversarial trial process leads to a judicial decision after one trial event. The judge has to make final orders, but as Professor Parkinson said:

23 Family Court of Australia (Nicholson CJ), transcript, 10/10/03, p 9.

24 Family Law Council, Sept 2002, p 58.

25 Under the one court principle, a separating family should be able to deal with all of their family law and child protection issues in one court rather than dealing with a number of different courts in different jurisdictions.

... We have an assumption that we can make a thing called 'final orders'—orders the court makes at the end of the hearing—but no family law order can be final in regard to children ...²⁶

- 4.29 Given this situation, the committee has been interested to find out what mechanism there might be for judges to understand better whether, apart from the normal appeal process, their judgments have worked to help the family to effectively parent in the future. 'Is there any process that exists within the court system where a judge can learn from their determinations in order to try and make better determinations in the future?'²⁷ Justice Chisholm's response was:

... It would be wonderful ... to be able to have access to information about the consequences of our decisions. It might be painful in some cases to look at them, but as an educational thing ... it would be very good.²⁸

- 4.30 He went on to point out that privacy issues would need to be considered and that a research project which enabled litigants to consent up front to being approached over a period of time might be possible. However, he added a qualification about what inferences could be drawn from results.

- 4.31 When asked the same question the Attorney-General's Department had this to say:

With respect, I think that the Family Court judges are as accountable for their judgments as are any other judges in the federal system or the state system, with the possible exception of ... publication of judgments of the court. ... In terms of the formal process of review and accountability, the Family Court judges are subject to the same processes as all other judges in this country. If we were to attempt to interpose some other form of accountability, it would have significant implications for the separation of powers, the doctrine under the Constitution. You will, of course, have been aware of the ongoing debate about whether there should be judicial commissions and that sort of thing where judges are subject to significant misconduct, but they are generally limited to situations where there has been serious and grave misconduct of judges, not about whether someone has a different view about a judgment they may or may not have made. Going down that road, particularly under the Commonwealth

26 Parkinson P, transcript, 13/10/03, p 31.

27 Pearce C MP, transcript, 10/10/03, p 14.

28 Family Court of Australia (Chisholm J), transcript, 10/10/03, pp 14-15.

Constitution, brings you up against this issue of the separation of powers.²⁹

- 4.32 Whilst there may be constitutional limits to judicial accountability the committee believes that family law judges, possibly more than others, need to be much more conscious of the societal and non-legal consequences of the decisions they make in a broader sense. This should be addressed by continuous and widely focussed judicial education. The Chief Justice said:

... In my view, the process of judicial education in this country has not been adequate over the years. There have been changes in the sense that the Australian Judicial College was set up for the first time last year and it is engaged in judicial education approaches. My own court has a regular judicial education program, which we introduced several years ago on the basis that one-third of the court will spend a week attending a seminar dealing with all the various issues that come before the judges. I think that has been very successful. That is attended usually by child psychiatrists and experts of various sorts ...³⁰

- 4.33 In addition, the committee notes the establishment of the Australian Judicial College in May 2002. The College is funded by Commonwealth and State and Territory governments. It provides professional development programs to all judicial officers in Australia, focussing on their legal and practical judicial skills.³¹
- 4.34 Dr Mary Hood of the Australian Association of Infant Mental Health, South Australian Branch, in her evidence to the committee, confirmed that members of the Association are ready and able to provide workshops for judges to inform them about research in the area of attachment relationships.³²

Conclusion

- 4.35 The committee has concluded that while courts remain the primary arbiter of family disputes more attention should be given by the Family Court and the Federal Magistrates Court to significantly broadening judicial education programs to include developments in research about post

29 Attorney-General's Department (Duggan K), transcript, 15/9/03, pp 19-20.

30 Family Court of Australia (Nicholson CJ), transcript, 10/10/03, p 14.

31 Attorney-General's Department, sub 1710, p 10.

32 Australian Association of Infant Mental Health, South Australian Branch (Hood M), transcript, 24/9/03, p 59.

separation parenting outcomes and community expectations and perceptions. A longitudinal research project on the long term outcomes of family law judicial decisions should be undertaken and incorporated into judicial education.

Impact of an adversarial process

4.36 The committee has heard a vast amount of evidence about the animosity that adversarial legal proceedings create between separated parents. Many witnesses have complained about the adversarial behaviour of lawyers working in the system. Also, as the Sole Parents Union said, people who turn up before the courts are adversarial, looking to get ‘justice’ from the system by exacting revenge for the hurt that has been done to them by the other party.³³ This makes it much more difficult for litigation and other processes to be focussed on reaching agreements in the best interests of the child. Importantly, at the same time a legal system which focuses on past behaviour does not allow the issues that led to the relationship breakdown to be appropriately aired. People feel unable to contribute actively in the decision making process. Neither does it enable the process to focus on what will be best for the child / ren in the future.

4.37 It has been made very clear to the committee that disputes in family law need to be dealt with in the context of relationships that cannot be dissolved. Parenting is a life long responsibility. Yet the adversarial ethic pits people against each other to determine a winner and loser. It pushes them apart when they need to be brought together around their children’s needs. It trawls over the past when they need to be looking to the future. Professor Parkinson set the issue out in his evidence to the committee:

... the court system has not changed. The court system is fundamentally predicated on the idea that there is one major issue to resolve sometime after separation: where the children will live. It is an inflexible system. It is an adversarial system. ... The system is not well attuned to the fact that families are dynamic ...³⁴

4.38 A decision made by a court reflects the circumstances at a certain point in time when the decision is made. As circumstances change in the lives of either parent or the children, so there may be a need for changes in orders if the parents cannot agree. The family law system needs to be flexible and

33 Sole Parents’ Union (Swinbourne K), transcript, 26/10/03, p 46.

34 Parkinson P, transcript, 13/10/03, p 31.

accessible enough to be able to deal with these post-order conflicts reasonably promptly and without undue expense.

- 4.39 The limitations of adversarial processes in child related disputes has also been recognised by the FCoA which, largely as a result of recent growth in numbers of self represented litigants but also following its own assessment of the limitations of the case management system, has begun to explore less adversarial approaches. The FCoA's submission recommends:

... that a significantly less adversarial process would facilitate the most appropriate solution to parenting proceedings based on the best interests of the child rather than considering changes to the substantive law.³⁵

- 4.40 The FCoA has noted that the High Court's directions in regard to how far the FCoA can diverge from adversarial processes have recently been more supportive³⁶ and it is currently exploring the possibility of piloting a new approach based on European systems where, particularly in parenting matters, lawyers play a very minor role.³⁷

- 4.41 The overwhelming impression from the evidence before the committee shows the time is ripe for a significant reform of legal processes for parenting disputes.³⁸

- 4.42 To be confident of a sufficient impact, the committee believes that change may need to be more radical than diverting people to alternative dispute resolution and making less adversarial changes to court processes alone. Only a small percentage of people get to trial before a judge, but since dispute resolution processes often occur within a framework of adversarially based litigation, and because the judge is the final arbiter, the courts significantly influence how the rest of the process works.

- 4.43 The committee is mindful of the constraints of the Constitution, but does not see any reason in principle why the system should not explore fully the options for less adversarial processes and alternative sources of authority for orders about parenting. The committee recognises that the Constitution requires there to be a role for courts when issues of adjustment of existing legal rights are involved. However, most parenting

35 Family Court of Australia, sub 751, p 52.

36 *U v U*, (2002) FLC 93-112 at 89, 102, see Family Court of Australia, sub 751, p 50.

37 Family Court of Australia, sub 751, pp 49-52; Family Court of Australia (Nicholson CJ), transcript, 10/10/03, p 4.

38 Attorney-General's Department (Duggan K), transcript, 15/9/03, p 10; FLC (Dewar J), transcript, 17/10/03, p 15.

orders are in reality about future arrangements for how the relationship between children and their parents will be after they have separated. The committee has received advice that such decisions can appropriately be dealt with by an administrative tribunal. The committee sees the future role for courts and lawyers as being limited to subsequent breaches of parenting orders in accordance with constitutional limitations.

- 4.44 The goal ought to be that primary dispute resolution processes are attempted before filing any application for an order, whether in a court or a tribunal. In this way, the available processes of primary dispute resolution, such as mediation will routinely occur before filing, rather than being included with a framework of court proceedings and court orders in a process managed by the courts.

Role of the legal profession

- 4.45 As mentioned in Chapter 2, legal advice is frequently given based on perceptions of likely court outcomes. Legal services are provided, including settlement negotiations, in a context of preparation for litigation. This is what lawyers are trained to do, they assist their clients ‘in the shadow of the law’. They interpret both the legislation and case law in light of the facts presented to them by their clients. On the other hand, they play a significant role in assisting resolution of the 94% of cases that do not proceed to a judge.³⁹ However, the committee has also heard numerous examples of lawyers whose adversarial approach to representing their client has exacerbated the dispute and cost the client a lot of money.
- 4.46 In a system where the aim should be to keep people away from courts as much as possible and help them to reach agreement, it might be argued that it is better to ignore the law at first (outside of questions of safety of parents and children) and concentrate on the family’s future circumstances and work out what arrangements will be practical for them.
- 4.47 The committee’s objective is to devise a system where the involvement of lawyers is the exception rather than the rule.
- 4.48 However, the committee acknowledges that there are also other options for changing the role of the legal profession which have been considered in this inquiry. Some creative developments in the practice of family law are emerging. Changing the way family lawyers practise might require more training in non-adversarial dispute resolution and methods for

39 Family Law Section of the Law Council of Australia, sub 1021, p 3.

helping their adult clients to focus on the needs of the children involved.⁴⁰ Those who are appointed as child representatives obviously would need specialist skills in working with children.

4.49 The committee is aware that, since the Pathways Report was published the Family Law Council and the Family Law Section of the Law Council of Australia have been developing new best practice guidelines for family lawyers.⁴¹ This is a step in the right direction.

4.50 Dads in Distress posed some critical questions to the committee about the qualifications and expertise of family law practitioners. Mr Lenton said:

... Why do we have solicitors practising in this area of family law, which is such a crucial area of human behaviour and so dynamic and difficult to deal with, whose first degree is not in behavioural sciences? Why do we let those people in? Why isn't it the standard that your first degree is in either human services or behavioural sciences before you can practise in family law? I think that would go a long way to resolving some of your issues ...⁴²

4.51 The government response to the Pathways Report notes that a professional development program for family law practitioners, 'Changing the Face of Practice' aims at 'promoting skills for achieving child-focussed practice when working with separating parents'.⁴³

4.52 Also the committee has heard evidence about the approach to practice in the United States and Canada, known as Collaborative Law, which a group of family law practitioners in Queensland is interested in piloting in Australia.⁴⁴ This involves seeking to resolve legal disputes in a non-adversarial way to avoid the polarisation that emerges from court-based dispute resolution. The approach focuses on working with the psychological needs of emotionally stressed clients. Its primary aim is to achieve settlement through a four way conferencing model. If this is unsuccessful then, by agreement in advance, those lawyers and experts involved are excluded from subsequent litigation.

40 Family Law Pathways Advisory Group, pp 21-23.

41 *Government response to the Family Law Pathways Advisory Group Report*. Attorney-General's Department and Department of Family and Community Services, Canberra, May 2003, p 15. Draft guidelines appear at: <http://www.ag.gov.au/www/flcHome.nsf/>, viewed 15/12/03,

42 Dads in Distress (Lenton R), transcript Coffs Harbour, 27/10/03, p 50.

43 *Government Response to the Family Law Pathways Advisory Group Report*, p 12.

44 Witness 3, transcript Keperra, 4/9/03, p 25; Tesler PH, Collaborative law: What it is and Why family law attorneys need to know about it, *American Journal of Family Law*, vol 13 no 4, (1999), p 215; Gamache S, Collaborative separation & divorce, *The Collaborative Review*, Spring 2002, p 6.

The stated advantages of the process are speed, cost, better settlements, and less stress for clients, children and lawyers. The perceived disadvantages include a lack of scrutiny and accountability; an increase in costs associated with the four-way meeting process; and the engagement, where necessary, of a range of experts, ...[the costs of which] ... are thrown away if there is no settlement and alternative representation has to be found. There are also some concerns about ethical issues.⁴⁵

- 4.53 Whilst this approach has a lot of appeal, it is still based on some agreement between the parties and common commitment to the collaborative process. It does not provide any way to prevent a vindictive party from dragging the process out and still proceeding to litigation at more cost to themselves and, more importantly, to the other party. The committee's preference is to keep separating families away from lawyers as much as possible but it would encourage the development of such practices by family lawyers as an option. This might usefully occur through a pilot program.
- 4.54 The committee notes that the Family Law Pathways Advisory Group 'encourages an interdisciplinary or sociolegal approach in undergraduate family law studies'.⁴⁶ They also noted that many law students do combined degrees, sometimes with a social science base. This committee believes that for family law practitioners there should be a much greater emphasis in their training on social sciences and on dispute resolution.

Conclusion

- 4.55 The committee notes and supports ongoing cooperation with the Family Law Section of the Law Council of Australia in developments for further education and training of family law practitioners in the way considered by the Pathways Report. In addition, the committee favours a future accreditation requirement for all family law practitioners of undergraduate study in social sciences and or dispute resolution methods.

Self represented litigants

- 4.56 Both the FCoA and the FMC confirm that there are now a significant proportion of litigants who are self represented, either all or some of the time, who face particular difficulties in managing the adversarial process

45 Witness 3, transcript Keperra, 4/9/03, p 26.

46 Family Law Pathways Advisory Group, p 22.

in their courts.⁴⁷ Many of these people access legal assistance or advice along the way from Community Legal Centres⁴⁸ or Legal Aid Offices.

- 4.57 Reasons for self representation vary. Some have failed to qualify for legal aid, either on means or merit grounds, some prefer not to engage a lawyer and consider they can do a better job themselves.⁴⁹
- 4.58 For the FCoA this experience has led to them questioning the role of the adversarial system (see above), particularly with respect to parenting proceedings.

Conclusion

- 4.59 The committee believes resolving family law disputes should be simplified to the extent that the lawyers' involvement is the exception rather than the rule. The FCoA has done much to improve its information for self represented clients and to provide procedural assistance to self represented litigants.⁵⁰ However, so far it has not yet effected any significant change to its processes with a specific view to making them simpler for unrepresented clients.

Courts as a last resort

- 4.60 The Pathways Report regards litigation as a last resort and the least preferred pathway.⁵¹ It stopped short of replacing the court system or preventing people from accessing courts – or making it more difficult. It said that for some families, what they need is rapid access to a decision maker, particularly those with entrenched conflict or those where safety is at risk. Instead of going down the path of new infrastructure, the Pathways Report's primary message was about building a more integrated family law system, the many parts of which should collectively aim to divert people from litigation as much as possible.
- 4.61 The committee has noted that the Government's response to the Pathways Report has endorsed this direction (see Chapter 1). However, the committee has concluded that to make a real difference to the way

47 Family Court of Australia (Nicholson CJ & Chisholm J), transcript, 10/10/03, p 28; *Family Court of Australia annual report 2002-2003*, FCoA, Canberra, 2003, p 5; *Federal Magistrates Court 2002-2003 annual report*, FMC, Canberra, 2003, p 15.

48 National Association of Community Legal Centres (Budavari R), transcript, 20/10/03, p 70.

49 Hunter R, Giddings J & Chrzanowski A, *Legal aid and self-representation in the Family Court of Australia*, Socio-Legal Research Centre, Griffith University, unpublished, May 2003, 71p.

50 Family Court of Australia, *Self represented litigants A challenge: Project Report December 2000–December 2002*, FCoA, Canberra, 2003, vi 70p.

51 Family Law Pathways Advisory Group, p 61.

separated families and the stakeholders in the current system behave in relation to post separation disputes, the directions started by the Pathways Report need to be taken further. This should be achieved by first redesigning the pathways in the family law system for separated families to direct them to mediation as recommended in Chapter 3, and then to a non-adversarial tribunal when an order is required.

4.62 The role for courts should be limited to:

- enforcement of tribunal orders, when required;
- appeals from the tribunal on specified matters of law only; and
- issues like entrenched conflict, violence, substance abuse and child abuse, including sexual abuse. In these cases urgent and legal intervention to ensure the safety of children and partners requires that they should be dealt with expeditiously.

Redesigning the legal system for family friendly outcomes

4.63 In the light of all the evidence the committee believes that all disputes about post separation parenting responsibilities not involving entrenched conflict, family violence, substance abuse and child abuse, including sexual abuse, must be removed from adversarial court processes. As Professor Parkinson said:

... So I think we have some fundamental rethinking to do, not only about the law – maybe that is the easiest part – but also about the systems by which we adjudicate and resolve ongoing conflict between parents and children ...⁵²

4.64 He went on to suggest some possible direction for that ‘fundamental rethinking’, drawing upon an approach to adjudication which is more administrative than adversarial:

... Look at how we have dealt with the child support issue. Where there is a dispute about the formula, we have child support review officers who will sit in a room, talk with mum, talk with dad, and maybe talk over the telephone if that is needed, and they can make a decision cheaply, quickly and easily. That is then appellable to a court and can [be] reviewed by a court. My research overseas

52 Parkinson P, transcript, 13/10/03, p 31.

suggests that a model like that would be much better for the ongoing conflicts that some parents have ...⁵³

- 4.65 Professor Moloney, Director, Department of Counselling and Psychological Health, La Trobe University, added two further important but quite distinct dimensions to this thinking. First, he suggested that in light of the importance of focus on the children, the committee consider, for the families not dealing with violence issues, the need for:

... a less formal tribunal system that would be chaired by one or more individuals who have an in-depth understanding of child development and family dynamics and who, whilst retaining their authority, can engage directly and respectfully with family members.⁵⁴

- 4.66 His second point related to involvement of lawyers:

... I think family members need to feel that they have been heard and that they can say what they need to say, not in a manner filtered by a barrister through legally modified language but directly and in their own language, to a decision maker who has the skills to check that he or she has indeed heard accurately.⁵⁵

- 4.67 The committee has explored the idea of establishing an administrative tribunal during its inquiry at some length. In principle the concept has been widely supported, but reservations have been raised about the constitutional limits of the idea. Professor Parkinson suggested that a new kind of decision-making process should be restricted to contact disputes, at least initially. The Attorney-General's Department and the Family Law Council had similar views.⁵⁶ In a supplementary submission by the Family Law Council a proposal for a new process for dealing with contact disputes after court orders (including consent orders) was developed.⁵⁷

- 4.68 The committee is concerned that separation of contact disputes from other parenting issues would not be optimal to the delivery of cohesive and comprehensive resolution of all parenting issues. Also in light of the evidence about problems with adversarial behaviour the committee doubts that a partial solution at a relatively late stage in the process would

53 Parkinson P, transcript, 13/10/03, p 31.

54 Moloney L, transcript, 20/10/03, p 3.

55 Moloney L, transcript 20/10/03, p 2.

56 Attorney-General's Department (Duggan K), transcript 15/9/03, p 8; Family Law Council, sub 1400, p 18, sub 1699, 9p and transcript, 17/10/03, pp 14-15.

57 Family Law Council, sub 1699, 9p.

sufficiently change behaviour in family law dispute resolution, particularly at the early stages in separation.

Conclusion

- 4.69 The committee's view is that a comprehensive and radical solution is required to effectively ensure the majority of families are able to reach solutions for their future parenting responsibilities first through mediation and then through a non-adversarial tribunal process. The outcome should be a practical parenting plan devised prior to any application in the FCoA or FMC.

Tribunals and administrative decision-making – some examples

Human Rights and Equal Opportunity Commission

- 4.70 The Human Rights and Equal Opportunity Commission (HREOC) is an administrative body which undertakes investigation and attempts resolution of complaints about breaches of human rights and anti-discrimination legislation.
- 4.71 The process is:
- A complaint is lodged in writing to the President of the Commission.
 - The material provided is reviewed and further inquiries are made, possibly seeking further material.
 - The President or a commissioner contacts the respondent to the complaint and attempts to conciliate between the parties by convening a conference to attempt to negotiate an agreement.
 - If the President determines the complaint not to be suitable the commissioner terminates the complaint in writing and with reasons.
 - HREOC has power to call for evidence and examine witnesses but has no enforcement power.
 - If the complainant is not satisfied then the matter can be commenced as an action for determination in the Federal Court or Federal Magistrates Court within 28 days of the notice of termination. Court hearings are *de novo*.⁵⁸
- 4.72 The powers of the Commission to make decisions binding by registration in the Federal Court were removed after the High Court's decision in

⁵⁸ A hearing *de novo* is a re-hearing when the matter is heard afresh, all the evidence given previously may be given again before the Judge. (FCoA web-site: www.familycourt.gov.au).

Brandy's case.⁵⁹ As a consequence, in effect HREOC offers little more than mandated primary (alternative) dispute resolution. It has no determinative effect.

State based tribunals

NSW Guardianship Tribunal

- 4.73 The NSW Guardianship Tribunal is a tribunal which appoints guardians for people who are incapable of making their own decisions and need a legally appointed substitute decision maker.

The Guardianship Tribunal is here as a last resort and works with the community and family to provide a legal remedy.⁶⁰

- 4.74 Staff of the Tribunal's Investigation and Liaison Branch assess applications received, and seek to resolve matters informally where possible. If the matter cannot be resolved it will be scheduled for a hearing before a Tribunal whose members will include a legal practitioner, a professional member such as a doctor, psychologist or social worker, and a community member who has experience with adults with disabilities. There is usually no fee involved in making application to the Tribunal.

Queensland Small Claims Tribunal

- 4.75 The Queensland Small Claims Tribunal provides a low cost way to make a small claim without using lawyers. A referee who is usually a magistrate presides over the Tribunal, and the referee will encourage the parties to reach agreement privately wherever possible. The referee's decision is final and can be enforced by a Magistrates Court. Filing fees are between \$12.50 and \$68.00.⁶¹

ACT Residential Tenancies Tribunal

- 4.76 The ACT Residential Tenancies Tribunal is an independent body with jurisdiction to hear and determine all matters arising from tenancy agreements. The Tribunal aims to facilitate dispute resolution which is just, prompt and economical. Pre-hearing conferences may be conducted, or the matter may be referred to a Member of the Tribunal for hearing, at which the parties may be legally represented. The Tribunal may make orders which can be registered for enforcement with the Magistrates

59 *Brandy v HREOC* (1995) 183 CLR 245.

60 http://www.gt.nsw.gov.au/PDF/general_info_2003.pdf, viewed 15/12/03.

61 <http://www.justice.qld.gov.au/courts/factsht/factsheet1.htm>, viewed 15/12/03.

Court. Filing fees apply, and the amount of the fee depends on the nature of the dispute.⁶²

Denmark

4.77 The committee has noted an administrative approach to contact disputes which is operating in Denmark.⁶³ Contact disputes are dealt with separately from other parenting issues but within the context of a 'normal package' of contact arrangements which is promoted by the Danish government. Courts resolve the major issue of custodial responsibility.

4.78 An aggrieved parent can initiate a complaint with the County Governor's office in writing. A lawyer in that office will contact the other parent for a response. A meeting will be held and the parties can be referred to mediation. If it cannot be resolved the lawyer will determine the issue by an order that is enforceable in court. There is a right of appeal to the Ministry of Justice. Enforcement is a very simple, non-adversarial but still court based process, with a meeting with a judge often resolving the matter. Penalties are available.

The system has many advantages over the current court-based approach in Australia. ... there are no procedural hurdles ... [it] is not adversarial ... The role of the lawyer ... and ... of the judge in an enforcement process, is to work out what the dispute is all about and to reach a decision, if the parties cannot reach their own agreement after counselling. The environment of an office is much more conducive to non-adversarial processes than a courtroom.⁶⁴

4.79 Other advantages appear to be that it is a quick and cheap process. One disadvantage is the separation of contact from other parenting issues. Another more significant disadvantage may be that the Danish model is not replicable in Australia for constitutional reasons.⁶⁵

4.80 These models provide some valuable insight into how family dispute determination processes can be non-adversarial, and relatively simple, but still apply the requirements of procedural fairness.

62 <http://www.courts.act.gov.au/magistrates/tribunals/rtt/rtt.html>, viewed 15/12/03.

63 Parkinson P, sub 1698, 7p.

64 Parkinson P, sub 1698, p 5.

65 Parkinson P, sub 1698, p 7.

What can be achieved within the Australian constitution?

- 4.81 A number of people with whom the committee has discussed a proposal for an administrative tribunal were supportive because of the benefit of moving away from the traditional adversarial processes to something less formal and more user friendly.⁶⁶ Some expert advice has been that there are limits to what can be achieved by such a body primarily to do with its capacity to enforce its decisions.⁶⁷ The committee received expert constitutional advice with respect to how a tribunal could be established in a way that would be constitutionally valid.
- 4.82 It has been suggested by some that such a new body may just add another layer to the system which would just increase the time and costs involved for families and government.
- ... If you had a tribunal that was a decision making tribunal, it would still be part of a formal legal system. Its decisions would still have to be, to some extent, subject to review by a higher authority; it would still be operating within a framework of legal rules. ... If it were making decisions about where children should spend their time and with whom, it is hard to see how it would do that without doing it within the framework set by the Family Law Act ...⁶⁸
- 4.83 The major constraint of the Constitution is that the judicial power of the Commonwealth – to make enforceable orders – must be exercised by a court established in accordance with the requirements of Chapter III of the Constitution. The judges and magistrates of those courts, and any officers to whom responsibility is delegated, must act judicially. However, the committee has been advised that, while this is the position with respect to decisions about adjusting existing legal rights, decisions which are essentially about adjustment of rights in the future, based on what is in the best interests of the child, can be made administratively. The committee is proposing that this be done by a new Families Tribunal.
- 4.84 In Chapter 2 of this report the committee has recommended a new framework of post separation parenting responsibilities, at the top of which sits a presumption that parents are jointly responsible for their

66 Dads in Distress (Lenton R), transcript Coffs Harbour, 27/10/03, p 49; Moloney L, transcript, 20/10/03, pp 3, 26.

67 Family Law Council (Dewar J), transcript, 17/10/03, p 1; Attorney-General's Department (Duggan K), transcript, 15/9/03, pp 8-9; Family Law Council, sub 1699, pp 2-5.

68 Family Law Council (Dewar J), transcript, 17/10/03, p 14.

children, except in circumstances of rebuttal. Those rebuttal circumstances are listed in Chapter 2 and decisions with respect to those issues remain matters for judicial determination. The committee understands that a new Families Tribunal could be given the power by statute to deal with the majority of the parenting decisions that sit beneath the shared responsibility, when parents cannot agree themselves even after mediation. This will include decisions about all matters of shared responsibility including, how much time the child/ren will spend with each parent, education, health, religious and cultural upbringing, relocation and so on.

- 4.85 The Tribunal would have to be set up by statute and would have defined jurisdiction to make certain decisions under the Family Law Act. The committee believes that there are a number of aspects of the Australian Industrial Relations Commission which could be used as precedent for this new body. The *Workplace Relations Act 1996* says that decisions of the Commission are binding and that penalties for breach of those orders or injunctions to enforce them may be granted by a court.⁶⁹
- 4.86 Courts would retain a role in matters where the presumption of shared parenting is rebutted as outlined in Chapter 2, in enforcement of Tribunal orders, and in a range of other matters that relate to existing legal rights, such as disputes over parentage. In light of this, ways to modify court processes, to make them less adversarial, simple and straightforward enough to make lawyers the exception rather than the rule should continue to be explored. A key to this work is avoiding the procedural complexities involved in applying the usual rules of evidence and procedure associated with adversarial litigation as far as possible. The court processes should also be as accessible and low cost as the Tribunal. The committee has already noted the work the FCoA is undertaking in this area.

Creating a new family law pathway– an outline of the concept

- 4.87 The committee believes that there is a range of options for reforming the family law system which could minimise adversarial behaviour between parents and assist more of them to reach agreements about their future parenting responsibilities. Some reforms could be built on to existing infrastructure, such as creating a single visible entry point into the system, providing improved contact dispute resolution mechanisms and other

69 See *Workplace Relations Act 1996*, ss 170VV and 170VZ.

post order support⁷⁰. Using available options which continued to rely on a court as the primary body for decision making when the parties cannot agree, in the committee's view, would only have a limited impact on adversarial behaviour especially at the early stage.

- 4.88 The committee has concluded that a completely new infrastructure with a new child inclusive, non adversarial decision making body at its centre would provide a sufficiently radical reform to have a real impact on changing behaviour and expectations for post separation outcomes. The tribunal should be clearly identifiable as the Families Tribunal and be set up with as wide a geographical spread as possible.
- 4.89 Courts will, firstly, enforce the decisions of the tribunal when they are breached, and secondly deal with cases where the safety of the parties or the children has to be protected and some other matters not within the jurisdiction of the Tribunal.
- 4.90 In addition, the pathway through the new system must have mandated mediation and this pathway must be widely known. The tribunal process must be simple and lawyers should only be permitted when the Tribunal determines that they are necessary.
- 4.91 When orders are made by the Families Tribunal they should be recorded in a parenting plan. The Tribunal will also have power to amend its orders if subsequent changes in the circumstances of the family so require.
- 4.92 When orders are breached, the first step should be to return to the Tribunal to consider whether the dispute involved in the breach can be resolved by a variation in the order, such as awarding extra parenting time to make up for what has been lost. Subsequent breaches, where the tribunal concluded that further variation was not going to address the behaviour of the party in breach, would be referred to a court for enforcement action.
- 4.93 The statute which creates the Families Tribunal would make it clear that orders made by the Tribunal are to have binding effect. The statute would also confirm the Tribunal's ability to vary its own orders on the basis of changes in circumstances. The courts' enforcement processes would then be confined to determining whether there had been a breach of the Tribunal's order and imposing a penalty when appropriate.⁷¹

70 See Family Law Council, sub 1699, 9p.

71 The committee received legal advice that the High Court's *Brandy* decision does not affect the proposed Tribunal because the original decision of the Tribunal does not relate to determination of whether there has been a past breach of a law but rather on making future arrangements in the light of the principles enunciated in the Family Law Act.

- 4.94 There is considerable scope for the Parliament to allow judges and magistrates to dispense with the rules of evidence and procedural complexity if it thought fit. The constitutional constraint is that judges and magistrates (and anyone exercising delegated authority) should act judicially. This allows room for the government to work with the FCoA and FMC to explore different ways of acting judicially in dealing with the parenting cases remaining within their post Families Tribunal jurisdiction, including the enforcement role. This would allow for non-adversarial and more user-friendly processes across the whole range of parenting disputes. To act judicially does not require courts and judges to operate in the usual manner dictated by common law tradition if Parliament legislates to allow different approaches.
- 4.95 Clearly any significant reshaping of the family law system will require careful and detailed consideration by governments and by other stakeholders. The committee has not developed all the detail of its vision but outlines its conclusions about what are the key characteristics for a system to achieve the objectives it is seeking. The legislation necessary to support the objectives will need to identify the legal and constitutional details to ensure a properly integrated and valid solution.

Step one – single entry point

- 4.96 It is important for there to be a well-recognised and available source of assistance for parents following separation to work out their parenting arrangements initially without the need to either apply to the Tribunal or litigate in a court. At the present time lawyers and the courts are the most widely recognised sources of assistance when parents cannot work out their own arrangements. Mediation services provided by community organisations are typically accessed by referral from lawyers and courts, whom parents usually first approach to resolve their parenting disputes. Establishing a new single entry point to access help is an indispensable first step in moving away from a legal framework.
- 4.97 A single entry point into the family law system would go a long way towards effectively steering people down the best path. In the committee's view this is likely to be more successful in integrating the system and helping people to access the services they need than the approach of the Pathways Report. That Report relies on the commitment of all the existing services, many of whom are in competition with each other.
- 4.98 This single entry point to the system would be most cost effectively established if it were located in or attached to an existing Commonwealth agency that already has a wide geographic spread and existing

infrastructure, such as Medicare (or Centrelink). However, it should be identifiable separately within the host agency.

- 4.99 Alternatively, a new agency could be created which is given a 'shop front' presence in the same way as other government agencies serving a significant number of people in the general population. It should be a condition for filing an application for a parenting order in the Tribunal that there has first been an attempt to resolve the dispute through accessing this ready source of advice and assistance. An exception to this would be matters of imminent danger, which are of substance and which are not mere allegations, may have direct access to the court.
- 4.100 Any new agency of the kind envisaged would involve some new costs being incurred to support parents going through separation. However, such costs need to be evaluated against the cost of relationship breakdown, especially where children are involved. Cost-effective early intervention to help parents, especially in the first few months of separation, has potential for significant savings to government and the community in the longer term. It would also promote the welfare of children at a vulnerable time in their lives, by significantly reducing their exposure to family conflict.
- 4.101 This single entry point would have close administrative and operational links with the Families Tribunal but would be created separately from it. It is not a front door to the Tribunal but to the full range of dispute resolution options available across the family law system.
- 4.102 This first step in the process is designed to diffuse the tension and distress of separation. There needs to be an incentive to encourage parents to focus on the needs of their children first and foremost, before issues of property division or child support fix their thinking on parenting. Accordingly, the committee believes that there should be a six week moratorium before any parents begin to pay and receive child support. This would avoid the risk of fixing parenting arrangements, which impact on child support, that parents have not had the chance to properly consider. During this period parents will be assisted to enter counselling and to focus on the needs of their children. There are a range of policy and administrative issues that will need to be addressed, such as a process by which staff of the single entry point are able to advise the Child Support Agency of the date on which child support should commence. In addition, the committee believes that additional social security benefits should be available to parents to ensure that children are not financially disadvantaged during the six week period on the basis of evidence that they had commenced this process.

- 4.103 The new procedure of mediation, followed, if necessary, by a decision by the Families Tribunal, is not a mechanism designed to promote delaying tactics by any party. It is the committee's intention for an agreed interim arrangement to be entered into by the parents, for the benefit of children, at the earliest opportunity. The committee considered that a parenting plan should not take longer than six months to prepare.

Step two – information about parenting after separation

- 4.104 The immediate aftermath of separation can be a very confusing and stressful time for both parents and children. If parents can receive appropriate help to establish workable and appropriate shared parenting arrangements in the early part of separation this will do much to reduce conflict and facilitate ongoing parental involvement in their children's lives. Traditionally, Family Court counsellors, during their first contact with the client, provide parents with information about children's needs and possible appropriate parenting arrangements and about options for resolving disputes.
- 4.105 Building upon this experience and proposals set out in Chapter 3, the committee believes it is imperative to bring such information processes to a point in the separation process before the parents have approached the Tribunal or the courts. The new agency's intake processes (described below in paragraph 4.107-4.109), importantly, should include provision of information which will help parents to focus on their children's needs very soon after separation.
- 4.106 This would be an important point at which information and education about shared parental responsibility as discussed in Chapter 2 would be made available. The agency would play a pivotal role in the community education campaign also recommended in that chapter.

Step three - assessment of needs

- 4.107 The single entry point should be staffed by appropriately trained and qualified gender balanced teams to act as parenting support advisers. They should have the capacity to meet with both the parties and make an assessment on the needs of the dispute and the parties. While an agency of this kind could not compel attendance by both parties, an incentive to cooperate would be if there is any subsequent Tribunal application or litigation, a failure to participate could lead to an adverse view of the parent's willingness to focus on the best interests of the children.
- 4.108 Parenting support advisers should also assist parents to reach an early agreement (which could then be filed as consent orders at the Tribunal or

as a parenting plan). If this is not possible then they could be assisted by the advisers to develop time-limited temporary arrangements to obviate the need for application to the Tribunal about this. This would allow time for the issues in dispute to be resolved.

- 4.109 An initial assessment should quickly identify those cases where immediate access to a court process is necessary, for example, for protection of a child or a party in the circumstances listed in Chapter 2 of entrenched conflict, family violence, substance abuse, and child abuse including sexual abuse. Case assessment conferences now happen in the FCoA at a very early stage in the Court's pathway. It is the first event after an application is filed. With this new pathway, this kind of process would be brought forward to a pre-application stage. This does not preclude a further intake process if litigation commences in the courts. But the subsequent intake would build on the initial assessment by the agency, rather than duplicate it.
- 4.110 Families for whom entrenched conflict, family violence, substance abuse, or child abuse, including sexual abuse, is an issue which could be identified at this stage and referred to the proposed investigative arm of the Families Tribunal to ensure direct access and prompt investigation when these issues are raised during the Tribunal's process.

Step four – dispute resolution

- 4.111 The case assessor should be able to refer the parents to mediation or counselling services in the community or at courts (where there are services available) as appropriate. Alternatively, they could refer them directly to a court if there are issues of imminent danger, which are of substance and are not mere allegations, to be addressed and which make the mediation process inappropriate. If mediation is unsuccessful the parties could return to the single entry point and then be assisted with information about how to commence a Tribunal process.

Step five – parenting plans

- 4.112 The mediation processes as well as the Tribunal's conciliation processes would aim to deliver a parenting plan, as discussed in earlier chapters. The plan should then be registrable at the Tribunal and become binding in the same way as Tribunal orders will be binding but subject to a relatively simple procedure for variation. This would also facilitate the use of the parenting plan as evidence in any future dispute about things covered in it, in contrast to the current rigidity of interim and final orders.

Step six – the Families Tribunal

- 4.113 As outlined previously in the report, when mediation and other dispute resolution options have failed to help the parents reach an agreement, the next step will be to commence an application in the Families Tribunal for a decision. The processes in the Tribunal are envisaged to be as informal as possible, with very little documentation, but consistent with the rules of natural justice. It is anticipated that Tribunal members would be appointed from the ranks of professionals working in the family relationships field. First, the Tribunal would attempt to conciliate the issues in dispute. This could be undertaken by a single member. If this does not resolve it, the hearing of the dispute and the decision making function of the Tribunal could be performed by a panel of members comprising a mediator, a child psychologist/other person able to address the child's needs and a third person with appropriate legal expertise.
- 4.114 The outcome of the hearing would be a binding order, confirmed by the relevant legislation.
- 4.115 The statute should totally exclude legal representation for parties appearing in a Families Tribunal application. The statute should allow the Tribunal at its sole discretion to appoint legal counsel, interpreters or other experts to assist the Tribunal. These experts should be drawn from an accredited panel maintained by the Tribunal. The committee anticipates that the Tribunal will be able to deal with the overwhelming majority of its clients without the need for the services of these experts. In addition as children's voices are to have a significant role, there may be a need to provide separate representation, especially for young children.

Step seven – enforcement

- 4.116 Whilst the orders of the Tribunal will be binding, by force of the relevant statute, it is inevitable that there will be subsequent breaches, especially if relationship conflict issues have still not been resolved.
- 4.117 The committee envisages that first allegations of breach of an order could be appropriately dealt with by the Tribunal in the first instance. If, as is often the case, the breach is in reality a symptom of a need to vary the original order to make it more workable, the Tribunal would have the power to vary its own order.
- 4.118 Subsequent breaches would be dealt with by a court. This function could be performed by a magistrate either in the Federal Magistrate's Court or attached to the Tribunal. Alternatively it could be performed by delegation from a judge or magistrate within a court to a Registrar or Judicial Registrar attached to the FCoA. In some instances the first breach

may be referred by the Tribunal to the court if it is apparent that a variation will not be effective to resolve the dispute.

The future role for courts

- 4.119 There will be a protective role, an enforcement role and a limited review role that will remain with the courts. The committee believes that, even with a new Tribunal in place, it is in the interests of the parties going before courts that the court processes be as non adversarial as possible.
- 4.120 There will also need to be provision for judicial review of the decisions of the Families Tribunal but in very limited circumstances also set out in the relevant statute. The committee believes that the potential for review should be as far as possible excluded. It should be limited to issues of denial of natural justice and with respect to the Tribunal acting outside its statutory jurisdiction.
- 4.121 Court decisions when required, should be based therefore on the following approach:
- a significantly simplified, speedy and low cost process for making decisions;
 - specifically designed for appropriate non-adversarial deliberation of relevant matters;
 - rules of evidence should be eliminated or at least significantly limited;
 - forms and affidavits should be minimised;
 - procedures should be easily understood and manageable without the need for lawyers;
 - formalities for the admission of relevant documents should be simple and user-friendly;
 - the court should be able to adopt an investigative approach and decide what information it needs and does not need to make a decision;
 - a hearing process should avoid undue formality and be investigative in character rather than adversarial; and
 - consideration should be given to the design of rooms used for making parenting decisions, especially where the decision-maker does not need to be a judicial officer.

Step eight – post order support

- 4.122 If a conflict about compliance with a Tribunal order is one that lies in the court's jurisdiction, this function could be performed by Registrars with an enforcement role who would be attached to courts. The first instance

breach would have been handled within the Tribunal, so the primary role of this person would be to determine an appropriate penalty. Their power would come from delegation by judges and be as wide as the constitution allows them to be.

- 4.123 In addition, this court attached function should be linked strongly to services in the community (such as the contact orders program referred to in Chapter 3) that can provide more intensive interventions for highly conflicted families where the problems are really about conflict in the relationship that is the primary cause of repeated breaches of the relevant order. They should have power to order parents to attend appropriate programs. When people are not satisfied with a decision of the Registrar, including a decision to impose a penalty, they would need to have access to a hearing *de novo* in court as a matter of constitutional validity.⁷²
- 4.124 The enforcement Registrar's role could be modelled on that of Special Masters known to operate effectively in California.⁷³
- 4.125 All of the above processes would be underpinned by a commitment to natural justice⁷⁴ and due process. Registrars with enforcement jurisdiction would need to act in a manner consistent with the exercise with judicial functions.

Cost

- 4.126 It is critically important for all services provided by the family law system to be accessible according to need. Resources need to be sufficient to avoid delays, as this can often exacerbate a dispute. Cost to clients should not be prohibitive. Also actions with respect to breaches of orders should not be at the cost of the aggrieved party. The Family Law Council has recommended a new court related contact enforcement process that includes public support for litigants/complainants where there is a wilful and serious violation of court orders.⁷⁵ Under the committee's model that function would be shared across the Tribunal and the courts. Access to either place for enforcement, if legal representation is necessary, should be supported by public funds. It should also be possible to proceed without representation.

72 A hearing *de novo* is a re-hearing when the matter is heard afresh, all the evidence given previously may be given again before the Judge. (FCoA web-site: www.familycourt.gov.au)

73 Relationships Australia (Bickerdike A), transcript, 20/10/03, p 53; Family Law Pathways Advisory Group, p 51.

74 The key principles of natural justice are opportunity to be heard, knowing the case against you and being given reasons for decisions made.

75 Family Law Council, sub 1400, p 18.

- 4.127 The committee agrees that after a parenting plan has been agreed upon, or Tribunal orders have been made, support for families to maintain the all important on-going relationship between children and parents should be provided at minimal cost to the parents. However, it is also recognised that some fees may be necessary to avoid vexatious or frivolous applications or to discourage over reliance on the system.

Simplifying the choices of last resort

- 4.128 At the beginning of this Chapter is a brief outline of the different courts currently working in family law. The committee has concluded that an essential aspect of the new pathway described above will be that for those families who need to access a court because they require possibly urgent access to a legal process which will provide the protection they need, the way to access a court should be simple and the choice of starting point should be transparent. There should be one way into family courts, when they are needed, and a coherent hierarchy of decision makers available according to specific case needs. This is particularly critical if families are in crisis due to issues of violence or child protection.
- 4.129 The superior court jurisdiction of the FCoA has a role in complex property disputes and in complex parenting disputes (eg. cases involving serious child abuse). The simplified less adversarial processes discussed above would logically be handled by magistrates. The FMC and the FCoA operate a very similar jurisdiction in family law.⁷⁶
- 4.130 To make the way into family law courts simpler and to enable a proper assessment of the needs of each case followed by a coordinated referral to the appropriate decision maker, the committee believes there should be one court. One way to achieve this is to remove family law jurisdiction from the FMC and create magistrates in the Family Court (as happens in the FCWA) to provide a fully co-ordinated and resourced hierarchy of judicial decision makers.⁷⁷
- 4.131 Another way would be to better link Federal Magistrates with the case management processes of the FCoA so that (while their formal appointment to a separately established court continues) they exercise family law jurisdiction within a co-ordinated system of case and file management. For litigants and practitioners, they are for all intents and

76 Federal Magistrates Court, sub 741, p 1.

77 Family Court of Australia currently has 45 judges, 6 Judicial Registrars & 3 Registrars, largely engaged in interim applications, viewed 15/12/03, <http://www.familycourt.gov.au>; FMC has 19 magistrates, viewed 15/12/03, <http://www.fms.gov.au>

purposes part of the same court. This would still allow Federal Magistrates to operate in a way separate and distinct from the FCoA in matters other than family law. The committee believes that, with the establishment of the Families Tribunal, there will obviously be a need to re-examine and streamline the roles of each court in any event. This option would be the simplest in that situation.

- 4.132 A way of achieving this would be for Federal Magistrates to hold dual appointments, the second appointment being as a Magistrate within the FCoA. Where the FMC sits side by side with the FCoA in metropolitan areas, the Magistrates should exercise their jurisdiction as Magistrates within the FCoA. When they are on circuit in regional areas where there is no FCoA presence or where exercising non-family law jurisdiction, they should do so as the FMC.
- 4.133 It is essential to a co-ordinated scheme that ordinarily interim proceedings are dealt with by magistrates and Judicial Registrars in a way which allows for proper evaluation of the issues where family violence and or child protection are relevant.

A voice for children

- 4.134 The FLA acknowledges the need to pay attention to children's views through appointment of a separate representative under section 68L and as an element of their best interests in subsection 68F(2). Separate representation is currently by order of the court. Guidelines on that role have recently been promulgated by the FCoA.⁷⁸
- 4.135 The committee was privileged to be able to observe the interaction of a group of children in Melbourne who had previously been engaged in child inclusive mediation at the Family Mediation Centre. The focus group was facilitated by Dr Jennifer McIntosh. This experience confirmed for the committee that children of any verbal age can and should be consulted in important decisions about their lives.
- 4.136 The committee also met with some young people, in a facilitated forum organised by the Youth Affairs Council of Victoria, whose families had been through separation. The strongest message from this group was that the representation they had did not meet their needs and that they felt they had not had enough of a say in what was put to the courts in their own cases.

78 Family Court of Australia, *Guidelines for child representatives: Practice Directions and Guidelines*, viewed 23/11/03, www.familycourt.gov.au/html/child_representative.html

- 4.137 Some witnesses who are children of separated parents have expressed to the committee a dissatisfaction with the limited opportunities they currently have to be heard in decisions about parenting after separation that affect them so directly.⁷⁹
- 4.138 The UN Convention on the Rights of the Child states in Article 12 the following:
1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.⁸⁰
- 4.139 The new Families Tribunal processes should be designed around maximising opportunities for children to participate. The same should be the case for all of the services in the family law system and the committee has identified in Chapter 3 a strong need to build up these opportunities. The simpler court processes proposed also need to be child friendly and the services which come both before and after that process should all have the capacity to involve children in age appropriate ways. Child focussed practice such as has been developed in the community sector family relationships organisations should be adopted as widely as possible.⁸¹

Enhanced contact enforcement

- 4.140 There has been a lot of evidence about a perception of an imbalance in the current system between the enforceability of child support through the Child Support Agency and of contact through the courts.⁸² Alongside the development of a new Tribunal and enforcement Registrars in the courts, the committee has considered the need for strengthening the enforcement options around contact in the current Family Law Act.

79 Witness 1, transcript, 26/9/03, p 2; the young people the committee met with on 12 November 2003.

80 United Nations: "Convention on the Rights of the Child", viewed 23/11/03, <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

81 Moloney L, transcript 20/10/03, pp 5-6.

82 Family Law Council, sub 1400, p 18.

- 4.141 The committee is aware that in 2000 the government added provisions to the FLA in response to recommendations from the Family Law Council⁸³ which created a three stage parenting compliance regime.⁸⁴ The emphasis of these reforms was the interposing of mandatory referral to post separation parenting courses in advance of applying punitive measures. The evidence is that the impact of these measures has been minimal. The primary reason appears to have been the limited availability of appropriate programs.⁸⁵
- 4.142 The committee has concluded that there is scope for further strengthening the enforcement provisions in the FLA in a number of ways.
- The Families Tribunal and the enforcement Registrars or a current Judge or Magistrate attached to the court, when established, should be able to make orders for compensatory parenting time and for referral to parenting programs. This would allow them at least to deal with some issues arising out of post-order disputes in a way which would satisfy an aggrieved party without undue cost or delay. Punitive options would have to be a matter for the court or the Registrar, reviewable by rehearing before a judge or magistrate.
 - The consequences of a deliberate breach of an order should be as serious for the parent who fails to make themselves available in accordance with an order as it is for a parent who wilfully refuses to make the children available without reasonable excuse.⁸⁶ Parents do not need to govern their post-separation parenting arrangements through court orders. They can make informal arrangements or develop a parenting plan. But if they do want court orders, then those orders create obligations as well as rights.
 - Consequences should be cumulative for subsequent breaches. Capacity to vary an order where this is seen to be appropriate should be retained as should the capacity to order compensatory time⁸⁷ and all the other sentencing options including the imposition of fines or a term of imprisonment.

83 Family Law Council, *Child Contact Orders: Enforcement and penalties. A report to the Attorney-General by the Family Law Council: The interim report Penalties and enforcement (March 1998) should be read in conjunction with this report*, Commonwealth of Australia, Canberra, June 1998, xvi 79p.

84 Attorney-General's Department, sub 1257, p 8.

85 Attorney-General's Department, sub 1257, p 12.

86 Reasonable excuse is defined in section 70NE of the Family Law Act.

87 See Family Law Act 1975, sub par 70NG(1)(b).

- Reasonable but minimum financial penalties should be imposed for first and subsequent breaches.
 - A third breach, if found to demonstrate a pattern of deliberate defiance of court orders, should require the court to give serious consideration to making a new parenting order in favour of the other parent (unless this is contrary to the best interests of the child).⁸⁸ This would in effect be overruling the decision of the Tribunal.
 - The ultimate sanction of imprisonment should be retained.⁸⁹
- 4.143 This should be supported by the adequately resourced enforcement Registrar process. Enforcement proceedings should be easily accessible and not incur cost to the aggrieved parent if there is a *prima facie* case of a deliberate and serious breach of court orders.⁹⁰
- 4.144 These suggestions are equally and immediately applicable to the current FLA and current court based enforcement mechanisms. The committee sees these as changes that should be implemented with or without a new pathway or redesigned court process. If the changes to the system as recommended are subsequently implemented, the intention of these enforcement changes should be retained but some adjustment may be necessary to make them fit the new structure.
- 4.145 For a schematic representation of the proposed new family law process see Figure 4.1.

Transitional arrangements

- 4.146 As was discussed in Chapter 2, the committee is conscious of the level of discontent in the community around experiences of and outcomes from the current family law system, including existing orders issued by the FCoA or the FMC.
- 4.147 When the changes to the legislation set out in Chapter 2 are implemented it is likely to create a demand for reconsideration of parenting arrangements or orders on the basis of a change in circumstances brought about by the change in the legislation.
- 4.148 One issue that raises complex legal issues is the impact a change of the law on parenting responsibilities may have on existing court orders. There

88 For example, the contact parent may have no capacity to take care of the child.

89 Family Law Act 1975, sub par 70NJ(3)(e).

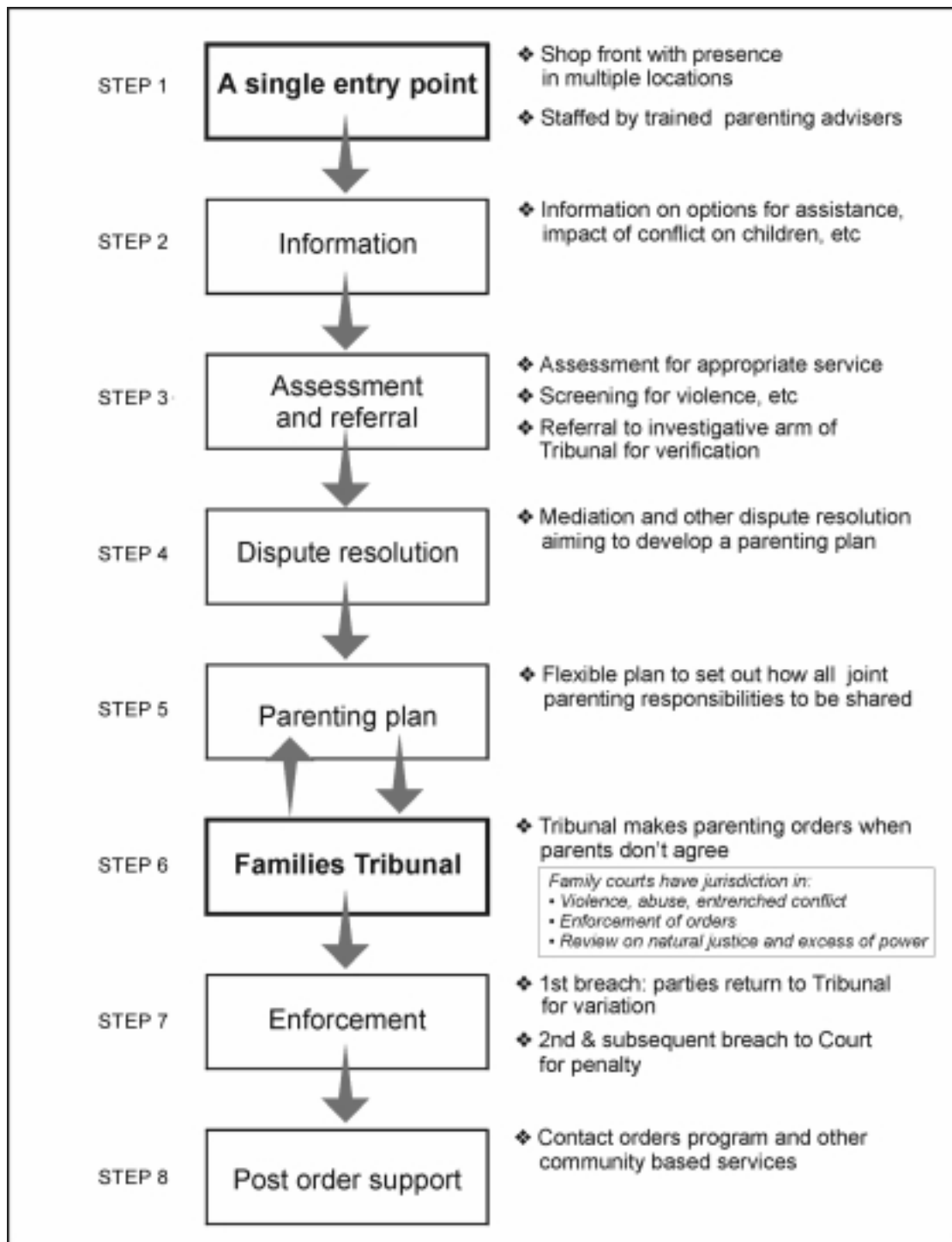
90 Family Law Council has recommended in its submission that a public body should take up the responsibility for enforcement. This has been developed further in the Council's supplementary submission, sub 1699, 9p.

seems no reason why a change of the law cannot apply to any application to a court to vary existing court orders. The more difficult issue is whether an administrative tribunal can be given power to make new parenting orders based on the new law contrary to existing court orders. The Tribunal could not be given power directly to set aside or vary the court orders. However, legislation may be able to make clear that any future adjustment of existing contact arrangements is to be determined in accordance with the new legal regime, even where there are existing court orders. New applications would then be required to be made to the Tribunal, and any decision of the Tribunal would supersede for the future existing court orders because of the effect of the change in the law.

- 4.149 Initial legal advice indicates that it may be possible to make legislative provision to this effect.⁹¹ The committee received the best advice available, however, the issues raised are complex and need to be further investigated.
- 4.150 Further detailed consideration of this issue will need to occur with a view to devising constitutionally sound transitional provisions that can, to the greatest extent possible, allow the new legal framework to apply to situations already covered by existing court orders.
- 4.151 As is the case for families who need to access a decision maker, any strategy for implementation will need to heavily emphasise the preference for parents working out these issues for themselves.
- 4.152 Implementing the legislative changes in Chapter 2 without a new system to support them would inevitably create a critical workload issue for the courts. Establishing a new Families Tribunal will take some time, including the passage of legislative requirements, infrastructure and recruitment of appropriately qualified personnel across the country. The government may need to consider a staged roll out on a state by state basis.
- 4.153 As with past experience (eg, in 1976 with the introduction of no-fault divorce), it is likely that the prospect of such a major reform as this Report proposes will encourage some separating parents to delay their applications until the Tribunal commences operation. This could create a peak workload at the start. In such circumstances the Tribunal would commence with a backlog and the risk would be that this would add to the discontent in the community and extend the conflict between parents in the queue rather than reduce it.

91 Private briefing from Henry Burmester QC, Chief General Counsel, Australian Government Solicitor.

Figure 4.1 A new family law process: A schematic representation



- 4.154 To address this concern, as well as the transitional issue, an option to consider might be to create a new incentive for parents to reach agreement, by allowing already separated parents with existing court orders, who both agree, to take their case to the Tribunal. For those who do not agree some delay may need to be built in to spread the workload more manageably for the Tribunal.
- 4.155 The committee acknowledges that the Families Tribunal will also require injection of considerable additional funds in the first years particularly. The committee has not quantified this but is convinced that over time, savings will be able to be recouped from expenditure on courts and legal aid, as fewer families will need to access the current legal system. For example, the Commonwealth currently expends \$50m per annum on legal aid in family law disputes. The committee believes savings in this area would emerge directly as a result of establishing the Tribunal.⁹² However, it would be dangerous to make reductions in those areas before the new Tribunal had sufficient time to prove its success.

Recommendation 11

- 4.156 **The committee recommends that a shop front single entry point into the broader family law system be established attached to an existing Commonwealth body with national geographic spread and infrastructure, with the following functions:**
- **provision of information about shared parenting, the impact of conflict on children and dispute resolution options;**
 - **case assessment and screening by appropriately trained and qualified staff;**
 - **power to request attendance of both parties at a case assessment process;**
 - **referral to external providers of mediation and counselling services with programs suitable to the needs of the family's dispute including assistance in the development of a parenting plan.**

92 Attorney-General's Department, sub 1710, p 2.

Recommendation 12

- 4.157 **The committee recommends that the Commonwealth government establish a national, statute based, Families Tribunal with power to decide disputes about shared parenting responsibility (as described in Chapter 2) with respect to future parenting arrangements that are in the best interests of the child/ren, and property matters by agreement of the parents. The Families Tribunal should have the following essential features:**
- **It should be child inclusive, non adversarial, with simple procedures that respect the rules of natural justice.**
 - **Members of the Families Tribunal should be appointed from professionals practising in the family relationships area.**
 - **The Tribunal should first attempt to conciliate the dispute.**
 - **A hearing on the dispute should be conducted by a panel of three members comprising a mediator, a child psychologist or other professional able to address the child's perspective and a legally qualified member.**
 - **Legal counsel, interpreters or other experts should be involved in proceedings at the sole discretion of the Tribunal. Experts should be drawn from an accredited panel maintained by the Tribunal.**

Recommendation 13

- 4.158 **The committee recommends that all processes, services and decision making agencies in the system have as a priority built in opportunities for appropriate inclusion of children in the decisions that affect them.**

Recommendation 14

- 4.159 **As discussed in paragraph 4.102, the committee recommends that in the period immediately following separation:**
- **there be a 6 week moratorium before any obligation to pay child support arises;**
 - **parents be required to access the single entry point and begin**

the process of mediation (including the commencement of a parenting plan); and

- **during the first 6 weeks parents be able to access their full entitlement to social security benefits without penalty, to ensure neither they nor their children are financially disadvantaged.**

Recommendation 15

- 4.160 The committee recommends that all family law system providers, but most particularly the single entry point service, should screen for issues of entrenched conflict, family violence, substance abuse, child abuse including sexual abuse and provide direct referral to the courts for urgent legal protection, and for investigation of allegations by the investigative arm of the Families Tribunal.**

Recommendation 16

- 4.161 The committee recommends that an investigative arm of the Families Tribunal should also be established with powers to investigate allegations of violence and child abuse in a timely and credible manner comprised of those with suitable experience.**

It should be clear that the role is limited to family law cases and does not take away from the States' and Territories' responsibilities for child protection.

Recommendation 17

- 4.162 The committee recommends that after establishment of the Families Tribunal, the role for courts in disputes about parenting matters should be limited to:**
- **cases involving entrenched conflict, family violence, substance abuse and child abuse including sexual abuse which parties will be able to access directly once the issues have been identified;**
 - **enforcement of orders of the Families Tribunal when the**

- dispute cannot be resolved by a variation of the order of the Tribunal so far as possible by judicial delegation to Registrars;**
- **review of decisions of the Families Tribunal only on grounds related to denial of natural justice or acting outside its power or authority.**

Recommendation 18

- 4.163 **The committee recommends that in parallel with the establishment of the Families Tribunal the current structure of courts with family law jurisdiction be simplified. This should ensure there is one federal court with family law jurisdiction with an internal structure of magistrates and judges to support the delivery of judicial determination in the best interests of the child.**

Recommendation 19

- 4.164 **The committee recommends that a longitudinal research project on the long term outcomes of family law judicial decisions should be undertaken and incorporated into judicial education programs.**

Recommendation 20

- 4.165 **The committee recommends that there should in future be an accreditation requirement for all family law practitioners to have undertaken, as part of their legal training, undergraduate study in social sciences and or dispute resolution methods.**

Recommendation 21

- 4.166 **The committee recommends the immediate implementation of the following additions to contact enforcement options:**
- **a cumulative list of consequences for breaches;**
 - **reasonable but minimum financial penalties for first and subsequent breaches;**

- **on a third breach within a pattern of deliberate defiance of court orders, consideration to a parenting order in favour of the other parent; and**
- **retaining the ultimate sanction of imprisonment.**

Recommendation 22

- 4.167 **The committee recommends that in the lead up to the implementation of the recommendations in this chapter to create a Families Tribunal there should be a public awareness campaign to inform the community about the reform and its benefits.**

