CHAPTER TEN: DE FACTO PROPERTY SETTLEMENTS

Introduction

10.1 The Committee was required to consider whether the *Family Law Act 1975* should be amended to include the jurisdiction to decide property disputes between de facto couples. At present, the Family Court's jurisdiction is limited in this area, with the consequence that de facto couples must pursue property matters through State courts according to the general principles of law and equity (except in NSW, Victoria and the Northern Territory, where specific legislation has been enacted). A major problem and source of injustice to many people is the widely varying legislation from State to State and the different outcomes which can result. Concern has been expressed that, while married couples are provided for under the *Family Law Act*, where unmarried couples pursue a property settlement, they are 'exposed to substantial injustice because of the reliance on legal title and the inability of courts to take account of issues such as non-financial contributions or the needs or vulnerability of the financially weaker party'.[1]

The historical context

10.2 Under the Constitution, the Commonwealth government has power over marriage, divorce and matrimonial causes.[2] However, because de facto couples have not been deemed to be within the Constitutional power of the Commonwealth, any disputes which arise as a result of the termination of such a relationship must be dealt with through the state courts, under common law or, where the states have enacted specific legislation, under that legislation.

1 Harrison M, 'The legal system and de facto relationships', **Family Matters**, No 30, December 1991, p 31

2 sections 51 (xxi) and (xxii)

The common law

10.3 The control and alteration of property interests between people living in a de facto relationship is subject to differing state legislation which has attempted to rectify the injustices and inequities which can result under common law. Where there is no state legislation, the principles of common law still apply to the property of de facto relationships. Common law principles also apply when parties elect to opt out of state legislation and to proceedings concerning third parties to a de facto relationship.

10.4 In applying common law principles there is a large range of possible actions available to the parties. The principles conceivably applying to property disputes between de facto parties includes contractual principles, express and implied, the laws relating to trusts, both express and constructive, and other property law applications such as *quantum meruit*[3], restitution and equitable liens. As there is such a wide range of possible proceedings between de facto parties any litigation can be expected to be expensive and complex. The collation of material and preparation for a trial in such complex areas results in expensive and lengthy proceedings.

10.5 With such a diversity of actions and remedies available to de facto parties many problems arise as the applicability of common law principles vary from case to case. There is also no predictable range of results. Pleadings between the parties may be lengthy and protracted and, as this is a very complex area of the law, negotiations between parties may not take into proper account or consideration of all legal principles which may apply to a particular matter.

10.6 A very real deficiency in the application of common law, in comparison to proceedings under the *Family Law Act*, is the inability to take into account the non-financial contribution of a party to the acquisition and conservation of property. A fundamental difficulty with the application of common law principles is that they are based on a strictly proprietary nature and may not provide a suitable or appropriate remedy in relation to what are essentially personal relationships.

10.7 The Committee notes that s43 of the *Family Law Act* requires the Family Court to have regard to the need to preserve and protect the institution of marriage as one of the principles to be applied in the exercise of its functions within some of its jurisdictions. Notwithstanding its consideration of the issue of jurisdiction in de facto property disputes, the Committee emphasises its concern that the notion of marriage not be in any way devalued and that it in no way equates legal marriage with a de facto relationship.

10.8 The Committee is not concerned with the morality or otherwise of de facto relationships. Rather, its concern is that people should be treated equally and fairly

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3 *Quantum meruit* is the reasonable amount to be paid for services rendered or work done, when the price for such service or work is not fixed by contract.

before the law. In the case of de facto couples who separate and enter into a property dispute that equality of treatment does not exist at present. (It should be noted that the committee is primarily concerned here with marital like relationships, but not homosexual relationships. 'Shared property' in the non-marital context is not under consideration in this report.[4])

10.9 This position was stated succinctly in a submission to the inquiry from Dr T Deklin:

> The role of law is to prevent injustice that results from human relationships or to provide remedies for injustice. Two aspects of a de facto relationship that have called for justice are the welfare of children and property rights. Two states, Victoria and New South Wales have responded positively to these demands through limited statutory provisions.
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> The Federal government should also follow suit. The object of such a task is to redress injustice arising from consequences of the de facto relationship rather than a recognition of the relationship as such.[5]

10.10 The problems for disputing de facto partners who are obliged to go to the supreme courts were summed up in evidence in Perth:

> In many states disputes arising out of relationships are still presently heard under common law, which means that they need to go before supreme courts for hearing. These disputes often become very protracted, very lengthy, and take a great deal of time and cost to be heard and resolved in the supreme courts.[6]

10.11 It was argued that it was in the interests of justice and consistency for the de facto couples to be brought within the jurisdiction of the Family Court:

> The reasons for this are that I think people have come to understand more about the processes of the Family Court and understand that they have easier access to that Court where they can argue the kinds of matters that arise when you have family breakdown. That Court recognises the non-financial contribution that a partner may make in the home, raising children, caring for household duties and all of that type of work that traditionally women have done. It is for those reasons that we feel that

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4 The Queensland Law Reform Commission has produced a report called **Shared Property**, which encompasses the issue of the division of assets in a non-marital context.

5 Submission 401, Vol 10, p 2025

6 Transcript, 20 February 1992, pp 1084-5

there should be some recognition that it could come under the Family Court.[7]

10.12 It was further stated that to continue to ignore the issue was an injustice:

> At the end of the day, when the relationship finishes, particularly where there are children, there should be the same recognition of the importance of the contributions of a partner as a home-maker and rearer of children in a de facto relationship as applies in a de jure relationship.[8]

10.13 The National Women's Consultative Council argued also that injustice was likely to occur, given the state of the law relating to de facto relationships:

> However, it [the law] generally operates to the detriment of the person who does the major part of the unpaid work in the home, and who bears and cares for the children of the relationship. This is because common law relating to de facto relationships makes it clear that, basically, the person who puts the money directly into property is the person who owns the property. The other person is obliged to make out an argument as to constructive trust, etc. in order [to] gain a share of the property. This is far more complex, costly and has less certainty than does property division operating under the *Family Law Act*.[9]

10.14 Such comments highlight the non-recognition in the common law of non-financial or indirect contributions to the acquisition and maintenance of property. In order for a party to a de facto relationship to establish any claim to property it is necessary for that party to establish a constructive trust or some such other common law device. Any litigation is likely to be lengthy and costly, with no predictable outcome.

Major issues

10.15 The major issues for the Committee were:

- 10.15.1 the definition of 'de facto' relationship;
- 10.15.2 whether the *Family Law Act 1975* should be amended to include the jurisdiction over property disputes between de facto couples;
- 10.15.3 whether the Family Court should exercise jurisdiction over de facto property disputes;
- 10.15.4 how such a jurisdiction should be effected.

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7 Transcript, 20 February 1992, pp 1085-6
8 ibid, p 1098
9 Submission 873, Vol 26, p 5219

The definition of 'de facto relationship'

10.16 For the purposes of proceedings in relation to children under the *Family Law Act*, s60 defines 'de facto relationship' as 'the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other'. This definition was inserted into the *Family Law Act* in 1991 following the reference of powers from some states in relation to laws concerning custody and guardianship of and access to ex-nuptial children.

10.17 In evidence to the Committee, the Chief Justice supported the view that jurisdiction in relation to de facto couples should be confined to those relationships between men and women of a 'marriage-type'. The Chief Justice argued that the Commonwealth should concentrate on legislating for such relationships, because they were the greater in number and because often the relationship produces children.[10]

10.18 If a uniform legislative proposal is to be developed in relation to de facto relationships it will be necessary for 'de facto relationship' to be clearly defined. The Committee is of the view that the definition contained in s60 of the *Family Law Act* for the purposes of proceedings in relation to children, would suffice for proceedings between de facto partners in relation to the alteration of property interests.

Legislative amendment for the recognition of de facto relationships

10.19 Over the last decade or so both the States and the Commonwealth have enacted legislation recognising de facto relationships for various purposes. There has been very little uniformity and commonality in these different pieces of legislation:

> ...there are a myriad of state and federal laws that rely on different definitions applying in different circumstances, causing de facto relationships to attract more legal recognition in one state or for one purpose than they do in or for others.[11]

10.20 Legislation governing de facto relationships has been enacted in New South Wales, Victoria, and the Northern Territory. That legislation is the *De Facto Relationships Act 1984* (NSW), *Property Law (Amendment) Act 1987* (Vic), and the *De Facto Relationships Act 1991* (NT) respectively. Queensland has recommended the introduction of its own legislation and Western Australia may pass its own legislation in the near future. It should be noted that the Victorian legislation only covers real property.

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10 Transcript, 29 May 1992, p 1965
11 Harrison M, op cit, pp 30-31

The De Facto Relationships Act 1984 (NSW)

10.21 The New South Wales legislation was a response to a 1983 report of the New South Wales Law Reform Commission, which examined specific areas of the law to determine whether there were injustices or significant anomalies in relation to de facto relationships vis-a-vis marriage relationships and what remedial action should be taken. The resulting legislation came into effect in July 1985. De facto relationship was defined as it is in the *Family Law Act*, with the further requirements that, 'except where a child is born of the relationship, or the applicant has made substantial contributions that would otherwise go uncompensated, or has care and control of the respondent's child, the parties must have cohabited for at least two years before any order may be made'.[12] The main provisions in the Act relate to adjustment of interests with respect to property and incorporate the provisions in the *Family Law Act* dealing with non-financial contributions.

10.22 Generally, the Act does the following three things:

10.22.1 it gives a broad judicial discretion to divide property between de facto spouses;

10.22.2 it gives judicial power to award maintenance between de facto spouses;

10.22.3 it clarifies the validity and binding effect of cohabitation and separation agreements.

The Property Law (Amendment) Act 1987 (Vic)

10.23 The *Property Law Act 1958 (Vic)* was amended in 1987 to include a new Part IX, entitled 'Real Property of de Facto Partners'.[13] As its title suggests, the section only deals with real property - if the partners wish to pursue other remedies available through the common law an action under this section does not preclude them from doing so.[14] Similarly, in NSW and the Northern Territory the parties are not precluded from initiating an action under common law.

10.24 Part IX of the Act came into effect on 1 June 1988 and applies to relationships which had not ended before that date. The relationship must have an appropriate connection with Victoria and have endured for at least two years, except

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12 ibid, p 31

13 The article by Dr Virginia Kovacs in the Law Institute Journal of March 1990 provides the basis for much of the discussion in the following three paragraphs.

14 Section 27 of the Act specifically preserves the right of a de facto partner 'to apply for any remedy or relief' under another Act or law.

where children are involved. The court's powers to alter interests in real property is governed by ss279 and 285. The court can have regard to contributions, financial and non-financial, direct and indirect, as well as contributions to the welfare of the other partner or to the welfare of the family, including a contribution as a home-maker. The court is also directed to consider any written agreement between the parties, although the weight to be attached to the agreement is a matter for the court to decide.

10.25 A major point of departure between arrangements under the Victorian legislation and under the *Family Law Act* is the absence of a 'future needs' provision. Any order made under the Victorian legislation is on the basis of contributions already made and any disparity in the respective earning capacity of the parties and their general situation and needs, such as the necessity to care for children, is not a consideration.

10.26 The Act also differs from the NSW legislation in three major ways:

10.26.1 the NSW legislation provides limited spousal maintenance rights, whereas there are none in Victoria;

10.26.2 the NSW legislation sets up a scheme for the recognition and enforcement of agreements whereas under the Victorial Act the court is to take 'a written agreement into account' in a general way;

10.26.3 the NSW legislation creates an all-encompassing ability to alter property interests; the Victorian legislation only allows for the alteration of real property interests.

De Facto Relationships Act 1991 (NT)

10.27 The De Facto Relationships Act 1991 is substantially the same as the NSW legislation.

Other areas of the law

10.28 There are many areas of the law which now do not distinguish between de facto and de jure marriages. The Commonwealth's social security legislation now refers only to 'marriage-like' relationships and previously that legislation's term 'married person' included de facto spouse. Since 1984-85 both categories of spouse have been treated the same by the Australian Taxation Office for the purposes of the dependent spouse rebate and payment of the medicare levy. Margaret Harrison, in an article in **Family Matters**, outlines additional areas in state legislation where de facto spouses have rights akin to married persons:

> In state legislation, in addition to the provisions on discrimination, domestic violence, spousal maintenance, intestacy and testator's family maintenance ..., all state workers' compensation legislation and several Acts relating to fatal accident claims allow de facto partners to claim payment after the death of or injury to their 'spouse' providing their relationship has continued for a particular time, which varies from state to state.[15]

The jurisdiction of the Family Court

10.29 At present all states vary in their legislative arrangements. This has consequences for parties to a dispute and the outcome of a dispute will be very much dependent on the state in which the action was brought. The Chief Justice of the Family Court had this to say:

> In New South Wales, for example, the rights of people in de facto relationships are much the same as the rights of people in marriages, with the difference being that the court to which they go is the Supreme Court of New South Wales instead of the Family Court. At one stage, the Supreme Court of New South Wales was taking quite a divergent view on the same legislation to that of the Family Court. So you had that peculiarity as well. That, I may say, seems to have settled down a bit and they tend to be adopting a similar approach to this Court in New South Wales.
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> You have in Victoria a situation where real property is subject to the same provisions as that of couples in a marriage but personal property, shares and other things fall to be determined in accordance with ordinary equity principles. Some of the other States are straight common law. I think Queensland is still common law. On the other hand, it is currently considering legislation. Its Law Reform Commission has made recommendations to introduce separate de facto property laws. It seems to me to be essentially a problem, in a country where we have got so much mobility in our community, to have different legal regimes in different States in relation to areas of this sort. I think it is something that does need to be addressed by the States and the Commonwealth.[16]

Cross-vesting legislation

10.30 The Family Court currently has the power to exercise jurisdiction over property disputes between de facto couples where children are involved. In 1989 the

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15 Harrison M, op cit, p 33
16 Transcript, 29 May 1992, pp 176-177

Family Law Act was amended to allow the parents of an ex-nuptial child to commence proceedings under the Act for the maintenance of children and for the custody and guardianship of, and access to, children. In effect the jurisdiction was extended to all children in the States which referred powers over ex-nuptial children, whereas previously jurisdiction under the *Family Law Act* was limited to children of a marriage.

10.31 Following this amendment to the Act, the States referred their powers in relation to laws concerning ex-nuptial children to the Commonwealth. As a result, where children are involved, separating de facto partners fall within the jurisdiction of the Family Court under the *Family Law Act.* Cross-vesting legislation enables the Family Court to exercise jurisdiction in property matters where the proceedings have been instituted primarily in relation to children. However, it should be recognised that, although the Family Court has the power to hear such disputes, the Court must exercise the relevant State law relating to de facto property settlements or, where there is no specific legislation, the common law.

10.32 The basis and intention of the cross-vesting legislation is that, if proceedings have been instituted in a court having jurisdiction in relation to custody proceedings, then if those proceedings have been instituted in the Family Court of Australia, that Court could exercise jurisdiction over property matters in relation to the disputes between de facto couples. De facto couples may institute proceedings for custody and guardianship of and access to children following the reference of powers from the States to the Commonwealth in this area.

The Family Court's record

10.33 The Committee notes that the Family Court has not been fully utilising its powers under the cross-vesting legislation. In the case of **Chapman v Jansen** (1990) FLC 92-139, the Family Court chose not to exercise jurisdiction in relation to a property settlement, referring the case to the State Supreme Court. From the facts, this would seem to be a representative case of many de facto situations and is discussed below. The Queensland Law Reform Commission also noted the reluctance of the Family Court to exercise its jurisdiction under the cross-vesting legislation.

Chapman v Jansen

10.34 In Chapman and Jansen the relationship commenced in February 1980. During the course of the relationship property was acquired and two children were born. The parties separated in April 1988. Following the separation, disputes arose in relation to the children and the property of the relationship. The de facto wife initiated proceedings in the Family Court applying for orders relating to guardianship, custody, child maintenance and property. The parties reached agreement in all matters except the property dispute.

10.35 In relation to the property aspects, the de facto husband applied for the transfer of those proceedings to the Supreme Court under the cross-vesting legislation. He argued that the class of matter was that which is usually heard in the Supreme Court of Victoria and the relevant time for the transfer of the matter was at the time of hearing and not at the commencement of the proceedings. The de facto wife argued that the Family Court should deal with the property matter as it was in the interests of justice that the principles applied in relation to the alteration of interests of property rights between parties to a marriage, either de jure or de facto, should be applied by the one jurisdiction.

10.36 In this case the Court held that if it had not been for the cross-vesting legislation a substantial part of the proceedings could not have been instituted in the Family Court, but would have been commenced in the Supreme Court of Victoria. The Court also held that the hearings of the property application would require the interpretation and application of State law and there were no objective factors which would render it in the interests of justice for the matter, to be heard in one court rather than the other. Accordingly, the Court allowed the husband's application for transfer to the Supreme Court of Victoria.

10.37 The Committee notes that the Chief Justice dissented from the majority decision, highlighting the anomalous situation many de facto couples find themselves in:

> I think that the fact that there are a series of disputes between the parties, some being within the jurisdiction of the Court and some being outside it, is a classic situation for the invocation of the provisions of cross-vesting legislation. It could not, in my view, be in the interests of justice to have two parallel sets of proceedings between the same parties being undertaken in different Courts relating to differing issues arising out of their de facto relationship.[17]

10.38 Following the decision in **Chapman v Jansen** the following practice direction was issued by the Chief Justice of the Family Court:

> **Proceedings Relating to De Facto Property**
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> 1. The reasons of the full Bench in Chapman and Jansen (1990) FLC, 92-139 were handed down on 30 April 1990.
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> 2. Applications which, but for cross-vesting legislation fall outside the Family Court's jurisdiction, should not be filed unless there is a related proceeding within the Court's jurisdiction.

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17 at 77,956

3. Thus, property applications between de facto spouses will not normally be dealt with by the Family Court unless there is a related matter in issue between the parties which falls ordinarily within the jurisdiction of this Court.

4. In the event of such an application being made in this Court, the matter is likely to be transferred to the Supreme Court.[18]

10.39 In evidence to the Committee, the Chief Justice stated that, although there were problems about jurisdiction in relation to de facto property disputes, the Family Court can exercise State cross-vesting jurisdiction in relation to property as it has jurisdiction over the custody of children of de facto relationships,[19] (albeit not always exercised). However, there still exists the problem that the Court must consider the State law in relation to the particular de facto couple. If there are no children or the issue of children is resolved, the current state of the law is that proceedings then have to be sent back to the Supreme Court in the State or Territory in question. The Chief Justice considered that this was a very unsatisfactory situation generally and that full legislative intervention is necessary.

10.40 Notwithstanding the above discussion, there remains the issue of the Family Court's jurisdiction over de facto property disputes, either where there are no children or where the children are no longer dependent. In the latter case the relationship is normally of a long-standing duration, where one partner may be severely disadvantaged by the breakdown of the relationship. At present, the parties in that situation have a very difficult and expensive court battle ahead of them in some States if a claim is pursued.

Submission comment

10.41 The submissions to the inquiry were divided in relation to whether the *Family Law Act* should be extended to property disputes arising out of de facto relationships. There are those who stress the sanctity of marriage and consider that those who have not undertaken a legal commitment should not have redress under the law, those who believe de facto couples should have redress under the *Family Law Act* and those who argue that some people who form de facto relationships do so to avoid the *Family Law Act.* However, the majority of submissions which discussed de facto property were in favour of extending the *Family Law Act* to cover de facto relationships for the following reasons:

10.41.1 to avoid the injustice that presently can prevail on the dissolution of such relationships and to bring uniformity to the law in Australia;

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18 Family Court of Australia, Practice Direction 1990/3, 26 June 1990

19 Transcript, 29 May 1992, p 1963

10.41.2 to put the resolution of such disputes with the 'expert body', ie the Family Court;

10.41.3 to increase the level of certainty of the outcome of such disputes; and

10.41.4 to reduce the time and cost to the litigants.

10.42 Those submissions which argued against the inclusion of de facto property disputes into the *Family Law Act* did so primarily for the following reasons:

10.42.1 a de facto relationship was seen to embody a lesser commitment than marriage and should not therefore be equated with a marriage;

10.42.2 because there was no legal commitment people entering de facto relationships should not have the protection of the law;

10.42.3 some people deliberately chose not to marry, in order to avoid the provisions of the *Family Law Act.*

10.43 To elaborate on the last point, a number of submissions made the point that, having been through the Family Court once before, they were reluctant to put themselves in a position whereby they could lose hard-earned assets again. These were usually couples, one or other or both of whom had assets prior to the commencement of their relationship. Often such submissions argued that only property acquired during the relationship should be the subject of any property dispute.[20]

10.44 Although some submissions argued against the proposition that the State ought not to encroach upon an area where the parties themselves had chosen not to allow their relationship to be so regulated, the possibility of exploitation of the weaker party was raised:

> In my view, and also in my limited experience as counsel dealing with de facto couples, I believe that in many cases (which I am unable to quantify) there is the possibility of exploitation. The decision to enter into a de facto union is not always bilateral. The decision may be unilateral, with acquiescence by the other partner who might have preferred legal marriage.[21]

10.45 Further, the NWCC pointed out that although there are those who may believe they are escaping the operation of the law, they are deluding themselves, given

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20 Submission 186, Vol 4, p 941
21 Submission 723, Vol 21, pp 4142-3

that NSW and Victoria have specifically targeted legislation and the fact that they are in any event subject to the common law in the other states.[22]

10.46 The submission from the Australian Association of Social Workers argued that it was the duty of the state to protect those citizens who were vulnerable, giving the following example:

> The law of Queensland in particular fails to do this in the case of women in de facto relationships. In this state, a woman may have lived in a relationship for many years, performed the tasks of a homemaker and assisting the male partner to build up assets by this division of labour, but have virtually no claim on those assets if the relationship ends.[23]

10.47 The Domestic Violence Crisis Centre pointed out why it was that women were particularly vulnerable in de facto situations:

> It is largely women who suffer financially from the unavailability of family law remedies and procedures. This is because women often do not have control of assets acquired jointly or for joint benefit, and are more likely to make indirect financial contributions to the acquisition of assets.[24]

10.48 The Family Law Council submitted that the powers in relation to the property of persons in a de facto relationship should be transferred from the States to the Commonwealth. It argued that the non-economic contribution principle, that is, the recognition by the courts of the value of a home-maker still applied. The Council argued that common law principles which have been applied to de facto relationships are complex and expensive and do not take into account the non-financial contribution of the homemaker that is taken into account under the *Family Law Act.*

10.49 The NSW Bar Association concurred with the views of the Family Law Council, arguing for the introduction of one law (Commonwealth) and one court to deal with de facto disputes, in order to avoid the possible variations on the treatment of de facto disputes. The Association recommended this be done by the referral of state powers.[25] The Family Law Practitioners Association of Tasmania made similar recommendations, arguing for uniform nationwide legislation, with the jurisdiction being exercised by the Family Court.[26]

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22 Submission 873, Vol 26, p 5219
23 Submission 650, Vol 20, pp 3846-7
24 Submission 351, Vol 8, p 1805
25 Submission 639, Vol 19, p 3782
26 Submission 299, Vol 6, p 1365

10.50 The submission by the former Chief Justice of the Family Court, the Hon Elizabeth Evatt, argued for a uniform national approach to the question of the property of parties of de facto relationships on the basis that:

> The issues relating to the property interests of de factos often involve a claim based on indirect or non-financial contributions to property. The Court is asked to recognise and to give proper weight to such contributions. A factor common to marriage and de facto relationships is that the parties' contribution to the relationship and to the property may be different in nature. The law of property and trusts does not cater for role division between partners and generally does not recognise that interests in property can arise from non-financial contributions. Therefore, special legislation is needed to ensure that unpaid work and indirect contributions are recognised as the basis of an interest in property, having regard to the circumstances of the relationship.[27]

10.51 The former Chief Justice went on to state that s79 of the Act deals with the issue by conferring a broad discretion on the Court to consider contributions of different kinds and that it should also be possible to exercise a discretion of this kind in relation to de facto couples. She argued that separate legislation is necessary to ensure uniform treatment and that the approach engendered in s79 of the *Family Law Act* is a better model than the NSW legislation and allows the consideration of such factors as the nature of the relationship, the property acquired during the relationship by the efforts of the parties, the contribution of each and the way in which the financial position of the parties has been affected by the relationship.[28]

10.52 The Australian Institute of Family Studies submission recognises that there is a lack of uniformity in the treatment of property disputes in the State courts. The AIFS states that 'originally the move for such legislation grew out of concerns that the combination of common law and equitable devices was causing injustice, particularly amongst older women, and the constitutional limitations obviously prevented any Federal move'.[29]

10.53 The submission from the AIFS argued that the extension of jurisdiction over de facto relationships was a logical extension of the development of the law:

> The issue of legal treatment of de facto relationships and a possible assumption of powers by the Commonwealth is a logical extension of the law's movement in a variety of areas to treat marriage and bona fide de facto relationships as giving rise to identical rights and obligations. There are very few instances now of differentiation between de facto and de jure

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27 Submission 447, Vol 13, p 2611
28 ibid, p 2612
29 Submission 777, Vol 24, p 4655

marriages. The final test may, however, be a question of community acceptance, either because of the fear that marriage has been eroded, or because of the belief that individuals should be able to avoid the responsibilities associated with marriage if they so wish.[30]

10.54 The AIFS also stated that any consideration of the legislative treatment of de facto couples should take account of the issues such as why people choose not to marry, whether such couples are in general similar to, or different from, married couples, whether treating them differently from formally married people would cause injustice and how the law should deal with their disputes if not under the *Family Law Act* - like provisions. The Institute argues that the essence of the issue is whether a de facto relationship should be equated to a marriage.

10.55 One submission[31] argued that despite the improvement in the law resulting from the High Court's decision in *Baumgartner*[32] a statutory regime was required to settle de facto property disputes. However, that submission also commented that the NSW legislation fell short in its failure to include the s75(2) components in the property adjustment. The submission argued that any federal legislation should include the ability of the court to consider the contributions of the parties as well as the 'future needs and resources' of a party, the s75(2) component:

> That is to say, where the future financial position of a de facto partner is weakened because of responsibilities for the care of children, or because of reduced earning capacity resulting from the relationship, it is proper for the court to take this into account, in addition to the parties' various contributions during the relationship, in deciding what would be a fair and just apportionment of the assets.[33]

10.56 Some submissions argued against the broadening of the Family Court's jurisdiction to encompass de facto relationships. Usually objections were based on religious grounds or took the view that those who chose not to undertake legal responsibilities should not enjoy the protection of the law. One religious objection was stated in the submission from the Brethren:

> De facto relationships are according to God wicked, being nothing less than fornication or adultery...The whole concept of living in de facto relationships is to dispense with marriage - with its commitments,

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30 Submission 777, Vol 24, p 4647

31 Submission 760, Vol 22, p 4387

32 In *Baumgartner v Baumgartner* (1987) 11 FLR 915, the High Court showed a willingness to develop a more generalised concept of a constructive trust imposed to prevent the unconscionable retention of disproportionate contributions to a joint relationship. The constructive trust was based, in essence, on the unconscionability of one party's attempt to retain the benefit of the other's contributions to their joint relationship.

33 ibid, p 4388

responsibilities to each other, relative security, and the importance of the family being the basic unit of our society. Such a degrading and corrupt substitute for marriage is obnoxious to every right thinking person having any measure of appreciation of God's law.[34]

10.57 A submission which took the view that de facto couples should not enjoy the protection of the law came from the Endeavour Forum:

> Those who embark on de facto relationships do so deliberately because they wish to avoid the legal responsibilities of marriage. They should not, therefore, be given the benefits of marriage.[35]

The Constitutional Commission

10.58 The Constitutional Commission, which reported in 1988, considered the question of Commonwealth jurisdiction in the area of family law and, specifically, the question of jurisdiction in relation to de facto property disputes. The Commission concluded that:

> ...it is artificial to decide issues arising between de facto partners in the Family Court under federal law if they involve the custody, guardianship or maintenance of, or access to their children and in a State court under State law if they involve their property. The consequences of family breakdown should be dealt with under the one law in the one jurisdiction. This is particularly important in view of the difficulty of separating property and financial issues which may arise between de facto partners from the issue of maintenance of any child who is or had been part of their family.[36]

10.59 The Commission went on to recommend that the Federal Parliament be given legislative power over 'property and financial rights between persons who are or were living together as if they were husband and wife'.[37] The Commission, in support of their recommendation, argued that, while they were not supporting the abolition of the distinction between married and unmarried couples, they felt that it was irrational to divide legislative power in such a way that inter-related issues within the same family must be determined in accordance with different sets of laws.[38]

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34 Submission 328, Vol 7, p 1554
35 Submission 215, Vol 5, p 1042
36 Final report of the Constitutional Commission, Vol 2, p 686, para 10.228
37 ibid, para 10.229
38 ibid

The constitutional question

10.60 The essence of the question about jurisdiction lies with the constitutional power of the federal government. At least two submissions, one from the NWCC[39] and one from Dr H Finlay,[40] argued that the definition of the marriage power had been interpreted unnecessarily restrictively by the High Court:

> The NWCC considers that it is possible to make a clear argument that at the time of the passage of the Constitution 'marriage' would have been taken to include common law marriage: such marriages were relatively common at that time, or at least their existence was well known and accepted in law.[41]

10.61 Dr Finlay referred to evidence to the previous Select Committee in his submission:

> It was submitted by Professor John Wade before the Joint Select Parliamentary Committee on the Family Law Act in 1979 that 'it is reasonably strongly arguable that the meaning of marriage historically includes a range of de facto relationships'. The question whether this consideration would enable the Commonwealth to exercise legislative power under the existing constitutional structure with respect to de facto unions does not, however, appear to have been pursued at that stage.[42]

10.62 However, it is not likely that constitutional interpretation will be expanded to the point where de facto relationships will be taken to be included within the marriage power. The only alternatives in that instance are to amend the Constitution or to convince the States that they should refer their powers in this area to the Commonwealth. Of the two alternatives it would appear that the latter is the more realistic and the more achievable, notwithstanding that even this measure could take some time.

10.63 If such a process is to be undertaken there remains the question of how de facto relationships will be dealt with under the law, whether they are dealt with in exactly the same way as marriages or whether they receive specific attention, either within the *Family Law Act* or in separate legislation.

10.64 A number of submissions did refer to the fact that people entered into de facto relationships to avoid the operation of the *Family Law Act.* However, the extent

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39 Submission 873, Vol 26, p 5119
40 Submission 723, Vol 21, p 4136
41 Submission 873, Vol 26, p 5222
42 Dr H Finlay, Submission 723, Vol 21, p 4141

of such a motive is not known to the Committee, nor is the Committee aware of any research that might gauge the incidence of this motive.

10.65 De facto relationships, once there had been a referral of powers, could be brought within the jurisdiction of the Family Court either by an amendment to the *Family Law Act* or by enacting separate legislation. Buckley J argued, from a personal point of view, for separate legislation covering de facto relationships vesting jurisdiction with the Family Court:

> Our preferred position is that if you decide that there should be such legislation then we do not want to see it by way of amendment to the *Family Law Act*. You have to set up a separate Act under which we would then hear the cases.[43]

Queensland Law Reform Commission

10.66 In a discussion paper issued by the Queensland Law Reform Commission in October 1991 entitled **Shared Property**, the Commission stated that arguments in favour of referring powers to the Commonwealth included:

10.66.1 the existing expertise of the Family Court in family matters;
10.66.2 the speed of resolution of matters in the Family Court;
10.66.3 conciliation facilities available under the *Family Law Act*;
10.66.4 the familiarity of legal practitioners with the procedures in that court; and
10.66.5 increased certainty of outcome.

10.67 Although the Commission came to an interim conclusion that the Family Court was the appropriate forum to resolve property disputes in domestic relationships,[44] the Commission went on to conclude that enactment of State legislation was the preferred option for the following reasons:

10.67.1 a referral of powers to the Commonwealth was not likely in the near future;

10.67.2 the interpretation of the State and Commonwealth cross-vesting legislation together with the recent practice direction of the Family Court did not facilitate the determination of [de facto property disputes] by the Family Court.[45]

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43 Transcript, 29 May 1992, p 1965
44 QLRC, **Shared Property**, Discussion Paper No 36, October 1991, p 9
45 ibid, p 13

Conclusions

10.68 The Committee grappled with the issue of whether or not the Family Court should have jurisdiction to deal with property disputes between de facto partners and if so, in what way that jurisdiction should be effected. The issue presented something of a conundrum for the Committee, given the commitment expressed in the *Family Law Act* to support the concept of marriage.[46] The argument that the recognition of de facto relationships erodes the sanctity and importance of marriage is noted by the Committee. The Committee considers that statutory recognition of de facto relationships for the purposes of dealing with the consequences of such relationships is not inconsistent with the statutory recognition of the importance to the family of marriage. The Committee notes the Working Paper of the Queensland Law Reform Commission, brought down in September of this year, which concluded that parties to a de facto relationship (draft legislation sets out how parties will qualify for this status) should have as far as possible the same property rights 'as a married couple' on the dissolution of their relationship.[47]

10.69 A de facto relationship is defined in s60 of the *Family Law Act* as 'the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other', frequently in marriage like relationships. The Committee is of the view that property disputes resulting from the breakdown of such relationships are best dealt with within the ambit of the Family Court for the purposes of settlement of those disputes. The Committee regards the current complex situation and the lack of uniformity of both process and outcome for the resolution of property disputes arising out of de facto relationships as undesirable. The Committee is also mindful of the fact the the Family Court is well placed to decide such disputes through their expertise and experience in dealing with such issues since the Court's inception.

10.70 The Committee is of the view that, having regard to the narrow interpretation of the existing cross-vesting legislation and the reluctance of the Family Court to exercise its widest powers under the cross-vesting legislation, there is a need for a reference of powers from the States in relation to property, similar to the reference obtained in relation to ex-nuptial children. The Committee notes that the submission from the Family Court states that the option for a referral of powers from the States to the Commonwealth is currently on the agenda of the Standing Committee of Attorneys-General,[48] but it is unaware of any action currently being taken on this matter by that Committee. The Committee therefore believes that the Commonwealth Government should seek the immediate referral of powers from the States in relation to property disputes between de facto partners. The Committee has concluded that legislation should be introduced based upon the same definition which exists in section 60 of the *Family Law Act* relating to de facto relationships.

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46 Section 43
47 QLRC, Working Paper No 40, September 1992, p 39
48 Submission 940, Vol 30, p 6015

10.71 The Committee agrees that the Family Court should have the jurisdiction to decide de facto property disputes, and the Commonwealth should seek a referral of powers from the states to that effect. The mechanism by which the Family Court will be given the jurisdiction is a matter for the Government to decide.

Recommendations

10.72 The Committee recommends that:

84 **there be no amendment to the *Family Law Act 1975* in respect of de facto relationships;**

85 **the Commonwealth Government seek a reference of powers from the States in relation to the jurisdiction of de facto property disputes;**

86 **the Commonwealth Government legislate separately in relation to jurisdiction in property disputes between de facto partners; and**

87 **the jurisdiction of this Act be vested in the Family Court.**

CHAPTER ELEVEN: FAMILY FARMS

Family farms and property settlements
Case law
Submission comment and other evidence

Family farms and property settlements

11.1 The Committee considered whether or not family farming businesses should receive different treatment from other forms of property in the event of a property dispute. The major problem is that, following a property settlement, farms may need to be sold to pay out one or other of the parties and there is, in effect, no protection to ensure the continuing viability of the farming business. This may have an effect, not only upon the separating spouses, but also on other family members. In some cases this may involve property which has been passed down from generation to generation.

11.2 In evidence to the Committee, Deputy Chief Justice Barblett stated:

> I come from Western Australia where all the farming cases come from. There is no doubt that the decisions are hard. But I think that claims are somewhat exaggerated in fact, because rarely would a short marriage without children entitle a spouse to get anywhere near the family farm. But if it is a marriage of 25 years, where a spouse has got four or five children, then it has to go.[1]

11.3 Also in evidence, the Chief Justice of the Family Court stated that:

> I think there is no doubt that the Court does attempt, as far as it can, to alleviate the sorts of problems associated with farms and businesses within the existing law.[2]... The law does not draw a distinction between farms and any other form of property. The question is whether it should, I suppose. It has to be a question for the legislature.[3]

1 Transcript, 29 May 1992, pp 1949-50
2 ibid, p 1950
3 ibid

Australian Law Reform Commission report

11.4 The ALRC report on matrimonial property discussed the key issue of whether businesses and farms acquired during the marriage should be included as matrimonial property.[4] The report drew an important distinction between the acquisition of a farm during the marriage and a farm which may be inherited:

> In farming families, matrimonial property law arouses sensitivities where there is a tradition, or at least an expectation, of passing the farm to the next generation.[5]

11.5 The ALRC report criticised the *Family Law Act 1975* for failing to give any clear guidance on the appropriate treatment of businesses and farms. The report noted that this was a controversial aspect of the wide discretionary jurisdiction created by the Act. The report states that the protection of the business or farm, and of the income earning capacity of the spouse, is an important factor in determining the most appropriate orders to give effect to the assessment of the parties shares in the value of the property.[6]

11.6 An issue of significance in this area is whether the farm has been purchased during the course of the marriage, the degree to which it has been built up or developed during the marriage and whether or not it is clearly the product of the shared endeavours of the parties to the marriage. The ALRC report favoured the equal sharing approach to farms and businesses, but did acknowledge that if the business was owned by one spouse before the marriage or was acquired by one spouse by gift or inheritance, this could provide a ground for departing from the equal sharing approach.

11.7 The ALRC report concluded that legislation should clarify the approach to be taken to farming property.[7] It recommended that the parties' entitlements to share in the value of the property of the marriage should be determined and then the legislation should provide appropriate protection for farms and businesses. The report recommended that the proposed legislation should prohibit any order that would require the sale of a farm or business which would have an adverse effect on the running of a farm or business, unless the Court can make no other just order that would give effect to the parties' entitlements.

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4 Australian Law Reform Commission, Report no 39, **Matrimonial Property**, p 126
5 ibid, p 127
6 ibid
7 ibid, p 174

Family Court of Australia

11.8 The submission from the Family Court of Australia states that the same provisions of the *Family Law Act* apply in proceedings in respect of the property of parties to a marriage, regardless of the nature of that property or of the financial resources of those parties.[8] The Court notes that while the same statutory provisions were applicable to the farming cases as in other property cases, disparate views evolved in the Court.[9]

Case law

11.9 The Family Court's submission provided a useful analysis of the major cases in relation to farming disputes. The first case referred to is in the matter of **Scott v Scott** (1977) FLC 90-251. In that case the trial judge attempted to distinguish rural properties in the following manner:

> In my view land which is used for farming purposes and which is essential to the production of an income is in quite a different category from land which simply provides 'a place for the family home'. If the continued availability of the land is essential to one spouse as a place on which to work and produce income, in my opinion, any property order affecting such land should not affect its production capacity or seriously reduce its income producing potential.[10]

11.10 As the Family Court's submission states, the trial judge was intent on preserving the farm as a production entity for the farmer husband. Such an approach may lay too great an emphasis on the retention of a farming property compared with having regard to the future needs of the spouses, particularly where children are involved. The Committee acknowledges that the approach taken in **Scott v Scott** may not necessarily result in a just and equitable distribution of property between the spouses. However, it maintains an income producing entity, which may be of immediate benefit to the children.

11.11 The Family Court's submission[11] states that the first departure from the approach taken in **Scott v Scott** was by the Full Court in the case of **Magas v Magas** (1980) FLC 90-885. In that case the Full Court stated:

> I would agree with respect with what His Honour there says but with this rider. If arrangements can be made which would relieve the spouse who

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8 Submission 940, Vol 30, p 6043
9 ibid
10 ibid
11 ibid

was working a farm as a farmer from selling the farm but at the same time doing proper justice to the claim of the spouse who was not living on the farm, then of course those arrangements should be made. His Honour, the Learned Trial Judge in this case has arranged things so far as he can do to that end. I appreciate that it is not an ideal situation but few of the cases which come before this Court are. If there is no other way to do that which is just and equitable then a sale must take place. It becomes an incident of the sad fact that when two persons separate, property which might have given them together a reasonable competence will not be sufficient for each of them when divided; this is an inescapable situation and cannot be used as an argument to deprive one party of that to which he or she is otherwise properly entitled. The suggestion was made that the husband would be placed in a better position if the period of repayment to the wife were extended or if the interest which the husband had to pay to the wife was reduced. I must admit I found some attraction in those propositions but ultimately I have come to the conclusion that if this Court were to do so, this Court would be unduly interfering with the decision of the Learned Trial Judge.[12]

11.12 The Committee acknowledges that if an arrangement is to be made over a period of time to pay one spouse an entitlement which they may have in relation to farming property, then the concept of a clean break between the spouses following the separation is not being complied with. The Committee also notes the reluctance of the Full Court to interfere with the discretion of the 'Learned Trial Judge'. As previously discussed, the Committee is of the view that the wide discretion of trial judges has resulted in the uncertainty and unpredictability of decisions emanating from the Family Court and was the subject of much criticism to this inquiry.

Lee-Steere v Lee-Steere

11.13 The leading decision in relation to rural farming matters is that by the Full Court in **Lee Steere v Lee Steere** (1985) FLC 91-626. In that case the Full Court stated:

> The fact that the subject of property proceedings under s79 is a farm may give rise to considerations as to the ways and means by which property division should be effectuated, a matter which will be discussed later; but there is no 'farming case' exception to the ordinary principles applicable under s79 of the Act. Although the Full Court in Magas v Magas ... sought to distinguish the decision of Demack J in Scott v Scott ... without formally overruling it the approach indicated by His Honour in the remarks earlier cited is in our view quite inconsistent with the Act and the view expressed by the full Court in Magas v Magas.

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12 ibid, pp 6043-44

> By the same token it is wrong to approach a farm case on the basis that the applicant wife should only receive an amount which adequately meets her needs without considering first her entitlement by way of contribution. The needs approach was rejected by the Full Court in Albany v Albany (1980) FLC 90-905.
>
> **We must therefore reiterate that in relation to farming properties as in relation to all other assets be they business assets or suburban land the ordinary principles of s79 of the Act apply.**[emphasis added][13]

11.14 As a result of this decision the same principles were to be applied in the alteration of interests of farming properties as those to be applied in other property disputes. This decision thereby overruled the approach which was taken in **Scott v Scott**.

Submission comment and other evidence

11.15 In evidence to the Committee, the Law Council of Australia, drew attention to the provision in the *Family Law Act*, whereby the Family Court has the opportunity to consider whether farming or other businesses should be treated any differently from other property.[14] The Council referred to section 79(4)(d) of the Act which states that the Court should take into account 'the effect of any proposed order upon the earning capacity of either party to the marriage'. In referring to Lee Steere's case the Council acknowledged that the farmer would not get a greater benefit in the community than anybody else, and that the farmer's spouse is entitled to her share of the assets as is the suburban spouse.[15]

11.16 Both the Law Council of Australia[16] and the Family Court of Australia[17] argue that a policy change by government would be required if farmers are to be treated as a separate category.

11.17 The Family Court's submission stated that the Full Court in **Lee Steere v Lee Steere** went even further in overruling and departing from the principle of **Scott v Scott**. The Family Court's submission states that after discussing the balancing of contributions of the parties to the marriage the Full Court said:

> Thus, if the parties at the inception of the marriage acquire a farm of value and build it up through equal shares in their respective

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13 at p 80,076
14 Transcript, 27 March 1992, p 1345
15 ibid
16 ibid
17 Submission 940, Vol 30, p 6045

> spheres, the conclusion that the contributions are equal would be difficult to resist.[18]

11.18 The situation outlined above really relates to the acquisition and development of a property after the marriage has taken place. The issue of a property which may have been inherited or was brought into the marriage by one spouse is not addressed. The decision of **Lee Steere v Lee Steere** also reinforces the principle of equality of the parties when it stated that 'the longer the duration of the marriage, depending on the equality and extent of her contribution, the more the proportionality of the original contribution is reduced'.[19]

11.19 It seems that there is a contradiction in the approach taken in Lee Steere's case compared with the approach in Mallet's case where the High Court clearly stated that equality was not to be a starting point. The Committee acknowledges that the contribution made at the time of a marriage may well be offset by the non-financial contribution of the other spouse during the marriage. However, the issue of whether the non-financial contribution relates to the 'matrimonial home' concept in a rural property or in relation to the actual and direct contribution to the farming business still needs to be addressed, as does the question of whether a distinction needs to be drawn within rural properties in relation to the 'matrimonial home' portion compared with the 'business' portion.

11.20 In evidence to the Committee the Law Council of Australia[20] suggested that the use of pre-nuptial or pre marriage contracts or agreements could be taken advantage of by farming families. The Council stated that:

> It gives an opportunity to farming families, families who have had property in the family for a long time, families who have got sons coming on that want to go onto the land. They are worried that any future marriages motivated for the wrong reasons will result in impecunious circumstances arising later in the family's generational history. That would be one occasion on which you might use pre-nuptial agreements.[21]

11.21 Individual submissions to the Committee expressed concern in relation to the approach adopted under the *Family Law Act*, particularly where a property has been inherited and there is a desire to pass on the inheritance within the family. There has also been concern expressed in relation to marital property disputes having a consequential financial impact on the extended family. The following case studies illustrate the problems currently being experienced by people in such situations.

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18 ibid
19 at p 80,078
20 Transcript, 27 March 1992, pp 1345-6
21 ibid, p 1346

11.22 This case concerns the wife of a farmer in Queensland[22] where it is stated:

> My husband and his half brother in partnership are on a dairy and grazing property in Queensland. It is the brother's marriage that has ended in divorce and we are caught in the middle of a bitter settlement wrangle. After three years the case was finally brought before the court. In this time the brother-in-law obtained two assessments of the property, while she had only the one assessment. Her evaluations ..... were nearly twice that of his.
>
> ... half of the estate awarded to his ex-wife came to the overwhelming sum of $640,000, $50,000 payable by 21 days the rest to be finalised after 18 months, with interest accruing after six months. This staggering sum can't be obtained without selling most of the property. Now this involves us.

11.23 In this case the farm had been operated by the partners for 40 years. The partner not involved in the divorce wanted to retain the property and pass it on to the sons. The case highlights the situation of a third party not being involved in a divorce suffering financially and being without any protection of their interests. The submission continued:

> The brother-in-law will have no inheritance to pass to his son either. His ex-wife ... will end up with all the inheritance and the two men, who spent a life time working hard will end up with less than nothing.
>
> It encourages wives like her to walk out of a marriage and leave nothing but hurt and despair behind her. Are city people punished as severely as farmers? They don't lose their jobs or their ability to earn a living, then why should a farm be considered as just so much disposable asset. In many cases these very farms have been in the family for generations and at the whim of an insensitive judge all of that is brought to an end.[23]

11.24 Another submission from Queensland highlights the difficulties associated with inherited properties. The farmer states:

> I have recently been involved in a divorce and property settlement, which I believe I was unfairly and unjustly treated, I was ordered to pay in excess of $600,000.00. This amount was arrived at by way of percentage of property value. Property which had been gifted to me by my father only three years prior to separation. The court decided that my wife had contributed nothing to the business, except to say she was a good mother...

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22 Submission 62, Vol 2, pp 415-416
23 ibid

I have no dispute about paying my wife half of what we made together while we were married. I just feel it is unfair that one judge...can have so much power as to wipe out three (3) generations of farming.

She came into the family with nothing and left with $600,000.00...this farm now is total ruin...and what does this farmer do for the rest of his life! Join the dole queues![24]

11.25 Another submission stated:

...assets taken into a marriage should be able to be taken out after a divorce. All assets gained during marriage should be divided equally. This is particularly relevant in rural cases...[25]

11.26 A submission from Bathurst argued that there is no justice under the present system:

We are both in our sixties, we have two daughters (and) one son, we got rid of 3/4 of our assets to our son over a period of approx. five years - he married a divorced woman in 1986 - she left in 1989 - this woman is now suing our son for 1/2 million dollars. To make matters worse, she came here on the dole. Even if she only gets a 1/4 of this amount - we don't think we can finance this amount in these times.

...(our son) may have to sell up, (and) all his assets, that we both acquired of a life-time - therefore we don't have assets to borrow on anymore.[26]

11.27 These submissions are examples of complaints that one spouse is receiving an alleged unjustifiable proportion of assets with little or no contribution and a situation is created where the income producing resources are being dissipated. They support claims for an alternative approach to these cases. A submission from a farmer in Walcha stated:

I believe a better and fairer way to resolve property disputes that involve rural land and businesses is to look not at the asset value, but at the income available to be split between both partners and the requirements and needs of both. As farming involves a large amount of capital for such a small return, often less than five percent, it is impossible to raise further capital to pay out a partner. ...I consider that there is a very real need

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24 Submission 157, Vol 4, p 816
25 Submission 341, Vol 8, p 1718
26 Submission 357, Vol 9, p 1829

today for marriages that involve substantial property and business interests to be subject to a pre-marital agreement.[27]

Evidence at public hearing

11.28 While the analysis of existing case law tends to suggest that just and equitable results may be achieved in the resolution of farming disputes, evidence taken by the Committee does not support this attitude. In Launceston a witness stated:

> I am a farmer from the north-west coast of Tasmania. My reason for asking to be a witness at this hearing is that I believe that the Family Court is biased towards the non-active partner within a business, unfair in its judgements as far as inherited properties are concerned, and that the present court system is a very cumbersome and costly exercise to both parties and the Australian community.[28]

11.29 The witness stated to the Committee that after some 16 years his marriage broke down. He advised the Committee that there were four children from the marriage and he stated that his wife had not worked at any stage on or off the farm. The witness stated that his court proceedings were drawn out and held over a long period of time. The witness advised that the court awarded his wife a total of $272,000 which represented 35 per cent of the assets of the marriage. The total cost to the witness was $347,000 which included an amount of $75,000 for legal and other fees. The witness stated:

> After our separation my wife continued to live in a newly built house on the property. I had returned to the family cottage. I was ordered by the court to pay maintenance to my wife at a rate of $160 a week and for my youngest daughter during the one and a half years she spent with my wife, at $100 a week. All our other children were supported in the house by myself.[29]
>
> Although I pride myself on being a highly innovative and successful farmer, my present financial situation has all but destroyed me. I know of many other divorced farmers who have had to sell up their properties and pay out their spouses. It makes life a lottery. How could anyone risk another marriage while this situation exists?[30]

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27 Submission 288, Vol 6, p 1338
28 Transcript, 7 February 1992, p 1016
29 ibid, p 1017
30 ibid

11.30 Another witness in Albury stated:

> I believe that when two ordinary people get married, irrespective of who comes in with what - we virtually got together with just a few hundred dollars and we built our life around that - you gain property, you gain material wealth and all the rest of it. So, if two people gain it, two people should be able to split it up and take it fifty-fifty. In the rural situation, the ownership of rural properties is a little bit different from normal real estate. Usually rural properties are passed down from father to son, so usually there is a lot of family ownership in it. If it is split up on a partner coming into the family, that not only affects those two people who were in the marriage that is splitting up but also it can affect the parents of that family or the grandparents of that family because they could have been originally or could still be in part ownership of it. It does not seem fair to me that one person, a stranger, can come into a family and obliterate a family and what has probably been a sort of heritage in that piece of property.[31]

11.31 This evidence is a representative view of the emotional and difficult issue of the alteration of interests in farming properties, which have been within families for many generations. It also highlights and epitomises the difficulties in approaching rural property disputes following a marriage breakdown.

11.32 The Committee was concerned by other evidence taken in Albury in relation to a matter where proceedings related to property owned by the father of a separated couple. The evidence was that the son had worked on the farm for the father for some years for a salary. The wife's legal representatives argued that the fact the father intended to bequeath the property to the son in his will, implied that a constructive trust had been created and that the son in effect had a beneficial interest in that property. It was further argued that this constructive trust entitled the wife to claim an interest in the father-in-law's property.

11.33 The witness stated:

> The whole crux of it was that they were going to try and create a constructive trust, which means you just pluck it out of the air and the judge says yes, it is a constructive trust. And that has entitled her to a big share of the property which she had no legal right to at all. All the shares are owned by the wife and me, but an intent was even brought into it where they had my will floating around to see whether I was going to leave the son the property when I died. They were going to take all that into consideration. I reckon that is completely unjust. I was an innocent party

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31 Transcript, 1 May 1992, p 1805

to the whole situation. I did not marry her. I did not have anything to do with her, but she dragged me into it.[32]

11.34 The Committee was most concerned with this evidence, particularly having regard to the High Court decision in **Ascott Investments v Harper**, (1981) FLC 91-000, where it was held that the Family Court did not have jurisdiction to make binding orders on third parties to a marriage. Another factor in this case which is of concern to the Committee is that the legal expenses of the father-in-law amounted to approximately $230,000 which did not include the settlement figures for the alteration of property interests. The Committee acknowledges that, although this type of case may not be common, it does illustrate the apparent inequities and injustices which may occur under the current property regime.

11.35 In evidence to the Committee the Western Australian Farmers Federation stated:

> Under the current regime it is very difficult to work out what should be done. One could only suggest that perhaps pre-marital contracts could be appropriate in situations where you have got a property that is in the true sense a family farm.[33]

11.36 The witness continued:

> Where there is an expectation that the property is going to be passed down - it has been in the family for a number of generations and there is the expectation those people who still are alive, the grandparents and grandchildren, that they will be a rural family. Their livelihood depends upon it. One would think that a pre-marital understanding - an enforceable one - would be the only realistic way of dealing with it.[34]

11.37 In response to a question whether a farm should be treated in the same manner as a business, that is, a spouse is entitled to the interest in that property only if it can be shown to be matrimonial property and that they have actually made a contribution towards the acquisition, preservation and operation of it, the witness stated that:

> I do not really think there is a case to separate farms from any other business. What I have said in respect to farming properties could apply equally to family businesses. I do not think you could make [a] distinction.[35]

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32 ibid, pp 1849-50
33 Transcript, 20 February 1992, p 1118
34 ibid, p 1119
35 ibid, pp 1119-20

The 'farm' component vs the matrimonial home

11.38 The Committee notes that a difficulty which arises in property disputes involving family farms is how to actually isolate the 'farming' component of a property from the 'matrimonial home' component of that property. This problem was alluded to by Coleman, J in an article when he stated:

> The decision of the Full Court in **Lee Steere** leaves farmers, other than those who bring to a marriage property inherited or donated or otherwise acquired prior to marriage, with cause for concern in a number of areas; firstly that a trial Judge will regard as equal the contributions of a wife as homemaker and parent as against those of a farmer running and managing a farming enterprise; and secondly, that, when an order is made, a farmer cannot expect to receive terms for payment to a former spouse which are any more favourable than would be the case if a matrimonial home or any other asset were under consideration.[36]

11.39 The Committee recognises that there may be a further complication where a farming interest has been incorporated into a company structure in order to take advantage of specific tax incentives and whether in fact this should be taken into account as matrimonial property. The Committee also notes that the Family Court has been active in investigating structures that may have been established by the spouse conducting the business to deny the other spouse a fair division of assets in the event of a separation. At present the *Family Law Act* in effect recognises two categories of assets. The first is the property of the marriage over which the Court has jurisdiction to exercise control and the other may be a financial resource, such as family trusts, where the Family Court may have difficulty in exercising jurisdiction. Another factor which perhaps should be taken into account is that a marriage breakdown may easily result in the breakdown of the farming business which directly affects the capacity for the production of future income.

11.40 The Committee notes that, for the purposes of assessing capital gains tax under the *Income Tax Assessment Act 1936*, the Act excludes from the operation of the capital gains tax provision for the sole or principal residence of a taxpayer. A dwelling may include adjacent land to the extent the land is used primarily for private or domestic purposes. The size of the land deemed to be used for domestic purposes must not exceed two hectares. In relation to farming properties an allowance of two hectares would also be permitted in the assessment of a capital gains tax liability. This legislative model would be a useful guide in the valuation of the matrimonial home component in resolving property disputes involving family farms.

11.41 The submission from the Family Court stated:

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36 Coleman, J, 'Do Farmers Need Land Rights', **Australian Family Lawyer**, Vol 7 (4), June 1992, at p 9

> A farmer without land is reduced in status to a rural labourer, if he has no other skills his income could drop to that of a field hand. Greater stress should perhaps be given to s79(4)(d) as to the effect of proposed orders in such cases.[37] (Section 79(4)(d) requires the court to take into account the effect any proposed order may have upon the earning capacity of either party to the marriage).

11.42 The evidence from the Western Australian Farmers Federation supports this view:

> The bottom line - and it is a very vague concept perhaps - would be that after the separation, after the division of property of the marriage, the farm still be somehow or other in the hands of the family and be a productive unit. Most farming properties these days are heavily encumbered...usually farmers are so mortgaged up that they cannot obtain finance to pay out the wife. The property has to be sold. He is unemployed because farmers, by and large, are not mobile in the job force...the costs fall back on to the taxpayer. For the benefit of the community, and in the interests of children, the family, and individuals, it would better if somehow or another there was a deferral of the payment to the wife or the husband, whoever it may be, and the unit kept intact and able to produce.[38]

11.43 This statement clearly indicates the predicament of many farming situations, however, the Committee does not favour the deferral of payment to a spouse following a marital breakdown. This is only one factor to be taken into account and it does not comply with the 'clean break' principle in section 81 of the *Family Law Act.* It may also result in protracted and costly proceedings.

11.44 In relation to assessing contributions in farming cases and whether the farmer made any greater contribution than the spouse who looked after the home and children, Coleman, J commented:

> It is submitted that farmers cannot objectively or fairly be said per se to require land rights in relation to the recognition of their contributions to the acquisition, conservation and improvement of farming properties and associated assets. The need is rather for consideration to be given to the nature of the farming activities, what that involves, and the presentation of evidence to portray to city-domiciled Judges, largely uneducated in rural ways, the realities, complexities and immense effort and diverse skills involved in running and maintaining a family farm.[39]

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37 Submission 940, Vol 30, p 6046
38 Transcript, 20 February 1992, p 1122
39 Coleman J, op cit, p 8

11.45 The Committee received correspondence from a practising accountant from Goulburn who had had experience in the Family Court in the valuation of farming properties.[40] That accountant drew an interesting analogy between that of a farmer who needs to rely upon fixed assets for income production, and that of a brain surgeon, solicitor or accountant. It is argued that the latter group of professionals have the capacity to continue their occupation following a marital breakdown whereas the farmer may leave the Family Court with both his assets and his source of income substantially reduced.

Conclusions

11.46 The Committee concludes that there are circumstances where farms should be treated differently from other matrimonial property. The Committee recognises that there are unique matters to be taken into account in relation to farming properties as, usually, the Family Court not only has to take into consideration the fact that there is a business but also that there is a matrimonial home within the farming entity. The major problem in relation to farming property is that, if it is going to continue to be a productive unit, difficulties arise in the actual payment of any entitlement a spouse may have in relation to that unit. The Committee recognises the need, if at all possible, to retain the income producing property for the future benefit of all members of the 'separating' family.

11.47 The Committee also recognises that there are two major fact situations which should be taken into account. The first is where a farm may be acquired and maintained during a marriage and the second is where an existing property is brought into the marriage. Another factor which may have to be taken into account is the issue of where a farm has been inherited and there is an expectation that that farm remain within the family for years to come.

11.48 The Committee is of the view that there ought to be elements built into the *Family Law Act* that will isolate a family farm from the settlement of a property dispute in a marriage. The Act should take into account the manner in which the farming property was brought into the marriage and also take into account the direct contribution to the acquisition, preservation and operation of the farming business. Another important factor for consideration is the length of the marriage. The Committee considers that the longer the marriage, the more justification there is to equality of sharing of the property as a starting point.

11.49 The Committee is also of the view that the ability to establish pre and post marital contracts which are legally recognised would be especially valuable in such instances where rural properties are concerned. The Committee discusses such contracts in detail in Chapter Twelve.

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40 Letter to Committee from Mr G W Gildea, 12 May 1992

11.50 The Committee emphasises that the following recommendations are matters to be taken into account in addition to the existing factors in the *Family Law Act.* The Committee recognises that there are other family businesses to which the principles in the above discussion may apply. The Committee has received insufficient evidence to formulate specific proposals for those other businesses.

Recommendations

11.51 The Committee recommends that:

88 the *Family Law Act 1975* be amended to distinguish farming properties from other matrimonial property so that the Family Court, in addition to other matters, is able to consider the following:

88.1 whether the farming property was brought into the marriage by one or other party or whether it was acquired by both parties and developed after the marriage;

88.2 the necessity for the retention of a farming property as an income producing unit for the future needs of the separating family;

89 the *Family Law Act 1975* be amended to include the above factors as matters to be taken into account by the Family Court in making orders with respect to farming properties.

CHAPTER TWELVE: FINANCIAL AGREEMENTS

Introduction

12.1 The Committee considered the desirability of the wider use of financial agreements and areas where such agreements might be useful. When speaking about financial agreements the Committee means pre-marital or pre-nuptial contracts, post-marital contracts and, where appropriate, separation agreements.[1] Situations where agreements might be beneficial include especially where couples are marrying for a second time, couples where one or both parties bring substantial assets to a marriage and those parties who bring a major inheritance, such as a family farm or business into the marriage.

12.2 The major issues for consideration are:

12.2.1 the legal recognition of pre-marital/separation/financial agreements;

12.2.2 the inclusion of a registration of assets clause at marriage;

12.2.3 the conditions under which such agreements may be altered or set aside by the courts.

12.3 **Australian Family Law Practice and Reporter** argues in relation to pre-marital agreements that, providing there had been candour, good faith and independent legal advice, a court would generally tend to uphold an agreement entered into before marriage as to how the bride and groom proposed to manage their financial affairs.[2] They further state:

> Such agreements ought generally to be conducive to marital tranquillity and to the avoidance of disputes about ownership, use, and descent of

1 Under common law and the New South Wales *De Facto Relationships Act* separation agreements are not legally recognisable unless they have been made after the decision to separate.

2 Australian Family Law Practice and Reporter, CCH, p 26,281

property. Just as the purpose of contract law generally is not so much to govern disputes that arise between contracting parties as to make the position of each party to a contract clear so as to avoid disputes arising, so an agreement between a bride and groom before their marriage may in effect reduce the chances of subsequent argument between them.[3]

The Australian Law Reform Commission report

12.4 The ALRC report on matrimonial property considered extensively the question of financial agreements. The report set out the circumstances in which financial contracts in relation to marriage would be appropriate or useful:

12.4.1 where spouses and intending spouses have a desire for greater certainty than is provided for within the provisions of the *Family Law Act* and where they wish to have control over their financial affairs;

12.4.2 Australia as a multicultural society, has a significant number of people coming from countries where marriage contracts are traditional. Many such people believe that there should be some capacity within the law for spouses and intending spouses to make their own arrangements for the ownership and management of their property and finances during marriage and for its division in the event of separation;

12.4.3 where people live together for a period of time before their marriage and have their financial relationship well established by the time of their marriage;

12.4.4 where the marriage is a second marriage for one or both parties and where the spouses wish to preserve the assets of a former relationship, if not for their own benefit for that of their children;

12.4.5 where there is a vast disparity in the respective assets of the parties to the marriage because of inherited wealth or expected funds from family or other sources;

12.4.6 where rural properties or business assets have been in the family of one of the parties for generations and the family is anxious to ensure their preservation.[4]

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3 ibid

4 **Matrimonial Property**, op cit, p 191

12.5 The Commission concluded that parties ought to be able, before or during marriage, to enter into more effective general agreements concerning their property and maintenance rights in the event of breakdown of the marriage, subject to appropriate safeguards. The Commission stated that their conclusion was provided with considerable support by consultations with members of the public and the legal profession.[5]

Submission comment

12.6 Of the 62 submissions which specifically mentioned the use of pre-marital contracts, only two were against such a mechanism, with the remainder being in favour of the agreements. Of the 60 submissions in favour, 43 specifically supported the legal recognition of such agreements, while 26 submissions also recommended the registration of assets at marriage and a 50:50 split of assets acquired during marriage, if the marriage dissolved. It should be noted here that, of the total number of submissions received, 106 argued that assets held prior to marriage ought not to be included in the pool of property for division on failure of a marriage. No submission which mentioned this issue argued for the inclusion of assets held prior to marriage to be available in the pool of property for division. Mr Rod Burr, Chairman of the Law Council of Australia's Family Law Committee, argued that the reasoning behind such agreements is that adult couples should be able to govern their financial affairs as they see fit and the Family Court should not be able to override those decisions except in special circumstances.[6]

12.7 The use of financial contracts was favoured generally for the following reasons:

12.7.1 the increased certainty the existence of such contracts would bring to the property division;

12.7.2 the ability to protect any assets owned prior to the marriage and acquired either through an inheritance or through their individual endeavours;

12.7.3 the speedier resolution of property settlements through the courts;

12.7.4 the social mores of other cultures, whereby the use of financial agreements on marriage was widespread and acceptable.

12.8 Financial agreements, and particularly pre-marital agreements, were seen to be disadvantageous for the following reasons:

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5 ibid, p 193
6 Bulletin, September 24, 1991, p 32

12.8.1 the existence of such agreements is not conducive to marital stability;

12.8.2 women are disadvantaged given that they are generally in a less powerful bargaining position than men;

12.8.3 it is not possible to foresee all possible developments which could affect the future financial position of both parties.

12.9 The two submissions which disagreed with the use of pre-marital contracts were from the Domestic Violence Crisis Centre and the Anglican Information Office. The Domestic Violence Crisis Centre rejected the notion of giving such agreements legal recognition under the Act, stating that such agreements rarely made fair financial provision in the event of changed circumstances, such as childbirth.[7] The Anglican Information Office regards the concept of pre-marital agreements as being at odds with the trust on which christian marriages are based, arguing that such agreements are counter productive.[8] Another submission disagreed with the notion of a pre-marital contract, arguing that marriage itself was a contract, but did suggest that post-nuptial contracts could be beneficial to the welfare of the marriage and should be legally binding.[9]

12.10 By far the greater number of submissions to discuss financial contracts were in favour of them, particularly recommending that such contracts be legally recognised and acted on by the Family Court. Many submissions which favoured the use of financial agreements were from people who had to liquidate a family property in order to pay the former spouse the amount set down by the Family Court. One submission had this to say:

> I consider that there is a very real need today for marriages that involve substantial property and business interests to be subject to a financial agreement, which would clearly define the interests of both parties, along with possible dissolution arrangements. Such an agreement, I believe, would not only be useful in the event of a marriage break-up, but would be of great benefit in removing many of the uncertainties and doubts that do exist in these marriages.[10]

12.11 Some submissions made the point that the wider use of financial contracts would be advantageous in lessening the adversarial nature of family law proceedings:

> Statistics on marriage breakdown make verbal agreements made at the altar a very risky undertaking. Written and agreed rules of the game must

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7 Submission 351, Vol 8, p 1805
8 Submission 452, Vol 13, p 2680
9 Confidential submission, No 48
10 Submission 288, Vol 6, p 1338

be established before the teams step onto the playing field and not after a disputed game when both teams are sitting in separate dressing sheds.[11]

12.12 As stated above a significant number of submissions argued for a registration of assets or a statement of financial contribution at marriage, which would then enable only property acquired jointly during marriage to be divided in equal proportions on dissolution of the marriage.

12.13 The Committee heard from a number of people who had been financially disadvantaged by decisions of the Family Court to the point where they would not consider getting re-married or even married at all unless they could protect themselves and their property in some way. The following case studies illustrate some of these concerns.

Case study 1

12.14 This case[12] study typifies the problems that the non-recognition of an existing contract has for a person, in this case a father, who was trying to keep a property intact for his children. The study involves a male, B, who worked in partnership with his parents on their property until they had purchased and paid off small holdings for both himself and his brother. The partnership then dissolved and the brothers acquired another small holding, each having a half share. It appears that B worked on the property for at least 6 years prior to marrying. In order to protect the future family, his lawyer drew up a partnership agreement. The lawyer at the time was dealing with two 'rural property divorces' which involved the selling up of the properties.

12.15 The agreement reached was that, in the event of a break up of the marriage, the husband would have the right for his accountant to appoint a valuer and purchase the wife's share of assets over a 10 year period with no interest. The agreement was signed in 1979 and both parties subsequently moved to Canberra, with the husband returning to the farm at weekends. During this time the father and brother assisted considerably with the farm. In 1987 the wife left and wanted half of all assets. After both parties had spent $30,000 in legal costs an agreement was reached whereby B would pay his ex-wife $165,000. B's legal advice was that the Family Court would not take his agreement into consideration. In order to hold the farm together for the children, B borrowed heavily from his family to pay the settlement and also to replenish the farm with stock which had been sold. Had B not had the assistance of his family he would have had to sell his property. The marriage had lasted 8 1/2 years.

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11 Submission 308, Vol 6, p 1399
12 Submission 463, Vol 14, p 2756

Case study 2

12.16 In evidence to the Committee in Launceston, Tasmania, Mr M Badcock described his own situation. He was married in 1970, neither party at that time having any appreciable assets. He and his wife moved into a cottage on his parents' farm. In 1980 he and his parents divided the farming operations and he ended up with ownership of part of the properties:

> It was done with the understanding that I was gaining my inheritance early and since then I have not been part of my parents' will.[13]

12.17 The marriage ended in 1986, with the wife continuing to live in a new house on the property and the husband returning to the cottage. The wife was awarded $272,000 or 35 per cent of total assets, which together with legal fees and costs of $75,000, put the farm into a high debt situation. In response to a question from the Chairman at the public hearing, Mr Badcock responded that he would find it a very risky business to be married again under the present circumstances but did support amendment of the legislation to recognise pre-nuptial contracts as one way of addressing the problem.[14]

The Family Court

12.18 The Family Court discussed the issue of financial agreements in its submission[15] and briefly in its presentation to the Committee on 29 May 1992. The submission discussed the perceived advantages and disadvantages of pre-nuptial agreements, particularly as set out in the ALRC report. The Court, while considering it inappropriate to express a view on changes to the law in this area, did suggest that the following might be a possible compromise:

> ...the Court would be required to take into account, in property or maintenance proceedings, the intention of the parties manifested by an agreement between them in contemplation of marriage or in contemplation of a de facto relationship. It is suggested that this might provide a sufficient degree of certainty of result for contracting parties who prove to have been able to foresee, and make provision for, most developments. At the same time, it is said that the compromise may enable the Court to modify or set aside the agreement where a stipulated period of time has passed and/or where unforeseen significant developments have eventuated.[16]

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13 Transcript, 7 February 1992, pp 1016-7
14 ibid, p 1018
15 Submission 940, Vol 30, p 6017
16 ibid, p 6018

12.19 In oral evidence to the Committee, the Chief Justice stated that financial agreements were 'comparatively rare..., being not worth the paper they are written on'.[17] Nicholson CJ acknowledged that it was a very difficult area and made the following points:

12.19.1 the real problem is how to look into the future at a time when parties are getting married;

12.19.2 there could be aspects of oppression which would be a cause for concern;

12.19.3 pre-nuptial agreements would be advantageous in second and subsequent marriages where people have accumulated substantial assets and which they may want to preserve for their children;

12.19.4 pre-nuptial agreements could become a further source of litigation.[18]

The New South Wales legislation

12.20 Some years ago New South Wales passed its *De Facto Relationships Act 1984.* Part IV of that Act is called Cohabitation Agreements and Separation Agreements. This part of the Act sets out the rules by which such agreements, which are defined as an agreement which makes provision with respect to financial matters between de facto couples, may be recognised for the purposes of the Act. Briefly, the Act provides that:

12.20.1 agreements are subject to the law of contract;

12.20.2 nothing in the agreements affects the power of the court to make orders relating to the custody, maintenance of and access to children;

12.20.3 where the agreements fulfil certain specified conditions set down in s47 of the Act the Court is not able to make an order inconsistent with the agreement, except as provided by sections 49 and 50 of the Act;

12.20.4 sections 49 and 50 of the Act permit the court to intervene, notwithstanding the existence of an agreement. In particular, section 50 provides:

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17 Transcript, 29 May 1992, p 1940
18 ibid, pp 1940-1

> *On an application by a de facto partner for an order under Part III a court may vary or set aside the provisions...of a cohabitation agreement (but not a separation agreement) made between the de facto partners, being a cohabitation agreement which satisfies the matters referred to in section 47 (1) (b), (c), (d) and (e), where, in the opinion of the court, the circumstances of the partners have so changed since the time at which the agreement was entered into that it would lead to serious injustice if the provisions of the agreement, or any one or more of them...were to be enforced.*

12.21 In New South Wales there currently exists the anomalous situation whereby, if a couple is in a de facto relationship, they can have their cohabitation or separation agreement recognised by the courts under the *De Facto Relationships Act 1984*, including the Family Court if their case is heard in that forum under cross-vesting rules, while married couples will not be able to have any such agreement recognised. This situation means that de facto couples have more control over any settlement which may be necessary in the event of a separation, and are therefore in a more favourable situation than married couples. One law firm in Sydney advised the Bulletin magazine that they were drafting twice as many co-habitation agreements as pre-nuptial contracts, putting their popularity down to the fact that they were more enforceable and involved fewer disputes.[19]

Pre-marital property holdings

12.22 A number of submissions calling for the legal recognition of financial agreements concurrently argued for the exclusion of assets held by an individual prior to the marriage. Several submissions also called for the registration of property holdings prior to marriage, if necessary in the form of an attested declaration, certified by a registered accountant. Should a marriage end in divorce, the property held prior to marriage would remain the property of the original owner and only property acquired during the marriage would be available for distribution. Most submissions argued that the division of property acquired during the marriage then be on the basis of a 50:50 property split.

12.23 Another common theme was the registration of gifts made to only one of the parties - ie personal property and those items which comprise personal property to remain the property of the party to whom they originally belonged or to whom they were originally given.

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19 Bulletin, September 24 1991, p 34

Conclusions

12.24 The very process of discussing matters to be included in a financial agreement may help to establish a positive basis for a marriage. The ability to raise and discuss such issues of importance as 'family finances' could be fundamental to the establishment of a partnership that will work in the long term. The Committee concludes that the wider use of financial agreements should be encouraged. The Committee reiterates that, when talking about financial agreements, it is referring to pre and post marital agreements. These agreements could include such matters as a registration of assets and liabilities at marriage, the method by which any division of property is to be undertaken, including consideration of any gifts or compensation payments which may be made to either party, and the means of amending the agreement to take consideration of changed circumstances, such as childbirth.

12.25 The Committee considers that a standard agreement should be developed. Standard contracts are commonplace in other areas, eg wills and property sale contracts, and the Committee considers that having a standard agreement with appropriate flexibility could remove some of the 'stigma' or negative connotations the making of such an agreement can produce. The increased certainty which would exist for the property settlement would have the added advantage of reducing the litigation time in most cases, unless the agreement was disputed, thereby decreasing costs to the individual.

12.26 The Committee is also aware of the necessity for any kind of financial agreement to have, as a starting point, a registration of assets and liabilities of each of the parties to the agreement. Any agreement so entered into by the parties would be a legally recognisable and enforceable document, from which the Family Court could depart only if there were 'material changes in circumstances' which would warrant departure from the agreement. Material changes in circumstances could include, but not be limited to, such events as the birth of a child, the disablement of one of the parties and other events which would have a serious effect on the ability of a person to maintain their present commitments and standard of living.

Recommendations

12.27 The Committee therefore recommends that:

90 **financial agreements be legally recognised and enforceable in the courts under the *Family Law Act 1975*;**

91 **such financial agreements to be in writing, signed by both parties and witnessed by independent persons;**

92 **pre- and post-marital financial agreements to contain a registration of assets and liabilities of both parties;**

93 pre- and post-marital financial agreements to include provision for the variation of the agreement;

94 the ability to amend the register of assets to include gifts received by either party after the marriage be available;

95 it be possible for parties to enter into financial agreements at any time prior to or during their marriage;

96 a standard agreement of sufficient flexibility be developed; and

97 the courts have a residual discretion to intervene notwithstanding the existence of a financial agreement, where the circumstances of the parties have so changed since the time the agreement was entered into that it would lead to serious injustice if the provisions of the agreement were to be enforced.

CHAPTER THIRTEEN: THE ADVERSARIAL NATURE OF PROCEEDINGS AND ASSOCIATED MATTERS

The adversarial framework

13.1 A significant issue for consideration by the Committee in this inquiry was the adversarial nature of proceedings in the Family Court. This issue is at the heart of many of the problems relating to processes in family court proceedings. The Committee is also concerned at the increasing formalisation of court proceedings over the years since the Family Court's inception. This formalisation relates not only to the physical characteristics of court surroundings and the wigs and gowns worn by judges, but also to the very nature of the adversarial legal process itself. The increased and increasing formalisation of proceedings is at odds with the spirit and intention of the legislators when the Act was passed in 1975.

13.2 The Committee considered whether and in what ways the aim of minimising the adversarial nature of proceedings has or has not been achieved and what consequences have resulted from any failure to fulfil that aim of the legislation. The Committee is aware that an appearance or attendance at court can be an intimidating experience for many people and that the court may not be the most appropriate forum for many of those to resolve what are for the most part emotional and personal problems. It is evident that there is added emotion in family law disputes, particularly where these disputes involve children. This being the case, it was necessary to consider whether alternative mechanisms or procedures are better suited than a strictly adversarial legal process to the resolution of family law disputes.

The spirit and intent of the 1975 legislation

13.3 The original intention behind the *Family Law Act 1975* was expressed by the then Attorney-General, Senator the Hon Lionel Murphy, in his second reading speech introducing the Family Law Bill in 1974. At that time he said:

> There are important provisions in the bill for helping persons who contemplate, or have begun, proceedings under the bill to achieve a reconciliation where possible, and for helping persons for whom reconciliation is not possible to resolve their differences with the minimum bitterness and hostility. The reconciliation provisions extend to all proceedings under the bill, not just divorce proceedings. Provisions have been included for more effectively bringing to the notice of parties wishing to institute divorce proceedings, the consequences of divorce and the availability of marriage counselling ... The bill is not presented as my ideal solution to the very difficult problems that arise in this area of human relationships, but is presented as proposals which may be generally accepted now. I would prefer solutions even more compatible with the dignity of the individual. It does not seem right to me that divorce itself should be an occasion for judicial intrusion. It may be different in custody, maintenance and property disputes but even in those the parties should be encouraged to resolve their differences themselves.[1]

13.4 These sentiments were reiterated by the then Prime Minister, the Hon E G Whitlam, in his second reading speech on the introduction of the bill, when he stated:

> The essence of the Family Courts is that they will be helping courts ... These courts will therefore be very different from the courts that presently exercise family law jurisdiction. The Family Court will, of course, determine legal rights which it is bound to do as a court, but it will do much more than that. Here will be a court, the expressly stated purpose of which is to provide help, encouragement and counselling to parties with marital problems and to have regard to the human problem, not just their legal rights.[2]

13.5 The Committee examined:

13.5.1 the nature of the adversarial system;
13.5.2 the nature of family law proceedings;
13.5.3 court procedures and recent initiatives by the Family Court;
13.5.4 the recent *Courts (Mediation and Arbitration) Act*; and
13.5.5 the court environment.

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1 Second Reading Speech, Hansard, 1 August 1974, pp 759 and 760
2 Hansard, 28 November 1974, p 4322

The adversarial and inquisitorial systems

13.6 There are two major trial systems, adversarial and inquisitorial. The adversarial system was developed in common law countries, through the general application of judicial decisions. In the adversarial procedure each party to the proceedings presents its case and an independent tribunal, after listening and taking account of both arguments, makes a decision or determination based upon rules of evidence, as to which is the correct outcome. The inquisitorial system, in use in continental European countries, whose judicial system developed out of Roman law and the Napoleonic Code, involves the conduct of an inquiry by a court or tribunal of its own volition through an examination of the parties which come before it. The parties may or may not have legal representation and there are no rules of evidence.

13.7 Dr Richard Chisholm, from the University of New South Wales, recently addressed a family law conference on the subject of the adversary system and the Family Court.[3] In his paper, Dr Chisholm outlined the following attributes of adversarial proceedings:

13.7.1 proceedings are controlled by parties. It is up to the applicants to decide what arguments to put, with the respondent having a free hand in deciding which evidence and arguments to be used in defence;

13.7.2 an impartial judge presides as 'umpire', to listen to the evidence presented and to see that the cases are presented according to the rules of procedure and evidence;

13.7.3 the decision is based only on material admitted as evidence in proceedings;

13.7.4 the necessity for legal representation in proceedings, the adversary system being such that it is usually assumed that in order for parties to adequately put forward their case they need professional representation.[4]

13.8 The adversary system as described above contrasts with that of the inquisitorial system, where a tribunal can set about gathering evidence on its own initiative. Such a process is similar to that of a Royal Commission or a parliamentary inquiry. Chisholm argues that 'the adversary system is based on the assumption that the best way of discovering the truth is to allow the persons immediately involved in disputes

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3 Chisholm R, 'The adversary system and Family Court developments', a paper for the Family Court Conference, Coffs Harbour, 1 July 1992

4 ibid, pp 3-4

to put their case in their own way'.[5] However, this assumption is based on the following conditions being fulfilled:

13.8.1 it depends on the parties being able to identify their own interests and fight their own battles;

13.8.2 the extent to which this is possible will depend largely on their own personal qualities and their access to adequate legal advice and representation.[6]

13.9 Chisholm argues that the adversary system is part of our legal and social inheritance and that new developments need to be considered in the light of their relationship with that system.[7] The adversarial system comprises a range of elements that vary in importance and changes to the system, where they can be shown to be in the public interest, should not be shied away from. Chisholm's comments are predicated on the continuation of the adversarial system, but making the appropriate modifications to that system, where those modifications can be shown to be beneficial.

13.10 The inquisitorial procedure allows the court to determine the issues which it wishes to investigate and to pursue inquiries with the parties, who do not have the responsibility of presenting their case to the court. This procedure means the court determines the issues requiring clarification and the facts of the case and then makes a determination, as opposed to a reliance upon the parties presenting their case to the court.

13.11 In Australia, two of the arenas in which the inquisitorial system is used are the Immigration Review Tribunal (IRT) and the Human Rights and Equal Opportunity Commission (HREOC). The IRT was established in 1989, under the revised immigration legislation. That tribunal is an informal arena, often dealing with very sensitive and personal issues within a complex legal system. Lawyers have no right to speak, but may be invited to do so by the Tribunal. The HREOC also conducts its investigations in a more inquisitorial style. The Commission, in the conduct of an inquiry:

(a) is not bound by rules of evidence and may inform itself on any matter in such manner as it sees fit;

(b) shall conduct the inquiry with as little formality and technicality, and with as much expedition, as the requirements of [the] Act and a proper consideration of the matters before the Commission permit; and

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5 ibid
6 ibid
7 ibid, p 19

(c) *may give directions relating to procedure that, in its opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties.*[8]

The nature of family law proceedings

13.12 As noted in chapter two, the Family Court is created by the *Family Law Act 1975*.[9] The Court is a superior court of record[10] and is a federal court created by the Commonwealth Parliament under section 71 of the Constitution. As such, the court exercises jurisdiction as a common law court within an adversarial framework. The Committee notes that in principle a basic philosophy of the Family Court was intended to be the resolution of disputes by means other than the litigation process.

13.13 In relation to family law proceedings there may be inherent difficulties in the use of the word 'adversary'. The Concise Oxford Dictionary[11] defines adversary as 'opponent, antagonist; enemy' and even refers to 'the devil'. The Committee acknowledges that while there may be high feeling and emotion in relation to some family law proceedings, the emphasis should be on simplicity and conciliation. The effect of the adversarial framework on the parties before the court may be an increased polarisation of the parties within a necessarily antagonistic process.

13.14 Evidence to the Committee suggests that when parties are fully involved in the adversarial stages of proceedings they are committed to a determined confrontation and there may be unnecessary hurt to each party. In Sydney the former Chief Justice of the Family Court, the Hon Justice E Evatt, AO, stated:

> I think that the government, the Parliament and the court can take the lead in saying that we are not going to be a party to that kind of approach; we want to break away from the adversary-type activity. If we want to talk about rights, when it comes down to it neither party can have a greater right than the other, if you look at it that way. So we still have to come back to a different way to solve the problem.[12]

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8 Section 25V (1), of the *Racial Discrimination Act 1975* and Section 77 (1) of the *Sex Discrimination Act 1984*

9 Section 21(1)

10 Section 21(2)

11 6th Edition, Oxford University Press, 1964, 1976, p 16

12 Transcript, 24 September 1991, p 369

The case of R v Watson; ex parte Armstrong

13.15 In 1976 a case went to the High Court on appeal from the Family Court for determination. A major issue in the case was the nature of the proceedings in the Family Court and the adversarial nature of those proceedings. The facts of the case are as follows.

13.16 In the course of interlocutory proceedings in a matter pending in the Family Court the judge requested an affidavit from the petitioner wife, giving details of her financial position, her working capacity and her usual way of life in the 24 months before she married her husband. No request for such information had been made by counsel for the husband, but no objection was raised. The affidavit requested by the judge was subsequently filed by the wife, but it contained an objection to the judge's direction. The judge rejected the objection on two grounds, firstly because he regarded certain paragraphs as offensive (apparently those incorporating the objection), and secondly, because although the affidavit dealt with the two years before the marriage, it appeared that the wife had lived with the husband for approximately five years prior to the actual marriage.

13.17 The judge argued that he thought that there should be on the file material relating to the wife's financial position and economic capacity before she became associated with the husband, and that he should know something of her background prior to her marriage. The judge, in interlocutory proceedings, made the following comments:

> ...this will sound a strange comment but the proceedings in this court are not strictly adversary proceedings. The matter in which I am involved is more in the nature of an inquiry, an inquisition followed by an arbitration. If it is an inquiry into the available funds of both parties, there is no such thing as your client's case and Mr Armstrong's case. There is a general inquiry.[13]

13.18 The case went on appeal to the High Court, which allowed the appeal and confirmed that the procedures applicable by the Family Court of Australia are adversarial in nature. The High Court held:

> The learned judge's remark that the proceedings were not adversary proceedings but were in the nature of an inquisition followed by an arbitration, indicated a basic misconception as to the position of the court in proceedings of the relevant kind under the *Family Law Act 1975 (Com)*. A judge of the Family Court is given a wide discretion but he must exercise it in accordance with legal principles including the principles laid down in

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13 **R v Watson; Ex parte Armstrong**, 9 ALR, p 552

the Act itself; he exercises judicial power and must discharge his duty judicially.[14]

13.19 Having regard to the original intention of the *Family Law Act* referred to by the late Hon Justice Murphy above, the Committee argues that this would seem to be a narrow interpretation by the High Court of the legislation, which did not take sufficient account of the intention of the legislators at the time of passing the legislation.

13.20 The Family Court advises that, notwithstanding the traditional role of the judge in the adversarial system, recent decisions in some NSW cases show a relaxation of the traditional position, with judges taking a more active role in proceedings. In **Glassock v GIO**,[15] the New South Wales Court of Appeal said:

> A trial judge is entitled to intervene to clarify evidence which is ambiguous, to ask additional questions which counsel is unable for the moment to formulate, to mention topics which may have been overlooked, and in many other ways to facilitate a smoother and more expeditious progress of the case.

13.21 The President of the New South Wales Court of Appeal, Kirby J, went further than this in **Galea v Galea** (1990) 19 NSWLR 263 at 282, when he said:

> It has become more common for judges to take an active part in the conduct of cases than was hitherto conventional. In part, this change is a response to the growth of litigation and the greater pressure of court lists...In part, it arises from a growing appreciation that a silent judge may sometimes occasion an injustice by failing to reveal opinions which the party then affected has no opportunity to correct or modify. In part, it is simply a reflection of the heightened willingness of judges to take greater control of proceedings for the avoidance of injustices that can sometimes occur from undue delay or unnecessary prolongation of trials...

The effect of adversarial proceedings

13.22 The Committee has been constantly advised that approximately 5 per cent of cases proceed to trial. The Committee received submissions stating that, of the cases that settle prior to trial, a large number of people are dissatisfied with the outcome of the settlement. Some of these people seem to be substantially dissatisfied but take no further action, either because of their frustration or the uncertainty of any outcome from further proceedings or are prohibited from further action for reasons of costs. Also, people may have commenced proceedings with unrealistically high expectations. The

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14 ibid, p 553
15 unreported judgment, 19 February 1991

Committee acknowledges that there are many instances of marriage breakdown, where the parties are able to settle their disputes and differences amicably both within the family law system or with little or no contact with that system.

13.23 People settle for a variety of reasons including a dislike of the tensions involved in the process; an uneasiness with the court system; the inability to pay the costs; a desire to get on with their lives as soon as possible and the lack of a legal or factual ground to continue. Cases may also settle on the basis of legal advice which is given and founded upon experience of previous matters. That advice may be given on the basis of predicting how a case may fall within a range of possible settlements. This range provides a negotiating platform. A settlement may not please one party but may be favourable to the other. On the other hand, a settlement may also displease both parties which does not necessarily mean an unsuitable result has been achieved.

13.24 In evidence to the Committee the Chief Justice of the Family Court referred to the level of satisfaction of litigants after the settlement of a dispute when he stated:

> I have been a practising barrister for many years before I was a judge and I do not think I recall anyone who was ever satisfied with a settlement of a dispute, other than those who managed to get a result that was wildly beyond what they expected. But that did not happen very often. I think in family law matters there is never a winner. Many people who resolve a dispute tend to do so because of the uncertainty of litigation. There will always be uncertainties of litigation, whether you have a discretion or not. So much depends on whether a particular witness's evidence is accepted; the impression a particular person makes on the Court. I am not trying to evade the issue but I am simply pointing out that in any litigation, any litigious system, particularly when you are dealing with what is going to happen to possessions which may be the only possessions that people have; children are obviously their dearest, not possession, but they have such a close attachment to their children, that any settlement that involves them getting something less than that what they regard as what they should have, is going to produce dissatisfaction.[16]

13.25 Further, in relation to reaching a solution to a dispute satisfying both parties, Mr Crowley from the Law Council of Australia, stated in evidence:

> This problem of balancing the interests of two people in the proceedings is the greatest challenge that the Court has. For every person who complains about how unjust the decision has been, there is probably someone on the other side who is saying how good the decision has been or how much it was in his or her favour. We are finding that in business

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16 Transcript, 29 May 1992, p 1984

cases, whilst we understand the ramifications of orders that the Court makes, nevertheless justice is required to be done for both parties; and that is the difficult position.[17]

13.26 In submissions to the Committee there have been many criticisms of the adversarial system, mainly on the basis that it is not a suitable system to determine emotional family issues. It is necessary to bear in mind that, for parties to family law proceedings it may be necessary to continue their relationship in at least a communicative form for many years in relation to some matters, particularly where children are concerned. An adversary system may add to the hostility between those parties and indefinitely damage their respective attitudes to one another. In an unpublished paper provided to the Committee by Dr H Finlay,[18] a lecturer in law at the University of Tasmania, the following criticisms of the adversarial nature of proceedings in the area of family law were made:

> Lawyers and other professionals working in the family law area must be aware of the damage, amounting at times to devastation which is caused in this sensitive area of interpersonal relationships by our common law adversary system of litigation. We inherited that method of forensic dispute resolution in Australia from the English legal system at Settlement. Aspects of it bear all the hallmarks of an 18th or 19th century Dickensian England transported to the Antipodes. Its origins owe much to the dialectical methods of an ancient Athenian philosopher and his disciples engaged in the leisurely pursuit of truth and knowledge for their own sake. Considerations of time and money were not a problem for them. More importantly for the present discussion, these scholarly disputations were not calculated to provoke lasting personal animosity between the parties to a debate. In this respect they differed markedly from what so frequently happens between the parties to such an intimate relationship as marriage at the point of breaking up.

13.27 The point at issue is not so much which is the better system, but which system is most appropriate for the resolution of family law disputes. It would appear that the adversarial system has the potential to promote hostility between parties. Parties to proceedings in the family court feel that they are on trial, when they have not committed any crime. In relation to the issue of whether the adversarial nature of proceedings compounds the bitterness between the parties, a member of the NSW Family Law Reform Association stated to the Committee that:

> The most emotional thing that you could be put through is the Family Law Court because really the offence that has been committed is that you married someone, and that after a period of time it did not work. That is

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17 Transcript, 27 March 1992, p 1355

18 Dr. H.A. Finlay **Family Law Mediation and the Adversary Process**, p 1

> the only offence that you have committed and yet the legal system tries to treat the matter as a criminal matter. Where there was a little bit of animosity to start with they are trying to engender hatred.[19]

13.28 This view is indicative of the extreme effect of the adversarial system in family law. It is also representative of the large number of submissions where people expressed dissatisfaction with the current system. In contrast to the above evidence the Law Council of Australia submitted that 'adversarial' is a word that is over used in the family law jurisdiction and indeed is probably inappropriate.[20] Mr Rod Burr, the Chairman of the Family Law Section of the Law Council, suggested that people should stop equating the family law system with an adversarial system. He continued:

> Since 1976 certainly, there was a fairly rapid education for the members of the profession who already were embracing principles of conciliation and negotiation. In fact we have a suspicion, but are unable to bear it out statistically, that probably almost as many, as a percentage, were being settled and resolved by the profession under the old Act as they are under this Act - without the assistance at all of the other helping professions. ... There was a great well of expertise among the profession to adopt other than adversarial, confrontationist approaches. Basically you got your client's story; you asked the other side what their story was; if it was different from yours, you would ask them to provide some evidence. That could be letters from the superannuation fund, valuations of the property. Then you would sit down around a table, and most of the time you would thrash it out.[21]

13.29 Consideration should be given to the necessity for the retention of a system based upon a confrontationist approach and attitude. As stated by Dr Finlay:

> A perusal of the submissions to the Joint Select Committee reveals what anyone acquainted with the system already knows, that there is a widespread malaise and disenchantment with our court-based system of family law and with the Family Court. At times, that disenchantment amounts to outright rejection and even hatred. To a considerable extent the cause lies in the nature of the adversary system. The present interest in mediation and other alternatives to the adversary process is the most hopeful sign of progress in 18 years in the evolution of our system of law.[22]

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19 Transcript, 24 September 1991, p 273
20 Transcript, 27 March 1992, p 1340
21 ibid, pp 1340-41
22 Finlay, op cit, p 30

13.30 In evidence at Hobart, Dr Finlay stated to the Committee that what concerned him most about the adversary system was the cross examination process.[23] He commented that a major purpose of the cross examination is to discredit a witness on the basis that if that person is lying about a particular matter then that person may also be lying about other matters concerned with the proceedings. Dr Finlay also stated that in his view the justification for cross examination is to provide the opportunity to properly test the evidence of the witness and suggested that cross examination did far more harm than good in the context of family law litigation of personal matters.[24] Dr Finlay strongly supported the alternative approach of using mediation to resolve disputes between parties. In advocating such an alternative system, Dr Finlay stated:

> I think we can get away from the adversarial nature because that goes to the process that you go through to get an agreement. What I am putting forward is that you have an alternative procedure which cuts out the adversarial nature of it and which simply endorses the agreement of the parties legally so it then becomes a legal agreement.[25]

13.31 In advancing this argument Dr Finlay acknowledged that, while there will always be a number of people who may never fit into an alternative dispute system, on the other hand, there are a large number who could resolve their problems outside an adversarial system if they had knowledge of the alternatives.

13.32 In Launceston, the Committee heard from a marriage counsellor who argued that the adversarial system was unsuitable for family law:

> ...fixed principles that come in the adversary system do not really work in the Family Law Court. This makes it very hard for arbitration. There is not sufficient arbitration, there is not sufficient mediation and there is not funding for a mediator to work effectively, and this makes it very difficult.[26]

13.33 A witness in Canberra supported the view that family law is not suited to the traditional adversarial system. Dr K Butler stated that:

> Though I am not a lawyer, my prime belief is that family law is a very different area of law. The sorts of solicitors or practitioners that should be practising family law are a particular breed of person and they should be assessed on an on-going basis to make sure that they maintain that sort of empathy for people and that they do not get into that adversarial role.[27]

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23 Transcript, 6 February 1992, p 892
24 ibid, p 893
25 Transcript, 6 February 1992, p 908
26 Transcript, 7 February 1992, p 991
27 Transcript, 23 August 1991, p 38

13.34 Dr Butler continued to say that his perception was that once a party consults a solicitor and 'starts on this adversarial track, or track of the division of property, the other party feels somehow threatened, cheated, and the whole thing just develops a whole momentum of its own'.[28]

13.35 The Family Law Council supports moves for alternative dispute resolution to the adjudication provided by the courts. The Council stated:

> ...a system is needed that provides a number of alternatives to cover a variety of disputes and to offer a reasonable standard of justice at reasonable cost. In the Council's view, the consensual approach is to be preferred to the confrontationist antagonist philosophy that pervades ordinary court cases and destroys mutual trust and confidence between the parties.[29]

Conclusions

13.36 The Committee concludes that, even though there have been criticisms of the adversarial system and that it may not be the ideal method for resolving family law disputes, the adversary system should be retained but with appropriate modifications for alternate dispute resolution and simplified procedures discussed below in this chapter. The Committee does not favour the introduction of an inquisitorial system as an alternative.

13.37 The Committee notes that the vast majority of matters do not proceed to a hearing as they are settled by the parties within the existing system. The modification of the adversary system discussed below may not necessarily result in an increase in the number of matters that settle, but matters may settle at an earlier stage, with less hostility and with reduced cost to the parties both emotionally and financially. The Committee is of the opinion that the existing adversarial system be retained with the modifications referred to in the recommendations below.

Court procedures and case management

Pleadings

13.38 A matter of concern to the Committee is the increased complication of proceedings in the Family Court brought about by the introduction of pleadings. The pleadings system requires a party to file more detailed and complex documents to reach the negotiating stages than was required before their introduction. The introduction of

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28 ibid, p 39
29 Submission 546, Vol 16, p 3169

the pleadings system by the Family Court was an attempt to streamline and simplify proceedings through the Court, by discouraging lengthy affidavits which often did not bear sufficient relation to the issues of fact before the Court.

13.39 In evidence to the Committee, the Law Council of Australia stated:

> Pleadings were introduced initially with the majority approval of the Law Council of Australia. There is a problem in registries in some of the larger cities with very, very long, prolix, inflammatory affidavits being filed. There were 100-page affidavits where a party felt compelled to tell the entire story from day one. Clearly, that was going to have no other effect than entirely inflaming the situation and guaranteeing almost that this was not one of those matters that was going to settle.[30]

13.40 The pleadings system not only introduced complexity to proceedings, but it increased the cost of litigation to the client. The Law Council of Australia expressed concern that the introduction of pleadings had added significantly to the cost of proceedings and suggested that their usefulness was questionable. The Council stated:

> It is our view that it [pleadings] have added significantly to the cost of proceedings in the Family Court in the very early stages. There is some legitimate argument, I think, to say that, as you approach a trial stage, pleadings are useful in that they encapsulate the issues, the inflammatory material is removed, you are dealing with matters of pure fact. But to draft a document as long as we have to draft now, just to get the action up and running before conciliation, negotiation, mediation processes have failed, is just too great.[31]

13.41 In response to a question during evidence in relation to the growth and requirements of the pleadings process, the Chief Justice of the Family Court argued that, it was a move which had resulted from a proposal from the legal profession to introduce a system to overcome the unsatisfactory situation in relation to the production of extremely lengthy affidavits during the course of proceedings before the Court.[32] The Chief Justice advised that the Court accepted the proposal from the legal profession.[33] He continued:

> They suggested that the better way to approach it would be to have a system of pleadings, whereby a short, concise statement of the facts on which the person making the application relied would appear, and the other side would then have the opportunity to respond, equally shortly and

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30 Transcript, 27 March 1992, p 1342
31 ibid, p 1342
32 Transcript, 29 May 1992, p 1977
33 ibid

concisely, to that proposal. There were no affidavits until a very late stage of the proceedings. That was what was envisaged.[34]

13.42 In acknowledging that the pleadings system did not achieve its objective, the Chief Justice said in evidence:

> It has not worked largely because people seem to have gone back very much to their old habits in producing verbose and lengthy documents, which again are not of great assistance to anyone. They seem to be charging more for doing that than they did for the production of affidavits earlier. The Court is not entirely blameless in this area. Probably the greatest mistake was to use the expression 'pleadings'; I think that conjured up nineteenth century concepts of pleading summonses and intricacies and difficulties. It was never intended to do that, but it may be that some Judges of the Court took, I believe, an overly technical view of what was required in those documents. But basically, I think, the problem was that most family lawyers had not had much common law experience and had great difficulty coming to terms with the concept of preparing for pleadings at all.[35]

13.43 The pleadings system also places unrepresented persons at a distinct disadvantage. People without experience in the court cannot be expected to understand the intricacies of the pleading process. This was acknowledged in the Family Court's submission where it is stated that lay persons may find difficulty in complying with the rules in relation to pleadings as the lack of properly drawn pleadings can be a great disadvantage to a non-represented party.[36]

Developments in the Family Court

13.44 In an effort to overcome the difficulties with the present system of pleadings the Committee was advised that the Court is developing a dual tracking system, whereby the Court will isolate the vast majority of cases which are not complex, and reduce the procedural requirements in those non-complex cases. The Court will retain a system of pleadings in relation to complex cases where it would be necessary for a party to establish facts and produce the evidence to be relied upon at a hearing.

13.45 The detailed proposal for these simplified procedures has been developed by Deputy Chief Justice Barblett.[37] The proposal comprises two sets of procedures for matters proceeding through the Court - one set of procedures for simple matters and

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34 ibid
35 Transcript, 29 May 1992, p 1977
36 Submission No. 940, Vol 31, p 6137
37 Transcript, 29 May 1992, pp 1977-78

another set for complex matters. The originating application to the Court will only have the orders that are being sought. The first notice of defence will not be called a notice of defence but a notice of consent. That notice will contain the orders which the respondent consents to and will refer to matters where a different order may be sought. The matter will then proceed to a directions hearing after the conciliation facilities under the Act have been utilised. This means that a summary initiating procedure for all proceedings will be developed followed by a summary process for non-complex matters and the retention of a pleadings system for complex cases. The main problem with the development of a two-tier system is the identification of the complex matters. This could probably be determined at the directions hearing, which is usually the first return date of the application.

Conclusions

13.46 The Committee concludes that the development of a more simplified system within the Family Court is a matter of high priority. The Committee therefore supports the development of simpler procedures under the *Family Law Act* and reiterates the view that the Court process should be oriented towards a settling process as opposed to preparing parties for a trial. The Committee considers that it is necessary to continue and reinforce the current policy of directing or encouraging settlement of cases at the earliest possible time, either before or during the litigation pathway. In determining whether a matter should remain in the summary list or be transferred to the list of more complex cases, the Committee is of the view that the option should remain open not only at the first return date but at any time during the proceedings.

13.47 The Committee is of the view that with simplified procedures and maximum use of conciliatory facilities, the original intention of the *Family Law Act* may be more likely to be achieved.

Recommendations

13.48 The Committee recommends that:

98 the pleadings system be abolished by the Family Court;

99 the Family Court introduce a summary procedure for simpler matters.

Arbitration and mediation

13.49 This section refers to the structure of mediation and arbitration and how these alternatives to the adversary litigation process may be introduced into the existing

family law system. For the development of mediation and arbitration in a conceptual context, reference should be made to Chapter Four.

13.50 There have been a number of recent initiatives in the area of family law mediation and arbitration:

13.50.1 the enactment of the *Courts (Mediation and Arbitration) Act 1991*;

13.50.2 the release of a report prepared by the Family Law Council in June 1992, called **Family Mediation**;[38] and

13.50.3 the implementation of a pilot mediation program by the Melbourne registry of the Family Court.

Courts (Mediation and Arbitration) Act 1991

13.51 The *Courts (Mediation and Arbitration) Act 1991* was introduced to facilitate alternative dispute resolution in the Federal and Family Courts of Australia. The intention of the legislation was to enable courts to provide parties with a greater choice of methods of dispute resolution, in particular mediation and arbitration. The availability of these mechanisms was seen to provide efficient and cost effective alternatives to the judicial process for the resolution of many disputes.

13.52 The *Courts (Mediation and Arbitration) Act 1991* amended the *Family Law Act* by inserting a new Part III (A). Consequential amendments were made to the Family Law Rules by introducing new order 25A which established a mechanism for conduct of mediation in family law matters. Consequential amendments were also made to the Family Law Regulations by introducing new regulations 7A and 9A which provide for the approval of mediators and specifies the oath or affirmation of office.

Mediation

13.53 Mediation, where a neutral third person assists the parties arrive at their own solution to their dispute, is regarded as being particularly suitable for parties who need to maintain some kind of relationship, as many parties to family law proceedings do. Mediation, as a dispute resolution process in family law, can provide greater flexibility in the outcomes, as parties are not necessarily constrained by legal remedies. Given the wide variety of individual circumstances in family law disputes, such flexibility is desirable.

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38 Family Law Council, **Family Mediation**, op cit

13.54 Before the issue of proceedings under the *Family Law Act*, a party may file a notice in the Family Court requesting the assistance of a mediator in settling a dispute to which that person is a party. The dispute between the parties must be one to which the *Family Law Act* applies, other than proceedings for divorce. Section 19A(3) defines dispute as meaning 'a dispute about a matter with respect to which proceedings ... could be instituted under this Act'. It should be noted that there is a limitation within this subsection that an application for mediation only applies where proceedings have not already been instituted under the Act. Where proceedings have been commenced under the Act, an application for mediation may only be made after the filing of a notice seeking mediation and is approved by the Court or made by the consent of both parties. Where a court makes an order for mediation then the proceedings are adjourned and the mediation rules come into operation.

13.55 Section 19B(4) of the Act provides that where an order has been made referring a particular matter for mediation and subsequently '... a party to the proceedings files the notice in the court that the mediation of a matter has ended, the court may make such orders or give such directions as it thinks appropriate in relation to the proceeding'. Section 19C of the Act provides that anything said or any admission made in a conference conducted by an approved mediator in any Court or any proceedings before a person authorised to hear evidence is not admissible in later evidence.

Arbitration

13.56 Arbitration is the determination of a dispute by a third person who is not a judge and is particularly useful in matters which do not involve complex matters of law. A court may order the referral of proceedings to an arbitrator only in relation to proceedings under Part VIII of the *Family Law Act 1975*, which are proceedings for orders with respect to spousal maintenance or property of parties to a marriage, but does not include any proceedings specified in regulations. The Committee notes that there are no proceedings specified in regulations to date.

13.57 After an arbitrator has made an award, a party to the arbitration may register the award in accordance with the Rules of Court in the relevant court initially ordering the arbitration. Once the arbitration award is registered in the Court, it has the same effect as if it were an order made by that court.[39] Following the registration of an award in the Court, the parties may apply to the court which ordered the arbitration for a review of the award. In effect, this is a complete re-hearing of the matter, where the judge is empowered to either confirm the award made or to substitute another decision in place of the award.[40]

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39 see Section 19D (v)
40 see Section 19G (ii)

13.58 If the parties desire a private arbitration, a court exercising jurisdiction under the *Family Law Act 1975*, on an application by a party, may make such orders as the court thinks appropriate to facilitate the effective conduct of the arbitration.[41] In contrast to awards which may have been made in relation to court ordered arbitration, awards made in relation to private arbitration may be reviewed only by the Full Court of the Family Court, and only on questions of law.

Alternate dispute resolution and the pilot mediation project

13.59 The Committee notes that alternative dispute resolution procedures have been a central component of the facilities offered by the Family Court since its inception. These comprise conciliation conferences in property matters and confidential counselling in children's matters. These procedures have been effective in resolving many disputes, thereby avoiding the need to proceed to trial. The Chairman of the Family Law Council, Mr Justice Emery, adequately summed up the situation when he said:

> The Court offers and encourages people to go to conciliation either with a counsellor or with a registrar. Both those procedures are compulsory. Mediation is to be fully available but is available only partially now - there is a pilot project in Melbourne, Dandenong, and what might perhaps be described as a circuit court approach in Adelaide; arbitration will then be available shortly; and, if all else fails, the court still falls back of course on litigation, the adversary system. So people have all those options available if they come to the court. The court can, therefore, with the exception of the mediation option which is voluntary, both encourage and direct parties to the other resolution procedures.[42]

13.60 The Family Court advised that, due to lack of Government funds for the implementation of mediation services within the Court, only a scaled down pilot project was able to be established. This project was established in the Melbourne registry in December 1991 and commenced service delivery in 1992. This pilot project was extended to provide limited services in the Dandenong and Adelaide registries from May 1992.[43] It is too early to evaluate the effectiveness of the pilot project as yet.

13.61 The Committee is of the view that alternate dispute resolution, mediation and arbitration, should be available as real alternatives to the litigation process. The Committee supports the comments of Deputy Chief Justice Barblett, when he stated in evidence:

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41 see section 19E
42 Transcript, 13 March 1992, p 1213
43 Submission 940, Vol 29, p 5707

That is the alternative to litigation and that is something the pilot is all about. What we hope to offer is a real alternative, so that everybody that comes, whether they go to a solicitor or they come to the Court, is advised that mediation is available. Then they have a mediation induction program, or education program, and then they have mediation. There are two matters, apart from funding, that are preventing this being universal, and one is the question of property agreements not having the force of an order. All other agreements have the force of an order, be they custody access, maintenance, but property does not. That needs a legislative amendment. The other drawback at the moment is that registrars - mediators - cannot conduct conciliation conferences, rather than mediation, in relation to property before the commencement of proceedings. There is a procedure for those after the commencement of proceedings but not before.[44]

Family Law Council Report - Family Mediation

13.62 This report is discussed extensively in Chapter Four.

Conclusions

13.63 In addressing a family law conference in Auckland, New Zealand in September 1991, the Hon Betty Barteau, a judge of the Court of Appeal of Indiana, stated:

> So, the scenario for the future can be one of our choosing. Will it be an uninspired future - where family courts remain essentially unchanged, underfunded, overburdened with cases, virtually the wasteland of the judicial process; continuing to employ the adversarial system with people emerging from the family litigation feeling as if they have been used and abused by the system; or shall we choose a bright and shining future? A family court where all individuals will have access to highly competent and trained lawyers and judges, as well as an array of dispute resolution processes conducted by highly respected neutrals. Shall we work toward a bright and shining future, where troubled families can have access to affordable expert mental health professionals, where divorcing parties can 'close the book gently' on a marriage and receive counselling so they do not repeat some of their mistakes in the new book soon to begin? ... Its up to us.[45]

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44 Transcript, 29 May 1992, p 1893

45 New Zealand Law Society Family Law Conference, Conference Papers, Auckland, 1991, p 12

13.64 The Committee acknowledges the dilemma expressed above and considers that it is now an appropriate time to look to the future and to develop an integrated professional approach to family disputes, an approach which is accessible and affordable, but not necessarily adversarial. The initial intentions of the architects of the *Family Law Act* were to adopt a more humane approach to the consequences of marital breakdown. The Committee concludes that the simplified procedures being developed by the Family Court, combined with wider legislative implementation of mediation and arbitration, should result in the enhancement of more amicable resolution of disputes. However, the Committee is of the view that alternate dispute resolution procedures will not solve all problems, neither should they be made compulsory. The benefit of such procedures could be reduced by compulsorily requiring parties to participate. The success of such mechanisms is contingent upon the parties willingly taking part in the process.

13.65 The Committee recognises that no law and, perhaps no court, can make an unreasonable person reasonable and that sometimes people may act in a manner which is malicious or selfish. However, the ramifications of divorce for people are significant and need to be dealt with in a professional and comprehensive manner. The family law system and process should be oriented towards a settling process as opposed to preparing for trial. Dispute resolution procedures under the *Family Law Act* need to be as simple, speedy and cost effective as possible in order to effect the minimum disruption to people's lives. Should parties wish to pursue disputes through the courts then that is a matter for those individuals to resolve. But for the vast majority who merely wish to obtain a fair and equitable resolution of their dispute, with the minimum amount of hostility and argument, the mechanisms must be available for that to happen. The operation of the *Family Law Act* and the Family Court must not require parties to be 'pitted' against one another, arguing their case as if one party is 'right/not guilty' and the other is 'wrong/guilty'.

13.66 The present structure of the family law system within Australia already contains procedures that facilitate the resolution of family disputes without the need for involvement from the judiciary for most people. The Committee recognises that there are advantages in alternate dispute resolution processes which include cost and time savings, the protection of privacy, confidentiality of proceedings, reduction of delays in the courts, self-empowerment of parties in making their own arrangements and, ideally, the better preservation of relationships between the parties in the future. The Committee concludes that the recent developments in the expansion of conciliatory procedures within the existing family law system has the potential to develop non judicial methods to an even greater extent. This must be a high priority in the continued development of the family law system in Australia. Alternative dispute resolution methods must be available early in any family law system. Parties should be given every opportunity to reach a mutually satisfactory agreement which has been determined by the parties themselves as much as possible. The Committee is of the view that the legislature should provide for early intervention in family law disputes. The Committee emphasises that formal proceedings in the Family Court should be used as a last resort.

13.67 The Committee is of the view that more emphasis should be placed on parties making their own decisions with the appropriate professional assistance. Alternative dispute resolution mechanisms should be developed as a real alternative and an adjunct to the adversarial system. The Committee acknowledges that, if at the end of the day, these procedures are not being effective and the disputing parties have a power imbalance, then the mediation or arbitration process may be terminated and the matter referred for judicial intervention.

13.68 The Committee recognises the practical difficulties involved in the introduction of a different system of civil justice in the family law jurisdiction. However, what may be achieved is more emphasis on alternative approaches within the existing adversarial system. The Committee notes that the submission from the Family Court argues for the abandonment of the 'more extreme aspects of our adversary system of litigation'.[46]

13.69 The Committee is of the view that the combination of the introduction of more simplified procedures in the Family Court and the development of alternative dispute resolution mechanisms, ie the mediation and arbitration procedures under the *Courts (Mediation and Arbitration) Act* are only a first step. However, the framework which has been established is a positive and encouraging move. The Committee notes that Order 24 conferences and counselling in the family law system have been an integral part of family law in Australia since 1975.

13.70 The Committee endorses the introduction of alternate dispute mechanisms within the family law system. However, the Committee is of the view that the provisions under the *Family Law Act* as amended by the *Courts (Mediation and Arbitration) Act* are not extensive enough, given the following restrictions:

13.70.1 the legislation is restricted to proceedings not yet commenced in the Family Court; and

13.70.2 matters should be able to be referred to an alternate dispute resolution process either at the instigation of the court, or by one or both of the parties to the proceedings after approval by the Family Court.

13.71 The Committee commends the introduction of the *Courts (Mediation and Arbitration) Act 1991*, but the Committee considers that, in its present form, too much emphasis is placed upon whether proceedings have commenced in the Family Court or not. The alternative dispute resolution mechanisms must always be available at any stage of proceedings within the litigation process, including before the commencement of proceedings.

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46 Submission 940, Vol 31, p 6121

13.72 The Committee acknowledges that not all people are able to achieve a self-determined plan for the future and for the best interests of the entire family. There will always be some people for whom the only means of resolving their dispute is via the court. The Committee is of the view that the legal profession has a vital role to play in what should be a diversified professional approach to family law disputes. The legal profession has an important role in directing parties away from the adversarial system to the mediation, arbitration and counselling arenas. The Committee considers that it is imperative that the legal profession actively promote an attitude of co-operation between parties rather than preparing for the litigation process. The fundamental aim in the resolution of family law disputes is to reach mutually agreeable arrangements and, if that is not possible, to ensure that any proceedings in the Family Court are not predicated upon a win/lose mentality.

Recommendations

13.73 The Committee recommends that:

100 **the provisions of the *Courts (Mediation and Arbitration) Act 1991* be expanded to encourage and implement the development of alternative dispute resolution mechanisms, not within the existing adversarial system but as realistic alternatives available at any time;**

101 **agreements made between parties using the alternative dispute resolution processes not to be subject to scrutiny or approval of the courts prior to signature by the parties;**

102 **the legislation provide for the review by the Family Court of any agreement reached between the parties in the event that there is a dispute in relation to agreements reached, such review to be subject to a time limit;**

103 **the Family Court of Australia and the legal profession take an active role in identifying matters which may be more suitable for resolution by alternative dispute mechanisms.**

Other issues

Formality of the Family Court

13.74 When the Family Court was established in 1975, the purpose was to establish a more informal and less intimidating environment than that which prevailed for the resolution of family law disputes, prior to the introduction of the Act. However, the Family Court has progressively become more formal over the years, through the use

of larger, traditional court rooms and the adoption of formal court proceedings and robing. The Family Court argues that these measures have:

(a) assisted in the calmer conduct of affairs and the resolution of disputes between sometimes angry people who have not been able to mediate their differences;

(b) provided the necessary personal space which witnesses, parties, practitioners and the court staff prefer;

(c) provided that degree of anonymity and sense of occasion which assists people to accept the rulings of duly constituted authority.[47]

13.75 The Family Court goes on to say that:

> It is appropriate that all concerned, parties, witnesses, practitioners and the Court itself, be constantly reminded of the importance and authority of the Court's procedure.[48]

13.76 The Committee notes the comments made by the Court in relation to the 'necessary formality' of proceedings and the benefits this has for the Court. However, the Committee is also conscious that there may be an unnecessary reliance on formal procedures, which could be additionally stressful to people who are already emotionally overwrought. The Committee is aware of current moves in the United Kingdom to shed wigs and robes, and it is anticipated that this will take effect within 12 months. On balance, the Committee regards the move to increased formality in the Court to be detrimental to the family law process, and the degree of formality introduced into the proceedings by the 'robing' of judges and barristers to be unjustified.

Recommendation

13.77 The Committee therefore recommends that:

104 as part of a move towards less formal proceedings, the wearing of wigs and gowns be discontinued in the Family Court of Australia.

The unrepresented litigant

13.78 A difficult problem facing any court is the unrepresented litigant in proceedings. In some respects courts are faced with the dilemma of providing assistance

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47 Submission 940, Vol 31, p 6118
48 ibid

to the unrepresented litigant and on the other hand being an objective and impartial adjudicator of proceedings. It is in effect a balance of retaining judicial impartiality and objectivity on the one hand and preserving an individual's right to be heard on the other.

13.79 The Committee has received several submissions from people who have been financially unable to pay for legal representation, and/or have been anxious to avoid what they perceive to be impersonal legal representation in proceedings on matters which are of vital personal importance. Some of the people who have decided to represent themselves in court consider that they have perceived that the court was unwilling to give basic assistance, or to depart in any way from the usual format of proceedings. Further, most criticism alleges that the courts make it difficult for unrepresented litigants by failing to explain matters clearly, and by exhibiting marked impatience during proceedings. Submissions suggest that the Family Court does not appear to have adopted any procedures for dealing with such cases. The Committee recognises that such views should be balanced against allegations that unrepresented litigants may frequently cause delays within the courts by being unprepared or by wasting court time with matters which are not relevant.

13.80 The Committee believes that two issues arise in relation to the unrepresented litigant:

13.80.1 should a party be refused the right to a legal representative simply because they cannot afford representation?

13.80.2 would it be fair to the represented party if a court were to grant assistance to the unrepresented party?

13.81 In evidence to the Committee the Chief Justice of the Family Court alluded to the difficulties of a person representing themselves and to the court's approach to assistance when he stated:

> I am not saying the Court should not assist litigants in person. In fact, I think in one of our submissions we referred to the desirability of providing at least paralegal assistance for people who are in that position. One of the things I think has to be faced is that in the past litigants in person tended to come to the Court possibly more for idiosyncratic reasons than because they were unable to afford representation. You tend to get some people who insist on doing the whole thing themselves, often very difficult people to deal with.
>
> What we are encountering now - I think this is a real problem - is that with the reduction in legal aid availability a lot of people are coming to the Court unrepresented simply because they cannot afford to be represented. I think that they will cause us real problems in the next few years. All judges have been commenting to me about the increase in litigants in

person. That usually means that the cases are much more difficult to resolve, for the reasons I have stated, and it usually means that they take longer. Although I believe that people who are in that position should be helped, I am strongly of the view that the best help they could have is to be represented.[49]

13.82 The Committee was also advised the Family Court has implemented initiatives to assist litigants in person following the review of the court. Buckley, J advised:

> The other issue that is relevant in relation to the assistance which litigants in person get is that it has been upgraded considerably as a result of the review. The positions on the counter, the inquiry positions, the telephone positions have all been upgraded and we have prepared a computer program for the supervisor of that whole area, which runs to some 200 pages in text, providing answers to all the usual questions that can be asked. That was an area that was exposed by the review as requiring that sort of assistance and, in fact, that whole regime is now in place and in operation.[50]

13.83 The Committee does not encourage or discourage litigants in person. However, the Committee is concerned that appropriate impartial advice is obtained before a decision is made. An example of assistance available to litigants in person is the services of the Victorian Court Network. This service provides the appropriate, adequate and skilled non-partisan information required to assist litigants in person. This valuable service assists in the problem of the lack of access to information required to understand the family law system, as opposed to strict legal advice. An impressive aspect of the service is that it is largely provided on a voluntary basis.

13.84 In evidence to the Committee, the Chief Justice of the Family Court supported the services of Network where he said:

> I am a strong supporter of Network. I think they have done a terrific job in Victoria in the Court. They do not provide legal advice but they do provide referral advice and they do assist people who are distressed in the area of the Court. I think they are an interesting body in the sense that they are not professionally trained as such but they are volunteers who do undertake quite a significant training course. I know I can speak for the Victorian judges on this matter. At one stage, the Government withdrew funding from the Network and there was considerable uproar from the

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49 Transcript, 29 May 1992, pp 1971-72
50 ibid, p 1974

judges in Victoria and from me about it. I would like to see that process extended throughout the Court in other States.[51]

13.85 The Committee supports the services of Network and encourages its expansion to other States, especially where there are registries of the Family Court. The Committee is of the opinion that the Family Court has an obligation to provide assistance to unrepresented litigants in procedures of the Court. In order to fulfil this obligation the Committee considers that the Court should produce material on court procedures to assist such people and should also have available an officer of the court to whom people seeking assistance can be referred. The Committee is of the view that the provision of assistance in these ways will be of benefit to the unrepresented litigant and to the Family Court itself.

Recommendations

13.86 The Committee recommends that:

105 written material on processes and procedures of the Family Court be available for those people who wish to represent themselves; and

106 the Family Court nominate, at each of its registries, an officer of the court to whom people can be referred for information.

51 ibid

CHAPTER FOURTEEN: COSTS

Introduction

14.1 The Committee is concerned about the effect that increasing costs is having upon the access to justice in family law matters. A matter of fundamental principle is the accessibility and the availability of professional services at an affordable cost for people approaching family breakdown or following any separation of parties. The Committee is concerned that there should be a balance between the cost of services of the legal profession and the availability of those services to the community.

Major issues

14.2 The following issues relating to costs are of significance:

14.2.1 whether the current method of charging by an hourly rate is appropriate and whether that method of charging should be replaced by a costing done on an item by item basis;

14.2.2 whether costs would be reduced with the introduction of simplified and reduced procedures required to process litigation in the court;

14.2.3 whether better trial management may assist in the reduction of costs once a matter has proceeded to the litigation pathway;

14.2.4 whether the practice of contracting out of the scale, ie, entering into cost agreements, should continue; and

14.2.5 whether the existing costing review mechanisms within the Family Law Rules are sufficient.

14.3 These matters were raised in the evidence to the Committee. The Committee notes that 521 submissions made a reference to the high cost of being involved in family law disputes.

14.4 The first Joint Select Committee on the Family Law Act noted:

> In proceedings under the *Matrimonial Causes Act*, the court had a discretion to make such orders as to costs as it considered just. Moreover, as a general rule the husband paid the wife's costs irrespective of the outcome of proceedings. Furthermore, the costs of proceedings under the repealed act were notoriously high. The Senate Standing Committee on Constitutional and Legal Affairs reported in 1974 that it had 'no doubt that the legal costs (incurred by parties in proceedings under the *Matrimonial Causes Act*) were too high, in some cases inordinately so'. The Senate Committee considered that this was so largely as a result 'of the existing adversary system of determining matrimonial disputes'.[1]

Evidence and submissions

14.5 Evidence has been received by the Committee of instances where exorbitantly high fees have been charged for trials in the family court. In one instance the Committee received in camera evidence from a litigant who was also a lawyer who had instructed five different solicitors during the course of proceedings which extended over four years. The witness had strong feelings about the problems which were encountered and felt that the costs charged 'were outrageous'. The witness was also outraged at being unable to move to another lawyer within the same firm. The witness was apparently also unable to change firms due to a litigation loan and the lack of funds to pay the bill to obtain the file. The cost of the proceedings to the witness was approximately $250,000 which did not include $48,000 for accountancy fees. The witness referred to being powerless in a system and being tied to a firm of solicitors because of the amount of the money owed. This is strong criticism from a fellow lawyer. Her views were supported by comments like the following:

> Submission 124: The main beneficiaries from divorces and separations are solicitors. All too often the precious resources of a family are eaten up by this profession. Even when the assets of families are substantial, a major portion of the funds from the realisation of those assets is taken by solicitors. This means that money which should be available for housing and care of children is being lost. Of course this situation is invariably the result of one or both parties to the separation refusing to negotiate. However, it seems to me that the rates being charged by solicitors are horrendous.[2]

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1 Joint Select Committee on the Family Law Act, **Family Law in Australia**, op cit, p 185
2 Submission 124, Vol 3, p 634

14.6 In relation to the point raised in the above submission that costs may be escalated by parties refusing to negotiate, the submission from the Legal Aid Office of the ACT stated:

> Submission 403: Some responsibility for family law costs has to be taken by clients. The longer it takes to resolve a family law dispute the higher the costs. Sometimes clients actually prefer to pay legal fees rather than take steps themselves to reduce or resolve the dispute. Frequently clients do not have the perspective or skills necessary to resolve the dispute. This is not necessarily a criticism but it is a fact. Counselling and Order 24 conferences assist a lot of clients and most cases in fact settle without the court adjudicating. Nevertheless costs are occasioned along the way by mistrust, wilful refusal to co-operate in establishing an agreed factual situation and the like.[3]

14.7 The Legal Aid Office also noted that 'clients do not always accept their legal advisers' advice about steps which might be taken to resolve the dispute, eg, settlement offers.'[4]

14.8 The Committee notes that the cases cited above may be examples of individual instances where complex fact situations may have been involved or where legal practitioners have been acting on instructions to take every course or action available against the other party in what could be a vindictive and malicious approach.

14.9 In response to a question concerning the exorbitantly high costs which may be charged by the legal profession in family law matters, the Chief Justice of the Family Court responded:

> It is difficult, as you correctly point out, for us necessarily to know the full extent of it, in the sense that we only get to hear of cases that actually come to court. Also, we only get detailed knowledge of what has been charged if there is a taxation of costs, which is comparatively rare. Anecdotally, one does hear these stories. I think, if one looks at it and still puts it into perspective, I do not believe that the vast majority of the legal profession is engaged in these practices...I still believe that the great majority of people do not behave in this way, but there is a problem with those who do, there is no doubt about that.[5]

14.10 A witness in Albury, in response to a comment that 'as the law is at the present, the solicitors barristers and QC's are the ones making big, big money and leaving the two families poor for the rest of their lives', stated:

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3 Submission 403, Vol 10, p 2046
4 ibid
5 Transcript, 29 May 1992, p 1981

In this case the legal costs are well over $400,000 for all the parties, and that is a lot of dough.[6]

14.11 In this case the legal expenses for the witness and his son were $230,000 and in excess of $200,000 for the other party. The witness continued:

Hers [legal fees] were over $200,000 and it was costing her $9,000 a day in legal costs when it went to court. She had a top QC from Sydney, a barrister from Sydney at $9,000 per day. Certainly we were not up in that high category. That is just a rip-off.[7]

14.12 Referring to the general issue of costs the following comments were made:

Submission 354: This is an important area that needs overhauling. Both parents involved in legal battles are just lining solicitors' pockets. There are no other ways of having differences settled. It is costing the Government millions in Legal Aid, and the money parents are spending would be so much more beneficial going towards the children's upbringing.[8]

Submission 287: I wanted legal advice, as I was working, my partner works casual - total income did not exceed $400 per week - I wasn't entitled to legal aid. On visiting four solicitors the following became evident.

Sol. 1 wanted $800 up front before he would look at the case. If he accepted the case I would have to pay an extra $2,000 plus barrister fees for the court + other costs.
Sol. 2 $1,500 up front + $3,000 per day in court costs.
Sol. 3 $1,250 up front + $1,500 per day plus barrister costs.
Sol. 4 $300 to look at case $700 if case taken $80 per hour at court $72 per page of declarations etc. plus min of $500 for court costs.[9]

14.13 Another issue raised was the availability of legal aid to one spouse and not to the other. The following comments were made in submissions:

Submission 78: If one parent is in receipt of free legal aid, then the self supporting parent, usually the father, becomes involved in a war of financial attrition. He runs out of funds to pay a lawyer or gets substandard representation if he represents himself, or gives up.[10]

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6 Transcript, 1 May 1992, pp 1854-55
7 ibid, p 1855
8 Submission 354, Vol 8, p 1815
9 Submission 287, Vol 6, p 1331
10 Submission 78, Vol 2, p 468

Submission 163: There needs to be some mechanism of either decreasing or assisting the costs involved in family law court litigation. In general it is well accepted that the 'average person' will frequently not resort to litigation because of the costs involved. In the same way these costs also provide some protection for the 'average person' against vexatious litigation. However, the Family Court spends a majority of its time dealing with the 'average person'. These same people may be forced into litigation which they often cannot afford in order to defend their rights at law. In the case of Family Law litigation this is often against an ex-spouse who may well be running a case funded by Legal Aid.[11]

Submission 174: It is too easy for Legal Aid recipients to take action on trivial matters, make false allegations, etc., all of which involve unfair and unnecessary expense for the other party involved who must respond.

I believe that a system has to be created whereby some financial responsibility must be accepted by the Legal Aid recipient for the costs involved. This would then create an incentive to avoid any unnecessary action and to achieve a suitable settlement.[12]

14.14 Another issue mentioned regularly was the complexity of proceedings in the Family Court. The following comment was made in evidence in Perth:

We are also expressing concern, as we believe a number of private lawyers would, about the way in which pleadings and affidavits are presently produced in the Family Court. We understand that this is driven by the requirements of the rules themselves and the way in which those rules are administered by the judges. For example, there is a requirement under the rules that a final affidavit is filed where a matter is to go to trial, notwithstanding the fact that that affidavit may repeat things that were said time and time again before, thus adding to the overall cost of providing representation...

There appears to be little or no comment from the Bench about this. I am not saying that no judges comment, but our experience and my experience of the reported cases is that there are very few cases reported dealing with adverse comments by the Bench to the profession. The profession can hardly be blamed for continuing that way if there is not this authority coming back from the court suggesting that the way in which this is carried out is inappropriate.[13]

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11 Submission 163, Vol 4, p 832
12 Submission 174, Vol 4, p 887
13 Transcript, 20 February 1992, pp 1067-8

14.15 In its submission to the Committee, the Law Council of Australia added:

> It is clear that the greater the number of facts in issue in a particular dispute, the greater the number of witnesses, both expert and otherwise, the longer the trial of the case will take and, inevitably the greater will be the expense. On the other hand if these areas of dispute can be reduced in number, resolved wholly or in part by processes of alternate dispute resolution, there is likely to be a considerable saving in costs. The Council refers to and repeats its above recommendation [relating to increased use of alternate dispute resolution] so that the opportunity for saving costs and avoiding the unpleasant aspects of adversary proceedings may be fully explored.[14]

14.16 In relation to the complexity of proceedings in the Family Court the Director of the Legal Aid Commission of Victoria, Mr Crockett, stated:

> I think there are a number of factors combining to increase the cost of family law cases. It certainly is not explained alone by increases in the Family Court scales, which have more or less followed the CPI. I mentioned the impact of pleadings. That is acknowledged by everyone, including the Court itself, as adding significantly to the cost of cases by adding to their complexity. Case management guidelines have also had an effect. Ironically, they were introduced to improve the efficiency of matters before the Court. By requiring the parties and their practitioners to go to Court more frequently, for pre-trial hearings, for example, it does have the effect of increasing the cost of the case.[15]

14.17 The Law Institute of Victoria raised the issue of family law costs in its submission.[16] The Institute stated that the costs could be reduced if the Family Court itself was to undertake a review of its own practice and procedures.[17] The Institute also stated that the rate of settlement at the pre-trial hearing has decreased significantly since the introduction of pleadings and that the conduct of some judicial officers at hearings increases costs by extending the length of hearings. The Institute was also critical of the cost of provision of transcripts for an appeal, as was the Family Court in its submission, the Court suggesting that the government should fund Auscript to provide a copy of the transcript to an appellant where the Court is satisfied there is a prima facie case.[18]

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14 Submission 415, Vol 11, p 2322

15 Transcript, 23 April 1992, p 1722. Under the case management guidelines of the court, parties are required to attend the court on four occasions prior to a hearing.

16 Submission 895, Vol 27, p 5379

17 ibid

18 Submission 940, Vol 31, p 6164

14.18 In relation to the increasing complexity of matters before the court and in an attempt to curb the increasing consequential costs, Mr Crockett from the Legal Aid Commission of Victoria suggested:

> My Commission urges this Committee to consider recommending the insertion in the *Family Law Act* of a provision to the effect that in exercising its rule-making powers, the court must have regard to the impact the rules will have on the cost to the parties, and must ensure that the court and the services provided by the court are accessible, affordable and understandable to the general public.[19]

14.19 The Committee received submissions stating that lawyers unnecessarily draw out proceedings. This may be a result of the adversarial nature of the proceedings or inactivity and undue delay in the conduct of the proceedings. On this issue the Law Council of Australia stated in evidence:

> Some of the complaints you have received are that lawyers in fact exacerbate the dispute - once they get hold of it they will beat this up in order to make a quid out of it. Those suggestions indicate that proponents of that view have absolutely no idea of the economics of a legal office. That would be the fastest way I know to go out of business in a hurry. You do not make any money out of the long, drawn out, bitter cases. The better way to make a quid out of legal practice - and that is what you are talking about - is to turn the matters over quickly. If you can get the matters in, dealt with, the client out reasonably happily, onto the next matter, then that is the way to maximise the economics of a legal office.[20]

14.20 In addressing ways in which there may be a reduction of costs in family law proceedings, the former Chief Justice of the Family Court, Hon Elizabeth Evatt, AO, stated:

> I would simply like to encourage the Court, with perhaps the support of your Committee, to develop very clear ways of containing litigation, either in the paperwork or in the conduct of hearings. They might even develop - and some registries have experimented with this - a short form of hearing. They offer parties a half day for their case and the judge will make sure that one side does not use up too much time so the other side gets a go, and they try to finish it in the half day and to get judgement. You need a bit of co-operation from lawyers to do that.
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> What I am suggesting is that it become a little more formalised and that it have, maybe, legislative backup so that the court could give a more

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19 Transcript, 23 April 1992, p 1719
20 Transcript, 27 March 1992, p 1349

summary proceeding where that is going to be the right thing for people. They cannot afford thousands of dollars if their home is only worth $50,000 or $60,000. It has got to be dealt with quickly and cheaply.[21]

14.21 This comment accords with the discussion in the earlier chapter on the development of more simplified procedures within the family court where appropriate.

14.22 In relation to the possibility of the reduction of costs in the family law system the Chief Justice made a telling comment in a paper delivered to the 4th National Family Law Conference:

> I believe that much more needs to be done to reduce expense to the parties. If one assumes that 93 per cent of disputes are resolved without an adjudication, it is clearly desirable that these matters be resolved as early as possible, preferably before any proceedings are issued. **This is an area where, I believe, both the court and profession have failed** [emphasis added].[22]

The basis of costing

14.23 The Committee considers that an important issue which needs to be considered is the quantum of costs charged to parties of the proceedings. As stated, one of the most important issues for this inquiry is the access of people to professional assistance for the resolution of disputes. At present, procedures make it expensive for people to have access to the Family Court and the legal system to resolve both contested and uncontested matters where necessary. The impact any new legislation may have on the demand for legal costs and legal aid is of significant importance, one issue to consider is whether there is a need for a provision in the *Family Law Act* that in exercising its rule-making powers, the Court must have regard to the impact the rules will have on the cost of proceedings to the parties, and must ensure that the Court and the services provided by the Court are accessible, affordable and understandable to the general public.

14.24 The following extracts from submissions and public evidence had this to say about the methods of charging costs.

14.25 In response to a question about whether there should be a standard fee chargeable in relation to family law matters, a witness in Adelaide stated:

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21 Transcript, 24 September 1991, p 371

22 Nicholson, CJ, 'The Idea of an Independent Family Court 15 years on - Was it a Good Idea?', Paper delivered to the 4th National Family Law Conference, Gold Coast, July 1990, p 22

> Each family law dispute is fairly unique in itself, in that it would be too hard, after that first return date, to be able to put a block figure on [a standard fee]. Cases can resolve at any stage along the way in a family court proceeding, and in a lot of the proceedings the structures of the family court are there to provide a settlement all along the way. It would be too difficult to put a flat figure on all issues. We probably are stuck with some form of either time basis or event basis, but we could not have a set figure to cover everything.[23]

14.26 Another witness in Perth, a consultant staff solicitor to the Citizen's Advice Bureau, stated:

> Some time and effort ought to be given to the question of why this scale of costs is based on the time that is expended, rather than on the efficiency with which the person who is doing the job does it. I would suggest, at the risk of sounding a little facetious, that, if someone were to pay a solicitor $300 to $350 an hour, it would not be difficult for that person to draw up a scale of costs based on achievement of ends rather than on time spent.[24]

14.27 In relation to the issue of whether consideration has been given to continuing an hourly rate of charging, as opposed to the introduction of an item by item rate of charging the Chairman of the Family Law Section of the Law Council of Australia, Mr Burr, responded:

> Yes, we are certainly considering those two separate issues. In some cases we are criticised for an hourly rate, yet in many instances that produces a more efficient result to the client. Mr Crowley could tell you of an example, I think it was only last week, where he costed a matter on an hourly basis and it came to $1,100.00. He costed it on the family court scale, and it came to $2,000.00. So there are instances where an efficient use of an hourly scale is better than an item by item scale. There are other situations where it is not - that of the inexperienced practitioner, perhaps. The inefficient practitioners ought best to stick to an itemised scale and not an hourly scale.[25]

14.28 The Committee received evidence in Perth from Mr David Garnsworthy, a consultant on legal costs from the Legal Aid Commission of Western Australia. In evidence to the Committee he stated:

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23 Transcript, 22 October 1991, p 404
24 Transcript, 20 February 1992, p 1144
25 Transcript, 27 March 1992, p 1365

> Our concern is primarily in relation to the cost of providing representation in family law proceedings. It is our submission to you that this is a consumer-wide issue and is not an issue simply driven by concerns unique to Legal Aid Commissions throughout Australia. It is our submission to you that these concerns are about the cost of representation before the Family Court are widely based and are of impact to all consumers before the Court...
>
> Where a private individual engages a lawyer in this jurisdiction, then he or she will almost certainly in this State sign a cost agreement of which the hourly rate can be as high, I have heard, as $250 per hour. Legal aid pays $104.40 per hour less 20 per cent, about $85 per hour. So there is a considerable discrepancy and that poses problems for Legal Aid representation because it means that a number of lawyers are saying to us they simply cannot afford to represent people on a Legal Aid basis because they are losing too much money in doing so. I am not suggesting that every lawyer in Perth is charging $150 an hour, but my own experience would suggest that a mean figure of $180 to $190 per hour, based on cost agreements in this jurisdiction, would not be unusual. So the real cost of representation in this jurisdiction is much higher than even the scale would suggest. I will be suggesting to you that there are some problems in the scales themselves which urgently need addressing from everyone's viewpoint.[26]

14.29 Mr Garnsworthy also discussed the fees that may be charged under Schedule 2 of the Family Law Rules:

> Costs in the Family Court are driven by the second schedule.... The structure of that schedule, I submit to you, poses a number of problems, not the least of which is that the costs of drawing documents, examining documents or dealing with documents in this jurisdiction are very high indeed. In fact, the practitioner is paid more for drawing an affidavit before the Family Court than before the High Court of Australia.[27]

The scale fees

14.30 The principles underlying solicitor and client costing in family law proceedings are contained in Order 38 of the Family Law Rules. Order 38 was expanded in 1987 by the introduction of amendments to the procedures of contracting out, the procedures on taxation and party/party taxation of costs and the limitation of the basic composite amount in relation to undefended dissolution applications.

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26 Transcript, 20 February 1992, pp 1062, 1064-5
27 ibid, p 1065

14.31 The essence of setting a scale of fee is that costing for the legal profession is concerned about the receipt of a proper and reasonable return for the delivery of professional skills and attendances which a solicitor may provide to a client. Evidence to the Committee has claimed that for a solicitor to maintain a successful practice, having regard to rising overheads and other financial necessities, there is no opportunity to charge less than the scale. Evidence to the Committee also suggests that there is a regular practice, particularly in Sydney, of charging well above the hourly rate provided for in the scale of fees. This practice is discussed further in the section below on contracting out. The following discussion sets out the different methods of setting costs to date.

The basic composite amount

14.32 In general, the Family Law Rules provide a detailed code as to solicitor and client costs. Both the Family Law Regulations, which previously contained the provisions in relation to costing, and the current Family Law Rules, have undergone extensive amendment resulting in a comprehensive and complete code concerning disputes between solicitors and clients as to what may be a proper and adequate amount to be charged by a solicitor. The former regulations and the rules have provided a 'basic composite amount' that a party may be charged for costs for proceedings in relation to both dissolution of marriage and ancillary matters. The rules have been amended to delete the basic composite amount for ancillary matters.

14.33 The basic composite amount is defined in Order 38, Rule 4(2) as an amount which includes all the necessary preparation of an undefended divorce and allows for a hearing time not exceeding one hour. The Rules currently make provision for charges in addition to the basic composite amount and additional costs where a solicitor may charge for work done for proceedings, an amount justified by the complexity of the proceedings, the difficulty or novelty of the matters raised in the proceedings or the special skill, knowledge or responsibility required of, or the demand placed upon, the solicitor by the proceedings. It would appear such circumstances would not apply to an undefended divorce and are superfluous to the basic composite amount for an undefended dissolution.

14.34 The basic composite amounts were intended to cover a party's ordinary and expected costs for a normal and uncomplicated matter. With the increasing complexities of the Family Law Rules and the procedures to be complied with under the Family Court case management guidelines, it may be argued that an ancillary matter could not be reasonably expected to be completed within the time and within the amount provided for in basic composite amounts.

14.35 It would appear that this factor may be a reason for the 1987 amendment to the Family Law Rules to make provision for a basic composite amount only for an application for an undefended dissolution of marriage. In all ancillary proceedings the

basis for charging is now under Schedule 2 of the Family Law Rules which provides an hourly rate or permits a cost agreement to be entered into between the solicitor and the client. The present scale of fees is based on an hourly rate of charge as opposed to an item by item rate of charge, that is, the current scale is based upon the time spent in achieving a particular goal as opposed to a fixed sum set for achieving that goal. The current hourly rate for time reasonably spent by a solicitor on work requiring the skill of a solicitor is $104.40. Schedule 2 also provides that a solicitor may charge $24.90 per page for drawing court documents and $11.80 for the perusal of each page of a document. These items may well result in an amount of more than $104.40 per hour.

14.36 This method of determining costs may be the reason for some of the exorbitant bills of costs referred to in evidence to the Committee. Despite argument from the Law Council of Australia to the contrary, this may also be a valid reason to support the introduction of an item-by-item basis for costing. This would not affect the practitioner who may be able to deal with matters efficiently and expeditiously, as suggested by the Law Council in para 14.19 of this chapter. In effect, it would be a return to the system of using basic composite amounts. As stated by Buckley, J:

> I have been involved in that organisation [Federal Costs Advisory Committee] for a long time. The profession, as I understand it, many years ago had, in fact, agreed that they would do a cost survey practice which, for many, many reasons, has not happened, so that the work of the advisory committee, they say, has been hampered. I think the other thing that you should be looking at is really a question of whether there should be that schedule 2 which is based upon time costing, or whether there should be an item by item fixed cost scale. I think that it is now clear that the lawyers have followed the accountants and that the inefficient lawyer is assisted by time costing. I think clients are paying unfairly for that. Costs are an area that unfortunately I have had a lot of involvement in over many years. I was chairman of the rules committee for three years and fought consistently with the profession over the issue.
>
> The time has come for there to be model scales on a Federal basis which apply to the High Court, the Federal Court, and the Family Court. There may be differences in relation to quantification, the quantum of the various items, but that could be fixed by statutory authority. People should not be subjected to varying items set out in a scale so that one court construes it this way and another court construes it another way. There should be model scales. It should be item for item so that if you are going to get some money you have to earn it. I think it is grossly unfair to favour people with an hourly rate if they are incompetent.[28]

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28 Transcript, 29 May 1992, p 1982

14.37 An important matter to take into account is that if costs are kept too low, competent practitioners may choose not to undertake family law work and the desired outcomes will not be achieved. It is important that there is a balance maintained in the remuneration for family law matters and accessibility to legal practitioners.

Options

14.38 There are three options for costing legal work:

14.38.1 an item-by-item basis;
14.38.2 an hourly rate;
14.38.3 a costing system structured on an event basis.

14.39 The Committee has not received detailed evidence on the various methods of costing. From the evidence the Committee has received it appears that a choice between the first two options would be an arbitrary decision. On the one hand the inefficient practitioner may be assisted by the time costing system, and on the other hand, the item-by-item system may result in higher bills of costs when every detail of a matter is taken into account and costed.

Conclusions

14.40 At present, costs are driven by the hourly rate under Schedule 2 and the complex pleadings system. As noted in Chapter Thirteen, the practices and procedures of the Family Court are being reviewed with the view to the introduction of more simplified procedures. This Committee has recommended that the pleadings system be abolished and that the review of the court's procedures be completed as a matter of priority. The Committee considers that this may be an opportune time to introduce a new costing system structured on an event basis rather than the timing or item-by-item basis. Following the introduction of simplified procedures, scales of fees could be set in particular matters to reach certain stages of a proceeding. The Committee is of the view that the former system of basic composite amounts for ancillary proceedings could be a useful guide. The Committee notes that undefended dissolution proceedings are currently costed on the basis of the basic composite amount.

14.41 The apparent reasons for the abolition of basic composite amounts discussed above (paras 14.33 and 14.34) will be no longer valid with the abolition of pleadings and the introduction of simplified procedures. As an example, a matter could be costed in stages from taking instructions to the first return date; then to an Order 24 conference in property proceedings; then to a pre-trial conference or trial. This concept is not new as some legal aid agencies grant financial assistance to certain stages of a proceeding after which continuing assistance is reviewed. The Committee favours the introduction of the option of a costing system developed on an event basis.

Recommendation

14.42 The Committee recommends that:

107 having regard to the introduction of simplified procedures in the Family Court a new costing system be developed, structured on an event basis, similar to the previous system of basic composite amounts.

14.43 The Committee notes the existence of the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the costs of justice in Australia. The issue of costs in the Family Court will be the subject of further detailed discussion and recommendation by that Committee.

Awarding costs

14.44 Under sections 117 and 118 of the *Family Law Act* there is a general principle that each party to the proceedings under the Act shall bear their own costs. The Act does provide for exceptions to this general principle. Section 117(2) of the Act provides that if the Court is of the opinion that there are circumstances that justify it doing so, the Court may make such order as to costs and security for costs, as the court considers just. Also, Section 118 of the Act provides that the Court may make an order for costs in relation to frivolous and vexatious proceedings. In exercising the court's discretion under section 117(2) of the Act to award costs between parties to proceedings, the Court is required to have regard to several matters:

14.44.1 the financial circumstances of each of the parties to the proceedings;

14.44.2 whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to the party;

14.44.3 the conduct of the parties to the proceedings in relation to the proceedings, including their conduct in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;

14.44.4 whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;

14.44.5 whether any party to the proceedings has been wholly unsuccessful in the proceedings;

14.44.6 whether either party to the proceedings has in accordance made an offer in writing to the other party to the proceedings to settle and the terms of any such offer; and

14.44.7 such other matters as the court considers relevant.

14.45 In relation to the issue of making cost orders under Section 117 of the *Family Law Act*, the Family Court is of the view that the discretion to award costs should be retained. The court argues that if a party is at risk of having to pay the other side's costs as well as their own costs then there may be a deterrent to proceed to litigation in matters which really ought to be settled. There is also the argument that if a person unnecessarily puts the other party to the payment of legal costs in proceedings which are unnecessary, then an award can be made to that party for the reimbursement of the costs unnecessarily spent.

Conclusions

14.46 The Committee accepts the validity of the Family Court's argument as stated above. The Committee is of the view that courts exercising jurisdiction under the *Family Law Act* have sufficient discretion to make orders for costs in proceedings under the Act and there is not a need to extend the matters to be taken into account as to whether an order for costs should be made. While the general principle is that each party should bear their own costs, the Committee considers that the more extensive use of orders for costs in accordance with above matters may ensure better compliance with orders and less time wasting in court. The courts need to be firm in this area. The Committee also concludes that cost orders against parties who either fail to comply with directions or who are not ready to proceed when required should be rigorously used.

Recommendations

14.47 The Committee recommends that:

108 cost orders to be made more often, especially where one party unnecessarily forces the other party to incur legal costs, such costs orders to include an award for fee reimbursement of those costs unnecessarily incurred; and

109 cost orders against parties who have not complied with court directions or who have not been ready to proceed when required to be used more vigorously.

Trial management

14.48 References in the chapter on the adversarial nature of proceedings have been made in relation to the conciliation services and case management guidelines within the Family Court. In its submission to the inquiry[29] the Court considers that there is

29 Submission 940, Vol 31, p 6124

a further area where savings of significant amounts in costs could be achieved. That area is related to judicial administration and is known as trial management. What is perceived as trial management is:

14.48.1 evaluation of the particular case by the trial judge and counsel to determine, at the time of trial, the remaining triable issues;

14.48.2 an examination of the matters consequently requiring presentation;

14.48.3 the development by consent (and in default of consent by direction) of a timetable for submission and the examination of each witness; and

14.48.4 a general adherence to, and if necessary an enforcement of, that developed timetable by the trial judge.

14.49 In essence this means that the judge actively controls the time and scope of the hearing of matters. It is important that the length of time allotted to a particular case is balanced against the fairness of the parties to have an equal time to present their case. An example of this is whether a custody trial should be allocated three to four weeks, which may occur in the larger registries of the court, or whether it would sufficient time for the parties to canvass all the relevant issues within three to four days. Another example is where the matter may be set down for hearing and for some reason an application for an adjournment is applied for or where previous directions by the court have not been complied with and there is a necessity to set a new hearing date.

14.50 Dr Richard Chisholm, from the University of New South Wales, points out that, because parties control the length of proceedings, delays in litigation, for whatever reason, can have the following adverse affects:

14.50.1 additional costs are not entirely borne by the parties concerned, since there is a public component of the costs of litigation;

14.50.2 they can cause delays to other litigants;

14.50.3 such delays can put pressure on parties who are less able to tolerate delay and expense to make unsatisfactory settlements.[30]

14.51 The Family Court's submission quoted Rogers J, who stated:

> The proceedings throw up quite vividly the collision that exists between the traditional concept, that it is part of the demands, or requirements, of natural justice that a judge must allow a party to present its case in full, no matter what, and the demands of ordinary justice that a litigant should not be allowed to be bled white, or to be oppressed by a wealthy party, taking as long as it likes in the conduct of the litigious process. It imposes a

30 Chisholm, op cit, p 17

super human burden on a trial judge to decide where the line should be drawn.[31]

14.52 In its submission, the Family Court noted that a substantial number of submissions to the Committee have indicated that the costs of justice are too high and are beyond the affordability of Australians of average means.[32] The court takes the view, therefore, that it should move to the fullest extent possible, to develop appropriate modes of trial management to assist containment of costs of litigation and to make the fullest use of available judicial resources. The court is of the view that the development of appropriate trial management procedures could be facilitated by legislative amendment to empower the judges to make additional Rules of Court enabling the court to make directions for a more structured and more interventionist approach to the management of trials. The court is of the view that an expansion of the extent to which trial management can be undertaken is possible.

Conclusions

14.53 The Committee agrees with the Family Court that the *Family Law Act* be amended to empower the judges to make additional Rules of Court in relation to trial management.

Recommendations

14.54 The Committee recommends that:

110 the *Family Law Act 1975* be amended to enable judges to make Rules of Court in relation to trial management; and

111 the *Family Law Act 1975* be amended to provide that in exercising its rule-making powers, the Family Court must have regard to the impact new rules will have on the cost to the parties, and to the effectiveness of the Family Court providing services which are accessible, affordable and understandable to the general public.

Case management

14.55 The Family Court has attempted to address the incidence of delays in bringing cases to court and delays in the hearing of cases once in court. Developments within the Court relate both to case management, the progress of the case up to and

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31 Submission 940, Vol 31, p 6127
32 ibid, p 6127

beyond the trial and trial management, the control of the actual hearing. Case management refers to the supervision or management of the time and events involved in the movement of a case through the court system. Trial management refers to the conduct of the case during the trial before the judge. These matters are discussed in Chapter Thirteen.

Cost agreements

14.56 Order 38 Rule 8 of the Family Law Rules provides:

> *[Order 38 rule 8] Solicitor and client agreement as to costs*
>
> *8 (1) A solicitor acting for a party to proceedings may enter into an agreement in relation to the costs of the proceedings with:*
> *(a) a client of that solicitor who is such a party;*
> *(b) any other client of that solicitor in relation to those costs; or*
> *(c) any clients referred to in paragraphs (a) and (b).*
>
> *(2) The agreement shall be in writing and shall be signed by each person who agrees to be bound by the agreement.*
>
> *(3) Subject to rule 8A of this order:*
> *(a) the solicitor may charge in accordance with the agreement;*
> *(b) the solicitor's bill of costs for the amount due under the agreement may be taxed in accordance with the agreement in any court of competent jurisdiction; and*
> *(c) the agreement may be enforced or set aside in the same manner and on the same grounds as any other agreement.*
>
> *(4) Before entering into the agreement, the solicitor shall:*
> *(a) provide the client with a copy of a pamphlet summarising the main effects of Order 38, prepared by the Principal Registrar; and*
> *(b) advise the client of the availability of independent legal advice.*

14.57 This provision enables a solicitor to enter into an agreement with the client which permits the charging of a fee in excess of that provided by the scale of costs. The Committee notes that from evidence received the fee which may be charged under an agreement may range from $200-250 per hour.

14.58 Order 34 Rule 8 specifies the obligation of a solicitor wishing to enter into an enforceable contracting out agreement with a client. Important issues are that the solicitor must inform the client of the substance of the costs rules. Rule 8 also provides that before entering into an agreement the solicitor shall advise the client of the availability of independent legal advice, and the solicitor must explain the nature and the effect of the agreement to the client.

14.59 An important factor in entering into a costs agreement is that the consent obtained from the client must be real and well informed. An issue to be addressed is whether in consulting a solicitor for the first time in relation to emotional family law issues the client is sufficiently well informed and capable of making a balanced decision before entering into a costs agreement.

14.60 The Committee acknowledges the right of a client to enter into a costs agreement. This is similar to parties freely and voluntarily entering into a financial agreement as to property prior to a marriage. In recognising this, it is important that in relation to cost agreements that the client has in fact freely and voluntarily entered into the agreement.

14.61 There have been some suggestions that in accordance with Order 34 Rule 8 a client should seek independent legal advice before entering into an agreement. The Committee supports this view, however, from the practical point of view this may not be done and it may result in incurring additional costs in receiving the independent advice. An alternative approach may be that inquiries be made of other practitioners as to their willingness to undertake the conduct of proceedings on the basis of the scale of costs described by the Rules of Court.

14.62 In evidence to the Committee, the Law Council stated:

> In a sense, we are a little bemused by the complaints about costs agreements because the very intent and purpose of that legislation and costs agreements is in order to fully inform the client at the outset, what likely costs are going to be incurred. As we understand it, one of the other criticisms of the profession is a lack of communication, a lack of information, and a lack of detail.
>
> One of the areas in which we are almost beyond criticism is in the area of costing out. The clients are given a document; they are invited to read it; they are invited to get separate legal advice. They are given a pamphlet that is published by the Family Law Court, and they are told to go away and read it all. If they want that individual solicitor to act, then they sign it and bring the document back. The family law litigants in Australia are better informed than any other litigants in the whole of the country, the

United Kingdom, or wherever you care to name, about what costs they are embarking upon.[33]

14.63 The Committee does not accept the view expressed by the Law Council that all litigants are adequately protected under the existing procedures. In a paper delivered to the Family Law Conference in Perth, Hase, J argued against the view of the Law Council:

> It is clear that throughout Australia there are various pieces of legislation which permit the solicitors and clients to enter into costs agreements.
>
> Unfortunately, for years costs agreements have been abused by some solicitors who charge fees which are exorbitant.
>
> We are only too familiar with cases dealing with average people when the costs of litigation are greater than the property of the parties.
>
> It is a sad indictment of the system that parties cannot afford to litigate many cases and that many families, who have not behaved unreasonably, have lost the whole of their property in legal costs.
>
> The average litigant, in my view, is most upset as a result of the failure of the marriage and it is not reasonable to pretend that there is a level playing field upon which he, and the solicitor, can negotiate a reasonable costs agreement when we are well aware that the amounts charged are at times, more than three times the scale.
>
> In my view, there has been ample opportunity for the profession to regulate itself with costs agreements, and advantage has been taken of the lack of control.[34]

14.64 Further criticism of the existing arrangements was expressed by Baker, J when he stated:

> As I have said, in my view, the rules do not go far enough in ensuring that litigants are reasonably informed in relation to what they are signing and thereby committing themselves to in relation to the subject litigation. Litigants who become involved in Family Law proceedings are usually suffering from a high level of distress and are therefore, in my opinion, extremely vulnerable. Although I do not advocate the abolition of costs agreements, I am convinced that parties are entitled to receive a far

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33 Transcript, 27 March 1992, p 1364

34 Hon Justice Hase, 'Cost Agreements', **5th National Family Law Conference**, Perth, September 1992, p 8

greater level of protection from the court than they are getting at the present time...

I am firmly of the view that it is simply not good enough for the rules to provide that a solicitor merely hand his client the Registrar's pamphlet and then inform the client that he should obtain independent advice.

Given the fact, as I have said, that most litigants at the time of marriage breakdown are under considerable emotional and financial stress, there is a need for the court to ensure that litigants are given adequate protection. What is needed, in my view, is a provision in the rules requiring all costs agreements to contain a certificate by an independent solicitor.[35]

Conclusions

14.65 The Committee is of the view that before any cost arrangement is entered into it must be established that it has been agreed upon freely and voluntarily. However, the Committee is concerned that Order 38 Rule 8 may not sufficiently protect the client entering into an agreement as a solicitor is only obliged to advise the client of the availability of independent legal advice. The Committee therefore concludes that, in order for an agreement to be enforceable, a copy of the agreement should be filed in the Family Court when an application initiating proceedings is filed. The agreement should include a statement by the practitioner that the effects of the agreement have been explained to the client. The agreement then becomes a part of the court file.

14.66 The Committee concludes that the guidelines in relation to cost agreements are not adequate and need to be tightened. Notwithstanding the existence of a costs agreement a court must have the right to determine whether the fees charged under the agreement are fair and reasonable in the circumstances of each case where this matter may be brought to the Court's attention.

Recommendations

14.67 The Committee recommends that:

112 cost agreements be retained with an amendment to the Family Law Rules to the effect that, in order to protect litigants, in addition to existing requirements, cost agreements contain a certificate from a solicitor that the agreement has been entered into freely and voluntarily; and

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35 Hon Justice Baker, 'Cost Agreements in Family Law', August 1992, p 5 and p 8

113 in order for a cost agreement to be enforceable, a copy of a cost agreement is to be filed in the Family Court when an application initiating proceedings is filed.

Pro bono publico

14.68 *Pro bono publico* is a latin term meaning 'for the public good'. The basis of the *pro bono publico* obligation is that the legal profession has an obligation to provide free or reduced cost legal services to people who are either ineligible for legal aid or cannot afford the cost of legal representation. With increasing demands upon limited legal aid resources the issue of *pro bono* work by the legal profession has become particularly relevant. The Committee is of the view that there is potential for the legal profession to provide valuable assistance to the community on a *pro bono* basis. As stated in the Law Society Journal:

> This *pro bono* duty is grounded in the inescapable reality that much of daily life is governed by law and the legal process. Consequently, the universally accepted principle of 'equality before the law' takes on critical importance in a society which aims to be just. Given the complexity of the legal system, individuals generally require professional representation in order to convert this principle into reality.[36]

Conclusions

14.69 The provision of *pro bono* assistance from legal firms could meet the substantial unmet legal needs of the community in family law disputes. The Committee is of the view that a more extensive and regular *pro bono* service to the community could meet the need of many clients who are neglected under the present system. The provision of *pro bono* services should not be ad hoc, but should be organised by the legal professional societies and be practised by the profession on a collective basis.

Recommendation

14.70 The Committee recommends that:

114 given the limitations on legal aid, legal practitioners be encouraged to provide *pro bono* work on a regular basis.

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36 B Hounslow, 'Pro Bono Programs move to marshall volunteer effort', **Law Society Journal**, Vol 30(1), 1992, p 56

CHAPTER FIFTEEN: PUBLICATION OF PROCEEDINGS

The legislation

15.1 Section 121 of the *Family Law Act 1975* governs the publication of proceedings in the Family Court. The press is free to report on proceedings taking place in the Family Court, but is not permitted to identify parties to the proceedings. That restriction on identification is limited to identifying parties who may be involved in any way in proceedings. Such people include the parties themselves, witnesses in proceedings and any other persons concerned in the proceedings.

15.2 Section 121(3) lists the matters which will be taken to identify a person. These matters include, among others, names and/or pseudonyms, addresses, employment, relationships, a picture of the person, or a sound recording of the person's voice, 'sufficient to identify that person to a member of the public'.

15.3 Section 121(9) provides for exceptions to the restrictions imposed by the rest of the section to enable parties to have access to documents concerned with proceedings, to permit the publication of law reports and the publication of notices by the Family Court. The identification of parties can only happen with the express authority of the Court. This normally only happens in such instances as child abduction cases, when it is necessary to publicise the case and identify the parties in order to locate them.

The restraint on publication

15.4 Historically, the first restraints on publication of proceedings were imposed by the *Matrimonial Causes Act 1961*, whereby only the names of parties, a statement of the issues, the submissions on law and the judgment of the Court could be published, unless the Court ordered otherwise. Penalties were prescribed for any infringement of these strict parameters. The restrictions came about to prevent 'the sensational and salacious reporting of matters relating to divorce which had been part of the format of

many Australian newspapers for a number of years'.[1] However, because it was still possible to publish names many people were still exposed to the scandal and potential prying into their private lives made possible by the legal process operating at that time.

15.5 When the *Family Law Act* was first introduced it contained a blanket ban on reporting anything in relation to proceedings in the Family Court. By virtue of s97 all proceedings were to be held in closed courtrooms and under s121 it was an offence to publish any statement or report proceedings that had been instituted or any account of evidence in proceedings. This blanket ban on the reporting of proceedings meant that the Act had 'made a revolutionary departure from the traditional approach of the common law as to the holding of court proceedings in public and the protection of the publication of those proceedings to the public at large'.[2] The rationale for this departure from the norm was described as follows:

> Parliament, when reversing the usual presumption, considered that there was no particular public good to be served by exposing the private domestic conflicts of individuals to the public gaze and it was concerned that individuals involved in such disputes should not be, in any way, exploited by the press.[3]

15.6 The practice of a closed court was relatively short lived. The privacy of the proceedings led to accusations of the Court being akin to a 'star chamber'. A further problem for the Court was described by the Chief Justice as follows:

> Litigants who complained that they had been denied justice could make allegations concerning the Court and the conduct of Judges and those involved in the proceedings without these allegations being capable of rebuttal. The administration of justice in the Family Court was open to criticism by slur and innuendo and thus, from the outset, the administration of justice in the Court was capable of being portrayed as being of a different category to that of other courts.[4]

15.7 In 1983[5] the Act was amended to permit proceedings to be held in open court, with the restrictions on identification of parties remaining. The amendment was in response to the earlier Joint Select Committee's report, which recommended that proceedings take place in open court.[6] That Committee also recommended that:

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1 Family Court of Australia, Submission 940, Vol 32, p 6303
2 ibid
3 Nicholson CJ, 'The idea of an independent Family Court 15 years on - was it a good idea?', Paper given to the Fourth National Family Law Conference in July 1990
4 ibid, p 24
5 No 72 of 1983, s52
6 **Family Law in Australia**, op cit, Recommendation 59

> ...the publication of details of proceedings under the Act should be permitted and that steps should be taken to relax the restrictions on publication contained in s121 of the *Family Law Act*, provided that the names of the parties and any other identifying information is prohibited from disclosure.[7]

15.8 The Government of the day, in amending the legislation, acknowledged the calls for the hearing of the Family Court's proceedings in open court. The Act relaxed the total prohibition on the publication of details of proceedings, severe penalties were prescribed for publication of any account of proceedings that identified a party in connection with the proceedings, and guidelines as to what constituted identification were set down in s121(3). These parameters have been criticised for setting insurmountable barriers to publication.

15.9 The restraint on publication has been criticised, especially by the media and some interest groups. The media argues that the full reporting of legal proceedings is a fundamental pillar of democracy and that the public has a right to be informed on all matters. Some of the legal fraternity and some interest groups argue that proceedings able to be fully reported are more likely to ensure the accountability of the court, - people will be able to air any grievances and judges can be scrutinised more effectively.

Major issues

15.10 The major issues for consideration for the Committee in the matter of publication of proceedings were:

15.10.1 the retention of the status quo, ie proceedings are held in open court but the media and other persons to be prevented from publishing material which could identify parties connected in some way with proceedings in the court; or

15.10.2 the amendment of the legislation to permit proceedings to be fully reportable by the media but, with the right for the court to sit in camera or to restrict publication on appropriate occasions.

The view of the Family Court

15.11 The Family Court's submission, while pointing out the dangers of relaxing the controls on the publication of proceedings, argues that such relaxation may be

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7 ibid, p 162

merited in some classes of cases for the advancement of the public good.[8] The Court cites the comments of Gibbs J in **Russell v Russell** (1976) FLC 90-039:

> It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view'. (**Scott v Scott** (1913) A.C. 417 at p 441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure'. (**McPherson v McPherson** (1936) A.C. 177 at p 200). To require a court invariably to sit in closed court is to alter the nature of the court. Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality in the interests of privacy or delicacy may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court.[9]

15.12 The Family Court justifies its support for some loosening of the s121 safeguards, arguing:

15.12.1 the continuing validity of the arguments of Gibbs J in **Russell v Russell;**

15.12.2 the right of the media to exercise its proper role as the surrogate of the public to scrutinise judicial administration and the competence and the effectiveness or otherwise of legislation in meeting social needs;

15.12.3 the fact that there is little difference in proceedings concerning parties to a property dispute and those of other litigants disputing claims of a proprietal nature in the civil courts;

15.12.4 the fact that there is little difference in cases of contempt of court and disobedience of orders which are quasi-criminal matters and those of similar matters in other courts.[10]

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8 Submission 940, Vol 32, p 6305
9 ibid, pp 6303-4
10 ibid, p 6305

15.13 The Family Court sums up their view by saying:

> The Court would wish to see the Act retain strict protection against publication of cases involving children. It would have little difficulty, however, in accepting normal court-reporting of property settlement claims and contempt and disobedience cases so long as there remained a wide overriding power to prevent publication by order in an appropriate case...[11]

15.14 The Chief Justice personally favours a further opening up of court proceedings, believing the advantages far outweigh the disadvantages. The Chief Justice takes this view for the following reasons:

15.14.1 the necessity to recognise the public interest in the report of proceedings; and

15.14.2 the need for the Court to be accountable and to be seen to be accountable in public.

15.15 The Chief Justice states that very often the Family Court suffers because the press does not report its proceedings on appropriate occasions. He argues that the reason the press does not report proceedings is a result of the extent of restrictions in s121. Nicholson CJ is conscious of the need to protect children and supports the retention of the prohibition of publication of any matter which might identify a child without the Family Court's approval.[12]

Submission comment

15.16 One submission from a practising solicitor argued that s121 protects the legal profession, and in particular the judiciary:

> I am opposed to section 121 of the Act as I am of the opinion that it too often protects the legal profession. In particular, I think it protects judges who are not held accountable for their decisions except if an appeal is brought.[13]

15.17 The submission also made the point that the effect of a provision such as s121 was to prevent change to the law, given that many people were unaware of what was happening in family law proceedings.[14]

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11 ibid, p 6306
12 Nicholson CJ, op cit, p 25
13 Confidential submission, p 7
14 ibid

15.18 The Hon Elizabeth Evatt, a former Chief Justice of the Family Court, argued for no change to the present law, that it was not enough for one person to want to publicise their case in the media, but that the right to privacy for the other party and any children should be respected. Evatt J pointed out that the press is not prevented from publishing details of cases so long as parties are not identified.[15]

The Australian Press Council

15.19 The Australian Press Council made a submission to the Committee solely on this term of reference. The Press Council concurred with the views of Nicholson CJ as set out in a speech, cited earlier, given when he became Chief Justice. The Council recommended that the Act be amended to permit the reporting of the Court's decisions, including identification of the parties, but with no reporting of the evidence. The Council also recommended that the Family Court have the power to prevent publication in appropriate circumstances, for the purposes of protecting children.[16]

The Law Council of Australia

15.20 The Law Council of Australia argued that relaxation of the restrictions in s121 was not the answer to the perceived problems of publication:[17]

> The Council's major concern is that the freedom to publish would only be exercised by the media when the parties were prominent or the substance of the proceedings was sensational.[18]

15.21 The Council argued that the major problem was that of ignorance about the workings of the Family Court and that a more effective solution to the problem would be wider publicity of and education about the Court's activities.[19]

The Family Law Council

15.22 The Family Law Council concurred with the view of the Law Council of Australia, pointing out that the press was unlikely to demonstrate a responsible attitude to the reporting of divorce proceedings and that the position of children in cases of divorce, the right to individual privacy and the threat of publicity as a weapon all

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15 Evatt J, Submission 447, Vol 13, p 2621
16 Australian Press Council, submission 450, Vol 13, p 2643
17 Law Council of Australia, submission 415, Vol 11, p 2324
18 ibid
19 ibid, p 2326

supported the retention of the status quo.[20] The Council regarded the provision, as it exists at present, as a sensible one and did not favour any change to it.

The Australian Institute of Family Studies

15.23 The AIFS did not support the relaxation of s121. The Institute argued that the anonymity of those involved in marriage breakdown is important, and the welfare of children can only be harmed if they are exposed to media scrutiny.[21] The Institute also made the point that, so long as the issues are able to be reported, the identity of the parties has no significance.

The present confusion

15.24 The Committee acknowledges the anomalies that exist at present in the extent to which proceedings taking place in the Family Court can be reported and is concerned that the restrictions in s121 may be too severe. In particular, the Committee is concerned that the guidelines as to the identification of parties may be too prescriptive, in which case they may be inhibiting the press from reporting proceedings. However, the Committee regards the privacy of the individual as important and sees that there is little to be gained by allowing the press to identify individuals.

15.25 It should be noted that, since the law was amended in 1983 to permit proceedings taking place in open court, but with the restriction remaining on identification, it appears that very few members of the media have bothered to report family law proceedings. This outcome could be attributed to one of two reasons - either journalists are unaware of the extent to which they are able to report proceedings in the Family Court or they have decided that, unless parties can be identified, the reporting of such proceedings will have little interest or merit for their readership or viewers.

15.26 From the evidence in submissions it would appear that there is a significant level of misunderstanding in the community regarding the s121 publication provision. The following extract from the submissions is illustrative of this point:

> The secrecy or 'privacy' of the court is iniquitous. This allows judges to make perverse or crazy decisions behind a cloak of secrecy - they are not open to public scrutiny or criticism. The only redress an individual has (one who receives one of these perverse decisions) is to appeal (although already financially crippled) to the same incestuous system and judges...There is no need to suppress any case details from the media - it

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20 *Submission 546*, Vol 16, p 3173
21 Submission 777, Vol 24, p 4662

> could be permitted upon application that names be suppressed, but why conceal all the proceedings and the judgement from scrutiny.[22]

15.27 The Committee is concerned that court officials themselves may be unaware of the extent to which publication is permitted. The Committee notes the comment in a newspaper article appearing in the West Australian of 6 March 1992:

> WA Family Court Registrar Caroline Martin warned last month that reporters could not take notes after *The West Australian* told her it intended covering Family Court proceedings.[23]

15.28 The article went on to say that although the Chief Justice of the WA Family Court later advised that there was no ban on 'accredited press' taking notes. When this was tested a court official removed a reporter's notes for a short period until the presiding magistrate ordered their return.[24]

15.29 The case against opening up the Court further and permitting more extensive reporting of proceedings is the need to protect children and other parties from the consequences of publicity and the questionable practice of prying into people's private lives. There is also the tendency of certain sections of the press to print whatever will sell newspapers, defending their actions with the phrase 'the public's right to know'. Essentially, the issue comes down to a choice between the possibility of exposing flaws in justice, the public interest and the right of the individual to privacy.

Conclusions

15.30 After much deliberation, the Committee has concluded that no significant evidence has been placed before it to justify the relaxation of the policy behind s121. The Committee is concerned that the individual's right to privacy be respected. In coming to this conclusion the Committee is very conscious of the moves in the Parliament and the community to promote the right of the individual to privacy. The introduction of the Privacy Act in 1989 was a significant commitment to this issue.

15.31 The Committee feels that the points made by the Law Council of Australia and by the former Chief Justice, the Hon Elizabeth Evatt, have significant weight, particularly in relation to the fact that there is already sufficient scope for the press to comment on the issues and the law - the only restriction being the identification of parties to proceedings and others connected with the case. The Committee is not convinced that the Family Court's claim that it is unable to defend itself against incorrect or biased reporting is a problem. Nor does the Committee accept the claim that the

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22 Submission 384, Vol 9, p 1934
23 The West Australian, 6 April 1992
24 ibid

section as it is currently written enables members of the judiciary to remain unaccountable.

15.32 The Committee is concerned that the Family Court makes known to the press the extent of as well as the limitations to any publication of proceedings. The Committee is concerned that the press and many other people in the community are simply unaware of the degree to which proceedings can be publicised and the fact that courts are open. The Committee appreciates that this is a sensitive area, nevertheless the Committee feels this would be an appropriate area of activity for the Family Court's media liaison officers.

15.33 If court officials are unaware of the correct application of s121, then it is hardly surprising that members of the press may be similarly misled. The Committee believes that the extent of s121(3) may have been misinterpreted by the press and there may be a case for either simplifying the section by rewriting it or stating explicitly how the section is to be interpreted. It may be that s121(3) is written so as to deter the press from writing anything at all about Family Court proceedings for fear of being in breach of the section or for fear of damages claimed by people who feel they may have been identified, although not named in a press article.

Recommendations

15.34 The Committee therefore recommends that:

115 there be no change in the current policy relating to the publication of proceedings in the Family Court;

116 section 121 of the *Family Law Act 1975* be rewritten so that the intention of the Parliament, ie to permit publication but without permitting any identification of parties, is clear;

117 section 121(3) of the *Family Law Act 1975*, which specifies the particulars which may identify a person, in particular be amended and perhaps rewritten in more general terms; and

118 the Family Court use its media liaison personnel to promote the reporting of family court proceedings in the public interest.

Publicity orders

15.35 Publicity orders are granted under s121(9) of the *Family Law Act*, normally for the purpose of locating children who have been abducted. At times, the publicity has continued after the children have been located and where continued publicity no longer

serves its original purpose. It is possible to mount a media campaign against the abducting parent with the unwitting connivance of the law. In such situations there is considerable merit in restricting publicity orders to a stated purpose; once the purpose has been fulfilled the order ceases to have effect.

A case in point

15.36 One case, which received a great deal of media publicity long after the original purpose of the publicity order was fulfilled, was brought to the attention of the committee. The case concerned a father who failed to return his two children to the custody of their mother after an access visit, instead taking them out of Australia. This was in defiance of the court order and, in order to locate the children, the Family Court granted the mother leave to publish details of the case in the media. However, even after the children had been located, the media coverage continued to a significant degree. The coverage was highly critical of and unfavourable to the father, who was unable to put his side of the case. The father also felt that such coverage was deeply prejudicial to any trial he might have to undergo as a result of his actions.[25]

Conclusions

15.37 The Committee is concerned that it is possible for publicity orders to be exploited. The Committee feels that any publicity order made by the Family Court should be restricted to the release of details which will assist in the location of the children and that such orders must cease to have effect once the children have been located. The Family Court should be able to provide for the cessation of a publicity order in the terms of the order.

Recommendations

15.38 The Committee therefore recommends that:

119 **the scope of publicity orders made under section 121 (9) of the *Family Law Act 1975* for the purposes of locating children who have been abducted, be limited to the release of relevant information only and for the purposes of assisting to locate the children; and**

120 **the Family Court publicity order, as part of the order, state when the publicity order is to cease to have effect and in any case to cease to have effect once the child or children have been located.**

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25 Confidential submission No 61