The Parliament of the Commonwealth
of Australia

The Family Law Act 1975

Aspects of its Operation and Interpretation

Report of
the Joint Select Committee
on Certain Aspects of the
Operation and Interpretation
of the Family Law Act

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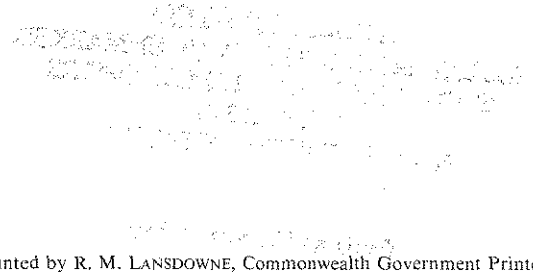

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TERMS OF REFERENCE

That a joint select committee to be known as the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, be appointed to inquire into and report on the provisions and operation of the *Family Law Act 1975* and, where the committee thinks appropriate and necessary, make such recommendations for amendments to the Family Law Act and other action in respect of:

(a) the role, funding, effectiveness and availability of the services of:

  (i) the Family Court Counselling Service, and

  (ii) approved organisations providing marriage counselling and family mediation services;

(b) the proper resolution of custody, guardianship, welfare and access disputes;

(c) the proper resolution of family law property disputes, including the question whether it is desirable that the Family Law Act be extended to property disputes arising out of de facto relationships;

(d) the effective enforcement of rights and duties under the Family Law Act;

(e) the exercise of discretion by the courts, including the question whether it is desirable to better structure the exercise of the discretion of the courts in making orders determining disputes in relation to children or property;

(f) the adversarial nature of proceedings under the Family Law Act and their associated legal costs, including the question whether amendments to the Act or other action are desirable to require or encourage greater use of arbitration, mediation or other forms of alternative dispute resolution;

(g) the prohibition in the Family Law Act on the publication of accounts of proceedings which identify parties, witnesses or other persons associated with the proceedings; and

(h) the retiring age for judges of the Family Court of Australia.

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APPENDICES

ABBREVIATIONS

AIFS	Australian Institute of Family Studies
AFP	Australian Federal Police
ALRC	Australian Law Reform Commission
AWE	average weekly earnings
CEO	Chief Executive Officer
CSA	Child Support Agency
FCA	Family Counsellors' Association
FCCS	Family Court Counselling Service
FLA	Family Law Act
FLC	Family Law Council
GAL	*guardian ad litum*
HREOC	Human Rights and Equal Opportunity Commission
IRT	Immigration Review Tribunal
NCVAW	National Committee on Violence Against Women
NWCC	National Women's Consultative Council
PCAG	Police Commissioners Advisory Group
PWP	Parents Without Partners
QDVC	Queensland Domestic Violence Council
QLRC	Queensland Law Reform Commission

RECOMMENDATIONS

Chapter One

1 The Government re-number and re-print the *Family Law Act 1975* at the earliest opportunity. (paragraph 1.23)

Chapter Two

2 An administrative review of the Family Court be undertaken. (paragraph 2.46)

3 The review be undertaken by the Joint Select Committee on certain aspects of the operation and interpretation of the *Family Law Act.* (paragraph 2.46)

Chapter Three

4 The Family Court Counselling Service should be sufficiently resourced to enable:

4.1 the demand for self or solicitor referred counselling to be met;

4.2 a reduction in waiting times for all appointments;

4.3 the provision of a limited after hours service in all registries;

4.4 an extension of Family Court visiting services to outlying areas that are currently infrequently serviced; and

4.5 capacity to deal with the full additional case load generated by the enactment of s70BB and s112AD(5), and the reference of powers from the States in relation to ex-nuptial children. (paragraph 3.25)

5 The establishment of filing registries and sub-registries where necessary, eg, at Geelong, the Gold Coast, and Coffs Harbour. (paragraph 3.25)

6 The Family Court Counselling Service review its staffing levels and training program, to ensure that all counsellors have an opportunity to regularly update their knowledge and skills, particularly in the areas of domestic violence and child sexual abuse. (paragraph 3.48)

7 An interpreter service be provided free of charge where necessary to clients of the Family Court Counselling Service. (paragraph 3.54)

8 The Family Court ensure that counsellors are provided with adequate cross cultural awareness training. (paragraph 3.54)

9 The Family Court investigate the most cost effective means of ensuring that parties who file for voluntary pre-filing conciliation counselling under s15(1) of the *Family Law Act 1975* and who subsequently fail to notify the counselling service of their intention not to attend, are prevented from using repeat applications for counselling as a means of harassing their ex-partner. (paragraph 3.76)

10 All clients ordered to attend conciliation conferences, or reportable conferences for the purpose of family reports, should be offered the option of having separate interviews if domestic violence has occurred in the relationship. (paragraph 3.91)

11 The Director of Family Court Counselling take all necessary steps to ensure that the statements of policy included in the Family Court's revised domestic violence policy statement dated May 1992 be translated into consistent practice in all registries. (paragraph 3.90)

12 Detailed fact sheets on the role and nature of various types of counselling offered by the Family Court, with a strong recommendation that clients attend in-house induction sessions, be sent to all couples upon the initial filing of papers seeking dissolution of a marriage. (paragraph 3.97)

13 There be increased provision of information sessions in registries and other centres where demand exists. (paragraph 3.97)

14 The Family Court Counselling Service monitor demand for grief, post-decision and post-settlement counselling. (paragraph 3.125)

15 Sections 61B and 16A(1) of the *Family Law Act 1975* be amended to require that the Family Court and legal practitioners direct the attention of clients to the facilities and procedures referred to in those sections. (paragraph 3.125)

Chapter Four

16 The Family Court Counselling Service play a more active role in educating its clients as to the availability and potential value of complementary counselling services available within approved marriage counselling and mediation organisations. (paragraph 4.50)

17 The Family Court actively promote short term interchange of its counsellors between the Family Court Counselling Service and approved agencies. (paragraph 4.50)

18 Diploma and post-graduate courses in mediation be established as soon as possible in at least one higher education institution in each State. (paragraph 4.59)

19 A diploma, with appropriate practical experience, be required as the base level qualification for mediators. (paragraph 4.59)

20 Until such courses are established and a sufficient number of graduates have completed the courses, only those organisations that meet standards currently required by government be publicly funded. (paragraph 4.59)

21 Sufficient funding be provided to approved marriage counselling organisations to enable the prompt provision of appointments to potential clients, and to improve the accessibility of marriage counselling to those living in rural and remote areas. (paragraph 4.97)

22 The Commonwealth Government take steps to raise the awareness of private employers of potential cost-benefits of making available to their employees the use of counselling services. (paragraph 4.97)

23 Appropriate steps be taken to promote community understanding, and use of, counselling, mediation and other related services. (paragraph 4.97)

24 Appropriate funding be provided for effective community education about counselling and mediation. (paragraph 4.97)

25 The Commonwealth Government substantially increase funding for community education in relation to:

25.1 the rights and responsibilities of marriage and parenthood;
25.2 effective parenting;
25.3 communications and dispute resolution skills; and
25.4 anger management. (paragraph 4.97)

26 Particular attention be given to the further development of schools-based education programs which provide basic education in the areas set out in recommendation 24 above. (paragraph 4.97)

Chapter Five

27 The concept of guardianship be retained in the *Family Law Act 1975.* (paragraph 5.54)

28 Every order for custody/access made by the Family Court specify the guardianship rights and responsibilities of both parties, and particularly of the non-custodial parent, and the extent of these rights and responsibilities. (paragraph 5.54)

29 There be no change to the terminology of the *Family Law Act 1975* in relation to custody and access, until such time as there is clear evidence that a change would be advantageous to the settlement of custody and access disputes. (paragraph 5.55)

30 The Family Court provide to parties who apply for dissolution of marriage or who initiate proceedings in the Family Court an information leaflet on the meaning of the above terms, the arrangements that may occur in practice and the rights and responsibilities of parties to each other in their parenting role. (paragraph 5.54)

31 The Family Court develop a more systematic and intensive program of judicial education in relevant non-legal matters, and particularly in factors, such as domestic violence and child abuse, which can influence the welfare of the child. (paragraph 5.64)

32 Judges of the Family Court give clear and adequate reasons for decisions and/or orders made by them in matters relating to children. (paragraph 5.64)

33 Interim custody orders only be made where there are firm grounds for intervention to protect the welfare of the child concerned. (paragraph 5.70)

34 Where necessary, the Family Court contract out the preparation of family reports. (paragraph 5.83)

35 Organisations and individuals be approved by the Family Court for the preparation of such reports. (paragraph 5.83)

36 A separate representative for a child be appointed where:

36.1 there are allegations of child sexual abuse; or
36.2 where, in the opinion of the Family Court, the circumstances of the case are such that the welfare of the child is seriously at risk. (paragraph 5.102)

37 The role of the separate representative be to assist the court in the provision of evidence relevant to the welfare of the child. (paragraph 5.102)

Chapter Six

38 Information on the existence and purpose of parenting plans be made available to separating parents and professionals in the family law area. (paragraph 6.24)

39 The development of a parenting plan should not be a prerequisite to litigation. (paragraph 6.24)

40 A detailed review of the jurisdiction of the Family Court in relation to child welfare be undertaken, with a view to establishing whether the jurisdiction of the Family Court be increased to include wardship and *parens patriae* powers. (paragraph 6.42)

41 The review be undertaken by the Family Law Council. (paragraph 6.42)

42 No orders be made for the transfer of custody/access to child/ren either inside or outside a police station unless:

42.1 it has been positively ascertained that the police station is suitably staffed to facilitate such a change-over;

42.2 the officer in charge of that police station agrees to the police station being used as a custody exchange point; and

42.3 a copy of the order has been made available to the officer in charge of the police station at least 48 hours prior to any custody/access change-over.
(paragraph 6.58)

43 When making access orders, or considering applications for variations of those orders, the Family Court should:

43.1 give consideration to the fairness and capacity of the custodial parent to share the costs and travelling time involved in the exercise of access rights by the non-custodial parent; and

43.2 where appropriate, include a requirement that the custodial parent contribute to such costs and travelling time in its access orders.
(paragraph 6.81)

Chapter Seven

44 The Commonwealth Attorney-General request the Family Law Council to broaden its inquiry into repetitive access applications to include:

44.1 the extent to which breaches occur;
44.2 the incidence of breaches leading to Family Court proceedings;
44.3 the 'penalties' imposed;
44.4 the extent to which breaches occur after proceedings for breach of an order have taken place; and

44.5 the adequacy of the range of 'sentencing options' available to the Family Court in dealing with such breaches. (paragraph 7.35)

45 The Family Court include in its custody and access orders, information about enforcement procedures, including the availability of the summary enforcement procedure established under Order 34, Rule 9. (paragraph 7.42)

46 Information provided by the Family Court, including information provided in its custody and access orders, should make it clear that it is not necessary to engage legal representation in order to make an application for summary enforcement using Form 49. (paragraph 7.42)

47 The Family Court investigate the provision of information, including that relating to the summary enforcement procedure, by way of video. (paragraph 7.42)

48 The *Family Law Act 1975* be amended to provide that in proceedings relating to non-compliance with access orders:

48.1 proof of reasonable excuse should constitute a defence to a charge under section 70(3); and

48.2 the onus of establishing such reasonable excuse for the denial of access should lie with the respondent. (paragraph 7.47)

49 The Family Court Counselling Service continue to place high priority on the provision of early intervention counselling in cases where it appears that access is likely to be a problem. (paragraph 7.58)

50 Improved mechanisms for the regular exchange of information and viewpoints between Federal and State police and the Family Court with respect to the enforcement of orders made under Family Law jurisdiction be established. (paragraph 7.84)

51 The Chief Justice of the Family Court initiate urgent discussions with the Chairman of the Police Commissioner's Advisory Group regarding the establishment of appropriate mechanisms for this purpose. (paragraph 7.84)

52 The Commonwealth Attorney-General give consideration to whether any amendment to section 121 of the *Family Law Act 1975* is required to enable these recommendations to be implemented. (paragraph 7.84)

53 The Family Court develop a suitable on-line data base, accessible by the Australian Federal Police which will contain up to date records of the contents of orders made under Family Law jurisdiction, both by the Family Court and by magistrate's courts. (paragraph 7.99)

54 In order to prevent the disclosure of information contained in the database to unauthorised police personnel, the Australian Federal Police nominate an officer with responsibility for accessing this system and for protecting the confidentiality of the information. (paragraph 7.99)

55 State police to have access to the specific information required in particular cases through the Australian Federal Police. (paragraph 7.99)

56 The *Family Law Act 1975* be amended to provide that the Family Court make orders empowering police to take temporary custody of a child at the same time as a warrant is issued for the arrest of the party who is unlawfully attempting to take a child out of the country. (paragraph 7.103)

57 The *Family Law Act 1975* be amended to empower the Family Court to order:

57.1 that warrants issued for the arrest of a person who has abducted or attempted the abduction of a child may remain in force for a specified period of time, notwithstanding the execution of the warrant during that period of time; and

57.2 that a police officer, who believes on reasonable grounds, that the person against whom the warrant is directed has taken certain steps in contravention of the relevant order, may arrest the respondent. (paragraph 7.108)

58 The Chief Justice issue a practice direction specifying that:

58.1 penalties for the non-compliance with Family Court orders and injunctions are contained in the *Family Law Act 1975*;

58.2 such penalties should be used where appropriate in cases of non-compliance with orders and injunctions; and

58.3 such penalties should be consistently applied throughout the Family Court. (paragraph 7.123)

59 The Family Law Council conduct a review of penalties applied by the Family Court in cases of non-compliance with orders and injunctions which come before the Family Court. (paragraph 7.123)

60 The *Family Law Act 1975* be amended to clarify what is meant by 'personal protection' in sections 70D and 114AA to address situations where the terms of an injunction are breached, but no actual assaults or threats are made. (paragraph 7.133)

61 The *Family Law Act 1975* be amended to ensure police have a power of arrest which is sufficient to enforce the terms of injunctions issued by courts and to restrain the possible non-compliance with the injunction. (paragraph 7.133)

62 The *Family Law Act 1975* be amended to ensure that those people in breach of injunctions be restrained from committing further breaches of an injunction before being dealt with by the courts for the initial breach. (paragraph 7.133)

63 The Commonwealth Government take urgent steps towards:

63.1 the implementation of the Standing Committee of Attorneys'-General resolution regarding portability of domestic violence orders; and

63.2 the extension of the jurisdiction of the Family Court to include State/Territory domestic violence legislation where parties to proceedings are also parties to proceedings under State/Territory domestic violence legislation. (paragraph 7.141)

64 The Court make the necessary amendments to the Family Law Rules to enable the issue of warrants under section 34(2) of the *Family Law Act 1975.* (paragraph 7.155)

65 The Commonwealth Attorney-General initiate discussions with the States to amend State legislation which affects the enforcement of financial and property orders to include warrants issued by the Family Court. (paragraph 7.155)

66 A practice direction be issued by the Chief Justice of the Family Court stating that maintenance orders for maintenance which has been unpaid for over twelve months should be enforced according to the relevant provisions of the *Family Law Act 1975.* (Paragraph 7.155)

67 Sections 107 and 112 AB of the *Family Law Act 1975* be amended to remove restrictions upon the imposition of imprisonment for non-payment of maintenance where payment has been wilfully or fraudulently withheld. (paragraph 7.155)

68 The Commonwealth Attorney-General examine the operation of existing mechanisms for the investigation and prosecution of perjury cases. (paragraph 7.159)

69 The Family Court examine means of raising client awareness of the penalties for perjury, and of the options available to parties who believe that an offence has been committed. (paragraph 7.159)

Chapter Eight

70 The *Family Law Act 1975* be amended to combine the relevant matters to be taken into account under section 75(2) and section 79(4) for the purposes of alteration of property interests. (paragraph 8.30)

71 Equality of sharing should be the starting point in the allocation of matrimonial property. (paragraph 8.95)

72 Where a pre-nuptial or subsequent financial agreement exists, that agreement should be the starting point. (paragraph 8.95)

73 Courts should have a discretion to depart from the equality of sharing principle to take account of exceptional circumstances. (paragraph 8.95)

74 Matters to be taken into account in exercising a discretion may include but should not be limited to:

74.1 the length of the marriage;
74.2 the care and control of children;
74.3 obligations incurred under the child support legislation;
74.4 the future needs of each spouse;
74.5 the financial impact on each of the parties;
74.6 the property brought into the marriage;
74.7 the home-making and child rearing contribution; and
74.8 the financial contribution by each person. (paragraph 8.95)

Chapter Nine

75 To the extent possible within constitutional power, the *Family Law Act 1975* be amended to include superannuation entitlements as property. (paragraph 9.62)

76 As a general rule, at the discretion of the court, the notional realisable value of the superannuation entitlement be the value to be taken into account at the time of the hearing. (paragraph 9.62)

77 The *Family Law Act 1975* be amended to empower the Family Court to order that a superannuation entitlement be split and shared between the contributing and non-contributing spouse. (paragraph 9.62)

78 The entitlement be shared between the parties in proportion equal to the length of the marriage or cohabitation by reference to the total period of contribution to the fund. (paragraph 9.62)

79 The power to divide the superannuation entitlement be discretionary and not automatic in all cases. (paragraph 9.62)

80 A court order, either a consent order or otherwise, be required to direct the trustee of a superannuation fund to divide the entitlement. (paragraph 9.62)

81 The divided funds be portable between a similar superannuation scheme or approved deposit fund. (paragraph 9.62)

82 If the above recommendations are not achievable, the notional realisable value to be introduced in legislation as the approach to value superannuation entitlements. (paragraph 9.62)

83 In the event of the notional realisable value approach being introduced in legislation the court to be empowered to have a discretion to depart from this approach where it would result in an injustice or inequity. (paragraph 9.62)

Chapter Ten

84 There be no amendment to the *Family Law Act 1975* in respect of de facto relationships. (paragraph 10.72)

85 The Commonwealth Government seek a reference of powers from the States in relation to the jurisdiction of de facto property disputes. (paragraph 10.72)

86 The Commonwealth Government legislate separately in relation to jurisdiction in property disputes between de facto partners. (paragraph 10.72)

87 The jurisdiction of this Act be vested in the Family Court. (Paragraph 10.72)

Chapter Eleven

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.

(paragraph 11.51)

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. (paragraph 11.51)

Chapter Twelve

90 Financial agreements be legally recognised and enforceable in the courts under the *Family Law Act 1975*. (paragraph 12.27)

91 Such financial agreements to be in writing, signed by both parties and witnessed by independent persons. (paragraph 12.27)

92 Pre- and post-marital financial agreements to contain a registration of assets and liabilities of both parties. (paragraph 12.27)

93 Pre- and post-marital financial agreements to include provision for the variation of the agreement. (paragraph 12.27)

94 The ability to amend the register of assets to include gifts received by either party after the marriage be available. (paragraph 12.27)

95 It be possible for parties to enter into such financial agreements at any time prior to or during their marriage. (paragraph 12.27)

96 A standard agreement of sufficient flexibility be developed. (paragraph 12.27)

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. (paragraph 12.27)

Chapter Thirteen

98 The pleadings system be abolished by the Family Court. (paragraph 13.48)

99 The Family Court introduce a summary procedure for simpler matters. (paragraph 13.48)

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. (paragraph 13.73)

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. (paragraph 13.73)

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. (paragraph 13.73)

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. (paragraph 13.73)

104 As part of a move towards less formal proceedings, that the wearing of wigs and gowns be discontinued in the Family Court of Australia. (paragraph 13.77)

105 Written material on processes and procedures of the Family Court be available for those people who wish to represent themselves. (paragraph 13.86)

106 The Family Court nominate, at each of its registries, an officer of the court to whom people can be referred for information. (paragraph 13.86)

Chapter Fourteen

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. (paragraph 14.42)

108 Cost orders to be made more often especially where one party unnecessarily forces the other party to incur legal costs, such orders to include an award for fee reimbursement of those costs unnecessarily incurred. (paragraph 14.47)

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. (paragraph 14.47)

110 The *Family Law Act 1975* be amended to enable judges to make Rules of Court in relation to trial management. (paragraph 14.54)

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. (paragraph 14.54)

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. (paragraph 14.67)

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. (paragraph 14.67)

114 Given the limitations on legal aid, legal practitioners be encouraged to provide *pro bono* work on a regular basis. (paragraph 14.70)

Chapter Fifteen

115 There be no change in the current policy relating to the publication of proceedings in the Family Court. (paragraph 15.34)

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. (paragraph 15.34)

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. (paragraph 15.34)

118 The Family Court use its media liaison personnel to promote the reporting of family court proceedings in the public interest. (paragraph 15.34)

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. (paragraph 15.38)

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. (paragraph 15.38)

CHAPTER ONE: THE INQUIRY

Background to the inquiry

1.1 The inquiry into the operation and interpretation of the *Family Law Act 1975* was announced on 13 March 1991, with the establishment of the second Joint Select Committee to undertake a comprehensive and systematic review. The Committee's terms of reference are reproduced at page v. Given the nature of the subject matter it was also decided to refer the matter to a joint committee, bearing in mind the number of representations all members of parliament receive on family law matters.

1.2 The inquiry was prompted by the concern expressed by some members of the Parliament, in particular, Senator David Brownhill, acting on behalf of the many constituents who had made representations to him. Senator Brownhill tabled a number of petitions to the Senate, requesting the establishment of an inquiry into the *Family Law Act* and the Child Support Agency and legislation, although ultimately the terms of reference were limited to the operation of the *Family Law Act*. Senator Brownhill's request was supported by the Australian Democrats, following rejection or deferral of a list of reforms submitted to the Attorney-General.

1.3 The *Family Law Act*, when it was passed in 1975, was considered to be a watershed in the reform of the law relating to the dissolution of marriages, particularly, the abolition of the notion of fault with the introduction of the 12 months separation ground for divorce. However, matters of major concern now appear to be the ancillary matters relating to children and property, as opposed to the principal relief matter of divorce. It is with the ancillary matters that the major dissatisfaction with the Act and with the Family Court appears to be focused.

Evidence to the Committee

Submissions

1.4 The inquiry was advertised on 18 May 1991 in all major daily newspapers, regional daily newspapers and some periodicals.[1] Submissions continued to be received until November 1991. The Committee received a total of 1031 submissions, including 89 confidential submissions. As well, the Committee has continued to receive a considerable number of letters relating to the inquiry. A list of submissions is reproduced at Appendix 1.

1.5 Submissions were received from a large number of individuals - people who had been both directly and indirectly involved in proceedings in the Family Court, and from lawyers, academics, government departments and authorities, and community groups. A comprehensive submission was also received from the Family Court. The Committee authorised submissions for publication wherever possible, although in some cases it was necessary to edit submissions to protect the privacy of individuals and to ensure that s121 of the *Family Law Act* was not breached. Many of the submissions that have been deemed to be confidential have been accorded that status by the Committee and not at the request of the individual who has made the submission.

1.6 Many people made submissions to the Committee in the hope that the Committee could pursue their case and redress any grievance they may have had. However, this appellate role is not one for which this Committee in particular, and parliamentary committees in general, have been established, nor is it an appropriate one. What is being undertaken is an investigation into the provisions of the *Family Law Act 1975* and the operation of those provisions, not a system of redress for personal grievances. To the extent that personal experience was indicative of the operation of the Act the Committee considered those cases and has referred to them throughout its report. However, any further action required by persons who have made submissions to the Committee must be undertaken through the appropriate appeal mechanisms by the individuals concerned.

1.7 The Committee is also conscious of the concern expressed in some submissions that the submissions received may not be representative of the broader community, ie, that only those people who are aggrieved by the family law process and have had an unsatisfactory outcome will have made submissions. This concern was summed up as follows:

> It is well known that a number of groups have sought to influence the development of family law. Some of these groups purport to represent the interests of men, or women, or some sub-group. Clearly it is important to listen to all such submissions. Even anecdotal evidence can be illuminating

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1 See Appendix 3

> in revealing attitudes and experiences. However, there is a serious danger that submissions by such groups will be unrepresentative. The vast majority of people who go through the Family Court process, after all, do not join such organisations or make submissions to law reform bodies. It is important that law reform bodies should not assume that the views put to them by such groups are representative of most people, even in the relevant category.[2]

1.8 The Committee notes the comments quoted above and is aware that the majority of those people making submissions to the Committee will be people who have not had a satisfactory experience with the family law process and it is in that context that they will have made their submission. However, the Committee has also listened to a very wide range of people, including those disaffected by the process, academics, legal organisations such as the Law Council of Australia, the Australian Institute of Family Studies, and the Family Law Council, to name but a few. The Committee aims to take account of all comments made to it, to weigh up the evidence and to come to reasoned conclusions on the weight of the evidence.

Appearance of Chief Justice before the Committee

1.9 Members of the judiciary are not required to appear before parliamentary committees. Normally, the Chief Executive Officer appears, when necessary, before such committees. *The Committee is therefore grateful to the Hon Alistair Nicholson and his* judicial colleagues for appearing before the Committee on 29 May 1992 and for agreeing to have their evidence made publicly available.

Public hearings and inspections

1.10 During the course of the inquiry the Committee took evidence in all capital cities, as well as two regional centres (Launceston and Albury). A list of public hearings and witnesses is contained in Appendix 2. The Committee also visited several registries of the Family Court and the Noble Park Family Mediation Centre. Statistics on the work of the Committee are set out in Table 1.1.

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2 R Chisholm and O Jessep, Submission 760, Vol 22, p 4389

Table 1.1 Committee statistics

Type of Meeting	Total number
Private	23
Public hearings	17
In camera hearings	5
Inspections	8
Private briefings	2

1.11 The Committee was unable to take evidence at public hearings from all those who had made submissions to the inquiry. Given the very large number of submissions, the Committee attempted to speak to as many individuals as possible, as well as the many organisations, both government and non-government, as it could, in order to have a representative spread of witnesses giving oral evidence. The Committee also attempted to take as much evidence as possible in public. Only on five occasions did the Committee take evidence in camera and then usually at the request of the witness(es). The in camera evidence provided by the Family Court was subsequently authorised for publication.

1.12 An analysis of the type of witness appearing before the Committee is set out in Table 1.2 below. The following comments should be borne in mind in relation to the data contained in that table:

1.12.1 the number of individuals appearing before the Committee is disguised to a large extent by the fact that they appear as members of organisations. However, quite often they belong to the associations because of their encounters with family law and have talked about their own personal experiences when giving evidence on behalf of the organisation. They may have been selected to give evidence because of their own history;

1.12.2 the number of government organisations which have appeared totals 22, although the Family Law Council appeared twice, while the number of non-government organisations totals 38. It is this latter group from which a great deal of the individual evidence has been heard.

Table 1.2: Witnesses appearing before the Committee

Date of hearing	Government Organisations	Non-Government Organisations	Individuals
15 August 1991	1	-	-
23 August 1991	-	2	4
29 August 1991	1	4	1
24 September 1991	6	-	3
22 October 1991	3	2	-
23 October 1991	2	3	3
20 November 1991	-	4	5
21 November 1991	1	4	2
6 February 1992	-	1	6
7 February 1992	-	-	5
20 February 1992	2	6	2
13 March 1992	1	-	-
27 March 1992	4	2	1
6 April 1992	-	-	2
8 April 1992	-	1	5
22 April 1992	2	2	5
23 April 1992	2	3	4
1 May 1992	-	-	8
29 May 1992	1	-	-
TOTALS	22	38	52

Earlier inquiries into family law

1.13 There have been a number of earlier inquiries into the *Family Law Act* or aspects of family law. These inquiries include the 1980 Joint Select Committee on the Family Law Act, the Law Reform Commission's inquiry into Matrimonial Property and the Family Court's internal review of its operations. In addition the Family Law Council has published a number of reports on such matters as maintenance and property settlements, patterns of parenting after separation and mediation. The committee has referred to many of these various inquiries and reports throughout this report.

Previous Joint Select Committee on the Family Law Act

1.14 The Committee was established on 28 September 1978 to inquire into:

(a) the provisions, and the operation, of the Family Law Act 1975, with particular regard to:
- *(i) the ground of divorce and whether there should be other grounds;*
- *(ii) its effect on the institution of marriage and the family;*
- *(iii) maintenance, property and custody proceedings including:*
  - *(a) the bases on which orders may be made in such proceedings; and*
  - *(b) the enforcement of orders in such proceedings;*
- *(iv) the organisation of the Family Court of Australia and its conduct of proceedings;*
- *(v) the conduct of proceedings by State and Territory courts exercising jurisdiction under the Act;*
- *(vi) whether the Family Court should be more open to the public when hearing proceedings, and whether publication of the details of proceedings under the Act should be permitted;*
- *(vii) the services provided by:*
  - *(a) the counsellors attached to the Family Courts; and*
  - *(b) approved voluntary marriage counselling organisations;*
- *(viii) the cost of proceedings under the Act; and*

(b) any other matters under the Act referred by the Attorney-General.[3]

1.15 Wherever possible, the Committee has considered the work of the previous Committee. Many of their recommendations have been implemented, although, at the time of their inquiry, the *Family Law Act* had only been in operation a relatively short period of time and it was not possible for the Committee to make final determinations

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3 Joint Select Committee on the Family Law Act, **Family Law in Australia**, Parliamentary Paper No 150/1980, AGPS, Canberra, p iii

on some matters. The recommendations of that Committee are contained in Appendix 4.

Extension of inquiry

1.16 During the course of this inquiry and particularly during the Committee's deliberations on the detailed report, it became increasingly obvious that there was insufficient data available to the Committee on the funding levels of the Family Court and the administrative efficiency with which those funds were expended. The Committee decided that a further inquiry into the administration of the Family Court, with particular reference to its funding levels and its internal allocation of funds was essential.

1.17 The Committee also considered who should conduct the inquiry. After considerable discussion, the Committee decided that the inquiry should properly remain within the Parliament and would be an appropriate follow up to the present inquiry. The Committee also felt that the present inquiry would be incomplete and its efforts superficial without some consideration of funding levels and the administration of the Court, given the necessary funding implications of some of the recommendations. The Committee was concerned that any inquiry be completed before the end of the current Parliament and therefore decided to write to the Attorney-General prior to tabling this report and request an immediate referral of the matter to the Committee. That letter is reproduced at Appendix 5.

1.18 The Attorney-General referred the matter to the Committee on 16 September 1992. The terms of reference are as follows:

> *The Committee is to examine the administration of the Family Court of Australia to assess:*
> *(a) the base level of funding required to enable the Court to undertake its statutory functions at a level that will meet the reasonable expectations of the Parliament; and*
> *(b) the effectiveness of present expenditure by the Court towards undertaking those functions and meeting those expectations.*

1.19 The Committee anticipates reporting to the Parliament in February 1993 on this matter.

The structure of the report

1.20 The structure of the report reflects as closely as possible the terms of reference. Chapter Two is a general introduction to the Family Court and its operation, Chapter Three describes the Family Court Counselling Service and its operations, Chapter Four deals with marriage counselling and family mediation. The next two

chapters deal with issues relating to children and Chapter Seven discusses the enforcement of Family Court orders, particularly access orders. Chapters 8-12 deal with different aspects of property settlements, Chapter Eight being a general chapter on matrimonial property, and Chapters 9-11 dealing with some specific problem areas in matrimonial property, including family farms, superannuation and the jurisdiction of the Family Court in relation to de facto property disputes. The Committee has also considered the question of financial agreements and their legal status in Chapter 12. Chapters 13 and 14 deal respectively with the adversarial nature of proceedings and its applicability in the family law area, and the costs associated with pursuing a case through the courts. Chapter 15 discusses whether there should be any change to the current policy on publication of Family Court proceedings. Chapter 16 deals with the new child support scheme. Although the child support scheme was not included in the terms of reference the Committee received so much comment on different aspects of the scheme that the Committee felt obliged to set its concerns down on paper.

General conclusions

The Family Law Act 1975

1.21 The Committee makes a total of 120 recommendations. Of these, only 19 relate to amendments to the *Family Law Act.* The Committee found that, as a general rule, the Act itself was an effective vehicle for the administration of family law matters in Australia. Generally speaking, the Committee also found that the Family Court was not using the powers granted to it under the Act to the extent possible, nor was the Court making the best use of the flexibility of the Act. Under the Act, the Family Court has available to it a wide range of courses of action, which it does not appear to be using to their best, or even their intended, advantage. In particular, the Committee cites the introduction of new penalties for the enforcement of court orders, which the Court has not yet begun to use to their best effect. The cross-vesting legislation, which allows the Family Court to hear a range of matters which would normally be dealt with by other jurisdictions, similarly has not been made use of to the extent that is possible under the legislation.

Renumbering of the *Family Law Act 1975*

1.22 The Committee notes that the *Family Law Act* has been amended 34 times since the Act was initially passed in 1975. The Act has become unwieldy and the Committee considers that it is now time for the Act to be renumbered, for ease of reference. The Committee would suggest that the Government moves to renumber and reprint the *Family Law Act 1975* as a matter of urgency.

Recommendation

1.23 The Committee recommends that:

1 **the Government re-number and re-print the *Family Law Act 1975* at the earliest opportunity.**

Complaints about the Family Court

1.24 The Committee received a number of submissions from people complaining about aspects of their experience with the Family Court, where their complaints were of sufficient seriousness to warrant some kind of independent investigation.[4] One submittee provided further advice to the Committee that after appeal to the Attorney-General's Department, the Department had agreed to make an Act of Grace payment to her. The anomaly exists that complaints about the operation of the Family Court, including complaints about the Chief Justice, are in the first instance made to the court itself. In this situation it would be difficult for the Court to be an independent arbitrator.

1.25 The Committee notes that the administration of the Family Court does not come within the jurisdiction of the Commonwealth Ombudsman. The Committee feels that scrutiny by the Commonwealth Ombudsman is an effective feedback mechanism for government departments, not to mention the Parliament. Agencies such as the Family Court should not be excluded from such scrutiny and the presence of an effective complaints handling process may have reduced the necessity for the present inquiry. The Committee urges the Commonwealth Government and the Family Court to introduce a complaints handling mechanism for the Family Court. It suggests that the Ombudsman's Office may be the most appropriate agency to handle such complaints. If this is not the case then some kind of alternate complaints handling mechanism could be introduced.

Child Support Legislation

1.26 The Committee's terms of reference did not include child support. However, the Committee received so many complaints regarding the operation of the Child Support Agency and the scheme itself that it felt it was necessary to make some comments, which are contained in Chapter 16. While the Committee has not made recommendations on child support, it does draw to the Government's attention the problems as expressed to the Committee during the course of the inquiry.

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4 See for example, submission 595, Vol 18, and particularly submission 309, Vol 6

CHAPTER TWO: THE FAMILY COURT OF AUSTRALIA

The establishment of the Family Court

2.1 The Family Court of Australia was established in 1975 with the passing of the *Family Law Act 1975.* This Act replaced the *Matrimonial Causes Act 1959.* The Family Court is a superior Court of Record, exercising a family law jurisdiction under the *Family Law Act 1975* and the *Marriage Act 1961.* Through legislative amendment over the years and the referral of powers by the States (except for Western Australia), the Court has had its jurisdiction broadened, particularly in matters relating to ex-nuptial children.

2.2 The objective of the Family Court is:

> To serve the interests of the Australian community by providing for the just and equitable administration of justice in all matters within the Court's jurisdiction, with emphasis in its family jurisdiction on conciliation of disputes and the welfare of children.[1]

The Matrimonial Causes Act 1959

2.3 The Federal Government has power under the Constitution to make laws relating to marriage, divorce and matrimonial causes[2]. Prior to the introduction of the Matrimonial Causes Act 1959 each State had its own legislation relating to marriage and divorce. The *Matrimonial Causes Act 1959* unified the differing State laws in this area consolidating provisions on divorce, maintenance, custody and access. The 14 grounds for dissolution of marriage under this Act were principally fault based, the exception being separation by parties to a marriage for at least five years. The *Family Law Act 1975* came into operation on 5 January 1976, replacing the *Matrimonial Causes Act 1959.*

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1 Family Court of Australia, Corporate Plan, as quoted in the Family Court's Annual Report for 1989-90

2 Sections 51 (xxi) and (xxii)

The Family Law Act 1975

2.4 The Family Law Act replaced previous Australian laws relating to divorce and nullity of marriage and superseded State and Territory laws of maintenance, custody and property where they related to marriages or children of marriage.[3] The main purpose of the Amendment Act was described by the then Senator, the Hon Lionel Murphy, Attorney-General, as follows:

> ...to eliminate as far as possible the high costs, the delays and indignities experienced by so many parties to divorce proceedings under the existing Matrimonial Causes Act. The main way in which the Bill seeks to achieve this is by replacing the existing fault grounds of divorce with a single, no-fault ground - irretrievable breakdown of the marriage - to be provable only by 12 months' separation of the parties up to the date of hearing of the divorce application.[4]

2.5 The other major changes intended by the introduction of the legislation were:

2.5.1 simpler procedures;
2.5.2 the introduction of reconciliation provisions and marriage counselling;
2.5.3 more effective enforcement of custody and access orders;
2.5.4 the ability of the courts to determine a property settlement independent of proceedings for divorce;
2.5.5 the introduction of criteria for the determination of property settlements;
2.5.6 the requirement for courts to proceed without undue formality; and
2.5.7 the requirement for proceedings to be heard in private.

2.6 The Family Law Act did not just establish the Family Court of Australia. The Act also established the Family Law Council and in 1980 the Australian Institute of Family Studies (AIFS). The Family Law Council was established under s115(3) of the original Act to advise and make recommendations to the Attorney-General concerning:

(a) the working of the *Family Law Act* and other legislation relating to family law;
(b) the working of legal aid proceedings in family law;
(c) any other matters relating to family law.[5]

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3 Attorney-General's Department, **Annual Report 1988-89**, p 318
4 Senator Lionel Murphy, Second Reading Speech, Hansard, 1 August 1974, p 759
5 Family Law Council, **Annual Report 1979-80**, AGPS, p 1

2.7 As at 1991 the Family Law Council had published 22 reports and discussion papers.[6]

2.8 The Australian Institute of Family Studies was established in February 1980 under s114B(2) of the Family Law Act to:

(a) promote, by the conduct, encouragement and co-ordination of research and other appropriate means, the identification of, and development of understanding of, the factors affecting family and marital stability in Australia, with the object of promoting the protection of the family as the natural and fundamental group unit in society; and

(b) advise and assist the Minister in relation to the making of grants, and with the approval of the Minister to make grants out of moneys available under appropriations made by the Parliament for purposes related to the functions of the Institute and the supervising of the employment of grants so made.[7]

2.9 The Institute defines its overall role as follows:

2.9.1 to study and evaluate matters which affect the social and economic well being of all Australian families;

2.9.2 to inform Government and other bodies concerned with family wellbeing and the public about issues relating to Institute findings;

2.9.3 to promote the development of improved methods of family support, including measures which prevent family disruption and promote marital and family stability;

2.9.4 to publish and otherwise disseminate the findings of Institute and other family research.[8]

2.10 From the Institute's establishment in 1980 until June 1989 the AIFS operated within the Attorney-General's portfolio. Since 1989, the Institute has functioned within the Social Security portfolio. The Institute's Director advised that the transfer, initiated by the then Minister for Social Security, the Hon Brian Howe, was prompted by the view that the Institute's work was much broader than the legal system and certainly much broader than the operation of the Family Law Act.[9]

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6 Family Law Council, **Annual Report 1990-91**, p 67
7 Australian Institute of Family Studies, **Annual Report 1990-91**, p 10
8 ibid
9 Transcript, 22 April 1992, p 1471

The functions and powers of the Family Court

2.11 The Family Court differs from other courts in Australia, predominantly for the following reasons:

2.11.1 the number of people who come into either direct or indirect contact with the Court at some stage in their lives;

2.11.2 the volume of business undertaken by the Court. In 1990/91 the Family Court dealt with 46,000 applications for dissolution of marriage and 40,000 applications for custody, property, access. maintenance.[10] In that year 178 long cases were listed, with 126 being finalised and 99 short cases were listed, with 72 being finalised; the remainder were adjourned.[11]

2.11.3 the size of the Court and its geographical distribution; and

2.11.4 the inclusion of a large and important counselling service, fundamental to the purpose of the Court as a conciliation court as opposed to a court of litigation.

2.12 The Family Court exercises jurisdiction in the following broad areas:

2.12.1 the dissolution of marriage;

2.12.2 the guardianship and custody of children, including ex-nuptial children in all States except Western Australia;

2.12.3 spouse maintenance and reviews of child maintenance under the *Child Support (Registration and Collection) Act 1988*;

2.12.4 property settlements.

2.13 The Family Court has the following specific functions and powers:

2.13.1 to exercise jurisdiction in all matrimonial causes;
2.13.2 to exercise appellate jurisdiction under the *Family Law Act 1975*;
2.13.3 to provide a counselling service, to assist reconciliation, and to help separated or divorced couples to establish improved relations with

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10 Family Court of Australia, Submission 940, Vol 29, p 5618. It should be noted that many of the 46,000 applications for dissolution of marriage would include applications for custody, property, access and maintenance. The Family Court would not have had to deal with a total of 86,000 applications.

11 Family Court of Australia, **Annual Report 1990-91**, Table 4, p 117

each other and with children of the relationship, and to adjust to the consequences of the breakdown of the relationship;

2.13.4 to provide a conciliation service in property and other financial matters;

2.13.5 to issue, or direct the issue to orders, warrants and writs of such kind as are prescribed by the Act;

2.13.6 to enforce its orders and some orders of other courts;

2.13.7 to punish contempts of its powers and authority; and

2.13.8 to exercise some functions under the *Marriage Act 1961*.[12]

2.14 The Court has jurisdiction under the *Family Law Act 1975*, but also exercises jurisdiction under a number of other pieces of legislation:

2.14.1 under the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988*, the Federal Court of Australia is able to refer cases to the Family Court in bankruptcy, taxation, consumer protection and administrative appeals matters[13];

2.14.2 the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988* gives to the Family Court jurisdiction to hear appeals against decisions made under that Act;

2.14.3 the Family Court has some functions under the *Marriage Act 1961*;

2.14.4 by virtue of federal cross-vesting legislation, the *Jurisdiction of Courts (Cross-vesting) Act 1987*, and complementary State legislation the Family Court is able to exercise jurisdiction over matters which previously came within the exclusive jurisdiction of the States.

2.15 The Family Court no longer has jurisdiction to assess or order maintenance for children to whom the *Child Support (Assessment) Act 1988* applies. Its role, so far as these children are concerned, is limited to reviewing applications for re-assessments and other decisions of the Child Support Agency.

2.16 In the exercise of its jurisdiction under the *Family Court Act 1975* must have regard to:

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12 Attorney-General's Department, **Program Performance Statements 1992-93**, Budget related paper no 9.3, p 181

13 Cases can be referred after consultation between the two Chief Justices. In fact the power of referral of cases outside the family law jurisdiction has been rarely used.

(a) *the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;*

(b) *the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;*

(c) *the need to protect the rights of children and to promote their welfare; and*

(d) *the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.*[14]

State family courts

2.17 Section 41 of the *Family Law Act* provides for the establishment and federal funding of State family courts. Only Western Australia has established its own family court. The WA Family Court is vested with federal jurisdiction under s41(3) of the *Family Law Act.*

The structure of the Family Court

2.18 The Family Court is the largest of the courts operating within the federal jurisdiction. According to the Court's submission, it has a staffing of approximately 730, including 53 judges, 7 judicial registrars, 55 registrars and 160 counsellors.[15]

2.19 The organisational structure of the Court as at 30 June 1991 is shown in Table 2.1. There are three principal arms of the Court - the administration, the judiciary and the counselling service. From the organisation chart it is apparent that the judiciary report direct to the Chief Justice, while the counselling service and the administrative arm report through the Chief Executive Officer (CEO).

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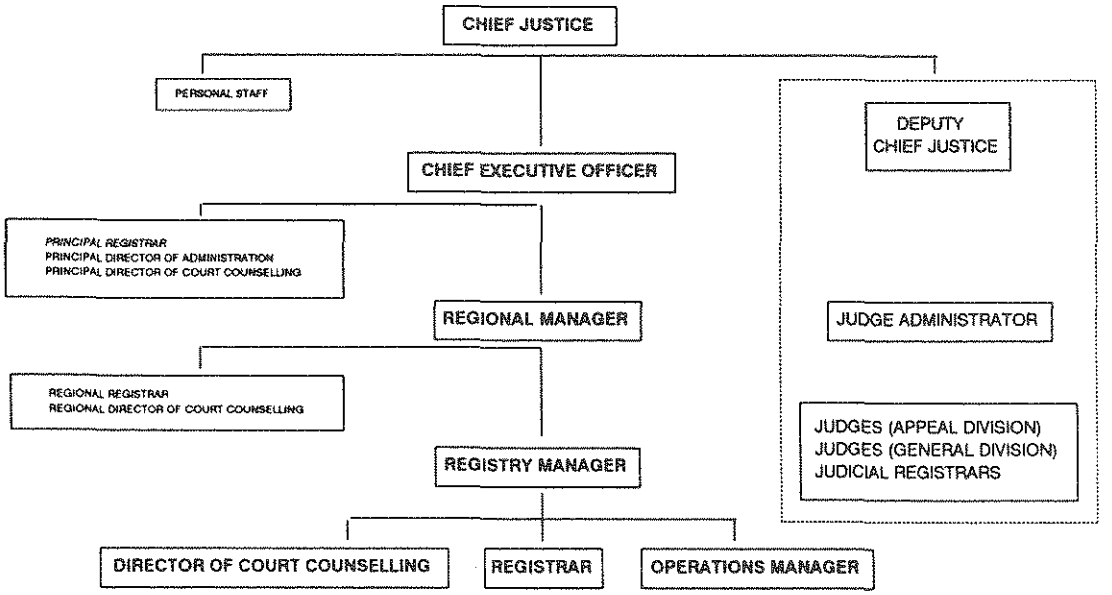
14 Section 43, *Family Law Act 1975*

15 Family Court of Australia, Submission 940, Vol 29, p 5618. However, according to its latest available annual report, the Court has a staff of 765 people, including 47 judges, 6 judicial registrars, 44 registrars and 114 counsellors.

Table 2.1: Organisation chart of the Family Court, 1990-91



Source: Family Court of Australia, **Annual Report 1990-91**, p 18

2.20 Prior to 1 January 1990 the Family Court was administered through the Attorney-General's Department. However, during 1988-89 the Government agreed that the funding of the all federal courts and the Administrative Appeals Tribunal should be changed, with a view to enhancing the independence of those bodies. This policy resulted in the *Courts and Tribunals Administration Amendment Act 1989*, which ensured that the Family Court was administratively independent of the Attorney-General's Department from 1 January 1990.

2.21 The principal registry of the Family Court is in Sydney, although the office of the Chief Justice is in Melbourne. The CEO has an office in Sydney and an office in Canberra. The CEO and the Chief Justice are required to work closely together, particularly since the Court has undergone fundamental administrative changes as a result of recommendations of the Working Party on the Review of the Family Court and the Court's achievement of its administrative independence from the Attorney-General's Department.

2.22 The Family Court has 20 registries, including the principal registry, under the umbrella of three regional administrations:

Principal Registry

Eastern Region:	Sydney, Wollongong*, Parramatta, Dubbo*, Newcastle, Canberra, Albury*;
Northern Region:	Darwin, Brisbane, Lismore*, Rockhampton*, Townsville, Cairns*;
Southern Region:	Melbourne, Bendigo*, Dandenong, Hobart, Launceston, Adelaide.

2.23 Those cities marked with an asterisk are sub-registries, which provide counselling services only. These registries are visited by judges on regular circuit sittings. Under the overall direction of the Chief Executive Officer, each region is managed by a Regional Manager with the assistance of a Regional Registrar and Regional Director of Court Counselling. Each registry is managed by a registry manager, assisted by a registrar and director of court counselling.

Statistical data

2.24 Approximately one marriage in three ends in divorce, there are 2.5 divorces for every 1,000 people per annum, the Family Court deals with over 100,000 adults and 150,000 children every year. In 1990-91, the Court dealt with 46,000 applications for dissolution of marriage and approximately 40,000 applications for custody, property, access, maintenance and like matters.[16] Statistics such as these indicate the number of people who utilise the services of the Court.

2.25 The Family Law Council provides statistics on marriage and divorce in its annual reports. In 1990 the crude marriage rate was 6.8 per 1000 population. The Australian crude marriage rate was 7.3 in 1961, reaching a peak of 9.3 in 1970 and gradually declining since to 7.8 in 1976, 7.6 in 1980, 7.2 in 1985, 7.0 in 1987 and 7.1 in 1988.[17] During 1990 a total of 42,635 marriages ended in divorce. The crude divorce rate (the number of divorces per 1000 population) has settled at around 2.5 since the mid 1980's. In 1961, the rate was 0.6 per 1000 population, rising to 1.8 in 1975, and peaking at 4.5 in 1976. The figure declined to approximately 2.8 in 1981 and fell further to 2.5 in 1985, stabilising at this level.[18]

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16 Family Court of Australia, submission 940, Vol 29, p 5618
17 Family Law Council, **Annual Report 1990-91**, p 39
18 ibid, p 40

Table 2.2: Family Court statistics - July 1990 to June 1991

	FCA	FCWA	AUST TOTAL
A. FILES OPENED			
A.1 Ex-nuptial Files Opened	1 879	N/A	1 879
A.2 Total Files Opened	51 959	5 589	57 548
B. DISSOLUTIONS AND NULLITIES			
B.1 Forms 4 & 5 Filed	41 452	4 175	45 627
B.2 Remissions of Fees	9 691	630	10 321
B.3 Applicants in Person	18 640	2 424	21 064
B.4 Divorces Granted (DN)	37 130	4 220	41 350
B.5 S.98A DN- Parties Absent	5 473	1 064	6 537
B.6 Nullities Granted	36	1	37
C. ANCILLARY APPLICATIONS			
C.1 Forms 7 Filed (Ex-nuptial)	2 075	195	2 270
C.2 Total Forms 7 Filed	30 647	1 990	32 637
C.3 Forms 7A Filed	8 949	779	9 728
C.4 Forms 7B Filed	2 038	197	2 235
C.5 Forms 8 Filed (Ex-nuptial)	364	52	416
C.6 Total Forms 8 Filed	5 804	1 024	6 828
C.7 Forms 12 Filed	91	1 183	1 274
C.8 Forms 43 Filed	137	50	187
C.9 Transfers From Other Courts	2 303	158	2 461
D. ORDERS SOUGHT - FORMS 7, 7A & 8			
D.1 Cuardianship/Custody (Ex-nuptial)	1 852	131	1 983
D.2 Total Guardianship/Custody	18 285	1 148	19 433
D.3 Access (Ex-nuptial)	1 326	113	1 439
D.4 Total Access	11 828	907	12 735
D.5 Property	20 920	1 456	22 376
D.6 Spouse Maintenance	2 633	157	2 790
D.7 Child Maintenance (Ex-nuptial)	691	31	722
D.8 Total Child Maintenance	8 420	406	8 826
D.9 Injunction	3 877	317	4 194
D.10 Other	5 789	662	6 451

Source: Family Court of Australia, Annual Report 1990-91, p 116

2.26 As can be seen from Table 2.2, in the financial year 1990-91, 57,548 files were opened, of which 1,879 were files relating to cases involving ex-nuptial children. These figures represented an increase of 6.5 per cent of the total number of files opened and 55.1 per cent of ex-nuptial files over the figures for those areas in 1989-90.

The counselling service

2.27 During 1990-91 24,000 counselling cases were opened, an increase of 12 per cent over 1989-90. More than 67,000 people took part in 38,000 interviews. About 18 per cent or 4,500 of these cases concerned ex-nuptial children.[19] Of the total number of cases, 12,500 predated the commencement of any litigation, 9,500 were court ordered counselling (post commencement of litigation) and 1,950 family reports were prepared.[20] More detailed statistics can be found in the Family Court's annual report.

Annual funding

2.28 In the financial year 1990-91 the Family Court spent approximately $58 million. Of this amount, about $43m was on running costs, including salaries and administrative expenses, but not judicial expenses and $15m on property operating expenses. Approximately $9.3m was collected in revenue, almost all of this from filing fees.[21] The Court's current financial position was outlined in a letter to the Committee[22] as follows:

Item	1991-92	1992-93
Salaries	$32.509m	$31.333m
Administration	$16.038m	$13.692m
Revenue	$9.315m	$9.320m (est)

2.29 The Family Court argues that it has suffered an actual reduction in its level of funding, and not simply a reduction of funding in real terms. In order to come in within budget the Court states that it must reduce its staffing level by 74 staff. However, because the Court does not consider this to be a viable option, the Court has advised

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19 Family Court of Australia, **Annual Report 1990-91**, p 25

20 ibid

21 L Glare, **Financing the Court**, Speech given to the Judicial Development Conference, Queenscliff, 12-14 February 1992, p 5

22 Letter dated 16 July 1992

that its only realistic strategy is to reduce staff as much as possible and to transfer funds from its administrative vote, a strategy which incurs a 20 per cent penalty.[23]

Review of the Family Court

2.30 A comprehensive review of the operations of the Family Court was established in June 1989, in anticipation of the Family Court becoming administratively independent of the Attorney-General's Department. The purpose of the Review was:

> ...to assess the requisite services of the Court and the effectiveness and efficiency of the Court's existing operational arrangements and structures for delivering the services required of the Court by the relevant legislation with a view to making recommendations to the Chief Justice and to the Attorney-General on how improvements can be made and making a detailed costing of them.[24]

2.31 The scope of the review included:

2.31.1 the application of judicial and quasi-judicial resources to the jurisdictions of the Court;

2.31.2 the provision of other direct Court services including registrars and counselling services;

2.31.3 administrative support to the Court.[25]

2.32 The Review, chaired by Justice Neil Buckley, made a detailed study of the operations of the Court, and resulted in many detailed recommendations relating to, among other areas, management improvement, the counselling service, judicial workload and the provision of registry services. The review found that the organisational structure, management abilities of many staff in management roles, and staff development activities of the Court had been 'clearly inadequate' for some time.[26] While the Review acknowledged the need for improved administration of courts, it also pointed out that courts had a unique role and there was an obligation on government to ensure appropriate funding.[27]

2.33 In particular, the Review identified the following major areas as requiring change:

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23 Letter of 16 July 1992, p 2

24 Family Court of Australia, **Report of the Working Party on the Review of the Family Court**, 1990, p 63

25 ibid

26 ibid, p 37

27 ibid, p 38

2.33.1 the restructuring of the organisation of the Court into three regional administrations. (This has been achieved and it is this revised structure which has been discussed above);

2.33.2 the lack of standardised practices throughout the Court's registries;

2.33.3 the non-existence of corporate and information technology plans;

2.33.4 the lack of staff training for court personnel;

2.33.5 the failure to set performance standards for all levels of the Court's operations;

2.33.6 deficiencies in the management and control of the counselling service;

2.33.7 deficiencies in the operation and efficiency of each registry;

2.33.8 a lack of adequate statistical and management information.[28]

2.34 The Review made many detailed recommendations relating to the above.

Funding of the Family Court

2.35 A major feature of the Review of the Court, the Court's submission to the inquiry and the Court's annual reports has been the consistent and persistent request for additional funding. The Review had this to say:

> The Court accepts that it must be properly managed. However, there is also an obligation on Government to ensure appropriate funding and the courts should not be forced into the position of supplicants having to justify staff levels and funds on the basis of the least amount which will keep the doors open. Nor should funds to operate the Court be in any way dependent upon the amount of revenue it can raise. The importance of the Family Court of Australia to the functioning of Australian society should not be overlooked nor should adequate funding.[29]

2.36 The Review stated that:

> The capacity of a court to perform its functions is determined to a large extent by the resources available to it. Adequate funding is required to attract and retain competent personnel, to provide and maintain facilities and equipment. The extent to which the Court achieves real independence from the executive branch of Government is an issue which will be closely observed, not only in Australia, but also in those jurisdictions throughout the world which follow the Westminster model of representative government.[30]

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28 Family Court of Australia, submission 940, Vol 29, p 5620

29 Report of the Working Party on the Review of the Family Court, op cit, pp 38-39

30 ibid, p 39

2.37 The review also pointed out that many of its recommendations relating to the organisational structure of the Court were predicated on the continued provision by the Attorney-General's Department of current levels of corporate services. Should those resources not be forthcoming the review argued that increased funding would be required to perform corporate service functions, given that economies of scale and specialist skills would be lost.[31]

2.38 The Court's submission consistently mentioned the chronic shortage of funds and the consequent effect such a shortage had on the range and level of services the Court was able to offer. The submission states:

> Most, if not all, of these deficiencies, [identified in the review process] were due to a combination of inadequate resources and the failure by the Attorney-General's Department in the years prior to 1990 to properly manage or address the Court's problems...Those parts of the Review recommendations which the Court was not capable of implementing without the assistance of Government have not fared as well. All of the Court's new policy proposals in 1990/91, with the exception of provision for part of the cost of implementation of the new management structure, failed to attract funding.[32]

2.39 While the Committee was holding meetings in Brisbane the Family Court announced the withdrawal of services to the Gold Coast. While the Committee was meeting in Melbourne on 5 August 1992 the Age ran an article on the evidence given to the Committee on 29 May 1992, emphasising the parlous state of the Court's funding.[33] From evidence to the Committee, the Family Court is seriously concerned about its inability to service those areas of maximum population growth, such as Geelong, the Gold Coast, Coffs Harbour and Wollongong, which have either had services withdrawn, not introduced or have not been able to expand to the level required.[34] This matter is further discussed in Chapter 3 at paras 3.20 - 3.23.

2.40 The Family Court, under the *Mediation and Arbitration (Courts and Tribunals) Act 1991*, has the authority to offer mediation services. To date such services have not been offered by the Court, due to lack of funding. In discussing the submissions to the inquiry, the Family Court noted that:

> What has also emerged is that a number of areas of legitimate concern have arisen from public expectations of the Court which it would wish to, but is unable to, fulfil by reason of its chronic lack of resources. This is

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31 ibid
32 Family Court of Australia, submission 940, Vol 29, p 5620
33 The Age, 5 August 1992, p 3
34 Transcript, 29 May 1992, p 1884-7, and Submission 940, Vols 29-32

particularly marked in the areas of litigation, conciliation and mediation...[35]

2.41 In a letter to the Committee,[36] which resulted in a request arising out of the hearing with the Family Court, for a detailed costing of the recommendations in the Court's submission, the Chief Executive Officer advised:

> The Court's contention is that its poor financial position arises fundamentally because:
>
> 1. It has never been adequately funded for an appropriate level of operation in respect of its statutory responsibilities...
>
> 2. The Court did not get adequate funds to assume the extra work which came from the Government's decision, enshrined in 1990 legislation, to make the Court administratively independent. Issues such as the loss of economies of scale were never addressed...
>
> 3. The appropriate level of funds to meet functions devolved from the Attorney-General's Department has never been provided...
>
> 4. There was Government acceptance of the recommendations of the 1990 Review of the Court (Buckley Report) and the Court proceeded to implement those recommendations but the corresponding funds have not been made available. The review recommendations were costed at the time at $3.4m but only $1.2m was made available. Because many of the recommendations were interdependent, it was not feasible to implement only to the extent of funding.

2.42 However, the Committee also received a letter from the Attorney-General, the Hon Michael Duffy, MP, which expressed concern at a number of matters in the letter from the Chief Executive Officer. The Attorney-General stated:

> These matters include the assertions that the Court has never been adequately funded to provide an adequate level of operations to meet its statutory obligations; that the Court did not receive adequate funding to assume its separate administration; and that it has received insufficient funds to assume functions developed by my department.[37]

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35 Submission 940, Vol 29, p 5622
36 See Appendix 6
37 See Appendix 7

2.43 The Attorney-General continued:

> I note that the Court received significant increases to its base funding in 1989 and after the 1990 Review of the Court; that it has received adequate funding to assume its separate administration; and that no further function has been devolved to it from my Department without the accompanying level of funds being agreed between the Court and my Department.[38]

2.44 The Attorney-General was also concerned that there was a perception within the Family Court that Government had accepted the recommendations of the Buckley review and stated that this was not in fact the case.

Conclusions

2.45 Despite the Family Court's emphatic requests for additional funding, the Committee is not convinced that the Family Court has substantiated a case for additional funding. The Committee was particularly concerned by the comments made by the Attorney-General in his letter of 2 September 1992. However, the Committee was not in a position to investigate fully the operations and funding levels of the Family Court as a whole, such an inquiry being outside its terms of reference, and could not therefore, endorse or reject the Buckley report. The Committee has some very real concerns regarding the Court's requests for funding and feels that an independent investigation of the administration and operations of the Family Court is required to ascertain actual funding requirements and the administration of those funds. The review should be independent also of the Attorney-General's Department, given that the Department and the Family Court are competitors for budget funds within the same portfolio.

Recommendations

2.46 The Committee therefore recommends that:

2 **an administrative review of the Family Court be undertaken;**

3 **the review be undertaken by the Joint Select Committee on certain aspects of the operation and interpretation of the Family Law Act.**

Postscript

2.47 As noted in Chapter One, the inquiry was referred to the Committee on 16 September 1992 and the Committee plans to report in February 1993.

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38 ibid

CHAPTER THREE: THE ROLE, FUNDING AND EFFECTIVENESS OF THE FAMILY COURT COUNSELLING SERVICE

Introduction

3.1 The *Family Law Act 1975* gave legislative recognition to the pivotal role that the provision of free, in-house counselling might play in assisting separating couples to reach their own decisions on difficult issues, without recourse to expensive litigation. The architects of the Act also hoped that the availability of free reconciliation counselling through the Family Court Counselling Service (FCCS) might help to prevent many marriages from reaching a stage of irretrievable breakdown. Whether or not reconciliation was possible in particular cases, the overriding emphasis of the new Act was to be on the reduction of bitterness associated with marital breakdown. The establishment of an in-house court counselling service to help achieve this was a first in the English speaking world.

3.2 In this chapter, the Committee considers the extent to which the counselling service has been able to achieve these objectives, and possible means of improving the quality and availability of the service.

3.3 Submissions to the inquiry were mixed in their assessments of the quality of the existing FCCS, and what might be done to improve its effectiveness. Although the majority of submissions which mentioned the counselling service were critical of one or more aspects of the service, they did not all agree on its perceived deficiencies. For example, some submissions suggested that the service would be more effective if counsellors had more power and authority, whilst others complained that counsellors were too powerful, and not fully accountable.

3.4 Issues of concern in relation to the counselling service which were raised in many submissions included the following:

3.4.1 lengthy delays in waiting times for appointments;

3.4.2 the low accessibility of the service for clients who reside outside major metropolitan centres;

3.4.3 the relatively low number of male counsellors;

3.4.4 perceived inadequacies in the training, qualifications and experience of counsellors;

3.4.5 policies used by court counsellors in cases of domestic violence;

3.4.6 the reluctance of court counsellors to pursue the possibility of reconciliation of the marriage;

3.4.7 a perceived bias towards women; and

3.4.8 the Family Court's inability to compel clients to participate constructively in the counselling session.

The role of the Family Court Counselling Service

3.5 This section briefly describes what was originally intended for the counselling service in 1975, and the priorities that the Family Court has assigned to the provision of various services in the face of budget constraints. The Family Court's submission states that, in addition to those provisions of the Act, which make explicit reference to counselling, the Family Court Counselling Service is guided in the performance of its functions by the following principles embodied in the Act:

3.5.1 the need to protect and preserve the institution of marriage;

3.5.2 the need to protect the rights of children and to promote their welfare;

3.5.3 the need to assist parties to consider reconciliation, to improve their relationship or their relationships with their children; and

3.5.4 the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while parents are responsible for the care and education of dependent children.[1]

3.6 It was clearly intended that the FCCS would be more than a divorce counselling service. The late Senator, the Hon Lionel Murphy, then Attorney-General, in his second reading speech, stated:

> 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

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1 Submission 940, Vol 29, p 5643

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.[2]

3.7 The FCCS was also to be available to help couples reconcile, or to improve their marital relationship and their relationships with their children. Sections 15, 16 and 61 (A) of the Act make it clear that 'as far as practicable', the Family Court Counselling Service should make its facilities available to any party to a marriage at any stage in their marital relationship, or to any party or children of the marriage during divorce proceedings. However, section 15(2) was amended in 1987 to state that parties seeking voluntary marriage guidance would be referred to a marriage counsellor, thus reducing the onus on the FCCS to provide this type of counselling service.

3.8 Many provisions of the Act give the FCCS a special role in relation to the welfare of the children of parents undergoing divorce:

3.8.1 under s62(1) the Family Court is empowered to order parties to child related proceedings to attend court counselling to discuss the welfare of a child, or to attempt to resolve any differences relating to arrangements for the future care of the child;

3.8.2 where a couple's on-going disagreement as to the care or welfare of children results in a contested court hearing, the Family Court is empowered to direct a court counsellor, or a welfare officer appointed for the purpose, to conduct further interviews with parties and the child with a view to reporting to the Family Court on matters relevant to the proceedings (ss62A(1) and 62A(2));

3.8.3 where parties reach their own agreements as to the future care of children prior to the hearing of the marriage dissolution application, and the Family Court is not satisfied that the proposed arrangements are in the best interests of those children, it may order that the Family Court Counselling Service prepare a report on the matter under s55A(2);

3.8.4 where it is proposed that a party other than a parent of a child should be given guardianship or custody of that child, the Family Court will not make such an order unless the parties have attended counselling and a report on the proposed arrangements has been prepared by a Family Court Counsellor or welfare officer; and

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2 Senator the Hon Lionel Murphy, Attorney-General, Second Reading Speech, 1 August 1974, p 759

3.8.5 where an order involving a child is made, the Family Court may order that compliance with the first order be supervised by a Family Court Counsellor or a welfare officer (s64(5)).

Recent legislative extensions to the responsibilities of Family Court counsellors

3.9 Since the passage of the Family Law Act in 1975, there have been several legislative amendments and an extension of jurisdiction to cover ex-nuptial children. These matters have extended the role of the Family Court Counselling Service and include the following:

3.9.1 the reference of powers over ex-nuptial children by all states except Western Australia between 1987 and 1990, which has had the effect of markedly increasing the load of the counselling service in relation to the conciliation of disputes related to children;

3.9.2 s112AD(5) of 1990 states that orders in relation to contravention of access orders will not be made unless counselling in relation to that contravention has occurred;

3.9.3 ss61A(1) and 16A(1), which came into effect in 1988, recognised the importance of providing 'grief' counselling to the members of families affected by marital breakdown, and the need to remind parties considering or undertaking litigation of the availability of alternative dispute resolution mechanisms within the Family Court. The amendments provided that it was the responsibility of all courts exercising jurisdiction under the Act, and of legal practitioners consulted on family law matters, to alert their clients both to the facilities of the Family Court Counselling Service available to assist families adjust to marital breakdown, and to the procedures available for the conciliation of matters arising in the proceedings;

3.9.4 following the enactment of the *Child Support (Assessment Act) 1989*, the Family Court Counselling Service is to be made available to the parent or custodian of an eligible child should he or she request counselling; and

3.9.5 in 1991, s70BB made it compulsory for court counsellors to report allegations of child abuse to state welfare authorities.

Resources and priorities

3.10 The Family Court's submission to the inquiry asserts that the service is currently unable to provide the level and range of counselling support which was intended by the legislation. The submission argues that the counselling service has been 'inadequately staffed since its inception to carry out all of its statutory obligations'.[3] The court claims that lack of funds has resulted not only in the inability of existing counselling units to provide the range of services mentioned in the Act, but has made it impossible to establish counselling units which are easily accessible to people living in many rural areas, and in a number of growing urban population centres.

Existing counselling units

3.11 The Family Court states in its submission that, in the face of tight budget constraints, the counselling service has been forced to prioritise its responsibilities under the Act:

> Developing demand for these varying counselling services placed great strain upon the resources of the Family Court and led to limitations on the achievement of the intention of the legislation in all registries. As funding provided proved to be insufficient, priorities had to be established to provide the best quality service in the most critical areas of parties' needs.
>
> The clear intention in the formative stages of the legislation that reconciliation and marriage guidance counselling would be a major focus of the service was largely abandoned as the important had to give way to the urgent. In these circumstances, the availability of approved marriage guidance agencies in the community provided an alternative. Referrals have regularly been made to such agencies.
>
> With the shrinkage of funds, Family Court counselling increasingly became crisis-driven, concentrating on the resolution of disputes over custody and access and on the preparation of reports for the Family Court's use in contested matters. This was particularly so in the larger registries where the demand for Family Court ordered counselling and reports was greater. The smaller registries and sub-registries have been able to offer a wider range of services as there has been less demand for Family Court related work.
>
> The urgent need was to assist couples in making suitable arrangements for the children and the emphasis was placed on conciliation as distinct from reconciliation counselling...other much needed assistance to parties has

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3 Submission 940, Vol 29, p 5646

been delayed or has fallen by the wayside. Groups for separated parents, and children's groups, programs of community education, on going training of Counsellors and supervision of access have been either abandoned or severely limited as to time of operation.[4]

3.12 There are currently 19 permanent counselling units located in major urban centres, which operate either within an existing registry, or as a sub-registry of one of the major registries. Nine of these units provide visiting services to an additional 50 rural and outer suburban centres. Details of the location of permanent court counselling units, and population centres currently served by periodic visiting services are listed in the Court's submission to the inquiry.[5]

3.13 The Family Court's submission has stated its concern about the 'severely limited' service it is able to provide to rural centres due to insufficient funds to cover the costs of travel and accommodation for counselling service staff, and for office accommodation. The Family Court has complained that 'it is an embarrassment' that it is frequently placed in a position where it must rely on other agencies or courts to provide such office accommodation or administrative assistance.[6] The Family Court has also expressed great concern that, even in those areas currently served by permanent counselling units or visiting services, funding restrictions have meant that many people who would otherwise wish to use the service are unable to do so, and that the effectiveness of the limited counselling that is taking place is being severely compromised.

3.14 Particular difficulties mentioned in the Family Court's submission include:

3.14.1 long waiting times for appointments, which often mean that counselling comes too late, or is relatively ineffective in assisting couples to resolve disputes;

3.14.2 a periodic inability in some major registries to offer appointments to self or solicitor referred clients;

3.14.3 withdrawal of the free interpreter service in 1991, which has left the Family Court 'acutely conscious that non-English speaking clients are being disadvantaged in their access to counselling by comparison with its other clients'; and

3.14.4 lack of funds to allow for the provision of an after hours service to meet the needs of those who are unable to leave their place of work during the day.[7]

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4 Submission 940, Vol 29, p 5645-6
5 Submission 940, Vol 29, pp 5680-82
6 Submission 940, Vol 29, p 5682
7 Submission 940, Vol 29, p 5684

3.15 Similar concerns have been registered by the Law Council of Australia and the Family Law Council. The Law Council of Australia has recommended that:

> Because of the savings in terms of use of resources of the court and in legal expenses, the Service should be fully funded to enable prompt provision of appointments to those seeking its services.[8]

3.16 Similarly, the Family Law Council expressed its concern about the difficulty in having urgent cases seen promptly by the Family Court and the limited availability of pre-application conciliation counselling appointments. The Family Law Council argues that these deficiencies in the service are indicative of a serious shortage of resources needed to meet the demands of the service.[9]

3.17 Many other submissions from individuals, legal practitioners and organisations which assist those undergoing divorce expressed concern at the limited availability of the services of the FCCS. The following comments are indicative of the level of this concern:

> The counselling section of the Family Court plays a very important role but because it is very much understaffed and under-resourced, it is very difficult for it to assist. If there were more counsellors then there could be more time given to each matter.[10]

> Family Court Counselling is not easily accessible in country areas...travelling to Adelaide, or even large rural centres, can be very expensive and beyond the means of many families.[11]

> Cobar is a community of some 5,000 people and the closest counselling service is 300 km away at Dubbo. It is heavily overloaded. A recent enquiry at the Family Court office in Dubbo indicates a delay from mid-July to mid-September for s62(1) counselling. Qualified counselling is not available in Cobar. I believe this is the case in much of non-metropolitan NSW.[12]

> It is appropriate that there be a Family Court Counselling Service and that parties be encouraged to attend at an early stage to attempt to resolve their disputes. In urgent cases it is not always possible to get appointments as promptly as one would wish because of staff limitations. Family Reports, prepared by the Counselling Section in Canberra, are routinely

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8 Submission 415, Vol 11, p 2188
9 Submission 546, Vol 16, p 3159
10 Submission 427, Vol 12, p 2453
11 Submission 564, Vol 17, p 3393
12 Submission 406, Vol 10, p 2063

available only one or two days prior to the hearing of the case. It would be far preferable if the reports were available at least one or two weeks prior to the hearing to give the parties the opportunity to assimilate the Counsellor's views and make a further attempt at settlement. Again the problem appears to be insufficient resources.[13]

3.18 The Family Court Counselling Service has also argued that funding to cover the extra workload resulting from the legislative amendments detailed at para 2.14 has been insufficient. Between 1987 and 1988, the Family Court Counselling Service received funding which enabled the employment of an equivalent additional 18 full time staff members to cover additional work involving ex-nuptial children. The Court claims that this increase was insufficient to meet the actual demand for the service, and that it received nothing to cover the additional counselling load related to Queensland's subsequent referral of its powers in relation to ex-nuptial births. Furthermore, the Family Court claims that such cases involving ex-nuptial births may require more counselling resources than cases dealing with nuptial children, as they are more complex.[14]

3.19 In addition, the Court states that it has not received any extra funding for extra staff hours needed to cover:

3.19.1 the mandatory obligation on counsellors to report any suspicions of child abuse: or

3.19.2 the preparation of reports for the Family Court in matters where consent orders are to be made giving custody or guardianship to a person who is not the parent of the child.

Additional counselling units

3.20 The Review of the Family Court, headed by Justice Buckley, concluded that there was an urgent need for the establishment of an additional two filing registries at Geelong and the Gold Coast, and a sub-registry at Coffs Harbour. New policy proposals were submitted to Cabinet for these registries in April 1991, but the Family Court was not successful in gaining the additional funds needed for the establishment of these services. In an attempt to meet the need for services in these areas, the Family Court established counselling circuits, or visiting services.

3.21 The Family Court has claimed that the Gold Coast service had to be terminated after 12 months due to 'excessive strain on limited resources and an inability

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13 Submission 403, Vol 10, p 2035
14 Submission 940, Vol 29, pp 5646-7

to meet the overwhelming demand'.[15] The decision to terminate the service was taken by the Court because it felt that the counselling being offered was likely to be of limited effectiveness, as waiting time for appointments had reached eight weeks.[16]

3.22 The Family Court suggested that:

> Apart from the obvious issue that families in crisis need to be seen quickly, the other difficulty was that follow-up appointments were also affected. Agreements or partial agreements that occur in the first counselling session are often tenuous. If there is a further problem before a follow up appointment can be held, the couple may become disenchanted with the counselling option as the means by which their dispute can be resolved.[17]

3.23 The Family Court has been particularly concerned about the availability of counselling services in the Gold Coast area, as it is projected that the corridor between Noosa Heads and the NSW border will experience a significant population increase over the next ten years. During the taking of oral evidence, Justice Buckley expressed the view that it was 'quite extraordinary' that the Family Court's new policy proposals for a registry to service the area had been rejected by the Expenditure Review Committee of Cabinet. He claimed that, as a consequence, the service offered by the Brisbane registry will also be further eroded:

> Things are very bad in the Gold Coast area. They cannot afford the transport to come to Brisbane. There is no transport network that is effective. We have now got to have a very serious look at taking five counsellors out of Brisbane, because the need is so great in that area, and establishing a counselling registry out of existing funds. That means that the service which we will then provide in Brisbane will be very strictly confined to actual litigation within the Family Court. We will not be able to provide anything else. People are going to scream, and justifiably so. It is disgraceful.[18]

Conclusions

3.24 The Committee recognises that the resolution of disputes and emotional difficulties associated with divorce through the provision of counselling services may provide financial savings to the parties themselves, and reduce the burden on other publicly funded services such as legal aid and the 'legal arm' of the Family Court. It therefore supports the view that the resources allocated to the Family Court Counselling

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15 Submission 940, Vol 29, p 5681A
16 ibid
17 Submission 940, Vol 29, p 5682
18 Transcript, 29 May 1992, pp 1890-91

Service should be sufficient to enable it to maximise the number of cases which are resolved through the provision of early intervention appointments. The Committee is particularly concerned about the extremely limited services now offered by the FCCS to fast-growing regions such as the Gold Coast.

Recommendations

3.25 The Committee therefore recommends that:

4 the Family Court Counselling Service should be sufficiently resourced to enable:

4.1 the demand for self or solicitor referred counselling to be met;

4.2 a reduction in waiting times for all appointments;

4.3 the provision of a limited after hours service in all registries;

4.4 an extension of Family Court visiting services to outlying areas that are currently infrequently serviced;

4.5 capacity to deal with the full additional case load generated by the enactment of s70BB and s112AD(5), and the reference of powers from the States in relation to ex-nuptial children; and

5 the establishment of filing registries, and sub-registries where necessary, eg, at Geelong, the Gold Coast, and Coffs Harbour.

Counselling staff

3.26 Some submissions to the inquiry criticised the qualifications and personal characteristics of some Family Court counsellors. Issues raised included the following:

3.26.1 the relatively low number of male counsellors;

3.26.2 the relatively low number of bi-lingual counsellors, and an inadequate appreciation of different cultural perspectives;

3.26.3 a need for more counsellors with broad 'life experience', as opposed to academic qualifications; and,

3.26.4 a need for more and better quality training and professional qualifications, most particularly in the fields of child development, child sexual abuse, and domestic violence.

3.27 The Family Court's recruitment policy for counsellors requires that all court counsellors must have a social work or psychology degree, and at least two to three years experience in working with families. The majority of counsellors apparently have 'well in excess' of three years clinical experience before joining the Family Court. One third of counsellors currently employed by the Family Court have a post graduate qualification in social work, psychology or education, and many have other relevant academic qualifications. Two thirds of counsellors are over 40 years of age, and only four counsellors are under 30 years of age. Just under 70 per cent of court counsellors are female.[19]

Shortage of male counsellors

3.28 The Committee received a number of complaints about the lack of male counsellors employed by the FCCS. The Family Court advised in its submission that the ratio of male to female counsellors (31 per cent:69 per cent) employed by the Family Court is higher than the ratio of males to females in the general population of psychologists and social workers in Australia, 20 per cent males to 80 per cent females.[20]

3.29 The Committee has received a considerable amount of evidence regarding the different responses of men and women to divorce, and different attitudes to seeking professional help in the face of marital difficulties. The following comments made by a Launceston witness whose own experience in divorce led him to do 'a lot of networking and talking with men, particularly with men who are in the early stages of divorce' are pertinent:

> I am not a trained counsellor by any means but after spending some time with these men, I will say, 'Right, I have a list of counsellors. You have agreed with me that you need professional help. Let us make an appointment now'. I will reach for the phone to make an appointment and they will not seek professional help...one of the big problems is that men find it very difficult, in the early stages of their divorce, to talk to women. There are not a lot of men counsellors around and I think that is one of the problems....[21]

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19 Submission 940, Vol 29, p 5679
20 ibid
21 Transcript, 7 February 1992, p 1007

Conclusions

3.30 The Committee concludes that there is no immediate means of changing the ratio of male and female Family Court counsellors. The Family Court already employs a higher percentage of males to the percentage of males in the population of trained psychologists and social workers. In the longer-term, it is to be hoped that more men will be attracted to relevant tertiary training courses and to counselling as a profession. The Committee draws to the attention of the Minister for Employment, Education and Training the current imbalance in the social worker/counselling profession of males and females.

Life experience

3.31 A small number of individuals and organisations suggested that some court counsellors are too young, and that there is a need to rank varied 'life experience' more highly as a selection criterion in the recruitment of counsellors. A few submissions suggested that counsellors were too remote and academic in their approach to clients, intimating that personal qualities and life experience should be considered more important than tertiary qualifications.

3.32 The following is illustrative of other similar comments:

> All counsellors should be of a mature age and have had relevant life experience along the lines of those they are trying to assist...in my particular case, where the dispute is over a handicapped young child, there has not been one single instance of being counselled by a person who has ever dealt with such an issue.[22]

3.33 The Committee notes that only one third of court counsellors are under 40 years of age, and that four are under 30 years of age. However, it also notes that the age distribution of counsellors is significantly 'older' than the age distribution of couples seeking marriage dissolution. As around 66 per cent of women, and 56 per cent of men are under 40 at the date of dissolution, the vast majority of couples are likely to see a court counsellor who is older than they are.[23]

3.34 In any case, while it is clearly important that counsellors have broad life experience, in the sense that they have a broad understanding of human nature and human relationships, it must be remembered that the younger employees of the counselling service have all had several years of working with families before they joined the Family Court, and should therefore have had a far greater exposure to the emotional and other difficulties faced by families and parents than many people of their age. The

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22 Submission 213, Vol 5, pp 1037 and 1936

23 Data obtained from ABS Catalogue No 3307, **Divorces Australia 1991**, Table 8, p 5

Committee recognises that from time to time there may be personality clashes between a client and a counsellor which may affect the relationship.

Qualifications and expertise

3.35 The Committee received a large number of submissions which suggested that counsellors should have higher academic qualifications, and more training, skills and experience, most particularly in dealing with domestic violence and child abuse cases. Although the Committee believes that the level of qualifications and experience required of new recruits to the FCCS is set at a reasonable level, it is concerned that inadequate opportunities are available to court counsellors to enhance their skills. It also believes that there is a need for the Family Court to ensure that court counsellors receive more systematic and on-going training in specialised areas such as domestic violence and child abuse. The issue of training in relation to child abuse issues is discussed in more detail in chapter six.

3.36 The Family Court has defended the level of expertise and experience possessed by court counsellors:

> Staff who are accepted for engagement as Family Court counsellors are all qualified in social work or psychology. They have all had prior extensive experience in both couple and relationship counselling. Upon commencing with the counselling service they are provided with close professional supervision. Continued professional training and development is a high priority and is systematically provided on both an individual and section basis...[24]

3.37 The Court further states:

> Counsellors (and welfare officers appointed under Regulation 8) have significant expertise in the psychological and social development of children and their needs, attachments, perceptions and behaviour...[25]

3.38 The Committee is satisfied that the Family Court aims to employ the best qualified people from the pool of applicants for its vacancies. However, it recognises that it may be difficult for the counselling service to attract a wide range of highly trained and experienced applicants for positions in more remote areas, and in places where the job is particularly stressful. For example, during its inspection of the Family Court's Northern Territory operations, the Committee heard of the additional stresses under which counsellors who provide visiting services to remote areas must work, due to the high rate

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24 Submission 940, Vol 29, p 5669
25 Submission 940, Vol 29, p 5655

of social problems such as alcohol abuse and domestic violence in the Territory,[26] and due to the lack of the support from colleagues that may be available to counselling staff who work together in larger registries.

Opportunities for on-going training

3.39 Despite the Family Court's assertion in its submission that systematic, on-going training is provided, the Committee heard evidence from Court personnel which supports the view that more training and the updating of skills in some fields is needed. For example, the Committee heard the following comments from the Regional Manager of the Northern Region, who appeared before the Committee with a group of court counsellors who joined together to compile a submission to 'represent the people of the Family Court':

> Of late, I think a lack of resources has imposed a substantial load on our workforce...we see evidence of an increase in demand which is not necessarily matched by provision of resources; yet our people feel that they are there to provide the service and in so doing they deny themselves the usual opportunities that people who work in that intense environment have. Those include opportunities of time off, more intensive training, stress relief and the like...[27]

3.40 In response to a question about professional and on the job training, another counsellor said:

> I think on the job training could be added to. Most of us have adequate skills to handle what we have to do...There is no formal program of updating. A number of us have undertaken extra uni studies, but there is no formal program.[28]

3.41 However, counsellors find it hard to fit in time for intensive training in the face of tight appointment and report writing schedules:

> There is a very intense workload. When you say to people who are in the counselling service, 'You should come out of that and spend a week away on a course,' they say, 'We get behind in our workload'...I would like to see more opportunities for expanding skills, particularly in the areas of staying abreast with research.[29]

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26 **A brief Outline of the Family Court in the Northern Territory**, Alistair Campbell, Director of Court Counselling, Darwin, March 1992

27 Transcript, 20 November 1991, pp 697-8

28 Transcript, 20 November 1991, p 699

29 Transcript, 20 November 1991, p 700

3.42 The Committee is concerned that opportunities for updating knowledge and counselling practices provided to Family Court counsellors has been inadequate. The Committee heard the following comments from a member of the Coalition on Domestic Violence:

> You cannot learn about domestic violence from a newspaper ... they are not reading reports. The counsellor who came to the domestic violence courses and met with the workers in the women's shelters admitted that she had no knowledge of the report that had come out the previous year. She had no knowledge of domestic violence legislation produced following the report...She was the person directing the supervisors in the section. I imagine she had considerable power over the way those counsellors work.[30]

3.43 The Committee also heard criticisms that at least in one state, the Family Court Counselling Service did not appear open to learning from the latest research into domestic violence, and had not availed itself of opportunities to use the learning resources that are available in relation to domestic violence.[31]

3.44 The Committee has observed that comments made in the Family Court's formal submission to the inquiry are somewhat dismissive of the specificity of the field of domestic violence research:

> Criticisms of counsellors as being inadequately trained to work with families where violence has been involved are quite unfounded. While there are particular knowledge bases associated with violence...these families are not unique in their relationship processes...understanding of family roles, hierarchy, power and boundaries are subsumed in the broader knowledge bases of, for example, General Systems Theory and Family Therapy models.[32]

3.45 As research into domestic violence is a relatively new field, and new studies continue to shed new light on the nature and dynamics of domestic violence and its effect on children, the attitude reflected in this statement caused the Committee some concern.[33] However, the Committee is pleased to note that the process of its inquiry has prompted the Family Court to revise its policies and practice in relation to domestic violence. In his oral evidence to the Committee, the Chief Justice made the following observation:

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30 Transcript, 20 November 1991, p 693

31 Transcript, 20 November 1991, p 694

32 *Submission 940, Vol 29, p 5669*

33 See, for example, C Bookless-Bratz & P Mertin, **The Behavioural and Social Functioning of Children Exposed to Domestic Violence: A Pilot Study**, Children Australia, v 15(3), *September/October 1990.*

> I was interested to read the submissions to the Committee in relation to domestic violence...that is one of the useful things that I have found has come from this Committee's activities. It has concentrated our attention more on that. I do not say that we have ignored it in the past, but some of those submissions have certainly drawn our attention - well, my attention anyway - to the need to look more carefully at this area.[34]

3.46 The Chief Justice went on the provide the Committee with a copy of a new draft of the Family Court's domestic violence policy statement, which was revised in May 1992. The new policy statement places an obligation on Regional Directors, and Directors of Family Court Counselling, to establish links and co-operation with agencies working in the field of domestic violence, in order to 'facilitate referrals and exchange of information'.[35] The policy also states:

> Regional Directors of Family Court Counselling are to ensure that adequate and regular training occurs in their region consistent with the needs of staff. In educating staff about domestic violence the aim is to update and increase awareness and understanding of the role domestic violence plays in separation issues and disputes over children and to keep abreast of recent developments in the field.[36]

Conclusion

3.47 The Committee believes it is important that Family Court counsellors keep abreast of the expanding body of research that is relevant to their work. It accepts that there is evidence that the case loads borne by counsellors in some registries may leave insufficient time for attendance at training courses. The Family Court Counselling Service must have sufficient resources to enable it to provide each counsellor with ongoing training and up-to-date knowledge of specialised areas such as domestic violence and the identification of child sexual abuse.

Recommendation

3.48 The Committee recommends that:

> **6 the Family Court Counselling Service review its staffing levels and training program, to ensure that all counsellors have an opportunity to regularly update their knowledge and skills, particularly in the areas of domestic violence and child sexual abuse.**

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34 Transcript, 29 May 1992, p 1895
35 See para 7.2, Family Court of Australia, Draft Policy Statement on Domestic Violence
36 See para 6.1, Family Court of Australia, Draft Policy Statement on Domestic Violence

Cross-cultural awareness training and the provision of interpreters

3.49 Several submissions to the inquiry suggested that, despite initiatives such as the provision of information material in a variety of languages, the FCCS is currently unable to meet the particular needs of families of non-English speaking background. For example, the Australian Law Reform Commission's paper **Multiculturalism: Family Law** states that:

> Dispute resolution services (such as marriage and court counselling and mediation) designed to help families to resolve their disputes and difficulties seem to be insufficient or inadequate for some families. For example, the dispute resolution services offered by the Family Court are not being used by people of Vietnamese background despite clear evidence that they or similar services are needed. This is not just because of language difficulties or the lack of interpreters or own language counsellors. More fundamental issues of inappropriateness, unfamiliarity of concepts and power struggles seem to be involved.[37]

3.50 The Law Council of Australia also raised the issue of cross-cultural awareness in its submission. It drew attention to a recommendation of the previous Joint Select Committee, which stated that the Family Court should recruit people with sensitivity and experience in working with the major ethnic communities residing in areas where the Court is located. In its submission to the Committee, the Law Council stated that it was not aware that the recommendation had ever been acted upon and reiterated the need for the recommendation to be implemented.[38]

3.51 The Law Council added that some members of the Family Law Section of the Council had received complaints from people who felt that counsellors let their personal prejudices against particular cultural practices and attitudes intrude into the counselling process. Accordingly, the Council recommended that a concentrated effort be made to ensure that training instils in counsellors the highest degree of tolerance towards different ways of life.[39]

3.52 The Committee notes that in the short term, it is not possible for the FCCS to recruit bilingual counsellors with a range of cultural backgrounds which match the demographic characteristics of each major population centre in Australia. Therefore the need for an affordable and accessible interpreter service will remain. Amongst others, the Family Law Council[40] and the Law Council of Australia[41] have both stressed the

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37 Australian Law Reform Commission **Multiculturalism: Family Law**, Discussion Paper No 46, January 1991, p 13

38 Submission 415, Vol 11, p 2190

39 Submission 415, Vol 11, p 2191

40 Submission 546, Vol 16, p 3159

41 Submission 415, Vol 11, p 2189

need for an interpreter service which is adequately resourced to meet the needs of Family Court clients.

Conclusion

3.53 The Committee considers that the Commonwealth should take urgent steps to improve the availability of interpreters to meet the needs of all families of non-English speaking background. At the same time, the Committee believes that the Family Court should review training provided to counsellors to ensure that they receive more intensive and comprehensive cross cultural awareness training. Particular attention should be paid to social and cultural dynamics which conflict with aspects of the existing Australian family law system.

Recommendations

3.54 The Committee recommends that:

7 an interpreter service be provided free of charge where necessary to clients of the Family Court Counselling Service; and

8 the Family Court ensure that counsellors are provided with adequate cross cultural awareness training.

Conciliation counselling

Introduction

3.55 The Family Court's submission describes the purpose and nature of conciliation counselling:

> In the Family Court, conciliation counselling is a process whereby parents are encouraged and assisted to make joint decisions about the welfare of their children.
>
> It should be made clear that conciliation counselling relies on definable, technical and personal skills which assist in the reduction of often severe dislocation in families. There are often great psychological and social barriers which must be overcome and require the services of a skilled professional...
>
> The importance of helping to reduce the conflict between parents cannot be over emphasised; children can be adversely affected if subjected to

long-term conflict between their parents. In addressing this conflict the counsellor helps the parents recognise their feelings about the relationship and the breakdown of the relationship; this may involve dealing with emotional and symbolic issues that stand in the way of them adjusting to the separation and fulfilling their parental role with their children.

Counsellors assist parents to understand that the family system has changed but they still have a continuing role and responsibility as a parent. Because the focus is on the needs of the child the counsellor avoids elevating one parent's needs above the other.[42]

3.56 In the Family Court, conciliation counselling may occur:

3.56.1 on a voluntary basis at any stage prior to or during proceedings;
3.56.2 on a referral (rather than an order) from the Family Court under Order 24 once an application in an ancillary matter has been filed; and
3.56.3 at the direction of the Family Court under s62(1) at any time following the first day in court.

The effectiveness of the Family Court's conciliation counselling program

3.57 In its submission to the inquiry, the Family Court noted that:

> No clear indisputable picture has emerged as to what are the benefits of conciliation. Part of the problem inherent in the evaluation of effectiveness research involves specifying just what is meant by successful and effective conciliation counselling....the effects of counselling intervention can show up in a number of different ways from subtle psychological and relationship changes to objective and observable changes in specific behaviours.[43]

3.58 The counselling service has conducted a number of surveys which attempt to assess the effectiveness of the conciliation program along several dimensions, and in particular:

3.58.1 rates of agreements achieved through the process;
3.58.2 the proportion of agreements which subsequently break down and lead to litigation;
3.58.3 client satisfaction with the process.

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42 Submission 940, Vol 29, pp 5649-50
43 Submission 940, Vol 29, p 5686

3.59 The Committee has considered the results of these surveys, along with positive and negative comments about the Family Court's conciliation service made in submissions to the inquiry. The overwhelming bulk of submissions to the inquiry stated or implied that working through disputes via some form of counselling or mediation was a preferable alternative to protracted litigation.

3.60 These comments, from one man who had experienced prolonged and unwanted litigation, are instructive:

> I would say that in my case counselling was effective. It helped to make parties create a dialogue. I think solicitors tend to encourage parties to assert their powers and rights. When you get locked into this...you have this dreadful litigation process occur.[44]

3.61 A submission from Mr T Graham was critical of the Family Court and the legal process but favourable to the FCCS:

> The only positive experience I have had after six months of legal harassment is the FCCS. As a result of counselling we reached a decision over the children and this was the only occasion that an agreement was reached in six months.[45]

3.62 Many individuals who had been through conciliation counselling did have criticisms of the process, or suggestions as to means of improving it. Such people generally expressed one or more of the following viewpoints:

3.62.1 the counsellor was biased - in most cases, towards women;

3.62.2 the counsellor was not directive enough or did not 'make' the other party participate constructively;

3.62.3 the counsellor was too directive, and did not give the parties a chance to work out their own agreement;

3.62.4 attendance should be compulsory and enforceable;

3.62.5 counselling should not be confidential - what is said should be recorded, because in cases where the dispute goes to trial, parties will often submit affidavits and other evidence which contradicts what they said or admitted in counselling;

3.62.6 procedures for dealing with cases where domestic violence has been an issue have often been inappropriate; and

3.62.7 too many custodial parents subsequently ignore agreements about access that are made during conciliation conferences.

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44 Transcript, 22 April 1992, pp 1634-5

45 Submission 400, Vol 10, p 2019

3.63 It is not possible to provide a complete and accurate assessment of the effectiveness of the Family Court's conciliation services, partly because of the unverifiable and subjective nature of some of the criticisms made about the conciliation process in submissions to the inquiry. In addition, the very nature of an inquiry such as that undertaken by the Committee tends to elicit responses from those who are dissatisfied with the existing services, rather than from those who had no complaint. Nevertheless, the Committee comments on all the major criticisms listed above in the sections that follow.

3.64 The evidence before the Committee suggests that there is cause for concern in relation to two areas of criticism mentioned in submissions:

3.64.1 procedures which have been used in some registries for dealing with cases where domestic violence is an issue; and

3.64.2 the unknown, but apparently large, number of conciliated access agreements which subsequently break down.

3.65 Although the Family Court's research suggests that it is easier for counsellors to effect apparent agreements on access than on custody matters, such research cannot provide a real measure of the extent of the subsequent breakdown of agreed arrangements. Evidence provided in submissions to the Committee's inquiry would suggest that many non-custodial parents who are denied access finally give up, and hence do not appear in Family Court statistics.

3.66 It should be noted that, while there is evidence that an unknown number of conciliated access arrangements do not result in the lasting resolution of access issues, the reason for the breakdown of the agreement is difficult to determine. There is no reason to assume that the breakdown is as a result of the counselling process. Although some submissions have suggested that counselling is ineffectual in resolving access disputes, it may be that intractability on the part of one partner, rather than a lack of expertise on the part of the counsellor, is at the heart of many such cases. It must also be noted that there is some evidence to suggest that access agreements that are reached through early intervention counselling are more durable than those which are reached further down the litigation path, or are imposed by the Family Court.

3.67 The results of the Family Court's own surveys on the effectiveness of the counselling service are included in their submission.[46] Claims made by the Family Court on the basis of its research findings which support the view that the Family Court's conciliation program is cost-effective, particularly if conciliation can take place as soon as possible after separation, include the following:

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46 Submission 940, Vol 29, pp 5686-99

3.67.1 an average of 74 per cent of those cases which are conciliated on a voluntary basis, and 73 per cent of those conciliated before proceedings commence under an Order 24 referral, result in parties reaching agreements;

3.67.2 of the total of all conciliated cases across all registries, including those cases conciliated at the direction of the Family Court at a late stage in litigation, an average of 62 per cent of cases reach agreement on all disputed issues;

3.67.3 a 12 month follow up of a sample of counselling cases found that re-litigation on issues which had been agreed on during conciliation did not occur in any of those cases during the period; and

3.67.4 findings on rates of agreement, and tentative findings on rates of re-litigation, are consistent with the little research that is available about conciliation outcomes in family law matters in a number of overseas countries on conciliation outcomes.

3.68 The Committee has concluded that there is evidence to suggest that the conciliation program offered by the Family Court Counselling Service is an effective means of resolving disputes. However, it would appear that the effectiveness of conciliation counselling, in terms of the rate of agreements reached between parents in relation to arrangements for their children, is in large part dependent on how early couples attend conciliation following separation.

Early intervention conciliation

3.69 Family Court research has shown that the rate of agreement achieved in conciliation conferences is higher for couples who have a shorter duration of separation.[47] Likewise, rates of agreements of disputes conciliated at a relatively early stage of disputes are higher than those for disputes conciliated after litigation has proceeded further along the path to a contested hearing. Long waiting lists and delays before many clients can get appointments are of particular concern to the Committee.

3.70 In order to encourage more couples to attend conciliation counselling at an early stage following separation, the Family Law Act was amended in 1987 to place an obligation on solicitors who are consulted in relation to family law matters to alert their clients to the conciliation service offered by the FCCS. In 1990-91, 52 per cent of the clients seen under the Family Court's conciliation counselling program attended on

47 Submission 940, Vol 29, p 5693

a voluntary basis as a result of self referral or referral by a solicitor, other agency or other professional.[48]

Enforcement of compulsory attendance at conciliation counselling

3.71 Some submissions to the inquiry have suggested that attendance at conciliation counselling should be compulsory and enforceable for all couples who lodge applications in relation to children or property, before any further action is taken by the Family Court.

3.72 The Committee is concerned that some parties can use counselling appointments as a means of harassing their ex-spouse, by making appointments but subsequently failing to turn up, without notice. The Family Counsellors' Association (Inc) raised this matter in its submission:

> The Family Court Counselling Service can be used as a harassment technique (usually by the husband) where there is a custody dispute. Under s15 (1) a party to the marriage may file a request for counselling. The partner is then contacted under s15 (2) and the counselling session arranged. It has been the experience of our members that on a number of occasions the filing party has not attended with the result that the other party has suffered considerable stress with no result.
>
> The FCA is disturbed that the counselling process can be used as a psychological weapon and urges the Committee to investigate the establishment of a central data bank where applications for counselling can be cross referenced to prevent this abuse of the system.[49]

Conclusions

3.73 While the Committee is strongly in favour of finding means of encouraging the early resolution of disputes, the weight of evidence before it suggests that amending the Act to provide penalties in relation to non-attendance at counselling would lead to an increased strain on the Family Court's resources which is unlikely to be offset by a corresponding increase in the effectiveness of the Family Court's conciliation counselling program. The Committee notes that the Joint Select Committee on Family Law which reported in 1980 also reached this conclusion, and for the same reason.[50]

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48 Submission 940, Vol 29, p 5651

49 Submission 763, Vol 22, pp 4433-4

50 Joint Select Committee on the Family Law Act, **Family Law in Australia**, Vol 1, AGPS, Canberra, 1980, p 172

3.74 As is suggested throughout this report, there is a great need for more community education regarding the benefits of counselling, and the financial and emotional costs of litigation to parties and their children. However, a party who is determined to litigate in respect of children, and attends Order 24 counselling only because they will suffer some financial or other penalty if they do not, will not necessarily make any real effort to reach compromise solutions during such a counselling session.

3.75 Although the Committee is in favour of increased funding for the counselling service, it believes that such funds should be allocated where they are most likely to provide results. A two-fold waste of resources may result from attempting to enforce attendance at counselling: wastage in terms of counsellor time, and wastage of resources spent in enforcing attendance. The Committee believes that instead, every effort must be made to increase the percentage of separating couples who attend conciliation counselling willingly, preferably before they consider filing applications for proceedings in respect of ancillary matters. Rather than expending resources on forcing people to attend conciliation conferences in cases where one party is not interested in participating, the Committee believes that resources might be better employed in promoting the benefits of voluntary attendance at conciliation conferences.

Recommendation

3.76 The Committee recommends that:

9 the Family Court investigate the most cost effective means of ensuring that parties who file for voluntary pre-filing conciliation counselling under s15(1) of the *Family Law Act 1975* and who subsequently fail to notify the counselling service of their intention not to attend, are prevented from using repeat applications for counselling as a means of harassing their ex-partner.

Reconciliation counselling

3.77 Sections 14(1) and (2) require a judge to give consideration to the possibility of a reconciliation and to order counselling if s/he so decides. Sections 44(1B) and 44(1C) of the Family Law Act require that, except in special circumstances, parties who have been married for less than two years produce a certificate stating that they have attended reconciliation counselling before a dissolution of the marriage may be granted. The intention of such provisions was to attempt to ensure that newlyweds who are having difficulties adjusting to married life do not walk away from their marriage without making serious attempts to make it work. Section 14(2) of the Act also empowers judges of the Family Court to order parties to attend reconciliation counselling at any stage during court proceedings, should it appear that there is a prospect of reconciliation. Such reconciliation counselling under sections 14 and 44 is to be provided

by approved marriage counselling organisations or other suitable persons or organisations nominated by the Principal Director of Court Counselling of the Family Court.

3.78 In its submission to the Committee, the FCCS makes the following comments about the requirement that counsellors ensure that reconciliation is an option that has been considered by presenting couples:

> This is a function which counsellors take seriously if both partners indicate a willingness to become involved...However, in cases where long-term on-going counselling appears likely to assist in areas of reconciliation, emotional support, or personal development, the policy of the Family Court Counselling Service has, of necessity, been to refer the client to another agency approved under the Act.[51]

3.79 The Law Council's submission expressed the view that there was little scope for reconciliation counselling to be provided by the FCCS and that marriage guidance organisations are the appropriate body for this aspect of counselling:

> It has long been recognised that by the time a separated couple reaches the Court there is little prospect of reconciliation. It is well established that the resources of the counselling service should not be taken up with reconciliation counselling as such but only when the same incidentally arises during the course of current proceedings. Approved marriage guidance organisations are especially equipped for the purpose of long term reconciliation counselling and can therefore meet this need.[52]

3.80 The Family Court's submission to the Committee has expressed concern that even the limited provisions for compulsory attendance at reconciliation counselling under ss44(1B) and 44(1C) are ineffectual as a means of preventing marital breakdown:

> This may well reflect the reality that people rarely approach the Family Court until they regard their marriage at an end. For this reason, ss44(1B) and 44(1C) give rise to concern. Counsellors are of the view that these sub-sections have in the past been of no effect. Attempts to achieve reconciliation when the parties have long been separated - in some cases for longer than they were married - and have in most cases established new relationships or lifestyles, are usually unrealistic.[53]

3.81 These concerns were echoed in evidence provided to the Committee by the Chairman of the Family Law Council, the Hon Mr H C Emery, QC, in relation to reconciliation counselling ordered under s14(2):

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51 Submission 940, Vol 29, pp 5648-9
52 Submission 415, Vol 11, p 2181
53 Submission 940, Vol 29, p 5649

> People occasionally come into court, for instance, on a divorce application wanting to discuss reconciliation. Nine times out of ten the judge makes the order that they go to counselling. In all my career on the bench, I never saw one resolved. Usually the counselling report was that it did not get off the ground. But this is one of the things that the Family Law Council and, for that matter, the Family Court is pushing - get them before the dispute is so ingrained in their ideas and emotions that there is no hope of settling it. If that can be done, the counselling section might, ultimately, be able to save some marriages....[54]

Conclusions

3.82 The Committee believes that an increased emphasis on educating the community, and particularly the young, about communication in relationships, about the responsibilities of marriage, and about the potential benefits of relationship counselling will in the long-term be a more effective means of preventing marital breakdown than orders for reconciliation counselling which are made after that breakdown has occurred. The Committee would prefer to see increased funding for marriage education, and the introduction of measures to increase community awareness of the benefits of seeking professional help at an early stage in marital difficulties. The Committee concludes that, rather than ordering reconciliation counselling at the request of one party to the marriage, or requiring couples who have been married for less than two years to attend reconciliation counselling before granting a dissolution, other procedures may be more appropriate and effective.

Domestic violence

3.83 The Committee was concerned at several disturbing reports given in evidence of the inappropriate handling by the FCCS of couples where domestic violence had been an issue. In particular, a major complaint was the practice of holding joint husband and wife conciliation conferences, without first ascertaining whether the victim of that violence felt comfortable being in the same room with the perpetrator.

3.84 A member of the Queensland Coalition Against Domestic Violence raised two issues in evidence - the imbalance of power between couples where one partner has experienced domestic violence and the requirement imposed by the Family Court that the couple attends a joint counselling session:

> The Family Court operates under a series of assumptions. One of these is that both spouses have equal power to negotiate in situations of counselling and mediation. This is not the case with domestic violence. It

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54 Transcript, 13 March 1992, p 1231

is well documented that domestic violence causes a power imbalance where one partner is continuously cowered and dominated. If this is not remedied immediately by the presence of a counsellor or mediator, agreements can be reached which are inappropriate for both wife and child and are only made to deflect further threats or harm.[55]

We have had situations where women have obtained State protection orders through the Magistrates Family Court saying that there will be no contact with perpetrators. They have then rung up the Family Court and been told that they have to appear in the same room with the perpetrators. Another situation that has occurred is that women have requested - it is not often - separate interviews with regard to counselling. Such requests have been denied. In fact, the only time that those requests are allowed are times where we as workers have to argue quite strenuously to allow for separate counselling, in other words, not to have the perpetrator and the victim in the same room together.[56]

3.85 During the Committee's inspections of major Family Court registries in Australia, the registries advised that separate counselling was available where a victim of domestic violence requested it. Some counsellors said that they were sympathetic to the need to hold separate interviews where a fear of potential violence at, or following the counselling session, was an issue. However, counsellors were concerned that they were frequently not made aware that domestic violence was an issue before a joint counselling appointment was made.

3.86 In response to calls for a revision of its policies, the Family Court has issued new draft guidelines for procedures dealing with domestic violence cases. The Brisbane Registry which was the focus of some complaints, has also modified its practices in lines with concerns detailed in submissions:

I want to pick up on the domestic violence issue, because I think that was directed to the Brisbane Registry. As the Chief Justice has already said, one of the benefits which flows from an inquiry of this nature is that it can highlight matters which we have overlooked in the organisation. We had become driven in terms of ensuring that both parties were present for counselling and conciliation. In fact, we had a very good success rate - a much higher success rate than we ever contemplated would be achieved in terms of both parties being there - but we were not picking up those people who had been subjected to domestic violence. Here they were in the same room with just the counsellor and they felt intimidated. We are overcoming that by recommencing the information sessions. All parties, prior to undertaking the counselling, are involved in the information

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55 Transcript, 20 November 1991, p 680
56 Transcript, 20 November 1991, p 683

session, in which the issue of domestic violence is addressed. The parties are given the option of making other arrangements with the counsellor...[57]

3.87 The Committee notes with approval statements of policy which appear in the Family Court's latest revision of its domestic violence policy guidelines. Salient points made in the new policy include the following:

3.87.1 the safety and on-going protection of clients should have priority over other considerations. This means that people's safety should be ensured, and that they should be provided with information about domestic violence, the resources available to support them in the community, and where they may find on-going support;

3.87.2 clients who have been subjected to domestic violence have the right to make their own choices about what is realistic for them, and their choices should be respected;

3.87.3 domestic violence clients...often lack confidence to represent their own interests and need the assistance of an advocate to put forward their requirements. The role of counsellor as neutral facilitator would not be appropriate in such circumstances. The counsellor needs to be aware of power imbalances and should continue counselling only while such imbalances can be compensated for by the counselling process;

3.87.4 the counsellors role includes defining any behaviour which cause injury or harm as unacceptable and encouraging clients who have been violent towards their partner to accept responsibility for their behaviour; and

3.87.5 clients should be made aware that they have the right to leave the appointment if they feel intimidated.

3.88 The Family Court later advised that, at the Parramatta Registry, clients ordered to attend counselling are now sent a letter containing an option to attend a single interview in cases of domestic violence. The Family Court is monitoring the effects of the new policy on its ability to provide other services.

Conclusions

57 Transcript, 29 May 1992, p 1898

3.89 The Committee is strongly of the view that all registries should forward letters containing the option of attending a single interview to court ordered counselling clients.

Recommendations

3.90 The Committee therefore recommends that:

10 all clients ordered to attend conciliation conferences, or reportable conferences for the purpose of family reports, should be offered the option of having separate interviews if domestic violence has occurred in the relationship; and

11 the Director of Family Court Counselling take all necessary steps to ensure that the statements of policy included in the Family Court's revised domestic violence policy statement dated May 1992 be translated into consistent practice in all registries.

Information for conciliation clients

3.91 Currently, clients who make appointments with the Family Court Counselling Service are sent a brief information sheet on counselling and on the particular type of counselling they are seeking. The counselling service also advises all clients to attend the information sessions it provides prior to their counselling conference. The Family Court advises:

> Information session help clients understand the range of emotional responses associated with separation in both themselves, their partners and their children; this in turn often helps clients to make sense of the added difficulties they tend to experience in communication with each other and making decisions at the time of breakdown. The session also advises clients how to help the children cope, how to make constructive use of counselling sessions, and provides information on conciliation processes and litigation options as the two main modes of dispute resolution in family law.[58]

3.92 The counselling service has found that attendance at such sessions tends to reduce the amount of time needed to conciliate disputes, because both parties hear the same information and start from the same point and because the counsellor can focus on the issues with the clients, knowing that they have had some basic information about

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58 Submission 940, Vol 29, p 5665

the trauma of separating families.[59] Although these sessions are run daily in one registry, and weekly or monthly in others, there is frequently no opportunity to run such sessions on Family Court circuits outside major cities and urban centres.

3.93 However, those who do not make appointments with the counselling service, and hence do not receive information fact sheets or attend information sessions, may not be aware of the nature or functions of conciliation counselling. For example, the Committee has heard evidence to suggest that some legal practitioners are neglecting their statutory duty to advise their clients of the existence of the Family Court's conciliation services. One woman who had extensive contact with her solicitor during the nineteen months which elapsed from her property application to the court hearing, stated:

> I cannot comment on the services [of the FCCS] as I was not at any stage offered any type of counselling...I know of many cases where the problems were multiplied because the only communication in the early stages was through solicitors.[60]

3.94 The Committee has also heard that it is particularly important that those of non-English speaking backgrounds be provided with information about the FCCS. For example, the submission from the Migrant Women's Emergency Support Service in Queensland stated that:

> The process of family court counselling is for some groups an alien concept. There is not enough information amongst ethnic communities about the role and availability of the service. In some instances women are extremely scared to attend since they believe the government wants them to be reconciled with their husbands.[61]

Conclusions

3.95 The Committee can see value in increasing the availability of information sessions both in urban and rural centres. Many people who might wish to attend such sessions may be unable to do so, due to other commitments. The Committee believes that every effort must be made to encourage all separating couples, and not only those who have made a counselling appointment, to attend information sessions.

3.96 The Committee also takes the view that there may be considerable merit in providing information sheets on counselling, and on the information sessions run by the Family Court, to all couples who are seeking marriage dissolution at the time that the

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59 ibid
60 Submission 206, Vol 5, pp 1010 and 1013
61 Submission 573, Vol 17, p 3435

initial application for the dissolution of the marriage is made. While the provision of such information to all those seeking marriage dissolution, and increased in-house information sessions may require the expenditure of extra resources, the Committee believes any additional cost is likely to be offset in a number of ways:

3.96.1 a reduction in the actual counselling hours which are required in cases where one or both parties has not attended an information session;

3.96.2 an increase in the number of couples who attend conciliation on a voluntary basis prior to making applications in ancillary matters;

3.96.3 an increase in the number of people who attend conciliation conferences through referral under the *Family Law Act*; and

3.96.4 a possible reduction in the number of couples who proceed with litigation, and hence a reduction in expenditures on legal aid and other costs to the community which may result from the additional hostilities between parties which tend to be engendered by the litigation process, with consequent effects on children.

Recommendations

3.97 The Committee recommends that:

12 detailed fact sheets on the role and nature of various types of counselling offered by the Family Court, with a strong recommendation that clients attend in-house induction sessions, be sent to all couples upon the initial filing of papers seeking dissolution of a marriage; and

13 there be increased provision of information sessions in registries and other centres where demand exists.

Confidentiality of conciliation counselling

3.98 Submissions and letters to the inquiry included a number of calls to make conciliation counselling on the record. Some expressed great frustration that one party to conciliation could make statements during counselling which could not later be used in Family Court as evidence to contradict misleading, or inaccurate written or oral statements made by that party in the context of a contested case.

3.99 Comments made by the ACT Legal Aid Office in relation to this issue are indicative of the frustration and anger that this may generate:

> The other recurring complaint about confidential counselling is frustration because an admission or statement made in counselling cannot be related in Court (unless repeated outside the counselling session). For example sometimes one party will admit things in counselling which the other has been trying to prove for the Court proceedings - and deny it again outside the counselling session. Sometimes one party gives the impression of being reasonable and conciliatory in Court and the other reports to their solicitor that they have behaved inconsistently and outrageously in confidential counselling. Sometimes it is reported that in the confidential counselling session one party actually taunted the other by saying things like, 'I'll admit it here but you'll never prove it in Court.' The frustration engendered by this sort of comment is obvious.[62]

3.100 A number of other submissions, including that from the Family Court, argued strenuously in favour of retaining the present policy of confidentiality in relation to conciliation counselling. The counselling service argued that confidentiality encourages open disclosure of issues, which can then be addressed. The Court's submission also argued that those litigants who take advantage of confidentiality are an extremely small minority.[63]

Conclusion

3.101 The Committee has concluded that the weight of the evidence before it supports the retention of the confidentiality of conciliation counselling. Making conciliation conferences on the record may decrease the willingness of many parties to attend such counselling. There is then the danger of a rise in the incidence of disputes which proceed to trial, with all the additional emotional and financial costs that contested hearings entail.

Criticisms of role and attitude of the counsellor

3.102 A number of submissions and letters to the Committee expressed frustrations about the role played by the counsellor assigned to their case during conciliation. Clients of the counselling service who complained to the Committee on this issue frequently had very different expectations as to what the counsellor should do.

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62 Submission 403, Vol 10, p 2036
63 Submission 940, Vol 29, p 5650

3.103 Some argued that counsellors should be more neutral and passive, and that they tended to close off discussion of certain options for resolving the dispute that one party would have liked to see discussed. Others argued that counsellors should have more power and authority to 'make' the other party 'see reason' or accept certain solutions to disputes. A number of clients, particularly men, seem to think that the counsellor was biased against them. In most cases, the counsellor assigned to the case was not named in submissions complaining of bias, and it was not possible, on the evidence available to the Committee, to make an objective assessment of the situations or of circumstances of particular cases.

3.104 The Committee notes that the Working Party on the Review of the Family Court was concerned about the lack of funds that had been available up until that time to ensure that there is frequent and effective supervision of counsellors, particularly in larger registries. Following recommendations made by the Working Party, the Family Court has now added to the classification structure of Counselling Sections in larger registries, to provide for an additional supervisory position in larger registries.

3.105 While the establishment of additional supervisory positions in 1991 will improve the capacity of the Family Court to monitor bias in its counsellors, the Committee has heard evidence to suggest that many allegations of bias may be indicative of the attitudes and expectations of clients themselves, rather than of a lack of objectivity on the part of counsellors.

3.106 A comment made by a male member of the Family Law Council illustrates the difficulties of assessing the validity of complaints of bias:

> ...it is so much in the eye of the beholder. I have had the same counsellor...complained about to me by different clients: one on the basis that he or she constantly favoured women; the next day someone said that he or she constantly favoured men...I have not found anyone who has been consistently accused of bias one way or another. I therefore conclude that the criticism is more a matter of perception than a matter of fact.[64]

3.107 It is notable that such a range of viewpoints, and a similar incidence of allegations of bias, also appeared in data collected by the AIFS in its recent survey of the clients of marriage guidance services. Further, the AIFS study found a clear pattern in the types of clients who were likely to be dissatisfied about the aggressive/passive role of counsellors working with separated couples in organisations other than the Family Court. These patterns are also reflected in the Family Court's own surveys of client satisfaction with the counselling service, and are apparent in submissions to the Committee.

3.108 Research by the AIFS has shown that those who are most dissatisfied with the services offered by independent marriage guidance counselling services are separated

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64 Transcript, 13 March 1992, p 1227

men who did not initiate the separation, and who do not return to counselling after the first one or two appointments.[65] Similarly, a member of the Family Law Council suggested that in her long experience of counselling, she had found that people go in to counselling with certain expectations which are often not realised:

> People come into counselling with very different expectations. I think that is compounded perhaps by what happens in the counselling section in the Family Court in that - I guess it is primarily related to resources - counsellors only see people on a few occasions. People may well go away feeling angry. They may have gone in wanting their marriage to be re-ignited by some sort of magic wand, and that has not happened.[66]

3.109 Another area of criticism of the counselling process was the issue of how directive counsellors should be, and how much authority they should have. Analysis of submissions to the Committee tended to suggest, however, that men who complained about the counselling service were aggrieved on the grounds that they felt the counsellor should be more, rather than less, directive, and should have more power to push their spouse to participate differently, or to accept their own favoured means of resolving the dispute. Men who made such comments frequently stated that they had not been the initiating party in the separation. One man suggested that Family Court counsellors should be able to 'issue any orders once the parties are talking'.[67] Another submission suggested that the recommendation of the Counselling Service should be accepted without Court proceedings.[68]

3.110 It must be borne in mind that the effectiveness of the counsellor in helping couples reach agreement is a function not only of the quality of the counsellor and his or her ability to assess whether or not a more directive role was required, but of factors which are beyond the control of counsellors themselves. Such factors include the willingness of those being counselled to compromise, or change their position in relation to their disagreements, and to honour agreements that are reached as a result of the conciliation process.

3.111 For example, the witness representing the Family Law Reform Association (NSW) who felt that compulsory counselling would not work where people were 'pigheaded like me', also argued that the counselling service was a toothless tiger and that one party need not participate at all.[69] That witness argued that the solution to this was to give the counsellors some authority and a lot more training to compensate for their very limited expertise and lack of power.[70] Many submissions suggesting that

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65 I Wolcott & H Glezer, **Marriage Counselling in Australia: An Evaluation**, Australian Institute of Family Studies Monograph No 8, 1989

66 Transcript, 13 March 1992, p 1228

67 Submission 210, Vol 5, p 1025

68 Submission 43, Vol 1, p 198

69 Transcript, 24 September 1991, pp 274-5

70 ibid, p 275

counsellors should have more authority came from people who had not initiated the separation. Family Court and AIFS research suggests that the party who has not initiated the separation is at an earlier phase of the 'grieving process' which accompanies marital breakdown and divorce. When conciliation counselling takes place, that party may see attempts of counsellors to stress the needs of children as biased or without understanding.

3.112 Several other men commented in their written and oral submissions that they felt that the counsellor assigned to their case had been too directive, rather than not directive enough, particularly in relation to access arrangements:

> Under the status quo system, trial by counsellor, the natural father is denied the basic human and equal right to raise or even assist in the raising of his children the way he wants.[71]

> The counselling service has a clear view of what is appropriate in arrangements and do not hesitate to suggest and extol the virtues of their 'standard' scheme...the 'standard' is for one party to have sole custody of the child (the court and its agents favour the mother) with the other party having access to the child on alternate weekends...It was my experience that this situation was pushed on my wife and myself with some vigour. Alternatives I suggested were not explored during counselling.[72]

Grief and post-decision counselling

3.113 The Family Court's submission expressed concern that the pressure of the urgent demand for conciliation counselling in relation to children meant that it could not provide the range of services it felt was necessary to assist adults and children cope with emotional responses to separation, and to learning to adjust to new roles and new lifestyles:

> While the compelling need to provide prompt assistance in establishing stability in the lives of children involved in marriage breakdown is being met overall, the service as a whole is not able to give that degree of assistance to parties in coming to terms with the reality of breakdown that it considers desirable. It also has a very limited ability to assist a party who is emotionally devastated by the result. It is a matter of concern that there is an absence of adequate educational opportunities to prepare parties to cope better with their subsequent relationships. All too often, such relationships similarly fail, and one cannot but think that an opportunity has been lost.[73]

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71 Submission 9, Vol 1, p 32
72 Submission 386, Vol 9, p 1941
73 Submission 940, Vol 29, p 5648

3.114 The Committee received submissions that claimed that the following particular unmet needs existed:

3.114.1 counselling support for men who finding it difficult to cope with the emotions following an unwanted separation;
3.114.2 post-decision or post-settlement counselling;
3.114.3 follow-up counselling after compulsory reportable counselling;
3.114.4 counselling for children who need assistance to adjust emotionally to the divorce and to new living arrangements or the new relationships in their parents lives; and
3.114.5 intensive on-going counselling in cases of intractable access and custody disputes.

3.115 It has been put to the Committee that much litigation, many broken access arrangements, and much continuing conflict between divorcing parents has its psychological base in the failure of one or both parties to the marriage to separate emotionally and resolve their grief in respect of the breakup.[74] Justice Eric Baker of the Family Court stressed this point in a recent paper delivered to the 5th National Family Law Conference in Perth:

> In my opinion the percentage of cases actually proceeding to trial could be further reduced if resources could be directed at separation counselling. For the reasons already given, many custody and access cases are defended simply because the parties wish to explore the reasons for the breakdown of their marriage, or of their relationship, with the objective of establishing what used to be known as 'matrimonial fault'.
>
> If counselling is available and availed of at the time that the parties separate, they will receive professional assistance, not only to effect a physical separation but, and more importantly, to separate emotionally.[75]

3.116 The Committee notes that s16A(1) of the Act already requires that the Court, and legal practitioners who are consulted in family law matters to have regard to the need to direct the attention of parties to proceedings, and persons considering proceedings, to the facilities provided by the Family Court for counselling to assist parties to marriages and their children to adjust to the consequences of a marital breakdown; and the procedures available for the resolution by conciliation of matters arising in the proceedings. It appears that many separating couples are not made aware of counselling facilities that are available to them until the litigation process has commenced.

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74 See, for example, Peter Jordan **The Therapeutic Relationship Chart**; Family Law Council, **Access: Some Options for Reform**; Submission 940, Vol 29, p 5692

75 Hon Justice Eric Baker, **Parenting Issues - A Changing Approach**, 5th National Family Law Conference, Perth, 8-12 September 1992, p 100

3.117 Counselling follow-up after court hearings, or after settlements which occur a long way down the litigation path, was also mentioned as an area of need in many submissions, and by the Family Court. Its submission suggests that post-decision counselling offered is extremely limited and generally restricted to cases where a specific order is made by a judge. The Court claims that resource constraints do not presently allow it to offer post-decision counselling more widely, but argues that an expansion of this service is desirable, for the following reasons:

> In addition to those cases which go to judgement, a number of cases settle at the court door or during the hearing. The emotional impact and consequences of the settlement may cause much distress to the parties who would benefit from counselling at that stage. Solicitors may be of limited assistance as often the idea of 'settlement' is seen by them as a final outcome. The parties themselves tend to see it in a different light and may need assistance to accept the outcome.[76]

3.118 The Law Council of Australia, and the Australian Institute of Family Studies also expressed concerns about the limited provision of post-decision counselling by the court. In its submission to the inquiry, the Law Council stated that:

> ...there should be greater provision of resources and more recognition given to the need for post-court order counselling. After contested litigation concerning custody or access of children there is often a considerable need for a 'bedding down' process. An expert counsellor can provide considerable assistance in this process.[77]

3.119 Nevertheless, the Committee notes that s61B of the Act, which came into effect in 1988, already requires that the Court, and legal practitioners 'have regard to the need to direct the attention of parties...to the facilities provided by courts exercising jurisdiction under this Act [Part VII - Children] for counselling to assist children and parties to adjust to the consequences of orders under this part.'

3.120 The Family Court has suggested that that the *Family Law Act* does not specifically provide for the counselling service to offer post-decision counselling, and has recommended that the Act be amended accordingly, and that appropriate resources be provided to enable this to take place.[78] However, the Family Court expressed concern in relation to counselling follow up after a court decision:

> The unsuccessful party may not be receptive to counselling because he/she perceives that the Family Court has found against them. He/she may elect to have no further contact with the Family Court. Such people would

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76 Submission 940, Vol 29, p 5649
77 Submission 415, Vol 11, p 2188
78 Submission 940, Vol 29, p 5704

> often benefit from counselling as it may alleviate the possibility of their becoming entrenched in litigation. However, it would not be appropriate to force counselling upon them ...such people may perceive post-decision counselling as the Family Court assuming a policing role.[79]

3.121 A number of witnesses to the inquiry commented that they believed that such services should be provided by the Family Court; others suggested that many people associated the Family Court with negative experiences and the legal profession, and would not go near the Family Court for counselling unless they really had to. For example, one witness who had sought, but been unable to obtain individual counselling from the FCCS told the Committee that:

> The people that I have spoken to say that they would not go back to Family Court Counselling no matter what happened; they would have nothing further to do with it.[80]

Conclusions

3.122 The Committee has concluded that there is a need to extend the availability of post-separation, post-decision counselling and other forms of counselling support for families and individuals in crisis, both within the FCCS and approved marriage counselling agencies. It also believes that it is important that greater priority is given to appropriate community education to raise public awareness of the range and nature of counselling services available within approved marriage counselling and other counselling services. This issue, and that of funding for approved marriage counselling agencies, is discussed in the following chapter.

3.123 The Committee does not share the view of the court that there is a pressing need to amend the Act to specifically provide for the provision of separation and post decision counselling by the Family Court. The Committee considers that the existing provisions of ss16(2) and 61A are broad enough to cover the delivery of this type of service. These sections provide that a party to the proceedings may seek counselling assistance, and that the court will as far as is practicable make the facilities of the FCCS available.

3.124 The Family Court has perceived a 'need' for the provision of more post-decision counselling, but the Committee believes that a more accurate assessment of the demand for the provision of such services by Family Court counsellors should be obtained in order to gauge the level of resources that should be allocated for such counselling. In order that a realistic assessment of potential demand for the provision of separation and post-decision counselling by the FCCS and approved counselling agencies may be made,

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79 ibid, p 5659
80 Transcript, 23 August 1991, p 37

it is important that separating couples be made aware of the existence of such services. To this end the Committee believes that ss61B and 16A(1) of the Act should be amended to place a greater obligation on the Family Court, and legal practitioners, to direct the attention of potential litigants to the availability of separation and post-decision counselling within the FCCS and approved agencies.

Recommendations

3.125 The Committee therefore recommends that:

14 **the Family Court Counselling Service monitor demand for grief, post-decision and post-settlement counselling; and**

15 **sections 61B and 16A(1) of the *Family Law Act 1975* be amended to require that the Family Court and legal practitioners direct the attention of clients to the facilities and procedures referred to in those sections.**