THE LAW SOCIETY OF NEW SOUTH WALES

SUBMISSION BY THE FAMILY LAW COMMITTEE
ON THE FAMILY COURT RULES 2004
ANNOTATED EXPLANATORY DRAFT
JUNE 2003

APPROVED BY THE COUNCIL OF THE LAW SOCIETY ON 19 JUNE 2003

Introduction

These Rules seek to move the Court from an adversarial system to inquisitorial system by the Rules. This is being done, in the absence of public and political debate or discussion.

The process adopted is curious to say the least. Rules must be valid under the primary legislation. Yet many of these Rules depend upon creation of legislation which is not enacted and the legislative detail is not otherwise available. This is not a desirable departure from normal practice. Some of the changes undermine client legal privilege, e.g. rule 11.04 and other Rules profoundly change the Rules of evidence and the underlying drive for a national standard Evidence Act. It may be that any legislative changes would not be seen as uncontroversial. However, for example, the legal profession would strenuously oppose the diminution of client legal privilege not to mention the creation of the "so called" civil penalties. The legal profession and the community may be put to enormous expense and trouble to prepare for any new Rules and then have the scheme collapse through lack of legislative support. The legislative changes must be a starting point, not an end point.

In March 2004 the government will have appointed a new Chief Justice of the Family Court. It seems that whoever is appointed to fill that office will be presented with structure and processes into which he/she may have had no input. A new Chief Justice should be involved in these changes.

These Rules do not serve the community (including both represented and self represented litigants), the profession or the Court. They impose enormous burdens on parties and practitioners and will significantly increase costs. The difference in costs in the Federal Magistrates Court and the Family Court will become much more stark.

The underlying philosophies and approach of the Rules are flawed and misconceived.

The Committee cannot recall the last time a Court threw out all of its Rules and forms and completely started again. The cost of legal education, re-documentation, software changes and the implementation of the changes will be great, and will need to be met by the users of legal services. The Committee is not persuaded that the benefits of the proposed changes will outweigh the costs.

The Family Court has gone through pleading, simplification, case management, form changes, culture changes at regular intervals. The culture of the Court has been changed from a summary

simple process to a complex structure which has become increasingly remote and inaccessible to those whom the system was designed to accommodate. Few matters consist of complex commercial issues, most are children, house and garden family proceedings.

Section 97(3) of the *Family Law Act 1975* provides:

> *In proceedings under this Act the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted.*

These Rules add to a complex process and seemingly remote institution where parties can sometimes be defeated by the system. It is a place where vast amounts of costs are expended in complying with the requirements imposed by legislation and by Rules. The revised Rules will exacerbate the costs burden and may lead to parties unable to afford the cost of representation, to then seek to represent themselves.

The Court has to all intents and purposes disbanded its philosophy of primary dispute resolution (except perhaps the rhetoric in respect of same). It has overseen the emasculation of the counselling services and is now left with a core adversarial dispute resolution function which is progressively moving towards an inquisitorial function. This will have to be reconciled with Rule 1.06(b). With these Rules the Court seeks to impose further levels of regulation upon the parties and the legal profession.

Lord Woolf has been quoted with approval in respect of the pre-action procedures sought to be adopted by the Rules. There is an underlying philosophical argument as to whether the pre-action procedures should be educative or punitive. The application of these Rules to those procedures makes them mandated and punitive and will provide a fertile area of argument as to whether compliance has been achieved and may drive the focus to the Rules rather than the substantive issues between the parties.

In New South Wales there is a significant movement to create a generic set of Rules to apply in all civil litigation proceedings. These can be refined and moulded to the specific nature of each particular Court by way of case management procedures. The advantage of a generic set of Rules and forms will assist in a number of ways:

a) it will facilitate eventual electronic filing and storage of documentation;

b) it will enable legal practitioners, already overloaded with both the quantity and frequency of change to laws, to have a sound underlying structure upon which they can rely and which structure can be taught in both undergraduate and post graduate levels;

c) reduce the cost of software for computer systems; and

d) consequently, and hopefully, reduce the cost of access to justice.

It is the Committee's view that these complex and punitive Rules will have the capacity to significantly increase costs and make access to the Court far more difficult, particularly in regional and suburban areas.

The Rules seem to have been drafted as a guide for the unrepresented litigant, (most of whom will not read or understand the Rules). It could become a device for the vexatious litigant who will be able to use the complex, bulky and demanding Rules to cause further difficulties to the other party, the profession and the Court. It does not assist in addressing the needs of those who are unrepresented and seek representation as there will be costs and expense increases underpinning these Rules. This will further reduce the availability of legal aid resources and the availability of whole or partial pro bono legal services to the community.

These Rules have been developed by the Family Court after a determination of the Judges Meeting in July 2000 after which a Rules revision project commenced in July 2001. The finalisation of the draft Rules seems to have taken place in early February 2003.

The time for consultation in respect of the Rules is constrained (March, April, May 2003). Bearing in mind the extensive nature of the Rules and the need for a Law Society to consult with 18,000 members practising throughout NSW, the timetable was and remains unrealistic.

The Committee notes that the rules will be considered at a forum of Judges convened between 15 and 17 August, with the ultimate aim for the final version of the Rules to be approved by the Judges of the Family Court and Gazetted at the end of October 2003, with a commencement date in January 2004. In essence this gives November 2003 and December 2003 to:

i) educate the profession on the Rules;

ii) amend all of the forms and processes in legal offices, and

iii) absorb massive structural changes to the manner in which family law is to be delivered.

This must be considered in light of the fact that there will be a new Chief Justice of the Family Court in March 2004 and in light of the need to harmonise these Rules with those in the Federal Magistrates Service.

The Committee understands that statutory amendment of the Family Law Act will need two sessions of Parliament to deal with the changes and the changes may not be enacted until the December 2003 parliamentary sitting.

Once the final form of the Rules is determined there should then be a 6-12 month rollout of the Rules to enable litigants and the profession to be educated and the system established.

Educating the Profession: Two options are suggested. The first educational strategy would be characterized as long but hard. The second strategy would be short but soft.

Long but hard. The lead-in period for training would be a long one of at least 12 months after which there will be no period of grace, that is, the new Rules will be implemented with no exceptions.

Short but soft. The lead-in period for training is short (no more than 6 months) after which there would be a 6-month period of grace in terms of implementation when compliance with the old Rules is tolerated but not encouraged.

In terms of educational methods, it needs to be borne in mind that the proposed Rules represent, in many respects, a significant departure from the existing Rules. Moreover, the scale of these changes is unprecedented. Indeed, it is doubted whether there has been a change of Rules that will affect so many lawyers and their clients since the enactment of the Family Law Act itself. It is doubtful whether traditional methods of training per se will be adequate to re-educate the Australian profession. An educational campaign would need to be multi-faceted. Thus, for example, it might comprise face to face and distance learning, traditional didactic and small group learning, and would definitely need a problem-solving/workshop orientation in order to be effective.

A seminar series of at least one day duration would need to be conducted in each capital city, all regional centres and throughout rural Australia. The legal profession and the Family Court would need to be represented in presenting these seminars in order to lend authority to them. These seminars would need to be interactive, and have a small group or workshop focus. Distance-based learning materials will need to be developed and widely distributed eg CD-ROM and on-line learning modules. These could be hosted on the websites of the Family Court, Family Law Section and the various State Law Societies. It is further recommended to develop Self-Learning Kits for use by lawyers in small city, suburban and regional discussion groups. These kits might include commentary, case studies, problems and completed sample forms.

Training could also be included in the Specialist Accreditation schemes, not only for lawyers seeking accreditation for the first time, but perhaps in re-accreditation as well. The development of such a training strategy will be time and cost intensive.

Failure to comply with Rules and certain procedural orders: Part 21.5. Rule 21.23 provides that a person (presumably a party, corporation, legal practitioner or expert witness) must:

- attend Court as required by the Rules when serving an application or is required to attend by order of the Court or if a person
  - fails to comply with certain Rules, including Rule 1.16 (photographing, recording, broadcasting or publishing the Court event)
  - fails to notify in accordance with Rule 2.04
  - fails to provide a change of address for service
  - fails to make a genuine offer to settle in accordance with Rule 10.06
  - fails to attend Court in accordance with Rule 12.13
  - fails to make disclosure as required in Chapter 13
  - fails to notify the Court that agreement has been reached
  - fails to give costs notification (if a lawyer)
  - fails to inform the client about costs (if a lawyer)

- fails to notify a client of a costs order
- fails to give notice about a costs agreement
- is guilty of a civil penalty and liable to a maximum fine of 250 penalty units (about $26,000).

In terms of what is a 'civil penalty', the Committee does not know whether that has been interpreted and it would be worthwhile analysing the meaning of the term. The Committee cannot see the value in imposing further hardships on parties by way of penalty when there are other remedies available to the Court to resolve these issues. The civil penalties have the capacity to further inflame the relationship between parties.

The Court also seems to wish to become a regulating authority in respect of the parties, legal profession and for expert witnesses. The Committee is not convinced that this is necessary and further considers that the Court does not have the resources to exercise the proposed regulatory powers.

In terms of expert witnesses the providers of these services must be made aware of the liability in this regard and it may have the effect of persuading many not to provide that service, or alternatively to factor in additional cost to manage that issue. Why would a 30A expert in respect of child matters not increase their fees or avoid this jurisdiction?

As to the profession, it has broader ramifications. It will impose upon the profession a requirement to slavishly follow the Rules. It will be a disincentive to practitioners who do not practice in this area to become involved in this area with the consequent significant reduction in access to justice.

In New South Wales there is an obligation for legal practitioners to disclose convictions and certain other matters. It is possible that a penalty under this provision would invoke those requirements and will leave the legal practitioner exposed to further consequences in terms of unsatisfactory professional conduct or professional misconduct.

For solicitors employed by government, there may be industrial relations questions that may arise in terms of workload and in terms of resources available. It may impact on the level of remuneration of those solicitors, or may impact upon the level of work with which they are reasonably able to cope.

More importantly, there is an underlying principal that legal practitioners should not be exposed to a fine for undertaking their normal duties. In this regard, the Family Court is trying to become involved in the regulation of the profession. That is best left to the Law Societies, Bar Associations, Legal Ombudsmen, Legal Services Commissioners, and so on. Any such prosecution would have to be dealt with as a separate hearing. Who would prosecute? This could not be a function of the Court. Is the Attorney General going to fund such prosecutions? Invariably such action would interfere in the relationship between the legal practitioner and his/her client. How would confidential information as between practitioner and client be made available for a practitioner to mount a defence or to the Court or Attorney General for prosecution? The practitioner has no right to breach that client legal privilege. A party to a

proceeding may be reluctant to waive the privilege as the civil penalty liability could fall to that party.

There are sufficient powers presently in place in terms of:

i) referral to the regulatory authority;
ii) the power to make costs orders; and

iii) the inherent power of the Court to prevent a legal practitioner from charging for work if it considers inappropriate.

To comment on these Rules is a mammoth task. The Committee could not, in the short time allocated, analyse all of the Rules. The absence of comment on some chapters is not to be taken as approval, however the following is submitted.

Chapter 3 - Divorce

Appearance by electronic means, if implemented, will be a positive development. The new form is an improvement, provided it is Word Processor friendly.

Chapter 5 – Applications in a case

Part E

If a person is represented they will have received advice as to the merits of the application for the purposes of the certification. It is, however, not a function of the Court to become involved in the regulation of the profession. There is already a duty to the Court to not file unmeritorious applications. It is however up to the Court to make a final determination on merit. If a person is self-represented, they may well not understand what evidence is required and what amounts to evidence rather than conjecture or opinion. This then creates an unfair advantage to the unrepresented party.

Form 1: (Application for Final Orders) and 1A (Response to an Application for Final Orders), require the Applicant/Respondent to make a statement in an affidavit the effect that the orders sought are supported by evidence. Forms 1B (Reply), 2 (Application in a Case) and **2A** (Response to an Application in a Case) require a certificate to the same effect. The certificate can be given by the party or by the party's lawyer. The requirement or this statement/certificate is of concern for the following reasons:

- Much of the evidence that the parties will rely upon when the matter is finally determined will not be available at the time the document is filed.

- There will be property settlement cases in which a party has no alternative but to make an ambit claim because there is insufficient knowledge of the financial affairs of the other party to determine what is a reasonable application.

- There will be cases involving parenting issues in which much of the relevant evidence is yet to be discovered, or in which events yet to occur will be the subject of evidence in the proceedings.

- Valuations change and for this reason an application that may have been reasonable when initially prepared may later be well outside the range.

While unmeritorious applications should be discouraged, they can be dealt with by way of orders for costs, orders for security for costs and vexatious litigant orders. What will be the penalties if it is later determined that an application was inappropriate? Lawyers are unlikely to be prepared to give a certificate, even where the application is one of a procedural nature only.

Rule 5.03(1): How does one show that he or she has made a "genuine and reasonable" attempt to settle? This really illustrates the Court's attempt to over-regulate the system. Attempts to settle already occur in most instances before an application is filed. It is likely that Rule 5.03(2) will increase litigation.

Rule 5.04: The Court is taking a backward step in not allowing the form to incorporate both interim and final orders. A combined form would cut down on administration if interim final orders are being sought at the same time.

Rule 5.05(3): The Court again refers to costs stating that it can make an order for costs if a person has unreasonably listed a matter for an urgent hearing.

Hearing

Rule 5.08: There is no substantive guidance here. The court's actions could increase parties' costs if it adjourns an application because it thinks the parties could benefit from alternative dispute resolution. However, if the matter does not settle the application must be heard on another day. This Rule is contrary to the Court's primary goal.

Rule 5.09: While this is a positive approach if material is filed and served at least 2 days before the hearing as there is less likely to be the need for an adjournment, it will not be always be practicable in urgent matters where the respondent has received little notice e.g. most urgent childrens' matters are made returnable within 5-7 days. In those circumstances the respondent should not be penalised.

Rule 5.17: It is noted that the Court should promptly advise the parties of the procedural orders made and that there should be some provision to return to the Court if a party was not served or there is an error and for the Court to deal with this within a specified time frame.

Part 5.3: Applications without Notice The new Rules use simple clear language and refer to damages, which the current Rules do not do. The list provides a good structure for the affidavit in support of the application.

Part 5.4: Hearing on the papers in the absence of the parties. This option is likely only to be useful in cases where the issue is narrow or uncontroversial. One of the practical effects of this will be to increase the work of the solicitor prior to the return date as it is most likely to be the solicitor preparing submissions rather than a barrister. This process will not necessarily save costs for the parties. The procedure would also not be practicable in circumstances were the application is made with short service and the response documents are not filed prior to the date. It is also not clear how this will assist in the resource problem of the Court. There is no guidance in this section as to when a matter will be listed for a hearing and when and how the parties will be informed of the decision. The provisions relating to service and proof of service of these applications is unclear.

Conclusion

This chapter refers to cost consequences several times. It seems to an attempt by the Court to discourage not just baseless applications but all except the strongest applications. Currently costs applications are made when someone has been wholly unsuccessful in their application. Why does the Court now feel the need to refer to costs orders so frequently? It seems to be a shift from the usual position that the parties pay their own costs to a more punitive regime.

The Rules in this chapter do not provide any guidance or assurance for genuine applicants but threatens costs orders against them at several points. It also ignores that often all the evidence is not known at the point of filing these applications. For example, material produced in answer to a subpoena may reveal information that casts quite a different light on the case. However, the applicant has no way of knowing this until after the application has been filed and subpoenas issued.

This chapter really seems aimed at discouraging applications. Parties who are represented will have received advice as to risks. The mention of costs in these Rules will neither assist nor deter self-represented litigants from making interim applications.

Chapter 6 - Parties

There is a need to clarify whether a party who is given permission to intervene should file a Form 1 (or Form 1A) setting out the formal relief sought in the proceedings. The Form 2 and Affidavit in support are documents in respect of the interlocutory hearing (or procedural hearing) to determine the question of intervention.

The chapter opens with an operational definition of parties however, there is no Rule which formalises the requirement that a third party whose interests may be directly affected by orders sought by a party in proceedings is given notice of the proceedings.

Rule 6.02: May impose an obligation on parties to join everyone whose interests may be affected. This can be better served by notice or by affidavit. This Rule is also inconsistent with Rule 1.06.

It is recommend that there be an addition as Part 6.5 titled "Notice of proceedings to third parties".

Chapter 7 - Service

This chapter has been compared with the existing provisions and the changes to acknowledgment are noted.

Rule 7.11(c): It is recommended that the word “undertakes” should be replaced with “acknowledges” or “agrees”. The word “undertake” is particular to the legal profession and obligations may remain despite termination of instructions.

Rule 7.17: It would be useful for the Rule to state with precision what document is required to make an application of this type.

The proposed affidavit of service has been designed to "cover the field" as regards the different methods of service, however, it does not seem to specifically provide for service upon the lawyer of the opposing party (Part A and Part B).Although these boxes can no doubt be modified at the time of preparing the document, it would be much easier to include a specific box for completion when the document is being served lawyer to lawyer.

Chapter 8 – Right of Appearance and Address for Service

It is unclear whether the right to be heard extends to a person who is not a party to proceedings. The right to be heard is currently afforded to a third party at trial in some circumstances even though the third party has not intervened and does not propose to intervene. Perhaps a Sub Rule could be added such as:

> *“8.01 (3) A person who is a party to proceedings is entitled to be heard in a case and a person who is not a party to the case may be heard in a case if the rights of the person may be directly affected by a matter in the case and it is in the interests of justice for the person to be heard.”*

Such an amendment would be consistent with the provisions of Rule 8.05 which provides that a party must give an address for service if the party has filed an application or the party seeks to be heard by the court. Arguably, a "party" should be amended to "person" in Rule 8.05(1) to avoid confusion between a person who is a party and a person who is not a party but who wishes to be heard by the court at trial or a procedural hearing.

Rule 8.03: This appears to be an endeavour by the Court to involve itself in the regulation of the profession in law which is generally well-settled. As this is not a function of the Court, it is not supported.

Rule 8.04: It is recommended that the following words be added to (a) before (b):
"at any time after a client terminates the lawyer's retainer"

Children's matters

The Rules in many areas operate on the assumption that wealthy parties who have the capacity to fund compliance with complex procedures and to fund expensive experts are the main users of the Family Court. Rules which might be suitable for expensive property matters do not suit children's matters or ordinary litigants. Particularly in children's matters they may inhibit relevant evidence coming before the court.

Aspects of the Rules are likely to add costs for 3 reasons:

- The Rules encourage cost applications potentially in circumstances where objectively the behaviour of a party/expert would not warrant such applications

- The Rules provide for applications to the court in circumstances where such applications are not presently required

- The complexity of new provisions will add costs

Given the transfer of matters between jurisdictions, it is also a considerable problem if these Rules are unlikely to be adopted in the Federal Magistrates Service.

Rule 8.02 (3)(a): There was at least an expectation that in response to many strong submissions, the guidelines were not to have the standing of a Practice Direction or Rule and were in fact to be guidelines rather than an inflexible mandatory requirement as suggested by this Rule. There was also an understanding that they were aspirational and that context and discretion were important.

These detailed guidelines, especially if embodied in Rules, will have the effect of further increasing complaints against child representatives in an area of practice where self represented and partially represented litigants are common. Indeed where one of the guidelines of the Full court in Re K is to appoint a child representative where both parties are unrepresented. The research of Rosemary Hunter and her associates published in August 2002 (The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia) noted some of the characteristics of fully unrepresented and partially unrepresented litigants and commented

> *"cases involving a partially represented litigants were also more likely to concern children's matters (and) at both first instance and on appeal were of longer than average duration, and correspondingly more likely to finalise at or close to final hearing or appeal judgment. At first instance this pattern was associated with a greater likelihood that these cases would include evidence of family violence and child abuse, the appointment of a child representative and enforcement proceedings…particularly difficult children's matters at first instance may be most likely to generate partially represented litigants, who doggedly pursue their case*

beyond their ability or willingness to pay for a lawyer, or beyond any legal aid assessment of the merits of their case." (p 73)

The Court itself has effectively modified the more mandatory guidelines set out in Johnson v Johnson to more discretionary guidelines as set out in Re F: Litigants in Person guidelines, because of the response from some unrepresented litigants.

Rule 8.02 (3)(a): together with costs provisions contained in the Rules, the new procedure is likely to use up the time of Child Representatives in defensive responses to litigants both by way of responding to complaints to legal aid and professional bodies and responding to applications in court for discharge of the child representative. The need for such defensive responses inevitably adversely impacts on the work of a child representative in relation to a particular child.

It will also have a negative impact on the resources available for the representation of children. The Commonwealth imposes caps on grants of legal aid, including for the child representative. Legal Aid Commissions wish to use their resources to assist as many clients as possible. Private practitioners working on a legal aid scale may well find a disparity between the scale and the real costs of the child representation particularly when a case involves many court appearances initiated by litigants who are doggedly pursing their matters as described in the Hunter study.

This Rule needs to be considered in the context of other provisions in these draft Rules which will in many circumstances also have the effect of increasing the costs of Child Representatives.

It is not clear when the Rules will apply to Child Representatives.

Rule 8.02 (3)(c): provides that a person appointed as a child representative must do anything required by the Rules to be done by a party. However other Rules refer to each party and the child representative, eg, Rule 13.01 (1), Rule 15.29 (3), Rule 15.29 (3) while the definitions under Part 15.5 provide that "in this part: party includes a child's representative".

At the same time it would seem that a Child Representative must be included as a party for the purposes of Rule 15.03 (1) which provides that a party to an application for final orders may apply for an order that a family report be prepared under Section 62G of the Act in specified circumstances, and Rule 15.14 (2) which requires a party seeking to cross-examine a deponent to give written notice to the party who files the affidavit at least 14 days before the trial. Presumably a Child Representative is also treated as a party for the purpose of the Rules relating to subpoenas. Is the Child Representative treated as a party for the purpose of the disclosure Rules?

There is inconsistency here with Rule 6.01.

Throughout this Chapter, it appears that the Court is endeavouring to become involved in the regulation of the profession, the rules of which are well-settled.

Chapter 10 – Concluding a Case

Part 10.2: Discontinuing case

There is no reference to filing & serving. If costs are outstanding, the party cannot restart the same or substantially the same proceeding until those costs are paid, thus staying the proceedings indefinitely.

Part 10.3: Summary Judgment

While aimed at saving costs there is the potential for litigious parties to make multiple applications.

Part 10.4: Consent Orders

The Committee does not consider there is any benefit to preparing a draft consent order. The requirement is also inconsistent with Form 12A

Chapter 11 – Case Management

Part 11.1 Court's Powers of Case Management

Rule 11.01: General Powers

These appear to be a codification of many powers which one might have considered were obvious or inherent. For example:

> "11.01 The Court may do any of the following:
>
> (p) decide the order in which issues are to be tried."

This appears to be an aid for the unrepresented litigant. Issues include:

- Given the breadth of the list, is it the case that the Court is prescribing its powers?

- Many powers are set out without any indication of what grounds must exist for the power to be exercised.

Rule 11.04: Frivolous or vexatious applications

- There may be conflicts leading to uncertainty, cost and waste due to differences with Section 118.

- The Rule applies to applications and appeals. The legislation refers simply to 'proceedings'. This will create a distinction. In relation to appeals, as defined in the dictionary this does not include, for example, a Review.

- The Rule allows the Court to make an order of its own initiative. The legislation does not go that far. This may involve a denial of natural justice.

- Section 118 does not prescribe the factors to be taken into account before an Order is made. It is a matter for the Court to be "satisfied". However, under the proposed Rule, the application or appeal must have been made both frequently and without reasonable grounds. The court has arguably been given limited mandatory requirements not currently provided for in the legislation. Further, one could therefore bring an application which is frivolous, vexatious or an abuse of process so long as one did not do so frequently. Also, although a little harder to hypothesise, one could bring an application which is frivolous, vexatious or an abuse of process so long as one did so with reasonable grounds. It is suggested that such applications be barred rather than being dismissed.

Rule 11.06: Dismissal for want of prosecution

- Pursuant to sub-para (3), where a costs order has been made but not paid, certain applications are automatically stayed until costs are paid. Some issues which arise as a result include:
  - It is not certain that the court has the power to do this in children cases {Bennett & Bennett (2001)FamCA462}
  - What will the Court do if the applicant is an undischarged bankrupt
  - What will occur if the Costs order has been stayed pending an appeal

Rule 11.08: The penalties in this Rule are too harsh, and do not take into account any genuine reasons for not responding for example, illness.

Rule 11.09: If there is agreement between the parties, there should be no indemnity costs implication.

Rules 11.10 and **11.11:** Applications have been traditionally refined up to and until final submissions. The form of the relief sought in applications will often change once affidavits are filed and before hearing. The time frames set out in 11.10 and 11.11 are therefore not likely to work in practice.

Rule 11.18: **Small Claims**

This Rule may work quite well for those disputes which involve separating couples with a car, furniture, a rental bond, unpaid phone bills etc. However, one concern is that although required in (e), there will be instances when the parties will not bring all relevant documents. Nonetheless, using its powers and especially those in (d)(i) to "...inform itself of the facts in any way it considers appropriate," the Court could adduce that information. The problem with this is that under Rule 19.40 a lawyer may only charge 80% of scale costs in a small claim. This reduced sliding scale does not recognise the actual costs of conducting a small claim matter. The Committee opposes this Rule.

Chapter 12 – Court Events

The profession has previously expressed its concern at the resolution phase concluding at this time and maintains its opposition to that course. It is the Committee's view that the resolution phase should not conclude until the completion of the pre-trial conference.

The overwhelming experience of the profession is that the present case management system has increased the costs in most cases by between approximately $5,000 and $10,000 for each party. Further, this procedure seems to have reduced settlements between the conciliation conference and the pre-hearing/pre-trial conference.

Division 12.2.1: Note 3 provides that a lawyer for a party has an "obligation" to advise the party about cost before the first return date and each subsequent court event.

Rule 12.02(2): Should there be a provision for the person conducting the conference to express their considered view on the cases put forward by each of the applicant and the respondent? This is possible in most cases and can assist in the resolution of cases, particularly in circumstances where one party has unrealistic expectations and does not accept the advice of their solicitor.

Rule 12.03(1)(b)(ii): query whether the Registrar at a procedural hearing is making "orders" or "directions".

Rule 12.03(2): requires an identification of agreed facts and outstanding issues to enable the preparation of a case summary document. The usefulness of this case summary document in many cases is limited. Frequently, parties do not wish to commit themselves at an early stage of the proceedings when the evidence has not been fully explored. In the experience of practitioners this document merely sets out extremely basic facts such as dates of marriage, age of parties, children involved and date of separation and serves no practical function. The requirement should be abolished.

Rule 12.05: It is noted that documents to be provided in the Order should be sent at least 7 days before the conciliation conference and further exchange of a draft case summary document at least 7 days before the conciliation conference. This appears to be more appropriate than the current requirement providing for the production of those documents at the conciliation conference as it gives the other party greater time to consider those documents prior to the conciliation conference. This provision is supported.

Rule 12.06(3)(h): provides for documents to be provided at the conciliation conference. This goes much further than the current provisions seeking evidence of:

1. financial matters mentioned in the party's financial statement and case summary document;

2. financial contributions made when the parties commenced cohabitation;

3. any inheritances, gifts and compensation payments received after the commencement of cohabitation;

4. any purchase of disposal of properties since the parties separated;

5. any increase or reduction of liability since the parties separated; and

6. the value of any superannuation interests of the parties including the basis on which the value has been calculated in any documents working out the value.

This provision is extensive and should assist in the earlier assessment of the strength of each party's case and hopefully an earlier resolution which may overcome the difficulties of the resolution phase ending after the conciliation conference. One of the concerns of the profession relating to the conciliation phase ending at the conciliation conference, is that the time that has elapsed often does not give parties time to come to terms with the breakdown of the marriage and the process in which they are involved. Currently the delays in the Sydney Registry are significant between conciliation conference and pre-trial conference, being some eight months. With the new Rules pressing the provision of evidence earlier in the process it may be appropriate to have a bigger gap between filing and the case conference/directions hearing and between the case conference and the conciliation conference and a shorter period between the conciliation conference and the pre-trial conference.

Rule 12.10: provides for the filing of the compliance certificate at least 14 days prior to the pre-trial conference. Order 12.10(b) provides that if a party has not complied with a procedural order set out in the trial notice or the case is not otherwise ready to be set down for trial, costs can be ordered against a defaulting party but also against a defaulting party's lawyer. The provision in relation to the costs against a defaulting party's lawyer should not be included in the Rules. The court has that power in any event. It is not possible for solicitors to defend themselves against a costs order by providing the court with evidence that the failure was due to their client as this would be a breach of client legal privilege.

Rule 12.11(2): provides that if a pre-trial conference is cancelled the case must go before a judge. This is too limiting. The "defaulters" lists take up a significant amount of judge time which could be better spent on hearing cases. The possibility should be left open for a Registrar to determine such proceedings.

Rule 12.11(3): provides that the court "must" dismiss the case if the orders in the trial notice have not been substantially complied with and a compliance certificate has not been filed within 12 weeks after the date when a conference was cancelled.. This is unnecessarily draconian. There may be good reason why a party has not complied. Further, the rule does not say which case is meant to be dismissed, one would assume it is the defaulting party's case but that is not what the Rule states. The Rule merely states: "The court must dismiss the case."

Rule 12.17: provides that a Registry Manager must not postpone a conference more than once or a procedural hearing more than twice. The Committee submits that the current provision in order 24 r.1(6) is more appropriate, which provides that the conference may be adjourned from time to time and from place to place leaving it to the discretion of the Registrar as to whether it is appropriate to further adjourn a matter. The proposed rule also requires that the court event must not be postponed for more than eight weeks. The Committee is concerned that this requirement is unnecessarily inflexible.

Rule 12.18: provides for the pre-trial conference only to be postponed in "exceptional" circumstances. The Committee submits that there may be occasions when it is necessary to postpone a conference, although the circumstances may not necessarily be exceptional.

General Comments

Order 24A Rule 4(a) requires the Registrar at a pre-trial conference to attempt to resolve the proceedings or any part of them by agreement. There does not seem to be a similar Rule in Chapter 12. This Rule is appropriate and should be included.

Chapter 10 (Part 10.1) – Offers and Chapter 13 – Disclosure

Part 10.1 on **Offers to settle** is not consistent with Chapter 13 on **Disclosure**.
The Family Court needs to continue to foster community awareness of the need for full financial disclosure and the serious ramifications for the non-disclosing party of not disclosing. It is not possible for a party to make an Offer until that party is properly informed of the net asset and income position of the party to whom the Offer is to be made.

The Rules as drafted will disadvantage the party awaiting full disclosure because:

- That party must file an Offer when it does not have the full facts about other party's position.

- The non-disclosing party might accept an Offer based on misleading and incomplete information.

- If that party is not in a position to make an Offer, that "innocent" party must apply to the Court to be permitted not to make the "compulsory" Offer, thereby incurring costs brought about by the party not disclosing, [Division 10.1.2 and Rule 1.09] or before proper investigation can take place.

- The litigation tools can only be used after the resolution phase has been completed, so this phase is wasted in matters for which the tools are most useful.

- Why does an acceptance of an Offer need a draft Consent Order when the Order will have been drafted already by the Offeror ? [see Rule 10.04]

- What is the position if further relevant information is provided after the compulsory Offer has been served ? [10.07] The Offer must be left open for 14 days. This could be very prejudicial to the offeror.

- Why are the questions which can be asked of an employer so restricted in Rule 13.27(2)? The requesting party may need all employment conditions and benefits, not just what is owed, and what is earned.

Matters in these Chapters requiring clarification

- How long must an Offer be left open for it to be useful on the question of costs? [10.03 does not provide the necessary guidance]

- Why can only the <u>first</u> Offer apply when seeking to benefit from automatic indemnity costs consequences of non acceptance? [Div 10.1.3]

Duty of Disclosure

Rule 13.01 (1) provides:
Each party to a case has a duty to the court and to each other party and any Child's Representative to give full and frank disclosure of all information in a timely manner.

Rule 13.02: The duty of disclosure applies to each document that:
(a) is or has been in the possession, or under the control of, the disclosing party; and
(b) is relevant to an issue in the case.
It is not clear from the draft Rule if the Child Representative is required to file a Notice under Rule 13.10.

The major exception to this Rule is where there is a valid claim for client legal privilege. This right is problematic in terms of child representation as this position crosses both areas of lawyer and client. A letter to the Child Representative from a child is not protected by privilege and the contents of such a letter are likely to be "relevant to an issue in the case". Disclosure of such a document could potentially have serious consequences for a child, have adverse consequences for the capacity of the Child Representative to prepare a case in the best interests of a child and damage the relationship of trust between the child and the Child Representative. Similarly there are times when a health professional might write to the Child Representative about matters concerning a child the disclosure of which at a particular time could adversely impact on a child. The problem is exacerbated by the presence of unrepresented litigants in many of the difficult cases in which Child Representatives are involved. The effect of the application of such a Rule to the Child Representative would be to give a child less protection than an adult party.

The principles of discovery supporting all civil litigation and Family Law must remain consistent and must be enforced. There needs to be separate provision for formal discovery which should remain distinct from disclosure.

Chapter 15 – Evidence

Preliminary Observations

Firstly it might be noted that the Family Law Rules appear to have grown substantially in complexity. By way of comparison, one could look to the Rules of the Supreme Court of NSW.

These Rules are quite succinct, relying upon a long history of precedent to add "flesh to the bones".

Commentary

In the interim report of the Law Reform Commission, at paragraph 3, it was observed:

> *"The Laws of Evidence. In broad terms, the laws of evidence regulate who may give evidence and who may be required to do so, the manner in which evidence is given, what evidence may be received or excluded, how evidence is to be handled and considered once received, and what conclusions shall or may be drawn from it. They also specify the strength of a party's case that is required before that party can succeed. The laws of evidence began to develop in the late 17th Century and early 18th Century. Views differ as to the causes of their development. The better view appears to be that key factors were the increasing involvement of lawyers in trials and the changes in the role of the jury from a group of people familiar with the facts, who decided the case on their own knowledge, to a body of people with no such knowledge who decided the case on evidence placed before them."*

It is submitted that it is fundamental to any trial process that the receipt of evidence is governed by a set of rules and, in that respect, it is submitted that the Introductory Rules of Chapter 15 should state clearly in words or similar words:

> "Evidence to be adduced at a Hearing or Trial shall only be material which is admissible evidence in accordance with the provisions of the Evidence Act 1995 (Commonwealth) subject to any exceptions created by the Family Law Act 1975 or these Rules."

It is submitted that if the Evidence Chapter is designed to regulate the admission into evidence of material, then all that flows after the Introductory Rule is designed to expand upon, implement or create exceptions to the General Rule.

It is submitted that, having expressed a statement of general application in an Introductory Rule, the better approach would then be for the Rules to move on to deal with those matters dealt with in Part 15.2 of the Chapter, being the matters relating to Affidavits. Issues relating to Children's Evidence as dealt with in Part 15.1, should perhaps be consigned to a place in the Rules after Affidavits.

Part 15. 1: **Children**

Rule 15.01 Child as a Witness

Commentary

While there are no objections to the broad intent of this Rule, it is submitted that the Rules Committee may be assisted by referring to Part 4 of the Evidence (Children) Act 1997 (NSW) (hereinafter referred to as "the Act"). That part of the Act gives a right to a child to give evidence by closed circuit television in certain circumstances. Children who are under the age of 16 appear to have an unfettered right in that respect.

In the Committee's submission, where children are to give evidence, the presumption should be in favour of the child not giving evidence in the body of a Court, but rather by the use of closed circuit television facilities.

The other submission that is made with respect to children's evidence is a concern that it appears unclear as to the circumstances in which the child would give viva voce evidence. It is plain that Section 100B proscribes the taking of Affidavits from children unless the Court makes an Order allowing the child to be called as a witness. It is unclear whether part 15.01 envisages children being called as witnesses without first their evidence in chief being given by Affidavit. If it is anticipated that a child is to be called to give evidence without having sworn an Affidavit, then it is submitted that the Rules should further provide that the child witness' evidence should first be in some way particularised so that the parties to the proceedings (or one of them) will be on notice as to the evidence likely to be given by the child.

Rule 15.03: Family Reports

Commentary

The main concerns expressed relate to the late stage at which Family Reports are being ordered. It should be noted, however, that in the light of the limitation contained in 15.03(1) with regards to the timing of the Application for the preparation of a Family Report, there is the potential that the Family Report will be ordered while Affidavits and the like are being filed. It is submitted that the Rules should provide that at the time of ordering the Family Report the Court may make Orders with respect to the Counsellor's access to pleadings and Affidavit material. It is submitted that the Rules should specifically outline that the Court has power to authorise access to some material, and not others. In addition, the Rules should provide that the Court has power to authorise the Counsellor to access some or all of the subpoenaed material which may have been produced to the Court either at the time of the ordering of the Family Report or, alternatively, at the time the Family Report is prepared.

Rule 15.07: Filing an Affidavit

Commentary

It is submitted that 15.02(2)(b)(ii) should be amended to provide that not only should the notice specify the name of the witness, but also provide particulars of the evidence sought to be adduced from the witness.

It is anticipated that a broad range of persons in the community will refuse to swear Affidavits in Family Law proceedings. Amongst those would be, in many instances, teachers, social workers, and Police officers. Plainly in many circumstances the evidence of these persons could have significant bearing upon the proceedings. It is submitted, in those circumstances, that a party intending to call such witnesses is under an obligation to disclose more than simply the name of the witness.

Rule 15.09: Making an Affidavit

Commentary

In respect of 15.09(1)(a) it is said that the Affidavit must be "in the deponent's words" it is submitted that while that is a laudable concept, it is neither an enforceable Rule or in anyway practical. There are many circumstances where deponents may wish to put a wide variety of things in the Affidavit many of which would be irrelevant, provocative, argumentative or inadmissible for a variety of other reasons. Plainly, in that respect, it is incumbent upon the preparer of the Affidavit to take the instructions from the client and then produce a document which reflects as accurately as possible what their client has said. The client adopts what is written as their own words by reading and then swearing the Affidavit. It is submitted that the more appropriate term in 15.09(1)(a), therefore, is that the current words be deleted and the words "in direct speech" be substituted.

In respect of 15.09(1)(c) and submits that the phrase "confined to admissible evidence that could be given orally" is ambiguous. Whether the evidence is given orally or in writing, subject to these Rules, does not determine the admissibility of the evidence. It is submitted that 15.09(1)(c) (if it is to be there at all) should read: "confined to admissible evidence pursuant to the provisions of the Evidence Act 1995 (Commonwealth)". It is suggested, however, that if there is an initial declaratory statement about admissible evidence, as suggested in this submission, then 15.09(1)(c) is entirely unnecessary. This view is reinforced by the presence of Rule 15.13.

In essence, it is suggested that 15.09(1) has become a somewhat tortured Rule containing issues pertaining to admissibility as well as more mechanistic issues relating to the swearing of documents and the like.

It is suggested that it is appropriate to separate these two issues so that Rule 15.09(1) only deals with mechanistic matters, not issues relating to admissibility.

Rule 15.13: **Striking out Objectionable Material**

(1)(a) should read "is inadmissible". The remainder seems to try to codify evidence laws as does (b).

Rule 15.18: Time for Issuing a Subpoena

Commentary

It is submitted that Rule 15.18(1) should be amended to provide that a Subpoena may issue at an earlier time rather than only after the issue of a Trial Notice.

Rule 15.20: Limit on Number of Subpoenas

Commentary

It is submitted that the limit proposed by this Rule, if properly understood, is unduly limiting. There are many circumstances in which issues may arise necessitating the issue of a number of Subpoenas. For instance, where the health of one of the parties may be an issue it may be

appropriate and necessary for Subpoenas to be issued to a number of Area Health Services and Doctors. Plainly one Subpoena will be of little benefit. Similarly, in respect of a financial matter where a paucity of Bank records may have created problems, it may be appropriate to issue a number of Subpoenas directed to Banks, Building Societies and Credit Unions.

If this Rule applies to a Child Representative it means that a Child Representative is really unable to comply with the expectation clearly set out in the court's child representation guidelines to place relevant evidence particularly that relating to section 68F factors before the court. Child Representatives do not have clients who are able to give detailed instructions. The need for this evidence is often of particular significance at interim hearings when usually there will not be a report available but when issues of domestic violence, child abuse and/or substance abuse may well be relevant issues for the court and issues of risk to a child must be addressed.

While it must be recognised that the issuing of Subpoenas can create significant administration loads upon the Court, a severe limit on the number of Subpoenas significantly interferes with the forensic exercise of accumulating evidence for a Trial.

It is further submitted that if leave needs to be obtained before obtaining further Subpoenas, there is potentially significant imposts that will be incurred by parties on a quite regular basis in obtaining such leave.

In the circumstances it is submitted that the appropriate course, if there is to be a limit on the number of Subpoenas issued, that number should be in the vicinity of, say, six (6) with the opportunity then existing for an approach to the Court for leave to be granted to issue further Subpoenas.

Rule 15.28

The effect of this requirement, simple as it seems, will be to add cost, complexity and delay especially in children's matters. From experience the local school, doctor or other health professional can have a problem in easily finding a Justice of the Peace. A Child Representative often finds out about an appointment fairly close to an interim hearing. A requirement like this will make obtaining evidence from these sources slower and more difficult. It may well cause the adjournment of matters or effectively be an obstacle to important evidence coming before the court. It will add to costs. It is submitted that there is no need to change present practice. The practice of producing copies of, for instance, Bank records, schools, doctors has worked. The Evidence Act makes such material admissible.

Expert evidence

The Committee has made a previous submission which is attached. These proposed Rules will not reduce costs but will add to costs and are misconceived.

Chapter 19 – Costs

Practitioner and client costs

It is the view of the Family Law Committee that practitioner/client costs regulation should not be undertaken by the Family Court. It is not undertaken by the Federal Magistrates Court, the Federal Court or the High Court. The commercial arrangements between parties and their legal providers is well entrenched in each State and Territory and is, of course, the subject of present negotiations in the Standing Committee of Attorneys-General where costs disclosure and a model legislation is being considered. The role of the Family Court is not to investigate the relationship between solicitor and client, it is to resolve the dispute between parties to a marriage and/or parents of children when parenting issues are in dispute.

Each State and Territory has its own system of resolving costs disputes. The Family Court is the only jurisdiction which provides for its own practitioner/client Rules and takes over the area in which each State has an efficient and effective mechanism to deal with those issues supported by Regulation.
In a paper on costs[1], Registrars Dittman and Pendergast discussed lawyer and client costs in chapter 3. They correctly identified the underlying question as to whether the Family Court continues to play a role in this area. They comment upon the party/party system adopted by the Federal Court and indicate that this could be adapted for practitioner and client disputes. In terms of the mechanics that is no doubt correct but it does not recognise the intensity of the dispute between practitioner and client when that relationship has foundered. There can be no comparison between the commercial nature of the determination of party/party cost where usually objective legal practitioners are advising clients to the intense dispute between an often very unhappy former client and often equally unhappy solicitor. If the Family Court remains in this area the level of dispute will not diminish and the resources will need to be applied. The conclusion that the number of taxations would be reduced may be an expression of hope over experience.

The option to play no role is canvassed by the Registrars who observe that non-regulation shortcoming is the lack of consistency in the regulatory procedures. It is the case that legal practitioners fees are regulated by their respective State or Territory Supreme Courts or Government or professional regulation. These requirement are well known to legal practitioners as much of their work is done under that regime, including work in the Federal Magistrates Courts and under the various de facto laws. In addition, there is a movement for a national standard in this respect and if the Family Court continues to remain in the field it will be and remain the Court out of step with the national approach. All States also require disclosure of costs to clients.

The removal of the Court's role in settling of practitioner/client costs disputes will not impinge upon the Court requiring lawful costs disclosure in property, maintenance, Child Support or other financial disputes and will not prevent the Courts continued involvement in party/party costs.

[1] Dittman and Pendergast, *Developing an Approach to Costs*, 21 February 2003 Family Court of Australia.

The Courts involvement in practitioner/client disputes will result in less uniformity rather than its stated aim of more uniformity.

The Registrars assert that there is a disadvantage in relying upon state regulatory bodies as the clients of a National Federal court will not be subject to a uniform procedure on this issue. Yet it is the various state and territory bodies that have the authority to discipline the legal profession where necessary and can take into account different local conditions on a practitioner and client relationship. The rents and staff costs in the CBD of Sydney Melbourne and Brisbane cannot be equated with those in regional areas such as Launceston, Dandenong, Townsville, Mildurra, Broken Hill or Dubbo etc. The Family Court is no longer the primary deliverer of Family Law Services as that is divided between State Courts and two Federal Courts.

The Registrars assert that solicitor/client scales are useful in establishing a benchmark for reasonableness. This would mean that the Court would need to have a significant research capacity to determine such empirically based benchmark. Certainly in cases where there has been no disclosure and there is no costs agreement, a state or territory could fall back to a party/party scale as is the case in the Federal Magistrates Court. Of course the better way is to follow the NSW scheme which imposes the cost of assessment on the practitioner and requires the determination of fair and reasonable costs and disbursements.

Party/Party Costs

As to party/party costs, the Court has inherent and statutory power to make those orders. The Law Society of NSW is endeavouring to promote a process through the Law Council and Attorney-General's Department that there be one assessment process for party/party costs in all Federal Court jurisdictions which could be self-funding and any legal arguments that arise out of there could either be referred back to the Court where the order was made or (preferably) back to the Federal Magistrates Service.

The duty to inform clients about costs and the notification of costs under 19.03 and 19.04 will be either an alternative to the current State and Territory laws or an addition to the current State and Territory laws. Either way they will impose an alternative or additional burden upon the solicitor to comply, giving rise to greater possibility of non-compliance and adding to the cost of delivery of legal services.

The Committee has already made comments in respect of the penalties arising from non-compliance. Other notes are as follows:

- If the Court is determined to require a costs notice, the Committee submits the particular form does not need to changes from year to year and that it should be designed to collect generic information. This will avoid the problems arising as forms change (as they invariably do) under the Family Law Act.

- **Rule 19.03:** Must provide for re-disclosure as the circumstances of the case change. The Rules must acknowledge that the complexity of the case and the issues vary as proceedings commence. Lawyers take hundreds of instructions each year, some of which

come to nothing, some of which are resolved very quickly, some of which have limited issues and some of which become complex and difficult litigation.

- There needs to be provision noting that some estimates are unable to be given. A wife, for instance, who needs investigation of her husband's business may incur a few thousand dollars in costs in that investigation or tens of thousands once the extent and scope of that business is known.

- **Rule 19.03(3):** Seems to have been taken from motor accident or compensation type cases. These are cases where there is a lump sum of money and usually the deductions for medical expenses, repayment to workers compensation, etc are known and the net figure is able to be given to the client. In property cases there are sometimes settlements where property is taken in specie, other times, when the full tax consequences are not clear. This Rule (if it is necessary) should simply say that the client should be informed of the costs of the client as at the date that the offer of settlement is made.

- **Rule 19.04:** The notification of costs should be aspirational to give it before the event or as soon as reasonably practicable. Often, particularly with experts, the amount of their fees is not known and may not be known for some time. There are actual costs owing, but not defined.

- Often in urgent cases it will not be possible to give an estimate of costs as both the legal practitioner and the party are anxious to get the substantive matter before Court and there is not sufficient time to strictly comply with this Rule.

- **Rule 19.04(2):** Where this Rule refers to "actual costs" it should add 'or a reasonable estimate of the actual cost'. Costs payable to a witness if known.

- **Rule 19.04(3)(b):** This Rule will impose significant administrative costs on both the private profession and Legal Aid. In New South Wales, Legal Aid give a lump sum for child representative work.

- **Rule 19.04(4):** The Committee can understand the need for disclosure of the source of funds in relation to property or maintenance or child support matters. However, it cannot understand the need for the provision of the Statement of Source of Funds in parenting issues. It has the capacity to further inflame situations and perhaps further alienate parties from each other or from extended families.

- **Rule 19.2:** Security for costs - if this provision is necessary the list in 19.05(2) should indicate that this is not an exhaustive list.

- **Rule 19.3:** If there is an application for costs against a party who is not a party to proceedings, there would need to be a separate trial or hearing with parties given particulars of the claim, including the basis of the claim and the likely quantum of the claim, the right to put in material in reply. Where a claim is by a client against a solicitor, the underlying principle of client confidentiality needs to be considered. It may well be

that a client is reluctant to give up confidentiality or may be persuaded to give up confidentiality in circumstances where the client does not understand the full consequences of that action.

- **Rule 19.10:** The Committee is concerned that the Court does not have the power to order costs against expert witnesses. Even if it were to then determine that the Court does have the power, the Committee considers that it would be inappropriate for the Court to order costs against expert witnesses. The Rule imposes extensive responsibilities and costs on expert witnesses which will inevitably increase costs and reduce the pool of expert witnesses available, particularly in children's cases.

- **Rule 19.11:** does this Rule mean that the Court will in each case set out reasons for the order and make them readily available to the lawyer for publication of his or her client or his or her former client?

- **Rule 19.12(3):** if the Rule remains it does not enable a legal practitioner to charge for work which the lawyer advises would be unreasonable; the legal practitioner is only entitled to charge the expense.

- **Rule 19.12(3)(a):** should replace the word "expense" with the term 'costs'.

- **Rule 19.13(a):** The Committee repeats its comments in relation to Costs Notices.

- **Rule 19.14:** It is submitted that:
    - Sub-paragraph 2(a) should specify the work or scope of work.

    - Sub-paragraph (b) at the end of each of the requirements should be added the words 'and/or'.

    - Sub-paragraph (d) has a number of problems. It may not be possible to have the person sign the agreement if there is a litigation guardian and provision should be made for signature by the guardian. If there is a child representative, the cost agreement would need to be signed on behalf of Legal Aid. The agreement should be able to be signed on or on behalf of the lawyer and finally, and in fairness, if a party (by act or other expression) approves the costs agreement then there should be deemed signature or acceptance by the client.

    - Paragraph 4(c): The Committee cannot understand why costs cannot be payable on the successful outcome of a case. If a case is "high risk" (for example, a legal practitioner is prepared to assist a client to seek a property adjustment, where assets might be hidden or in trusts or otherwise difficult to find) the Committee suggests that the client and the lawyer should have an opportunity to commence the proceedings. The availability of Legal Aid in property matters is restricted and without such an approach the Committee submits many would end up with unjust results.

Forms

The reduction in the number of forms is in the Committee's view a positive move. The new forms are well set out, reasonably easy to comprehend and the instructions will be useful for unrepresented litigants.

The following suggestions are submitted:

1. Form 3 (Application for Divorce) in particular, Form 13 (Financial Statement) and to a lesser extent Form 11 (Application for Consent Orders) incorporate instructions which lengthen the form considerably. These instructions are not necessary when the form is to be drafted by a lawyer. It is suggested that the instructions should be submitted in a separate document. The form could also indicate that instructions to complete the form are available and should be referred to. This would reduce the expense to lawyers of producing these forms and would eliminate unnecessary bulk from court files.

2. Form 3A (Response to an Application for Divorce) is to be used only if the divorce is opposed. However, there is no procedure to enable a respondent to a divorce application to file material in circumstances where the respondent disagrees with something asserted in the application but does not oppose the divorce. This may be important where there is a issue about the date of separation or where information about the children is disputed.

3. The instructions in the service kit under the heading "Who do you serve with the documents?" indicate that the other party must be served with a copy of a document filed and that a lawyer may accept service in behalf of his or her client. This instruction is not limited to an initiating application. The instructions should make it clear that where a party has filed a Notice of Address for Service then service must be effected at that address and not on the party personally.

4. Item 16 in Form 11 (Application for Consent Orders) reads as follows:

   "Has any person with whom the child will reside or have contact been convicted of an offence under a child welfare law or the Family Law Act, or of a criminal offence relevant to a child's welfare?"

   This question is not relevant where the application is for orders of a financial nature only. It should be moved to Part D "About the Children" or alternatively there should be a "not applicable" option among the available answers.