

ALRC Issues Paper Number 22

FAMILY LAW COUNCIL

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The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

The Family Law Council has considered the Australian Law Reform Commission (ALRC) Issues Paper No 22 Review of the adversarial system of litigation: Rethinking family law proceedings (November 1997) and wishes to make the following submission in relation to the Issues Paper ("the paper"). A copy of this advice is being forwarded to the ALRC as the Council's submission on Issues Paper No. 22.

Preliminary reaction to the paper

Council had preliminary discussions on the paper at its meeting on 19-20 February 1998 and further considered the matter on 21-22 May 1998. Council notes that the ALRC's terms of reference in relation to this matter are wide and raise many issues. Also, the Issues Paper already acknowledges the work of other bodies in relation to some of the issues raised. Council is concerned, however, that there should not be duplication of effort on a number of matters covered by the terms of reference.

Council wrote to the President of the ALRC, Mr Alan Rose AO, on 16 March 1998 expressing its concerns. In its letter Council noted that aspects of some of the issues raised in the paper were already being considered by other bodies, including this Council, the Family Services Council and NADRAC.

In the circumstances, Council suggested to the ALRC that there might be a need for an audit of the various issues raised in the paper with a view to sharing the work and to avoid duplication of effort.

Mr Rose has replied saying that he agrees with Council's suggestion. Council will discuss the matter further with its ALRC Observer (Mr Barnett) and will cooperate with the Commission

in relation to the sharing of the workload and the avoidance of duplications of effort and overlaps in projects.

Information needs

The Family Law Council (FLC), the Australian Institute of Family Studies (AIFS) and the Australian Bureau of Statistics (ABS) have held discussions with the Family Court over the years about the need for more and better data in a number of areas. Council has also been advised that others, including your Department, have also consulted the court on this issue.

There have been two problems from the court's perspective: (a) lack of resources to provide other than the basic data required for the court's own needs, and (b) limitations imposed by the court's computer system (and until fairly recently the lack of an Australia-wide computerised system).

Council notes that the court has put more resources into this area and is upgrading its computer facilities.

The court has indicated to the FLC in the past that it will generally be unable to supply data which is not readily available from existing statistics except in cases where the requesting organisation is prepared to meet the cost of collecting the required information. At the same time, however, it needs to be recognised that the court has been most helpful in providing assistance to the FLC in obtaining data from court sources (sometimes using court resources to assist in doing so) for the purposes of some of the projects undertaken in recent years.

The basic problem for the court in relation to data collection generally, in this Council's experience, is one of resources.

Council is aware that considerable valuable research has been undertaken over the years by officers of the court, such as staff of the Family Court Counselling and Mediation Service. This type of research has, from time to time, been used by Council in relation to its own projects and is known to be valued in a number of quarters.

The court should, in Council's view, be able to undertake whatever research it considers necessary for its purposes. However, there may be room for improved communication and coordination between the court and other interested bodies.

In this regard, in December 1995 this Council and the AIFS jointly organised a research planning seminar which was attended by representatives of the AIFS, FLC, Attorney-General's Department, Family Court of Australia, Family Court of WA, the Law Council of Australia, National Legal Aid, the Family Services Council, NADRAC and 3 invited academics. This type of seminar, on a more regular basis, would help improve coordination of effort at a relatively low cost. The involvement of your office in such a seminar may assist with overall coordination.

Council draws attention to comparatively recent developments in relation to information. The Australian Bureau of Statistics is now producing more data on families. The data being collected and published by the Australian Institute of Health and Welfare (AIHW) is also a major development. For example, Council used AIHW data recently in examining the issue of Step-parent adoptions.

The role and objectives of family law proceedings

It will be important that the issues raised in this chapter be fully considered by the Family Court.

A number of recommendations made by Council in its report *Magistrates in Family Law* (July 1995) are relevant. A copy of that report is being enclosed with material sent to the ALRC. Council also wishes to draw attention to its project on *Violence and the Family Law Act: Financial Remedies*. A discussion paper on this issue should be released shortly.

Perceived problems in family law proceedings

Council wishes to comment on three issues raised in this chapter: (a) repeat applications, (b) violent applicants and (c) the jurisdiction of Magistrates.

Council suggests that most repeat applications coming before the Family Court relate to child contact matters. Council produced an interim report to you on *Penalties and Enforcement* (March 1998) which mainly relates to child contact issues and in which it says, among other things:

A major conclusion of Council is that the repetitive nature of contact orders is significant in that, unlike most court orders, each contact order has the potential to provide multiple and ongoing opportunities for the order to be breached. This factor, combined with the highly emotional circumstances of these cases, suggest to Council that a costly, time consuming or delayed court hearing may not be the appropriate way to process contact disputes and, in the circumstances, considers possible alternatives...

Council will be making a final report to you on this matter by the end of June 1998. This follows a study over a 2-year period of matters coming before the court and an examination of the situation in some overseas jurisdictions. Council considers that there is no one simple solution to the problems of repeat child contact applications and that various situations may require different responses in order to provide satisfactory solutions.

In Council's view this is a complex issue and needs consideration as a specific issue because of the relatively unique nature of child contact orders. In the circumstances Council would suggest that its study will complement the study being undertaken by the Commission and, therefore, there is a need for close liaison on the matter to avoid duplication and overlap.

Violence and family law generally is known to have been of concern to the Family Court for some time and this issue has been the subject of considerable attention in the past. The Family Law Reform Act 1995 contained a number of amendments designed to give the court adequate powers to deal with the issue in respect of children and personal protection matters.

Currently Council is looking into the question of financial remedies for the victims of family violence and, as indicated above, a discussion paper is due to be released shortly.

Council agrees that the issue of dealing with violent litigants is a separate one and notes the relevance of this matter to the operation of the adversarial system.

In relation to Question 5.14 in the Issues Paper, Council draws attention to the fact that the question of robing has been considered on several occasions in the past; see for example,

Family Law Council, Administration of Family Law in Australia (1985) at pages 27-34; and Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, The Family Law Act 1975: Aspects of its Operation and Interpretation (1992). The general question of security has been considered in the abovementioned two reports and also in : Joint Select Committee on the Family Law Act, 1980, Family Law in Australia; and Family Court of Australia, 1990, Report of the Working Party on the Review of the Family Court (the "Buckley Report").

Council draws attention to the role of Magistrates in family law and the use of summary procedures in the Magistrates' Courts. Council is of the view that there are some areas where the use of Magistrates may be preferable to a full trial before a Judge or Judicial Registrar.

Constitutional limits on family law reform

Council's Child and Family Services (CAFS) project involves the interaction between the Family Law Act and State and Territory child and family services legislation. This is an area in which the role of the Commonwealth is limited by the Commonwealth Constitution. While such limitations raise difficulties, those difficulties are no insurmountable. The CAFS project, for example, is seeking to overcome these problems through the development of commonly accepted principles and standards of operation.

Protocols have also been developed by the Family Court, in cooperation with the States and Territories, to overcome problems in achieving a coordinated scheme.

Council also points out that cross vesting legislation has also enabled some problems to be overcome, especially in relation to children. In this regard Council retains the view that the Family Court should have power to deal with de facto and child related matters.

Primary dispute resolution services

The following Council reports are relevant to the question of PDR in family law:

- Arbitration in Family Law (1988)
- Family Mediation (1992)

The discussion paper released by the Attorney-General's Department in August 1997 examined the options available to government in relation to the future PDR needs in family law. Council, and other interested persons and organisations, made detailed submissions in response to the departmental discussion paper. Council understands that the departmental work in this area is currently progressing.

You have also asked the Family Law Council and the Family Services Council to provide advice to him before the end of June 1998 on a number of specific issues by way of follow up action on PDR needs in family law.

Council appreciates the close relationship between PDR services and the court's litigation processes, but questions the need for a further complete examination of this issue having in mind the work currently being undertaken within the Department.

At a wider level, Council notes that NADRAC was established to provide you with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision. Council is also aware that NADRAC has already issued a number of papers on a range of PDR issues.

Council notes that the ALRC's terms of reference require the ALRC to focus its attention on a number of matters, including "alternative dispute resolution". However, in view of the work already being undertaken, Council strongly recommends that the ALRC should enlist the cooperation of the Department and NADRAC with a view to avoiding duplication. Council also considers that another broad ranging study of PDR in family law is not warranted at the

Case management in the Family Court of Australia

Case management guidelines are an established feature of the Family Court's operations. From the beginning of 1996 the court implemented simplified procedures and those procedures have recently been evaluated. Council notes that the Commission will be considering the evaluation report. Revised guidelines commenced to come into effect in 1998.

Council has no comment to make on the specific questions raised in the Issues Paper but points out that one contentious aspect of the court's case management guidelines (CMG) relates to the operation of CMG 2.9, 7.14, 8.5 and 9.6 which require practitioners to give to the other party a copy of the costs memorandum provided by the practitioner to their client. This matter has been the subject of ongoing negotiation between the court and the Law Council of Australia. Council notes that in Chapter 9 (Managerial Judging) the Commission raises the question of judges inquiring into costs (para 9.4) and this aspect of the CMGs is possibly relevant for consideration in that context.

Managerial judging

The Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975 recommended to government that the Act be amended to enable judges to make Rules of Court in relation to trial management (paragraph 14.54 - Recommendation 110). This recommendation was accepted by government and implemented by Act No 34 of 1997.

Council notes that trial management is one aspect of the broader concept of managerial judging.

A major aim of managerial judging is to streamline trial processes by enabling the judge, for example, to restrict the length of cross examination, to limit the number of expert witnesses, to limit the use of discovery or to dispense with the rules of evidence.

The advantages of managerial judging are thought to be particularly evident in relation to hearings involving children's matters, such as applications relating to child residence and contact orders.

Council has formed the tentative view, in relation to aspects of children's issues, for example, that a much more flexible approach is required and that approach needs to be timely and responsive to individual needs. This could be achieved, for example, by using court appointed

experts or dispensation of the statutory rules of evidence. Council also considers that the use of Magistrates in family law may give the court a greater degree of flexibility and more mobility and enable the court to be more responsive to needs in individual cases. These issues are currently being further pursued by Council in its penalties project.

Evidence and procedure in the Family Court

A number of matters relating to child representation were addressed by Council in its report *Involving and representing children in family law* (August 1996) and Council draws attention to the recommendations made in that report. Council has been advised that the recommendations made in this report are currently being considered by government.

Litigants in person

As a result of changes in legal aid policy and the consequential changes in legal aid funding and an increasing tendency towards self representation in the Family Court in recent years, Council recently decided that when some current projects were completed it would commence a project on litigants-in-person in family law.

The basic aim of Council's project would be to accept self representation as a reality and to try to see what is necessary to make the best of that situation. For example, Council would be seeking to identify the circumstances in which self representation were occurring, the areas in which self representation was considered to be inadvisable (in the applicant's interests), what assistance is currently available to the litigant in person and what further assistance might be required by the litigant in person and the court.

Council notes the very wide focus of the ALRC paper and considers that its own project would complement, rather than duplicate or overlap with, the ALRC's work. However, it wishes to bring its intended work to the notice of the ALRC in order to ensure that the Commission is fully aware of what Council proposes to do and so that the ALRC might wish to consider referring aspects of its own inquiry to Council where it considers that they would be more appropriate for Council to undertake.

The culture of family dispute resolution

The main focus in this chapter relates to the attitudes of judges and the legal profession to alternatives to judicial determination. Council meets in capital cities and major regional centres around Australia and has noted on a number of occasions that the legal profession has confidence in, and a commitment to, the use of PDR services.

In its submission in response to the Attorney-General's Department's discussion paper *Delivery of Primary Dispute Resolution Services in Family Law* (August 1997) Council said:

- The Council believes that people use the PDR services of the court because the well-established policy of the court is that judicial determination should be a last resort measure and the court (with the support of the legal profession) directs people into the PDR processes. It is incorrect to imply that the court or the current system encourages litigation ... (p 35 of Council's submission of 5 December 1997)

Council notes that Issues Paper No 22 seeks comment on the attitude of judges and the legal profession to litigation and PDR, and suggests that this information might be more accurately obtained through a survey questionnaire directed at judges and family lawyers. Council has previously surveyed judges' views on matters with the support and assistance of the Chief Justice of the Family Court of Australia and the Chief Judge of the Family Court of WA. Council has also surveyed the attitudes of family lawyers on specific issues in the past, with the cooperation of the Family Law Section of the Law Council of Australia. These surveys have proved useful in a number of ways, including better policy formulation.

Fairness in family law proceedings

The main areas in which Council has encountered this issue has been in relation to such matters as:

- Gender bias - See Council's discussion paper Violence and the Family Law Act: Financial remedies (to be released shortly);
- The need to improve ways of involving children, as appropriate, in decisions which affect them - See, for example, Council's report Involving and representing children in family law (August 1996); and
- Use of the Family Court by Indigenous persons. Council will be considering this matter in relation to its work program later this year. Discussions by Council in Alice Springs in May 1998 indicated a range of problems for Indigenous persons, especially those in remote areas, and under-use of counselling and mediation services by Indigenous persons. These matters need to be investigated.

Council's current work in relation to enforcement of child contact orders is also relevant. Council will be reporting on this matter in the near future.

The cost of family law proceedings

The issue of costs in family law has been considered and reported on in a number of studies in recent years, including Access to Justice (Justice Ronald Sackville Chairman - 1994), The Family Law Act - Aspects of its Operation and Interpretation (Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act - 1992), and the Costs of Justice Inquiry by the Senate Standing Committee on Legal and Constitutional Affairs.

Council notes that some inquiries have recommended more detailed studies of the issue. For example, in its report Funding and Administration of the Family Court of Australia (1995) the Joint Select Committee on Certain Family Law Issues recommended that a study be conducted to determine what the legal costs of trials in the Family Court of Australia are to litigants (para 7.59).

One difficulty with such inquiries is that the processes of the court are undergoing regular change (for example, the introduction of the simplified procedures) and such inquiries are probably not fully successful unless the system is reasonably stable. Even an inquiry, such as the present one, which mainly focuses on the effects of the adversarial system on costs to the litigant may be affected by the constant change which is occurring in the family law system.

However, Council questions the need to re-visit the whole issue again.

As a result of changes in legal aid policy and the consequential changes in legal aid funding there is a need to look at self representation, particularly in non-complex matters. To this extent the comments made in relation to litigants in person are relevant.

Council notes that the focus in the paper is on financial costs and draws attention to the social costs of litigation, particular in relation to family matters.

Delay in family law proceedings

Council noted in its interim report Penalties and Enforcement (March 1998) that the processing time for contact enforcement applications varied from less than a month to over 6 months. The court's Case Management Guidelines provide that contact enforcement applications are to be dealt with within 2 weeks. In Council's view, the issue of delay cannot be considered without also considering the question of resources as delay in relation to contact enforcement applications is due largely to inadequate resources.

The social consequences of delay in the family law field is one matter which could appropriately be addressed in the Commission's study.

Enforcement

Enforcement is currently being examined in Council's Penalties project. The Commission's attention is drawn to Council's interim report Penalties and Enforcement (March 1998), which largely looks into enforcement of contact orders. In Council's estimation, more than 80 per cent of enforcement applications to the Family Court relate to child contact orders. Council's final report Child contact orders: Enforcement and penalties is expected to be available in the near future.

Council therefore requests that, in view of its current work in relation to the enforcement of child contact orders, this particular aspect of enforcement of Family Court orders (which in Council's view are quite distinct from other orders of the court) should not be duplicated by the ALRC.

Council also notes that work has been undertaken in relation to enforcement of property orders.

Special issues

Council has noted above the wide terms of reference for the ALRC's adversarial project. With this in mind and having said, at the outset, that Council considers that Issues Paper No 22 tries to cover too many major issues, Council is reluctant to suggest additional matters for inclusion in the Commission's project. However, by way of information only, Council draws attention to a number of matters of relevance.

This Council is currently undertaking a project on the operation of the "clean break" principle (section 81 of the Family Law Act) with a particular focus on spousal maintenance. Council has surveyed the attitudes of the legal profession and others in this area and will be issuing a discussion paper later this year for public comment.

In relation to children's issues, the Family Law Reform Act 1995 came into effect from 11 June 1996 and is to be evaluated when it has been in operation for a reasonable period.

Council has recommended to you that section 63E of the Family Law Act, which enables parenting plans to be registered in the Family Court, should be repealed. You have advised that this matter will be considered later in relation to the evaluation of the operation of the new Part VII of the Act.

Council's report Sterilisation and other medical procedures on children (November 1994) has been before the Standing Committee of Attorneys-General (SCAG) for some time. Council recently asked you if consideration of this important issue could be given a higher priority.

The Commission's Issues Paper also refers to the question of torts and family law. Council will shortly be releasing for public comment a discussion paper Violence and the Family Law Act; Financial Remedies. This paper will have obvious relevance to this aspect of the Commission's inquiry.

The future of family law

Council notes that your address to the National Press Club on the occasion of the 20th anniversary of the Family Law Council in October 1996 is particularly relevant to this question. The current examination of the delivery of primary dispute resolution services in family law (the PDR inquiry) is also relevant.

Summary

As the ALRC has indicated that it will work with this Council, the Family Services Council and NADRAC, Council recommends a coordinated approach to minimise duplication in future work plans. To this end there needs to be a meeting of the ALRC and this Council to consider this issue in more detail.

A number of other matters of relevance to this reference have been discussed with the ALRC's observer on the Family Law Council.

A copy of the Council's submission to the PDR inquiry, and related documents, will be made available to the Commission along with a copy of this letter.

At its meeting in Alice Springs on 21-22 May 1998 the Council agreed that the issues covered in this letter should be raised with the ALRC through you. I have signed this letter on behalf of the Council and by agreement with the immediate past Chairperson whose term of office expired on 30 June 1998.

Yours sincerely,

(R W Hughes)
Director of Research
on behalf of the Chairperson