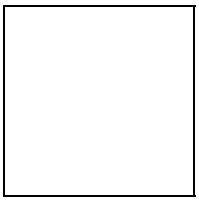


FAMILY
•LAW •
COUNCIL

FAMILY LAW APPEALS AND REVIEW

An evaluation of the appeal and review of family law decisions

---

• JUNE 1996 •

ISBN **0 642 20863 8**

THE FAMILY LAW COUNCIL

The Family Law Council is a statutory authority which was established by section 115 of the *Family Law Act 1975*. The functions of Council are set out in sub-section 115(3) of the *Family Law Act* which states:

> It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning -
>
> (a) the working of this Act and other legislation relating to family law;
>
> (b) the working of legal aid in relation to family law; and
>
> (c) any other matters relating to family law.

CONTENTS

Composition of the Family Law Council

Members of the Family Law Council at the time of production of this report were:

Mrs Jennifer Boland *(Chairperson)*
Ms Dale Bagshaw
Mr Rod Burr
Dr Nigel Collings
Associate Professor Regina Graycar
The Hon Justice Michael Hannon
Ms Louise Hansen
Mr John Hodgins
Ms Annemaree Lanteri
The Hon Justice Michelle May
Mr Richard Morgan
Mr Des Semple

Secretariat

Mr Bill Hughes	Director of Research.
Ms Serena Beresford-Wylie	Legal 1 (to October 1995).
Mr David Wallace	Legal 2 (from February 1996)
Dr Jo Herlihy	Executive Officer
Ms Bim Engler	Administrative Officer

The Appeals Committee

The members of Council's Appeals Committee are:

The Hon Justice Michelle May	*Convenor*
Ms Barbara Guthrie	Appeal Registrar, Family Court of Australia.
Mr John Hodgins	Family Law Council
Ms Annemarie Lanteri	Family Law Council
Mr Peter Rose QC	Barrister-at-Law, Sydney

Terms of Reference

The Family Law Council recognises that if the objective of access to justice is to be met then the appeals process must be capable of providing timely, inexpensive and just review. Consequently, the Family Law Council decided at its October 1994 meeting to establish a committee to undertake an inquiry into the conduct of appeals under the *Family Law Act 1975*. The aim of the inquiry is to examine legislation, practice and procedure in relation to appeals and to make recommendations for any possible improvements to the appeals process which may enhance access to justice for parties who are dissatisfied with decisions made under the Act.

The terms of reference of the Committee are:

1. To examine legislation, practice and procedure with respect to appeals under the *Family Law Act 1975* including appeals from:
   - both interlocutory and final decisions of the Family Court;
   - decisions of judicial registrars; and
   - decisions of Magistrates and Local Courts.

2. To examine costs in relation to appeals, including but not limited to:
   - the cost of transcripts; and
   - in consultation with the Legal Aid and Family Services Division of the Attorney-General's Department, the Federal Proceedings (Costs) Act 1981.

3. To make recommendations for any possible changes to legislation, practice or procedure which may improve the accessibility and efficiency of the appeals process.

4. To determine whether any proposed changes to the present appeals system may have unintended consequences and to take account of any such consequences in making recommendations.

In fulfilling these terms of reference, the Committee will consult fully with representatives of the courts, the legal profession and other persons or organisations who have an interest in the appeals process.

SUMMARY OF RECOMMENDATIONS

The following recommendations are made in this report:

Recommendation 1 Statistics (para 4.19)

(a) That appeals statistics currently kept by the Regional Appeals Registrars should include (i) more detail about the outcome of appeals; (ii) the sex of the applicant by the type of order sought; (iii) the matter appealed from; (iv) and the source of the appeal. This would not require additional resources and would considerably enhance the accuracy and usefulness of appeals statistics.

(b) In the longer term, when the court's information technology platform is upgraded the court should consult with the Family Law Council, the Australian Bureau of Statistics and the Australian Institute of Family Studies and fully review the quality and usefulness of the data it collects.

Recommendation 2 Procedures of other courts (para 5.30)

The Family Court be asked to examine developments in other Australian and overseas Courts of Appeal that operate within a common law system to see whether the adoption of some of the procedures of those courts would assist in streamlining the procedures and processes of the Family Court and in reducing costs. The procedures and processes which may be of particular interest to the Family Court include:

- **Courts of Appeal of less than 3 Judges;**
- **How best to deal with litigants in person;**
- **The use of arguments in writing;**
- **Limits on oral arguments:**
- **Greater use of staff lawyers;**
- **Expedited hearings; and**
- **The use of telephone hearings and video links.**

Recommendation 3 Cost of transcripts (para 6.08)

Steps should be taken to reduce the cost of transcripts. To this end the function of producing official transcripts of Family Court proceedings should be subject to competitive tender.

There should be a means tested scheme under which persons in need may apply for the cost of transcripts to be reduced or waived. Decisions about the reduction or waiver of the fees should be made by a Registrar of the Family Court, the Legal Aid Commissions or the agency providing the reporting service. The court or the

Legal Aid Commissions, as appropriate, should be fully funded to provide such assistance to needy applicants or, in the case of a reporting agency, tenders should be sought on the basis that free transcripts will be provided to legally aided applicants or persons who satisfy a hardship test.

Recommendation 4 Numbering of appeal book pages (para 6.12)

That the Family Court examine the current appeal book page numbering system, the possibility of further eliminating unnecessary material from appeal books and the use of electronic storage of appeal books with a view to reducing costs of appeal books.

Recommendation 5 Federal Proceedings (Costs) Act (para 6.16)

That the maximum amounts allowed under the *Federal Proceedings (Costs) Act 1981* should be reviewed. The maximum amount which applies in relation to Family Court appeals should be increased to the same level as applies to Federal Court appeals.

Recommendation 6 Solicitors costs estimates (para 6.19)

That solicitors be required to prepare costs estimates as part of their advice in relation to a proposed appeal and to provide estimates to their clients at the time of filing the notice of appeal.

Recommendation 7 Delays (para 6.26)

That Case Management Guidelines should be amended to provide the following:

(a) where a judgment has been delivered ex tempore, written reasons should be provided to the parties within 14 days;

(b) where no judgment has been given, but orders have been made, written reasons should be provided within 14 days of the orders having been made; and

(c) the time for appeal should not commence to run until written reasons for the judgment have been published to the parties.

Recommendation 8 Conciliation conferences (para 6.28)

The Family Court should publicise the fact that it offers conciliation conferences to parties to appeals with a view to resolving appeals which can be satisfactorily resolved by this means.

Recommendation 9 Courts of Summary Jurisdiction (para 6.37)

That the appeal procedures from courts of summary jurisdiction should be reviewed following the establishment of a scheme of specialist family law magistrates as recommended by Council in its report *Magistrates in Family Law*.

1: INTRODUCTION

1.01 The role of an appeals system, to review primary decisions, is integral to the administration of a justice system. Access to an appeals system and the opportunity for judicial review must be seen to exist for people to have confidence in the objectivity of, and consistency in, the application of the law.

1.02 The broad objects of any process of appeal should be to:

- Correct errors of law and fact and thereby to apply the law fairly and accurately between the parties on a case by case basis;

- Establish principles of law and guidelines for the application of the law so that through an adequate reporting system consistency and predictability of results can be achieved for the better advice of parties and for the guidance of the court; and

- Expound and reinforce policies of public interest in the interpretation and application of the *Family Law Act*.

1.03 There have been a number of cases which have laid down the proper approach in relation to appeals from discretionary judgments. The leading authority in Australia is *House v R*[1] where the High Court said:

> *If the Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary Judge has reached the result embodied in the order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.*[2]

1.04 In *Sharman v Evans*[3] Barwick CJ made the following points:

> *... the function of a court of appeal, in my opinion, is not to offer what in connection with another discipline would be called a "second opinion". Such a court is strictly confined to the remedy of error in the trial or in the assessment of*

---

[1](1936) 55 CLR 499
[2]*Ibid* at page 505
[3](1977-1978) 138 CLR 563 at pages 565-566

> *the trial Judge. It cannot be too strongly said that a mere difference of opinion as to what ought to have been the proper award ... does not indicate error on the part of the trial Judge...*
>
> *I think it is relevant to the decision of this appeal to remember that our system by which differences between citizens and, for that matter, between the state and the citizen are resolved is one of trial. It is not a system of resolution by appeal... I have said elsewhere, and I venture to repeat, that resolution of difference by trial rather than by appeal is of great public benefit. It tends to earlier finality and greater certainty than would be the case if cases were chiefly decided on appeal.*

1.05 In a jurisdiction which is federal, and which is operated through a large number of registries and circuit courts[4] throughout the country, which includes such varied socio economically and demographically diverse locations, the need for a system of information exchange and networking between Judges of first instance is obvious. In order to maintain an even level of interpretation and approach, Judges move around the country to allow that cross fertilisation to take place. The Appeals Court and the system of appeals is a further drawing together of what is a widely disparate experience.

1.06 ***Statistics.*** A review of the family law appeal process would be assisted if the available statistics on Family Court appeals were to reveal more about the system. In the absence of more comprehensive statistics about the system it is difficult to make a judgment about whether the appeal system is achieving the objectives referred to above.

1.07 Better information would enable an assessment of the outcomes of the appeal process by reference to the success rate of appeals from the various primary decision makers (registrars, magistrates, judicial registrars and Judges) and the success rate of appeals from different types of determinations. The court at least should know whether there are particular patterns of outcomes of appeals which might throw light upon persistently idiosyncratic approaches or particular problems from different locations which are not apparently satisfactorily addressed in the overall system.

1.08 For example, a comparison of the success rate of appeals in property matters as against child custody matters, might merely indicate the difficulties of decision making in the latter case compared with the more objectively assessable area of property division. However, if the outcomes of appeals were to be tabulated by reference to the gender, age, ethnicity, language and other such characteristics of the parties to the appeal, as well as the location in which the primary decision was made, this sort of data would enable a realistic assessment to be made about such matters as accessibility of the appeal system to different groups within society. At present such a realistic assessment is not possible.

---

[4]There are currently 14 registries and 4 sub-registries of the Family Court of Australia. Some registry services are provided in an additional 6 regional centres. The Family Court of WA has one registry.

1.09 Council is aware that its role is not to recommend to government courses of action which are not practicable, having in mind economic and other relevant factors. In its 20 year history Council has consistently been aware of the advice given to it by the Attorney-General at its inaugural meeting, when he said that the basic role of the Council was to put forward "practical law reform that an Attorney-General from time to time can undertake."[5] Council is also aware that the wider issue of family law statistics is a matter of interest to a number of bodies, such as the Australian Bureau of Statistics and the Australian Institute of Family Studies, as well as the court, and that there is a need to upgrade the court's Information Technology system.

1.10 With these factors in mind the recommendations of Council touch on some of the more easily addressed issues of data collection. However, Council considers that in the longer term the wider issues will need to be addressed. At the same time, it should be said that the available data enables the Council to draw some useful conclusions about the current appeal system and to make some suggestions which aim at improving that system.

1.11 ***Limitations on the appeal process.*** In the context of family law in Australia, the limitations on the appeal process in the overall judicial system are perhaps more restricting than in some other jurisdictions. The wide discretionary power of the Family Court in dealing with the vast majority of matters which arise before it is well known. The approach of the *Family Law Act 1975* in specifying lists of factors to be taken into account when making decisions, without dictating the weight or priority to be given to those matters, leaves the primary decision makers a particularly wide discretion.

1.12 Those wide discretionary powers have been noted in a variety of property cases, for example, particularly in the cases of *Mallet*[6] and *Norbis*[7]. The *Family Law Reform Act 1995* does not significantly change this situation.

1.13 In applying the *Family Law Act*, the courts grapple with cases which have an enormously wide range of fact situations where language, background, culture, gender and economic circumstances, and the very nature of the relationship between the parties, can produce situations seemingly similar, but in fact quite different. The need for the application of law and its interpretation to be discretionary in such instances is clear. The difficulty this presents in structuring and applying a process of appeal is inevitable.

1.14 At the same time, a pluralist society needs the binding force of clearly established guidelines as to what is seen as acceptable or unacceptable parenting

---

[5]Address by the Attorney-General, the Hon R J Ellicott QC, to the first meeting of the Family Law Council in Sydney on 26 November 1976.
[6]*Mallet v Mallet* (1984) 156 CLR 605
[7]*Norbis v Norbis* (1986) 161 CLR 513

behaviour and appropriate standards for the fair disentanglement of the financial aspects of personal relationships. The appeal system seeks to acknowledge this diversity and at the same time to draw out the common principles.

1.15 ***Costs.*** A further major factor which limits the degree to which the objectives of an appeal system can be achieved is that of costs. Given the volume of litigation, some formal or informal mechanism must operate to reduce the cost to the public purse of what Barwick CJ referred to as "resolution by appeal"[8]. The very particularity of individual cases might otherwise lead to a plethora of appeals arising from each individual having a genuine view that the circumstances of their own case allow a result different from that achieved at first instance.

1.16 The cost of appeals to the parties also militates against an open-ended appeal process. Unlike the corporate clientele of other jurisdictions, the parties in the Family Court meet their expenses out of their own pockets. The opportunity to achieve a result by the financial exhaustion of the other party through a series of appeals must be extremely limited to avoid injustice.

1.17 The need for limits on access to an appeal system is generally acknowledged. Resolution by appeal (or by exhaustion) does not suggest a healthy structure. While, on the one hand, providing a mechanism for judicial review which is accessible and fair, is important, consideration must always be given to appropriate limitations on access to the appeal system so as to achieve a practical balance.

1.18 Traditionally jurisdictions have relied on limitations on appeal as of right by reference to time frames, a specified set of grounds for appeal and perhaps a limitation on the quantum of subject matter by way of threshold in financial disputes.

1.19 One of the main objectives of the appeal process - that is, to provide principles and guidelines for the application of the law - requires that there be some limitation on appeals so that the number of appeals which pull together the threads of a range of first instance decisions is manageable. The restriction of cost, both public and private, must also justify some limitation on the appeal process.

1.20 The costs of appeals in the family law jurisdiction are substantially added to by the cost of production of the transcript on which the appeal must be founded, rather than the actual costs of the hearing of the appeal itself. The cost of transcripts may prove to be the greatest single component of costs incurred in some cases. In others, it will approach the cost of the hearing. The cost of appeal books is also a significant factor.

1.21 The cost to the public purse of misconceived, on occasions frivolous or vexatious appeals may increase in proportion to the number of litigants in person

[8](1977-1978) 138 CLR 563 at page 565

who are moving through the system. While an emphasis on access to justice suggests that inevitably more people will use the justice system for the resolution of their disputes, the "demystification" of the system itself must also encourage an increase in litigants in person at all levels. The involvement of a litigant in person in proceedings can result in those proceedings being prolonged, and therefore the costs to the taxpayer and other parties is generally increased by the litigant in person. Although the number of appeals overall is relatively small, and these issues will be apparent in even smaller numbers, they should be flagged as issues to monitor for the future.

Outline of this report

1.22 This report addresses the operation of the Family Court appeal system under the following headings:

- The present law and practice are summarised in chapter 2;
- Chapter 3 outlines the Council's consultation process in relation to its study of the appeal system;
- Available statistics on appeals are discussed in chapter 4;
- Some of the features of the appeal systems of other jurisdictions are looked at in chapter 5 with a view to showing the types of changes the Family Court might consider; and
- Some immediate proposals for improving the current system are advanced in chapter 6.

2: PRESENT LAW AND PRACTICE

2.01 The *Family Law Act* , Family Law Regulations and Family Law Rules provide for various forms of appeal and review of decisions of Judges, magistrates and registrars. This chapter outlines the relevant provisions of the Act, Regulations and Rules together with some matters covered in the Practice Directions and Case Management Guidelines issued by the Family Court.

2.02 An appeal is available from courts of summary jurisdiction. Such an appeal may be heard by a single Judge or the Full Court of the Family Court (subsection 28(2)), the latter being unusual. The Supreme Court of the Northern Territory also has jurisdiction to hear appeals from a court of summary jurisdiction in that Territory.

2.03 Under section 94 of the *Family Law Act* an appeal lies to the Full Court of the Family Court from:

(a) a decree of the Family Court, constituted otherwise than as a Full Court, exercising original or appellate jurisdiction under the *Family Law Act* or any other legislation; or
(b) a Family Court of a State or a Supreme Court of a State or Territory constituted by a single Judge exercising original or appellate jurisdiction under the *Family Law Act* or in proceedings continued in accordance with section 9 of the Act.

2.04 Under section 94AA of the *Family Law Act* an appeal to the Full Court of the Family Court may lie as of right or it may require leave of the Full Court.

2.05 The Full Court is constituted by three or more Judges of the Family Court, where a majority of those Judges are members of the Appeal Division[9].

Meaning of appeal and review

2.06 The common meaning of "appeal" would seem to include both an application for the reconsideration of a decision and an application for the review of a matter (see, for example, the Australian Concise Oxford Dictionary, 2nd edition). Subsection 4(1) of the *Family Law Act*, a definition section, states that "appeal" includes an application for a rehearing. While this definition extends to the de novo hearing of an appeal from a decree of a court of summary jurisdiction (section 96(4)) it is not so described in relation to an appeal from an exercise of delegated power by

[9]Section 4(1). Definition of "Full Court".

a registrar or judicial registrar (sections 26C and 37A(9) and (10)). In that case, it is described as a "review".

Appeals from courts of summary jurisdiction

2.07 ***Power.*** Section 96 of the *Family Law Act* provides for appeals from the decrees of courts of summary jurisdiction to the Family Court or to the Supreme Court of a State or Territory. The Governor-General issued a proclamation pursuant to subsection 96(3) on 27 May 1976 ending appeals to the Supreme Courts of all jurisdictions other than Western Australia and the Northern Territory. All appeals from Magistrates Courts in the other States and the ACT go to the Family Court.

2.08 A "decree" is defined to mean a decree, judgment or order, including a decree *nisi* and an order dismissing an application or refusing to make a decree or order (Subsection 4(1)).

2.09 Appeals must be instituted not later than one month after the date on which the decree appealed from was made or within such further time as a Judge directs (Subsection 96(1A), Order 32 Rule 22(2)).

2.10 ***Procedure.*** Subsection 96(4) of the Act provides that a court hearing an appeal under this section must proceed by way of a hearing *de novo* . The court may, however, receive as evidence any record of evidence given, including any affidavit filed or exhibit received, in the court of summary jurisdiction.

2.11 A court hearing an appeal under section 96 may refer the appeal to a Full Court of the Family Court (Subsection 96(5))[10]. In such a case the Full Court may proceed by way of hearing *de novo*, order that questions of fact be tried by a Judge, determine questions of law arising in the proceedings and remit the appeal to a Judge for hearing in accordance with directions and make such other decrees as the Full Court considers appropriate (Subsection 96(6)).

2.12 ***Stay of proceedings.*** An appeal pursuant to section 96 of the Act does not operate as a stay of proceedings (Order 32, Rule 24). However, where such an appeal has been instituted the magistrate who made the decree or, if not available, a Judge of the Family Court (or Supreme Court) may make an order staying the operation of the decree until the appeal is decided.

2.13 ***Practice.*** An appeal under section 96 of the Act must be instituted by filing a notice of appeal in accordance with Form 43 (Order 32, Rule 22). Within two days of filing the notice of appeal the appellant must have served a sealed copy of the notice on each other party and filed a sealed copy in the court appealed from (Order 32, Rule 23). The rules require the Registrar of the court appealed from to send all the documents in his or her possession to the Registrar of the court in which

[10]This is a rare occurrence.

the appeal has been instituted as soon as practicable after the filing of a sealed copy of the notice of appeal (Order 32, Rule 25). In practice, however, the Family Court Registrar writes to the lower court advising that the appeal has been lodged and requesting the relevant file.

2.14 The Case Management Guidelines provide that appeals from courts of summary jurisdiction to the Family Court are to be referred to the Registry Manager and allocated a date for hearing within 4 weeks from the date of filing. The appeal is to be listed in a Registrars List on a day when a Judge is sitting in the Judicial Duty List.

Review of decisions of registrars

2.15 ***Power.*** A party to proceedings in which a registrar has exercised any of the powers of the court pursuant to a delegation under subsection 37A(1) of the *Family Law Act* may apply to the court to review that exercise of power (Subsection 37A(9)).

2.16 The party has 7 days after the day on which the registrar exercised the power to file an application for review of the registrar's decision (Order 36A Rule (5)(2)). The time limit for filing such an application may be extended by the court or a registrar or by the consent of all the parties to the proceedings (Order 36A Rule 6(2)).

2.17 ***Procedure.*** A court reviewing an exercise of power by a registrar is required to proceed by way of a hearing *de novo* , however the court may receive as evidence any affidavit or exhibit tendered before the Judicial Registrar, the transcript of the proceedings before the Judicial Registrar or, if a transcript is not available, an affidavit sworn by a person who was present at the hearing (Order36A Rule 7(4)). The court may, by leave, receive further evidence.

Review of decisions of judicial registrars

2.18 ***Power.*** The Family Court may, on application by a party to proceedings review the exercise of a power delegated to a Judicial Registrar and make such orders as it considers appropriate in relation to the matter in which the power was exercised (Subsections 26C(1) and (2)).

2.19 In the case of powers exercised by a Judicial Registrar, which are powers delegated to Registrars generally, a party has 7 days after the day on which the Judicial Registrar exercised the power in which to apply for review (Order 36A Rule 5(1)(a)). In the case of powers delegated only to Judicial Registrars parties have one month after the day on which the Judicial Registrar exercised the power in which to apply for review (Order 36A Rule 5(1)(b)). The prescribed times to apply for the review may be extended in any proceedings by the court or a Judicial Registrar or by

the consent of all the parties to those proceedings whether or not the time has expired (Order 36A Rule 6(1)).

2.20 The court may review the exercise of power delegated to a Judicial Registrar of its own motion (Subsection 26C(2)). No express time limits apply in these circumstances.

2.21 ***Procedure.*** A court reviewing an exercise of power by a Judicial Registrar is required to proceed by way of a hearing *de novo* , however the court may receive as evidence any affidavit or exhibit tendered before the Judicial Registrar, the transcript of the proceedings before the Judicial Registrar or, if a transcript is not available, an affidavit sworn by a person who was present at the hearing (Order36A Rule 7(4)). The court may, by leave, receive further evidence. The court may receive and have regard to the reasons for judgment given by the Judicial Registrar (*Parrot v Public Trustee of NSW* (1994) FLC 92-472).

2.22 It is important to mention that the appeal process is different for Judges hearing interim or interlocutory matters as opposed to judicial registrars. In such circumstances an appeal against a Judge's decision is heard by a Full Court, whereas an appeal against a judicial registrar's decision is reviewed before a single Judge.

2.23 ***Stay of proceedings.*** An application for review of an exercise of power by a Judicial Registrar does not operate as a stay but the Judicial Registrar who exercised the power, or if not available another Judicial Registrar or Judge, may make an order staying the exercise of the power until the application for review has been decided (Order 36A Rule 7(3A)).

2.24 ***Practice.*** An application for review of exercise of power by a Judicial Registrar may be made in accordance with Form 44 (Order 36A, Rule 7). A sealed copy of the application must be provided to each other party to the proceedings within 7 days after the application is filed in the court. Once filed the application is given a return date before a Registrar exercising delegated power pursuant to section 37A of the *Family Law Act* who then lists the matter for hearing before a Judge.

2.25 The Case Management Guidelines provide that applications for review of decisions made in urgent, interim or procedural matters are to be listed in the Registrars List on a day when a Judge is sitting in Judicial Duty List or is otherwise available to hear the matter. If the review is unable to proceed on that date, any necessary directions are to be made and the matter referred to the List Clerk for the allocation of a hearing date in the next available list. If an application for review of decision is made in a defended property matter or where the hearing of a review of a decision will take one day or more, the matter is to be referred to the Case Management Judge for allocation of a hearing.

Appeals to the Full Court

2.26 **Power** Section 94(1) of the *Family Law Act* provides that, subject to section 94AA, an appeal lies to a Full Court of the Family Court from a decree of the Family Court (usually constituted by a single Judge), a decree of a Family Court of a State exercising federal jurisdiction (only Western Australia has such a court) or a single Judge of a Supreme Court exercising family law jurisdiction (as previously noted, only the Western Australian and Northern Territory Supreme Courts retain such jurisdiction).

2.27 An appeal to a Full Court must be instituted not later than one month after the day on which the decree appealed from was made unless further time is allowed by a Judge of a court with jurisdiction under the Act (Subsection 94(1A); Order 32 Rule 2(2)).

2.28 Section 94AA provides that leave to appeal is required in respect of an interlocutory decree (other than one relating to a child welfare matter). Applications for leave must be determined by a Full Court. The section requires the Rules of Court to make provision for applications for leave to be dealt with without the necessity for an oral hearing. Reference should be made to the High Court decision in *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc*[11] The High Court held that it will normally be reluctant to review an interlocutory order concerning practice or procedure unless this results in a substantial injustice to a party. In *Rutherford and Rutherford*[12] the Full Court of the Family Court held that the principles expressed in *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* were to be applied in granting leave under section 94AA(1).

2.29 In addition to hearing appeals a Full Court may hear and determine questions of law pursuant to a case stated by a Judge of a court hearing proceedings which may be appealed from (Section 94A).

2.30 ***Procedure*** A hearing before the Full Court follows the same principles of appellate review as in other intermediate courts of appeal (*Mallet v Mallet* (1984) FLC 91-507).

2.31 When hearing an appeal the Full Court may affirm, reverse or vary the original decree or decision, or parts of it, and may make the decree or decision which it considers ought to have been made in the first instance or may order a re-hearing of the matter on such terms and conditions as it thinks appropriate (Section 94(2)). These powers are the equivalent of those of other intermediate courts of appeal. The Full Court must have regard to the evidence given in the proceedings from which the appeal arose. Applications may be made for the admission of fresh evidence, but this is not done as a matter of course (Subsection 93A(2); *Abdo v Abdo* (1990) FLC 92-013).

---

[11](1981) 148 CLR 170. See especially page 177.
[12](1991) FLC 92-255.

2.32 ***Stay of proceedings*** An appeal to the Full Court does not operate as a stay of proceedings (Order 32, rule 4). However, where an appeal has been instituted the Judge who made the decree appealed from, or if not available another Judge of the court in which the decree was made, may make an order staying the execution or operation of the decree wholly or in part until the appeal is determined.

2.33 ***Grounds of appeal*** The Family Law Rules do not place any restriction on the grounds of appeal that may be relied upon (see Order 32, Rule 2(3)(c)). That is consistent with all other superior courts of record in Australia. The leading authority regarding the principles for appellate review of discretionary judgments is *House v R* (1936) 55 CLR 499. The High Court has consistently adhered to the principles expressed in that case.

2.34 ***Practice*** Appeals in each region are coordinated by the regional appeal registrar. The content of the appeal papers is settled by the appeal registrar at a meeting with the legal representatives.

2.35 ***Appeal books*** The requirements as to the preparation of appeal papers are set out in Order 32, Rules 14 and 15. Subject to any direction of the Full Court, a single Judge or the appeal registrar the appeal papers must have a title page, an index and must be numbered consecutively (except for the pages of transcript which are not permitted to be renumbered). Appeal papers prepared pursuant to this rule are commonly referred to as the appeal book.

2.36 Subject to a contrary direction, the appeal papers must contain the documents listed in Order 32, Rule 14(4). They are: the notice of appeal, decree appealed from, any relevant subsequent decree, reasons for judgment, relevant pleadings, affidavits and other documents, any relevant report by a court counsellor or welfare officer which was received in evidence, relevant parts of the transcript, list of exhibits and, where practicable, each relevant exhibit or part thereof. In addition, appeal registrars sometimes direct that the list of documents relied on and chronology filed by each party at the trial be included in the appeal papers.

2.37 The appellant is generally responsible for preparing the appeal papers (Order 32, Rule 15(1)). However, if the appeal registrar is satisfied that it would impose hardship on the appellant for the appellant to be responsible for preparing the appeal papers, the appeal registrar may prepare the appeal papers or, if there is a cross appellant, order the cross appellant to do so (Order 32, Rule 15(2)). Assistance offered to unrepresented appellants by appeal registrars pursuant to this rule usually extends to help with the index and in obtaining copies of relevant documents from the court file.

2.38 The person who is responsible for preparing the appeal papers is required to file "the number of copies of the appeal papers that the appeal registrar directs" and to "serve two sealed copies on each other party to the appeal" (Order 32, Rule 15(3)). In practice, the appellant is almost always directed to file one copy for each

member of the bench and one for the court's appeal file, in addition to copies for the parties. If both parties consent, the appeal registrar may direct that only one copy need be provided to each party, thus reducing the usual number of books from 8 to 6. Using a sample of cases[13], the cost of printing/photocopying 8 copies of the appeal books was as follows:

	Cost of printing/photocopying	**Length of hearing**
Case A	$ 300.00	4 1/2 days
Case B	$1264.75	5 days
Case C	$ 459.68	4 days
Case D	$ 329.76	1 day
Case E	$ 771.58	6 days

2.39 In the Eastern Region, the appeal registrar usually directs the appellant to file and serve the appeal books 4 to 6 weeks prior to the hearing. In the Northern and Southern Regions and in Western Australia, the appeal is not usually listed until after the appeal books are filed.

2.40 If the appellant does not file the appeal books by the due date or otherwise does not meet a requirement of the Rules or show due diligence in proceeding with the appeal, the Full Court may dismiss the appeal for want of prosecution pursuant to Order 32, rule 18. Order 32, Rule 15(5) further provides that if an appellant who is responsible for filing and serving the appeal papers does not file and serve the appeal papers by the due date, the appeal is taken to be abandoned at the end of 28 days after the date by which the appeal papers should have been filed and served.

2.41 If a party does not agree with a decision of the appeal registrar, the party may apply to a Judge of the Appeal Division for a review of the appeal registrar's decision (Order 32, Rule 12(3)).

2.42 ***Transcript***[14] At the meeting to settle the index to the appeal papers, the appeal registrar is required to decide which parts of the transcript of the proceedings from which the appeal has arisen are relevant to the appeal (Order 32, Rule 12 (1)(a)). Subject to any direction by the Full Court or a single Judge, the relevant parts of that transcript must be included in the appeal books (Order 32, Rule 14). Current practice, in the overwhelming majority of cases, is to include the whole of the transcript of the proceedings before the trial Judge in the appeal books.

2.43 The Family Court Rules have recently been amended to emphasise that any irrelevant or unnecessary parts of the transcript are to be excluded from the appeal papers. The aim of the amendments is to focus the minds of the parties and

---

[13]Nine firms of solicitors in the Eastern Region who were known to have been involved in appeals in the previous 12 months were asked to provide details of the costs of transcripts. The figures given are from the 5 firms who responded.

[14]The normal procedure is for matters to be recorded and a transcript made if required. Eight copies of the transcript are photocopied for the appeal book.

the appeal registrar on whether the complete transcript is necessary, with a view to cutting down the length of appeal books and the cost to the appellant. The amendments also provide that a party who disagrees with the appeal registrar's decision, concerning, *inter alia*, what transcript is to be included in the appeal papers, may apply to a Judge of the Appeal Division for a review of that decision. It remains to be seen whether these changes will have any significant practical effect. The reasons for this are twofold: first, because the appeal book index is almost invariably settled without the benefit of the transcript and second, because most appeals involve grounds relating to the exercise of discretion and both parties usually insist that the whole of the transcript is relevant.

2.44 The appellant is required to obtain the original or a copy of the relevant parts of the transcript unless the appeal registrar directs any cross-appellant to do so (Order 32, Rule 13). In practice, it is highly unlikely that a cross-appellant would be directed to do so.

2.45 The transcript is only obtainable through the Commonwealth's reporting service, Auscript, at a current cost of $7.00 per page on a 5 day turnaround. Parties cannot purchase or borrow the tape of proceedings from Auscript. It is understood that Auscript's policy in relation to permitting parties to listen to the tape differs to some extent between Auscript offices. In Sydney, for example, a party is only permitted to listen to the tape in "exceptional circumstances" whereas in Brisbane the policy appears to be more relaxed. A small sample of transcript costs in recent appeals in the Family Court's Eastern Region is as follows:

	Cost of transcript	**Length of hearing**
Case A	$2044.00	4 1/2 days
Case B	$2274.00	5 days
Case C	$2509.00	4 days
Case D	$1155.00	1 day
Case E	$3360.00	6 days

2.46 Under its current agreement with Auscript, the cost to the court of purchasing transcript is slightly more than it is to litigants, being currently $7.70 per page for the first copy. Additional copies are generally cheaper. If the court has already obtained the transcript for its own purposes, it can be made available to the appellant for the cost of photocopying. However, it is understood that most trial Judges seldom order the transcript. The court is under no obligation by the Rules to provide transcripts and is not funded to do so[15]. However, Council is advised that in a small number of "hardship" cases the court has obtained the transcript and made it available.

---

[15]See *Zabaneh* (1991) FLC 92-239. The views expressed by Joske J in that case that the Family Court has no obligation under the rules to provide transcripts and is not funded to do so, have been supported on several occasions by the Full Court of the Family Court.

2.47 ***Hearing dates*** The practice with respect to the setting of hearing dates differs between the Eastern Region on the one hand and the Northern and Southern Regions on the other. In the Eastern Region parties are usually given a specific hearing date on the day the appeal book index is settled. In the Northern and Southern regions[16], parties are given an indication of which sittings they will be in and they are not given a specific date until the appeal book is filed and the list is settled for the sittings week. This means that the parties are usually advised of the specific date approximately 4 to 6 weeks prior to the sittings.

2.48 ***Amendment of notice of appeal*** Order 32, Rule 6(2) provides that an appellant may not amend a notice of appeal later than 7 days before the day listed for hearing the appeal except by leave. However, amendment of the notice of appeal may be allowed by leave of the Full Court provided that the respondent has been given reasonable notice of the amendment.

2.49 ***Filing and serving documents*** The appeal registrar supervises the lodgement of documents required under the Practice Directions such as the summary of submissions, list of authorities, and optional chronology. These documents are required to be lodged 5 clear working days prior to the hearing in the case of the appellant and 2 clear working days prior to the hearing in the case of the respondent.

2.50 ***Conduct of sittings*** The sittings are generally conducted as a rolling list[17].

Practice Directions and Case Management Guidelines

2.51 The court issues Practice Directions and Case Management Guidelines to assist appellants and their legal representatives. Practice Direction No. 6 of 1990, as amended by Practice Direction 1995/1 of 1 March 1995, set out guidelines in relation to appeal procedures generally, the preparation of summaries of argument, the operation of the *Federal Proceedings (Costs) Act 1981* and the provision of transcripts.

2.52 The Case Management Guidelines issued by the court also contain principles and procedures in relation to the appeal system. In particular, chapter 14 of the Guidelines relates to review and appeals, including the procedures for appeal to the Full Court.

Appeals to the High Court

[16]The practice in the Family Court of WA is the same as in the Northern and Southern Regions of the Family Court of Australia.

[17]The practice in all registries is to give specific dates for each appeal.

2.53 An appeal to the High Court from any decree of a court exercising jurisdiction under the Family Law Act is only allowed by special leave of the High Court or upon a certificate by a Full Court of the Family Court that an important question of law or public interest is involved (Section 95). Appeals to the High Court usually proceed by way of special leave rather than certificate of a Full Court. The High Court has advised that the number of family law appeals that proceeded to that court over the past three financial years were 1992-93 (0); 1993-94 (2); and 1994-95 (0).

2.54 The number of applications for special leave to appeal to the High Court are given in Table 8 at paragraph 4.13 of this report.

Federal Proceedings (Costs) Act 1981

2.55 The *Federal Proceedings (Costs) Act 1981* provides for partial or complete reimbursement of the costs of appeals in courts exercising federal jurisdiction including the Family Court. In the family law appeals context the Act covers:

- appeals to the High Court from the Family Court (including any subsequent appeals to the Full Court from a judgment of a single Justice of the High Court);

- an appeal to a Full Court of the Family Court from the Family Court; and

- an appeal to the Family Court from a judgment of a State or Territory court or a Norfolk Island court.

2.56 The Act provides that in certain circumstances parties may apply to a court for a costs certificate. A costs certificate is a certificate which states that, in the opinion of the court, it would be appropriate for the Attorney-General to authorise a payment, irrespective of the costs incurred by the appellant or the respondent. The nature of the costs which may be certified depend upon the nature of the proceedings. The jurisdiction conferred on a court to grant costs certificates may be exercised by a member of the court sitting in chambers. Once a person has been granted a costs certificate they may apply to the Attorney-General for reimbursement of those costs. The amount of any costs incurred by a person will be an amount agreed between the Attorney-General and the person granted the costs certificate, an amount assessed by an officer of the court or the amount specified in, or ascertained in accordance with, an order of the court.

2.57 The *Federal Proceedings (Costs) Act* only applies in relation to errors of law and it is clear, therefore, that certificates are not available where the sole ground of the appeal is that the trial Judge mistook the facts.

2.58 A costs certificate may be granted in relation to the whole or part of the costs incurred by a person in the following circumstances[18]:

- where an appeal succeeds on a question of law the court may grant a costs certificate to the respondent in respect of his or her costs and any costs incurred by the appellant which the respondent is required to pay by order of court (Section 6(1));

- where an appeal succeeds in relation to an amount of damages the court may grant a costs certificate to the respondent in respect of his or her costs and any costs incurred by the appellant which the respondent is required to pay by order of court (Section 6(2));

- where the respondent would be entitled to apply for a costs certificate pursuant to subsections 6(1) and (2) in respect of costs incurred by the appellant the court may, in certain circumstances, grant the appellant a costs certificate in respect of the costs incurred by the appellant in relation to the appeal (Section 7(1));

- where an appeal succeeds on a question of law and there is no respondent to the appeal the court may grant a costs certificate to the appellant in respect of the costs incurred by the appellant in relation to the appeal (Section 7A(1));

- where an appeal succeeds on a question of law and a new trial is ordered the court may grant a costs certificate to a party with respect to any costs incurred by the party in relation to the new trial (Section 8(1));

- where an appeal against a conviction succeeds on a question of law and a new trial is granted the court may grant a costs certificate to the accused person with respect to any costs incurred by the accused in relation to the new trial (Section 8(2));

- where a family law appeal succeeds on a question of law and each party bears his or her own costs in accordance with section 117 of the *Family Law Act* the court may grant the appellant a costs certificate in respect of his or her costs (Section 9(1));

- where any proceedings are aborted because a Judge or a magistrate involved dies, resigns, or is removed or dismissed from, his or her office, suffers a protracted illness or otherwise becomes unable to continue with, or give judgment in, the proceedings, the court may grant a cost certificate to a party with respect to those proceedings (Section 10(2)); and

[18]Not all of the provisions listed relate to Family Court Appeals.

- where the hearing of any proceedings is discontinued and a new hearing ordered other than by the neglect, default or improper act of any party to the proceedings, the court may grant a cost certificate to a party with respect to the cost of those proceedings (Section 10(3)).

2.59 The Attorney-General cannot authorise payment of an amount for an appeal or a new trial that exceeds the maximum amounts prescribed in the Schedule to the Act. The maximum amounts currently payable[19] under the *Federal Proceedings (Costs) Act* are:

Court	**Maximum amount**
High Court	$10,000.00
Federal Court	$ 6.000.00
Supreme Court of a Territory	$ 6,000.00
Family Court	$ 4,000.00

2.60 The Attorney-General's Department is currently giving consideration to whether the adequacy of these amounts should be reviewed.

Australian Law Reform Commission proposals on litigation costs

2.61 Council has noted the Australian Law Reform Commission (ALRC) Draft Recommendations Paper 1 *Litigation Cost Rules* (June 1995) and ALRC Report No 75 *Costs shifting - who pays for litigation* (1995). ALRC Report No 75 contains the following recommendations (Recommendations 21 and 22) in relation to family law appeals:

> **Recommendation 21** Each party to the appeal in family law proceedings shall bear his or her own costs subject to
>
> - a disciplinary or case management costs order
> - a public interests costs order
> - an order for costs in favour of a party where the court is satisfied that the order is necessary to permit that party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties, including whether either party is in receipt of legal aid or another form of assistance, and the likely costs of the proceedings to each party
> - the appeal succeeding on a ground not raised at first instance that could and should have been raised at that time.

[19]These amounts are current at June 1996.

Recommendation 22 If a court finds that the appeal succeeded on a ground not raised at first instance, the court may make such orders as to the costs of the appeal as it considers just. The orders the court may make include an order that the successful party pay all or part of the unsuccessful party's costs of the appeal.

An order under this provision will be subject to the court's powers to make disciplinary costs orders.

2.62 In considering whether to make a costs order, the Full Court of the Family Court currently applies the same section of the Act as is applied at first instance[20], although there are obvious differences in the application of those provisions. For instance, an appeal court will often take into account the fact that an appeal is an optional procedure which a party may take. The fundamental aim of the common law is trial at first instance. A view often taken by the Full Court of the Family Court is that a party who takes the additional step of appeal involves the other party in substantial additional costs and this is a very relevant factor. This is particularly so if the appellant is not successful in the appeal.

2.63 In recent times the court has often taken the view, particularly in appeals relating to property, that if the appeal is unsuccessful the other party should receive a costs order. The costs of appeal can be quite substantial. The court, among other factors, also takes into account the respective financial circumstances of the parties.

2.64 ***Conclusion.*** Council does not agree with the proposals in ALRC Report No 75. In Council's view, the existing provisions in relation to costs are as fair as might be expected and there do not appear to be any strong reasons for changing the existing provisions.

[20]Subsections 117(1), (2) and (2A) of the *Family Law Act 1975*.

3: CONSULTATION

3.01 The Committee sent consultation letters on 13 April 1995 to the Chief Justice of the Family Court of Australia, the Chief Judge of the Family Court of Western Australia, the Presidents of all Law Societies and Bar Associations and the Chairpersons of various Family Law Practitioners Associations. The letter was also sent to the Legal Aid Commissions' Family Law Strategy Group for comment.

3.02 An examination of responses indicated that little information was received about appeals from the decisions of State and Territory magistrates. Accordingly, the Committee sent a consultation letter to the Chief Magistrates in each jurisdiction on 14 June 1995 seeking the Chief Magistrates' views on issues relating to appeals from magistrates to the Family Court and requesting details of any available statistics on such appeals.

3.03 The consultation letters identified the following issues as being of particular interest to the Committee:

- Is the present system providing appeals at a reasonable cost and in a reasonable time?

- Should there be some sort of conciliation or mediation procedure prior to the appeal being heard?

- Is the present timetable for filing a notice of appeal and written submissions appropriate?

- Should there be changes to the preparation of the appeal book?

- Should there be changes to the approach of how a transcript can be used and its cost?

- Are there any particular problems with appeals from magistrates or local courts or appeals heard by way of hearing de novo?

Summary of responses

3.04 In general, while acknowledging that the present appeals system was by no means perfect, respondents expressed a high degree of satisfaction with it.

3.05 The Queensland Bar Association expressed concern at the possibility of any "remodelling" of the existing system:

"The Association is clear that an appeal process including the law, the statute and the procedures should be regarded as an exclusive area and should not be remodelled simply as a result of expediency associated with changes in trial procedures. For this reason our Association queries the involvement of the Council in a system which it sees working satisfactorily which system could be drawn to the attention of the Chief Justice's Consultative Committee and/or the rules committee."

3.06 Criticisms of the existing system tended to be restricted to costs, particularly costs of transcript, delays, some specific procedures and some other matters. For example, n his submission, the Chief Magistrate of the Local Courts of New South Wales commented that:

"...almost all appeals from decisions of Magistrates [other than some brought under the Child Support legislation] proceed as of right and by way of hearing de novo. Nobody ...would maintain that hearings in the Family Court of Australia are provided at reasonable cost or within a reasonable time frame. It is precisely because many litigants cannot afford the expense of Family Court proceedings or cannot tolerate the delays involved in that court that a substantial number of people choose to litigate their family law matters, particularly those relating to the welfare and custody of, and access to, children, in the Local Courts.

3.07 The questions of costs and delays, and other relevant matters are further discussed below.

Costs

3.08 ***Appeal books*** Some respondents commented about the general cost of preparing appeal books. For example, the Family Law Practitioners Association of Tasmania commented:

"Preparation of the Appeal Books and the copying involved is ... an expensive exercise usually amounting to several hundred dollars. It is suggested that the appellant provide one appeal book and the court provide the 8 other copies by utilisation of its existing facilities."

3.09 A similar point was made by the Family Law Section of the Law Council of Australia which suggested that:

"In the interest of overall efficiency it may even be appropriate for all appeal books to be produced by the court. There could be a unit in the court set up with the latest technology to produce appeal books quickly, efficiently and cheaply. Such a facility would cost the Family Court relatively little but would make an enormous contribution towards assisting the appeal process."

3.10 ***Transcripts.*** The predominant concern raised by respondents in relation to the cost of appeals was the cost associated with transcripts. The majority

of submissions suggested that the cost of transcripts was "prohibitive". The Family Law Committee of the Law Society of New South Wales, for example, commented:

> *"One of the most significant costs in an appeal is the cost of the transcript and this seriously needs to be addressed as a matter of urgency. The cost of a transcript together with the $500 filing fee for an appeal can often be prohibitive even in situations where solicitor and counsel are prepared to carry their own costs; they cannot be expected to carry these significant disbursements as well."*

3.11 Furthermore, the Family Law Section of the Law Council of Australia stated:

> *"The cost of transcript is the cost element which is of the most concern to litigants. The recent practice direction as to only including those portions of the transcript which are necessary for the proper conduct of the appeal is a laudable attempt to reduce costs, but the majority of appeals are such that it is not possible to limit the amount of transcript required. What should be addressed is how the actual cost of the transcript can be reduced. It surely is not beyond the Family Court to negotiate with the current transcript provider to provide a cheaper service. There are examples in State court systems of transcripts being available at less cost than in the Family Court. Thus, it is not acceptable for the court to simply say that nothing can be done about the cost of transcript. Surely, the court is there to provide an accessible system of justice, and for a litigant to not be able to launch an appeal because of the prohibitive cost of the transcript is simply not acceptable."*

3.12 The Bar Association of Queensland made some specific comments about the role of Auscript in the provision of transcript:

> *"As a general overview, it is the view of our association that the monopoly in the Family Court of Auscript is inappropriate. It is this monopoly which in our view has enabled them to charge an outrageous page rate for the provision of transcripts. There is no criticism by our members of the efficiency of Auscript. If they are to retain this monopoly however it is our view that there must be pressure brought upon them to change their methodology so as to enable discs of proceedings to be available in lieu of the written text."*

3.13 The cost of transcripts was regarded by many respondents as a serious obstruction to justice. The Family Law Committee of the New South Wales Bar Council stated:

> *"The most frequent complaint is in relation to the cost of transcript. Many litigants find that it is at such a level that rights on appeal cannot be exercised. This sometimes causes injustice and represents an unacceptable inhibition of the fundamental right of every citizen to have access to the court. The theoretical right is there but the practicalities for many people are such that by dint of economic management suited to the commercial world, the reality is quite different to theory."*

3.14 The New South Wales Bar Council noted that the prohibitive cost of transcript raised particular concern in relation to the review of decisions of judicial registrars *"which must be capable of review by a Judge to give the exercise of such powers a constitutional basis (Harris v Caladine (1990) FLC 92-130)."* The Bar Council recommended that:

> *"(a) A disc which recorded the evidence be made available to each litigant's legal representative for the purpose of transcription.*
>
> *(b) Or, transcript be made available without cost as was the case for many years.*
>
> *(c) The transcript fee be waived upon a means test being met or otherwise to enable application for the same to be paid by instalments free of interest."*

3.15 ***Filing fee*** Some respondents singled out the filing fee as a particular costs issue. For example the Family Law Practitioners Association of Tasmania expressed the view that the "most direct reduction of costs would be abolition of the $500 filing fee".

3.16 In general, however, the filing fee seemed to be regarded as a secondary issue to that of the costs associated with production of the appeal book and transcript.

3.17 ***Federal Proceedings (Costs) Act*** There was strong support for an increase in the amount available for family law appeals under the *Federal Proceedings (Costs) Act 1981*.

3.18 The Family Law Practitioners Association of Tasmania stated that the *Federal Proceedings (Costs) Act 1981* "...would provide a more realistic indemnity should it include all the costs of appeal."

3.19 The Family Law Committee of the Law Society of New South Wales stated:

> *"If an appeal is successful the court may issue the equivalent of a Suitors Fund Certificate under the Federal Proceedings (Costs) Act 1981, s.9. This entitles the party to be reimbursed for costs incurred in the proceedings. This is up to a maximum of $4,000.00.*
>
> *Under the New South Wales Suitors Fund Act, 1951, the maximum amount payable (pursuant to an equivalent certificate under s.6 of that Act) is $10.000.00. The costs of an appeal are likely to be greater than $10,000.00. The maximum payable under the Federal Proceedings (Costs) Act should be increased to at least $10,000.00, given that the cost of the appeal is in the vicinity of $15,000.00 to $25,000.00 (or greater in some cases). Successful parties should be entitled to expect to recoup some of these costs."*

3.20 The New South Wales Bar Council said:

"The prescribed maximum amount payable of $4,000.00 pursuant to the Federal Proceedings (Costs) Act 1981 should be increased to $6,000.00 for the following reasons:-

(i) Federal Court proceedings attract $6,000.00.
(ii) The Family Court is a federal court being a superior court of record.
(iii) The complexity of appeals is no different.
(iv) The cost of appeal books is often $2,000.00 or more.
(v) The successful litigant is often out of pocket under the current limit of $4,000.00."

Delays in hearing appeals and reviews

3.21 There were some differences in the comments made to the Committee concerning delay, which may reflect differences between jurisdictions. For example, one respondent[21] stated:

"The system fails in relation to appeals being heard in a reasonable time. It is often the more entrenched cases that proceed to an appeal and the possible prejudice to one or either party because of delays in the hearing of the appeals is causing difficulties.

One such difficulty is the perception of the lack of justice provided by the courts in causing the delay in the appeal. There are numerous cases whereby the appeal becomes a nonsense because circumstances have arisen pursuant to the judgment thus nullifying the grounds of appeal. This assumes that the appellant has been unsuccessful in relation to a stay pending appeal. Stay proceedings are considered by appellants particularly those appearing in person to be extremely prejudicial due to the fact that they are ordinarily heard by the trial Judge."

3.22 On the other hand, the Law Society of Western Australia stated that the *"present system provides a reasonable time frame for the hearing of Appeals..."*. This view was supported by the Chief Judge of the Family Court of Western Australia, Justice McCall, who noted that although there was an occasional problem about the time that a litigant has to wait for an appeal to be heard, in general the arrangement of twice yearly visits by the Appeal Court to Western Australia appeared to be working satisfactorily.

3.23 The Family Law Committee of the Law Society of New South Wales also expressed the view that appeals were being provided within a reasonable time while several other submissions made no comment on the issue at all.

3.24 ***Delays in issuing reasons for judgment*** The Family Law Committee of the Law Society of New South Wales noted that "*the delay frequently experienced in obtaining a copy of the reasons for judgment*" added unnecessarily to costs as it

[21]Submission from Ms Caroline Counsel of Coltmans Solicitors in Melbourne.

frequently resulted in the need to amend the grounds specified in the notice of appeal. The Committee offered two possible solutions to this problem. Firstly, it suggested that time for filing a notice of appeal, including grounds, should run from the time of publication of the Judge's written reasons for judgment. Secondly, in the alternative, grounds of appeal should not be required to be specified at the time of filing the notice of appeal.

3.25 It was of interest that no other written submissions specifically raised the issue of delays in issuing reasons for judgment.

3.26 ***Delay in appeals from courts of summary jurisdiction*** The New South Wales Bar Council made the following relevant comment:

> "*The current practice* [in relation to appeals from courts of summary jurisdiction] *is satisfactory and apart from the question of Counsel's convenience with short notice, the present system seems to be giving such matters a fast track form of priority.*"

Conciliation or mediation

3.27 The general consensus of opinion among respondents appears to be that conciliation and mediation processes would not serve a useful purpose at the appeal stage. The main reasons for this view are that the parties are likely to be entrenched in their positions by the appeal stage, the case may raise issues which warrant judicial consideration, the decision being appealed from is a decision of a judicial officer, a conciliation or mediation process may detract from the enforceability of the decree, negotiations among the litigants and their legal representatives have already taken place and this process operates satisfactorily and a formal conciliation or mediation process would impose extra cost on the parties and impose a significant burden upon court personnel.

3.28 Some respondents reserved their opinion or expressed some limited support for conciliation or mediation procedures. The Law Society of Western Australia, for example, expressed doubt about whether such processes would be of use but stated that it wished to "*reserve judgment pending any information following from* [the Conciliation Conferences conducted in] *the Sydney Registry*". The Family Law Committee of the Law Society of New South Wales also expressed doubt about the general usefulness of conciliation or mediation procedures at the appeal stage but suggested that conciliation may have some merit in proceedings where one party is unrepresented. Finally, the Chief Judge of the Family Court of Western Australia indicated that there may be a small number of cases in which a conciliation or mediation procedure would be useful.

3.29 The Family Law Section of the Law Council of Australia, however, differed from other respondents on this issue. It stated:

"We consider that there should be a compulsory conciliation conference in all appeals in between the lodging of a Notice of Appeal and the settling of the index to the appeal book. The current practice direction only refers to appeals instituted in the Eastern Region.

If the question of Registrar's time and resources is an issue in this exercise then the conference could even be combined with the appointment for the settling of the index to the appeal book.

There are often matters arising from judgments which are capable of being resolved by negotiation. One would not expect that there would be a rate of successful outcomes of such conferences as high as there is for pre-hearing conciliation conferences, but we consider that it would be a useful exercise, not only to attempt to settle the issues, but at least to limit those issues and could result inter alia in less of the transcript needing to be obtained.

Mediation could also be useful in appeals, but we do not consider that it should be required in each case, as we are suggesting a conciliation conference should be."

3.30 These submissions seem to reflect the general attitude of the profession to mediation at the appeal stage and their continued hesitancy about its usefulness.

Procedural matters

3.31 ***Service of Notice of Appeal*** The Legal Aid Office (Queensland) raised an issue concerning the Service of Notice of Appeal in relation to appeals from courts of summary jurisdiction. The submission notes that Order 32 Rule 23 gives only 2 days after filing a Notice of Appeal from Court of Summary Jurisdiction (Form 43) within which to serve a sealed copy of the Notice on each other party and in the court appealed from. There is apparently no provision for a court to extend this time other than the general provision for extensions of time in Order 3 Rule 3. The submission notes that by comparison, under Order 33 Rule 3, a Notice of Appeal to Full Court (Form 42) is to be served not later than 14 days after instituting the appeal. The submission states that the present time limit can be extremely onerous and expensive to the appellant as there may be additional expense associated with urgent service and additional cost if it is necessary to seek an extension of time. It is pointed out that the rules should not place the appellant, nor the appellant's solicitors, in the situation of manipulating the filing day to take advantage of the weekend closure of the court registry to be able to serve and file the Notice within the time allowed.

Preparation of appeal books

3.32 ***Electronic storage*** A number of submissions suggested electronic storage of appeal books. The Family Law Committee of the Law Society of New South Wales said:

"It is suggested that, to provide wider access and to save costs, urgent work should be undertaken to electronically store the appeal book with the ability to print out a hard copy on demand. Much time and expense is presently spent on preparing these volumes and, in many cases, large parts of the this material are simply not referred to on the appeal."

3.33 Similarly, the Law Society of Western Australia stated that:

"The Law Society considers that benefits would flow from the production of Appeal Books by way of computer disk."

3.34 ***Content*** Several submissions commented that appeal books often contain "unnecessary material". However, there was some disagreement as to how this problem could be overcome. For example, the New South Wales Bar Council said:

"Closer supervision is required by an experienced Registrar as often inexperienced practitioners seek to include such [unnecessary] *material "for more abundant caution". This causes unnecessary further legal costs and time which must be spent by members of the court and the parties' legal representatives in perusal of the appeal books prior to the hearing."*

3.35 The Queensland Bar Association agreed about the frequent inclusion of unnecessary material in appeal books stating:

"There is, in our view, far too little attention paid to the contents of the appeal books. Their preparation is proving an enormous expense to appellants and where orders for costs are made, there is, in our experience, little review of the extent to which the appeal book was relevant and in most cases the total cost of preparation is included in any party and party taxation.

3.36 In addition, the Association went on to say:

"It is obvious to our members that the appointment anticipated by [Order 32] *Rule 10, the index contemplated by Rule 11, the settling of the index pursuant to Rule 12 and Rule 13 need urgent reconsideration.*

1. We consider that at no time should the appeal registrar dictate to either party what should or should not constitute a content of the appeal book.

2. On this premise we do not consider it necessary that there be an appointment at the Registry to settle an index.

3. Given what we intend to suggest in relation to an outline of argument, we suggest that an appellant deliver to a respondent a draft index at the time that an outline of argument is delivered and filed.

4. We suggest that as the appellant has the carriage of an appeal, and bears the onus, the primary responsibility for the completeness of the appeal book should lie upon the litigant, bearing in mind then, the need to anticipate the respondent's argument,

5. A respondent should have the opportunity to take issue with the contents of the appeal book and in that event the appellant should accede to any request from a respondent, as he would be protected upon the question of costs when the indexes are brought to the attention of the court or the taxing officer at a later time.

6. The same regime should, in our view, exist in relation to the transcript. It is the view of some of our members that the appeal Registrar's involvement to date, has necessitated that the inclusion of parts of the transcript which are entirely unnecessary to any argument based upon the grounds of appeal alleged. Again the onus must rest upon an appellant and an argument in relation to the costs may result from a request from a respondent to include parts of a transcript that are later proved to be unnecessary."

3.37 ***Page numbering*** The New South Wales Bar Council expressed particular concern about the numbering of pages of the appeal book, saying:

"Particular attention should be paid to ensuring that each page of each appeal book, should be numbered clearly on the top right hand corner regardless of the material it contains. It has become a common practice for transcript not to be so numbered and the same applies in relation to copies of Exhibits. Not all transcript over more than one day is numbered consecutively eg.. 2 or more days are sometimes numbered from page 1 onwards. In addition so far as copies of Exhibits are concerned, they are sometimes given the designation - E"1" - or some other number, with or without the reference to the Exhibit designation that it had at the trial. These matters can all be overcome by ensuring that each page is paginated in consecutive numbers regardless of whether the page contains affidavit material, transcript or details of an Exhibit."

Hearings *de novo*

3.38 As previously noted, the Appeals Committee expressly requested comment on appeals from magistrates or local courts or other reviews by way of hearing *de novo*.

3.39 ***Procedural issues*** The Queensland Bar Association noted that there appears to be a misunderstanding of the nature of a hearing *de novo* within the profession. The Association stated:

"It is the practice, in the view of our members, that evidence received at first instance is in the majority of cases relied upon in toto upon the hearing de novo. In a significant number of appeals and reviews of this type the reasons for judgment given at first instance and the orders made, are available to the Judge hearing the appeal or conducting the review."

3.40 However, the Association went on to say:

> *"It is not our view that such appeals or reviews are used improperly nor is it the view of our members that they seriously impede the progress of matters at first instance whether in the pending cases list or in the duty list."*

3.41 The Law Society of Western Australia, however, took a different view saying:

> *"The Law Society considers that the procedure of appealing by way of a hearing de novo has been abused. There are many examples where inadequate preparation for the initial hearing is rectified simply by appealing and obtaining a hearing de novo. It is accepted that should Appeals from Magistrates or Local Courts proceed by formal Appeal with the production of Appeal Books, there would be a dramatic increase in the hearing time and costs of such Appeals. The Law Society does not wish to see the cost of Appeals from Magistrates or Local Courts become prohibitive, however, point out to the Committee that there are many examples of abuse of the right to a hearing de novo."*

3.42 The Family Law Committee of the Law Society of New South Wales noted that there is a tendency for Registrars to require the ordering of transcript by the appellant notwithstanding that it is an appeal by way of hearing *de novo*. The Committee said:

> *"No transcript should be required by the court of proceedings before a magistrate. If a party needs part of a transcript for some evidentiary purpose on rehearing then that is a matter for that party."*

3.43 ***Appeals from courts of summary jurisdiction*** The Queensland Bar Association expressed the view that appeals from courts of summary jurisdiction "*must be by way of hearing de novo and we agree with the amendment made in 1988 to provide for this*". The Association went on to say:

> *"If asked to do so, our Association will support the removal of power of courts of summary jurisdiction and the abolition of the office of Registrar and Judicial Registrar contemporaneous with the appointment of Federal Magistrates. It is hoped that as a result of this, all appeals will then be in terms of sections 94 and 94AA."*

3.44 However, a different view was expressed by both the Chief Judge of the Family Court of Western Australia, the Hon Justice McCall, and the Chief Magistrate of the Local Courts of New South Wales, Mr I H Pike. Justice McCall stated:

> *"It has always been the view in Western Australia that appeals from Magistrates should be by way of re-hearing and not be heard de novo. The original Family Law Act did not provide for such appeals to be heard de novo and this provision, I think, was introduced by amendment No. 63/76.*

I understand that the amendment was made to the way in which appeals were heard because in some of the courts of summary jurisdiction, there was no transcript available of the proceedings before the Magistrate, with the result that there was no evidence to place before the appeal Judge. This was not the case in Western Australia as from the beginning, proceedings were recorded and a transcript of the proceedings was available.

To provide that appeals should be by way of a hearing de novo, simply gives the party who is disappointed with the Magistrate's decision, a chance to have the whole matter re-heard from the beginning. In other words, the party has a second bite at the cherry. This is time consuming and enables a party to rectify any errors in the presentation of the case the first time, to see if a different result could then be obtained from a Judge. There would seem to be no justification for having this procedure. I believe (although I do not speak authoritatively)) (sic) that transcripts of proceedings before Magistrates is now available in all States, in which case there seems no justification for continuing with a procedure providing for an appeal to be heard de novo. Our view is that these appeals should not be any different to other appeals where it is incumbent on the appellant to show that the Magistrate was wrong in fact or in law. Accordingly, we would support a change in the procedure of the hearing of appeals from Magistrates which would revert to the position which was provided in the original Family Law Act."

3.45 Mr Pike, adopting the comments of Magistrate Scott Mitchell (who presides exclusively in family matters), said:

"Section 63D provides that the consent of both parties is required before a Magistrate may hear and determine custody/access proceedings to the stage of making "final orders". I would not want to change that but I would argue that, where the parties have given their consent and the matter has been heard and determined by a Magistrate on a "final" basis, it is unfair to the successful party, extravagant of the financial resources of the parties and a waste to judicial resources to allow an appeal as of right and to proceed by way of hearing de novo as Sections 96[1] and [4] presently provide. I would submit that appeals from Magistrates should lie to single Judge of the Family Court of Australia but only with leave and I think that Section 96[1] should be amended in that regard. I think that it should be necessary, in order to appeal from the decision of a Magistrate to whose jurisdiction each party has consented, to demonstrate that there is some reasonable and proper basis of the appeal other than a desire to "have another bite at the cherry" and I think that Section 96[4] should be amended so as to abolish the hearing de novo as the mode of appeal so that, if leave to appeal be granted, it is necessary that the appellant then demonstrate on the hearing of the appeal that the Magistrate erred in fact or in law so as to justify the appeal being upheld and the Magistrate's order being reversed.

The constitutional difficulties attaching to Judicial Registrars do not apply to Magistrates and there is no constitutional impediment to providing for appeals in this way. If it be suggested that matters of child custody/access are "too difficult" for Magistrates, I would respond by pointing out that it is Magistrates, and chiefly specialist Magistrates, who exercise the care jurisdiction under the child welfare legislation and that Magistrates daily confront a great deal of other extremely complex,

sensitive and taxing legislation and I would point out too that, under my proposals, only those who consent to the Magistrate's jurisdiction would be affected. I would point out that under my proposals, there would still be the sort of close judicial supervision by the Family Court as is provided by the Supreme Court in its function of supervising courts of summary jurisdiction. It does seem to me, though, that ordinary citizens who find themselves in dispute in relation to their children are entitled, if they so wish, to have those disputes determined speedily and relatively inexpensively in the Magistrate's courts, yet with the availability of counselling and conciliation services as are already provided to the local court [Family Matters] and with a proper degree of judicial supervision by a Judge of the Family Court pursuant to a proper but not profligate appeal system. At present, I think that Section 96 of the Family Law Act frustrates that entitlement."

3.46 The Family Law Section of the Law Council of Australia noted that there were some problems with reviews of the exercise of power by Judicial Registrars. It said:

"There is no doubt that there is an unnecessary cost to litigants for there to be a review, given that it is a hearing do novo and it makes the initial hearing pointless, but the court also seems to have a general policy that reviews will be hard to obtain. In some Registries reviews are only set down on a particular day every second month, and there is no proper provision for urgent hearings. It can often be a tortuous exercise to convince a Registrar that a review is urgent and that it should be heard on some other day than the day allocated for all reviews. The subject matter of some reviews is such that any delay can render the review pointless, yet the above mentioned listing policy makes it difficult to obtain an expeditious review of a Judicial Registrar's decision."

3.47 The Family Law Section went on to note that one effect of the delay was to increase costs because further evidence was required of changed circumstances or facts which had arisen since the earlier hearing.

3.48 The Queensland Bar Association noted its support for the abolition of de novo review in the context of the appointment of Federal Magistrates.

Other matters

3.49 In addition to the issues raised by the Committee, several other matters were raised by respondents.

3.50 ***Litigants in person*** The Bar Association of Queensland expressed the view that a more precise definition of the nature of an appeal from a final decree of a Judge "*...would provide some guidance that might reduce the large number of appeals brought particularly by litigants in person, entirely without merit and with no regard to the law applicable to such appeals*." The Bar Association suggests that the legislation provide "*...that an appeal from a final decree might only be brought where it was alleged that a Judge had exercised his discretion on a wrong principle or not at all or that there had*

been a miscarriage of justice." The Bar Association proposes consistent changes to Order 32, rule 2(3)(c) concerning the requirements for a notice of appeal to the Full Court.

3.51 ***Outlines of argument*** The Bar Association of Queensland proposed that the parties should be required to prepare, lodge and serve written outlines of the arguments on which they propose to rely. The Association said:

> *"It is our view that in most appeals grounds of appeal alleged in a notice of appeal are frequently abandoned and/or notices of appeal are amended.*
>
> *We are cognisant of Practice Direction No. 6 of 1990 which we consider respectfully, needs reconsideration.*[22]
>
> *We consider that if there was a requirement that within 28 days of the filing of a notice of appeal, an appellant lodged with the court a written outline of argument and served this on a respondent, and within 14 days of that date the respondent did likewise to the appellant, that the appeal books would, as a consequence be far more relevant.*
>
> *We agree that rule 14 should remain which provides the format for such appeal books. We believe that the outline of argument should form part of the appeal book despite the filing requirement.*
>
> *We are totally opposed to the suggestion in rule 15, that an appeal Registrar should impose the responsibility for preparing appeal papers upon any other party to the appeal. We are likewise opposed to the rule that enables the appeal Registrar himself to prepare the papers as anticipated by rule 15(2).*
>
> *As a consequence of this suggestion it is our view that rules 10 to 13 need to be rewritten and that rule 15(1) and (2) should be repealed. It follows that rule 15(4) should be repealed."*

3.52 ***Federal Magistrates*** As previously noted, the Queensland Bar Association expressed its willingness to support the removal of jurisdiction from courts of summary jurisdiction, the abolition of the office of Registrar and Judicial Registrar and the appointment of Federal Magistrates.

3.53 ***Cross-vesting legislation*** The Family Law Section of the Law Council of Australia pointed out that:

> *"...under the cross-vesting legislation, there is no appeal against the decision of a single Judge as to where a cross-vested claim will be heard. An unjust decision by a single Judge may give one party or the other an enormous advantage in the litigation. Despite this, no appeal is possible. Providing an efficient Family Law Act appeal system may be cold comfort to a Family Court litigant who is unable to appeal a*

---

[22]The time limits provided in the Case Management Guidelines been amended since this submission was made - See chapter 14 of Case Management Guidelines which commenced on 8 January 1996.

decision on cross-vesting which substantially alters the balance between the parties in terms of the fairness of the litigious process."

3.54 ***Section 94AA*** The Family Law Section of the Law Council of Australia expressed the view that the costs and benefits of section 94AA required consideration. It said:

"Many interlocutory and interim decisions are made by magistrates, registrars and judicial registrars and there is an automatic right of review of a hearing de novo. The mere fact that a Judge has made an interim or interlocutory decision is not a proper basis for putting parties to the expense and uncertainty of having to seek leave. Further, in common with other courts, both in Australia and overseas, the court is having difficulty in achieving consistency of approach in determining whether a particular order is interlocutory (or interim) or not. On balance we consider that Section 94AA should be repealed. Both the costs of an appeal and the threat of a costs order on the dismissal of an unmeritorious appeal are sufficient deterrents."

3.55 The Bar Association of Queensland, however, took a contrary view expressing its agreement with the provision in section 94AA. The Bar Association indicated that no real difficulty had been experienced in determining whether an order is an 'interlocutory decree' despite the dictum of Fogarty J in *Thallon v Thallon* [1992] FLC 92-322 at 79,422. The Association said:

"Many of the procedural difficulties have been overcome by the practice of the court of hearing applications for leave to appeal from interlocutory orders and where leave is granted hearing the appeal without additional cost to the litigant. We are aware of the practice direction issued on 1 April 1993 under Practice Direction No. 1 of 1993 and we support this procedure."

3.56 ***Definition of appeal*** The Bar Association of Queensland expressed the view that there is a fundamental difference between a "review" and an "appeal". It noted that while the definition of "appeal" in subsection 4(1) of the *Family Law Act* includes an application for a re-hearing it did not consider that the definition would extend to a review of an exercise of power by a registrar (Subsection 37A(9) and (10)) or a review of a decision of a judicial registrar (Section 26C). The Bar Association noted that the definition of "appeal" in the rules (Order 32) differs from that in the Act. The definition of "appeal" in Order 32 rule 1 says, unless the contrary intention appears, "appeal" means an appeal to a Full Court of the Family Court of Australia. The Bar Association indicated that it considered the difference between the two definitions to be confusing. It said:

"We see the reason for the difference being the retention of the right of appeal from decrees made in courts of summary jurisdiction and upon the abolition of this jurisdiction we would hope to see the definition of the word "appeal" in the Act amended."

The *Evidence Act 1995*

3.57 Under the *Family Law Reform (Consequential Amendments) Act 1995* appeals against decisions of Courts of Summary Jurisdiction (which require a hearing *de novo*) are now heard under the provisions of the (Commonwealth) *Evidence Act 1995*. Previously they had to be heard under the provisions of the relevant State legislation.

4: STATISTICS ON APPEALS

4.01 The Family Court does not, as a matter of course, compile statistics on appeals from courts of summary jurisdiction or reviews of the exercise of power by registrars and deputy registrars. The Family Court keeps statistics on appeals to the Full Court. It also records applications for special leave to appeal to the High Court but it does not keep statistics on the outcomes of those appeals. However, that information is available from court records and could be extracted if necessary.

Review of exercise of power by registrars and judicial registrars

4.02 At the request of the Appeals Committee the Family Court's Management Information Unit in Canberra was able to produce figures for 1993/94 and 1994/95 on the filing of applications for review of exercise of power by a registrar or judicial registrar (Form 44). These figures are reproduced at Table 1.

Table 1: Filing of applications for review of exercise of power

	1993/94	1994/95
Form 44	342	357

Appeals from courts of summary jurisdiction

4.03` The Family Court does not regularly compile statistics in relation to appeals from courts of summary jurisdiction. At the request of the Appeals Committee the court's Management Information Unit in Canberra was able to produce figures for 1993/94 and 1994/95 in relation to the filing of notices of appeal from courts of summary jurisdiction (Form 43). The figures are reproduced in Table 2 below.

Table 2: Filing of notice of appeal from court of summary jurisdiction

	1993/94	1994/95
Form 43	304	326

Full Court appeals

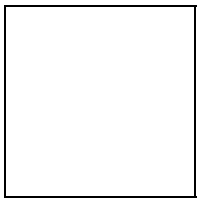
4.04 From calendar years 1984 until 1989 the number of appeals had always exceeded 230. In 1990 a drop off to 185 occurred which was maintained until 1993. A reversal from the drop in the number of appeals occurred in financial year 1993/94.

4.05 The growth started from July 1993 and continued during the year, when 243 appeals were filed.

4.06 In 1994/95 the same number of appeals were filed as in 1993/94.

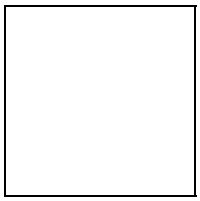
4.07 Table 3 sets out the number of appeals by calendar year from 1984 to 1994.

Table 3: Appeal Trends 1984-1994



4.08 Table 4 sets out the number of appeals by financial year from 1990/91 to 1994/95.

Table 4: Appeal trends by financial year 1990/91-1994/95



4.09 Table 5 shows a comparison of the issues raised in notices of appeal. An analysis of the issues raised indicates a gradual decline in appeals relating to property issues from 1990-91 to 1992-93 followed by a resurgence in 1993-94 and 1994-95. Custody matters rose gradually until 1993-94 and then dropped in 1994-95.

Table 5: Issues Raised in Notices of Appeal

Issue	Year 1989-90	1990-91	1991-92	1992-93	1993-94	1994-95
Custody	34	34	41	50	67	51
Access	27	22	27	41	50	48
Maintenance	30	33	30	22	19	25
Property	143	99	80	70	103	103
Costs	14	17	19	15	30	25
Injunction	0	0	2	4	6	5
Other	10	16	24	42	57	61
Child support	0	0	0	0	0	1

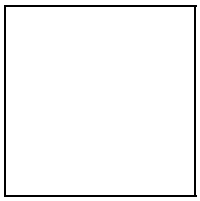
4.10 Table 6 sets out the statistics on collection of the filing fee. Of note is the high waiver rate on the filing fee.

Table 6: Collection of Filing Fee

Category	Year 1989-90	1990-91	1991-92	1992-93	1993-94	1994-95
Fee collected	177	133	109	113	157	169
Legal aid	18	13	9	6	12	10
Fee waived	17	30	53	50	74	64
Other	0	1	0	0	0	0
Total	**212**	**177**	**171**	**169**	**243**	**243**

4.11 Table 7 summarises applications by the characteristics of the appellant.

Table 7: Summary of Appellants



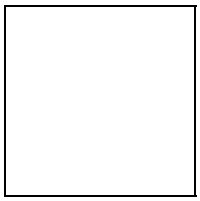
4.12 It is clear that the majority of appeals have been instituted by male appellants in each financial year between 1989/90 and 1994/95.

High Court Appeals

4.13 The number of family law matters which get to the High Court is relatively small. The figures given in Table 8 below are taken from the Family Court's annual reports and relate to applications for leave to appeal[23]. These are the most accurate figures currently available to the Council.

Table 8: Applications for special leave to appeal to the High Court

[23]The number of appeals heard by the High Court in the same period are given at paragraph 2.53 above.



Conclusion

4.14 The available statistics do not provide a sufficient basis for the assessment of trends in appeals and review processes in the Family Court. The most complete statistics are those relating to appeals to the Full Court. However, even those statistics do not include figures which would enable a reasonable assessment of the outcome of appeal cases. For example, the outcome of appeals are classified as upheld, dismissed or withdrawn. Additional data which would be valuable would be whether an appeal has been upheld or dismissed by consent, the gender of applicants by outcome of their appeals and whether an appeal has been upheld in whole or in part.

4.15 Council is aware from its discussions with the Family Court on statistics over the years that there are often difficulties related to cost, practicalities and priorities which need to be taken into account when considering the court's capacity to provide statistical data. The computer facilities of the court are also relevant. However, after discussions with relevant officers of the court, Council is of the view that there are some improvements which could be made in the short term without adding unnecessarily to the workload and costs involved.

4.16 In the longer term Council notes that the Joint Select Committee on Certain Family Law Issues recommends in its report *Funding and Administration of the Family Court of Australia* (November 1995) that the court should update its information technology platform (paragraph 4.40). When this occurs Council is of the view that it, the Australian Bureau of Statistics and the Australian Institute of Family Studies should be consulted about how the court's data collection could be improved.

4.17 Council has noted the wide range of data collected by bodies such as the Queensland Court of Appeal in relation to appeals. By comparison statistics collected on appeals to the Family Court are relatively basic. It is Council's view that the development of good policies and procedures is dependent upon having a detailed knowledge of the system in operation and this, to a large extent, requires the collection of appropriate data.

4.18 Council appreciates that the court has recently simplified its forms, as well as its procedures, and is not proposing that detailed and complex forms are required. However, having in mind the volume of appeals lodged, Council considers that more information about the operation of the appeal system is necessary. Council, and other bodies would be available to assist the court in reviewing its current appeal statistics with a view to achieving a balance between the need for full and detailed data on the one hand and the various constraints which operate to limit what the court can provide in practice.

Recommendation 1

4.19 (a) That appeals statistics currently kept by the Regional Appeals Registrars should include (i) more detail about the outcome of appeals; (ii) the sex of the applicant by the type of order sought; (iii) the matter appealed from; (iv) and the source of the appeal. This would not require additional resources and would considerably enhance the accuracy and usefulness of appeals statistics.

(b) In the longer term, when the court's information technology platform is upgraded the court should consult with the Family Law Council, the Australian Bureau of Statistics and the Australian Institute of Family Studies and fully review the quality and usefulness of the data it collects.

5: THE APPEAL SYSTEMS OF OTHER JURISDICTIONS

5.01 Council has examined a number of procedures used in other Australian and some overseas jurisdictions for improving their appeal systems and has considered whether some of those procedures may be appropriate for the Family Court appeal system[24]. These matters are discussed in this chapter.

Court of Appeal of less than 3 Judges

5.02 Section 435 of the *(Queensland) Criminal Code 1995* permits a Court of Appeal of fewer than 3 Judges in the following circumstances:

- to order the production of a document, exhibit or other thing connected with the proceedings;
- order a compellable witness to attend and be examined and admit the deposition taken as evidence;
- refer certain issues for inquiry and report to a commissioner appointed by the court and act on the report as far as the court considers appropriate; and
- appoint a person with special expert knowledge to act as an assessor to the court if the court considers the special knowledge is needed to decide the case.

5.03 The provisions of section 435 of the Queensland code are designed for the criminal jurisdiction and would not necessarily be entirely appropriate for the Full Court of the Family Court. However, the provision does make it clear that there are some functions of a full bench which would be appropriate for delegation to a single Judge and this issue may, therefore, be relevant for further consideration by the court.

Litigants in person

5.04 A proportion of appeals are brought by persons without legal representation. Problems resulting from unrepresented appellants include delay, failure to address the merits of the appeal, the length of time taken to present oral submissions, unmeritorious appeals and problems associated with the complexity of court procedures.

---

[24]An excellent and more detailed outline is provided in the Queensland Court of Appeal, *Fourth Annual Report*, 1994-95 at pages 85-148.

5.05 A number of procedures, rules and arrangements of other courts may be appropriate for use by the Family Court. There can, of course, be unmeritorious appeals, but some litigants are simply unable to afford legal representation or wish to present their own case and they should be able to do so. While it is not suggested that unrepresented appeals should be encouraged, there is a need to try to help the genuine litigant in person.

5.06 A general problem for such persons is to ascertain the laws and procedures in relation to the conduct of appeals. This places considerable strain on the resources of the court's registry staff. To overcome this problem the Civil Division of the English Court of Appeal makes available leaflets explaining the process, in relatively simple terms, to litigants in person. The leaflet is made available to unrepresented appellants together with a check list covering the requirements in relation to completing and filing documents, and related procedures. The Family Court also has explanatory material on appeals which has recently been revised and further expanded and which is available to the public. The information is made available to litigants in person. However, there is little public awareness of that material at this stage and this is a matter which should be addressed by the court.

5.07 The problem of the unmeritorious appeal could also be addressed by the adoption of a procedure for applications for leave to appeal by unrepresented persons. Such a procedure was adopted by the High Court in 1994. Order 69A Rules 13 and 14 of the High Court Rules provides that an unrepresented person seeking leave to appeal to the court shall present his or her argument to the court in the form of a written case. The court may dismiss the application without requiring the respondent to reply, but a respondent may also be required to file a written case. The court has a discretion to hear oral argument.

5.08 The current practice in the English Court of Appeal is that unless the court directs otherwise all applications for leave to appeal are determined by a single Judge in the first instance on written submissions without a hearing. The parties can renew the application before Full Court of at least two Judges but if there is an oral hearing the applicant's argument is normally restricted to 30 minutes.

5.09 Similar filtering procedures may be appropriate for the Family Court. Council notes that such procedures are designed to be both economical and fair, while at the same time trimming the workload of the appeal court. It also enables such appeals to be processed expeditiously.

5.10 Council is of the view that some of these options are worthy of further consideration by the Family Court.

Limits on oral arguments

5.11 Council is informed that most appeals to the Family Court do not take more than one day to hear, although there are no formal rules in place in relation to oral argument.

5.12 There have been, however, some recent changes in other courts. In 1994 the *Federal Court of Australia Act 1976* was amended to empower a single Judge or a Full Court of the Federal Court to give directions limiting the time for oral argument in an appeal.[25] In the Civil Division of the English Court of Appeal the applicant's time for oral argument in an appeal is limited to 20 minutes during an oral hearing for leave to appeal.

5.13 This is a matter which, on present indications, is not a great concern in relation to Family Court appeals and Council is of the view that there is no reason to recommend further action by the Family Court, other than to allow the appeal Judges discretion in each case.

Outlining arguments in writing

5.14 In Ontario, Canada, the parties are required to file and serve written submissions which include a statement of relevant facts in the form of generic reasons for judgment. In the NSW Court of Appeal there is a special procedure for appeals involving personal injuries where the amount of a damages award is the only matter at issue. Under the procedure the appellant is required to provide material in a specified form. Included in that material is a brief, but specific, statement which outlines the basis of the appellant's challenge.

5.15 A practice direction of the NSW Court of Appeal requires the parties, in some appeals, to prepare a narrative statement of facts. The Queensland Court of Appeal has used written outlines mainly to identify the issues, to assist in preparation, to isolate matters which are not in dispute and to reduce hearing times.

5.16 Courts are constantly seeking ways of improving their procedures to ensure that matters are dealt with as economically and expeditiously as possible and the experiences and procedures of other courts will be of obvious interest to the Family Court. Developments in relation to the use of written argument is one area which will be of interest to the Family Court.

Staff lawyers

5.17 Staff lawyers are widely used by courts of appeal in the United States. The types of duties which are allocated to staff lawyers by appeal courts include:

---

[25] *Federal Court of Australia Act 1976*, subsection 25(2B)(c).

- monitoring, reviewing and making preliminary classification of cases coming before the court in accordance with criteria established by the court and making recommendations for disposition of routine procedural matters;
- assisting in grouping hearing dates of cases covering similar or related issues;
- preparing analyses of cases, motions and other matters coming before the court and presenting recommended dispositions as appropriate under criteria adopted by the court;
- reviewing all matters presented in person and taking measures necessary to put them in correct and intelligible form;
- supplementing the research of the Judges' individual staff, as required; and
- acting for the court in supervising the preparation of complex records.

5.18 Staff lawyers are also used by the English Court of Appeal (Criminal Division), mainly to prepare summaries of cases coming before the court. In the English Court of Appeal (Civil Division) requests for extension of time and cases involving failure to lodge certain statements on time are dealt with in the first instance by the Civil Appeals Office senior lawyer. A matter is referred to the Registrar or presiding Judge only where necessary.

5.19 Council understands that the legal associates of Family Court Appeals Division Judges prepare factual summaries of cases and some research to assist the Judges. The wider use of staff lawyers or registrars by the Full Court of the Family Court may be an area where the court could streamline some of its procedures.

Expedited hearings

5.20 A practice direction has been issued in the English Court of Appeal (Civil Division) which sets out the procedure for expediting an appeal. The practice direction reads as follows:

> *In the interests of saving costs the registrar deals with as many requests for expedition as possible on paper without hearing. Requests for expedition should initially be made to the registrar by letter (or, if time is short, by fax) setting out succinctly and in short compass the grounds upon which expedition is sought, and if granted, how soon the appeal needs to be heard. At the same time a copy of that letter (or fax) must be sent to the other party's solicitors so that they know at the earliest possible stage that an expedited hearing is being sought.*
>
> *Subject to the qualification referred to below, the letter to the registrar requesting expedition should be accompanied by a transcript or note of the judgment being appealed, draft grounds of appeal, and a realistic advocate's time estimate of the anticipated length of the appeal. Where, however, a very early hearing is needed*

(ie. a hearing within days or weeks), the letter requesting expedition should be sent to the registrar (with a copy to the other side) without waiting for the transcript and the draft ground of appeal, so that the court has the maximum possible notice that such a high degree of expedition is sought.

5.21 The need for a similar practice direction in the Family Court, with appropriate modifications, could be given consideration.

Telephone hearings and video links

5.22 The Federal Court and the Administrative Appeals Tribunal[26] are able to receive evidence or submissions by telephone and the AAT uses telephone conferences in preliminary matters also to save costs and for the convenience of the parties.

5.23 The use of video links in court hearings is in its early stages of development, but video links are used in the ACT and Victoria Magistrates Courts for obtaining children's evidence and the Queensland Court of Appeal is able to hear some appeals and applications by unrepresented prisoners by video link without having to bring the prisoner to court[27].

5.24 The greater use of such facilities by the Family Court are worthy of further consideration. Council is aware of the recent decision of the Full Court of the Family Court in the matter of *NSW Director-General of Community Services v De Lewinski*[28] which raised the issue of whether the court was "sitting together" when one member of the appeal court (the Chief Justice) was in Melbourne and two members (Kay and Mushin JJ) were in Sydney. The court was convened on 14 March 1996 by the Chief Justice in his chambers in Melbourne linked to the two Judges in Sydney by conference telephone. The court rejected the submission that it was not "sitting together".

Notices of appeal

5.25 In most Australian courts the grounds of appeal are set out in the notice of appeal. In some courts, in Australia and elsewhere, other documentation is also filed with the notice of appeal and this sometimes results in duplication of information about the grounds of appeal. In those circumstances the need for stating the grounds of appeal in the notice of appeal is removed and the grounds are covered in the accompanying document.

5.26 In the Family Court the procedure is for the appellant to file a notice of appeal and a summary of arguments. Notices of appeal should include a clear statement of the grounds for appeal with a view to identifying the issues, thereby shortening the hearing and reducing costs. There is a view that notices of appeal do not always accurately indicate the grounds for appeal. For instance, the appeal notice can be prepared before the transcript of evidence is available or general, rather than specific, wording can be used.

---

[26]See *Federal Court of Australia Act 1976*, sections 27 and 59 and Administrative Appeals Tribunal General Practice Direction (1 August 1993) at paragraph 3.2.

[27]Queensland Rules of the Supreme Court, Order 40, Rule 1A.

[28]**[Insert footnote when case is reported]**

5.27 Council has considered whether inclusion of the grounds of appeal in the notice of appeal is desirable or whether the summary of arguments already provides adequate information. On present information, however, this does not seem to be a significant problem in relation to Family Court appeals and Council does not see a need, at present, to recommend changes to the present arrangements.

Conclusion

5.28 The Family Court is at the forefront of a number of developments aimed at streamlining its processes and reducing costs. In particular, the Family Court has developed and is already using a variety of primary dispute resolution processes and has recently introduced simplified procedures. It would be consistent with the Family Court's progressive policies for a number of procedures and processes employed by other Australian and overseas courts to be examined to see whether they might be appropriate for use, with appropriate modifications, in the Family Court. Those procedures and processes relate to:

- Courts of Appeal of less than 3 Judges;
- How to best deal with litigants in person;
- The use of arguments in writing;
- Limits on oral arguments;
- Greater use of staff lawyers;
- Expedited hearings; and
- The use of telephone hearings and video links.

5.29 Council is aware that the Council of Chief Justices of courts in Australia recently established a sub-committee[29] to advise on appeals processes in Appeal Courts in Australia and it is intended that a copy of this report be made available to that sub-committee as soon as practicable.

Recommendation 2

5.30 The Family Court be asked to examine developments in other Australian and overseas Courts of Appeal that operate within a common law system to see whether the adoption of some of the procedures of those courts would assist in streamlining the procedures and processes of the Family Court and in reducing costs. The procedures and processes which may be of particular interest to the Family Court include:

- **Courts of Appeal of less than 3 Judges;**
- **How best to deal with litigants in person;**
- **The use of arguments in writing;**
- **Limits on oral arguments:**

[29]The sub-committee is comprised of the following justices: Beaumont J (Convenor), Priestley JA, Fitzgerald P, Debelle J and Fogarty J.

- **Greater use of staff lawyers;**
- **Expedited hearings; and**
- **The use of telephone hearings and video links.**

6: IMPROVING THE EXISTING APPEALS PROCESS

6.01 The Committee considers that there are some changes which could be made to existing appeals and review processes which would significantly improve the accessibility of appeals and reviews.

Costs

6.02 The costs of appeals and reviews is clearly a significant obstacle to parties who may wish to have decisions reconsidered. Council considers that it would be inequitable to use costs as a mechanism for rationing court time and facilities. The availability of justice should not be made dependant upon the economic means of the parties. Accordingly, in Council's view the costs which apply to the appeals and review procedures should be reviewed regularly and reduced where possible.

6.03 ***Transcript*** The high cost of transcript was the predominant concern raised in submissions to the Appeals Committee. It was noted that the cost of transcript in Family Court proceedings was significantly greater than the cost of transcript in State and Territory proceedings. Council considers that every effort should be made to reduce the cost of a transcript. Accordingly, the function of producing official transcripts of family law proceedings in federal courts should be subject to competitive tender. The official transcript should be obtained by the court at the request of an officer of the court or of one of the parties to the proceedings and certified photocopies of the official transcript should be made available to the parties on a cost recovery basis.

6.04 To assist persons in need a means test should apply and the transcript fee should be waived for those parties who meet that test. The Legal Aid Commissions already meet the costs of transcripts for persons who qualify for legal aid. Others needing assistance will be persons in respect of whom the imposition of a charge will cause hardship. In all other cases the transcript fee should be capable of being paid by instalments free of interest. Finally, the official recording of the proceedings should be made available for purchase at cost by the parties to the proceedings.

6.05 There are a number of ways in which the means test could be administered. These include:

1. The means test could be applied by the Registrar of the Family Court (See Regulation 16) with the court fully funded to provide this service;

2. The Legal Aid Commissions could apply the means test and be fully funded to do so; or

3. The organisation providing the reporting service could be asked to tender on the basis that they would be required to provide free transcripts to legally aided persons and persons who meet a hardship test.

6.06 At first glance there appear to be wide differences among the costs charged for the productions of transcripts of evidence. However, some agencies charge on the basis of double spaced typing and others single spaced typing. In the case of the former, of course, the transcript might be expected to be double the number of pages of the latter and this needs to be taken into account when comparing costs. Other factors which need to be considered include such matters as the time taken to produce the transcript, whether the cost of additional copies are less than for the first copy and whether the agency provides a free service in some circumstances.

6.07 Council's inquiries into the costs of transcripts has not been exhaustive and were mainly aimed at obtaining an idea of the costs range. Those inquiries suggested a price range, among the agencies providing data, of $2.20 per page (double spacing) to $7.50 per page (single spacing). At present the costs in the Family Court seem to be at the higher end of the cost range.

Recommendation 3

6.08 Steps should be taken to reduce the cost of transcripts. To this end the function of producing official transcripts of Family Court proceedings should be subject to competitive tender.

There should be a means tested scheme under which persons in need may apply for the cost of transcripts to be reduced or waived. Decisions about the reduction or waiver of the fees should be made by a Registrar of the Family Court, the Legal Aid Commissions or the agency providing the reporting service. The court or the Legal Aid Commissions, as appropriate, should be fully funded to provide such assistance to needy applicants or, in the case of a reporting agency, tenders should be sought on the basis that free transcripts will be provided to legally aided applicants or persons who satisfy a hardship test.

6.09 ***Filing fee*** Those making submissions to Council mainly saw the cost of the appeal book and transcripts as the major costs issue needing attention. Some submissions also proposed that the filing fee should be abolished. To the extent that the filing fee aims at recovering some of the costs to the taxpayer associated with processing appeals, it is a legitimate impost. However, in Council's view, it would be inappropriate for the filing fee to be regarded as a mechanism for rationing the court's time or resources. Accordingly, Council considers that the filing fee for appeals should be reviewed to ensure that the amount is consistent with other filing fees imposed through the court.

6.10 ***Appeal books*** Aspects of the preparation and settlement of the appeal books impose extra costs for the parties to appeals. Council considers that there are ways in which those costs can be reduced. Ideas which could be considered by the court include the use of electronic storage of appeal books, the elimination of unnecessary material from the appeal books and the current numbering system.

6.11 Submissions to Council advocated the consecutive numbering of appeal books in lieu of the present system under which pages are numbered segmentally. At the same time it has been suggested to Council that consecutive numbering would be an additional impost on the applicant and would add to the costs of appeals. Council is aware that the court has already taken some steps to eliminate unnecessary material from appeal books and advocates further efforts in this area.

Recommendation 4

6.12 That the Family Court examine the appeal book current page numbering system, the possibility of further eliminating unnecessary material from appeal books and the use of electronic storage of appeal books with a view to reducing costs of appeal books.

6.13 ***Federal Proceedings (Costs) Act 1981*** Council considers that the maximum amounts provided under the *Federal Proceedings (Costs) Act 1981* are too low and should be increased to more accurately reflect the true cost of appeal proceedings. The current maximum amounts payable under the Act are set out at paragraph 2.59 above. Those amounts have applied since 1 September 1991. In this regard Council is pleased to see that the Attorney-General's Department is currently considering the need to review these amounts.

6.14 In any event Council recommends that the maximum amount allowed with respect to Family Court appeals should be increased to match that allowed in respect of Federal Court appeals. The Family Court is a superior federal court and there does not seem to be any justification for retaining a distinction of this nature between the two courts.

6.15 Total family law applications approved under the *Federal Proceedings (Costs) Act 1981* over recent years and the actual expenditure during each period are set out in the table below.

Period	**Applications approved**	**Expenditure during period**
1993-94	70	$272,503
1994-95	72	$310,487
1.7.95 - 31.12.95	42	$162,186

Recommendation 5

6.16 That the maximum amounts allowed under the *Federal Proceedings (Costs) Act 1981* should be reviewed. The maximum amount which applies in relation to Family Court appeals should be increased to the same level as applies to Federal Court appeals.

6.17 ***Other costs issues*** Council considers that if potential appellants were made fully aware of the potential costs of proposed appeal proceedings they would be less likely to institute appeals which did not have a strong likelihood of success. Accordingly, Council considers that solicitors should be required to advise their clients of the likely estimated cost of a proposed appeal. Cost estimates should include information about the risk of meeting the cost of the other party if unsuccessful.

6.18 In Council's view there are two stages at which costs estimates ought to be provided. A costs estimate should be given at the time the appeal is first filed on the basis that it is a preliminary estimate only. A more accurate estimate should be possible after the appeal book has been settled and, therefore, a revised estimate should be provided at that stage. It is obvious that the instinctive reaction of some litigants to a judgment is to appeal and they should have an estimate of the cost implications of such action at the earliest possible stage.

Recommendation 6

6.19 That solicitors be required to prepare costs estimates as part of their advice in relation to a proposed appeal and to provide estimates to their clients at the time of filing the notice of appeal.

Delays

6.20 ***Delays in issuing reasons for judgment*** Delays in issuing reasons for judgment at first instance places litigants in a difficult position as they are unable to determine whether or not there is any substantive basis on which to appeal. It should be noted that such delays are not common.

6.21 Delays in issuing reasons for judgment on appeal may cause litigants to suffer financial disadvantage through the lost opportunity to exercise their rights arising from the appeal. It should be acknowledged, however, that Judges of the Appeal Division come from different registries, to which they return and do first instance work when not sitting on appeals. This makes discussion difficult and the situation differs from some other Appeal Courts.

6.22 At present the Family Court's Case Management Guidelines[30] specify the following time limits in relation to reasons for judgment:

> *Except in unusual circumstances, reserved judgments will be delivered no later than 3 months from the date upon which they are reserved.*

6.23 There are no guidelines in relation to issuing written reasons for judgment where the reasons were delivered ex tempore. In Council's view, it would be consistent with the case management guidelines if written reasons for judgment were to be given no later than 14 days after orders have been made.

6.24 Council is also of the view that where orders have been made, but no judgment has been given, the situation should be regarded as similar to where the judgment has been delivered ex tempore and, in such circumstances, written reasons for the judgment should be given within 14 days.

6.25 It would also remove a good deal of the present concerns if the time for lodging appeals were to run from the date on which written reasons were published to the parties. This is an order that trial Judges usually make in any event.

Recommendation 7

6.26 That Case Management Guidelines should be amended to provide the following:

(a) where a judgment has been delivered ex tempore, written reasons should be provided to the parties within 14 days;

(b) where no judgment has been given, but orders have been made, written reasons should be provided within 14 days of the orders having been made; and

(c) the time for appeal should not commence to run until written reasons for the judgment have been published to the parties.

Conciliation and mediation

6.27 Council has considered the issue of whether dispute resolution methods other than judicial hearing should be used more frequently than at present to resolve matters which are the subject of appeals. At present conciliation and mediation are available to appellants, but these options are rarely used. Council has formed the view that a major reason for this appears to be the lack awareness of such dispute resolution processes as an option, although on available evidence there appears to be little enthusiasm among lawyers to use this process. While the number of cases which might be resolved by this method may not be expected to be high, an effort

[30]See Case Management Guidelines, Chapter 15, Paragraph 15.11.

should be made to encourage appellants to consider the option of conciliation or mediation.

Recommendation 8

6.28 The Family Court should publicise the fact that it offers conciliation conferences to parties to appeals with a view to resolving appeals which can be satisfactorily resolved by this means.

Other procedural improvements

6.29 ***Grounds of appeal*** The current Family Law Rules (Order 32, rule 2(3)(c)) do not place any restriction on the grounds of appeal that may be relied upon. That is consistent with all other superior courts of record in Australia. The Queensland Bar Association Family Law Committee submitted that the Rules should be amended to restrict the grounds solely to those that so far as discretionary judgments are concerned, the appellant may only contend that the Trial Judge "*had exercised his discretion on a wrong principle or not at all or there had been a miscarriage of justice*". The purpose of the submission is to ensure that the number of appeals without merit are reduced, in particular those appeals brought by litigants in person.

6.30 The leading authority regarding the principles of appellate review of discretionary judgments is *House v R* (1936) 55 CLR 499. The High Court has consistently adhered to the principles expressed in that case. To adopt the submission of the Queensland Bar Association would be to place a restriction on the grounds upon which an appellate court may set aside or vary orders made following the exercise of discretion which do not apply in any other court in Australia. Consequently a wrong finding of fact, the overlooking of relevant evidence or the reliance upon irrelevant material or the failure to give adequate reasons for judgment would not be grounds for appeal. It is impossible to understand how this submission could assist the current position.

6.31 So far as unmeritorious appeals are concerned, the appellant in the vast majority of cases is now ordered to pay the costs of the respondent (sometimes on a solicitor/client basis) in contrast to earlier years when costs orders were rarely made.

6.32 Accordingly, Council does not accept the submission of the Queensland Bar Association in relation to this matter.

6.33 It is, of course, a separate problem that in some appeals an unsuccessful appellant does not have the capacity to meet orders for costs.

Hearings *de novo*

6.34 Council acknowledges the strong views expressed by the Chief Magistrate of the Local Courts of New South Wales, Mr I H Pike, adopting the comments of Magistrate Scott Mitchell. Council acknowledges that in those cases where Magistrates, such as Magistrate Mitchell, specialise in family and children's law there seems little point in providing the parties with an appeal as of right by way of hearing *de novo*.

6.35 Council addressed these issues in its recent report on 'Magistrates in Family Law'. Council concluded that the *de novo* review ensured proceedings in magistrates courts can be conducted quickly and informally without the need to keep full transcripts of the proceedings, whilst preserving the parties right to have the whole matter reconsidered by a superior court. At the same time, however, Council recommended that the Commonwealth Attorney-General give consideration to opening discussions with his State and Territory counterparts concerning mechanisms which may be implemented to identify State and Territory magistrates who are interested in specialising in family law matters and giving those magistrates special responsibilities for hearing family law matters in particular regions.

6.36 Council considers that once a scheme of specialist family law magistrates is established the issue of appeals from those magistrates to the Family Court should be reconsidered. It may be appropriate to impose some restriction upon the abilities of parties to appeal decisions of specialist magistrates such as applying for leave.

Recommendation 9

6.37 That the appeal procedures from courts of summary jurisdiction should be reviewed following the establishment of a scheme of specialist family law magistrates as recommended by Council in its report *Magistrates in Family Law*.

APPENDIX 1

LIST OF PERSONS/ORGANISATIONS MAKING SUBMISSIONS

Submissions are listed in the order received by the Council.

No.	Person/Organisation making submission
1.	Ms Caroline Counsel, Coltmans Solicitors, Melbourne (5 May 1995)
2.	The Law Society of Western Australia (25 May 1995)
3.	Legal Aid Office (Queensland) (1 June 1995)
4.	Family Law Committee, NSW Bar Council (6 June 1995)
5.	Family Law Committee, The Law Society of New South Wales (6 June 1995)
6.	Family Law Section, Law Council of Australia (6 June 1995)
7.	Family Law Practitioners Association of Tasmania (8 June 1995)
8.	Family Law Committee, The Law Society of the Australian Capital Territory (14 June 1995)
9.	Chief Judge, Family Court of Western Australia (19 June 1995)
10.	Mr S J Deer, Chief Stipendiary Magistrate, Queensland (19 June 1995)
11.	Mr J M A Cramond, Chief Magistrate, South Australia (20 June 1995)
12.	Mr I H Pike, Chief Magistrate of the Local Courts, NSW (29 June 1995)
13.	Bar Association of Queensland (18 August 1995)