# FAMILY LAW COUNCIL

SUBMISSION TO THE ATTORNEY-GENERAL’S DEPARTMENT
CONCERNING A NEW APPROACH TO THE FAMILY LAW SYSTEM:
IMPLEMENTATION OF REFORMS: DISCUSSION PAPER
(10 NOVEMBER 2004)

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Recommendation 1 (p 11)
That a National Director of Family Relationship Centres (FRCs) should be recruited as soon as possible to plan the phased roll-out of the FRCs, develop FRC networks, and manage the development of key resources required by the FRCs.

Recommendation 2 (p 12)
That the Government should establish an expert advisory body to support the National Director and to advise the Government on issues arising from the work of the FRCs and the Family Relationships Services Program (FRSP).

Recommendation 3 (p 12)
That religious organisations, Family Support organisations and services provided or funded by State and Territory governments should be given information about the roles of the FRCs and the situations in which a referral will be appropriate.

Recommendation 4 (p 14)
That the Act is amended so that the Court, when making a parenting order, must consider “a parenting plan which is not a registered parenting plan” as one of the matters in s 68F(2).

Recommendation 5 (p 15)
That the legal profession be invited to play an active role in the development of templates for parenting plans and ancillary explanatory material.

Recommendation 6 (p 15)
That the roles of Parenting Advisers and mediators should be clearly distinguished. A Parenting Adviser needs to be suitably qualified, but need not be a family and child counsellor or mediator within the meaning of the Family Law Act.
Recommendation 7 (p 18)
That Family Relationships Services Program procedures include appropriate protocols to deal with the needs of children and in particular to ensure, so far as is appropriate in a particular case, the voice of the child is heard.

Recommendation 8 (p 19)
That culturally and linguistically appropriate service delivery be included in FRC service provision through:
   a  all staff in FRCs and FRSP services involved in parenting issues receiving ongoing cultural education
   b  development of an employment strategy that includes criteria promoting cultural and linguistic diversity; and
   c  provision of interpreters.

Recommendation 9 (p 19)
That FRC procedures include appropriate safeguards to maximise the proportion of clients transferring to referred services.

Recommendation 10 (p 20)
That the FRCs should be permitted to broker out mediation services.

Recommendation 11 (p 20)
That while legal representatives should not normally be involved in a mediation conducted under the auspices of the FRC:
   (a) FRC procedures should canvass the benefits of referring appropriate cases to a mediation model that does include lawyers where for example it is considered that the involvement of lawyers may assist in addressing power imbalance issues, and
   (b) the involvement of lawyers should remain at the discretion of the mediator in consultation with the parties concerned.
Recommendation 12 (p 22)
That the FRCs should provide an advice and support role to parents where face to face mediation is not appropriate because of a history of violence, abuse or any other such reason.

Recommendation 13 (p 23)
That a parent should be able to bring an application to the Court without preconditions if it is alleged that there has been a flagrant breach of a recently made court order.

Recommendation 14 (p 24)
That the Parenting Advisers providing telephone advice through the national advice line should also be engaged in face to face work with clients.

Recommendation 15 (p 24)
That the potential of the Pathways Networks be assessed in terms of their capacity to assist in implementing the new family law system in their local area, and that viable Networks should be given additional support.

Recommendation 16 (p 24)
That appropriately located FRCs be funded for outreach to smaller communities in their region in order to provide some face to face services in those communities at reasonable intervals.

Recommendation 17 (p 28)
That when planning the outreach of FRCs to regional areas, the location of defence force communities be taken into account.

Recommendation 18 (p 29)
That s 60B(2)(b) is amended as follows (in bold):
(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; such as grandparents.
Recommendation 19 (p 29)
That the issue of functional recognition of grandparents’ role as primary caregivers be referred to the Community Services Ministers Council.

Recommendation 20 (p 32)
That the Act is amended to expressly provide for three options which a Court must consider in cases where there is high conflict. The three options are to:

- adjourn and direct a parent or both parents to attend a service dealing with entrenched conflict families
- make a final order, and direct a parent or both parents to attend an appropriate service, or
- make an order vesting some or all decision-making authority in one parent.

Recommendation 21 (p 34)
That s 118 be amended to allow the Court to dismiss proceedings at any stage if it considers that they have no reasonable prospect of success.

Recommendation 22 (p 35)
That the Act should not require the Court to consider the option of substantially equal parenting time if this is not a proposal advanced by any of the parties, but the Act should make clear that an order for substantially shared parenting time is an option available to the Court in determining a residential schedule for the child.

Recommendation 23 (p 35)
That the Act is amended to expressly define shared parental responsibility as not involving any fixed percentage of parenting time.

Recommendation 24 (p 37)
An applicant should not need to demonstrate that he or she has engaged in a process of conciliation prior to filing where delay in filing would render the application nugatory.
Recommendation 25 (p 37)

That s 117 is amended along the following lines so that a court has the power to make a costs order either:

(a) where an application is filed on one of the grounds that renders it unnecessary to attempt to resolve the dispute before filing, and the court is satisfied that the application has been made without the applicant having a reasonable belief that one or more of those grounds could be established, or

(b) the court is satisfied that the application is frivolous, vexatious, or had no reasonable prospect of success.

Recommendation 26 (p 38)

In the implementation phase of rolling out the FRCs, the Government should make arrangements with suitable approved counselling and mediation organisations to provide some free mediation services in areas where the FRCs have yet to be established.

Recommendation 27 (p 38)

That the Act is amended so that applications can be filed without certificates by people who do not have Family Relationship Centres or another approved counselling or mediation organisation easily available to them. Legislation along the following lines is suggested:

A person shall be required to file a certificate from a Family Relationships Centre or other approved counselling or mediation organisation if subsection 2 applies.

Subsection 2:

A person shall file a certificate from a Family Relationships Centre or other approved counselling or mediation organisation:

(i) if the application is to be filed in a registry of a court which is prescribed by the regulations; or

(ii) if the services of a Family Relationships Centre or other approved counselling or mediation organisation are available within a distance
prescribed from time to time by the regulations from the person’s place of residence or employment.

**Recommendation 28 (p 39)**

That the Government defer decision about amending the Act to require the court to consider changing the parenting order in cases of multiple deliberate and intentional breaches of orders, until the results of other initiatives are assessed.

**Recommendation 29 (p 42)**

That a broad-based community education campaign be developed on the basis of a 5-10 year plan with the long term goal of bringing about cultural change concerning the way the community thinks about parenting after separation.

**Recommendation 30 (p 42)**

That each FRC be given a budget for local advertising and be encouraged to make regular contributions to local press and radio in order to make known the services and resources that can assist families in each locality.

**Recommendation 31 (p 42)**

That State and Territory governments be requested to examine their school curricula, especially legal studies, as well civics/citizenship/society/relationship type courses, with a view to ensuring that they reflect the key structures of the new family law system.
Introduction

1. The Family Law Council (the Council) is very supportive of the general thrust of the Discussion Paper. It believes that the proposed reforms have great potential to bring about positive change in the family law system. It welcomes in particular the development of Family Relationship Centres (FRCs), the proposed procedural reforms in relation to children’s cases, and the common entry point for family law cases through the creation of a combined registry.

2. A consistent theme evident in Council’s consideration of the Discussion Paper is the need to ensure that expectations are not created in the community that exceed the capacity of the FRCs to deliver on the funding provided to them. The Discussion Paper envisages that the FRCs will play a key role both in assisting parents who have recently separated and those who separated some time previously but have fresh disputes. In addition, they will assist grandparents and have a role in supporting intact relationships.

3. In the course of time, there will be no shortage of proposals for extending their functions or the groups that they service. Council considers that the advertising campaign for these Centres will need to be carefully targeted in the establishment phase in order to ensure, as far as possible, that the demands on the FRCs do not exceed their capacity to deliver services in a timely manner. It is essential that FRCs are not presented as all things to all people. Care should therefore be taken that their core function remains at the forefront of any public presentation and that this vision remain their operational driving force.

4. The FRCs need to be highly visible and highly effective from the outset in order to fulfil their mandate and to inspire confidence in the community. Not only will the FRCs need to be located, funded and staffed appropriately but there will need to be adequate provision of services to which the FRCs can refer.

5. At the conclusion of its submission to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into child custody
arrangements in the event of family separation, Council made some suggestions for reform. It suggested that:

“These reforms might contribute to promoting the best interests of children and contribute to reducing the amount of anger, frustration, and hopelessness of parents dealing with family breakdown, whilst at the same time recognising that the fundamental focus of the law should be the promotion of the best interests of children and ensuring the safety of all members of the family.”

Council notes that the initiatives outlined in the Discussion Paper pick up several of the key suggestions made by Council. It suggests that the total package of reforms outlined in the Discussion Paper could be characterised in similar terms to those used in the excerpt above.

Council comments are set out below. They generally follow the order of the headings used in the Discussion Paper.

A NEW SYSTEM

Council sees the FRCs as the centrepiece of the new system. As such it will be critical to the new system’s success that the FRCs have high quality national leadership providing strategic direction as well as effective day-to-day management at individual FRCs.

A National Director

Council recommends that a National Director of FRCs should be recruited as soon as possible. The National Director would, with a small Secretariat and an advisory committee, be involved in:

• planning the phased roll-out of the 65 FRCs,
• fostering good working relationships between the FRCs and Family
  Relationships Services Program (FRSP) organisations, relevant State and
  Territory government service providers, the legal profession and the courts,
• developing standard resources for use in FRCs around Australia and
• ensuring consistency of national service standards.

Recommendation 1
That a National Director of FRCs should be recruited as soon as possible to plan the phased
roll-out of the FRCs, develop FRC networks, and manage the development of key resources
required by the FRCs.

A phased roll-out of FRCs

10 One approach to the phased roll-out is to establish the initial FRCs as centres
of excellence. The tender process could differentiate these centres by providing an
explicit mentoring and training role with respect to later FRCs. These initial centres
would be at the hub of a network of FRCs in a region and would assist in the
development of resources for use nationally. They would also take the lead in meeting
local requirements, for example a service protocol for a particular State or Territory.

Advisory structures and governance arrangements in the Family
Relationships Services Program

11 Council also recommends that it is an opportune time to consider the advisory
structures and governance arrangements in the FRSP in the light of the role it needs to
play in the new system centred on the FRCs. Council’s concern is whether the
additional demands arising from the new system can be adequately catered for by the
governance arrangements currently existing for the non-government sector in its
relationship with Federal Government services.
12 Council recommends that there should be an expert advisory body that can assist the National Director in his or her work and provide a monitoring role in relation to the new system. That body should promote national best practice, encourage coordination between service providers and support the development of nationally available resources, as well as providing advice to the Government on issues arising from the work of the FRCs and the FRSP.

Recommendation 2
That the Government should establish an expert advisory body to support the National Director and to advise the Government on issues arising from the work of the FRCs and the FRSP.

Encouraging referrals
13 Religious groups and Family Support organisations also need to be targeted as possible sources of referral. They will need information about the roles of the FRCs and the situations in which a referral will be appropriate. Services provided or funded by State and Territory governments should also be kept in mind as sources of referral.

Recommendation 3
That religious organisations, Family Support organisations and services provided or funded by State and Territory governments should be given information about the roles of the FRCs and the situations in which a referral will be appropriate.

Parenting plans
14 It is perhaps helpful to set out the history of Council’s previous involvement with this topic.

15 In August 1998, the Council was asked, in cooperation with the National Alternative Dispute Resolution Advisory Council, to look into issues arising from parenting plans made under the Family Law Act 1975 including the continued need for s 63E of the Act. Council had already provided a letter of advice on the same topic dated 31 January 1997.
In its Letter of Advice in 2000 Council remained of the view that parenting plans were a valuable means for some parents to set out their agreement on their responsibilities as parents, but concluded that the registration provisions in the Act were unnecessary. In essence, Council advised repeal of the registration provisions. This recommendation was subsequently accepted. Some points made in that Letter of Advice in 2000 remain particularly pertinent to the issues examined in the Discussion Paper and informed Council’s thinking on this topic. Relevant excerpts are at Appendix 2.

Council remains strongly supportive of the use of parenting plans as outlined in its 2000 Letter of Advice, and as set out in the Discussion Paper. In particular Council emphasises that the benefits of developing a parenting plan accrue at two levels. While at a primary level the task is to develop a plan tailored to suit the particular circumstances of the particular family there is also considerable benefit in having the family learn the skills necessary to resolve issues in a constructive and child-focussed manner. The proposed inclusion of PDR mechanisms in parenting plans, also noted at 4.11 in Appendix 2, is one overt aspect of this secondary educative function. The Act was changed (effective 14 January 2004) to remove the ability to give provisions in parenting plans the same status as court orders by registration. The Council recognises that there may be a small number of parenting plans registered between 1995 and January 2004 which have the force of court orders (see s 63F(3) Family Law Act).

Parenting plans as a s 68F(2) factor

While not favouring registration, as something of a ‘half-way house’ Council recommends that parenting plans be included in s 68F(2) as a factor the court must take into account in making a parenting order. It suggests that this would lend some gravitas to the document, and thereby improve its potential appeal to some clients, without making it any more determinative of a parenting decision than any other

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factor in s 68F(2). It would also enable the plan to remain primarily a non-legal document which can be easily amended to reflect changing circumstances. This flexibility would reflect the fact that post-separation parenting arrangements need to be responsive to the changing circumstances of parents and children as the months and years go by. The following recommendation reflects the fact that only the provisions in parenting plans which have been registered have effect as if they were orders made by the court. Those types of registered parenting plans have a higher status than simply being a matter which must be taken into consideration pursuant to s 68F(2).

**Recommendation 4**

That the Act is amended so that the Court, when making a parenting order, must consider “a parenting plan which is not a registered parenting plan” as one of the matters in s 68F(2).

**Use of parenting plans by the legal profession**

19 Council notes that the use of parenting plans by the legal profession has always been limited by the comparative advantages of consent orders. It appears that lawyers will always tend to use consent orders because of the client’s need for certainty, typically after a history of ‘breaches’ of previous arrangements, and their ease of use.

20 Some of the negative factors previously associated with parenting plans may be addressed by the advent of FRCs and aids such as parenting plan templates. Council sees value in involving the legal profession in the development of parenting plan templates. It also supports the provision of appropriate resources to aid in the greater use and acceptance of parenting plans by the legal profession. The active encouragement of parenting plans should include the wide dissemination of information to the legal profession.4

4 The Council and Family Law Section of the Law Council of Australia have recently distributed *Guidelines for Family Lawyers doing family law work*. This is to be updated electronically and would be one suitable vehicle for encouraging the greater use of parenting plans.
Recommendation 5

That the legal profession be invited to play an active role in the development of templates for parenting plans and ancillary explanatory material.

The Staffing Of FRCs

21 The Council envisages a different role for Parenting Advisers to that set out in the Discussion Paper. The key difference is that their role would not normally include undertaking mediation, and hence they would not necessarily be qualified or accredited mediators. Rather, the primary role of Parenting Advisers will be the critical task of assessing clients as they present with problems of varying complexity and urgency, providing initial information and advice to parents, and assisting them to access the services most relevant to their needs.

22 There is of course no reason why a qualified family and child counsellor or mediator should not take on the role of a Parenting Adviser, but Parenting Advisers need not be family and child counsellors or mediators within the meaning of the Family Law Act. Furthermore, it would not be the best use of the qualifications and skills of family and child counsellors or mediators to have them trying to fulfil the triaging and advice role required in the Centres as well as engaging in mediation when parents are in dispute.

Recommendation 6

That the roles of Parenting Advisers and mediators should be clearly distinguished. A Parenting Adviser needs to be suitably qualified, but need not be a family and child counsellor or mediator within the meaning of the Family Law Act.

Individual interviews with a parenting adviser

23 Council considers that the general advice role of Parenting Advisers may not have been given sufficient weight in the Discussion Paper. Getting the parents into mediation about the parenting arrangements is only one successful outcome of the personal interview. It may be that many of the clients will not move onto the mediation track after the personal interview. They may decide to pursue avenues to help them restore the relationship, or need other kinds of services and supports as a
priority at that stage of coming to terms with the separation. Sometimes problems about the post-separation parenting arrangements only arise some time after the separation, at which point an agreed parenting plan may need to be worked out. In the aftermath of separation, a parent may need other kinds of information and support. The FRCs need to meet clients where they are at the stage they come to the Centre, and to respond to the needs and priorities as perceived by the clients.

24 Since the first critical interaction that clients will have will be with Parenting Advisers—whether in person or over the phone—these staff will need to be selected on the basis of particular skills, knowledge, and experience to properly deal with the range of FRC clients.

25 In addition there will be a high need for specialist support and supervision services for the Parenting Advisors. And because of the novel role of Parenting Advisers a formal training program would need to be developed. This could in time, as a second order priority, lead to a formal accreditation program.

26 It follows that a key to the success of the FRCs is properly defining the duty statements and selection criteria for the Parenting Advisers. Council would reiterate the importance of quality staffing in providing the one-to-one interviews. The following matrix sets out the key criteria that should be considered:
# FRC Parenting Advisers: Key criteria

<table>
<thead>
<tr>
<th>1 Qualifications</th>
<th>2 Specialist Training</th>
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<tbody>
<tr>
<td>• A degree or diploma in social services, education, counselling, mediation, PDR or equivalent</td>
<td>• Impact of divorce and separation on children</td>
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<tr>
<td><strong>Skills training</strong></td>
<td>• Family violence</td>
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<tr>
<td>• PDR/Conflict resolution</td>
<td>• Child protection</td>
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<tr>
<td>• Counselling</td>
<td>• Mental health issues</td>
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<tr>
<td>• Case Management</td>
<td>(including suicide)</td>
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<td></td>
<td>• Diversity (CALD and ATSI)</td>
</tr>
<tr>
<td></td>
<td>• Family law issues and processes</td>
</tr>
<tr>
<td><strong>3 Skills / Competencies</strong></td>
<td><strong>4 Personal Qualities and Attributes</strong></td>
</tr>
<tr>
<td>• Listening skills</td>
<td>• Maturity</td>
</tr>
<tr>
<td>• Empathy</td>
<td>• Ability to manage, cope with and withstand interactions with distressed, anxious, angry clients</td>
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<tr>
<td>• Sensitivity to clients’ needs</td>
<td>• Robust, able to manage stress and pressures of work and client population</td>
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<tr>
<td>• Ability to contain clients distress and anxiety</td>
<td></td>
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<tr>
<td>• Knowledge of wide range of services</td>
<td></td>
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<tr>
<td>• Assessment regarding Domestic Violence and Child Protection</td>
<td></td>
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<tr>
<td>• Ability to refer to appropriate services</td>
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<tr>
<td>• Ability to work with wider Family Law System networks</td>
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<tr>
<td>• Communication skills (verbal and written)</td>
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<tr>
<td>• Competent literacy skills</td>
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Legal protections and customer focus

27 Consideration will also need to be given to:

- Parenting Advisers’ legal status with respect to the extension of the protections afforded under the Family Law Act to ‘counsellors and mediators’ (see for example s 70NI Family Law Act), and
- the development of a complaints mechanism, as part of a broader customer charter, based on industry best practice.

Responding to children’s needs at FRCs

28 Council recommends that appropriate guidelines be established to deal with children in this process. It is important that parents are encouraged to take into account their children’s needs, perceptions and attachments in reaching appropriate parenting arrangements and, within that context, be sensitive to their children’s voices. In order to ensure that children are not ‘used’ by one party or the other, clients should be informed that children will not normally be seen as part of the services provided by the FRC, although some mediation services will engage in child-inclusive practice. Where clients bring children with them they will have to be appropriately looked after.

Recommendation 7
That Family Relationships Services Program procedures include appropriate protocols to deal with the needs of children and in particular to ensure, so far as is appropriate in a particular case, the voice of the child is heard.

Needs of a culturally and linguistically diverse community

29 Given the linguistic diversity of clients, linkages with the Department of Immigration and Multicultural and Indigenous Affairs should be developed. It will be desirable for local FRCs to employ culturally and linguistically diverse staff as appropriate to their catchment areas. Indigenous staff, with appropriate skill sets, will

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also be needed. The capacity of the FRC to employ an appropriately diverse range of staff will of course depend on the availability of people who are suitably qualified and experienced.

**Recommendation 8**

That culturally and linguistically appropriate service delivery be included in FRC service provision through:

a. all staff in FRCs and FRSP services involved in parenting issues receiving ongoing cultural education

b. development of an employment strategy that includes criteria promoting cultural and linguistic diversity; and

c. provision of interpreters.

**Minimising client loss at point of transfer**

30 Council recommends that the FRCs procedures take account of the high risk of ‘losing’ clients at the time of transfer if there are delays or other impediments to clients taking up the referral.

**Recommendation 9**

That FRC procedures include appropriate safeguards to maximise the proportion of clients transferring to referred services.

**Mediation in joint sessions**

*FRCs capacity to broker out mediation services*

31 Council suggests that the FRC model should encompass the capacity to broker out mediation services rather than necessarily providing in-house services. The key role which must be provided at the Centre is that of the Parenting Adviser. Once the parents are engaged to try to resolve a parenting plan by negotiation, it is less critical whether the venue for that is the FRC or that it be conducted by a person directly employed by the FRC management. Mediators from different organisations could be rostered to conduct mediations at the FRC or some mediations could take place at other premises. The best mix of services could be a matter for each FRC to determine,
dependent upon local conditions, such as geographic location, other local service providers and the like.

**Recommendation 10**
That the FRCs should be permitted to broker out mediation services.

**Accreditation**

32 Council concluded that the timely implementation of the new Accreditation system being managed by the Attorney-General’s Department will be a critical contributor to the success of the FRCs. Given the magnitude of the expansion of services that will be necessary it will be important that accreditation is managed so as to not dilute the quality of services currently offered.

**Role of lawyers at Family Relationship Centres**

33 Council agrees that normally lawyers should not be involved in mediation conducted under the auspices of an FRC. However there may be some mediation services that allow lawyers to attend their sessions. There will be occasions when a mediator decides that a lawyer’s involvement would be beneficial in the mediation process. This should remain at the discretion of the mediator and the parties concerned. Council notes that the Legal Aid Conferencing model includes lawyers.

**Recommendation 11**
That while legal representatives should not normally be involved in a mediation conducted under the auspices of the FRC:

(a) FRC procedures should canvass the benefits of referring appropriate cases to a mediation model that does include lawyers where for example it is considered that the involvement of lawyers may assist in addressing power imbalance issues, and

(b) the involvement of lawyers should remain at the discretion of the mediator in consultation with the parties concerned.
Screening

34 Council posits two propositions about screening for violence procedures:

i. Nothing should prevent or impede the grant of urgent Court based orders relating to the safety of the client/family. The existence of a present fear for one’s personal safety or the safety of a child should be sufficient to get into Court without having first attempted to resolve the parenting issues through conciliation, and an applicant would not require a certificate from an FRC or other approved organisation to file an application in the Court.

ii. When a determination has been made that the mediation service may not be suitable because of violence issues the FRC should still have a role to play in referring clients to appropriate services.

35 Elaborating upon the second point, the menu of FRC services should include a pathway for clients ‘screened out’ for violence which includes the provision of, or referral to other services by the FRC. However, the kind of service provided will be different from the more straightforward mediation referral. For example this might include a referral to a Domestic Violence Service, or a lawyer. In short, in terms of service delivery there should not be two distinct client categories – those with violence issues and those not presenting with violence issues. All clients will receive appropriately tailored, and in the case of violence, appropriately prioritised services.

36 The FRCs should also take account of the needs of clients who have gone down the court pathway. While this may involve a period between resolution and determination phase of up to a year, these clients may nevertheless still require advice and assistance from the FRC in the interim. At the other end of the spectrum there are also cases which require urgent court intervention, for example recovery orders or PACE alerts, but once the immediate problem is addressed and the position secured, may be amenable to mediation.

37 In mapping out their service delivery options in the context of an integrated family law system the FRCs will therefore need to ensure that the role of lawyers and the courts are taken account of. In particular, there will often be a direct FRC interface
with both lawyers and courts. In the case of courts this suggests the desirability of having clear protocols dealing with clients who may be going to court for interim residence applications, or its equivalent under the amended legislation, or injunctions and returning to the FRC for appropriate advice and assistance in dealing with other aspects of the separation.

**Recommendation 12**
That the FRCs should provide an advice and support role to parents where face to face mediation is not appropriate because of a history of violence, abuse or any other such reason.

**When agreements break down**

38 Council supports the role of FRCs in relation to situations where an arrangement under an order (or other informal agreement) has broken down. However, it should not be necessary for someone to obtain a certificate from an FRC or other approved organisation before an application can be filed in court where he or she contends that there has been a flagrant breach of a recently made court order.

39 Council supports the new approach of using the FRCs to deal with other ‘low-level’ breaches. It agrees that the sanctions set out in s 70NJ(3) are not appropriate to deal with breaches of that nature.6

40 In the event that an FRC or other approved counselling or mediation organisation concludes that there is a serious disregard for one party’s obligations

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6 At the current time the Family Law Act Division 13A – consequences for failure to comply with orders and other obligations that affect children have what are known as “stage 2” and “stage 3” contraventions of orders. Put simply stage 2 is the first breach of an order. The intent of the legislation (s 70NG) is to direct people who have breached orders for a first time to an appropriate parenting program. The court at its discretion can also ask the “non offender” to go. The court also has the option of granting compensatory contact or otherwise varying the original order. A second breach of an order (unless the court deems the breach trivial) has to be dealt with under stage 3. The penalties through a stage 3 breach are quite serious and are set out in s 70NJ(3). A court does have the power to deal with a first time breach under stage 3 if it is satisfied that a person has behaved in a way that showed a serious disregard for his or her obligations under the order (s 70NJ(1A)(b)).
under a current order (even though that order is not recent) then a certificate to go to court should be provided to allow an aggrieved party to access that remedy quickly.

Council supports the proposition in the Discussion Paper that making the Contact Orders Program more accessible will be crucial. It can be expected that the Contact Orders Program will play a very useful role in assisting high conflict families and will be a valuable option available to the courts.

**Recommendation 13**

That a parent should be able to bring an application to the Court without preconditions if it is alleged that there has been a flagrant breach of a recently made court order.

**National advice line and website**

Council considers that the service provided by the national advice line should, as far as practicable, be the same as that provided ‘over the counter’. It follows that the expertise of the staff providing the service will need to be at the same high standard as that of other Parenting Advisers.

Consideration could be given to including the provision of telephone advice as part of the FRC tender specification, with calls being directed to the caller’s nearest FRC, rather than setting up a Call Centre independent of the FRC network.

Council notes two broad resource issues that will need to be considered:

i. After hours service: this would be for advice on how to deal with an emergency only, and it is expected that staff answering an out of hours call would deal with the issues mainly by providing information on emergency response options such as calling the State child protection authorities or the police.

ii. In-hours service: if FRC staff are providing this service their staff should have a mix of telephone and face-to-face duties. This will contribute to maintaining similar standards of service between the two client groups, by offering a mix of tasks, and also aid in staff retention.
Recommendation 14
That the Parenting Advisers providing telephone advice through the national advice line should also be engaged in face to face work with clients.

Implementing the new system

Pathways Network

During its consultations around Australia Council has been impressed by the dynamism of Pathways Networks in some areas, while in other areas an effective network has yet to develop. Council concluded that the Pathways Networks offer one means of promoting the reforms set out in the Discussion Paper, but cannot be relied on as the only means of achieving interagency co-operation without additional targeted support and direction.

Recommendation 15
That the potential of the Pathways Networks be assessed in terms of their capacity to assist in implementing the new family law system in their local area, and that viable Networks should be given additional support.

Rural and remote services

Council is of the view that the national advice line and website on their own will provide an insufficient service to meet the needs of people in rural and regional areas, as they will only be able to offer initial information and support.

A primary means of offering some services to regional areas where there is no standing FRC would be for appropriately located FRCs to be funded for outreach to smaller towns and communities in their region. In this way, they could at least provide some face to face services in these places at reasonable intervals.

Recommendation 16
That appropriately located FRCs be funded for outreach to smaller communities in their region in order to provide some face to face services in those communities at reasonable intervals.
48 In addition to this, Council suggests that a number of other rural and regional service delivery models could be considered to extend the reach of FRCs from their immediate locations.

49 One option is the provision of similar material in correspondence and online formats to that which will be provided to people in person through information sessions at the FRCs. In the United States, mandatory post-separation parenting programs are sometimes delivered in correspondence mode to people who cannot attend programs in person. Such resources may provide a model for how to deliver a comparable service to people in rural and remote locations. It needs to be backed up with telephone calls to people after they have had time to study the package in order to provide an opportunity to ask questions and to clarify issues.

50 In terms of the distribution of other information one model that was drawn to Council’s attention was the Legal Information Access Centre (LIAC) model in New South Wales. Another is the system of Community Access Points used by Legal Aid in Queensland.

(i) NSW LIAC model

51 The Legal Information Access Centre (LIAC) of New South Wales provides a model of a network that makes information accessible through an existing network in order to reach a broader cross section of the community.

52 The primary LIAC centre operates from the State Library of New South Wales in Sydney, providing an in-depth research service and specialist expertise to assist the community to locate and understand relevant legal information. There are 76 LIAC regional service points that operate in public libraries around New South Wales. The regional service points have a small library of selected legal information and staff trained in assisting community members to access the complex legal information. LIAC distributes key legal information tools to all 382 local public libraries around New South Wales, thereby enabling communities in all corners of the State to have
initial access to legal resources, and a referral to the larger regional service points if required.

53 LIAC has arrangements in place to distribute brochures and information sheets of state and federal government agencies, thereby ensuring that these reach all 382 public libraries and the communities using those libraries.

(ii) Community Access Points: Legal Aid Queensland

54 In communities that do not have a regional office, Legal Aid Queensland maintains collaborative working relationships with specific local community organisations. In rural communities there are often one or two organisations people identify as the place they turn to for support. The support needed may include legal services. Examples of these organisations include neighbourhood centres, Queensland Government Agents, hospitals and courthouses. Staff of these organisations are often called upon to provide a wide range of services and to be up to date on every new government development. Often this is required in an environment with limited professional support. Legal Aid Queensland acknowledges the valuable role these organisations play and tries to effectively support these organisations in their work.

55 A Community Access Point is an organisation in a community which provides a range of support services and:
   i.  has current information about the services Legal Aid Queensland provides
   ii. is in regular contact with Legal Aid Queensland and
   iii. will assist people to access legal advice.

56 Community Access Points have a folder of Legal Aid Queensland fact sheets; some have Internet access, others videoconferencing. In some cases Legal Aid Queensland has accessed funding to resource organisations with videoconferencing units. The two videoconferencing networks are called Women's Justice Network (in southwest Queensland) and Western Queensland Justice Network (in western Queensland).
57 Community Access Points provide
   i. information about services provided by Legal Aid Queensland including fact sheets and kits
   ii. links to free telephone legal advice, and
   iii. feedback to Legal Aid Queensland about local needs and opportunities to provide community legal education.

Need for client choice
58 Council also notes that there is an important issue of choice in offering services in rural and regional locations. Service delivery will need to recognise that there may be personal reasons for not accessing a particular service if it is associated with a particular denomination, organisation, or personality. While FRCs may enter into various partnerships with other services this should not be at the cost of depriving clients of choice. It follows that how physical outreach programs are implemented is important.

59 The need for adequate infrastructure to support the FRC referral activities will be crucial to their success in rural and regional areas. If there are no back up services the FRC will be compromised.

60 Council also notes the development of teleconference technologies may be able to be integrated into the FRC service delivery model in appropriate circumstances.

The needs of the Defence forces
61 Council recently had discussions with representatives from the Defence Community Organisation. There are some 53,000 serving members in the Australian Defence Forces, 50% of whom are married or in de facto relationships. Hence, Council decided to examine how family relationships are dealt with, and in particular

\[\text{Family Law Council Canberra meeting: 18-19 November 2004.}\]
what post-separation support services are provided to these personnel and how the family law system can be responsive to their needs.

62 On the basis of these discussions Council concluded that there is a need to specifically consider the unique circumstances of defence force staff when planning the provision of family law information and advice services, in particular through the FRCs. An allied point is that there is a need to expand the coverage of existing family law services to take account of large military bases, for example by arranging more formal liaison with Courts and integration in Pathways Networks.

**Recommendation 17**
That when planning the outreach of FRCs to regional areas, the location of defence force communities be taken into account.

**Help for grandparents**

63 Council supports the more explicit recognition of the role of grandparents in providing support in the parenting of children after separation. However, it is concerned that a practice will develop of dividing a child’s time into ever more regimented schedules, with grandparents’ contact being formalised in a similar way to that of the non-resident parent. A balance needs to be found to ensure that the law remains child-focused and not driven by the demands of competing adults.

64 Council considers that the best way of assisting grandparents to maintain a relationship with their grandchildren is through the services of the FRCs and other counselling and mediation organisations, rather than through litigation.

65 If the Government wishes to reinforce the importance of grandparents’ roles through further amendment to the Family Law Act, it is suggested that this can be done by amendment to s 60B, making what is implicit in the section explicit.
Recommendation 18
That s 60B(2)(b) is amended as follows (in bold):

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; such as grandparents.

Functional recognition of grandparents as primary caregivers

66 Council also notes that there needs to be a whole of government approach to the functional recognition of grandparents when they take on the role of being primary caregivers, without the necessity of seeking a formal recognition of their parental responsibility through the courts. Functional recognition would involve different government agencies, Commonwealth, State and Territory arms of government, adapting legislation and policy so that grandparents are able to qualify for relevant benefits, concessions and entitlements, and to be recognised as exercising de facto parental responsibility for specific purposes, such as consents required by schools. In the Commonwealth sphere, there is already functional recognition under the Child Support scheme of a grandparent who is a principle provider of ongoing daily care for his or her grandchild. This type of functional recognition should also encompass Family Tax Benefits and Centrelink payments.

67 Council notes that the issues concerning functional recognition of primary caregivers are not confined to grandparents. In its Letter of Advice to the Attorney-General concerning recognition of ATSI parenting practices, Council draws attention to the need for functional recognition of kinship caring practices in the Aboriginal and Torres Strait Islander communities.

Recommendation 19
That the issue of functional recognition of grandparents’ role as primary caregivers be referred to the Community Services Ministers Council.
CHANGES TO THE LAW TO SUPPORT SHARED PARENTING

Equal shared parental responsibility

68 Council supports the intention to amend the Act as outlined in the Discussion Paper under this heading, and notes that this reflects proposals concerning shared parental responsibility contained in its submission to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into child custody arrangements in the event of family separation.

69 Council notes that the concept of equal parental responsibility is already enshrined in s 61C of the Family Law Act, and that consequently the primary goal of legislative amendment should be to spell out the meaning and effect of this to parents. It also notes that the Parliamentary Committee recommended that while the concept of equal parental responsibility should be given much more substance in the legislation by spelling out what it means, it is not always appropriate that parental responsibility be shared and that there are circumstances where it is in the best interests of the child that decision-making authority on some or all matters be vested only in the primary caregiver.

Entrenched conflict

70 Council agrees that entrenched conflict should be a basis upon which the court can make an order for sole parental responsibility in relation to long term decisions about the care, welfare and development of a child.

71 The council suggests two options in relation to the definition of entrenched conflict.

Option A: To provide no definition at all.

Option B: To define entrenched conflict to mean ‘a history of conflict between the parents which leads a court to find that it cannot reasonably be anticipated
that the parents can jointly reach a decision relating to a child’s long term care, welfare and development.’

72 In defining entrenched conflict in terms of option B the words “a child’s long term care, welfare and development” should be defined as set out in the second dot point in recommendation 3 in the House of Representatives HR Family and Community Affairs Committee’s report *Every Picture tells a Story*. The sorts of matters that constitute ‘long term decisions relating to the welfare of the child(ren)’ are noted in the Discussion Paper at p 10. The fact that parties are litigating should not be determinative of the question as to whether entrenched conflict exists or not.

73 Council agrees that while a finding of entrenched conflict could rebut the presumption of equal shared parental responsibility, the Court should be encouraged to consider a range of options in dealing with high conflict families. Entrenched conflict in and of itself should not mean equal shared parenting arrangements are deemed automatically unsuitable, or that appropriate therapeutic services should not be provided. The rationale of the Contact Orders Program is that couples with entrenched conflict can, over time, and with appropriate interventions be helped to avoid the behaviours characterised as entrenched conflict.

74 It is suggested that to have couples divided into one category – entrenched conflict or the other – no entrenched conflict – may encourage binary thinking in terms of accessing services and service delivery. If there is entrenched conflict then there may be no appropriate services provided.

75 Three options that Council would see as being most appropriate for families with very high conflict would be to either adjourn and direct a parent or both parents to attend a service dealing with high conflict families prior to making final orders, to order attendance at a Contact Orders Program after making final orders, or to make an order vesting some or all decision-making authority solely in one parent.

8 House of Representatives Family and Community Affairs Committee, *Every Picture Tells a Story*, Parliament of Australia, December 2003, 42
9 This reflects the recommendation in Council’s submission to the House Inquiry.
76 Council recommends clearly setting out these three options in legislation. This would provide signals to the judiciary, assist self-represented litigants better understand possible outcomes, and shape the community’s expectations about the nature of the proceedings.

77 While the power to adjourn is an inherent power of a court, Council suggests there are benefits in setting this out as part of a step-by-step procedure for dealing with entrenched conflict.

Recommendation 20

That the Act is amended to expressly provide for three options which a Court must consider in cases where there is high conflict. The three options are to:

- adjourn and direct a parent or both parents to attend a service dealing with entrenched conflict families
- make a final order, and direct a parent or both parents to attend an appropriate service, or
- make an order vesting some or all decision-making authority in one parent.

Enhanced protection against abuses of court processes

78 While the Council strongly supports the intention that the idea of joint parental responsibility should be spelled out in the legislation (indeed it proposed this to the Parliamentary Committee), it is concerned about a small but nonetheless significant minority of parents who drag the other parent through dispute resolution processes and court applications over relatively minor matters concerning the exercise of parental responsibility.

79 The power to dismiss frivolous and vexatious proceedings is contained in s 118:

(1) The court may, at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious:
   (a) dismiss the proceedings;
   (b) make such order as to costs as the court considers just; and
(c) if the court considers appropriate, on the application of a party to the proceedings—order that the person who instituted the proceedings shall not, without leave of a court having jurisdiction under this Act, institute proceedings under this Act of the kind or kinds specified in the order.

And Rule 11.04 of the Family Law Rules is directed to frequent applications and provides:

**RULE 11.04 Frivolous or vexatious case**

(1) If the court is satisfied that an applicant has frequently started a case or appeal that is frivolous, vexatious or an abuse of process, it may:

(a) dismiss the applicant's application; and

(b) order that the applicant may not, without the court's permission, file or continue an application.

(2) The court may make an order under subrule (1):

(a) on its own initiative; or

(b) on the application of:

(i) a party;

(ii) for the Family Court of Australia — a Registry Manager; or

(iii) for the Family Court of a State — the Executive Officer.

(3) The court must not make an order under subrule (1) unless it has given the applicant a reasonable opportunity to be heard.

*Note* Under section 118 of the Act, the court may dismiss a case that is frivolous or vexatious and, on application, may prevent the person who started the case from starting a further case. Chapter 5 sets out the procedure for making an application under this rule.

80 The option that a parent will be declared a vexatious litigant is rarely exercised. If the power under s 118 is limited in practice to situations where an applicant has “frequently started a case” it may not be broad enough in practice to deal with the situations where matters should be dismissed at an early stage.
In order to ensure that the time of the Court is not wasted over minor issues, and that one parent is not harassed by threats of litigation without any reasonable prospect of success, it is recommended that the Court be given stronger powers under s 118 to deal with applications early on in the process of case management which are not only frivolous or vexatious, but which have no reasonable prospect of success. Such a power could of course only be exercised by a judge, magistrate or officer of the Court carrying delegated authority, and only after giving the applicant a chance to be heard. An application may have no reasonable prospect of success and yet not be regarded as ‘frivolous’ or ‘vexatious’, since these terms imply something about motive.

Recommendation 21
That s 118 be amended to allow the Court to dismiss proceedings at any stage if it considers that they have no reasonable prospect of success.

Equal shared parenting time

Council supports the proposal that courts be required to consider substantially shared parenting time in appropriate cases, but it considers that the Court should not be required to consider this possibility unless the parents themselves put it in issue as an option that one or both would like to be considered. If a matter goes to trial, the Court needs to respond to the case as presented by the parties, although it is not bound by the options proposed by the parties (U v U). If both parties are seeking a residence order or its equivalent under the amended legislation and neither believes that substantially equal parenting time is appropriate in their circumstances, they should not have to lead evidence to demonstrate to the Court why an equal time arrangement would be inappropriate. This can only add to the cost and length of trials without appreciable gain, since the parties would feel the need to lead evidence in relation to a matter on which they do not disagree.

10 (2002) 209 Fam LR 74
Nonetheless, there may be value in making it clear that one option available to the Court in determining a residential schedule is for substantially shared parenting time. A change of this kind may be helpful in terms of making the law better understood by, and more easily explained to self-represented litigants.

Recommendation 22
That the Act should not require the Court to consider the option of substantially equal parenting time if this is not a proposal advanced by any of the parties, but the Act should make clear that an order for substantially shared parenting time is an option available to the Court in determining a residential schedule for the child.

Partly for the same reason, Council recommends that to remove all doubt the legislation should clearly define shared parental responsibility as not involving any fixed percentage of parenting time. This would ensure there is no possible confusion about the connotations of the term.

Recommendation 23
That the Act is amended to expressly define shared parental responsibility as not involving any fixed percentage of parenting time.

Council suggests that the key outcome to be achieved is that parents, and the broader community, are brought to an appreciation that the critical point in post separation parenting is not the number of hours set out in a particular parenting plan, but the quality of the relationship that ensues.

Compulsory dispute resolution

As noted in the Discussion Paper, the requirement for compulsory dispute resolution before filing will not apply in two situations, namely where there is family violence or child abuse. Council would add two further categories. The third category is applications relating to the flagrant breach of recently made orders (see recommendation 13). The fourth category would be to allow an urgent application where delay in the filing of the application would render the application nugatory.
With respect to applications where delay in filing the application would render the application nugatory, the court system currently has a well tried and effectively operating procedure where urgent applications can be listed on “short notice”. Leave to file on “short notice” has to be granted by a Deputy Registrar of the Family Court, or a Federal Magistrate in the Federal Magistrates Court. Deputy Registrars carefully consider the evidence supporting the claim for urgency before granting leave. Lawyers understand these cases have to be exceptional and do not lightly bring an application for listing on short notice. Only applications which have an appropriate level of urgency are let through.

The following examples are situations where a party should have access to the court without a certificate from an FRC or other approved organisation.

**Example 1**

_A parent has applied for a recovery order under s 67V following the abduction of their child within Australia. This parent wishes to have the order so that police are authorised to search for and apprehend an abducted child._

**Example 2**

_A parent seeking to have a passport issued for a child cannot locate the other parent to obtain their consent, and so applies to the Court seeking to dispense with the need for consent of the other parent._

**Example 3**

_A parent has reasonable grounds to believe a child is about to be removed from the jurisdiction. This parent wishes to seek an urgent parenting order._

**Example 4**

_A parent had agreed in a parenting plan that a child could go with the other parent on a 10 day trip to Disney World in Florida. The costs of the trip are paid. The parent with whom the child ordinarily lives, at the last moment, indicates that they do not intend to make the child available._
Recommendation 24

An applicant should not need to demonstrate that he or she has engaged in a process of conciliation prior to filing where delay in filing would render the application nugatory.

89 This ‘fast-track’ access to court should be ‘policed’ by way of providing the court with a power in s 117 to make a costs order where an application has been made without having reasonable grounds to do so.

90 At the same time provision should be made to ensure that high conflict parents that may seek to abuse the court process by serial applications are deterred not only by having such cases dismissed under s 118 – frivolous or vexatious proceedings - but also by the prospect of costs being awarded against them.

Recommendation 25

That s 117 is amended along the following lines so that a court has the power to make a costs order either:

(a) where an application is filed on one of the grounds that renders it unnecessary to attempt to resolve the dispute before filing, and the court is satisfied that the application has been made without the applicant having a reasonable belief that one or more of those grounds could be established, or

(b) the court is satisfied that the application is frivolous, vexatious, or had no reasonable prospect of success.

Compulsory dispute resolution during the phased implementation

91 Council notes that a critical issue, in terms of making allowances for transition issues, will be when the compulsory element of the reform is to commence. As a transitional issue the legislation will need to recognise that as a result of the FRCs’ phased roll-out there will be many clients who are not able to access a FRC. However, this is not a complete bar to the roll-out of compulsory dispute resolution before filing if mediation can be provided by other approved counselling and mediation organisations on the basis that the first three hours are free, or funded pursuant to other arrangements.
Recommendation 26

In the implementation phase of rolling out the FRCs, the Government should make arrangements with suitable approved counselling and mediation organisations to provide some free mediation services in areas where the FRCs have yet to be established.

92 The Regulations could prescribe the Court registries where a Certificate is needed to file an application.

Recommendation 27

That the Act is amended so that applications can be filed without certificates by people who do not have Family Relationship Centres or another approved counselling or mediation organisation easily available to them. Legislation along the following lines is suggested:

A person shall be required to file a certificate from a Family Relationships Centre or other approved counselling or mediation organisation if subsection 2 applies.

Subsection 2:

a person shall file a certificate from a Family Relationships Centre or other approved counselling or mediation organisation:

(iii) if the application is to be filed in a registry of a court which is prescribed by the regulations; or

(iv) if the services of a Family Relationships Centre or other approved counselling or mediation organisation are available within a distance prescribed from time to time by the regulations from the person’s place of residence or employment.

Changes to enforcement provisions in the Family Law Act

93 Council has four major concerns about the proposal to amend the Act so that ‘where there has been more than one deliberate and intentional breach of orders, the court must consider changing the parenting order in relation to which parent the child lives with and with whom the child spends time.’

94 First, while the Discussion Paper notes that the best interests of the child would still be the most important factor in making decisions, it is difficult to reconcile what appears to be an adult focus on punishment with the application of the best
interests of the child principle. Moreover, the proposal may be seen by some as using the child as a pawn or a weapon in the parental dispute.

95 The second ground for concern is that this may create an expectation in some quarters that even if a parent has been rejected by the court with respect to the child’s residence there would be an opportunity to achieve this if two breaches can be established.

96 The third concern is a corollary of the increased expectations that may arise in the community. By appearing to offer the prospect of changing a court order in a sense ‘by the backdoor’, this will increase the focus on litigation as an avenue for dispute resolution, and hence the prospect of increased litigation costs.

97 Finally, taking action now would seem to be premature as a number of other initiatives have been taken, or are planned, in this area. In particular the Contact Orders Program is undergoing significant expansion, and the Attorney-General has recently asked Council to develop better models in the family law system for dealing with contravention or variation issues involving children’s cases. It would seem prudent to give time to the initiatives already underway and which are already delivering promising preliminary results. Council draws attention in this context to its recommendation 13 (above) concerning prioritisation of flagrant breaches of recent orders.

Recommendation 28
That the Government defer decision about amending the Act to require the court to consider changing the parenting order in cases of multiple deliberate and intentional breaches of orders, until the results of other initiatives are assessed.

11 Council is about to distribute a Discussion Paper: The ‘Child Paramountcy Principle’ in the Family Law Act. The Discussion Paper invites comment on specific questions, such as whether the present approach of the Act should be retained, or whether it should be modified.
13 Council understands that the Evaluation of the Contact Order Program shows a high level of success.
However, if despite these concerns Government decides to proceed, it may be possible to mitigate adverse impacts by either specifying that the breaches must be of a serious nature (which raises definitional issues of its own), or by having the court look behind the actual breaches and determine whether the nature of the breach(es) can be characterised as flagrant or continuing, and if so, whether this indicates a failure of parental concern for the child, or disregard for the other parent’s relationship with the child.

In practical terms, the main significance of flagrant breaches of Court orders is likely to be that it will constitute a change of circumstances within the Rice and Apslund test that justifies the Court reopening the issue of residence on the application of a parent. It should not be given any stronger legislative significance than that. The residence issue needs to be determined on all the evidence available and in accordance with the principle that the child’s best interests are paramount. Evidence of unwillingness to comply with court orders may well reflect on the parent’s claim to be the preferred primary caregiver, but it is only one of the aspects a court would need to consider.

Provisions from overseas models

With respect to the two proposals based on Florida legislation, Council has concerns that the first element - the introduction of a requirement that courts have regard to circumstances where the residence parent is more likely to provide the other parent with frequent contact with the child - may give rise to adverse unintended consequences. In particular it was critiqued on the basis that:

- it focuses on the quantum of time rather than the quality of the relationship
- it may suggest that there is an element of voluntariness about complying with a court order
- it detracts from the central tenet that the child’s best interests determine parenting arrangements rather than a parent’s presumed intention to comply with a court order

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14 (1978) 6 Fam LR 570.
• arrangements based on an assessment of a parent’s state of mind at a particular point in time are not necessarily going to be durable. Parents may change their minds and new family circumstances may impede the anticipated frequency of contact
• problems of definition arise relating to ‘frequency’.

101 On the other hand Council notes that the second point - the introduction of a requirement that courts have regard to the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent - places the proper emphasis on the quality of the emotional relationship rather than a narrow time-based view of parenting arrangements. While courts already consider the willingness and ability of parents to facilitate and encourage the relationship with the other parent under s 68 F(2)(h) with respect to attitudes to the child and to the responsibilities of parenthood, more explicit guidance may be beneficial.

COMMUNITY EDUCATION

102 What communication or education programs need to be put in place to make the FRCs a ‘first stop shop’ in terms of the general community’s awareness?

103 Council agrees that a broad-based community education campaign is a critical component of the reforms. Any such campaign needs to be ongoing and have a high-profile if it is to have any reasonable prospect of contributing to the long term goal of bringing about cultural change concerning the way the community thinks about parenting after separation. A realistic time frame for bringing about such a cultural change may be 5-10 years.

104 In the initial phases of the development of the FRCs, the target groups for the community education campaign need to be carefully chosen so that expectation and demand can be met by the supply of available services. These education and awareness programs should target the same groups that were in mind when the costings for the Centres and the expansion of FRSP services were done.
Recommendation 29
That a broad-based community education campaign be developed on the basis of a 5-10 year plan with the long term goal of bringing about cultural change concerning the way the community thinks about where to get help in organising parenting arrangements after separation.

Local FRCs need to support a national campaign with regular contributions to local press and radio. These contributions should not only be about explaining the services of FRCs but also publicising other services and programs which are available in the community to help families. Such local advertising will supplement the referral role of the FRCs for people who drop in seeking assistance. To achieve this, each FRC needs a modest advertising budget.

Recommendation 30
That each FRC be given a budget for local advertising and be encouraged to make regular contributions to local press and radio in order to make known the services and resources that can assist families in each locality.

Council also recommends that school curricula, especially legal studies, civics and relationship type courses, should reflect the key structures of the new family law system. This will assist in ‘embedding’ the new approach in the minds of the next generation who will be prime users of the new family law system in terms of parenting after separation.

Recommendation 31
That State and Territory governments be requested to examine their school curricula, especially legal studies, as well civics/citizenship/society/relationship type courses, with a view to ensuring that they reflect the key structures of the new family law system.

Family Law Council
December 2004
References

Government Reports:


Articles


Miranda Kaye, Julie Stubbs and Julia Tolmie (June 2003) *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*,
Research Report 1 (Families, Law and Social Policy Research Unit, Griffith University).

Family Law Council

The Family Law Council (the Council) is a statutory body whose function is to advise and make recommendations to the Attorney-General on the working of the *Family Law Act 1975* and other legislation relating to family law. The Attorney-General appoints members to the Council and provides references to the Council.\textsuperscript{15} The Attorney-General has given his permission for this submission to be lodged with the Inquiry. The content of the submission is, however, the independent view of the Council.

Members of Council are:

**Professor Patrick Parkinson**, University of Sydney, New South Wales  
(*Chairperson*)

**Ms Josephine Akee**, Indigenous Consultant, Family Court of Australia, Cairns, Queensland

**Mr Kym Duggan**, Assistant Secretary of the Family Law Branch, Attorney General's Department, Australian Capital Territory

**Ms Nicola Davies**, Senior Legal Consultant (Family Law), Legal Aid Queensland

**Ms Christine Mead**, Federal Magistrate, Federal Magistrates Court, Adelaide, SA

**Justice Susan Morgan**, Judge, Family Court of Australia, Melbourne, VIC

**Mr Clive Price**, Executive Director, Uniting Care Unifam Counselling and Mediation, NSW

**Ms Susan Purdon**, practising family law lawyer, Hopgood Ganim Lawyers, Brisbane, Qld

**Mr Garry Watts**, practising family law lawyer, Watts McCray, Sydney, NSW.

The following agencies and the Family Law Section of the Law Council of Australia have observer status on the Council (with names of observers):

\textsuperscript{15} Section 115 *Family Law Act 1975*. For further information see <www.law.gov.au/flc>
Australian Institute of Family Studies – Mr Bruce Smyth
Australian Law Reform Commission – Ms Lani Blackman
Child Support Agency - Ms Yvonne Marsh
Family Court of Australia - Ms Jennifer Cooke, and Ms Di Gibson
Family Law Section, Law Council of Australia –Ms Maurine Pyke
Family Court of Western Australia –Judge Stephen Thackray
Federal Magistrates Court – Mr Peter May (note that Mr May did not attend the
Canberra Council meeting which formulated this submission)
EXEMPLARY EXCERPTS FROM LETTER OF ADVICE TO THE ATTORNEY-GENERAL
ON PARENTING PLANS
16 MARCH 2000

RECOMMENDATIONS

Recommendation 1 Amendment of the Family Law Act 1975

Division 4 of Part VII of the Act be amended to:

- encourage the use of parenting plans, and the use of consent orders where a party requires an element or elements of the plan to be enforceable; and
- repeal the registration provisions.

Recommendation 2 Encouragement of an integrated package

The use of an integrated parenting plans/consent orders package be encouraged through information and education through existing funded services, such as counselling and mediation services, legal aid bodies and community legal services and through other appropriate means, for example, clinical legal education.

Recommendation 3 Review of existing kits

To assist parties to develop parenting plans (and obtain consent orders, if required), the existing kits and information be reviewed and modified to reflect the above recommended approach.

Excerpt from Letter of Advice:

_The intention of parenting plans_
4.2 Parenting plans in Australia were first suggested by Council in the POPAS Report, in which Council said:

Parenting plans form an ideal basis for discussion in a mediation or conciliation setting by focussing on the details of parenting rather than on legal concepts such as custody and access.[22]

4.3 Dispute prevention and early resolution. Arguments for promotion of the use of parenting plans are based on the assumption that the process of developing a parenting plan, preferably in a structured way assisted by a kit, will encourage joint parental responsibility and prevent future disputes arising by ensuring that all potentially contentious issues have been identified and dealt with in as positive a way as possible.

4.4 Where conflict over some issues is anticipated, the assistance of a skilled neutral third person/mediator to facilitate the development of the parenting plan may ensure that such issues are identified and dealt with before there is opportunity for them to escalate into a legal dispute. The aim is to prevent unnecessary involvement in the Court system and its adversarial process. The mediator can: assist the parties to decide which key elements may need to be legally enforceable; focus the parents on the best interests of the children; and, ensure that the parenting plan incorporates a dispute resolution process, such as mediation, for any future problems.

4.5 Cooperation between parents. Parenting plans were intended to "give each parent the opportunity to consider the nature of their parenting responsibilities"[23] and to "increase the likelihood of shared parenting".[24] They were intended to be "flexible and capable of easy alteration to meet the changing needs of the child".[25] The proposal for parenting plans was consistent with the overall aim of the POPAS Report to maximise the opportunity for both parents to take full responsibility for decision making about the ongoing care of their children after separation.
4.6 The capacity of the separating parents to cooperate in relation to their ongoing parenting responsibilities was seen by Council as having pivotal significance. This matter is further discussed below.[26]

4.7 Flexibility. Parenting plans were an important aspect of Council's proposals. Council's original intention, as set out in the POPAS Report,[27] was that parenting plans would be flexible arrangements which would vary widely in scope, detail and content. Such plans were considered to be workable where there was an appropriate degree of cooperation between the parents involved.

4.8 It was Council's intent that parenting plans would enable the parties, if they wished, to commit their arrangements to writing so that both would understand their responsibilities and the children could have a reasonable degree of certainty about arrangements affecting them. However, the aim was not inflexibility or finality. Parenting plans would acknowledge the realities of changing needs over time: changes which occur in education, personal needs, health needs, living arrangements and financial support between birth and 18 years of age.

4.9 Alternative to court action. Parenting plans were seen as offering an alternative to the processes of the Family Court. It was not Council's intention that parenting plans would become formal agreements, capable of registration in a court. In fact, parenting plans contrasted with court orders and agreements in several respects, especially in relation to:

(i) the process by which the plans were to be drawn up;

(ii) flexibility of arrangements;

(iii) the costs to the parties; and,

(iv) the resolution of disputes about what had been agreed to between the parties.

4.10 The costs to the parties of taking a matter to a fully defended court hearing were considered to be high, from both financial and emotional viewpoints,
whereas parenting plans would involve minimal financial and emotional costs to the parties.

4.11 Dispute resolution. One of the major advantages which Council envisaged was that parenting plans would allow the parties to decide how they would resolve disputes over the detail of arrangements. They could thus avoid the winner/loser or loser/loser results of other options. Arrangements would be capable of meaning different things to different people or be capable of requiring elaboration as specific situations arose. Disputes about such matters, particularly those relating to children, were seen as an ongoing feature of the family law system. When such disagreements arose, a dispute resolution mechanism in a parenting plan would enable the parties to get together and try to find a solution which would be acceptable to them both.

4.12 This contrasted with the dispute resolution options of a court order or agreement under which either the problem remained unresolved and added to the gathering list of grievances between the parties, or an externally determined and enforceable solution was imposed on the couple. That solution may not have been acceptable to either party or may have been acceptable to one of them only.\footnote{http://www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Letters_of_Advice_Letters_Parenting_Plans
Footnotes omitted.}