

Can There Ever Be Affordable Family Law?

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Relationship breakdown and financial stress for families

Relationship breakdown, and its aftermath, is a time of enormous financial stress for most families, especially those with children. The finances which have supported one household must now be stretched over two – often with some help from the Government in the form of increased Family Tax Benefit and other payments. It nonetheless involves significant difficulties for both parties to the relationship and the children of that relationship. The mortgage must still be paid whilst one person, usually the male, has to find somewhere else to live – and that is likely to involve paying rent. If the children are to spend overnight time in both households that means having a place large enough for them to have beds to sleep in, and preferably bedrooms in which to do so.

If they cannot resolve their financial or parenting issues in the aftermath of separation, then the costs of engaging lawyers and navigating the court system add greatly to the financial stress. Full legal representation in family law litigation is quite simply unaffordable for many families – perhaps most. Yet the alternative, if they cannot settle, is also a hard road. It is difficult to represent oneself in litigation with complex rules and procedures in a system that relies on the competence of the advocate to present someone's case.

The costs of family law disputes that are hard to settle can be illustrated by research that Dr Judy Cashmore and I have conducted on relocation disputes. For five years, from about 2007 onwards, we followed 80 parents in 70 families who had been in dispute about relocation issues. The majority of these cases (about 59%) went to trial, while others settled. Twelve participants reported legal costs of \$100,000 or more just for themselves, with the highest estimate being between \$450,000 and \$500,000.¹ To put the overall legal costs in perspective, the average weekly ordinary full-time earnings in February 2007 was \$1,070.40 per week or \$55,661 per year.² Eleven participants in our

* Certain of the ideas in this paper were developed in conjunction with Brian Knox SC and Dr Nicky McWilliam. Thanks are due to them for their collaboration in developing reform proposals. Thanks also to others who commented on this paper. However, all responsibility for errors or deficiencies in this paper is my own.

¹ P. Parkinson, J Cashmore, and J Single, 'The Need for Reality Testing in Relocation Cases' (2010) 44 *Family Law Quarterly* 1.

² The statistics on average weekly earnings are available at the Australian Bureau of Statistics: <http://www.abs.gov.au>.

study lost their homes due to litigation costs, and many others ended up in considerable debt to parents or others.³ The very high legal costs participants had to meet, relative to income, was a major source of distress.⁴

These problems are quite well-known; but what is less appreciated perhaps is that family law is increasingly becoming difficult for governments to afford as well.

Relationship breakdown and financial stress for Government

Typically, we tend to think of governments as having unlimited resources. It is just a question of how resources are distributed across the myriad different programs and services and how much governments choose to raise through taxation.

However, few within government would recognise this view of potentially limitless resources and possibilities. As successive governments have found, not only in this country but elsewhere, it is much easier to create an entitlement than to take it away. There is never a shortage of pressure groups who will insist that another group should bear the pain of expenditure cuts or increases to taxation. This was illustrated by a recent Newspoll which found overwhelming public support for bringing the federal budget back under control. 70 per cent said they want the government to put a priority on spending cuts, but 61 per cent opposed welfare cuts.⁵ Yet, health, pensions and other income support payments such as family tax benefits constitute a very large proportion of federal government expenditure.

The situation is similar all over the Western world. When people have entitlements and expenditure is demand-driven, it is very difficult to keep the budget under control in periods of rising demand.

The level of demand-driven expenditure at both state and federal government levels is constantly increasing for two major reasons. The first is the ageing of the population. The second is the increasing fragility of families, especially those with children.

Western societies face an ever-growing problem arising from the increase in the proportion of the population who are beyond retirement age. Not only has most of the baby boomer generation moved into the twilight years of life, but this generation is living longer than previous generations of retirees. This puts enormous pressure on health budgets, pensions and accommodation for the elderly infirm who can no longer live at home. The ageing of the population also has an impact on the need for and demand for community services to support the elderly who remain living at home. Unfortunately,

³ Parkinson, Cashmore & Single, above n.1.

⁴ Ibid.

⁵ *The Australian*, April 25th 2017, p.1 <http://www.theaustralian.com.au/national-affairs/treasury/voters-cut-spending-but-no-pain-to-fix-budget-deficit/news-story/5d3de35b6c4ff1cec3245869108b76f2>.

increased longevity has been combined with decreased fertility.⁶ Because of this, an ageing population is supported by a shrinking base of people of working age who will be paying the taxes to support them.

Along with the ageing of the population there is also a rapidly increasing level of fragility in terms of relationships between parents, leading to family breakdown. This also has significant implications for government expenditure through entitlement programs.

Fragile families

Over the last 20 years, there has been a substantial increase in the number of children whose parents live apart, and who are therefore potentially the subject of parenting disputes. About 40 per cent of all children will experience one of their biological parents living elsewhere by the time they are 15–17 years old,⁷ an increase from around 25 per cent some 20 years ago.⁸

This is due mainly to the decline in marriage. More and more people are living together and having children outside marriage. The international evidence is that de facto relationships, even with children, are much less likely to last than marriages.⁹ There are also many more children being born into single mother households. About 13 per cent of all children are born into mother-only households,¹⁰ a figure twice as high as in the early 1980s.¹¹ There is no reason to believe this increase

⁶ K. Kinsella & V. Velkoff, *An Aging World: 2001*, (U.S. Census Bureau, Washington, Dc, 2001; Series P95/01-1); National Institute On Aging, National Institutes Of Health, U.S. Department Of Health And Human Services & U.S. Department Of State, *Why Population Aging Matters: A Global Perspective*, (2007).

⁷ Australian Bureau of Statistics, *Family Characteristics and Transitions*, Australia, 2012-13, ABS 4442.0 (released February 2015).

⁸ D de Vaus & M Gray, 'The changing living arrangements of children, 1946–2001' (2004) 10 *Journal of Family Studies*, 9 at 15.

⁹ In an Australian study, the odds of a cohabiting couple with children breaking up was more than seven times as high as a married couple who had not lived together before marriage, and more than four times as high as those who had lived together but went on to marry: P Butterworth, T Oz, B Rodgers, & H Berry, 'Factors Associated with Relationship Dissolution of Australian Families with Children', Social Policy Research Paper No 37, 22 and 29, tbl 9 (2008). See also K Kiernan & F Mensah, 'Unmarried Parenthood, Family Trajectories, Parent and Child Well Being' in *Children of the 21st Century: From birth to age 5*, (K. Hansen, H. Joshi, S. Dex, eds, 2010); C Osborne, W Manning, & P Smock, 'Married and Cohabiting Parents' Relationship Stability: A Focus on Race and Ethnicity', (2007) 69 *J. Marriage & Fam.* 1345.

¹⁰ P Laws, S Abeywardana, J Walker, & E Sullivan, *Australia's mothers and babies 2005*, National Perinatal Statistics No. 20, (Australian Institute of Health and Welfare, 2007). See also The Australian Institute of Family Studies, in a 2008 survey of 10,000 parents who separated after July 1 2006, which found that 12% of men and 15% of women reported that they had neither been married to, nor cohabited with, the other parent: R Kaspiw, M Gray, R Weston, L Moloney, K Hand and L Qu, *Evaluation of the 2006 Family Law Reforms*, p.25 (Australian Institute of Family Studies, Melbourne, 2009).

¹¹ De Vaus & Gray, above n. 8.

in the number of children whose parents live apart will slow down. Australia, with around 35% of all children born ex-nuptially,¹² is at the low end of the spectrum in comparison with other OECD countries.¹³

Family instability is also imposing immense costs on governments and therefore on taxpayers, who provide income support for many parents and their children,¹⁴ pay substantial administrative costs in ensuring income transfers through the child support system, and bear more of the costs of caring for the elderly than would be necessary if a greater number of marital and quasi-marital relationships remained intact.¹⁵

The increase in family instability also has obvious consequences for the family law system. As a consequence of the decline in the proportion of families in which two biological parents raise their offspring to adulthood, there is an ever-increasing number of children who may be the subject of family law disputes. For children born into single-parent households, there is the potential for a dispute about parenting arrangements between the mother and father from the day the child is born.

It is no surprise then, that the courts dealing with family law issues are increasingly overwhelmed by the number of cases that come before them, particularly disputes about children. Most of these have allegations of family violence, child abuse, mental illness or drug and alcohol abuse, and therefore involve some complexity.¹⁶ While most separating couples work out ways to separate without lawyers,¹⁷ inevitably a fairly consistent percentage will end up in court, particularly those involving allegations that go to the safety of a parent or child. If the overall numbers of parents living apart

¹² Australian Bureau of Statistics, *3301.0 - Births, Australia, 2014*, (2015).

¹³ In Britain, 47.5% of all births occurred outside of marriage in 2012: Office of National Statistics, *Births in England and Wales, 2012*, (2013). Half or more of all births are ex-nuptial in Belgium, Bulgaria, Estonia, France, Iceland, Slovenia, Norway, and Sweden. The highest rate is in Iceland at 65% of all births. C Haub, 'Rising Trend of Births Outside Marriage', Population Reference Bureau (2013) at <http://www.prb.org/Publications/Articles/2013/nonmarital-births.aspx>.

¹⁴ In Australia, this is mainly through Parenting Payment Single and through increased levels of Family Tax Benefit arising from the changed financial circumstances consequent upon parental separation.

¹⁵ This is so because parental separation reduces the capacity of adults in mid-life to support and care for the older generation. The burden of care for the elderly has in the past disproportionately fallen on women, and this pattern appears to transcend cultures. Parental separation is likely to remove any sense of obligation that a woman may have felt to provide care for her partner's elderly parents. Divorce does not only dissolve the marital bond, but also the ties of moral obligation and cultural expectation in relation to elderly in-laws, for no longer are they related. P Parkinson, 'Another Inconvenient Truth: Fragile Families and the Looming Financial Crisis for the Welfare State' (2011) 45 *Family Law Quarterly* 329.

¹⁶ J Harman, 'The Prevalence of Allegations of Family Violence in Proceedings Before the Federal Circuit Court of Australia' (2017) 7 *Family Law Review* 3. Judge Harman found that about 80% of all cases in his docket over the study period contained one or more of these allegations.

¹⁷ R Kaspiew, 'Separated parents and the family law system: what does the evidence say?' <http://theconversation.com/separated-parents-and-the-family-law-system-what-does-the-evidence-say-62826> July 29th 2016.

increase, so proportionately there is likely to be increased demand for dispute resolution services and courts.

This is not just a local Australian issue. The situation is similar in other English-speaking countries of the OECD such as Britain, Canada, New Zealand, and the United States. This is reflected in the available data on increases in litigation in several countries.¹⁸ In England and Wales, for example, contact orders increased more than fourfold between 1992 and 2008.¹⁹ The pressures on the courts arise not only from the volume of cases, but also the number of self-represented litigants who are trying to navigate their way through the system.

In Australia, certainly, family lawyers and judges bemoan the long delays in bringing the disputes to trial that cannot be settled. Despite important reforms in 2006 which mandated mediation prior to filing a court application unless exemptions apply, court waiting lists for hearing have continued to blow out. In a recent study of one Federal Circuit Court docket, the average delay from filing to first mention, excluding ex parte and short notice applications, was 16 weeks.²⁰ If a trial is needed, the delay is very much longer. Often it takes two or three years for cases to get to trial on the eastern seaboard.²¹ Getting a judgment may involve another long wait –although much depends on the judge.

Bleak House it is not; but bleak, it most certainly is. Lawyers are frustrated; litigants are frustrated; judges are overburdened, and see no end to the trail of misery queuing outside the doors of their courtrooms. Naturally, the call is for more resources; more judges, more courtrooms, more legal aid for poorer citizens to be able to litigate their claims.

However, the pressures on the courts are just one aspect of a much larger problem – that parental separation involves huge costs for governments in terms of welfare expenditure and other costs. These are demand-driven entitlement expenditures. Spending on the courts and on related services such as legal aid and community legal centres is, to some extent, discretionary. In a political climate in which there are few options for cutting expenditure that will pass the Senate, all discretionary expenditures are under great pressure. Cuts are imposed in the form of “efficiency dividends”. Expenditures are

¹⁸ See P. Parkinson, *Family Law and the Indissolubility of Parenthood* (New York, Cambridge UP, 1997) chapter 1.

¹⁹ In 1992, there were 17,470 contact orders. In 2008, there were 76,759. This Table is derived from the statistics published annually by the Ministry of Justice and its predecessor departments. See eg. Ministry of Justice, *Judicial and Court Statistics 2008*, ch 5; Lord Chancellor’s Dep’t, *Judicial Statistics 1986–2000*. See also G Davis & J Pearce, *Privatising the Family?*, [1998] 28 *Family Law* 614. For discussion of the explanations for this rise in litigation, see G Davis, ‘Love in a Cold Climate — Disputes about Children in the Aftermath of Parental Separation’, in *Family Law: Essays for the New Millennium* 127, 128-29 (S Cretny ed., 2000).

²⁰ Harman, above n. 16.

²¹ See Bryant CJ’s comments reported at <http://www.abc.net.au/news/2017-04-30/family-court-letting-families-down-chief-justice-says/8483858>.

frozen. In this climate, which affects all of government, even keeping judicial numbers constant represents a concession by government to the pressures on the courts.

The problems in Australia are far from unique. Family law systems in many parts of the common law world are under enormous financial pressure as governments look for savings in the cost of providing court-based resolution for family conflicts. This is so, for example, in England and Wales which has seen massive cuts to legal aid for family law cases,²² and in New Zealand²³ that has seen significant reductions in resources for its family law system.

The problems are likely to get worse

A realistic assessment of the current situation in Australia is that if federal governments continue to do on average no better nor worse at resourcing the courts than they have done in the last twenty years, the position in family law will continue to deteriorate. If the current complement of judges are all immediately replaced on retirement, with a new judge being sworn in the day after the retiring judge's last payday, the position will continue to deteriorate. Even if all new appointments to the court could 'hit the ground running' in hearing difficult family law cases – which will not be the case because the Federal Circuit Court has a general federal jurisdiction and appointees with a range of backgrounds - the position will continue to deteriorate.

The reasons are demographic. Not only does the increase in the number of parents living apart show no signs of slowing down, but the population is growing rapidly with people of child-bearing age. Economically, this is necessary to offset the ageing of the population, but it has impacts for the family law system.

There has been a substantial increase in the intake of people being permitted to migrate permanently to Australia in the last fifteen years or so.²⁴ In 1999–00, at the time the Federal Magistrates Court was established, there were 70,200 permanent migrants and 15,860 admitted under the humanitarian program – a total of around 86,000. The numbers have increased substantially every year since then. In 2005-06, the total figure for permanent settlers was around 157,000.²⁵ In 2014-15, the planned intake was 190,000.²⁶ In addition, there were 13,756 people admitted under the humanitarian

²² See generally, M Maclean, J Eekelaar & B Bastard (eds), *Delivering Family Justice in the 21st Century*, (Hart Publishing, Oxford, 2015).

²³ W Atkin, 'The Revised Family Court System in New Zealand: Secret Justice and Privatisation' in Maclean, Eekelaar & Bastard (eds), above n.22, p. 39.

²⁴ The migration intake is a mixture of people who are given permanent residence status and temporary migrants (for example, university students from overseas and those on temporary working visas). Temporary migrants generate some family law work as well.

²⁵ J Phillips and M Klapdor, *Migration to Australia since federation: a guide to the statistics* (2010), Table 1, p.13 at <http://www.aph.gov.au/binaries/library/pubs/bn/sp/migrationpopulation.pdf>

²⁶ See Australian Border Force, <https://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in->

program.²⁷ With current entry levels, Australia admits for permanent settlement as many people as comprise the current population of South Australia every eight or nine years.²⁸ These are typically people who are at an economically productive stage of life, and this coincides with the years in which family formation and dissolution are most likely to occur. Migrants from many countries, and those who come to Australia to marry Australian-born people, have higher divorce rates than Australian-born couples.²⁹

Court resources need to keep pace with the growth of the adult population; consequently, if judicial numbers, funds for ancillary staff and related dispute resolution resources are simply held constant and adjusted for inflation, that represents a real cut in resources over time.

The impact of public funding cuts on private litigation costs

One of the outcomes of long delays in the court system to deal with parenting and property disputes is that litigation costs increase. This is because, the longer the delay, the more issues that arise while waiting for a trial. Those issues – some relatively trivial, others more substantial – may lead to letters being exchanged between lawyers and interlocutory court events seeking Orders to deal with these interim matters. The longer the delay also in getting to a resolution or trial, the more likely it is that there will be an escalation of problematic behaviours due to the high levels of conflict between parents and the stress that they are under.³⁰ Furthermore, family circumstances may change, requiring the need for updated affidavits or amendments to the orders sought. In property cases, balance sheets are changing constantly and valuations may need to be updated.

It is true that the great majority of cases settle and so the delay in getting to trial may appear to be of relevance only to a very few cases. However, the delays in getting to hearing affect many other cases which do not reach trial. Many cases settle once trial dates have been given and the parties turn their minds to preparation for the trial, especially where barristers then advise on the prospects of success. The longer the trial delays, the more cases drift unresolved.

It follows that one of the collateral effects of overwhelmed courts is to make family law less and less affordable for the parties to litigation. A protracted dispute is likely to cost a lot more than one which

[australia/migration-programme](#) (2016).

²⁷ <https://www.border.gov.au/about/corporate/information/fact-sheets/60refugee#d>

²⁸ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>.

²⁹ D de Vaus, *Diversity and Change in Australian Families: A Statistical Profile*. Melbourne: Australian Institute of Family Studies, 2004, p.216.

³⁰ Judge Ian Gray, the State Coroner, noted in the Batty inquest that “delays in the system, can lead to an increasing risk of escalating problematic behaviours”. See *Inquest into the Death of Luke Geoffrey Batty*, Coroners Court of Victoria, 28 September 2015, para 124.

is resolved in an efficient and timely manner.

The need for yet further reform

Reform proposals therefore need to grapple with two interconnected problems – the unaffordability of family law for so many represented litigants, and the problem of affordability for governments that must cope with demand-driven pressures on resources.

Any change to the family law system to improve the situation for the individual litigants going through it must tackle the problem of overwhelmed courts who cannot give people judgments in many cases until years after litigation has been commenced. There may be other reforms that can reduce litigation costs as well; but if they involve a transfer of cost from private litigants to the public purse they are unlikely to gain acceptance from the Ministry of Finance. This means that reform proposals must be realistic and addressed to achieve real benefits as far as possible within current funding envelopes, or with just modest and justifiable increases in expenditure.

Thus far, much of the effort in resolving the pressures on the family law system have involved providing judicial officers at a lower cost and encouraging more use of mediation.

There is probably little more that can be done to reduce the cost of providing judges. Prior to 1975, family law disputes other than maintenance issues were dealt with at the highest level of trial court – the Supreme Court of each State or Territory. The Family Court of Australia commenced operation in 1976. It was created as a superior court of record, at the same level as the Supreme Courts of the states and territories – and at a fairly similar level of cost in terms of judicial salaries and pensions.

By 1988, the volume of work had become such that the Family Court began to delegate certain judicial functions to officers of the Court – deputy registrars, ‘SES band 2’ registrars, and ‘judicial registrars’ – who did not have judicial tenure or as high salaries. They could make various decisions, subject to review on a hearing de novo basis. In 2000, the Government set up the Federal Magistrates Court, now the Federal Circuit Court, which has taken over most of the trial work in family law. The Family Court is now a trial court only for complex cases and acts as an appeal court for the family law system.

Another response to the pressure on the court system has been an ever greater emphasis on mediation. An important innovation in 2006 was the requirement that in all parenting cases except where an exemption applies, the party should have attempted mediation. This is required by section 60I of the *Family Law Act 1975*. The certificate which must be filed (unless exempted), when initiating parenting proceedings is known as a section 60I certificate.

The establishment of Family Relationship Centres was also major strategy to promote the use of mediation in parenting cases.³¹ There can be little doubt that the requirement under section 60I to attempt mediation, and, in particular, the establishment of 65 Family Relationship Centres across the country, have had a positive impact in reducing court workloads. In the first five years after they were established, the number of applications to courts involving issues about children declined by about 32%.³² However, mediation can only do so much. Some matters are not suitable for mediation, not only because of a history of domestic violence or other imbalance of power, but also because, in some cases at least, there are significant factual issues to be resolved. This is particularly likely to be so in cases where the safety of parents or children would be significantly at risk unless protective court orders are made. Lawyer-lawyer negotiation, collaborative law and other strategies also may assist some to reach agreement, but not all.

It follows from this that the next wave of reform to the family system must focus upon processes to deal with those cases that cannot readily be settled through mediation or negotiation. Some reform occurred through amendments to Part VII of the Family Law Act in 2006, but much more is needed.

Reforms to gatekeeping

The family law system has fallen behind other state and federal courts in terms of gatekeeping at the entry point to the legal system.

The requirement to attempt mediation

The legislative requirement does seem quite easy to avoid. A recent study conducted by Judge Harman in Parramatta and Albury demonstrated that a relatively small minority had attempted mediation prior to filing even in parenting cases.³³ Nearly a third of all s.60I certificates issued were because the other party failed to attend. More than half of all litigants came to court without having a s.60I certificate, relying no doubt on the exemptions in the legislation;³⁴ but it is not clear to what extent those reasons were scrutinised, or other dispute resolution options explored, before the parties joined the long list of those waiting for hearing dates.

Section 60I itself provides that even when a party claims an exemption from attempting mediation, “the court must consider making an order that the person attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to that issue or those issues.”³⁵ section 60J provides that even where the exemption applies, “a court

³¹ See further, P Parkinson, ‘The Idea of Family Relationship Centres’ (2013) 51 *Family Court Review* 195.

³² *Ibid.*

³³ J Harman, ‘Should mediation be the first step in all Family Law Act proceedings?’ (2016) 27 *ADRJ* 17.

³⁴ *Ibid.*

³⁵ Family Law Act 1975 s.60I(10).

must not hear the application unless the applicant has indicated in writing that the applicant has received information from a family counsellor or family dispute resolution practitioner about the services and options (including alternatives to court action) available in circumstances of abuse or violence.”

The Act therefore expresses a strong intention first of all that prior to filing, mediation will be attempted in parenting disputes, and secondly that even where somebody comes to court without a section 60I certificate, the court should consider the possibility of referring them out to a dispute resolution process. Of course, that need not be face-to-face mediation. There are a range of alternatives by which negotiations could occur. Section 60J further emphasises that even those with exemptions need to be given information about other support services for them, including alternatives to court action.

The question is whether more than lip service is in practice paid to this. Perhaps practice varies around the country, but in Sydney at least there does not seem to be any systematic gatekeeping process that explores the efforts the parties have already made to attend dispute resolution or otherwise access counselling and support services. One way of dealing with situations where a section 60I certificate is issued because one party has failed to attend mediation is that the court would have a discretion to impose an immediate cost penalty at the first mention if the failure to attend mediation is without reasonable excuse and the result of the court event is an order that the person attend a dispute resolution process. The cost penalty might be both a lump sum to defray the legal costs of the other party for the mention, and some payment in respect of court costs.

Pre-action procedures in the Family Court

The Family Court of Australia did attempt a comprehensive approach to gatekeeping in the Family Law Rules 2004. In particular, those Rules require parties before they file court proceedings to engage in pre-action procedures.³⁶ These procedures require, inter alia, that each prospective party to a case in the Family Court of Australia is required to make a genuine effort to resolve the dispute before starting a case. In financial matters, this is by:³⁷

- (a) participating in dispute resolution, such as negotiation, conciliation, arbitration and counselling;
- (b) exchanging a notice of intention to claim and exploring options for settlement by correspondence; and
- (c) complying, as far as practicable, with the duty of disclosure.

There are also pre-action procedures for parenting cases, but these were largely superseded by the 2006 legislation.

³⁶ Family Law Rules 2004, rule 1.05.

³⁷ Ibid, Schedule 1.

The problem is that the pre-action procedures do not seem to have been very effective as a gatekeeping mechanism. This is for two reasons. First, they do not seem to have been policed. Schedule 1 of the Family Law Rules provides that: “There may be serious consequences, including costs penalties, for non-compliance with these requirements.”³⁸ Rule 19.10 provides that a costs order may be made against a lawyer as a consequence of his or her failure to comply with a pre-action procedure. However, without a mechanism for requiring parties to describe what attempts have been made to resolve the dispute prior to initiating court proceedings, and some scrutiny of the adequacy of those efforts, it is difficult to see the circumstances in which adverse consequences might be imposed.

A second issue is that these pre-action procedures only apply in the Family Court. They do not apply to the Federal Circuit Court³⁹ and there is no equivalent to them in the Federal Circuit Court Rules. Given that now about 80% of all trial work is done in the Federal Circuit Court, the imposition of a requirement to engage in pre-action procedures in the Family Court, but not in the Federal Circuit Court, seems extraordinarily anomalous.

The surprising legislative gap

Litigation under the Family Law Act is exempt from the requirement which applies to almost all other civil litigation in the federal sphere, that the parties provide a statement, when commencing litigation, of the efforts they have made to try to resolve their disputes. The *Civil Dispute Resolution Act 2011* requires both applicants and respondents to file a “genuine steps statement” which must specify either the steps that have been taken to try to resolve the issues in dispute or the reasons why no such steps were taken. The Explanatory Memorandum to the Civil Dispute Resolution Bill 2010 noted the benefits of this information in terms of the initial triage of the case:⁴⁰

For example, if genuine steps have been taken and have resulted in issues being identified and positions clarified, a court may be in a better position to decide that court ordered mediation would impose unnecessary costs and delay. Early listing for hearing will be the best and most cost efficient and just outcome. Alternatively, if a court is not satisfied with the steps already taken, further case management directions may be appropriate to ensure parties explore options for resolving or narrowing the dispute.

Section 12 of the Act provides that a judge or other decision-maker may take account of whether a party took genuine steps to resolve the dispute in making costs orders.

The Explanatory Memorandum justified the exclusion of the Family Law Act from the genuine steps requirements as follows:

³⁸ Ibid, Schedule 1, Part 1, para 3.

³⁹ *Thompson & Berg* [2014] FamCAFC 73.

⁴⁰ Explanatory Memorandum to the Civil Dispute Resolution Bill 2010 para 18.

The *Family Law Act 1975* has a comprehensive system of pre-trial options available to parties. Parties are encouraged and in some cases, required to undertake certain steps before a matter can be determined by a court. For example, people must attempt family dispute resolution before filing an application for orders relating to children unless an exception applies. Given that the issue of pre-trial steps is already significantly covered by the *Family Law Act 1975*, the Bill will not apply to family law matters.

It is certainly the case that under the *Family Law Act* there are various pre-trial dispute resolution requirements. However, the quoted paragraph confuses pre-trial requirements with pre-filing requirements. The only statutory pre-filing requirement is in relation to parenting cases. The Family Law Rules impose additional pre-filing requirements only for litigation in the Family Court. Judge Harman's survey in Parramatta and Albury found that only 2.5% of the parties had attempted mediation prior to filing property matters in the Federal Circuit Court.

Of course, Federal Circuit Court judges dealing with cases on a first return date will do their best to triage cases, giving priority to the urgent, and encouraging settlement processes such as mediation where this has not been attempted. However, there is no formal process such as there is under the *Civil Dispute Resolution Act 2011* for the court to be informed of the steps which have been taken to try to resolve the dispute and what impediments stand in the way of a negotiated solution. Given this, there does seem to be a case for further reform to the laws and processes by which cases are triaged in the family law system. The Productivity Commission recommended in 2014:⁴¹

The Australian, State and Territory Governments, and courts and tribunals, should “further explore the use of targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements.”

Strong judicial oversight requires not only that the Court to have information about compliance with pre-action protocols, but also that it has the power, of its own motion if need be, to impose sanctions immediately. Such sanctions ought to be imposed to deter conduct which wastes the resources of the Court and puts another party to unnecessary expense.

An online questionnaire

Perhaps the most effective way of getting this information would be through a detailed online questionnaire. Every person filing an application should, in addition to the substantive application, complete a questionnaire indicating what steps they have taken to try to resolve the dispute or how they have been able to narrow the issues between the parties. They would also be asked about the impediments to a negotiated settlement. The questionnaire could be based upon a revised set of pre-action procedures and could conceivably replace the s.60I certificate (while leaving the mandatory

⁴¹ Productivity Commission, *Access to Justice Arrangements*, vol 1, Recommendation 12.2, p.429 (2014).

mediation requirement unchanged). The survey responses would go to the other side who would then have a similar opportunity to say what they have done to resolve or narrow the issues between the parties.

Those forms could then go to a Registrar who would see what efforts have already been made, and what issues the Court needs to resolve. The Registrar could, and very often would be expected to, send the parties away to do further work to resolve the dispute or narrow the issues before allowing the matter to proceed into a judge's list. That might be as simple as ordering the respondent to file a response or to make full disclosure where there is complaint of lack of disclosure. Of course, the urgent cases including the domestic violence and child protection cases needing a protective response, would be fast-tracked. The registrar could discuss the option of arbitration with the parties in family property cases as well as other forms of dispute resolution such as early neutral evaluation. This will involve a cultural change in the courts to counteract a tendency just to waive cases on and progress them along the litigation pathway once an application to court has been made.

Listing priority

Cases in which the parties have attempted mediation of property or maintenance disputes, or engaged in other dispute resolution processes, should be given listing priority over those that have not. Procedures also ought to be introduced to focus on cases where the party who is resisting a referral to mediation benefits from the delay – for example, parties who are in occupation of a property and who want to delay an outcome.

There should be careful scrutiny of the circumstances of all litigants who apply to the courts for parenting orders without having first gone to mediation or been exempted from it. Applicants should be referred back to community services where appropriate, as legislation requires, and the application stayed in the meantime.

It follows from this that any application coming before a court should specify:

- (a) what steps the parties have taken to conciliate or mediate their dispute or any parts of their dispute (including arbitration on discrete issues);
- (b) what issues remain in dispute; and
- (c) whether the parties have made offers of settlement which reflect their overall proposals for settlement.

Case management within the court system

Just as the family law system may have fallen behind other areas of federal law in terms of gatekeeping when new applications are filed, so it has fallen behind other areas of both state and federal law in terms of the statutory requirements placed upon litigants, lawyers and judges to facilitate the resolution of disputes.

A good example of legislation of this kind is the Federal Court of Australia Act 1976. Amendments made to this legislation by the Access to Justice (Civil Litigation Reforms) Amendment Act 2009

impose quite strict duties to assure the timely resolution of disputes at a cost proportionate to the amount at stake. The legislation does so in various ways: for example, section 20A deals with the circumstances in which a judge can resolve a matter without an oral hearing and with or without the consent of the parties in so doing.

Overarching purposes and obligations

Of particular importance in this legislation is Part VB on case management. Section 37M provides an overarching purpose for case management:

- (1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
 - (a) according to law; and
 - (b) as quickly, inexpensively and efficiently as possible.
- (2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
 - (a) the just determination of all proceedings before the Court;
 - (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
 - (c) the efficient disposal of the Court's overall caseload;
 - (d) the disposal of all proceedings in a timely manner;
 - (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

This provision requires the court to manage cases not only so that individual cases can be dealt with as quickly, inexpensively and efficiently as possible, but also that the court's overall caseload should be efficiently managed and disposed of in a timely manner. By way of contrast, such provisions as there are in the family law system are focused on individual cases only. Section 97(3) of the Family Law Act provides that:

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

Rule 1.04 of the Family Law Rules provides that:

The main purpose of these Rules is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case.

Rule 1.03 of the Federal Circuit Court Rules is to like effect. The object of the Rules is said to be to assist the just, efficient and economical resolution of proceedings and to help the Court to operate as informally as possible, to use streamlined processes and to encourage the use of appropriate dispute resolution procedures.

Individual interests and the efficient allocation of court resources

What may be just in an individual case may not be just when all the other cases pressing for judicial resources are considered. An illustration of the problems in the family law system with its focus on individualised justice is the Full Court decision in *Holden & Wolff*.⁴² The case concerned the practice in the Federal Circuit Court of review of deputy registrars' decisions. In this case, the deputy registrar rejected an application for shortlisting of an application. In accordance with the normal practice, this was done on the papers filed by the applicant, without notice to the respondent and without providing reasons. The application did not have sufficient evidence of urgency. This is a common occurrence, because decisions of this kind involve the allocation of scarce judicial resources amongst all the cases in the registry.

When the applicant sought judicial review of that decision it was dealt with in chambers in the same way. The application was rejected. This was overturned by the Full Court which held, applying the Federal Circuit Court Rules, that judicial review of the deputy registrar's decision had to occur in open court with an oral hearing. As was noted by Watts J in *Kassis & Kassis*,⁴³ that impacts upon the speed with which other cases can be heard. A hearing to determine whether there should be an expedited interim hearing takes time away from the judge to hear substantive matters (including other interim applications).

Had a provision similar to section 37M of the Federal Court legislation been in place in the Family Law Act, reference might have been made to the need of the judge to consider all the cases in the list and not merely some kind of procedural fairness to one particular litigant. It is obvious that if an application for short listing needs to be ventilated in open court with an oral hearing, then the early listing of this might prejudice the position of other litigants with more urgent matters.

Section 37M is frequently referred to in the Federal Court both at trial and appellate level. There are some similar provisions in in NSW. Section 56 of the *Civil Procedure Act 2005* states that the overriding purpose of the legislation is to facilitate the just, quick and cheap resolution of the real issues in dispute. This is not infrequently referred to by registrars and trial judges and reinforced by the NSW Court of Appeal. It has had a salutary effect on changing the approach to litigation in NSW. The High Court, in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited*⁴⁴ (a case in which the Civil Procedure Act requirements applied) gave very strong support to the *Civil Procedure Act* requirements, and emphasised that they were consistent with its broader endorsement of proactive case management by judges. The Court said (at [51]):

⁴² [2014] FamCAFC 224.

⁴³ [2014] FamCA 1067.

⁴⁴ (2013) 250 CLR 303.

In *Aon Risk Services Australia Ltd v Australian National University*, it was pointed out that case management is an accepted aspect of the system of civil justice administered by the courts in Australia. It had been recognised some time ago by courts in the common law world that a different approach was required to tackle the problems of delay and cost in the litigation process. Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants.

The Court criticised the practitioners for getting embroiled in controversies of marginal significance to the central issues in the case.

Obligations on litigants and practitioners

Another important provision in the Federal Court legislation is s.37N:

(1) The parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.

(2) A party's lawyer must, in the conduct of a civil proceeding before the Court (including negotiations for settlement) on the party's behalf:

(a) take account of the duty imposed on the party by subsection (1); and

(b) assist the party to comply with the duty. . . .

(4) In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).

(5) If the Court or a Judge orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from his or her client.

There is thus a mandatory requirement on the judge to consider, in exercising the discretion to award costs, whether a party or a lawyer has failed to comply with the duty to conduct proceedings in a manner which will facilitate a just resolution as quickly, inexpensively and efficiently as possible.

The Full Court of the Federal Court of Australia has given strong endorsement to the provisions of section 37N. In *Specsavers Pty Ltd v The Optical Superstore Pty Ltd*,⁴⁵ Foster, Barker and Griffiths JJ observed that:

The power, indeed duty, of the Court to regard the failure of a party or its lawyer to comply with the s. 37N duties constitutes a powerful mechanism to encourage compliance with those duties.

Another example of strong legislation to support case management is the Civil Procedure Act 2010 in Victoria, which perhaps represents the gold standard in this area. Not only are there numerous

⁴⁵ [2012] FCAFC 183 at [57].

overarching obligations on litigants,⁴⁶ but there are very specific provisions concerning the consequences for breach of those obligations. Section 29 provides:

If a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice including, but not limited to—

(a) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation;

(b) an order that the legal costs or other costs or expenses of any person be payable immediately and be enforceable immediately;

(c) an order that the person compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation, including—

(i) an order for penalty interest in accordance with the penalty interest rate in respect of any delay in the payment of an amount claimed in the civil proceeding; or

(ii) an order for no interest or reduced interest;

(d) an order that the person take any steps specified in the order which are reasonably necessary to remedy any contravention of the overarching obligations by the person;

(e) an order that the person not be permitted to take specified steps in the civil proceeding;

(f) any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.

Not only may an application under this section be made by one of the parties or another person with sufficient interest in the proceedings; it may also be made on the court's own motion. The Victorian Court of Appeal gave strong support to these provisions in *Yara Australia Pty Ltd v Oswal*⁴⁷ which has been frequently cited since. The Court observed:⁴⁸

The Court's powers under s 29 of the Act include the power to sanction legal practitioners and parties for a contravention of their obligations as the heading to Part 2.4 indicates.[30] In our view, these powers are intended to make all those involved in the conduct of litigation — parties and practitioners — accountable for the just, efficient, timely and cost effective resolution of disputes. Through them, Parliament has given the courts flexible means of distributing the cost burden upon and across those who fail to comply with their overarching obligations. A sanction which redistributes that burden may have the effect of compensating a party. It may take the form of a costs order against a practitioner, an order that requires the practitioner to share the burden of a costs order made against their client or an order which deprives the practitioner of costs to which they would otherwise be entitled. The Act is clearly designed to influence the culture of litigation through the imposition of sanctions on those who do not observe their

⁴⁶ *Civil Procedure Act 2010* (Vic.), ss.7-27.

⁴⁷ [2013] VSCA 337.

⁴⁸ *Ibid* at [20].

obligations. Moreover, the power to sanction is not confined to cases of incompetence or improper conduct by a legal practitioner. Where there is a failure by the practitioner, whether solicitor or counsel, to use reasonable endeavours to comply with the overarching obligations, it will be no answer that the practitioner acted upon the explicit and informed instructions of the client. A sanction may be imposed where, contrary to s 13(3)(b), the legal practitioner acts on the instruction of his or her client in breach of the overarching obligations.

In this case, the Court found that the application book of the applicants were unnecessarily voluminous and burdened the court with excessive material.⁴⁹ The outcome was that each applicant's solicitor was required to indemnify the applicant for 50% of the respondent's costs incurred as a consequence of the excessive or unnecessary content of the application books and was disallowed recovery from the applicant of 50% of the costs relating to their preparation.

The absence of obligations on litigants in the Family Law Act

There are no provisions like these in the Family Law Act which impose clear and specific obligations on litigants and their lawyers, backed up by costs sanctions. Of course there are costs provisions which can be used to deter improper behaviour, but they are not specifically directed to this purpose.

The main provisions on costs are contained in s.117. In general terms, s.117(2A)(c) requires the court to consider:

the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters.

However, it is only one factor amongst many in the court's discretion to depart from the default rule that "each party to proceedings under this Act shall bear his or her own costs" (s.117(1)). In *I & I (no 2)*⁵⁰ the Full Court indicated that in deciding whether to make a costs order, the relevant considerations in that section "must all be taken into account and all balanced in order to determine whether the overall circumstances justify the making of an order for costs". This makes it more difficult for costs sanctions to follow from bad behaviour in the conduct of litigation, particularly if the party engaging in such conduct ends up winning the case. The common pattern is, in any event, for costs to be reserved until the trial has concluded, however poor the conduct is of one party at an early stage in the proceedings. Since most cases eventually settle, any costs sanction which might be used as a disciplinary measure to deal with bad behaviour by parties or their lawyers is rendered ineffective.

⁴⁹ Ibid at [40]-[52].

⁵⁰ (1995) 125 FLR 332.

The Family Law Rules also impose requirements on parties and their lawyers which are not dissimilar to section 37N of the Federal Court legislation.⁵¹ However, these only apply in the Family Court of Australia and are not directly tied to any cost consequences under section 117 of the Act.

Judicial enforcement

The case for statutory reform which modernises the Family Law Act to achieve the best practice approaches to case management in other jurisdictions is overwhelming. However, statutory reform alone is insufficient. The requirements have to be embraced and enforced by the individual judges who have the responsibility for case management. As the Productivity Commission noted:⁵²

“[M]any of the broadly based reviews of the civil justice system in Australia and overseas have noted the importance of clearly defining the obligations of parties and their legal representatives prior to, and during, litigation and the importance of effective enforcement mechanisms to promote compliance.

It observed that judicial support was a key ingredient in the success of overarching requirements. Another key factor was that the obligations be very specific.

Nothing of any consequence will be achieved by statutory obligations of the kind contained in the Federal Court legislation unless there is a determined effort to change the culture of litigation in family law matters. There is a need to police the use of strategies which waste the time of the court or which involve unfair tactics. This is particularly a problem in certain cities, and especially Sydney. Court resources in the Family Court, and to a lesser extent, the Federal Circuit Court, are disproportionately used by people who have the money to to fight protracted battles. While some former couples who are well-resourced do have quite complex property issues, their parenting

⁵¹ Rule 1.08 provides:

- 1) Each party has a responsibility to promote and achieve the main purpose, including:
 - (a) ensuring that any orders sought are reasonable in the circumstances of the case and that the court has the power to make those orders;
 - (b) complying with the duty of disclosure (see rule 13.01);
 - (c) ensuring readiness for court events;
 - (d) providing realistic estimates of the length of hearings or trials;
 - (e) complying with time limits;
 - (f) giving notice, as soon as practicable, of an intention to apply for an adjournment or cancellation of a court event;
 - (g) assisting the just, timely and cost-effective disposal of cases;
 - (h) identifying the issues genuinely in dispute in a case;
 - (i) being satisfied that there is a reasonable basis for alleging, denying or not admitting a fact;
 - (j) limiting evidence, including cross-examination, to that which is relevant and necessary;
 - (k) being aware of, and abiding by, the requirements of any practice direction or guideline published by the court; and
 - (l) complying with these Rules and any orders.
- (2) A lawyer for a party has a responsibility to comply, as far as possible, with subrule (1).

⁵² Productivity Commission, above n.41, pp. 422-23.

disputes are often no more complex than people of limited means. They should not utilise an unfair share of judicial resources at the expense of the needs of the great majority of litigants.

Burning off

Some people run applications or contest every conceivable issue in order to put financial pressure on the other party to settle. This is known as “burning off”. Another tactic is the unmeritorious opposition to applications that are bound to succeed – again to put pressure on the more impecunious party. The default rule that each pays their own costs thereby becomes a weapon which is used by the one who is better able to sustain those costs.

Legislation could impose penalties for such behaviour if it is drafted with sufficient specificity. In federal litigation in the United States, parties are required to certify that both applications and defences are properly justified both in fact and law. Rule 11(b) of the United States Federal Rules of Civil Procedure provides:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Sanctions follow for breach which are intended to have a deterrent effect, rather than merely being compensatory.⁵³

Last-minute responses

Another common technique is to provide last-minute responses to applications. Notwithstanding Rules of Court that require responses to be made within a defined time, it is far from uncommon to find that the response to an application, together with affidavits and other material, is first handed to one about half an hour before the court event in a foyer outside the courtroom.

⁵³ Rule 11(c), paras (3) and (4).

Trial by ambush

Another technique is trial by ambush. Affidavits are served at the last minute, or nearly so. They may be received at 5.25pm on the night before a case is due to begin. The receiving party may decide to run as best he or she can with the case rather than seeking an adjournment to consider the new material because there has already been such a long wait for the trial. A further adjournment may well be advantageous to the party who has delayed serving that evidence, even if there are cost consequences from the adjournment.

Efforts need to be made to deter this behaviour. Litigants, and their lawyers, should not be permitted to engage in unethical conduct of this kind.

Substantial cost recovery

Consideration also needs to be given, across federal law, to some rationing of court time beyond which there should be full, or at least substantial, cost recovery of the expense to taxpayers. Very often, the cases which take an inordinate amount of judicial time both in interlocutory applications and in final hearings involve very wealthy parties – or at least one very wealthy party. It would not be unfair to say that, at least in some cases, the work expands in accordance with the capacity of the parties to pay the fees that may thereby be generated. To the extent that they use up large amounts of judicial time, they do so at the expense of ordinary Australians. The excessive demands on the court system by well-resourced litigants impact upon access to justice for those who are less well-off.

Every registry is able to provide the names of cases where one or more parties has unreasonably protracted the hearings. There is one case which has already had over 40 trial-level judgments and six appeals, and it has not even got to trial yet! It is still in court after 11 years.⁵⁴ There is a quite recent parenting case in which there were 16 different trial level judgments and three appeals.⁵⁵

The same issues arise in other civil litigation, Examples include the Bell Resources litigation in the Supreme Court of WA which took 404 hearing days,⁵⁶ and the One-Tel litigation (Supreme Court of NSW), which took over 222 hearing days.⁵⁷ There have also been examples of protracted proceedings in the Federal Court, such as the C7 case.⁵⁸

⁵⁴ For the latest instalment, see *Strahan & Strahan (No 2)* [2017] FamCA 248.

⁵⁵ *Sampson and Hartnett*. The last reported court event was [2010] FamCAFC 220.

⁵⁶ *Bell Group Ltd (in liq.) v Westpac Banking Corporation (no 9)* (2008) 225 FLR 1.

⁵⁷ *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229.

⁵⁸ *Seven Network Limited v News Limited* [2007] FCA 1062.

Within the constraints of a Chapter III court and an adversarial system of trial, there may be limits to which the courts can control mega-litigation. As Justice Ron Sackville has said:⁵⁹

The overriding purpose of civil proceedings is now said to be to facilitate '*the just, quick and cheap resolution of the real issues in proceedings*'. The reality is that it is much easier to express that aspiration than to achieve it, particularly in the context of hard-fought litigation between well-resourced opponents.

That may be so, but there remains the question of who pays for it. These battles of the Somme are massively subsidised by taxpayers. The hearing fees in the Family Court are only \$825 per day, but the costs of the lawyers per day could well exceed \$15,000 per party - more if there are both senior and junior counsel. It is difficult to estimate what the daily amortised cost of a judge, an associate and ancillary staff would be; but a figure of \$9000 a day would not seem unreasonable. The Productivity Commission estimated in 2014 that the average cost to the Government of a family law case going to trial was \$20,000.⁶⁰

Consideration ought therefore to be given to the possibility that the taxpayer should fund litigation on the current basis of a daily hearing fee for up to say two weeks in total of court time (including interlocutory hearings). After that an elevated fee could be charged on a means-tested basis which would need to take account not only of the length of hearing beyond the two weeks, but for the additional time required for preparation and judgment writing. Another option is that litigants with assets over a certain amount⁶¹ should be considered rich enough to afford to make an appropriate contribution to the full cost of their own trial.

Adopting substantial cost recovery in such cases would have two benefits. First, it would produce more resources to fund judges and other staff to hear these cases. Secondly to the extent that the real cost of litigation was factored in, it may act as a deterrent to some of the more egregious behaviour of wealthy litigants and their lawyers.

Reforms to adjudication

A final area for reform to consider is in relation to trial processes. Here also, the family law system, once in the vanguard of innovation in civil justice, has now fallen behind best practice elsewhere. Years ago, the Family Court of Australia recognised that the adversarial system was not well-suited to the resolution of disputes about children. Alastair Nicholson, the former Chief Justice of the Family Court, argued that major reform of the adversarial process was necessary to address “the weaknesses of the traditional processes that allow the parties via their legal representatives (where they have them) to determine the issues in the case, the evidence that is to be adduced and the manner of its

⁵⁹ Sackville, R. ‘Mega-litigation: towards a new approach’ [2007] FedJSchol 13.

⁶⁰ Productivity Commission, *Access to Justice Arrangements: Overview*, p.12 (2014).

⁶¹ The appropriate cap is no doubt a matter for debate, but, in family law disputes, one option would be to adopt the limit put on superannuation assets beyond which tax concessions are not available.

use”.⁶² Looking back over sixteen years as Chief Justice, he wrote that:⁶³

“These weaknesses have been exacerbated in recent years as the proportion of litigants who represent themselves has increased. Judges find themselves being presented with reams of unnecessary material, usually dwelling on events long past, adult rather than child focused, and replete with allegations about what each party is alleged to have done to the other. Witnesses are called who can provide little or no relevant information, and trials become lengthier and more expensive. The relationship between the parties — if it is not already in tatters — deteriorates to the extent that they are unable to effectively co-parent their children in the future to any extent without hostility.”

The Children’s Cases Program

The Children’s Cases Program was a response to this need.⁶⁴ It offered the prospect for a major reform to the processes for dealing with parenting disputes, inspired by the processes of continental Europe. In this innovative program, litigants spoke directly to the judge, explaining what orders they sought and why, and judges could take an active role in determining what evidence might assist the court in coming to the determination of the issues. An evaluation of the program by a child psychologist showed demonstrable benefits in terms of reducing the stress of litigation on parents and therefore indirectly benefiting children.⁶⁵

The principles underlying the Children’s Cases Program were given legislative effect in the concept of the Less Adversarial Trial in the 2006 reforms. In determining the form of the legislation, the government of the day had to find the right balance between giving permission for the innovative practices of the Children’s Cases Program and mandating the adoption of its processes. It was a difficult balance to find, and to be frank, the Parliament didn’t find it.⁶⁶

The idea of the Children’s Cases Program was never embraced by the Federal Magistrates Court which took over more and more of the basic trial load in the cases where that program was likely to be most efficacious. The Family Court retained it at least in form, although too often the first day of the less adversarial trial seems more like a pre-trial conference of the traditional kind. The main impact of the legislative reforms has been that in parenting cases the court need not apply some of

⁶² The Hon. Alastair Nicholson, ‘Sixteen years of Family Law: A Retrospective’, (2004) 18 *Australian Journal of Family Law* 131, 144.

⁶³ *Id.*, 144–45.

⁶⁴ For a comprehensive account, see Harrison, M, *A Better Way* (Family Court of Australia, 2007).

⁶⁵ *The Children’s Cases Pilot Project: An Exploratory Study of Impacts on Parenting Capacity and Child Well-Being* (Family Transitions, 2006). See also J. McIntosh, D. Bryant and K. Murray, ‘Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia’ (2008) 46 *Family Court Review* 125.

⁶⁶ I was Chairperson the Family Law Council at the time when the 2006 legislation was being drafted and was involved in discussions concerning how to implement the Children’s Cases Program in legislation.

the traditional rules of evidence; but apart from this, a great initiative seems to have foundered upon the rock of legal conservatism. Trials in parenting cases, both in the Family Court and Federal Circuit Court, now do not look much different from 25 years ago. Federal Circuit Court judges have not been trained in the techniques that inspired the Children's Cases Program.

The Informal Domestic Relations Trial (Oregon)

The failure of the family law system to adopt the principles of the Children's Cases Program has undoubtedly been an opportunity lost. It has nonetheless been an opportunity taken up elsewhere. It was, for example, one of the inspirations for the Informal Domestic Relations Trial in Oregon.⁶⁷ This program was piloted in Deschutes County Circuit Court. It has been recommended for statewide implementation. In this program, the judge plays an active, inquisitorial role, engaging parties directly in discussion about what needs to be done. The approach is to highlight areas of agreement between the parties and isolate issues that need to be resolved. The process is designed to be more co-operative and to induce the parties to be more cooperative both with each other and the process.

In the Oregon program, both parties give explicit and voluntary consent to such a hearing. The court informs litigants by way of informational brochures and orally at multiple stages in the proceedings. The judge actively controls the process. The parties speak to the judge with no direct evidence nor cross-examination being permitted. The judge may ask questions but the lawyers and parties may not. Non-party witnesses are limited to experts. All traditional rules of evidence, including prohibitions on hearsay evidence are waived. The court determines the evidentiary weight to be given to exhibits.

Typically, IDRT cases last a couple of hours and decisions are given usually on the day of the hearing or trial. Shorter trials seem to be much easier to be scheduled into the court's trial calendar and are more likely to be heard when scheduled. Interestingly, cases involving domestic violence where both parties are self-represented appear to be particularly well-suited for that IDRT process. The IDRT process allows the victim to avoid cross examination by the perpetrator, and the judge is able to maintain a level of control in directing the lines of enquiry and the focus of the trial. Where both parties are self-represented, the vast majority of litigants have opted for the IDRT process over a traditional trial.

The IDRT process appears to reduce conflicts which might otherwise be evident at a traditional trial mainly because the parties do not cross examine each other, the parties are able to tell their side of the story directly and "be heard" and because testimony is provided in a more respectful manner that is the case with traditional hearing.⁶⁸

⁶⁷ W Howe and J Hall, 'Oregon's Informal Domestic Relations Trial: A New Tool to Efficiently and Fairly Manage Family Court Trials' (2017) 55 *Family Court Review* 70.

⁶⁸ Ibid.

The IDRT offers a particularly useful way of dealing with the needs of self-represented litigants. Matters can be dealt with relatively quickly, as the trial is judge-led, rather than relying upon the parties to present the case for themselves with all the difficulties that entails for self represented litigants.

Should there be a parenting tribunal?

One option which deserves reconsideration is whether at least some parenting disputes would not be better handled by a tribunal operating outside of the confines of a Chapter III court while nonetheless acting fairly and impartially. This is for three reasons. First, as is now widely accepted, the adversarial system of justice is usually not appropriate for parents who need to continue to cooperate after the litigation is over. Secondly, it is not well-suited to the needs of self-represented litigants. They must endeavour to present their case to the Sphynxian judge who, traditionally mute and entirely reactive to the applications and responses of the parties, reaches a decision on the basis of the evidence presented to him or her. Thirdly, parenting cases, particularly those involving allegations of domestic violence, child abuse, mental illness and drug and alcohol addiction, are particularly well-suited to a multi-disciplinary approach.

The idea of a multi-disciplinary tribunal to hear parenting disputes is not new; famously it was proposed by a unanimous Parliamentary committee in its report *Every Picture Tells A Story* in 2003.⁶⁹ At that time, the Government chose to fund the Family Relationship Centres instead.⁷⁰ One of the difficulties with the committee's proposal was that the Families Tribunal was to be a lawyer-free zone. Yet many people want to be represented by lawyers, and lawyers to play an important role both in narrowing the issues and helping people to settle.

A further problem was that if much of the work in resolving parenting disputes were given to a tribunal, the courts which are already funded and established for this purpose might be left with an inadequate workload. Judges have tenure till the age of 70, whether or not there is work for them to do for which they are appropriately qualified.

It was right for the Government to have rejected the idea of the Families Tribunal as it was presented at the time. The Family Relationship Centres represented a means of reaching many more people with practical assistance for their relationship problems. Nonetheless, the idea that parenting disputes might be resolved best by a multi-disciplinary and inquisitorial tribunal freed from the constraints of the adversarial system is one that needs to be reconsidered. It could be particularly useful for self-represented litigants. If parties are already representing themselves and trying to navigate their way

⁶⁹ Family and Community Affairs Committee of the House of Representatives, *Every picture tells a story: report of the inquiry into child custody arrangements in the event of family separation* (Canberra: Parliament of Australia, 2003).

⁷⁰ See P Parkinson, "Keeping in Contact: The Role of Family Relationship Centres in Australia" (2006) 18 *Child and Family Law Quarterly* 157.

through the complexities of the legal system, would it not be better for their cases to be handled in a different way than those who have legal representation?

In a private paper for the Government in January 2017, Brian Knox SC, Dr Nicky McWilliam and I presented a comprehensive agenda to the Government for family law reform which contained proposals consistent with the ideas contained in this lecture. One of the recommendations was that there should be a pilot program established in western Sydney or a community with a similar demographic profile, which would handle cases referred to it by the courts in which both parties either already were, or would choose to be, self-represented.

The central rationale for establishing such a tribunal is that it may be in a position to develop processes of adjudication which are much more user-friendly, non-adversarial, inquisitorial and procedurally simple than is possible within the framework of a court system. This is because the Constitution requires that courts must act ‘judicially’, and that has been traditionally interpreted as involving some of the major elements of an adversarial system.⁷¹

If a tribunal exercises administrative power and not judicial power, it may be in a position to develop different processes of adjudication.⁷² In particular, a tribunal, while following the basic principles of procedural fairness, would be free to experiment with processes which would be much better suited to self-represented litigants. This would benefit not only this substantial group of people, but also the courts, since self-represented litigants often take a lot of court time. There may also be more scope for decision-makers to interview children in suitable cases, as one obstacle to judges hearing from children in an appropriately informal setting is the adversarial system of justice.

It must be emphasised that such a tribunal would not offer some lesser form of justice. Indeed, for self-represented litigants it may represent a superior quality of justice. The relevant law and court procedures have become excessively complicated, with requirements that are irrelevant to many matters. An inquisitorial system is more likely to work out the relevant issues than one reliant upon self-represented litigants to present their cases and to adduce relevant evidence.

Cases referred to any such tribunal would be limited to those where neither parent is seeking an order for sole parental responsibility. The constraints upon the powers of a tribunal are those explained by the High Court in *Brandy v Human Rights and Equal Opportunity Commission*.⁷³ Where neither parent is seeking an order which would remove or diminish the parental responsibility of the other, but where there is a need to decide the detail of future parenting arrangements following separation, it is possible for a tribunal to make that decision. This is because it need not be seen as an exercise of

⁷¹ *R v Watson ex p Armstrong* (1976) 136 CLR 248.

⁷² For discussion, see ALRC, *Managing Justice: A review of the federal civil justice system*, (Report No 89, 2000) at 1.135-1.152.

⁷³ (1995) 183 CLR 245.

judicial power. Historically, of course, custody adjudication has traditionally been a judicial function; but historically, custody decision-making involved a choice between parents (or others) for the custody of the child. At common law, a custody award to one parent necessarily had the effect of depriving the other of existing parental rights and powers.

Where both parents continue to have parental responsibility, orders dealing with how much time the child will spend in the care of each parent and other issues concerning the future exercise of parental responsibility do not involve depriving a parent of existing powers and responsibilities. Rather they are practical arrangements which have to be made as a consequence of the fact that the parents are no longer living together. It follows that, while traditionally, custody adjudication has been a judicial function, it may be a non-judicial function in the circumstances where the parents will continue to have what we used to call 'joint custody'.

A tribunal of this kind could be modelled on the less adversarial trial and the Oregon Informal Domestic Relations Trial. It is for the Government to announce which, if any, of the recommendations we have made might be accepted, and what form any such initiative might take.

Conclusion

In western countries, the decline in the popularity of marriage as the means of family formation when two people live together in an intimate relationship and have children, has had devastating effects in terms of family stability, which has in turn led to enormous pressures on the family law system. Because cohabitation, even when there are children, is much more unstable than marriage, and because children are increasingly being born into single-parent households, there is an ever-rising number of parents who have the potential to be involved in a dispute about parenting or child support. For many parents, that potential arises from the moment the child is born because they are no longer in an intimate relationship. Other factors have also contributed to a substantial increase in court filings.

Governments in western countries face a lot of other financial pressures and in many jurisdictions, funding for the family justice system is not rising commensurately with demand. Consequently, it is necessary to rethink what we are doing in family law – to redesign the system. There will always be some cases that require adjudication, but not necessarily in the form it traditionally takes. It is time to adopt new strategies to make it more affordable.