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Australian Institute of Family Studies

Separated families and access to the family law system
A research-informed holistic approach to the resolution and management
of disputes over children.

Submission to the Productivity Commission
Issues Paper on Access to Justice

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on behalf of the
Australian Institute of Family Studies

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A well-functioning justice system should provide timely and affordable justice. This means delivering fair and equitable outcomes as efficiently as possible and resolving disputes early, expeditiously and at the most appropriate level. A justice system, which effectively excludes a sizable portion of society from adequate redress risks considerable economic and social costs.

Access to Justice Arrangements
Productivity Commission Issues Paper
September 2013, p ii

The focus of this submission is on access to justice for separated families when parents are in dispute about arrangements for their children. The submission pays attention to research data on the characteristics of parents who separate and the differing needs of these parents and their children. The submission acknowledges the pioneering work of the Family Law Pathways Advisory Group (2001, which recognised the need to see family law as a system in which the courts, lawyers and the family relationship sector all had important roles to play. It also draws inspiration from the work of the Honourable Peter Boshier (former Principal Family Court Judge of New Zealand) and his colleagues (Boshier et al 2013), who emphasised the important role of the State in protecting vulnerable people and in providing vehicles for dispute resolution, and the importance of providing leadership in the structuring of early intervention in highly conflicted separated families.

Summary Statement

Though there are considerably fewer applications to the courts in children's cases following the 2006 family law reforms, parenting disputes continue to represent the most time consuming and contentious aspect of family law and are therefore the primary focus of this submission.

Post separation disputes over children are mainly an expression of relationship rather than legal problems. At the same time, the law has an extremely important role to play in setting the conditions under which parenting may continue in cases in which a parent or a child is deemed to be at risk.

Disputes over children tend to focus on how much time the child should spend with each parent. Outside of "at risk" situations however, there is virtually no evidence linking the amount of time spent with each parent, with better outcomes for children. Rather, quality of parental relationships and capacity to cooperate are the clearest determinates of post separation outcomes for children.

Research in Australia has focused on three key relationship dynamics between separated parents.

1. Friendly or cooperative
2. Distant, and
3. Highly conflicted or fearful.

The number of separated parents in each of these categories and the responses required to meet their needs are considered below.

1. Friendly or cooperative relationships after separation are reported by about three out of every five parents. These parents are mainly able to self-manage disputes that may arise over their children. Importantly, as noted, cooperative parenting after separation correlates with good outcomes for children.

Some “friendly or cooperative” parents and some of their children nonetheless become “stuck” around practical or emotional difficulties associated with the separation. They are likely to benefit from relationship-focused interventions and/or from relatively short-term, child and relationship-focused mediation (known as Family Dispute Resolution - FDR).

The focus of effective facilitated interventions such as FDR is not just on “reaching agreement” but on processes that model both present and future cooperative behaviours. The details of the post separation parenting arrangements may be of great importance to individual family members. But from the perspective of the welfare of the child (the legislation’s guiding decision making principle), the details of the arrangement are likely to be less important than the quality of engagement between the parents and their capacity to focus on the present and future needs of their children.

The current family law system is well placed to deliver the sort of interventions described above and families in this category would generally have little difficulty in accessing appropriate services. But consistent with research findings on the profiles of separated families most in need of services, much of the family law system has increasingly geared itself to being able to respond effectively to more problematic cases.

2. Distant relationships are described by about one in five separated parents, though the proportion in this category tends to increase somewhat over time.

“Distant relationships” is a somewhat ambiguous category. It can signal wariness (for example parents in this category are more likely than “friendly or cooperative” parents to report a history of family violence); it can also reflect a more pragmatic response, in which parents go their own way but preserve what might be described as a functional relationship with each other as a way of continuing their obligations to their children.

The family law system is reasonably well geared to assist families in which the post separation parental relationships are distant. In particular:

- Much attention has been paid to screening and assessment processes within Family Relationship Centres (FRCs),¹ which are generally able to determine the appropriateness or otherwise of entering into a Family Dispute Resolution process.
- Child focused information sessions offered at these Centres as a matter of course, promote the benefits for children of moving towards a more cooperative stance.
- Referrals to other relevant services can also be made after initial screening and assessment.
- Increasingly, FRCs are cooperating with legal representatives who can act as advocates for their clients while reinforcing the key messages of parental cooperation (when it is responsible and safe to do so) for the sake of the children.
- Through a variety of mechanisms (including the issue of a section 60I certificate) FRCs can also act as a gateway to court intervention where this is deemed to be necessary.

¹ Where distances are an obstacle, FRCs in different locations can cooperate, or families may make use of the Telephone Dispute Resolution Service

For these families, the main constraint on accessing justice is likely to be delays. Delays may be exacerbated by a breakdown in communication between service providers, lawyers and courts. It may also be perceived to be in the interests of one parent (perhaps the parent enjoying the major care of the children), to be slow to respond to invitations to attend FDR sessions. Although timing is a complex issue in family law cases (for example a parent may be emotionally vulnerable in the weeks following a separation and unable to represent themselves adequately), the adage that “justice delayed is justice denied” still generally applies.

3. Highly conflicted post separation relationships are reported by about one in eight separated parents, while **fearful relationships** are reported by about one in twenty parents.²

Most parents in these categories have a history of family violence, not infrequently paired with mental health problems and/or alcohol or other addiction issues. These families represent by far the biggest challenge to the family law system, with access to justice posing many systemic problems, professional and jurisdictional boundary issues and ethical dilemmas.

Many of these families are referred in the first instance to one of the 65 Family Relationship Centres FRCs around the country. Though the role of these centres includes screening, assessment and referral, they are mainly geared to the provision of FDR. Family Dispute Resolution Practitioners can also issue section 60I certificates, which enable parents to take their matter to a court (should they wish), in cases in which FDR is inappropriate or deemed to be unsuccessful.

Research suggests that mandatory FDR (with exceptions) appears to have been a successful innovation in at least two senses. First, most parents who attempt FDR report reaching agreement either at the time of the intervention or some months later. Second, the introduction of mandatory FDR has been associated with an approximately one third drop in court applications in children’s matters. But while satisfaction rates with FDR are high, there is evidence that FDR sometimes takes place in cases in which one parent has intimidated the other or in which there are considerable power imbalances between the parties.

Research also shows that FRCs are mainly dealing with complex cases, which often include a history of dysfunctional behaviours such as family violence. This suggests that close attention also needs to be paid to the ways in which the screening and assessment processes can inform other options when FDR is either inappropriate or insufficient.

This also means that in addition to the issuing of section 60I certificates, families with significantly problematic histories, safety issues etc., are likely to require proactive referrals to relevant legal, mental health, and child and family relationship services, and to the courts.

Successful proactive referrals require local knowledge and the development and maintenance of trust, as well as mechanisms to resolve boundary issues, misunderstandings and the professional and the many ethical dilemmas that can arise when the focus of intervention is on more than one individual. Locally based Family Law Pathways Network, which are supported by the Attorney General’s Department represent one body capable of offering considerable assistance in this regard.

There is also encouraging evidence of a positive shift in family lawyers’ perceptions of FRCs in particular and the family relationship sector in general. This shift, which has partially come about as a result of initiatives from the Attorney General’s Department such as the *Better partnerships program*

² Mothers are roughly twice as likely to report this as fathers.

and the *Coordinated family dispute resolution pilot* opens up opportunities for greater levels of cooperation between the legal and family relationship sector. The shift is further supported by the growing recognition that no single intervention or approach is likely to represent a sufficient response for separated families presenting with highly complex and multiple problems.

It can be said in summary that considerable progress has been made following the 2006 family law reforms, especially via the central role taken by FRCs in matching client needs with a range of appropriate services. But in families in which a history of violence and other dysfunctional behaviours are accompanied by continued coercive tactics by one or both parents, speedy access to authoritative decision-making can be extremely important. A major difficulty for judicial officers however, is their inadequate access to independent professional reports.

A partial solution to the issue of independent forensic assessments exists in the form of “Magellan” cases (or “Columbus” cases in Western Australia)³. In these cases, State authorities agree to provide reports to the family law courts to assist in the assessment of child protection issues. The courts also have access to reports from their own Family Consultants or from professionals appointed under Regulation 7 to provide independent reports on a fee for service basis.

Despite these services however, it remains the case that many highly troubled families are seeking decisions from the courts without the benefit of independent reports. Although many of these are in the category of interim decisions, the impact of these judgments is likely to continue long into the future. The fact that judicial officers must frequently attempt to balance the need for child and parental safety with the aim of promoting ongoing meaningful child-parent relationships without the aid of professional assessments of family dynamics and children’s needs, remains a major concern.

Some see as a partial solution to this problem, the possibility of allowing courts to have access to the screening and assessment component of the work conducted by FRCs (or FDRPs in other settings), in those cases deemed unsuitable for FDR on the grounds of coercive or other dysfunctional behaviours exhibited by one or both parents. This possibility raises many practical, ethical and professional issues however, that would need careful consideration and wide consultation.

Scoping the submission

Although family law covers a wide range of matters, by far the most common matters falling under its jurisdiction relate to post separation parenting of children, distribution of property and the payment of child support. This submission focuses on the most contentious and most time consuming of these areas, the resolution of disputes over post separation parenting. More particularly, it addresses questions of how to build on gains made following the 2006 family law reforms, how to make more efficient use of existing resources within the family law system, and how ensure that all parents and children who need support and protection at this critical time in their lives, have access to appropriate legal and relationship focused services.

The focus of this submission is not meant to imply that just and timely resolutions of post-separation disputes over property and child support are unimportant. Indeed there is evidence that poverty amongst single parents is a strong predictor of poor outcomes for both parents and children, and debates continue on the extent to which this could be alleviated by adjustments to the post separation distribution of property and child support.

The focus of the submission does not suggest therefore, that the principles underpinning property settlements and the principles underpinning child support arrangements are settled; or that the dispute resolution processes available to parents with respect to these two areas may not need

³ See Evaluation by Higgins (2007)

further attention. In addition, we acknowledge that the emotional drivers of disputes over property and money are often inadequately appreciated (see Millman 1991; Fehlberg Smyth & Fraser 2010); and that the routine application of a child support formula runs somewhat counter to a “fundamental axiom of family law that the best arrangements are those that the parents negotiate for themselves” (Ministerial Taskforce on Child Support, Commonwealth of Australia (2005 p. 207).

We also note that an appreciable minority of parents surveyed in the Longitudinal Study of Separated Parents (LSSF)⁴ expressed dissatisfaction with the perceived fairness of property settlements and that there was considerable residual feeling with respect to the questions around the paying and receiving of child support. The extent to which these responses may be exacerbated by a perception that property and child support outcomes are too formulaic and not sufficiently sensitive to the individual needs of the separating couple is not clear. What is probably more certain however, is that a prime candidate for ongoing expression of unspent emotions over money matters, are ongoing disputes over children.

Making decisions about children: some preliminary considerations

Empirical analyses of decision-making about children have led many commentators to emphasise both the complexity and the essentially emotional nature of the process. Thus Schaffer’s (1998 p. 2) empirical investigation into the principles underpinning decisions about children led him to reach the following conclusion.

When one examines individual incidents of decision-making [about children] and attempts to unravel the factors responsible for the course of action adopted, it soon becomes evident that we are confronted with a highly complex, frequently obscure and far from rational process.

From a legal perspective, in a now celebrated article addressing the problem of indeterminacy in children’s cases in contemporary family law, Mnookin (1975) observed.

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child’s happiness? Or with the child’s spiritual and religious training? Should the judge be concerned with the child’s ‘economic productivity’ when he grows up? Are the primary values in life in warm interpersonal relationships or in discipline and self-sacrifice? ... [W]here is the judge to look for the set of values that should inform the choice of what is best for the child? Normally, the custody statutes do not themselves give content or relative weights to the pertinent values. And if the judge looks to society at large, he finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.

Neither of these statements, it should be noted, addresses the question of child protection, or the protection of a parent whose ongoing care for a child places her or him in a vulnerable position with respect to safety. We return to this key issue later in the submission. In addition, though the above statements emphasise the frequently multifaceted, emotionally driven and indeterminate nature of single decision about what is best for a child, the reality is usually more complex

This is because by their very nature, most parenting arrangements require adjustments as children develop and as family circumstances change. Evidence from LSSF supports this assertion by revealing

⁴ The Longitudinal Study of Separated Parents (LSSF) is a survey of approximately 10000 parents who separated after the 2006 family law reforms. AIFS has conducted an analysis of three waves of LSSF. The first survey (Wave 1) was conducted on average, fifteen months after separation (see Kaspiew et al 2009). The second survey (Wave 2) was conducted approximately a year later (see Qu & Weston 2010). The Report on Wave 3, which surveyed parents approximately five years after separation, is due to be submitted to the Attorney General’s Department in mid November 2013.

that large number of these families do indeed make changes to parenting arrangements that they have previously agreed to or that have been ordered by the courts.⁵

This is not a surprising finding when it is recognised that adjustments to parenting arrangements are also made relatively often within many “intact” families. Importantly however, in negotiating new arrangements to meet children’s changing needs, parents in “intact” families are likely to be strongly motivated to find solutions that work for their children, work for themselves and preserve family harmony. This may contrast with the situation in which separated families find themselves. In these families, negotiating parenting adjustments can provide considerable scope for the expression of unspent feelings or the continuation of the dysfunctional behaviours that may have contributed to the separation in the first place.

Understanding the emotional climate in which post-separation parenting disputes are being negotiated has been shown to be an important element in deciding what approach to take when assistance is required. We now have data that provide some clues about the nature of post separation relationships and the impact these relationships have on parental capacity to reach and sustain agreements.

The LSSF noted above found that about three out of every five separated parents reported a friendly or cooperative relationship with each other post separation. Most of these parents reported that they came to arrangements about their children mainly via discussions between themselves. In achieving these arrangements, many sought fairly minimal (if any) help from courts, lawyers, or family relationship practitioners. Thus though some of the negotiations for this majority of separated parents would no doubt be challenging, for many, the pathways to the resolution and management of child related issues seem in broad terms, to resemble the pathways adopted by parents who remain together.

About one in five of the parents in the LSSF sample, however, reported that their post separation relationship was “distant”. A further one in eight reported lots of conflict, while about one in twenty described their relationship with each other as fearful.⁶ These parents, especially those in the highly conflicted and fearful categories, were considerably more likely than those reporting friendly or cooperative post separation relationships to also report a history of family violence and/ or a history of mental health or addiction problems. They were also considerably more likely to make use of legal interventions and family relationship services and considerably less likely to be able to manage disputes over their children without such assistance. Providing appropriate services for families in the highly conflicted and fearful categories and making appropriate decisions for the considerable proportion of this group that struggle to reach agreements about parenting remains an ongoing challenge for the family law system

Post separation parenting: the problem of violence and other dysfunctional behaviours.

Over the past fifteen years or so numerous studies in Australia have reached the conclusion that there is a strong link between entrenched post separation disputes over children and a history of family violence. Though many of these studies had drawn on small or non-randomised samples, the results were fairly consistent. Drawing on a randomised sample of family law court files, an AIFS pre-reform study of allegations of violence and child abuse in court applications in children’s cases (Moloney et al 2007) found that more than half the cases contained (usually multiple) allegations of family violence.

⁵ Support for claims linked to the LSSF survey can be found in two key publications of the Australian Institute of Family Studies – Kaspiew et al (2009) and Qu & Weston (2010). The first survey was conducted on average, fifteen months after separation. The second survey was conducted approximately a year later. Analysis of a further survey conducted approximately five years after separation has also been completed. The final report is due to be submitted to the Attorney General’s Department in mid November 2013.

⁶ Mothers were significantly more likely than fathers to suggest that the relationship was fearful.

Importantly, many allegations were independently classified as being at the severe end of the spectrum.

Despite their seemingly severe nature in many cases, the study also found both little evidentiary material and low levels of detail supporting many of the allegations. In addition, fairly high rates of non-response to allegations were noted, with low levels of detail supplied, even in those cases in which responses were made.

This scarcity of supporting evidentiary material suggested that legal advice and legal decision-making in these cases often appeared to be taking place in a context of widespread factual uncertainty. Furthermore, although allegations of spousal violence or child abuse that were accompanied by strong probative weight appeared to influence outcomes, in the many cases in which such evidence was lacking, outcomes were indistinguishable from those cases in which no allegations had been made.

The policy objectives of the 2006 family law reforms included that of protecting children from violence and abuse. This is in some tension with another key aim of the reforms, which was to bring about a “cultural shift” in the management of parental separation “away from litigation and towards co-operative parenting”. (See Family Law Amendment (Shared Parental Responsibility) Bill 2005. Explanatory Memorandum, p. 1).

This tension can be more readily appreciated when we consider section 60CC of the 2006 legislation, in which judicial determination of outcomes in a parenting dispute was to be informed by two primary considerations: (a) The benefit to the child of having a meaningful relationship with both of the child’s parents; and (b) The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Consistent with results from the AIFS *Allegations of violence* report, evidence from the major AIFS *Evaluation of the 2006 family law reforms* (Kaspiew et al 2006) concluded that the family law system, including the courts, had some way to go in being able to respond effectively to issues related to violence, safety concerns, mental health and addiction problems.

Alongside these findings and in the light of earlier lobbying from a variety of individuals and organisations, government initiated further independent inquiries aimed at advising on the issue of legislative and other options. Chisholm (2009, p. 127), who provided one of the independent inquiries, noted that following the use of the term in a post 2006 judgment, the two ‘primary considerations’ outlined above had become known as the ‘twin pillars’ of post-separation decision-making about children. Chisholm provided a detailed critique of the framing of the legislation and the reasons why in his view (and the view of many other commentators), the ‘twin pillars’ concept had had the pragmatic effect of too frequently permitting aspirations for a ‘meaningful relationship’ to be given equal weight to the need for protection of the child and/or the child’s parent.

Although there were differences in approach and emphasis, the major reports commissioned by government to explore if or why the legislation and the family law system needed to undergo further reform, were in broad agreement about three issues: (1) the so called ‘twin pillars’ legislation needed to be less ambiguous when it came to balancing meaningful relationships with protection; in essence, safety concerns must trump concerns about the preservation of relationships (2) the definitions of family violence needed to be broader; and (3) those elements of the legislation that appeared to inhibit parents from making allegations needed to be modified or removed. The Family Law Amendment (Family Violence and Other Measures) Act 2011, which came into force in June 2012, has attended to each of these issues. It will be important to evaluate the impact of these changes.

Evidence for a “cultural shift” away from litigation and towards cooperative parenting.

To what extent is it a “good thing”?

There is evidence (see Parkinson 2013) that the number of children’s cases filed in Australia’s family law courts since the implementation of the 2006 reforms has dropped by about a third in the five years or so since the commencement of the reforms. At the same time, it is important to recognise that the majority of the applications in Australia’s family law courts continues to be those concerned with children’s matters.⁷

There is also evidence that the use of family relationship services,⁸ including family dispute resolution services, has increased considerably since 2006 and that these services have achieved considerable success in assisting separated parents to manage disputes over children. For example the majority of LSSF parents attempting Family Dispute Resolution (which with certain exceptions is mandatory for those in dispute over their children) were found to have reached agreement either as a direct result of the FDR process or within the period between delivery of the service and the LSSF surveys. Furthermore, most of the former partners who attempted and reached agreement following FDR had quite complex problems. Though it is not possible to establish a causal link, the data are consistent with the proposition that these services have helped a considerable number of families avoid litigation.

A minority of parents presenting for FDR however, had difficulties of such magnitude that they were deemed by family dispute resolution practitioners to be unsuitable to attempt or continue with FDR, and were given a certificate under section 60I (enabling them, should they wish, to take the matter to court). Only about one in three of these parents reported they had sorted out children’s issues at the time they were surveyed. Thus although it might be argued that cases given a section 60I certificate should ideally have been screened out beforehand and given an earlier chance to take their dispute to a court, the evidence from the LSSF surveys is that these parents continue to struggle to sort out matters related to their children even when given the opportunity to litigate.

Findings such as these have made it increasingly clear that though progress has been made, the family law system continues to be challenged by a minority of parents, many with a history of family violence and other dysfunctional behaviours, who struggle with or remain stuck around children’s issues. It is likely that for some and possibly many of these parents, the issues that contributed to their separation in the first place continue to be played out in the ongoing disputes over the children. Timely and satisfactory access to justice for these parents and their children requires the sort of proactive leadership from the family law system that Boshier et al (2013) noted above have referred to. Such leadership however, needs to be complemented by a strong commitment to inter sectorial and inter professional cooperation.

Building on the reforms through increased cooperative endeavours

Surveys of lawyers’ attitudes towards FRCs both before and shortly after the reforms (reported in Kaspiew et al 2009), revealed high levels of negativity towards the reforms in general and the FRC initiative in particular. In the relatively brief period since the 2006 reforms however, nothing short of a revolution has occurred with respect to cross-sector cooperative engagement between family lawyers and family relationship practitioners.

⁷ The 2010/2011 Annual Report of the Federal Magistrates Court (since renamed the Federal Circuit Court) reveals (p 28-29) that of the 17515 applications for final orders filed in that court, 55% were for applications related to child related disputes and a further 10% were for applications related to child related and financial disputes. This translates to 11385 applications. In addition, the 2010/2011 Annual Report of the Family Court of Australia reveals (p 49) that of the 3249 applications for final orders that were filed, 31% were for applications related to child related disputes and a further 13% were for applications related to child related and financial disputes. This translates to 1430 applications. Across both courts therefore, despite the substantial overall drop in applications calculated by Parkinson, about 62% of applications for final orders continued to be either related exclusively to disputes over children or included disputes over children.

⁸ A summary and description of these then new and expanded services can be found in Kaspiew et al (2009), Chapter 1.

Two recent initiatives evaluated by AIFS illustrate this point. The first is the Family Relationship Centres/Legal Assistance Partnerships Program, (the 'Better Partnerships' program) announced by the Attorney General in June 2009. The other is the Coordinated Family Dispute Resolution (CFDR) pilot program, also funded by the Attorney General's Department.

The aim of the 'Better Partnerships' has been to assist separated or separating families, 'by providing access to early and targeted legal information and advice when attending Family Relationship Centres' (McClelland, 2009). Though participation was not mandatory, all but one of the 65 FRCs participated in the program. The evaluation (see Moloney et al 2010) was a little early to allow for a definitive analysis of the impact of this initiative. Critically however, the evaluation found unambiguous evidence of the development of very positive relationships between the lawyers and the family relationship practitioners surveyed. Though the legal and social science cultures continued to be seen to be different in many respects and though some potential obstacles (such as differing approaches to client confidentiality) were identified, it appeared that lawyers and their social science counterparts were finding ways of working constructively together in the service of separated families.

Cross sector cooperation was taken a step further in the Coordinated Family Dispute Resolution (CFDR) pilot program. The program involved a multi-disciplinary, intensively case-managed process in which parents who reported a history of family violence were supported to attempt, or to consider attempting to resolve parenting disputes via mediation. This involved partnerships between organisations that provide family mediation, publicly funded legal services, family violence services and men's support services. It allowed each parent to have access to legal support and advice as well as the support of a specialist family violence or men's support professional and input where relevant from a child consultant.

The core aim of CFDR was to provide a non-adversarial and child-sensitive means for parents to sort out their post-separation parenting disputes. The intensive level of support provided to parents aimed to ensure that the process kept children and parties safe and that power imbalances resulting from family violence do not impede parents' ability to negotiate effectively.

The evaluation findings (see Kaspiew et al 2012) demonstrated the complexities involved in this work, including the logistics of coordinating contact between clients as well as multiple professionals over several locations who are dealing with cases involving not only family violence, but mental health issues and/or substance addiction. It was found for example that risk management was an active and time-consuming process, with issues related to risk escalating and abating as clients experienced a range of different challenges and triggers.

Again, lawyers and family relationship practitioners participating in this program appeared to have moved beyond the scepticism and constraints that featured in the earlier lawyer surveys noted above. Most of the professionals involved in the evaluation were very enthusiastic about the need for a CFDR-type service in the family law system and were positive about the capacity of CFDR to meet client needs. This was true of many professionals' views, even in locations where the partnerships encountered difficulties. Parents interviewed were also mostly positive about the process.

Where to next?

The House of Representatives Standing Committee on Family and Community Affairs. (2003), whose report provided a key catalyst for the 2006 reforms, had placed much of the responsibility for the family law system's inability to resolve children's cases onto the adversarial behaviour of lawyers. The evidence however, suggests that in most cases, a more parsimonious explanation for ongoing conflict between separated parents lies in the nature of the dispute itself and the history of violence

and/or dysfunctional behaviours that one or both the parents bring to the court or to the negotiating table.

In terms of access to justice, a key aim of the family law system must be that of protecting children and their parents from fear and violence, while reducing the number of cases of entrenched conflict over children to a minimum. As a “rule of thumb”, the more complex the case, the more resource intensive will be the interventions required. As a “rule of thumb” the more complex the case, the less likely it is that interventions from the legal sector alone or from the family relationship sector alone will meet the families needs or lead to enduring resolution.

Although this may not be an immediately attractive conclusion in times of fiscal constraint, it is important to recognise that most separated parents appear to need little or no input from publicly funded services in order to come to workable arrangements for their children. In addition, research data from organisations like AIFS, especially longitudinal data such as that provided by the LSSF, are capable of pointing to increasingly targeted interventions. For example, while child focused family dispute resolution (see Moloney & McIntosh 2006) and child inclusive family dispute resolution (McIntosh 2007) have contributed to increasing the capacity of mediators to assist families with quite complex difficulties, that capacity can be considerably enhanced when legal representatives are recruited into and feel able to reinforce the core messages that these processes invite parents to consider.

A lawyer/ family relationship practitioner team approach raises considerable systemic challenges. The continued development of protocols that address the need to balance the rights of individuals with the aim of preserving meaningful parent child relationships when that is possible, and protocols that permit the responsible exchange of information when children or parents are deemed to be at risk, are likely to be the next frontier in family law practice.

Of course such protocols are of little value if the professions themselves, notwithstanding different starting points and different assumptions, are not focused on a common purpose. Fortunately however, the growing evidence is that there is considerable good will and considerable willingness by lawyers and family relationship practitioners to be guided by such a focus. Indeed growing inter-sectorial cooperation may prove to be one of the most significant, even if one of the more unexpected legacies of the 2006 family law reforms. Such developments have also been quietly but effectively reinforced over more than a decade by the Family Law Pathways Networks, which with the support of the Attorney General’s Department, have been operating in many parts of the country.

Finally, it should be noted that a key element of cooperative endeavour not yet formally developed is that between the family relationships sector and the courts. It seems clear that from point of view of separated families, interventions should ideally have a joined-up feel rather than be experienced as if one system has little idea of what the other is doing. This principle however, raises many potential dilemmas, including how and in what circumstances information gained at a community based service might be relayed to a judicial officer to assist in making a decision, and how and in what circumstances a court might expect that a decision it makes could be actively supported by relevant services.

Hannan (2013) has described cases in which active referrals were made, including referrals to a legal service, for the purpose of applying for a restraining order, after child-inclusive interventions at an FRC revealed the existence of dangerous behaviours. A highly experienced practitioner, Hannan is aware that though she is pushing the boundaries of what an FRC might normally be expected to do, the option of simply issuing a section 60I certificate was unlikely to meet the needs of these families.

From a more “top down” perspective, there is also a need for judicial officers to be able to make appropriate use of the services available and, with confidence in those services, to be able to contextualise their orders in ways that might provide future options for families with serious issues.

The following judicial statement (cited in Johnston, Roseby & Kuehnle 2009 p. 27) sets out clear objectives for one family’s future.

Mr. R, what you have done to your wife is a criminal act under the laws of this state, regardless of what you say she did or said to provoke you, and there are consequences that the Court is bound to impose. What you did is also very harmful to your children, whether they actually witnessed the event or not. Living in a violent home is bad for children. Mr R I hear you when you say that you love your wife and children, that you are sorry for what you did and that you have promised not to do that again. The Court is going to help you keep that promise by doing three things: first, by providing your family with protection until it can be sure that you are no longer a danger, and that you can show you are no longer a danger; secondly by providing you an opportunity to manage your anger better and to resolve conflict in a non-violent way; and third, by providing you and your children a safe place to visit together, where they will not be afraid, and you will be given an opportunity to show that you have a loving relationship with your son and daughter.

In this case, the success of the judicial officer’s objectives relies on the active engagement of services such as a family violence service and an organisation (such as a Contact Centre) that can provide a safe location for the children to spend time their father. It might also require input from others such as an individual or organisation that can support the mother while simultaneously aiming for safe and responsible parenting arrangements. Moreover, success is more likely to be achieved if these services can work cooperatively with legal representatives and if a mechanism exists for providing feedback to the court if that proves to be necessary.

Concluding statement.

Based on our analysis of relevant data and the issues raised by these data, we suggest that key strategies to improve access to justice for separated parents in dispute over children include recognising that:

- The majority of separated parents develop friendly or cooperative post separation relationship with each other, and like parents in “intact” families, are largely in the “self help” category when it comes to sorting out arrangements for their children.
- Some of these families will benefit from receiving support from advocates or from family relationship services. FDR may be particularly helpful at times when external events such as re-partnering place extra stress on the parental relationship and/or raise new issues regarding arrangements for the children.
- Many parents are also likely to benefit from advice with respect to entitlements regarding property and/or child support. To minimise residual feelings about unfairness of property distribution and child support arrangements (which can spill over into parenting disputes), parents should be encouraged to make arrangements that they see to be consistent with their needs and the needs of their children.
- It has become increasingly clear that underpinning many of the more difficult and enduring post separation disputes over children is a range of dysfunctional behaviours, including violence, mental health concerns and addiction problems.
- With cases at this more challenging end of the spectrum, there is a need to continue to increase the range of cooperative protocols and two way communications between the key elements of the existing family law system – the family relationships sector, family lawyers and the courts.

- Linked to this, is the need for earlier recognition of families in which children or parents are at risk and for providing information to relevant services and/or courts as soon as possible.
- Courts in particular need independent expert information to assist them in cases of alleged violence or other dysfunctional behaviours. Without this, it is difficult (and stressful) for judicial officers to be expected make decisions that privilege safety without necessarily closing off the opportunity for ongoing meaningful relationships between children and those to whom they are emotionally attached.
- Consideration needs to be given to the role FRCs might be able to play in proactively assisting courts to make appropriate decisions in high-risk cases. Such considerations need to be balanced against the importance of maintaining client trust and the current confidentiality provisions that pertain with respect to FDR interventions. In particular, it needs to be appreciated that routine calling or cross examination of FRC staff would render the continued functioning of FRCs non-viable
- In some of these difficult cases, consideration should be given to having independent professional oversight of arrangements ordered by the court.
- Recognising the need for flexibility around unanticipated (or allegedly unanticipated) contingencies, consideration also needs to be given to how such professionals might assist in conciliating or advising parents and/or their legal advisors in the short term, having regard to the intention of the court orders.
- In potentially at-risk cases, there needs to be a mechanism for courts to also hear from such independent professionals of their own motion so that orders or directions may be adjusted if necessary.

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