LAW COUNCIL OF AUSTRALIA
FAMILY LAW SECTION

10TH NATIONAL CONFERENCE

FOOD FOR THOUGHT

THE STATE OF FAMILY LAW AND THE FAMILY COURT OF AUSTRALIA 2002

By

The Honourable Justice Alastair Nicholson AO RFD
Chief Justice
Family Court of Australia

0900
18 MARCH 2002

Introduction

It is a great pleasure to once again address the biennial conference of the Family Law Section of the Law Council of Australia and do so in my home city. I last did so in this city shortly after my appointment to the Court in 1988.

It has been a long learning curve since 1988 that continues, as it should do, and the years that have passed since that time have encompassed many changes and developments, some good and some bad. The one thing that can be said about them is that the process of change has been constant and has required much flexibility on the part of the Court and practitioners in order to cope with them.

As I said in a speech that I gave in the year 2000 at the 10th World Conference of the International Society of Family Law, Western societies have struggled for many decades with the reality, the rhetoric and the politics of marriage and latterly, relationship breakdown.

We all know that family law is far more than marriage and divorce law. The lives of many mothers and children are blighted, even endangered by the violence they experience directly or witness in the home. Relationships between unmarried heterosexual and homosexual couples continue to increase in proportion to traditional marriages, and medical technology provides us with ways of creating life that were unheard of even 10 years ago and also arguably effect alterations to gender.

The law does not always keep up with such changes and there are always those who would prefer that it did not. I was reminded of how archaic a comparatively modern piece of legislation like the Family Law Act can be when I recently had cause to look at s114(2). That subsection, which appears in a section dealing generally with the Courts powers to grant an injunction reads as follows: -

> *In exercising its powers under subsection (1) the court may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights.*

It does however behove us all to look at the discriminatory effects that such failure to make change can have upon ordinary people and to act to eliminate it. Even the above subsection has to be considered in an issue as to whether Australian law recognises marriages by persons who have been subject to surgical gender re-assignment.

Definitions of family become ever more complex as a consequence of these factors. Policies and laws have attempted to cope with all of these challenges, with mixed results.

Perhaps a good example of this is the *Family Law Reform Act* 1995 (Cth) which was an attempt to take family law forward in this country, particularly in the area of children's matters. Experience to date suggests that it is one thing to legislate, but quite another thing to change attitudes, and that sometimes legislation has untoward unintended effects.[1] Not least of these has been an explosion in the number of contact cases coming before the Court. Another example is the Government's well-intentioned attempt to improve the situation with regard to enforcement of orders in children's cases, to which I will turn subsequently.

Of course, disputes involving family members not only generate deep emotional responses but also on a wider plane, they frequently lay bare issues of power, gender, public and private responsibility and concepts of ownership.

Marriage and relationship breakdown is an issue of great public concern, because of its perceived destabilisation of society and its effects on children. Issues of family autonomy and state intervention intersect with each other as what was originally a private relationship becomes the subject of public scrutiny. Moral beliefs are challenged, as issues such as the recognition of same sex relationships, surrogacy and in vitro fertilisation have become significant.

The need for the law to protect children from abuse and persons in relationships from violence is an acute need and must not be forgotten.

In that address in 2000, I suggested a number of areas in which family law in its broadest sense seems to be at something of a crossroads. All too often lawyers, particularly in the wider general law sphere, tend to stereotype family law into a compartment and dismiss it as irrelevant to their considerations. This is inherently dangerous because family law impacts on the community to a much greater degree than any specific area of general law. In this regard I think it appropriate for me to pay

---

[1] Helen Rhoades, Reg Graycar, and Margaret Harrison *The Family Law Reform Act 1995 : The first three years,* 2001 available at http://www.familycourt.gov.au/papers/html/fla1.html

tribute to the Law Council of Australia and particularly to its Family Law Section for the work that they have done in bringing home to the legal profession and the public the significance of family law.

Limitations on the types of matters about which the Commonwealth can make laws naturally restrict the areas over which the Family Court can adjudicate. The fact that these limitations in no way reflect the circumstances of peoples' lives, and probably never did, is an historical legacy that is not easily rectified. However, I believe that it is time that we and the community and this Court and other courts exercising family law jurisdiction, look much more closely at the possibility of finding mechanisms to overcome these constitutional limitations. Dare I say it; politicians might even consider inviting the people to amend the Constitution to overcome them.

Another conference that will be held in Melbourne in October this year, namely the International Convention of Family and Children's Court Judges and Magistrates, will I am sure, throw further light upon these problems. They are not unique to this country but it is difficult to detect much political enthusiasm for change.

Looking more specifically at the Court and the future, I believe that we have proved over our 25 years of existence that we have an extremely significant role to play in the Australian community.

As all aspects of our lives have become less insular and more global in outlook and as mobility increases, family law generally and the Family Court of Australia specifically have become integral parts of a wider family law system. This is partly due to the ratification of International Instruments such as the Hague International Abduction Convention and the Convention on the Rights of the Child. It is also the result of the less formal but significant links, which are forged at Family Court and other conferences.

From an international point of view, this Court is often regarded as a role model, which has been used to provide assistance to other countries considering changes to their family law systems.

I am confident about the future of this Court and heartened by the quality of its judges, of its management and its staff. To work in this jurisdiction requires a high degree of dedication and that has been demonstrated in full measure by all judges and staff. As in the past, family law and the Family Court will continue to be the subject of controversy. But the Court

will continue to be at the forefront of innovation in the area of family law and in the wider arena of courts generally with respect to case management, court governance and information technology. Because we build and learn from the past the Court is well placed to meet the challenges that lie ahead.

I now turn to some specific areas of present concern about which I wish to make comment.

1. New Case Management System

You will be aware of the national roll out of the new pre-trial management system, beginning with the Sydney registry in late May last year and progressing through the registries.

The development and implementation of the system has required an enormous effort by the Court at many levels. In this regard, I would like to pay a particular tribute to the work of Justice O'Ryan, Registrar Jane Peacock and David McCormack, under the general supervision of Justice Buckley. They have put in long hours and an enormous amount of work into this project. There has also been most valuable input from Case Management Judges, Registrars and staff, as well as from the practicing profession.

However, the Court is confident that the system will deliver a more streamlined process for the management of cases requiring a determination. It will better manage our scarce judicial resources and contain both public and private costs. Greater trial date certainty, a reduction in the numbers of adjournments and part heard trials would benefit us all. I realise that a new system places demands upon all of you as well and that there is a learning curve involved for us all in changing long established practices.

Consultation has been central to the design of the new system, which had its genesis in the recommendations of the Future Directions committee. Family lawyers were an integral part of the consultations that accompanied that exercise, and your feedback – both positive and negative! - was most useful to us then – as it is now.

During the rollout ongoing liaison with external stakeholders has been a key component of the implementation plans for each registry. We have also held seminars for the local legal profession wherever possible, as

well as dedicated briefings for state legal aid bodies and their staff. The response has been very heartening.

The Court has established a new legal position (National Case Management Legal Coordinator) which will assist in monitoring the operations of the case management system. There are still issues that need to be resolved and the system will require ongoing monitoring. I am confident that the consultations between the Court and the profession will continue, to our mutual benefit – and that of our clients.

One of the major principles that underpin the Court's approach to case management is to reward those parties who do comply with its directions with speedier and more certain hearing dates and I have no doubt that as this comes to be appreciated so will the benefits of the case management system be understood.

Another is one that comes from the report of the Simplification of Procedures Committee. That is the desirability of minimising costs unless and until it is apparent that the matter is going to proceed beyond the resolution phase. I believe that those recommendations have been a great success in saving significant emotional and financial cost to many parties who are able to resolve their differences at an early stage.

One of the criticisms of the Court by the ALRC[2] was that we did not introduce an individual docket system. We considered that carefully. However we decided that because of the sheer volume of cases we could not have an individual docket system from the point of commencement of cases on the case management pathway. There are also other factors that militate against such a system in the Family Court of Australia that need not be discussed here. We have I believe, as I will demonstrate shortly, devised a system that takes account of the advantages provided by individual judge management of cases at a later stage of the process where that management is necessary.

We are committed to maintaining the demarcation envisaged by the Future Directions Committee between the Resolution and the Determination phases of the court's new Case Management System. That is that our focus during the Resolution phase is to provide parties with the opportunity to resolve at minimum expense the issues and if unable to do

[2] Australian Law Reform Commission (2000) *Managing Justice: A review of the federal civil justice system* Report No. 89, ALRC, Sydney.

so identify the real issues in dispute in their case. This will enable the court to tailor its resources to best meet parties' needs.

Another factor, that is also designed to overcome the difficulties associated with a system that moves between events with little happening in between, is a complete change in the Court's administrative structure in relation to case management. This involves a caseflow management team having the responsibility for individual cases. Caseflow officers will ensure that so far as possible individual cases will be managed by the same Deputy Registrar, Counsellor/Mediator, Registrar and Judge.

Once cases move into the Determination phase, there is an expectation of greater judicial management of those cases if required.

The fundamental tenet of the Determination phase is the reversal of the listing or compliance dynamic. That is no trial date unless ready. This will be maintained.

In the context of a case management system founded on this basic premise there must be a way of capturing those cases that are not ready to proceed. Hence the Not Ready List.

As a result of meetings held last week, we have reached firm decisions as to an issue that has troubled all of us, ie what to do with cases that are not ready because of non compliance by one or all parties.

Currently it is up to the parties subject to a call-over to make application to exit the Not Ready List.

We have decided that in future cases that are not certified as ready for a pre-trial conference will still have their Pre Trial Conference vacated, however they will be the subject of an automatic listing before the case management judge or his/her nominee in the defaulter's list.

This is consistent with the expectation of greater judicial intervention in cases in the determination phase where required. That is there will be judicial intervention in those cases in which parties do not do what they have been ordered to do to prepare the case for trial. This is arguably in part what is contemplated by an individual docket system, namely a judge looking at cases in which there are difficulties and trying to sort them out.

The options open to the case management judge are wide, including making final orders by consent, making costs orders, setting the case

down for undefended hearing, orders limiting the evidence to that already filed, loss of priority orders, dismissal or allocating a further PTC. There will still be an opportunity in some cases for the parties to attend a PTC on the date originally allocated however that is a matter for discretion.

2. Circuits

As I have said, central to the case management system will be the principle that cases will not be set down for trial unless they are ready to proceed and this will apply across the board, including at circuit locations. We are nevertheless prepared to allow some flexibility to take account of circuit requirements, but not to this principle.

I firmly believe that superior courts should not just sit in capital cities but should be seen to sit in regional and remote locations. Accordingly the Court will continue to sit at circuit locations and in this regard it is hoped that the existing co-operation between the Court and the Federal Magistrates Service will continue so that we can provide the best possible service to remote and regional areas. Some responsibility must be accepted by practitioners however. We are no longer prepared to tolerate the system whereby every case is placed in the list whether ready or not as has formerly happened in this State and then attempts are made to settle them and hear them if enough witnesses can be cobbled together to do so. If you can produce the cases to be heard and have them ready then we will go and hear them, as we demonstrated last year at Thursday Island where a judge sat to hear cases in the Torres Strait.

The Court will, so far as possible, use video links and telephones to enable practitioners outside the metropolitan area to deal with interim applications without having to incur the time and expense involved in travelling to court registries. This should happen as a matter of course, unless there is some very good reason to the contrary.

3. Casetrack

The very creaky and outmoded Blackstone system has been replaced. As a consequence the Court now has a purpose-built computerised case management system. This provides a common repository of information about clients and their matters, integrated diaries, automated calendaring, scheduling and rostering, provision of management information for both day to day and strategic planning and budgeting, and improved file and

records management. It is an essential vehicle for better case management and will also enable inquiries to be made on particular files in a speedy and satisfactory manner

Casetrack has already gone live in Newcastle and is being introduced in Parramatta and will be progressively introduced to other registries throughout the year. Like all new systems there are and will be some teething troubles but these are being overcome as they occur. The Court has made a massive investment in money and time into this project, but I am confident that it will pay off in the future. In this regard I would like to pay a particular tribute to Mr Tony Lansdell, who took over as project manager when the project was in trouble and whose special skills and application saved it from a potential disaster.

The Federal Magistrates Service is also linked into this system and it is to be hoped that this will eventually lead to a more seamless management of cases between the two Courts.

4. Child Representatives

I have recently set up a small committee to consider the development of a practice direction that will encapsulate the guiding principles that underpin what the Court expects of a child representative. The Committee will be holding its first meeting during this conference.

In this process assistance will be gained by having regard to the guidelines proposed in the Court's 1996 publication *Representing the Child's Interests in the Family Court of Australia*. However, that report was prepared prior to the significant resource reductions that have occurred to the Court's mediation services and it now needs to be re-considered in that light.

Once drafted the Practice Direction will be sent out for consultation, the responses will be collated and I hope to settle the material in late June.

I appreciate that other bodies such as the Attorney-General's Department, the Family Law Council and the Family Law Section also have a current active interest in the subject. The Practice Direction is not intended to be a substitute for developments by these bodies, but rather lay down some practical guidelines to those involved. For example I am and continue to be amazed that some child representatives do not think it necessary or desirable to interview the child concerned.

5. Pathways

The Pathways Advisory Group was established by the Attorney-General and the Minister for Family and Community Services in May 2000. I am aware that the profession was disappointed at not being represented on the group. The Court was however ably represented by Justice Dessau and the Chief Executive Officer, Mr Richard Foster with the assistance of Ms Jennie Cooke, the General Manager of the Court's Client Services Division.

The Group's report*, Out of the Maze,* went to Government in July 2001 and you may be familiar with some of its 28 recommendations. The Court is supportive of the goal of achieving a more integrated family law system. I accept wholeheartedly that the existing system is confusing and far from seamless and that more co-operation between agencies is required. In this regard I should say that as a result the Court has engaged in co-operative ventures with the Child Support Authority and with other key players in the family law system. Separating couples are diverse in their needs and they require a variety of different services at different times and in different circumstances. However there needs to be better linkage between these services, and better information to clients to access those that are most appropriate.

I am also very aware that the Court is only one player in this system and that many couples do not access our services, or do so only to receive information and perhaps mediation.

The Court has set up a working group to provide input into the government's taskforce deliberations. It is also building a catalogue of all Pathways related initiatives and is developing an internal communication strategy to promote ongoing developments.

Despite some of the drawbacks of the current system, the Pathways report has acted as a catalyst for the Court – and hopefully other organisations – to audit its activities, to liaise more energetically with external agencies and to develop some strategies which are consistent with its recommendations. There is a sense of goodwill and enthusiasm and we look forward to the government's response to the Report.

6. Constitutional Issues

There are, of course, structural reasons for some of the lack of cohesion in the design and delivery of family law services. I here refer to the constitutional division of powers between the Commonwealth and the States and the artificial divisions between State and Federal courts that ensue. I was heartened to note the Federal Attorney-General's pre election response to the Law Council which suggested that it is a desirable goal to expand the Family Court's jurisdiction to incorporate child welfare issues. He also indicated, (whilst acknowledging the Constitutional impediments to reform), that change was possible and should not be discounted.

I am also aware of the Commonwealth's willingness to accept a referral of powers over the property of de facto couples - and of its unwillingness to broaden that referral to the property of same sex couples. This was the subject of comment by the Victorian Attorney General yesterday.

As the subject is showing signs of developing heated political overtones, I do not wish to be involved in direct comment, beyond saying as I said yesterday at the opening of the conference, that the Court has handled children's disputes between same sex couples with sensitivity and I see no reason why it could not do so in the property area. I would add that it would be a great pity if the whole initiative results in a stalemate because of the differing political position of the Commonwealth and the States. I would also commend the concepts of equal opportunity and non-discrimination, to which I had thought that we had broad political agreement in this country.

It is not without interest that in addition to initiatives taken by the States, the New Zealand *Property Relationships Amendment Act* 2001, which came into effect this year, conferred jurisdiction upon the Family Court of New Zealand to deal with property issues arising from de facto relationships involving heterosexual and same sex couples.

7. Seamlessness

More examples of a far from seamless family law system are as follows

(A) Out-sourced pre filing mediation services

In relation to this matter, in capital cities the Court now only offers mediation assistance in children's matters to people that have commenced

proceedings. This has been forced upon us by financial circumstances. It is both unjust and illogical and I would have thought that it runs directly counter to the Act's purported focus on so-called primary dispute resolution. It also means that some clients are now advised to commence proceedings and thus qualify for free mediation assistance from the Court's staff.

I hear repeatedly that lawyers are now making very few referrals to the approved agencies. In some cases this is said to be because they are unaware of the services provided by them or the qualifications or experience of the mediators. Another very obvious reason relates to cost in that clients can come to the Court without incurring expense after issuing proceedings and another is the difficulty of referring clients to yet another service at another location.

On the other hand, I have considerable sympathy for the agencies themselves, some of who have told me that they are struggling to meet the needs of very difficult clients, and have security and other concerns. Moreover, these difficulties are exacerbated by uncertainty of funding, no guarantee having been given that this will extend beyond July of this year.

It gives me no comfort to note that the difficulties now being encountered were foreshadowed by the Court in its submission to the Department on Primary Dispute Resolution Services in Family Law in 1997, and in other communications when the Departmental discussion paper first mooted the idea of out-sourcing PDR services.

At the time I was, quite inaccurately, seen by some as denigrating the role of the community agencies. In fact, I was drawing attention to the different roles played by them and by the Court in this important area. I must say that the Court is doing all it can to assist the agencies by way of providing staff training etc and will continue to do so. I am concerned however that what we are seeing is a fragmentation of services with services of different quality being provided in different places. We have broken something that we did not need to fix.

(B) The New Enforcement Regime

Until 2001, when the new legislation came into force, enforcement had been by the traditional means of fines, community service orders and/or imprisonment and good behaviour bonds. As we all know, that was not without its difficulties, particularly in high conflict cases.

The purpose of the new scheme was to first ensure that persons who are subject to orders are made aware of the possible consequences of non-compliance. This was sought to be achieved by the judge or registrar making an order explaining this to the person concerned, and/or for written material to be distributed to this effect.

The second stage involves an educative process with the parties being sent to counselling at some designated outside agency.

Finally the third stage involves the imposition of the more traditional penalties. In the event of a person engaging in open defiance of orders the Court has a discretion to proceed to the third stage from the first.

The problems and difficulties of this process could well be the subject of a separate paper. While it does represent an attempt to deal with a problem which besets courts exercising family jurisdiction all over the world and does have some merit, not least of the difficulties associated with it is the fact that there is insufficient funding or training made available to the agencies involved in the process and most are quite uncertain what their function is. Many are simply not staffed or equipped to deal with it. It is a classic example of legislation being thought to solve a problem by itself, with insufficient back up or support.

Many judges and judicial registrars see the provisions as being unnecessarily inflexible, and they certainly impose quite onerous obligations on the Court to explain the nature and consequences of its orders. Since many orders and particularly consent orders are made in the absence of the parties this can usually only be done in writing and one wonders how much attention litigants pay to these written admonitions.

The post separation parenting program regime has proven to be a source of considerable concern. The legislation got off to an unfortunate start when the Department was unable to provide a list of the programs available. Whilst there is now such a list, it apparently does not always give an accurate picture of what is available, sometimes because the service providers have discontinued a particular program, it runs sporadically or particular personnel have left the organisation.

I have received reports that self represented litigants (particularly fathers) are often showing signs of exasperation, and that some practitioners find the quasi-criminal provisions difficult to deal with.

Our figures show that since the implementation of the amendments in January 2001 the Court has made 71 post- separation parenting orders. Subsequently, 21 notices were received from providers pursuant to section 70NH informing the Court that the person ordered to attend was found to be unsuitable or failed to attend. In all, 30% of the orders made did not result in the parent actually attending a program. It is therefore clear that much more commitment is needed from Government to enable these programmes to work.

There are a number of legislative improvements to be made and the Court remains willing to work with Government in this regard. What is not always appreciated is that the trigger for the enforcement application is quite often the fact of an inappropriate consent order having been made in the first place. An easy response might be to say that the Court should not sanction inappropriate orders. The trouble is that unless the matter is litigated, the judicial officer making the order will not have sufficient material to form a judgment. These consent orders are usually the subject of a compromise where either or both parties may have not fully appreciated the effect of the orders when they were made.

I think it quite clear that the Court needs a power of its own motion to substitute a more appropriate order in lieu of making an enforcement order.

8. Self Represented Litigants

The Self-Represented Litigants Committee chaired by Justice Faulks continues to make steady progress and a number of initiatives are well under way. These include work on the website and the holding of a weekend visioning workshop to be held in early April and chaired by the Hon Fred Chaney.

The Full Court for its part has wrestled with appropriate guidelines for judges in dealing with self represented litigants in *Johnson and Johnson* (1997) FLC ¶92-764 and *Re F: Litigants person guidelines* (2001) FLC ¶93-072.

What is apparent and we are well aware of it is that with the best will in the world there is nothing that the Court can do that will in fact provide a level playing field for self represented litigants. There is no substitute for the services of a competent legal practitioner and a self represented litigant is in a position akin to a self treating patient operating without the assistance of a doctor.

The recent ABC television program Do It Yourself Law was generally well received and appeared to have a large audience. I think it very graphically conveyed the difficulties experienced by judges who have to ensure that litigants without legal representation (or in some cases with poor representation) are treated equitably. Some members of the profession have suggested that the Court is in some way encouraging parties to represent themselves. Nothing could be further from the truth. Registrars and Judges are continually frustrated by the difficulties they confront when faced with litigants who have no understanding of the practices of the Court. Yet they also sympathise with those who struggle to present their case without professional assistance and frequently when they are in an emotionally fraught state.

I am sure the Attorney-General will agree that I am on record as expressing my concern at the high rate of self represented litigants in the Family Court, and of drawing attention, at every opportunity, to the urgent need for more legal aid funding.

Obviously the Court has an obligation to provide a just and equitable system for *all* who come before it. However it is most inappropriate for former partners and other family members to be cross examining each other when litigation is unavoidable. And it must be nearly impossible for formerly intimate adults to negotiate a settlement at a conciliation conference on their own, particularly when their relationship has been characterised by a power imbalance. It is precisely in these circumstances that a legally trained and informed objective advocate is so badly needed. While there have been some improvements in legal aid funding recently, I think that it can fairly be said that the Government's policies continue to be ill thought out and deficient in this area.

9. Rules Revision

I now turn to the Rules and their revision. The overhaul of the Rules is a massive project, but one that is greatly needed. Justice Buckley and his committee expect to finalise the consultation draft by December 2002. I understand that it will comprise 25 chapters (including a detailed dictionary), compared to the existing 41 and that drafting instructions for 18 of those chapters have already been completed. You will be greatly relieved to hear that the number of forms will be reduced substantially, - by approximately two-thirds.

The new Rules have adopted many of the concepts recommended by the Future Directions Committee and take into account the many projects in which the Court has been involved over recent years. Issues that have to be considered are: -

- Whether the Rules should include a mandatory pre-action protocol to encourage early and full disclosure by the exchange of information and documents about the prospective case; to enable parties to avoid legal action by reaching a settlement of the claim before starting a case; and to support the efficient management of a case, if legal action cannot be avoided by assisting the parties to clearly identify the issues ensuring as much as possible that the duration of the case, and the cost of the legal action are considered. This was an innovation of Lord Woolf.

- Whether the Rules should include provisions imposing a code of expected conduct on lawyers.

- Whether, like the English Civil Rules, the Judges should be empowered to abrogate rules of evidence in appropriate circumstances.

- Whether in particular, hearsay rules contained in the *Evidence Act* 1995 (Cth) should cease to apply in children's proceedings.

- Whether as in England, the permission of the Court should be necessary before any expert is called.

The following additional matters in relation to the new Rules may be of interest:-

- It is the intention to frame the Rules in such a way as to encourage compliance rather than punish non-compliance.

- The new Rules are aimed at the people who apply the rules as well as the people who use them. Consideration has been had particularly to making them as clear as possible for self represented litigants. They are couched in modern language. Any requirement which is regarded as administrative rather than quasi- judicial or judicial has been excluded and will be inserted into a manual for the use of the Court.

- The six chapters which are presently with the Legislative Drafting Office for settling and which should be ready for the Steering Committee at its June meeting include: Concluding a Case Early, Case Management, Disclosure, Preservation of Property, Evidence (excluding experts), Trial and Orders.

- Five chapters are part of the work currently in progress These are Enforcement of Financial Orders, Contravention and Contempt, Evidence, Registrars (delegations) and the Dictionary. A first draft of all of these chapters has been prepared. The Contravention chapter may need further attention, given that the Act in this area is being considered for amendment.

- Chapter 15 - Evidence awaits the recommendations from the expert evidence project before it can be completed.

- The financial enforcement chapter has drawn on the draft rules prepared by Smithers and Rourke JJ. Research into the rules of other jurisdictions in these areas has not yet been completed. The aim is to have these chapters ready for the consideration of the Steering Committee at its June meeting. The first draft of the chapter on Registrars can be considered in principle but as with the dictionary, it will require ongoing drafting, until the Rules are completed.

- The outstanding chapters deal with Appeals and Costs.

10. Federal Magistrates Service

The Court and the Federal Magistrates Service continue to work co-operatively together and I take this opportunity to pay a tribute to Chief Federal Magistrate Bryant in this regard. On the Court side I would also like to thank Principal Registrar Angela Filippello for the work that she has put into making the system work.

Sufficient time has now passed to make some assessment of the impact of the Federal Magistrate's Service upon the work of this Court. An interesting feature has been that overall filings have increased over both Courts by approximately 10% and filings in this Court have reduced by only about 5%. I consider that this can be readily explained by the fact that the Federal Magistrate's Service provides a more attractive alternative than the State Magistrates Courts, but it is also apparent that this Court also continues to have the confidence of the legal profession.

It follows, however, that the reality is that the establishment of the Federal Magistrates Service has not resulted in a significantly decreased workload for the Family Court of Australia in discharging its obligation to deal with contested trials, and with the recent increase in the property jurisdiction of the Magistrates Service, the two courts are exercising essentially concurrent jurisdiction in all but appeals and higher value property disputes.

An area where we have been grateful for its assistance, however, has been in relation to circuits and in registries like Dandenong and Wollongong. This has enabled us to make a more useful disposition of judicial strength.

The original rationale for the establishment of the Federal Magistracy – that it would deal with interim, summary or less complex matters – cannot be said to have eventuated in the manner envisaged. While the most recent Practice Direction was aimed at alleviating something of this problem and was introduced by agreement with the Federal Magistrates Service, it has done nothing to cope with the difficulties for the Court presented by interim hearings.

There is still no agreement as to the type of defended work that the Federal Magistrates Service should undertake and there is evidence that it is performing some of the more complex work that should be the province of this Court from time to time. The legislation is unclear and although the Government's intentions seem to have been clear enough, in the absence of legislative direction it is not surprising that difficulties have developed. Similarly the transfer provisions are entirely unsatisfactory and give this Court as a superior Court no control over its workload or over the principles that should apply to transfers.

As of 30 June next year the Court will only have funding for 2 SES registrars and our current funding only provides for 8. Their huge workload (which shows no sign of decreasing) must inevitably fall back onto the judges and judicial registrars. This not only places enormous additional pressure on them, but also must unfortunately have a detrimental impact on waiting times to trial. The Court has been active in its attempts to prepare itself for this onslaught of work, but realistically our options are very limited. We have already lost 40% of our capacity to handle interim matters but have seen a much more limited reduction in workloads. Unless urgent steps are taken to redress the balance I cannot see how delays overall can be contained.

I should stress that nothing that I have said should be taken as a criticism of the Federal Magistrates Service. Its Magistrates are extremely hard working and competent and we work well with them. The problem lies with the funding decisions that accompanied their setting up and a failure then and now to appreciate the needs of this Court

There are other areas that need to be improved between the two Courts, such as for example the use of single files, but none of these problems present insuperable difficulties and we will continue to work upon them together.

11. Mercury Project

The aim of this project is to address the problems arising from the large number of interim applications that come to the Court. You will find a discussion of it at p17 of the current issue of the Australian Family Lawyer

The Committee is examining a number of proposals that address this problem. One is closely associated with the holding of case conferences. These are not currently held in most registries circumstances where an interim application is made.

Current pilots are in place in Melbourne, Hobart and Parramatta to remove this exclusionary factor in relation to case conferences and make them available in all cases, prior to the time of the interim hearing (excluding applications of extreme urgency)

The case conference initiative already is showing considerable success in resolving and narrowing issues between parties and the advantage of its availability when an interim application is made would appear to be that it may in a number of cases obviate the necessity for the hearing of an interim application at all.

Experience has taught that all too often the parties are not ready to proceed upon the return day of these interim applications despite claims of urgency associated with them.

12. Magellan Project

This project, which has involved a different method of handling allegations of child sexual abuse, was conducted as a pilot in Melbourne

and was an outstanding success. Much of the credit for this success is due to Justices Dessau and Brown and their dedicated support staff of counsellors and registrars and clerical staff.

I have now requested Justice Dessau to undertake the supervision of its introduction upon a national basis. I am about to launch the Report of Professor Thea Brown and her colleagues from Monash University, who have evaluated it to be an outstanding success on both economic and social and efficiency grounds.

Its future success will be heavily dependent upon the co-operation of Federal and State Governments and Legal Aid authorities. If this is not forthcoming then the project will fail. Our children deserve better than this. As a Court we are absolutely committed to the project.

13. Ethnic Issues and Diversity

We are also working towards a comprehensive overhaul of our services to culturally diverse clients. The Court already produces a wide range of written and audio materials in a large number of languages, conducts training programs on family law issues to community workers specialising in working with ethnic communities and provides funded interpreter services for all Court events. These initiatives are however not always uniformly adopted across all locations, and a national committee chaired by Justice Buckley is now overseeing this area to ensure that there is a nationally consistent approach to meeting the needs of culturally diverse clients.

A consultant's report has suggested a wide range of measures that have been accepted in principle by my Consultative Council and we are looking forward to considerable developments in this area.

The need for this initiative, which I believe to be a first among Australian superior Courts is well overdue. Australian Bureau of Statistics figures[3] indicate that 48% of all Australians were either born overseas or have one overseas born parent, and of those 26% are people from non-English speaking backgrounds. Australia is second only in the world to Israel in its cultural and linguistic diversity. Thirteen per cent of recently divorcing couples were born in the same overseas country and 29% of divorcing couples involved one partner who was born in a different country. The

[3] Australian Bureau of Statistics (1996) *Marriages and Divorces*

impact of these statistics on the provision of services by the Court is that cultural diversity is a mainstream issue and one that must be faced.

14. The Honourable Justice Michael Kirby

I do not believe that I can let this occasion pass without saying something about the regrettable attack made upon the Hon Justice Michael Kirby.

It is not my purpose to traverse that matter in any detail. I also do not comment upon the issue of the role of an Attorney General when an attack is made on the judiciary or a member of it. The Federal Attorney General's attitude on that issue has been made clear by him many times. It must however be appreciated that a natural corollary of it is that when an attack is made upon a Judge in circumstances such as those that occurred last week, there can hardly be complaint when the judiciary take steps to defend a colleague, as I now do.

I think that I can best do so by placing on the record the enormous debt owed by the Family Court of Australia, the clients who use is services and family law practitioners in general to his Honour.

This merely reflects one of his many contributions to the law in Australia. He is a truly international jurist who has lifted Australia's reputation throughout the whole of the legal world.

I first met Michael Kirby at a conference of the International Law Association in Spain in 1976. I was enormously impressed by him then as a person, as a lawyer and in particular by his deep knowledge of the law as it affects individuals and his commitment to human rights. Nothing that has occurred since has altered that view.

Michael Kirby was one of the first to leap to the defence of the Family Court of Australia when it was unfairly criticised following the tragic events of the early 1980's.

He has always shown a sound appreciation not only of the importance of family law, but of the difficulties of its administration. As his reasons in cases such *CDJ v VAJ* (1999) 197 CLR 172 attest, he has been a stout defender of the Court, the importance of a specialist jurisdiction and the significance of the Court to the Australian community over many years. His judgments on the High Court more than those of any other judge of that Court, reveal an understanding of family law and an empathy for

those whose lives are affected by relationship breakdown. To take but one example, in the very difficult area of relocation cases, his Honour's thoughtful exposition of the principled and social context to these conflicts in *AIF v AMS; AMS v AIF* (1999) 199 CLR 160 has been an illuminating source of guidance.

He has been one of the few judges at that level to realise the importance and significance of treaties that this country has entered into to protect the human rights of children, people with disabilities and others who may be detrimentally affected by the operation of the law. In particular, and again in a very sensitive area of international family law, his Honour's individual judgments in Hague Child Abduction Convention cases such as *DP v Commonwealth Central Authority* (2001) FLC ¶93-081 provide, with respect, scholarly direction as to how our international obligations are to be understood and given domestic effect.

From a personal point of view, he has given me support and encouragement on occasions when I have been the subject of political or media attack. He has courageously spoken out on issues that I believe, that judges should address, whether or not doing so suits the political views of the government of the time.

15. Mechanisms to Deal with Complaints against Federal Judges

Another issue that seems to have emerged from the unfortunate events of last week relates to a proposal to set up some form of tribunal to deal with complaints against Federal Judges. In this regard I agree with the remarks of the Chairman of the Victorian Bar Council, Mr Robert Redlich QC, when he said that this is a singularly inappropriate context in which to consider such a suggestion. There are obvious constitutional difficulties that lie in the path of such a proposal, not least of which might be thought to be a political attempt to interfere with judicial independence. I consider the Australian Law Reform Commission's proposal to deal with this issue to have been shallow and ill thought out. While the issue deserves serious discussion, it should not be considered in the heated political atmosphere associated with what I consider to have been a disgraceful attack upon a fine Australian.

I would like to say that Michael Kirby has my full confidence and I am proud to count him as a friend and I think that the Australian public is indeed fortunate to have such a man occupy a position on the bench of the High Court of Australia.

In making these remarks I would like to suggest that this incident involves a serious breach of the doctrine of separation of powers and an attack upon judicial independence. In the past members of the Government have not been slow to invoke the doctrine of separation of powers when in receipt of criticism from Justice Kirby. These criticisms have almost invariably involved questions of high principle or human rights. The same cannot be said of this occasion. Given the events of the past week, one would be forgiven for thinking that the doctrine is something of a one way street.

However the Government and politicians do have a responsibility to maintain public respect for our system of justice, for if they fail to do so, they run the very real risk that they will undermine one of the foundations of a civilised society. There are enough breakdowns in the rule of law in other countries where the courts and their decisions have ceased to be respected to make this a very real prospect.

* * *