THE THIRD ANNUAL

AUSTIN ASCHE ORATION

THE FUTURE OF THE FAMILY COURT

THE HONOURABLE DIANA BRYANT

CHIEF JUSTICE OF THE FAMILY COURT OF AUSTRALIA

23 NOVEMBER 2004

Comments about Austin Asche, AC

To many of you Austin Asche needs no introduction, but I am conscious of the fact that there may be others here today who do not know of his background and outstanding contribution, both to family law and to our society in general.

The significance of him to family law is that as an experienced Queens Counsel, practicing at the Victorian Bar, he was one of the first four judges of the Family Court appointed in 1975, and remained a judge of the Court until 1986. Between 1985 and 1986 he was acting Chief Justice (then Chief Judge) of the Family Court of Australia. He was Chair of the Family Law Council and Presidential Chair of the Institute of Family Studies from 1980, in its inception, to 1986.

Following his retirement from the Family Court he moved back to the place from whence he originated, the Northern Territory, and became a judge of the Supreme Court of the Northern Territory. He became Chief Justice of that court in 1987, a year later, a position which he held until 1993. Upon his retirement as Chief Justice of the Supreme Court of the Northern Territory in 1993, he became Administrator of the Northern Territory, a position which he held until 1997.

Since that time, up until the present, he has been Adjunct Professor of Law at the Northern Territory University.

Those of you who know his wife Val would know that she is in her own right a highly qualified and respected microbiologist.

I recall in my youth, leading up to the passing of the Family Law Act, attending meetings at which Austin Asche spoke about the Act and the court that was to follow. His contribution to the court was so significant that it seems almost incredible that he was only there for ten years. I had the good fortune to appear before him many times when he visited Perth with the Full Court.

One of the things that I well remember of him during that time was his absolute courteousness to counsel and the fact that he always thanked counsel at the end of the

case for their helpful contributions (I felt in my own mind that this was often more imagined than real and that many times I had not deserved the praise he gave).

Nevertheless it was a powerful and encouraging message to an advocate and I am pleased to say that I have not forgotten it and have now had the opportunity when presiding on the Full Court to adopt his practice. I am delighted that Austin and Val are here today.

On this topic

I am conscious of the fact that I am only the third speaker to deliver this oration and that I follow in the footsteps of two illustrious speakers in the Honourable Austin Asche, AC and the Honourable Alastair Nicholson AO RFD QC.

This oration is entitled *The Future of the Family Court*, as a statement. It might have equally been entitled *The Future of the Family Court*, with a question mark.

Last year the Honourable Alastair Nicholson, then Chief Justice of the Family Court, spoke on "Reflections on the Family Law Act 1976 – 2003". His oration was a retrospective of what had happened in family law since 1976. He spoke primarily about the legislation and its various and changing characteristics from 1976 through to the present.

As the Parliamentary Inquiry was then well underway, it is not surprising that he commented,

> *"Family law is both intensely emotive and highly political. As a separate court dealing with an intrinsically unpopular area of law, the Family Court comes in for more than its fair share of criticism and hostility. Some of this unfortunately leads to legislative and other responses from the government of the day which are not necessarily thought through or rational. Highly publicized amendments to the Family Law Act also have a habit of raising expectations for how the law can solve their problems; whereas in this area the law is a well intentioned but relatively blunt instrument."*

He postulated that changes to the Family Law Act since 1976,

> *"…are undoubtedly the product of a combination of political pressures, changes in societal attitudes and values and responses to overseas developments; probably in that order of importance."*

Since he spoke last year, the House of Representatives Standing Committee on Family and Community Affairs tabled its Report titled *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* ("the Standing Committee report"), in December 2003. The Standing Committee's report had a strong focus on the importance of reducing conflict between separated parents and on separated fathers having greater involvement with their children. Flowing from the report was the recognition of a feeling of helplessness that many grandparents have when a family separates and a desire for re-evaluation of the Child Support Scheme.

The government agreed with the Standing Committee on the importance of these issues and in providing opportunities for families to resolve disputes without going to court. Two important things emerged from the Committee's report in my view. The first is that, if the role of the court was to evaluate the best interests of the child in each particular case, then that was inimical to a presumption of shared care, and the Committee rejected that proposal. The Committee however, recognising that there was a great dissatisfaction with the adversarial system suggested that a Families Tribunal for separating parents, that would not operate in the same adversarial manner as in the existing court process, be established. As we now know the government does not propose to implement that recommendation.

On 29 July 2004, the Prime Minister's Framework Statement on Reforms to the Family Law System was released and on 10 November 2004 the government released a

Discussion Paper titled *A New Approach to the Family Law System* ("the discussion paper") which indicates the direction of the government's proposals.

There are four areas addressed in the Discussion paper; a new system of 65 Family Relationship Centres; changes to the law to support shared parenting; changes to the courts and community education. A separate task force has been established to re-evaluate the child support scheme.

I do not think we should underestimate the government's commitment to change the system, exemplified in the title of the discussion paper.

This evening I want to discuss one of the proposed changes, namely a l*ess adversarial process in the court* in the context of the Court's Children's Cases Program. It is one of the most important features of the future of family law litigation, and unquestionably an exciting initiative. It has been described by Deputy Chief Justice Faulks as *"…the most important step in litigation for possibly a hundred years or longer."* I also want to examine some of the public criticism of the Court and the family law system and explore whether and how the public regard for both may be improved.

Children's Cases Program

While rejecting a Families Tribunal for separating parents that would operate in a less adversarial manner than the existing court process, the federal government in its Framework Statement and in the discussion paper has reiterated its commitment to this approach and it is probable that legislative change will follow. The Government acknowledges that "a range of amendments could be made to the Family Law Act and to family law procedures to help achieve this result", and then goes on to refer to the fact that the Children's Cases Program is trialling some of the ways this might be achieved. It is inevitable then that the program will become the model for the legislative change. The

focus has shifted from whether there should be a less adversarial model in children's cases, to what the most appropriate model would look like.

The Children's Cases Program was the brain-child of the former Chief Justice, the Hon. Alastair Nicholson, and an initiative of the Family Court. As early as 2002, the former Chief Justice had expressed both publicly and privately, that the Court needed to consider changing the way it determined children's cases. He perceived, and he was obviously not alone in this, that the traditional adversarial system was not the best system for determining private children's cases, given the inherent problems of that system.

Critique and debate about the contemporary utility of the adversarial system of litigation is not a recent development. CCP should be seen as innovative and ambitious, but not radical. It is ground breaking in the context of family law, but for the last three decades there has been an observable trend towards a departure from strictly adversarial proceedings in civil cases.

The adversarial system

The 'adversarial system' is a concept well known to lawyers. It is the model underpinning our legal system, inherited from the British common law system. Professor Richard Chisholm (as he then was) in 1992 summarised the key characteristics that encompass what lawyers mean when they use the term 'adversary system'.[1] They are:

- The proceedings are controlled by the parties;
- The judge is the umpire of the dispute;
- The judge is unbiased;
- The decision is based only on the material admitted as evidence in open court; and
- The parties to the dispute are legally represented.

[1] Prof. R Chisholm *The adversary system and Family Court developments*, Family Court of Australia National Seminar Papers, July 1992

Central to this system – this contest between competing adversaries - are a series of assumptions. The first is that the parties know what their legal rights are and know what is in their interests. They thus present their case in the way that they determine advances their interests within the ambit of the law. Parties are responsible for their own outcome and control the proceedings. The dispute of the parties culminates in one climactic trial. The second is that the judge is the impartial adjudicator brought in to determine the dispute on the basis of what is put to him or her by the parties. The judge's role is passive. Evidence is presented and tested to establish the facts relevant to the dispute, findings of fact are made and judgment is given determining the dispute. There is no need for the judge to intervene in the evidentiary process because of the first assumption and, as well, lawyers have an overriding duty to the court. To ensure fairness there is a strict reliance on the Rules of Court and the rules of evidence. The third is that the parties are represented and so the first assumption is ultimately fulfilled, notwithstanding that there may be a disparity in the competency of legal representation.

The conventional wisdom in common law systems such as ours has been that this is the best and fairest way of resolving a legal dispute.

This model is regularly presented to us in movies and on television. Hearings are demonstrated in the most adversarial context. The drama usually arises from the combat between the lawyer and witness. More often than not the theme itself is about who wins and who loses. Hollywood usually ensures the 'good guy' wins.

A more adversarial model may be regarded as the best and fairest way of determining some disputes, particularly disputes requiring jury trials, such as the criminal trial, but in civil cases, the problems highlighted above have led to a strong push for reform of the civil justice system. The features of the adversarial system have "*one principle rationale*

which now, effectively, no longer prevails: the requirement that all issues of fact had to be determined by a jury."[2] It is not difficult to see why this required a single climactic trial and oral evidence. In most jurisdictions in Australia a civil jury trial is rare, and in the context of civil proceedings in the Family Court, non-existent. So, if that rationale is gone, then it is difficult to envisage why we would be concerned about abandoning aspects of it.[3]

Strictures of the adversarial system

Analysis of how the civil justice system in Australia is too adversarial is repeatedly said to be as follows:

- The system discourages the limiting of issues and the disclosure of unfavourable information.
- The system obscures the advantages of an agreed solution.
- It provides too few opportunities for adjudication otherwise than by a full trial.
- It tends to make advocates of the witnesses.
- It advantages the richer litigant.
- It permits the parties to dictate the shape and pace of the litigation.[4]

History has shown us that this system is not conducive to what research now tells us is important for children, namely that there be as little conflict as possible between their parents. It is also intuitively the case for a judicial officer that allowing parties to file material raising issues which reiterate grievances but do not necessarily have an impact on the future parenting of their children creates conflict and does not alleviate it. Further, providing a venue for what can often be an inflammatory questioning process clearly

[2] Davies J *The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System* Journal of Judicial Administration 12 (3) February 2003, pg 3
[3] ibid. pg 3
[4] see Davies J *A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale* Journal of Judicial Administration 5 (4) May 1996

does nothing to bring the parties closer together and to focus on their children rather than on themselves and their issues. That is the reason why Judges in children's proceedings in particular encourage parties to resolve a case without allowing it to proceed to a hearing and encourage parties represented or unrepresented at the commencement of a hearing not to take that path.

The Standing Committee report furthered the debate. So critical was it of the 'adversary process' and lawyers, it concluded that:

> "*It has become very clear to the committee during this inquiry that the dynamics and emotions of family separation make adversarial litigation inappropriate. It does not work because it tends to be uncooperative and combative at a time when future cooperation for successful shared parenting is so critical. It is predicated on a win/lose outcome…the process seems to destroy families and escalate disputes rather than enable them to put aside their conflict and concentrate on the interests of the children.*
>
> *…only a new non-adversarial administrative Tribunal specifically established for determining disputes about future parenting arrangements will bring about any real change to the current domination of lawyers and courts in family disputes."*

This is a strong statement. Clearly, the concern within the Family Court is also felt by stakeholders in the family law system generally. Critics of the Court, many of whom are not legally qualified, complain of delays and cost and 'the system', by which they mean the adversarial system. The problem in the latter group, however, is that many perceive these problems, which are so heightened in family law cases, as being systemic to the Family Court. What is not appreciated, perhaps understandably, is that many of the problems identified are problems with a strict adversarial system, not the Family Court per se. While a Tribunal model is not to be adopted as the means by which to improve

the process, the sentiments in the Standing Committee report provided further impetus for change.

The Family Court has implemented several initiatives to reduce the adversarial processes, namely the Magellan project, amendment of the Family Law Rules 2004 and the self-represented litigants project. But despite these efforts, the problems were not resolved. The concern remained that in children's cases the strictures of the adversarial system impede the way of decision making that is in the best interests of the child.[5]

Justice O'Ryan observed[6]:

> *"There was a concern that the current procedure may be inconsistent with issues of proportionality in that children's cases were taking too long and costing too much to resolve, often being weighed down in reams of irrelevant evidence. Further, that this hindered the Court in applying the paramountcy principle to determine what is in the best interests of the child."*

So, the challenge for the Court in recognising this feature of the Court process has been how best to affect change.

Fact finding, a necessary part of many hearings must still be carried out in a fair way. Thus we need to be cautious about assuming too readily that the totality of the 'adversary system' should be abandoned. As Justice Chisholm has said: *"…perhaps one can see a common theme. The theme is that somehow or other the system should help families at the earliest possible stage to focus on the needs of the children and not get caught up a focus on their own entitlements and cascading allegations against each other."*[7]

---

[5] O'Ryan J *A Significantly Less Adversarial Approach: The Family Court of Australia's Children's Cases Program* Family Court of Australia, September 2004, pg 3
[6] ibid. pg 3
[7] Chisholm J, 2003 op.cit. pg 46

Change in the family law context

It has been said by the High Court as early as 1973[8] that children's proceedings are not inter-partes litigation in the usual sense and yet despite these comments, up until recently no genuine alternative has been presented.

Since its inception, the Family Court has conducted its proceedings on the basis of the adversarial system. But in children's cases, Part VII of the Family Law Act and the Family Law Rules 2004, the case management procedures and some decisions of the Full Court contain features that depart from the classic adversary approach[9]. Some instances may be summarised as follows:

- A curial approach to private children's proceedings – children are the subject of proceedings but not parties and there is a statutory direction by s 65E to regard the best interests of the child as the paramount consideration.
- The use of Family Reports.
- Alternative dispute resolution processes are built in to the litigation process.
- Provision for separate representation of children irrespective of the parties' wishes.
- Children's statements are not excluded as hearsay by s.100A of the Act.
- Implementation of the Magellan Project for child abuse cases.
- Guidelines for self-represented litigants – *Re F: Litigants in person guidelines*.[10]

But in essence the family court process, once a hearing is commenced, has been largely an adversarial one. The way in which individual judges (and federal magistrates) have conducted hearings may have been more or less adversarial, but the *system* as understood has remained largely unchallenged.

[8] Reynolds v Reynolds (1973) 47ALIR499 at 423 per Mason J, see also M and M (1988) 166 CLR 69 at 76
[9] see O'Ryan J op.cit. pg 2-3
[10] (2001) FLC 93-072

In 2000 members of the Family Court travelled to Europe on study tour to investigate and report on how the European courts (and in particular the German courts) decided children's cases and to see if we could genuinely learn from them and implement some of the proposals for change that had been mooted. What was undertaken was a critical analysis and comparative study of the features of the inquisitorial system and the adversarial system and then an assessment of each system's relevance and applicability to the Australian context. In response to their report to the Court, the Chief Justice established a Steering Committee and Working Party tasked with developing a pilot program for a less adversarial model to hear and determine children's cases.

As Justice Mark Le Poer Trench has observed[11]:

> *"That brief set an exciting challenge for those two groups. They were to develop a less adversarial process for hearing children's cases within the Australian Legal System. This involved a complete rethink of the way in which children's cases in the Court have traditionally been heard."*

Justice O'Ryan observed that the Family Law Act and its subordinate legislation provided extensive flexibility to adopt significantly less adversarial procedures. The Court then set about developing a model which merged less adversarial procedures from other legal systems with the structure provided by the Family Law Act.[12] The Working Party reported in February 2004 and so the Children's Cases Program was launched, which saw the Sydney and Parramatta registries commencing in March 2004 a pilot program.[13] Thus the program would be piloted at two registries and carefully evaluated to ensure that there are no unintended consequences.

---

[11] Le Poer Trench J *Children's Cases Project*, National Conference Papers, Gold Coast, September 2004
[12] O'Ryan J op. cit. pg 4
[13] The judges involved in the operation of the program include Justices O'Ryan, Boland, Le Poer Trench, Rose, Moore, Collier and Stephenson

Justice O'Ryan has said[14]: *"The Family Court is aiming with CCP to move from being adversarial with slight elements of inquisitorial procedure, to significantly less adversarial procedure with significant elements of inquisitorial procedure."* He considers, and I agree, that CCP claims to solve some of the problems raised by the adversarial procedures. It focuses on:

- producing best possible and sustainable outcomes for children;
- identifying the real issues which require resolution;
- looking to the future needs of the child;
- hearing cases in a timely and cost effective manner;
- providing a fair process which observes the rules of natural justice;
- effectively dealing with self-represented litigants; and
- aiming to achieve resolution wherever possible.[15]

He said[16]: *"Crucial to the implementation of such an approach would be a model where the relevant issues were identified early by the trial judge and where the trial judge could ensure that the evidence was confined to such issues within a procedure where the best interests of the children were the focus rather than the dispute of the parents."*

The less adversarial model for family law children's cases – Children's Cases Program

Cases are only eligible to enter the program at the conclusion of the Resolution Phase – that is, when all alternative dispute resolution options are exhausted - and they may be referred by a judicial officer or mediator. The program thus applies to the Determination Phase of proceedings.

[14] O'Ryan J op.cit pg 9.
[15] Ibid pg 14
[16] ibid. pg 4

At present, entry into the pilot must be consensual. Parties may access the program whether or not they are represented, and so far the program has dealt with a variety of matters, ranging from Magellan and relocation cases to straight-forward contact disputes. A matter is usually listed for the first hearing event within two weeks from referral. A case coordinator is assigned to the matter and is responsible for checking compliance and to assist the Judge with case management. Presently, the normal process would involve the parties in a 16 month wait to trial in the Sydney Registry, whereas the CCP offers a completion within 3 months.[17]

I am indebted to the judges involved in implementation of the pilot program for their feedback. In particular, the report of Justice Le Poer Trench from August this year provides the basis for the discussion that follows.

- **First day of hearing**

On the first day of the hearing, the parties may watch a video prepared for the purpose by the Attorney-General's Department. The intention is to encourage the parties to be child focused. It also includes information about post-separation parenting and has an educative purpose. If domestic violence is an issue in the proceedings then the parties are not required to watch the video together.

The hearing then commences, after the video, when the matter first comes before the Judge. The parties and their legal representatives are invited to sit together at the bar table which may be configured differently from a traditional courtroom. The mediator consultant may be present throughout. Counsel are not required to robe, and robing is optional for the judge.

[17] Le Poer Trench J, op.cit. pg 2

The mediator consultant is introduced to the parties. They are advised that the mediator may talk directly to the parties in court and provide information, on the record, as to the effect on the children of any particular proposal and any other information the judge may request.[18] The consultant may also assist the court as to defining the issues and in formulating the order for the preparation of a Family Report by a Court mediator or an expert appointed by the Court.

Parties are sworn in where they sit and remain on oath for the duration. Anything said by the parties forms part of the evidence. The first day is effectively the commencement of the trial.

The parties are asked to tell the judge about the case and what they see as the issues. The current parenting arrangements will be clarified and the competing proposals will be put. The parties are encouraged to do this in their own words, although they may do so through their lawyers if they are uncomfortable with this. While this may be novel, the project judges consider it important. It both enables the parties to have their say early and the judge to determine the emotional standing and perceptions of parenting of each of the parties. The Standing Committee report had this to say:

> *"…I think family members need to feel that they have been heard and that they can say what they need to say, not in a manner filtered by a barrister through legally modified language but directly and in their own language, to a decision maker who has the skills to check that he or she has indeed heard accurately."*

It also enables the mediation consultant to form an assessment and give the parties preliminary advice regarding the potential adverse affects for the children of what is being said. Thereafter, an orderly discussion between the judge, the mediation consultant,

[18] ibid. pg 4

and the parties ensues.[19] Judges have found that this approach lends itself to both a more courteous approach by the parties to each other, and in several cases, parties express a desire to try and resolve the matter with the assistance of the mediation consultant[20]. Consultants have commented that the parties are far more responsive at this stage than what the consultant might otherwise have expected in pre-hearing, confidential counselling.[21]

If the matter does not settle on the first hearing day, the judge, together with the parties, and lawyers if the parties are represented, settle the trial document, which includes a chronology of background facts, a statement of the non-contentious issues, a statement of the agreed issues for determination and, importantly, procedural orders and directions as to the evidence. The orders also formally include the case in the CCP and specifies procedures which are applicable to the program.[22] A family report may be ordered, and consideration is given to the requirement of any other expert evidence. Orders are made in relation to subpoenas. Further dates for hearing are set down.

- **Further hearing dates**

Where the matter is adjourned, the hearing is subsequently convened in such circumstances and at such time as the Judge directs. If a Family Report was ordered, the parties will have occasion to consider it before the matter is re-listed. Upon re-listing, two days are usually allocated, depending on the judge's estimate of time required. The concept of one climactic trial is dispensed with.

[19] ibid. pg 7
[20] ibid. pg 7
[21] ibid. pg 8
[22] ibid. pg 4

The further hearing varies in its form. Cases where there are serious issues of conduct will be dealt with in the more 'traditional' way. Other cases may proceed differently. The judge may take the evidence in whatever order is considered appropriate. [23]

The focus throughout the hearing is on future parenting and not on historical issues that have plagued the parties.

- **Giving of evidence and procedure**

One of the important aspects of identification of the issues is that the affidavit material is limited to material which goes directly to the identified issues. Likewise, witnesses are only permitted to be called in relation to those identified issues, and there is allocated to each witness a list of the issues numbers which may form the subject of evidence from that witness.[24] The witnesses do not file affidavits but rather they complete and serve witness statements.

All evidence is conditionally admitted, and the Judge determines the weight to be given to the evidence. No objections are to be taken to the evidence of a party or a witness or the admission of documents, photographs, videos, tape recordings other than on the grounds of privilege, illegality or other such serious matter.

The procedure for examining witnesses is totally at the discretion of the judge. The parties may be heard on particular issues in turn, rather than giving their evidence one after the other. The judge is likely to identify questions he or she wishes to ask and ask questions of the parties and witnesses before they are examined by counsel or the other party. Alternatively the judge may invite the child representative, where there is one, to explore issues identified by the judge. The child representative will usually question the witness before the other side does so. All this is designed to focus on the parenting issues

[23] ibid. pg 10

the parties have identified as relevant, and to avoid confrontational aspects of the traditional adversarial model.

The judge may direct the parties to make inquiries and obtain evidence on any relevant issue, irrespective of that the parties contend. The judge will determine the evidence to be given and the method of receiving it.

Children will be heard by a Family Report or through an expert and with input from the child representative. The judge retains the discretion to interview the child and may be more amenable to this in appropriate cases.

- **Role of the judge**

The matter is Judge managed from referral. The Judge plays the leading role in relation to the conduct of the hearing, including deciding the issues to be determined, the evidence to be called, the way the evidence is received and the manner in which the hearing is conducted.

The judge may shift between the process for determining the issues and using mediation techniques to assist in determination.

A decision may be made on issues of fact or discretion at any time during the hearing. Judgment may be given in specific parts rather than in one event at the conclusion of the hearing. This does not provide a basis for disqualification. As a document setting out the background facts has been agreed, judgments are generally much shorter.

Parties do not waive their appeal rights. However, an appeal cannot be lodged on any ground until the hearing process is concluded. Orders are made at the first hearing to deal with the times for lodging an appeal.

[24] ibid. pg 8

- **Legal aspects – the law around CCP and the Evidence Act**

The practice and procedure is embodied in Practice Direction 2 of 2004.

A key feature of the program is the departure from certain provisions of the Commonwealth *Evidence Act 1995*.

Section 190(1) provides that

> "The court may, if the parties consent, by order dispense with the application of any one or more of the provisions of:
> (a) Division 3, 4 or 5 of Part 2.1; or
> (b) Part 2.2 or 2.3; or
> (c) Parts 3.2 to 3.8;
>
> in relation to particular evidence or generally."

Thus the court may dispense with certain rules of evidence, namely: the general rules about giving evidence; examination in chief and re-examination; cross examination; documents; other evidence; and, the parts relating to hearsay, opinion evidence, admissions, evidence of prior convictions and credibility and character evidence.[25] As has been seen, the pilot program relies on the basis that entry to it is consensual.

The advice received by the Court was that the model for the pilot program was consistent with the exercise of judicial power. That view was qualified by deference to the view of the High Court, should it be tested.

It is readily accepted that legislative change is required for CCP to be implemented beyond the pilot program. This is obviously a matter for federal Government and I do not propose to discuss those aspects in any great detail at this stage. For the Court's perspective, and until legislative change is forthcoming, much will depend on the outcome of the evaluation process.

[25] See further O'Ryan J op.cit. pg 16

- **Some Statistics**[26]

1.1 Volume: As at 5 November 2004, 147 CCP cases entered into the program comprising 56 at the Sydney Registry and 91 at the Parramatta registry. CCP cases heard in both registries are reflective of the whole gamut of children's cases typically heard by the Court.

CCP is very well supported by the profession, particularly in Parramatta. Its popularity there has caused the Court to agree to continue the program beyond the 100 cases in the pilot.

1.2 Finalised Cases: 25 CCP matters (approx. 50%) have been finalised in Sydney and 35 (approx.40%) in Parramatta. There have been no appeals to date.

1.3 Legal Representation: In Sydney, in 38 of the matters both parties were represented. There were 12 cases where one party was unrepresented, and 6 cases where both were unrepresented.

In Parramatta, in 62 of the matters both parties were represented. There were 25 cases where one party was unrepresented and, in only 4 matters were both parties self represented litigants.

Legal Aid has made grants for 96 parents and for 58 Child Representatives .

A child representative had been appointed in about a third of the Parramatta and Sydney cases.

[26] From internal Family Court of Australia CCP Report, November 2004

- **Evaluation Process**

The evaluation of the project will be rigorous and is being carried out by an independent academic. It is proposed to evaluate 200 cases (100 at each location). Parties and children will be interviewed and feedback sought from those involved.[27]

Anecdotal evidence is that cases are involving significantly less hearing time.

The issue of participation in CCP being voluntary also needs to be addressed. To truly test the capacity of the CCP to achieve its objectives the Court needs to be able to extend the pilot to include non-consensual referrals. This will require legislative support.

As has been seen, this program is both innovative and exciting.

"To boldly go where no one has gone before!"

-- Jean-Luc Picard, Captain, Starship Enterprise; NCC-1701D

Whilst the evaluation is obviously in its infancy, lawyers who have been involved in the program itself and on the Steering Committee are enthusiastic and supportive of the program. There are many ramifications not least of which involve ensuring that there are adequate resources to provide this process however, it is worth noting at this early stage what some of the participants have said about the process it is these sort of comments that suggest that this is truly a way forward. Justice Le Poer Trench has said recently to a Steering Committee meeting speaking of his experience in CCP, *"Every Australian family involved in the Family Court process should be entitled to experience at least the first day of the Children's Cases Program"*. An experienced Court Officer having witnessed several CCP cases said: *"The person who thought of this should get a medal. He makes me proud to be an Australian."*

[27] Le Poer Trench J op.cit. pg 23

I now want to move on to the second aspect, and that is, the public perception of the Court and my aspiration for the future

The current climate

As my predecessor indicated last year, the Family Court comes in for more than its fair share of criticism and hostility, something that hardly needs repeating. Upon my appointment when asked about my plans for the court I indicated that I would like to see the public respect for the court increase and I intend to keep that as my benchmark for at least one measure of whether my tenure is successful.

It is important for the institution itself to be respected. Those who need to come to court should be reassured that in their case a fair result will be the outcome, even if it is not exactly the result that they wanted. They need to know that they have been heard and heard fairly and understand the reasons for the decision. Even if all of those elements are present, we cannot say that we have been successful unless we can produce such a result in a reasonably timely way and without too much cost, both financial and emotional, to the participants. Timeliness may depend on many factors, but one of them most certainly is having sufficient judicial resources to hear the cases. We should also bear in mind that respect for the orders of the court follow when the institution itself is respected.

On a wider landscape, or to use the words of John Donne, "No man is an island", and as part of our legal system, to the extent that the Family Court, or any Australian Court, does not have the public's confidence and respect, then that reflects upon the legal system as a whole.

There is thus an imperative for the system as a whole - and I mean by that all three arms of government - to support the institutions they create and the laws they pass. I make it clear that I in no way wish to shield the court from proper discussion and debate about its decisions. I am pleased to say that there was such a debate recently regarding the former Chief Justice's decision in *Re Alex: hormonal treatment for gender identity dysphoria*[28], about the gender reassignment of a teenager. There were of course, elements of the press, who could not resist the temptation to label, but generally the discussion was about the issues.

[28] (2004) FLC 93-175

Regrettably however this is a rare occurrence and too often the media seek only to write a good story rather than to portray accurately the decision, the factors involved in the decision and, the difficult cases judicial officers decide every day.

I acknowledge some fault on the part of the court in not making its work more open to the public. I think that we have, although in good faith, missed the opportunity to make more judgments available (subject always to the strictures of Section 121 of the Family Law Act in a manner that does not identify parties or witnesses) on the legal internet sites that can be accessed by the public and by those who wish to write about the court. The judgments of the court are the window into the court's work and I think we have an obligation to make it known how we decide cases in an area in which individual justice is required.

Of course, like this and so many things, the court is faced with inherent difficulties. Section 121 of the Family Law Act quite properly limits publication of identifying features. It is not entirely clear whether this applies to matters placed on the legal internet sites, but in any event, whether it does or not, in my view it is appropriate that matters which are placed on the internet, either on the Court's website or on Austlii, are anonymised. The ability to use search engines by the mere insertion of a name makes it all too easy for anyone who knows the people who have had a case determined in the Family Court to search for details of that case. But we must, I think, grapple with this and provide anonymised judgments which better reflect the work that we do.

Regrettably it seems to me that the very anonymising of the cases and the removal of identifying features is a disincentive for reporting by the media unless the case happens to have a particularly interesting aspect to it, such as *Re Alex*.

It might be said that in the area of family law it is even more important that the media report responsibly. That is so, it seems to me, because family law is so intensely emotive. Those who finally come to court to have their case determined have been through mediation and conciliation, offered many opportunities to resolve their case but have been unable to do so. Separation and the breakdown of the relationship is one of the most significant of life events. How we see ourselves as people and as parents and our ability to sustain and re-form relationships is fundamental to our core being. All of these things are challenged when a relationship breaks down.

I have the greatest admiration for those who can put aside their own feelings of pain and anger for the benefit of their children, and I understand those who cannot. They however are not going to be objective participants in the dispute, far from it. By the time they come to court the parties are generally polarised but they are part of a larger group. There are the immediate families - grandparents, uncles, aunts - generally (but not always) siding with the family member, and the broader community of friends and acquaintances who hear their story and offer them support. New partners also feature in this group. Indeed it is often the case that long held prejudices by other family members come to light when separation occurs.

And so the only parties who cannot resolve their disputes come to court. We see them in the courtroom and observe they carry with them not just baggage, but an entire caravan of family values, views and expectations.

It should be relatively straightforward to conceive that the Judge (the umpire) brings an objective view to the trial process, and with or without the help of counsel discerns the issues, decides disputed facts, and, having heard all of the evidence and the witnesses, and as the one truly neutral person in the process, comes to a decision. That decision will also be influenced by the manner in which the case is presented and the parameters of the dispute the Court is asked to determine.

No one could surely expect that the Judge could do more than make a decision about the facts and the issues that arise in the hearing. Judges can't know everything about people's lives beyond what is presented in the case. Judges are human. Findings have to be made on the evidence as it is presented. We know that the system has its limitations, but it is still surprising to me that in reporting on cases in the system so little regard is had for the decision of the one true objective person whose very role is to listen to both sides, analyse the evidence and then come to an unbiased conclusion. The Judge doesn't know the parties, has no interest in the outcome of the case and, I strongly contend, the court has no bias towards either men or women. Its role in parenting cases is to reach a conclusion that is in the best interests of the children having regard to a number of reasonably common sense matters set out in the Family Law Act. A reader may not agree with the decision the judge reached, but there is no particular reason why judges should be biased against fathers or in favour of mothers or visa versa.

Judges are mothers and fathers, they have mothers and fathers, they have sons and daughters, they have brothers and sisters and grandparents. I think it also has to be recognized that judges are, through their legal training and human experience, imminently qualified and capable of determining these legal disputes.

The Court *is* responding to the widely held view that it is in the children's best interests to maintain a relationship with both parents after separation. I agree with Richard Chisholm when he says:

> *"In all this, I think that family law is responding – some would say too slowly, others might say excessively – to the increasingly held view that it is generally best for children that both parents continue to be involved in a serious parenting role, not merely for weekend and holiday outings and fun."*[29]

The research certainly supports this. But as Richard Chisholm comments in relation to research and children's interests:

> *"Can they tell us what is good for children? I think the answer is that they might be able to give us some useful leads, but what we need to keep in mind when reading the studies at least two important points.*
>
> *The first and most obvious point, especially for lawyers and judges, is that research can give us information about generalities, but cannot tell about an individual case. Even if it could be shown that some arrangement is optimal for 80% of children, the research cannot tell us whether a particular case falls within the 80% or the other 20%.*
>
> *Secondly, what researchers typically tell us is that one thing is associated with another thing. This does not mean the first causes the second."*[30] *(emphasis added)*

It may be argued that the system – the Courts, lawyers and mediators - has been slow to implement the changes that recent research has told us about the long term importance of fathers remaining significantly involved with their children after separation, and their increasing role in the care of their children in intact families.

---

[29] Chisholm J *Post Separation Parenting: Public Debates, Reports and Policies*, August 2004 and see Dr T Altobelli 'Contact cases involving young children: Have we been getting it wrong?', Sydney Law School 23 April 2004 and see generally Bruce Smyth, ed, *Parent-Child Contact and Post-separation Parenting Arrangements*, Research Report No 9, AIFS, June 2004

[30] Chisholm J 2004 op.cit. pg 37.

It may also be argued that the cases that come before the Family Court at least, are, to use Richard Chisholm's example, the minority of cases where a shared or more shared arrangement is not best for the children in those cases. The point I make is that neither of these propositions establishes bias or unfairness on the part of the decision maker.

In any event, the Government has indicated a firm intention to make the Family Law Act clearer in its intent in relation to parenting orders and in so doing may make decisions more readily understood. That outcome would be welcome.