CHAPTER SEVEN: ENFORCEMENT OF FAMILY COURT ORDERS

Introduction

7.1 The enforcement of Family Court orders, particularly access orders, is the focus of a great deal of anguish, concern and anger to those affected. The Committee received several hundred submissions, and hundreds of letters not only from parties to divorce, but from their friends, relatives, and children, all complaining about the lack of action taken by the Family Court to penalise custodial parents who breach access orders or agreements. Many submissions expressed outrage at the fact that while default on a maintenance order is immediately penalised and enforcement action taken, enforcement of access orders is almost non-existent.

7.2 The Committee heard from many parents, mainly non-custodial fathers, who claimed that they were being unreasonably denied legitimate access to their children. The Committee also heard from custodial mothers who claim that they have breached access orders because they fear a violent partner, or can no longer tolerate persistent harassment from their ex-partner. It has also been claimed that procedures for seeking the variation of Court orders are out of the financial reach of many custodial parents, and that such parents may feel that they have no option but to breach an inappropriate order because they cannot afford to challenge it. As with many other issues discussed in this report there are two sides to the problems under consideration and no simple solutions.

Access orders

7.3 Section 70(3) of the *Family Law Act 1975*, places a statutory obligation on custodial parents not to prevent access to which the non-custodial parent is legally entitled:

> *S70(3) Where an order under this part or section 112AD provides for a person to have access to a child, a person shall not, without just cause or*

excuse, hinder or prevent the first-mentioned person from obtaining access to the child in accordance with the order or interfere with the access to the child that the first-mentioned person is entitled to in accordance with the order.

7.4 In 1987, the Australian Law Reform Commission (ALRC) published a report on its study of contempt provisions, which included specific recommendations relating to the enforcement of Family Court orders.[1] The ALRC argued that the Court needed to do more to ensure that its orders, particularly those relating to access, were respected. It concluded that:

> It is important to narrow the gap between the expectations of aggrieved access parents, who understandably believe that breaches of an order will attract effective sanctions, and the realities which at present confront them when their contempt applications come on for hearing.[2]

7.5 The ALRC also supported the view that the Family Court's response to breaches of orders should take account of the circumstances in which the breach occurred:

> ... in the particular context of access orders, the Family Court could not and should not switch suddenly to a policy of rigorously punishing all breaches. A considerable degree of flexibility, permitting apparently serious breaches of access orders to go more or less unpunished when there is good reason for this, must be preserved.[3]

7.6 Furthermore, the ALRC recommended that, except in special circumstances, the Court should not apply sanctions available under the act in the case of first-time offences 'until the spouses have first been directed to attend confidential counselling and adequate time has elapsed to permit counselling to have full effect'.[4] Even this quite reasonable procedure can be used to frustrate court orders.

1989 amendments to the *Family Law Act 1975*

7.7 In 1989 the *Family Law Act* was amended to 'clarify the rights and obligations of parents and the rights of their children after separation'.[5] The amendments were prompted by the ALRC report discussed above and a 1987 report of the Family Law Council.[6] The major thrust of the amendments was to provide force

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1 Australian Law Reform Commission, Report No 35, **Contempt**, AGPS, 1987
2 ibid, pp 399-400
3 ibid
4 ibid, p 404
5 The Hon L Bowen, MP, Second Reading Speech, Hansard, 21 December 1989, p 3470.
6 Family Law Council, **Access - Some Options for Reform**, AGPS, 1987

to orders, by providing a range of sanctions appropriate to the breaching of Family Court orders. In particular, these were directed at:

7.7.1 increasing the sentencing options available to judges in cases of unreasonable breach of orders;

7.7.2 clarifying the circumstances in which denial of access may be deemed reasonable by the Court; and

7.7.3 providing legislative role for counselling in the resolution of disputes which are the subject of enforcement applications.

Legislative role for counselling

7.8 Section 112AD(5), part XIIIA - sanctions for failure to comply with orders and contempt of court - was inserted as part of these amendments. It provides that the court should not make orders in relation to contravention of access orders unless:

(a) *the parties to the proceedings for the order have already attended upon a court counsellor, or a welfare officer, for counselling in relation to the contravention; or*

(b) *the court is satisfied that it is appropriate to make the order even though the parties to the proceedings have not attended upon a court counsellor, or a welfare officer, for counselling in relation to the contravention.*

7.9 Amendments under s112AD(2)(c) and s112AF(4), also gave the Family Court options to order attendance at counselling, or to impose a good behaviour bond which adds to the compulsion on the defaulting party to attend counselling.

Alternative sentencing

7.10 In addition, the 1989 amendments provided the Court with a range of alternative sentencing options. Under sections 112AD(2)(b) and 112AG(3), the Court can sentence persons in breach of orders to periods of community service, work orders, periodic or weekend detention or sentences similar to these.

Reasonable excuse

7.11 A new section, s112AC, was also inserted. This section provides a clearer definition of the meaning of a 'reasonable excuse' for contravening an order. In line with

recommendation 99 of the Law Reform Commission's report,[7] this section specifically provides that denial of access ordered by the Court will be excused if:

> The respondent believed on reasonable grounds that depriving that person of the custody or access provided for by the order was necessary to protect the health or safety of a person; and
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> the person was not deprived of custody of, or access to, the child for longer than was necessary to protect the health or safety of the person last-mentioned in paragraph (c).

7.12 The words 'reasonable grounds' in S112AC, and 'without just cause or excuse' in s70(3) are not defined by the Act. However, the Full Court has made it clear, in **Gaunt v Gaunt**, (1978) FLC 90-468 and later in **Wilson v Wilson** (Unreported judgment Family Court Appeal 224 of 1989) that:

> ...the genuine belief of the custodial parent that access would not be in the interests of the child did not constitute just cause or excuse for not complying with the order. The court made it clear that although the access order was open to variation under the Act in appropriate circumstances, while it stood the opinion of the custodian as to the desirability of access did not constitute 'just cause or excuse' for interfering with the operation of the order.[8]

Submission comment

7.13 In the order of 400 submissions, and many letters to the inquiry alleged that judges of the Family Court and State magistrates exercising family law jurisdiction are too lenient on custodial parents who deny their ex-partners access to children of the marriage. Many submissions suggested that orders for counselling, or the limited penalties that were applied, were ineffective in preventing repeated breaches of access orders. The Committee also heard of instances where non-custodial parents failed to apply for the enforcement of access orders because they were advised by their lawyers, or by friends, that it would be a waste of time and money.

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7 Australian Law Reform Commission, op cit, p 400

8 Hon Justice A Smithers, **Enforcement in Relation to Access and Contempt Issues**, Fifth National Family Law Conference Papers, Perth, 1992, p 341

Family Law Council

7.14 Although the Committee received much negative comment about the Family Court's enforcement of access orders from individuals, and from groups representing non-custodial parents, other organisations which provided evidence to the inquiry stressed the need to consider the issue from a wider perspective. For example, the Family Law Council's 1987 report, entitled **Access: Some Options for Reform**,[9] would seem to suggest that one of the reasons for the extent of non-compliance with access orders is the Court's willingness to make access orders in circumstances where it is inappropriate to do so:

> While it is widely accepted that a continuing relationship with both parents and other family members is usually desirable for the child's optimum development, it is being increasingly recognised that there are situations where access is not conducive to the welfare or best interests of the child. Over the years there has been a strong presumption by the courts in favour of access to the non-custodial parent and the question arises as to whether this presumption has been given too much weight - does it put the 'rights' of the parent before the best interests of the child? The Council considers that legislative direction is needed to counteract the notion that a non-custodial parent has a prima facie right of access to her/his child(ren).[10]

7.15 Currently, s64(1) of the Act sets out a list of factors that judges of the Family Court are to consider in relation to custody, guardianship, access, and child welfare matters. The Family Law Council has recommended that the Act be amended to provide a separate list of factors that should be considered by judges in determining whether or not access should be granted in each particular case.[11] This list included factors such as 'the level of tension and conflict between the parties' and the capacity of the non-custodial parent 'to provide adequately for the needs of the child during periods of access'. The Council suggested that:

> Attention to these matters will allow all relevant circumstances to be considered and may lead to a more appropriate order and thus fewer recurrent access applications.[12]

7.16 In its submission to the current inquiry, the Family Law Council has again stressed that in many cases, custodial parents may have valid reasons for failing to comply with access orders. These included:

7.16.1 where the custodial parent did not believe access to be appropriate;

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9 Family Law Council, **Access: Some options for reform**, AGPS, 1987
10 ibid, p 12
11 ibid, p 11
12 ibid, p 17

7.16.2 where the non-custodial parent used access periods to perpetuate the fight against the custodial parent;

7.16.3 where the children genuinely had difficulties in their relationship with the non-custodial parent; and

7.16.4 where behaviour of the non-custodial parent was such that access was only marginally desirable in any event.

7.17 The Council argued that each of the above problems appeared to be intractable and that further tinkering with enforcement provisions was unlikely to resolve the underlying difficulties relating to access orders.[13]

Police Commissioners' Advisory Group

7.18 The Police Commissioners' Advisory Group (PCAG) was very critical of the response of magistrates and judges to breaches of orders under the *Family Law Act*:

> In most cases offenders are treated with 'kid-gloves' and either no penalty or totally inadequate penalties are imposed. Police are not aware of any circumstances where an offender has received a sentence of imprisonment for breaching an injunction under the Act, where the breach has been an assault or threatening or harassing behaviour. In many cases the victims have been severely beaten and the offender has been fined or imprisoned as a result of criminal charges arising out of the incident. It is not sufficient to argue that the imposition of a custodial sentence under State/Territory criminal laws should preclude the Family Court from imposing a custodial sentence. The Court cannot expect to have its injunctive orders obeyed unless it is prepared to impose a sufficient deterrent for breaches of those orders. Although most Police have no direct knowledge of the response of the Family Court to repeated breaches of custody and access orders, many complaints have been received from custodial parents seeking to enforce access orders stating that the Family Court has done very little to resolve repeated breaches of such orders.[14]

7.19 The PCAG argues that the Family Court must be prepared to take a stand when faced with repeated breaches of its orders.[15]

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13 Submission 546, Vol 16, p 3167
14 Submission 778, Vol 24, p 4674
15 *ibid*

7.20 The PCAG also suggests that the AIFS or the Family Law Council conduct a study on penalties imposed on breaches of Family Court injunctions and breaches of access and custody orders, the proposed study to examine the following issues:

(a) The extent to which breaches occur;
(b) The incidence of breaches leading to Family Court proceedings;
(c) The 'penalties' imposed;
(d) The extent to which breaches occur after proceedings for breach of an order have taken place; and
(e) The adequacy of the range of 'sentencing options' available to the Family Court in dealing with such breaches, including:

    (i) imprisonment;
    (ii) monetary penalties
    (iii) Community Based Orders (orders to perform work in the community);
    (iv) good behaviour bonds; and
    (v) bonds to keep the peace.[16]

Other submission comment

7.21 The following extracts from submissions are typical of many of the cases related to the Committee:

> Submission 163: It is not an infrequent occurrence for custodial mothers to chronically obstruct access by the father, and yet in practice there is nothing that the father is likely to be able to do in order to establish the regular access that the Court has ordered...At the present time, a custodial parent can deny access by simply not presenting the child and by simply saying that the child is unwell and there is nothing that the access parent can do. If an order is not to be complied with then it should be necessary that the party who is failing to comply with the order produce evidence as to why they have not complied with the order, otherwise they should be held in contempt and have the orders enforced as would happen in orders in respect of custody or maintenance.[17]

> Submission 183: Yet my husbands ex-wife can deny us access to the children and be in Contempt of Court for leaving the State and get nothing, no punishment, no cut of Pension, nothing. We both feel as though we are the losers in a raffle and that we are being publicly

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16 ibid, p 4675. The PCAG suggests that the study must include cases where no court action was taken for breaches.

17 Submission 163, Vol 4, pp 832-3

humiliated for not winning. Every time we try to speak to the children on the 'phone we are abused by my husbands ex-wife. Almost every time we try to see the children we are denied access. We get kicked in the teeth every time we attempt to have any contact with the kids what-so-ever. Yet what can we do? We are not in a good financial situation because of all the Court Cases and we have been ordered to pay all the bills of my husbands marriage to his ex-wife. We have even seriously considered applying for Bankruptcy as the financial strain has been that bad at times. There just doesn't seem to be any justice for fathers in this system in its' current form.[18]

Submission 167: I can only see my children once a fortnight. That is if my wife chooses to allow it. I have access orders to see my children, but my wife pleases herself, as to whether she will abide by them. Why? Because she knows that Courts are reluctant to do anything about it, if she disobeys.[19]

7.22 One letter from a consultant criminologist stated:

The effective enforcement of rights and duties under the *Family Law Act* is not happening. Women refuse to allow their children to see their fathers even when a court order exists. Until the day that one of them is gaoled and fined and made to work at community orders this will continue. Men do not pay their maintenance because the payments are too high and they cannot get tax relief and they frequently have access problems. To top this off when they ring for help or enforcement of their rights they are almost accused of being child bashers. This area needs TOTAL QUALITY MANAGEMENT.[20]

7.23 The view of the custodial parent, and problems associated with access arrangements, was also put to the Committee. One organisation representing custodial mothers suggested that custodial parents frequently feel that there is nothing that they can do in the face of repeated non-compliance with the terms of access arrangements by non-custodial parents:

We are concerned with the impossibility of making access parents comply with the terms of an access order. The system really only works one way. The Act provides redress for the non-custodial parent where the custodial parent is obstructing access in breach of an access order s70(3) and 112(AD) but no redress for the custodial parent (usually the mother) where the access parent (usually the father) fails to turn up or is always

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18 Submission 183, Vol 4, p 927
19 Submission 167, Vol 4, p 866
20 Letter from Ms Maartje Irvine, 22 May 1992, p 20

late or otherwise mucks about with the arrangement. This is not uncommon, and it is at best inconvenient and disruptive, at worst extremely distressing. At the moment there is nothing that custodial parents can do about this problem short of eventually making an application for variation or ending of access.[21]

7.24 The Women's Legal Resources Centre expressed similar concerns:

A chronic complaint of women is the intermittent access parent who is usually a man. We are often told of the distress children feel when they are abandoned by their father after the breakup of the marriage. Mothers are left to try and settle and console children who were excited about an outing with their father, but feel angry and depressed when that outing is cancelled without notice. This becomes a pattern or the norm of many non-custodial parents' interaction with their children.[22]

The Family Court

7.25 In its submission to the Committee, the Family Court defends its record in relation to access enforcement applications that come before it. It suggests that the scope for improving the operation of enforcement mechanisms, and for greater success in achieving lasting resolutions of access disputes, will be set by the level of resources that is provided for this purpose.[23]

7.26 The Family Court places particular emphasis on the need to identify cases where access is likely to cause problems at a very early stage in the case management process, and to use early intervention counselling to prevent later difficulties and litigation over access. It also argues that in many intractable cases, longer term family counselling may be the only means of reducing hostilities between parties and changing entrenched behavioural responses.[24]

7.27 However, the Family Court also stresses that there is a need to find the means of reducing the cost to the complainant of initiating enforcement action and to improve the capacity of magistrates courts to deal with access issues.[25] In addition, the Court suggests that there may be merit in reversing the onus of proof in cases dealing with the contravention of access orders, so that the onus will be on custodial parents to show the court why any denial was justified.[26]

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21 WISDM (Women in Support of a Better Deal for Mothers), Submission 840, Vol 25, p 5002
22 Submission 911, Vol 27, pp 5464-5
23 Submission 940, Vol 31, p 6062
24 ibid, p 5664
25 ibid, p 5860
26 ibid

7.28 Evidence provided to the Committee illustrates that the Family Court is concerned about the cost to the complainant of seeking enforcement action, and recognises that very few enforcement cases actually get to the court:

> ...for summary access enforcement for 1991 there were a total of 206 applications...which is pretty small. Of those, a large number were dismissed, an equally large number were withdrawn. The problem is, and we have said this in our submissions, that it is a very expensive exercise to bring enforcement proceedings into court. It is particularly expensive if you have to keep doing it and it seems to me to be an issue that should be addressed.[27]

7.29 However, it would appear that, until recently, the Family Court has been unaware of the extent of cynicism in the community about the Court's response to unreasonable contravention of access orders. In response to a suggestion from the Committee that many of those who gave evidence to the inquiry believed that the Court does not bother to enforce access orders, the Chief Justice said:

> That perception, I think, is fostered by the legal profession. I had a letter yesterday from some person complaining about the Court's failure to enforce access orders and when one read it, he had not actually made an application to enforce an access order because his solicitor had told him it was a waste of time. That intrigued me somewhat...[28]

7.30 In response to the suggestion that solicitors might give this sort of advice because it is what they believe to be true based on their experience, Justice Buckley suggested that the Court was genuinely concerned about the problem of access enforcement:

> We are not trying to run away from the issue and I think all of us would agree that we regard this as the major source of concern to us from day to day...but it is very difficult to find solutions other than those which we have discussed...I am familiar with the type of correspondence [complaining about access orders] . Much of that, on the face of it, is quite convincing until you dig up the file and have a look at what is going on and what that person is trying to impose on the children...they are impossible cases.[29]

7.31 The Chief Justice also suggested that many cases which come before the Court for enforcement are dismissed, or treated leniently, because the actions of the custodial parent may be understandable in the light of the behaviour of the non-custodial parent:

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27 Transcript, 29 May 1992, p 1912
28 ibid, p 1915
29 ibid

> I do not believe the system is working as it stands at present, but I do not know what else this Court can do, beyond what it has done to date, to improve the situation. I have to recognise there may be cases where judges have taken an unduly lenient attitude to breaches, although often when you examine the circumstances you can understand the leniency...it may be the application for enforcement is really part of a harassment process, which does happen too, so you have got to weigh these things up pretty carefully.[30]

Conclusions

7.32 The Committee is concerned that many people, including the Police Commissioners' Advisory Group have highlighted the Family Court's inability or lack of will to enforce access orders. The frustration of court ordered access, which is not only a breach of the law, can irrevocably damage the relationship between parent and child. The Family Court must recognise that the new penalties provided in the legislation could be appropriately and effectively used so that children are not denied contact with their non-custodial parent, through selfish or vindictive acts on the part of the custodial parent. If access is refused or frustrated the Committee considers that reversing the onus of proof so that it is up to the custodial parent to justify the refusal, would also assist non-custodial parents to preserve contact with their children.

7.33 *The Committee recognises that there are times when custodial parents* frustrate or refuse access because they feel access is inappropriate or the welfare of the child is at risk. However, in those instances the access order should be challenged and the ability to do so cheaply and quickly must be available.

7.34 In the following sections, the Committee makes a number of recommendations regarding the application of penalties available under the Act in the case of 'unreasonable' breaches of access orders, and the means of increasing the accessibility and effectiveness of enforcement mechanisms. Due to the level of public concern on this issue, the Committee believes that it is important the there be follow up to monitor the Family Court's progress in the implementation of these recommendations. The Family Law Council is currently undertaking research into the legal aid costs and related issues surrounding repetitive applications for the enforcement of access.[31] The Committee considers that the Family Law Council's inquiry should be broadened along the lines suggested by the PCAG.

Recommendation

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30 ibid, p 1918

31 Family Law Council, **Annual Report, 1990-91**, p 16

7.35 The Committee recommends that:

44 the Commonwealth Attorney-General request the Family Law Council to broaden its inquiry into repetitive access applications to include:

44.1 the extent to which breaches occur;
44.2 the incidence of breaches leading to Family Court proceedings;
44.3 the 'penalties' imposed;
44.4 the extent to which breaches occur after proceedings for breach of an order have taken place; and
44.5 the adequacy of the range of 'sentencing options' available to the Family Court in dealing with such breaches.

Summary procedures for the 'fast tracking' of access disputes

7.36 Those who made submissions to the inquiry in relation to access enforcement were overwhelmingly in favour of the introduction of an affordable, summary procedure for initiating enforcement action. The Family Court has advised the Committee that in 1986 it attempted to introduce a procedure that might meet these requirements. In response to recognised difficulties in this area, the Court amended the Family Law Rules to add a new rule entitled 'Urgent Application To Deal with Alleged Contravention of Sub-Section 70(3) of the Act'.[32] The aim of the amendment was to provide for a fast tracking service which would enable minor access disputes to be dealt with within a week, and therefore usually before the next scheduled access period.

7.37 Order 34, Rules 9(1) and 9(2) read as follows:

9(1) (Form of application)Notwithstanding rule 6, an application to a court or a person to be dealt with for an alleged contravention of sub-section 70(3) of the Act may, where the applicant alleges that it is necessary for the welfare of a child in respect of whom the contravention is alleged to have occurred that the court hear the application urgently, be in accordance with Form 49.

9(2) (Affidavit in respect of proceedings) Notwithstanding any other provision of these Rules, a party to proceedings instituted by the filing of an application in accordance with Form 49 is not required to file an affidavit in respect of those proceedings, unless the court exercising jurisdiction in those proceedings otherwise orders.

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32 Order 34, rule 9

7.38 The Family Court's submission notes that although the form provided for this purpose was simple, the procedure has been little used.[33] As noted earlier, one reason for this may be that many people cannot afford to institute even the relatively inexpensive summary proceedings made available by the Court.[34] It would also appear that many aggrieved non-custodial parents may have been deterred from using the procedure because they are advised by legal practitioners, or friends, that the Family Court does not take enforcement seriously.[35]

7.39 An additional problem mentioned by the Court is that access to the summary procedure is not, in practice, equally available to city and country dwellers. The Chief Justice informed the Committee that, although summary procedures for breaches of access are technically available through local magistrates courts, 'it is much harder for a country person to get into court'.[36]

Conclusions

7.40 The Committee believes that it is important that the summary enforcement mechanism be accessible to all those who have a legitimate grievance, that enforcement is not confined to those who are eligible for legal aid or who can afford to pay for legal representation. This is particularly important in relation to the enforcement of access orders, as a judge may not be able to award costs in favour of the applicant due to the financial position of the custodial parent, and the consequent effect on the children involved.

7.41 The Committee believes that the Family Court should take steps to provide potential applicants with information about the summary access enforcement (Form 49) procedure. It should also direct the attention of non-custodial parents to the fact that they do not need to seek legal advice to institute the procedure. The Committee is also of the opinion that court orders determining custody and access arrangements should also contain information on enforcement procedures, including the summary access enforcement (Form 49) procedure. The order should also advise people that they can bring the matter back to court without legal representation. Officers at Court premises should be available to provide non-legal advice to litigants in person about the form court hearings take, and about how they are expected to conduct themselves before a judge or magistrate. Many organisations now provide information by way of video tape. The Committee feels that information on court procedures could be conveyed effectively to litigants by video.

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33 Submission 940, Vol 30, p 5858

34 See for example, submission 331, Vol 7, p 1616; submission 429, Vol 12, p 2476; submission 593, Vol 18, p 3516

35 See for example, submission 122, Vol 3, p 622; also Transcript, 7 February 1992, p 1028

36 Transcript, 29 May 1992, p 1923

Recommendations

7.42 The Committee recommends that:

45 the Family Court include in its custody and access orders information about enforcement procedures, including the availability of the summary enforcement procedure established under Order 34, Rule 9;

46 information provided by the Family Court, including information provided in its custody and access orders, should make it clear that it is not necessary to engage legal representation in order to make an application for summary enforcement using Form 49; and

47 the Family Court investigate the provision of information, including that relating to the summary enforcement procedure, by way of video.

Reversal of the onus of proof

7.43 The Family Court's submission has suggested that there may be merit in amending the Act to provide that, where applications are made in relation to non-compliance with access orders, the onus of proof should be placed on the respondent. Currently, it is the responsibility of the applicant to prove beyond reasonable doubt that the alleged contravention took place without reasonable excuse.[37] However, the amendment proposed by the Court would provide that:

> Proof of reasonable excuse should constitute a defence to a charge under the section. The onus of establishing such an excuse by way of defence should lie upon the respondent who should be required to establish it upon the balance of probabilities.[38]

7.44 The Committee notes that in the comments of Justice Adrian Smithers, in a paper presented to the Fifth National Family Law Conference, he points out that:

> The requirement that the applicant adduce evidence that the respondent did not comply with the access order, does not normally give rise to much difficulty. However, proof of the requirement that in breaching the order the respondent had no reasonable excuse is often likely to be difficult. In many cases the access parent will know only that he or she did not obtain

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37 See **Attreed v Attreed**, (1980), FLC 90-907; **May v O'Sullivan**, (1955), 92 CLR 654, at 657-659

38 Submission 940, Vol 30, p 5860

access. Any matters relevant to the issue as to reasonable excuse will be partly or solely in the knowledge of the respondent.[39]

7.45 The Committee did not receive any specific comment opposing such an amendment. However, it is clear that a shift in the onus of proof would significantly reduce the need for applicants to engage legal representation to prove that an offence took place without reasonable excuse. On the other hand, respondents may require legal representation to develop and present a case in their defence.

Conclusions

7.46 The Committee has concluded that there would be merit in reversing the onus of proof in cases where access has been denied to the non-custodial parent and the non-custodial parent brings an action in the Family Court under s70(3). Such an amendment may also help to reduce the cost to the applicant of instituting proceedings.

Recommendation

7.47 The Committee recommends that:

48 the *Family Law Act 1975* be amended to provide that in proceedings relating to non-compliance with access orders:

48.1 proof of reasonable excuse should constitute a defence to a charge under section 70(3); and

48.2 the onus of establishing such reasonable excuse for the denial of access should lie with the respondent.

Counselling and the enforcement of access

7.48 The Family Court Counselling Service submission provides a detailed examination of common fears and misunderstandings that may arise in relation to access visits. It is argued that, frequently, denial of access may be related to fears and misperceptions that may take time and the assistance of a neutral third party to resolve. For example, parents may misinterpret their children's responses to access visits, and genuinely believe that the children do not want to go on access with the non-custodial parent:

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39 Hon Justice A Smithers, 'Enforcement in Relation to Access and Contempt Issues', Fifth National Family Law Conference, Perth, September 1992, p 356

> During access changeovers, separated parents find themselves having to deal with each other and these occasions may provide a forum for the emergence of unresolved spousal conflict. Children are 'programmed' to their parents' conflict and automatically respond with tension and anxiety. This can manifest itself in aberrant behaviour, for example, sobbing and clinging, unusual aggressiveness or withdrawn states...Once having left the custodial parent and effected the separation from the primary care-giver, the child's anxiety lessens. The child is often observed to play and relate happily at the other household. A similar process is then repeated upon return to the custodial parent.
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> This is commonly, and not unnaturally, misinterpreted by both parents. The custodial parent perceives it as reluctance on the part of the child to go on access visits. The access parent, on the other hand, interprets it as the child always being in a heightened state of anxiety and distress while living with the custodial parent, and cites as evidence the fact that the child relaxes and plays happily except when on access.[40]

7.49 The Family Court's submission states that, in line with the provisions of s112AD(5), in most cases where an application in relation to non-compliance with an access order is made, parties to proceedings for the enforcement of access are referred to counselling in the first instance. It is then at the discretion of the Registrar as to whether or not further counselling will be ordered, or whether the case is to be returned to the bench.[41]

7.50 The Family Court Counselling Service has argued that the experience of court counsellors and the results of research conducted by the Court's research psychologist suggest that the likelihood of counselling effecting a resolution of disputes over access is dependent on:

7.50.1 the provision of early counselling intervention, so that a negative pattern of conflict in relation to access is not established; and

7.50.2 the provision of sufficient resources to allow longer term counselling in cases where disputes prove to be intractable.[42]

7.51 The Family Court Counselling Service has suggested that it believes that the most effective means of preventing ongoing disputes over access is to:

> Identify potentially difficult access cases during the early intervention program with a view to placing these families in a program over a longer

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40 Submission 940, Vol 29, p 5661
41 Submission 940, Vol 31, p 6062
42 Submission 940, Vol 29, pp 5662-3

period. Waiting times for hearings are such that this would not hinder the passage of the case toward a final judicial hearing if that was ultimately necessary. Such an approach to the management of difficult access cases would require additional resources if it were to be implemented widely across the Court.[43]

7.52 The Committee has received many letters and submissions from non-custodial parents which argue that what is required in cases of repeated non-compliance is not further counselling, but the application of other penalties available under the Act, in order to change the negative attitude of the custodial parent. Although the Counselling Service argues that resources directed towards early intervention in the resolution of access disputes have been shown to be cost-effective, the FCCS also concedes that:

> Early intervention cannot solve all access difficulties. Some exceptional 'highly conflicted families' are unresponsive to assistance even in the early stages. Problems become quickly entrenched and are then self-perpetuating.[44]

7.53 Contrary to the views expressed by many individual litigants, the counselling service believes that there is a case for the provision of more resources for late intervention counselling which, 'under current funding circumstances, are only marginally provided'.[45]

7.54 The counselling service provides details of three intervention programs, two of which have been tested within the Family Court with 'varying effectiveness'.[46] It argues that in its experience, late intervention is successful for some families, but that they do require intensive intervention.[47] Such intervention is, by its very nature, resource intensive.

7.55 In view of the relative expense and lower success rates of late intervention programs, the Family Court has given higher priority to early intervention, as it believes that 'this provides the greatest effectiveness to the greatest number of families'. Nevertheless, it is argued that the provision of more resources for late intervention is likely to be cost-effective in the long run:

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43 Submission 940, Vol 31, p 6062

44 Submission 940, Vol 29, p 5663

45 ibid, p 5664

46 These programs include (a) De Shazer's (1982) Strategic Family Therapy model; (b) a program which uses a team of four counsellors and a one way screen to encourage children to express their views and parents to consider the dynamics of the family from a different angle; and (c) a program researched by Johnston and Campbell, which has not yet been undertaken by the Court.

47 Submission 940, Vol 29, p 5663

> These are families who litigate time and time again causing children years of damage and misery and costing the state hundreds of thousands of dollars to provide services which do not result in lasting resolution of the problems...[48]

Conclusion

7.56 The Committee concludes that it is important that, in the first instance of non-compliance with an access order, both parties are directed to counselling in order that they have a forum in which to discuss their mutual concerns, and attempt to reach their own solution to the problems they are experiencing. The Committee also supports the Court's current emphasis on attempting to identify difficult cases at an early stage, in order that counselling may be provided to help resolve latent problems before they reach the stage of litigation in relation to enforcement.

7.57 The Committee accepts that there may be some merit in the expansion of 'late intervention' programs which involve longer term counselling, it believes that there is insufficient evidence to justify an immediate expansion of funds for such programs. On the admission of the Family Court, the expansion of such programs would involve the expenditure of considerable resources, but may only produce lasting results in a limited number of cases. The Committee would suggest that the imposition of stiffer penalties by the Family Court in cases of repeated breach of access may well have a similar success rate, in terms of increasing compliance with access orders, at a much lower cost.

Recommendation

7.58 Accordingly, the Committee recommends that:

49 the Family Court Counselling Service continue to place high priority on the provision of early intervention counselling in cases where it appears that access is likely to be a problem.

Sanctions

7.59 Sanctions under the Act include gaol terms and fines, reversal of custody orders, cessation of access and a number of other alternative sentencing provisions. From submission comment, it appears obvious that the Family Court has not used the powers available to it under the Act to enforce its orders. This fact is particularly evident in cases where the non-custodial father has been denied or been frustrated in access to his children by the custodial mother.

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48 ibid, p 5664

Gaol terms and fines

7.60 The *Family Law Act* has always had provision for judges to fine, gaol and award costs against custodial parents who breach access orders without reasonable excuse. However, the Family Court has been extremely reluctant to impose these penalties. Judges of the Court who appeared before the Committee could not remember one instance of a woman being jailed in relation to contravention of access orders. The Chief Justice stated that in one recent case, in which a custodial mother had acted in clear defiance of an access enforcement order of the Court, he had felt that a jail term would have been appropriate. However, he had only been able to order that access should be granted by the custodial parent. This was because solicitors for the father had failed to lodge an application which related specifically to punishment of the contempt, as the father had only been interested in obtaining an order that would ensure that he could see his children.[49] It has not been possible for the Committee to gauge how often such situations occur.

7.61 The Court strongly refutes the suggestion that its reluctance to impose fines and jail terms is a manifestation of bias towards custodial parents, or women.[50] Rather, the Chief Justice has argued that in view of its overall responsibility under the Act to promote the welfare of children, the Court has been wary of imposing fines that will impact on the custodial parent's capacity to provide for the material needs of the children.

7.62 *Representatives of the Law Council of Australia and the Family Law* Council have expressed reservations about the use of jail sentences to enforce access orders. The Chairman of the Family Law Section of the Law Council, Mr Rod Burr, pointed out that by jailing a custodial parent:

> You will then probably also irreparably damage the relationship you are seeking to protect. If it is the access parent who wants the custodial parent jailed because they are not getting access, what do you think that child is going to think of that mother or father who put the other parent, the parent with whom they live, in jail ? That is the grave danger. You are going to destroy, I think, forever the relationship that you are endeavouring to encourage.[51]

7.63 In its report, **Access: Options for Reform**, the Family Law Council states that:

> Council has severe reservations about imposition of imprisonment as a sanction for access violations. If it is to be imposed at all, it should only

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49 Transcript, 29 May 1992, p 1913
50 See Submission 940, Vol 29, pp 5660-1 and Vol 30, pp 5859
51 Transcript, 27 March 1992, p 1369

be in situations where all other penalties have failed to enforce the orders, or are impracticable. Imprisonment should only be imposed after the offender has been dealt with for a number of similar offences and despite this, the court is still of the view that access is worth considering.[52]

7.64 The view that imprisonment may be appropriate, but only if the offender has already committed several offences, was not offered by many individuals who wrote to the inquiry. The following opinion, which was put to the Committee by a consultant criminologist who has worked with many families in relation to access disputes, sums up the sentiments of many frustrated non-custodial parents:

> People want offenders punished, not slapped on the wrist with a wet tram ticket.
>
> 'Gaol them' refers to the case of the custodial parent who refuses to allow the non custodial parent, with a court order, the right to see his/her children during the hours specified on the court order. There is deliberate malicious destruction of the relationship of the children and their non custodial parent, which I say should be punished. Not after they have been to court for the tenth time and the non custodial parent has not seen the children for up to a year. At that point the relationship is shot. Usually the children have suffered great torment watching the 'loving, caring, devoted' custodial parent, punish the non custodial parent.
>
> As a general rule, the non custodial parent has had to spend a fortune on solicitors with no guarantee that they will see their children again. Yet they will be dragged into court immediately if they fail to pay maintenance. So much for justice.[53]

7.65 Other witnesses who appeared before the Committee took a different view. For example, one man whose wife had continually breached access agreements, despite being referred to counselling some six or seven times by the Court, made the following comments:

> Where you have carryings-on, whether it be by the male or the female...they are both as bad as each other in this situation. The court needs to take over that point and decide what further action it will take. Perhaps it can be like motor offences; the first offence is one level and the second offence is a bit higher. People should know that they are not going to continually get away with ignoring and breaching court orders, as they can at the moment.

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52 Family Law Council **Access: Options for Reform**, op cit, p 25
53 Letter from Ms Maartje Irvine, 11 May 1992, p 3

> Chairman: The ultimate penalty, even for parking offences, is imprisonment. Do you think it should end to that degree?
>
> Mr Allison: If you reach the stage where one party is that way inclined - they refuse to adhere to anything - then yes. I would like to think that, with services available, it would not get to that stage, but I suppose it can do. It is something that would have to be considered, but in the end if my ex-wife put me in gaol or I put her in gaol, then either party would say goodbye to the children and most of the friends they had.[54]

Conclusion

7.66 The Committee concludes that in view of the possible effects of the imposition of a jail sentence on the emotional well-being of children and their relationship with the non-custodial parent, the Family Court should only consider the application of such a penalty as a last resort in cases of repeated breach, where it is clear that repeated denial of access is motivated by a desire for vengeance on the part of the custodial parent.

7.67 The Committee believes that alternative sentencing options now available under the Act, such as community service orders, which are discussed below, will in the vast majority of cases be more appropriate than the imposition of a jail sentence. However, the Committee notes that if the Court is to gain public confidence in its determination to enforce orders that are breached without just cause, then it must demonstrate its preparedness to apply the alternative sentencing provisions now available under the Act.

Alternative sentencing provisions

7.68 In evidence to the Committee, the Chief Justice has suggested that judges 'would have no hesitation in considering' the range of sentences which are available under s112AG(3), in cases of repeated breach of orders made in relation to access. However, on the admission of the Court, 'there has to date been little use of alternate sentencing' by judges of the Court.[55] The Family Court's submission goes on to say:

> Whether these alternatives will be used more in the future is difficult to say. But their very presence in the Act is clearly useful. A custodial wife may well, quite rightly, take the view that a Court is unlikely to fine her or send her to prison for failing to comply with an access order, due to her custodial responsibilities and her strained economic state. She cannot

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54 Transcript, 20 February 1992, pp 1204-5
55 Submission 940, Vol 30, p 5859

however, feel the same confidence in respect of an order for weekend detention whilst the children are on access with the husband or in respect of an order for community service[56].

Conclusion

7.69 The Committee disputes this view. The existence of alternative sentencing provisions will not of itself prevent people from defying Family Court orders; those penalties also have to be used and seen to be used by the Court. Currently, judges of the Court have a wide discretion as to whether or not it is appropriate to apply the sentences available under s112AG(3). The Committee notes that judges must take into account the interests of children, but the Committee is of the view that there are circumstances where the custodial parent could be imprisoned, in order that the children's relationship with the non-custodial parent is protected. The Committee notes that if the Family Law Council's forthcoming study involving the repeated breach of access orders is broadened as recommended, it should provide further guidance as to the types of situations which warrant sentencing under s112AG(3).

Reversal of custody orders

7.70 Some submissions to the inquiry suggested that in cases where a custodial parent repeatedly and unreasonably denies access, an alternative sanction that might be applied by the Family Court is the reversal of custody, to give the non-custodial parent custody of the children. In response to a question about the Family Court's current practice in relation to the reversal of custody orders, Justice Buckley told the Committee that:

> There have been cases, as I have said to you before, when custody orders have been reversed, and that has been a very effective way of enforcing access thereafter. But you can only do that in so many cases. Often the person seeking access is not in a position to seek custody.[57]

Conclusion

7.71 The Committee believes that the reversal of custody would be inappropriate as a specific sanction against the parent who is in breach of access orders. Penalties already available to the Court under s112 are sufficient to provide a range of options for sentencing that are suitable to the particular circumstances of different cases. The Committee shares the view of the Family Court that in some instances of repeated

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56 ibid

57 Transcript, 29 May 1992, p 1920

breach, where a non-custodial parent makes a specific application challenging the existing custody order, reversal of a custody order may be appropriate. The Committee notes that the terms of the Act require that the Court should only consider reversing such custody orders where there is strong evidence to suggest that such a reversal would be in the best interests of the child/ren. The Committee considers that any reversal of custody orders can only be at the discretion of the judge.

Cessation of access

7.72 As discussed in Chapter Six, some witnesses have suggested that access has been ordered or sanctioned by the Family Court in circumstances which may not be in the best interests of the child, particularly where there has been a history of violence against the custodial parent. In addition, the Family Law Council has suggested that there may be a case for denying access where factors other than violence may prejudice the welfare of the child, and has suggested that the Family Court may currently be giving 'too much weight' to the presumption that children benefit from contact with both parents.[58]

7.73 The Family Court has also conceded that much more research is needed to ensure that its decisions are based on a full understanding of the effects of access on children:

> Judges and counsellors are at present placed in the difficult position of making access plans for children which may have differential and long-lasting effects on them without the benefit of relevant research data...There is a pressing need for scientifically valid research which could focus on children of all ages, encompass the full range of access arrangements and would address the issue of short and long-term effects on children's adjustment to divorce.[59]

7.74 The Family Court's submission acknowledges that 'protracted conflict, particularly if accompanied by continuing litigation, is likely to be more damaging to children than no contact with the access parent'.[60] At the same time, however, the Court expresses its great reluctance to legally sever contact between a child and one of its parents:

> The decision to stop access is a difficult decision for a Court to make and this option is only taken in rare cases of child abuse or where intense and continuing conflict is affecting the child. It is even more difficult for an

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58 Family Law Council, **Access: Options for Reform**, op cit, pp 12-17
59 Submission 940, Vol 30, p 5868
60 Submission 940, Vol 31, p 6062

access parent to accept such a decision or to make this decision for themselves.[61]

Conclusion

7.75 The Committee is of the view that access to a child by the parent should only be prohibited in instances where the welfare of the child will suffer if access continues. The Committee considers that each case will need to be judged on its merits.

Access enforcement: the police perspective

7.76 As discussed earlier in this chapter, submissions to the inquiry from the Australian Federal Police (AFP), the Queensland Premier's Department and the Police Commissioner's Advisory Group (PCAG) expressed concerns about the capacity of police to enforce Family Court orders, particularly those related to access and custody, and injunctions related to domestic violence. There would appear to be a high level of agreement between State and Federal police about the need to act urgently to fill gaps in the existing law, and to develop mechanisms which can address specific dilemmas which are experienced by police in their enforcement role.

7.77 At the Committee's hearing with judges of the Court, the Chief Justice commented that:

> The police tend to be reluctant to assist in the enforcement of these sorts of orders. State police sometimes tend to take an approach that it is a Federal matter and not their concern...obviously, they try to avoid it because it is a difficult area for them to work in.[62]

7.78 Submissions provided by police argue to the contrary that:

7.78.1 the terms of some orders issued by judges and magistrates render them practically unworkable and unenforceable; and

7.78.2 police frequently have great difficulty in ascertaining what orders were currently in force in particular cases, with the result that police may feel reluctant to act without full knowledge of the facts of the situation.

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61 ibid, pp 6062-3
62 Transcript, 29 May 1992, pp 1915-16

'Impractical' and 'unenforceable' orders

7.79 The Australian Federal Police has alleged that, some Family Court judges task police in circumstances that unnecessarily leave individual officers vulnerable or in doubtful legal situations.[63] The AFP has also expressed concern about inconsistencies in the terms of warrants issued to police providing them with the power to search for, and take possession of, children. It notes that some judges limit the terms of search powers unnecessarily, for example, by only providing police with the power to search a vehicle, when in fact it may be necessary for police to search a vessel, aircraft, or other places in order to take possession of the child. The AFP is concerned that:

> Inevitable delays result before the execution of some such warrants when police must first seek amendments to the search provisions. These delays, in urgent cases, may result in respondents relocating before the warrant can be re-issued.[64]

7.80 Similarly, the Police Commissioner's Advisory Group has argued that:

> Some orders made in the Family Court prove nightmares for those charged with policing their operation. Family Court judges, in attempting to resolve differences between parties, have at times made orders which are at best impractical and often impossible to successfully interpret...these problems are administrative rather than legal and arise out of practices adopted by the Family Court rather than interpretations of the Act. These problems must be addressed in order to make the Act more 'user-friendly' and assist police in interpreting the meaning of orders which should readily be apparent from their wording.[65]

7.81 The Committee was concerned by the examples of orders that were contained in the submission from the PCAG. For example, the PCAG suggests that orders have been made which allow both parties to occupy the matrimonial home while restricting their access to particular parts of the home at different times. Other orders have been made preventing a party coming within one kilometre of the wife or matrimonial home while also allowing access to the children.[66]

7.82 In evidence to the Committee, the Family Court expressed surprise at the comments by the PCAG regarding impractical orders. The Chief Justice advised that it was a matter to which his attention had not been previously directed.[67]

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63 Submission 941, Vol 28, p 6571
64 ibid, p 6570
65 Submission 778, Vol 24, p 4682
66 ibid
67 Transcript, 29 May 1992, p 1931

Conclusion

7.83 The Committee believes that the Family Court's response to these concerns is indicative of a need for a formal mechanism of regular liaison between the Family Court and relevant sections of State and Federal police forces. As it is clearly not possible for the Chief Justice or the Full Court to scrutinise all orders that are made by judges and magistrates exercising family law jurisdiction, it seems important that they be provided with regular opportunities to discuss relevant matters with police representatives, and to hear from police about any concerns that they have in relation to enforcement. The Committee believes that the establishment of such a forum may offer the most effective means of ensuring that judges and magistrates are fully aware of the types of provisions that can render orders impractical or unenforceable.

Recommendations

7.84 The Committee therefore recommends that:

50 improved mechanisms for the regular exchange of information and viewpoints between Federal and State police and the Family Court with respect to the enforcement of orders made under Family Law jurisdiction be established;

51 the Chief Justice of the Family Court initiate urgent discussions with the Chairman of the Police Commissioner's Advisory Group regarding the establishment of appropriate mechanisms for this purpose; and

52 the Commonwealth Attorney-General give consideration to whether any amendment to section 121 of the *Family Law Act 1975* is required to enable these recommendations to be implemented.

Police access to details of current Family Court orders

7.85 The AFP, the PCAG and the Queensland Police Service have also argued that there is an urgent need to expand the existing Family Court computer system so that it can be accessed by the police immediately that such information is required. The PCAG states that such access is required because:

> Such orders may authorise the arrest of a party for breach of an order and often the only copy of the order available is a photocopy (often, a poor photocopy) that is either unsigned or has only a poor copy of the Family Court seal. In these case police are often called upon to arrest a person

alleged to have breached an injunction or to difficult situation for they are unable to determine whether:

- the copy order produced is correct or has been altered; and/or
- the copy order is a copy of the last or most current order.[68]

7.86 Mr John Sybenga, representing the Queensland Police, similarly told the Committee that:

> The accessibility of orders is limited. We find that we are dependant upon information which is in the possession of the Australian Federal Police. But because of the lack of facilities we are not always able to contact and access that information. We are finding that police are confronted with the situation where an order is made by a family law court and one party says, 'This is what the order was', and the other party says, 'This is what the order was', and the police have to make a decision on which one is telling the truth. That creates real problems because it is difficult. You do not want to take sides in the matter. It is a case of establishing what that order is and assisting in enforcing it.[69]

7.87 All those police organisations which provided evidence to the Committee concurred with the view that:

> In order to eliminate the uncertainly surrounding the enforcement of such orders State and Territory police must be given 24 hour access to orders made by the Family Court. It is not good enough to say to a mother who fears that her husband is about to escape overseas or interstate with the children at 10pm on a Friday night that she will have to sort it out with her solicitor on Monday morning. There must be some means established by which police and other relevant agencies can confirm the terms and currency of an order made by the Family Court.[70]

7.88 Specifically, it has been suggested that the Australian Federal Police should be provided with 24 hour computerised access to a data base of all Family Court orders, and to all orders made in magistrates courts in the exercise of family law jurisdiction. In view of the need to safeguard the privacy of Family Court users, it has been recommended that access to the database be restricted to the Australian Federal Police, who could then provide the limited information required in particular cases by on-duty police of Federal and State forces.[71]

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68 Submission 778, Vol 24, p 4670

69 Transcript, 21 November 1991, pp 880-881

70 Submission 778, Vol 24, p 4671, see also Transcript, 21 November 1991, p 881, Submission 941, Vol 28, p 6568

71 ibid

7.89 In oral evidence to the Committee, the Court has accepted the view that such an on-line data base should be accessible to police. The Chief Executive Officer has pointed out that the Court's existing 'Blackstone' computer system would not currently provide a suitable basis for this data base. The Court has recommended that it be provided with over $2.5m to upgrade its management information system. It has estimated that the additional cost of constructing a fulltime database would be in the order of $170,000.[72]

Child abduction

7.90 The Committee received a number of submissions which suggested that mechanisms for the enforcement of custody orders are urgently in need of improvement. Although the Court's submission is silent on this matter, the Committee heard from a number of custodial parents whose children had been abducted interstate or overseas by the access parent. Amongst others, the Law Council, the Australian Federal Police, the Queensland Police and the Police Commissioners Advisory Group also made recommendations directed at perceived deficiencies in the provisions of the Act relating to the enforcement of custody orders.

7.91 Both submissions from police argued that the lack of a mechanism to enable immediate information on current Family Court orders hampers the capacity of police to prevent child abduction, and to take other appropriate enforcement action. The AFP has provided one example of a case which illustrates the seriousness of this problem:

> In a recent instance an airport based AFP member acting on the basis of documents presented by the father of the two children purporting to show Family Court orders were in existence, allowed the children to depart with their father on an international flight. It was subsequently established that the papers were not in fact valid resulting in the flight being diverted after departure, for which a considerable compensation claim has since been lodged by the airline involved. In this and similar instances, ready access to a mechanisms to confirm the existence or standing of Family Court orders would have been invaluable.[73]

Prevention of unlawful departure from Australia

7.92 Section 70A of the *Family Law Act* set outs a number of provisions which make it unlawful for a parent or guardian to take a child out of Australia if such an action would infringe on the custody or access rights of another party, without the written

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72 Transcript, 29 May 1992, p 1933
73 Submission 941, Vol 28, p 6568

consent of the latter party. Section 70A also prohibits parties to proceedings from taking a child out of Australia without the written consent of the other party to proceedings, except where the Court so orders.

7.93 Another section of the Act which is aimed at the prevention of child abduction is s64(6). This sub-section provides that "where a court is of the opinion that there is a possibility that or a threat that a child may be removed from Australia", the Court may order that the child's passport, or that of any other person concerned, be delivered to the Court.

7.94 The Police Commissioners' Advisory Group has expressed the view that these mechanisms are currently inadequate to prevent a parent who is determined to take a child overseas from doing so.[74] The PCAG notes that it is relatively easy to forge a signed consent to such departure from the other parent, which means that it is also quite possible for a determined parent to take a child on board a vessel or aeroplane without detection. As it is possible to fly to the other side of the world in 24 hours, the cost and difficulty of recovering and returning a child can be very high.

7.95 The PCAG has suggested that in order to reduce the possibility of this problem, the Family Court should make a standard practice of issuing an order preventing the child/ren being taken out of Australia at the time an order granting custody to one party is made:

7.95.1 in all cases where there has been a protracted custody dispute; and

7.95.2 in all cases where the child is the subject of an order for his or her personal protection.[75]

7.96 The PCAG has further noted that were the AFP to have access to Family Court orders, as recommended above, it would be possible for the AFP to place a 'stop order' with all Australian points of departure. It adds that:

> Under such a scheme, where an order is made the Federal Police would be notified and the name and date of birth of the child would be placed on the computer system utilised at major points of departure overseas. If the child is brought to a point of departure the standard checks conducted by the Department of Immigration would reveal that an order exists which prevent the child being taken out of Australia. The child would then be prevented from leaving Australia until that order is varied or discharged.[76]

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74 Submission 778, Vol 24, p 4680
75 ibid, p 4681
76 Submission 778, Vol 24, p 4680

7.97 However, separate concerns mentioned by the AFP would suggest that the suggestion above may not be sufficient to prevent the departure of the child, if the child expresses a strong desire to go. The AFP's submission to the Inquiry states that:

> Although the *Passports Act 1938* provides that it is technically possible for an 'approved senior officer' to cancel a minor's passport under certain circumstances this is not a viable option. In cases where the minor may wish to continue their travel, police are powerless to give effect to the spirit of the order. Legislative amendment would seem necessary to overcome these anomalies.[77]

Conclusions

7.98 The Committee recognises that police become directly involved in the enforcement of access orders in relatively few cases. However, the question of the currency of access orders may frequently be relevant to cases where police are called to deal with alleged breaches of injunctions. Nevertheless, it is satisfied on the basis of the evidence before it that there is an urgent need to provide police with computerised access to orders made under Family Law jurisdiction in circumstances where access to the terms of particular orders is necessary to enable police to fulfil their statutory duties. It is particularly concerned that the current difficulties experienced by police in determining what orders are in place in particular cases may not only undermine public confidence in both the Court and the police, but may place individual adults and children at risk. The Committee notes that computerised access to the terms of the Family Court orders need only be available to an authorised officer of the AFP, who is empowered to deal with specific requests for information from duty police in cases where there is a clear need for the provision of this information.

Recommendations

7.99 The Committee therefore recommends that:

53 the Family Court develop a suitable on-line data base, accessible by the Australian Federal Police which will contain up to date records of the content of orders made under Family Law jurisdiction, both by the Family Court and by magistrate's courts;

54 in order to prevent the disclosure of information contained in the database to unauthorised police personnel, the Australian Federal Police nominate an officer with responsibility for accessing this system and for protecting the confidentiality of the information; and

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77 Submission 941, Vol 28, p 6570

55 **State police to have access to the specific information required in particular cases through the Australian Federal Police.**

Care of children pending their delivery to the person entitled to custody or access

7.100 Another difficulty faced by police in the execution of warrants issued under sections 69(4) and (10) of the *Family Law Act*, which may authorise police to take possession of children and deliver them to the person entitled to custody and access, is that the terminology of the Act does not provide police with a clear mandate to look after the child pending delivery to the custodial parent. The PCAG's submission to the inquiry states that:

> Police officers in several jurisdictions have been reluctant to execute such warrants unless the person entitled to recover the child(ren) and to deliver the child(ren) is in company with the police at the time that the warrant is executed, arguing that the Act makes no provision for police to 'hold' the child until they are able to locate the person to whom the child is to be delivered. This has presented problems, particularly where police locate the child in another town, State or Territory from that where the custodian or person entitled to access resides. In such instances police are reluctant to take proceedings in State/Territory Courts for the protection of the child pending the arrival of the person entitled to custody or access and in fact, under existing Victorian legislation, Police would be unable to institute proceedings for the care and protection of such children.[78]

7.101 The submission from the Queensland Police expressed similar concerns.[79]

7.102 The Committee believes that this anomaly should be rectified and that the Act should be amended to provide that the Court make orders specifically empowering police to take temporary custody of the child, at the same time as a warrant is issued for the arrest of the party who is unlawfully attempting to take a child out of the country. The Committee notes that only minor legislative amendments would be required.

Recommendation

7.103 The Committee therefore recommends that:

56 **the *Family Law Act 1975* be amended to provide that the Family Court make orders empowering police to take temporary custody of a child at the same time as a warrant is issued for the arrest of**

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78 Submission 778, Vol 24, p 4678
79 Submission 889, Vol 27, p 5357

the party who is unlawfully attempting to take a child out of the country.

Repeated abduction of children

7.104 An additional problem which is mentioned in the submission from the Law Council is the incidence of 'repeat abductions', which sometimes occur very soon after the execution of a warrant which has been issued in connection with a previous abduction attempt. The Law Council points out that in the case of repeated abduction, the parent seeking the return of the child must commence fresh proceedings each time - a procedure which is 'time-consuming, costly and places the subject child at risk'.[80]

7.105 The Committee notes that in addition to imposing extra distress, inconvenience and expense on the parent who seeks the return of the child, the need to institute fresh proceedings in such cases may impose considerable public costs in terms of the use of court time, and the provision of legal aid to eligible applicants. It therefore believes that it is important that a mechanism be found to resolve this difficulty.

7.106 The Law Council proposed two possible means of simplifying procedures available to the aggrieved parent in such cases:

7.106.1 that warrants, once issued, remain 'live' for the time period specified in the warrant, even after execution of it, but that such warrants are then not to be acted upon unless notification is given by the Court to the relevant authorities;

7.106.2 alternatively, where such warrants remain 'live', provision could be given to allow a police officer who believes, on reasonable grounds, that the person against whom the warrant is directed, has since the warrant was issued, taken certain steps in contravention of an order, may arrest the respondent. In this regard, there are similar provisions for such police powers set out in the Act: eg, s.70D.[81]

7.107 The Committee believes that the latter of these two suggestions provides the most effective solution, as it removes unnecessary delay caused by the requirement to go back to the Family Court to obtain authority to act of the warrant. Given the installation of mechanisms to provide police with ready access to the terms of Family Court orders, as recommended above, police officers who are approached by a person seeking the execution of the warrant will immediately be able to check the existence and 'live' status of the warrant, and where appropriate, act upon it.

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80 Submission 415, Vol 11, p 2313
81 ibid

Recommendation

7.108 The Committee therefore recommends that:

57 the *Family Law Act 1975* be amended to empower the Family Court to order:

57.1 that warrants issued for the arrest of a person who has abducted or attempted the abduction of a child may remain in force for a specified period of time, notwithstanding the execution of the warrant during that period of time; and

57.2 that a police officer who believes, on reasonable grounds, that the person against whom the warrant is directed has taken certain steps in contravention of the relevant order, may arrest the respondent.

Injunctions

7.109 A major issue of concern mentioned in submissions was the adequacy of existing provisions of the *Family Law Act* as they relate to the protection of victims of domestic violence and the Court's interpretation of these provisions. The Court is empowered to make injunctions, or restraining orders, which may be granted to provide protection to victims, or potential victims, of domestic violence, under s70C and s114 of the Act. Under ss114 and 70C of the Act, the Court is empowered to grant injunctions which may be directed, amongst other things, at:

7.109.1 the personal protection of a party to the marriage;

7.109.2 restraining a party to the marriage from entering or remaining in the premises or area in which the other party to the marriage resides;

7.109.3 restraining one party to the marriage from entering the place of work of the other party.

7.110 Major issues of concern in relation to injunctions issued by the Court mentioned in submissions include:

7.110.1 a perceived reluctance on the part of the Family Court to apply penalties which are sufficient to act as a strong deterrent to repeated breach of injunctions;

7.110.2 the limitations which are placed on the powers of police in relation to breaches of injunctions by s114AA; and

7.110.3 the current limitations on the Court's jurisdiction in relation to protection proceedings, which may result in delays in the provision of appropriate legal protection for victims of domestic violence.

Penalties for non-compliance

7.111 The Court's submission to the Inquiry states that in relation to family violence, the Court's focus:

> is not upon punishment but on assisting parents to make decisions in the best interests of their children. While it must protect individuals in accordance with their civil rights, its focus is future-directed as opposed to past-directed.[82]

7.112 A number of organisations which gave evidence to the Committee alleged that Family Court judges were failing to use the penalties available in the act to deal with violence. For example, the National Committee on Violence Against Women (NCVAW) has argued that, while traditionally, judges of the Court have 'shied away from a sentencing role in their jurisdiction', the Court should 'no longer stand aloof, leaving the management of violence the precinct of the States Courts.'[83]

7.113 The NCVAW argues that in comparison with states courts exercising state domestic violence legislation, the Court has been markedly reluctant to impose jail sentences in cases of the breach of injunctions.[84] It argues that it is important that the sentences applied by judges of the Family Court in such cases are consistent with the penalties applied in like cases in other Courts.[85]

7.114 This view receives support from evidence provided to the Committee by the PCAG and the AFP.[86] The submission from the PCAG places particular emphasis on the need for the Court to take a tougher line on domestic violence, and to ensure that the victims of domestic violence are afforded proper protection under orders made under the *Family Law Act.* It recommends that there should be an independent study of penalties imposed for breaches of Family Court injunctions.

7.115 The PCAG makes a strongly worded case for such a study:

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82 Submission 940, Vol 29, p 5666
83 Submission 776, Vol 23, p 4575
84 ibid, p 4575
85 ibid, p 4576
86 Submission 941, Vol 28, p 6572

> Police are concerned at the response of magistrates and judges to breaches of injunctions under the *Family Law Act 1975*. In most cases offenders are treated with 'kid gloves' and either no penalty or totally inadequate penalties are imposed. Police are not aware of any circumstances where an offender has received a sentence of imprisonment for breaching an injunction under the Act, where the breach has been assault or threatening behaviour. In many cases the victims have been severely beaten and the offender has been fined or imprisoned as the result of criminal charges arising out of the incident. It is not sufficient to argue that the imposition of a custodial sentence under State/Territory criminal laws should preclude the Family Court from imposing a custodial sentence. The Court cannot expect to have its injunctive orders obeyed unless it is prepared to impose a sufficient deterrent for breaches of those orders...[87]

7.116 The submission goes on to state that:

> The criticisms raised and the recommendations made by the National Committee on Violence Against Women concerning the response by the legal system to violence in the community is equally relevant to the Family Court as it is to State and Territory Courts.[88]

7.117 The Committee also notes that the Law Reform Commissions' Report 1987 on **Contempt**, expressed similar concerns to those recently put to the Committee by police and organisations representing domestic violence victims. The Commission stated that its research 'reveals widespread dissatisfaction with the operation of non-molestation injunctions' issued by the Family Court.[89] The Commission added that:

> The regrettable fact that injunctions or restraining orders do not necessarily induce a violent husband (as it usually is) from indulging in further violence was made clear to the Commission from the Family Court files studied:
>
> - One man, as he broke down the door of the woman's house said, 'The ... restraining order doesn't hold'. He then physically assaulted the woman and destroyed the interior of her home.
>
> - Another man who had persistently breached the restraining orders made by the Court told his wife on one of these occasions, 'No Court is going to tell me what to do. I will come and see my children whenever and wherever I like'. The man moved into the house next door to his wife.

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87 Submission 778, Vol 24, p 4674
88 ibid, p 4675
89 ALRC, **Contempt**, op cit, p 383

- A man, in breach of a restraining order, broke into his wife's house and assaulted her and an old age pensioner who was there at the time. He said, 'I will kill you. If I cannot have you, no one else will'.[90]

Conclusion

7.118 The *Family Law Act* specifies a range of possible penalties that may be imposed by Family Court judges as appropriate in cases of non-compliance with injunctions. Section 112AD governs sanctions for failure to comply with court orders and states:

> *112AD [Sanctions] The court may:*
>
> *(a) impose a sentence of imprisonment on a person in accordance with section 112AE;*
> *(b) fine the person not more than:*
> *(i) for a natural person - $6,000; or*
> *(ii) for a body corporate - $30,000;*
> *(c) require the person to enter into a recognisance in accordance with section 112AF;*
> *(d) impose a sentence on the person, or make an order directed to the person, in accordance with section 112AG;*
> *(e) order the sequestration of some or all of the person's property;*
> *(f) order the person to deliver a document to the Registrar; or*
> *(g) order the person to give another person access to a child in accordance with section 112AJ.*

7.119 The Court may also award compensatory access under section 112AJ of the *Family Law Act.*

7.120 It is imperative that the penalties applied by the Family Court are sufficient to act as a strong deterrent to non-compliance with injunctive orders. The Committee is concerned that, from evidence contained in submissions, the Family Court does not take injunctions seriously enough and is not showing sufficient concern in enforcing orders, by imposing appropriate penalties already available under the *Family Law Act.*

7.121 The evidence before the Committee suggests that there is a need for the Court to take action to change attitudes towards non-compliance with injunctions granted in cases of domestic violence, and to encourage the consistent application of available penalties in cases of non-compliance with court orders. Furthermore, the Committee

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90 ibid

believes that it is important that there is consistency in the approach taken by Australian courts to domestic violence.

7.122 The Committee also believes that it is important that the effectiveness of penalties applied by the Court be monitored in order that judges may exercise the discretion available to them on the basis of a sound understanding of the effects of the application of different remedies available in different sets of circumstances.

Recommendations

7.123 The Committee therefore recommends that:

58 the Chief Justice issue a practice direction specifying that:

58.1 penalties for the non-compliance with Family Court orders and injunctions are contained in the *Family Law Act 1975*;

58.2 such penalties should be used where appropriate in cases of non-compliance with orders and injunctions;

58.3 such penalties should be consistently applied throughout the Family Court; and

59 the Family Law Council conduct a review of penalties applied by the Family Court in cases of non-compliance with orders and injunctions which come before the Family Court.

Limits of police powers

7.124 State and Federal police representatives, and a number of organisations which work with domestic violence victims, expressed concerns about the terms of injunctions issued by the Family Court, in particular:

7.124.1 the scope of the personal protection afforded to potential victims; and

7.124.2 the limited powers of arrest provided to police under the terms of the orders.

7.125 The Court is empowered to make injunctions or restraining orders under s70C and s114 of the Act. Warrants authorising State or Federal police to arrest a person who is in breach of an injunction for the personal protection of a child or parent may be issued under s70D and s114AA. The *Family Law Act* further directs a police officer who has arrested a person under s70D or s114AA to bring that person before a

court having jurisdiction under the Act within 24 hours, or within 48 hours if the arrest occurs or on a Saturday or a Sunday prior to a public holiday.

7.126 One member of the Queensland Coalition Against Domestic Violence told the Committee that restraining orders issued by the Family Court were 'next to useless'.[91] She stated that she usually recommended that clients of the service seek protection under State legislation, largely because 'State orders offer police the ability to hold a person who is harassing someone without charge'. She added that those women who obtained Family Court restraining orders had found that they had to go back to court two or three times, during which time they had to contend with continuing harassment.[92]

7.127 State and Federal police expressed similar concerns to the Committee. The AFP's submission to the Inquiry stated that:

> Insofar as orders or injunctions under section 114 of the *Family Law Act* are concerned and although a party may be directed not to harass, molest, interfere with, attend at a place of residence or employment, not telephone or cause any other person to do the same to the other party, police are only empowered to take action in relation to causing or threatening to cause bodily harm.
>
> Other breaches of the section are dealt with as contempt. Experience has shown that dealing with persons in this manner does not necessarily act as a deterrent to the commission of similar acts. Essentially, a section 114 order is of very little value with a low deterrent factor.[93]

7.128 The submission from the Police Commissioners' Advisory Group provided several examples of cases in which the wording of the provisions of the relevant sections of the Act has resulted in situations where police are not able to offer those who have been granted injunctions adequate protection from further violence, threats or harassment. In one example provided by the PCAG, a woman obtained an injunction preventing her husband from entering onto the premises of the matrimonial home, or threatening , harassing and assaulting her:

> One week after returning to the matrimonial home, her husband came to the house, knocked on the door and demanded to see the children. It was outside the times that had been agreed to for access. Sue called the police who arrived before her husband had left, he was not threatening her and had not caused any bodily harm. She was, however extremely frightened because of the past assaults.

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91 Transcript, 20 November 1991, pp 684-5
92 ibid, p 691
93 Submission 941, Volume 28, p 6572

> The police, after checking her copy of the court order, advised him to leave, which he did. They advised her (correctly) that they had no authority to take any further action and she should return to the Family Court to commence action against her husband for his breach of the restraining order. Sue's husband has returned to the premises on two further occasions, causing her anxiety and stress. She has reported it to the police, but as he has not threatened her or assaulted her they have been unable to take action.[94]

7.129 A further concern of the PCAG is the definition of the 'relevant period' as contained in s114AA of the Act:

> A person arrested on Friday night at 8pm, who cannot be brought before a court, must be released at 8pm on Saturday night, without entering bail or having conditions imposed on their release. This may leave the victim open to further instances of violence, threats or harassment at a time when she believes her assailant is still in custody. This problem may be alleviated in part if the power to remand a person in custody or to release them on bail were extended to all persons who otherwise have power to remand a person in custody or release them on bail under that particular State or Territory's legislation.[95]

7.130 The Queensland Police expressed the same concern to the Committee:

> It is considered inappropriate that an arrest is dependent upon a belief that bodily harm is likely to, or has occurred. No account is taken of personal fear and stress which may be experienced by a victim notwithstanding the fact that no physical injury may have been inflicted or contemplated.
>
> The best interests of the community are not served where a person arrested must be released purely because weekends and public holidays prevent access to a court having jurisdiction to deal with the offender.[96]

7.131 Police have recommended that, in order to ensure that personal protection orders issued by the Family Court are effective, ss70D and 114AA of the *Family Law Act* should be amended to clarify what is meant by 'personal protection' and to provide police with a power of arrest in wider circumstances, to address situations where the terms of an injunction are breached, but no actual assaults or threats are made. Police have also argued that the Act should be amended to ensure that those in default of injunctions who

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94 Submission 778, Vol 24, p 4677
95 ibid
96 Submission No 889, Vol 27, p 5355

are arrested on a weekend are not able to repeat that non-compliance before they have been brought before a Court for sentencing.[97]

Conclusion

7.132 The Committee believes that in order to reduce the extent of non-compliance with Family Court protection orders, it is essential that the provisions of the *Family Law Act* do not inhibit an effective enforcement response from police, or create situations where the person in breach of the injunction feels free to do so repeatedly without fear of substantial penalties. It therefore supports the recommendations made by the police regarding the amendment of relevant provisions of the *Family Law Act.*

Recommendations

7.133 The Committee recommends that:

60 **the *Family Law Act 1975* be amended to clarify what is meant by 'personal protection' in sections 70D and 114AA, to address situations where the terms of an injunction are breached, but no actual assaults or threats are made;**

61 **the *Family Law Act 1975* be amended to ensure police have a power of arrest which is sufficient to enforce the terms of injunctions issued by courts and to restrain the possible non-compliance with the injunction; and**

62 **the *Family Law Act 1975* be amended to ensure that those people in breach of injunctions be restrained from committing further breaches of an injunction before being dealt with by the courts for the initial breach.**

Jurisdictional limitations

7.134 Each State and Territory has some form of legislation which is designed to provide appropriate protection to the victims of domestic violence. Section 114AB of the *Family Law Act* sets out the effect of proceedings under such State or Territory legislation on a person's entitlement to institute proceedings under the *Family Law Act* in respect of the same matter. Up until the enactment of amendments in 1991, s114AB stated that where proceedings had been initiated under State legislation, a person was not entitled to initiate or continue with proceedings in respect of the same matter under

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97 Submission 778, Vol 24, p 4678; see also the Queensland Police, Submission 889, Vol 27, p 5355

Family Law legislation. Section 114AB(2) now provides that victims may seek an injunction in the Family Court in cases where a protection order granted under State or Territory legislation has expired or been discharged. However, it remains that the Family Court does not at present have jurisdiction under State and Territory domestic violence legislation. Therefore, unless a protection order is sought under Family Law jurisdiction in magistrates/local courts, an interval must occur between the discharge of one order and the making of another.

7.135 The Queensland Police,[98] the PCAG, and a number of organisations which provide services to the victims of domestic violence[99] have argued that recent amendments to s114AB have not adequately resolved the difficulties faced by victims of repeated violence. The submission from the PCAG provided two examples of recent cases which support its claims that the victim of repeated violence is offered no protection between the time the order made under State/Territory legislation is discharged and when applications can be made under the *Family Law Act 1975.* Such a situation is likely to create confusion between the parties as to which orders are current.[100]

7.136 Examples of the practical consequence of the amending provisions cited by the PCAG include the following:

> Mary called police late on Friday afternoon, after she and her child had been assaulted by her husband. At 4.00pm that day Police assisted Mary to obtain an intervention order under the Victorian Crime (Family Violence) Act 1989 to prevent her husband from further assaulting her. On the following Monday, Mary attended her solicitor's office, who made an exparte application in the Family Court for interim custody, restraining orders and sole use and occupation of the matrimonial home. The Family Court refused to grant the application saying that as the incidents on which the application was based were the same as those for which the intervention order under state legislation was obtained the Family Court was precluded from hearing the application until such time as the intervention order expired or was discharged. The Family Court referred to the decision in Nicolaou v Nicolaou in its judgement.
>
> Mary's solicitor was consulted by another client, Sue, who had been similarly assaulted and who had also obtained an intervention order under state legislation. Acting on the decision made by the Family Court in Mary's case, the solicitor arranged to have Sue's intervention order withdrawn and then issued proceedings in the Family Court. Sue's husband

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98 Submission 889, Vol 27, p 5354

99 See the National Committee on Violence Against Women, Submission 776, Vol 23, p 4575, and the Queensland Domestic Violence Council, Submission 870, Vol 26, p 5111

100 Submission 778, Vol 24, p 4673

attended at her premises and threatened to assault her again prior to the Family Court hearing. Police called to the home were unable to arrest Sue's husband because the intervention order had been discharged.[101]

7.137 The Queensland Domestic Violence Council has suggested that situations are arising where women have obtained a protection order from the Magistrates Court which prohibits contact between themselves and their husbands but these orders are rendered vulnerable if the husband applies to the Family Court for proceedings concerning the children.[102]

7.138 The PCAG has noted that the Standing Committee of Attorney's-General recently passed a resolution in favour of the introduction of 'portability' of domestic violence legislation, so that orders made under the laws of one State or Territory could be registered and enforced in another State or Territory.[103] The Committee has received a number of comments about the urgent need to address current barriers to the portability of such legislation.[104]

7.139 Although police have expressed support for this resolution, the PCAG and the Queensland Police[105] have suggested that it is important that the jurisdiction of the Family Court should be extended to enable it to make orders under State or Territory domestic violence legislation where parties to proceedings in the Family Court are also parties to proceedings under State/Territory legislation. The practical effect of this would be:

7.139.1 to allow the Family Court to discharge an order made under State/Territory legislation immediately prior to making similar orders under the *Family Law Act 1975* and thereby providing continuous protection for victims...

7.139.2 to make orders under State or Territory Legislation in circumstances where such orders are more appropriate than those available under the *Family Law Act 1975.* Such circumstances might include situations where assaults, threats or harassment are inflicted on one party to a marriage, by a person who is not a party to a marriage, where the reasons for such behaviour stems from the breakdown of that marriage...under existing legislation the Family Court cannot restrain a third party from engaging in such behaviour on their own behalf. The proposed amendment would allow the Family Court to finalise all such proceedings at the same time.[106]

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101 ibid, p 4672
102 Submission 870, Vol 26, p 5111
103 Submission 778, Vol 24, p 4673
104 See for example - Queensland Domestic Violence Council, Submission 870, Vol 26, p 5111
105 Submission 889, Vol 27, p 5354
106 Submission No 778, Vol 24, p 4673

Conclusion

7.140 The Committee is concerned at the practical consequences of the operation of s114AB, as exemplified by the cases cited by the Police Commissioners' Advisory Group. It believes that the Commonwealth should, in conjunction with the States, take urgent action to ensure that persons who have been granted the benefit of personal protection orders are not rendered vulnerable by the operations of dual systems of State and Commonwealth law.

Recommendation

7.141 The Committee therefore recommends that:

63 the Commonwealth Government take urgent steps towards:

63.1 the implementation of the Standing Committee of Attorneys'-General resolution regarding portability of domestic violence orders; and

63.2 the extension of the jurisdiction of the Family Court to include State/Territory domestic violence legislation where parties to proceedings are also parties to proceedings under State/Territory domestic violence legislation.

Money orders

7.142 While the Committee has heard considerable criticism of some of the property orders made by the Family Court, particularly in relation to the division of rural properties, it received very little comment in submissions in respect of the enforcement of money and financial orders by the Court. However, the Court's submission to the inquiry expressed dissatisfaction with extant Rules of the Court in relation to the enforcement of such orders, and has appointed a sub-committee to redraft these Rules.

7.143 Currently, Order 33 sets out enforcement procedures in relation to orders for the payment of monies prescribed in orders relating to maintenance, costs awarded by the Court, fines, payment of reparations, and recovery of monies. The Court has advised the Committee that it is in the process of extensively revising the provisions of Order 33 along the lines of the newly revised Victorian Supreme Court Rules.

7.144 The Court's submission advised that:

> The main thrust of the changes which the court envisages is towards administrative, rather than judicial, enforcement of orders in property and

financial matters. It seems preferable that the party who is attempting to enforce the order of the Court should be able to do so by obtaining the issue of an appropriate warrant for enforcement upon filing an affidavit of non compliance, rather than that he or she should have made an application to the Court to obtain an order for such a warrant. The latter procedure involves significant additional expense and delay to a party who has already established in the Court his or her entitlement to the relief which was granted.[107]

7.145 Specific legislative amendments recommended by the Family Court include the inclusion of the word 'warrant' in s34 of the Act. This section prescribes that the court may make orders, or direct the issue of writs of such kinds, as it considers appropriate or as are prescribed by the rules of the Court. The Family Court notes that the word 'writ' is commonly used to refer to a document which initiates proceedings in court, whereas the word warrant refers to the authorisation to take a direct step in relation to enforcement. The Family Court suggests that it may be useful to include the term 'warrant' in s34(1) of the Act, even though an amendment to the Rules would be all that would be necessary to allow the issue of warrants under s34(2).

7.146 The Family Court notes, however, that the inclusion of the word 'warrant' in the Act or the Rules may be incompatible with the provisions of some State legislation, such as s52 of the *Transfer of Land Act 1958 (Vic).* It recommends that the Commonwealth initiate discussions with the States towards the amendment of relevant State legislation to include warrants issued by the Family Court. Although it may be possible to exercise the jurisdiction of the State Supreme Courts under the cross-vesting legislation, the Family Court argues that the amendment of relevant State legislation would be the preferable option, as it would 'put the issue beyond doubt'.

7.147 The two other amendments recommended by the Court relate to the payment of maintenance and to penalties available to the Court in cases of the fraudulent or wilful withholding of maintenance payments. The Court notes that relevant case law has firmly established a rule that maintenance orders in respect of maintenance unpaid for over 12 months will not usually be enforced. It suggests that it is time that this rule was corrected by a legislative amendment. Furthermore, the Court has argued that s107 and s112AB of the *Family Law Act* should be amended to provide for the punishment of imprisonment for the non-payment of maintenance without reasonable excuse.

7.148 The Family Court noted that:

Before the passing of the *Family Law Act* in 1975, most if not all, State legislation provided for the enforcement of maintenance orders by imprisonment unless the person in default established that compliance with

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107 Submission 940, Vol 31, p 6057

the order had not been possible. It is believed that few maintenance defaulters went to prison but that most maintenance orders were complied with. It is understood that overseas in places such as the United States of America, there are no such limitations on imprisonment for non payment of maintenance as exist in Australia.[108]

7.149 However, it argues that the punishment of imprisonment should not be available in cases of offences under the Child Support Act, as in this legislation, maintenance is assessed according to a formula, and injustice could ensue if it was to be subject to the sanction of imprisonment.[109]

Conclusion

7.150 The Committee notes that all that would be necessary to empower the Family Court to issue warrants under s34(2) of the Act would be for the Court to effect relevant amendments to the Family Law Rules. Accordingly, the Committee does not believe that there is any need to make further amendments to the *Family Law Act* in relation to this issue.

7.151 The Committee shares the Family Court's view that it would be desirable for State legislation which is relevant to the enforcement of Family Court money and property orders to be amended to recognise warrants issued out of the Family Court.

7.152 With respect to the enforcement of orders for the payment of maintenance unpaid for over twelve months, the Committee has concluded that there is again no need to amend the *Family Law Act* to enable the Court to make appropriate orders for the payment of arrears. Although the Court has suggested that it is 'well established by judicial decision' that maintenance orders are not usually enforced in respect of maintenance unpaid for over twelve months, the Committee considers that it would be sufficient and appropriate for the Chief Justice to issue a practice direction on this point. The Committee adds that it believes that it is important that all orders for the payment of arrears of maintenance payments be enforced.

7.153 The Committee does however support the amendments recommended by the Family Court to make the punishment of imprisonment available for wilful or fraudulent default on the payment of maintenance. The Committee notes that unlike maintenance collected by the Child Support Agency, which is assessed on a formula, maintenance payment amounts set by the Court are based on the capacity of individual parent to pay. The Committee believes that where there is no reasonable excuse for repeated default, the punishment of imprisonment should be available to the Court, and

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108 Submission 940, Vol 31, p 6058
109 ibid

that the imposition of a custodial sentence should not in any way expunge the maintenance debt which is owed.

Recommendations

7.154 The Committee therefore recommends that:

64 **the Family Court make the necessary amendments to the Family Law Rules to enable the issue of warrants under section 34(2) of the *Family Law Act 1975*;**

65 **the Commonwealth Attorney-General initiate discussions with the States to amend State legislation which affects the enforcement of financial and property orders to include warrants issued by the Family Court;**

66 **a practice direction be issued by the Chief Justice of the Family Court stating that maintenance orders for maintenance which has been unpaid for over twelve months should be enforced according to the relevant provisions of the *Family Law Act 1975*; and**

67 **sections 107 and 112 AB of the *Family Law Act 1975* be amended to remove restrictions upon the imposition of imprisonment for non-payment of maintenance where payment has been wilfully or fraudulently withheld.**

Perjury

7.155 It was mentioned in Chapter Three that many letters and submissions to the Committee made complaints about ex-partners and other witnesses committing perjury in evidence provided to the Family Court, and about the fact that no penalty seemed to be imposed in such cases. Currently, parties who wish to lay allegations of perjury may write to the Attorney-General's Department. The Department may then refer the case to the Director of Public Prosecutions, who is empowered to investigate whether or not there is a case to be made. It is then up to the Australian Federal Police to institute proceedings.

7.156 The Committee was not able to undertake a proper investigation of whether or not current mechanisms for the investigation and prosecution of perjury are operating effectively. However, submissions to the Committee suggest that there is a need for a review of this mechanism, to ensure that responsible bodies are treating perjury in family law with the seriousness that it deserves, and that they are adequately resourced to deal with the investigation and prosecution of such complaints. Comments

made in the Court's own submission add support to the view that a review would be timely.

7.157 The Family Court has expressed some frustration at the attitude of both the Attorney-General's Department and the Director Of Public Prosecutions to the investigation and prosecution of cases of contempt of court accusing the Attorney-General's department of being 'notoriously reluctant to intervene in contempt proceedings at the request of the Court.'[110] The Court has suggested that the officers of the DPP need to develop a greater degree of understanding of the problems of the Court, and of family law generally than has been the case in the past.[111] The Court adds that:

> Prosecutions for offences against the *Family Law Act* have been remarkably few, and the Court has been informed that many requests for action by the DPP by the Attorney-General's Department have either been ignored, or action taken has been inadequate.[112]

7.158 The Committee believes that it is important that clients of the Family Court are made aware of the penalties for perjury. It is equally important that parties who believe that the offence of perjury has been committed are aware of the steps that they can take to initiate an investigation of the matter. The Court, and enforcement agencies, must be seen to take a very serious view of perjury, as dishonesty in Court may be encouraged by the lack of action to prosecute offenders.

Recommendations

7.159 In the light of the criticisms received by the Committee, the Committee recommends that:

68 the Commonwealth Attorney-General examine the operation of existing mechanisms for the investigation and prosecution of perjury cases;

69 the Family Court examine means of raising client awareness of the penalties for perjury, and of the options available to parties who believe that an offence has been committed.

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110 Submission 940, Vol 31, p 6068
111 ibid, p 6069
112 ibid

CHAPTER EIGHT: MATRIMONIAL PROPERTY

The resolution of property disputes

8.1 The fair and equitable resolution of matrimonial property disputes is a difficult task, complicated by a number of factors, including the vagueness of the current legislation, the unfettered discretion granted to the courts, the ongoing responsibility for children, the expectations of the parties themselves and the charged emotional atmosphere in which the proceedings take place. The Institute of Family Studies makes the interesting observation that family law *per se* is not central to the psychological or financial well being of many separated people, and it cannot either take the blame for many of the financial impacts of marriage breakdown or cannot single handedly ameliorate the negative consequences.[1]

8.2 The major issue for resolution is whether the courts should continue to exercise broad judicial discretion for the determination of property settlements or whether there should be a deemed 'equality of sharing' principle, which could be varied on consideration of factors set down in the legislation. Such factors would include, but not be limited to, the length of the marriage, the direct and indirect contributions made to the marriage and assets acquired either before marriage or after separation.

8.3 The Committee also considered the matter of financial contracts and whether such contracts could be an effective means of preventing some of the difficulties associated with the division of property. These agreements are discussed in detail in Chapter 14.

8.4 The Australian Institute of Family Studies stated in its submission:

> Outcomes from financial settlements have been a source of considerable controversy. On the one hand, many men feel they have been 'taken to

1 Submission 777, Vol 24, p 4644

the cleaners', while on the other, large numbers of women with dependent children have a much lower standard of living than their former husbands. Although no law will be able to satisfy everyone, the lack of specificity in the relevant Family Law Act provisions casts doubt on the capacity to provide justice, equitable and predictable outcomes in financial settlements.[2]

8.5 The AIFS here sums up the problems inherent in the achievement of equitable settlements.

Previous reports

8.6 The resolution of property disputes under the *Family Law Act* has been the subject of a number of earlier inquiries. It was first considered by the first Joint Select Committee on the Family Law Act. In implementing one of the recommendations of that Committee the Australian Law Reform Commission conducted an extensive study on whether a matrimonial property regime should be introduced into Australian law. After a considerable period of time the Australian Law Reform Commission's report on matrimonial property, the Hambly Report,[3] was finalised in 1987. The Australian Institute of Family Studies also published a report, called **Settling Up**,[4] in 1986.

1978 Joint Select Committee on the Family Law Act

8.7 As discussed in Chapter One, the first Joint Select Committee on the Family Law Act was established in 1978, almost three years after the Act came into operation. That Committee reported in 1980. Its conclusions and recommendations in relation to property are summarised below.

8.8 The Select Committee noted that neither the *Family Law Act* nor its predecessor, the *Matrimonial Causes Act*, attempted to give either party to a marriage an automatic interest in the other's property, either during the marriage or on its breakdown, but that both Acts gave to the courts the discretionary power to alter the property interests of the parties.[5]

8.9 It was put to the 1978 Select Committee that a discretionary power in the courts to alter the property interests of spouses on divorce is not sufficient and that what is needed is a clear legislative declaration of the property rights of spouses both during

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2 ibid, p 4646
3 Australian Law Reform Commission, **Matrimonial Property**, Report No 39, AGPS, 1987
4 Australian Institute of Family Studies, **Settling Up**, AGPS, 1986
5 Joint Select Committee on the Family Law Act, **Family Law in Australia**, 1980, AGPS, p 92

and on termination of the marriage.[6] That Committee concluded that there would be advantages in the existence of a law prescribing the property rights of parties to a marriage, arguing that people entering matrimony would know, in advance, the legal effect of marriage on their property rights.[7]

8.10 Because the previous Joint Select Committee was concerned that the *Family Law Act* had only been in operation for a short period of time (four years at the time of reporting to Parliament), they made the following recommendation:

> Recommendation 36
> 5.155 The Committee recommends that arrangements for the introduction of a full Matrimonial Property Regime should be preceded by:
> (a) a survey to establish community attitudes to the proposal;
> (b) a full study carried out by the Law Reform Commission of the legal implications of the introduction of such a scheme;
> (c) the assessment of the experience of the New Zealand and various Canadian schemes.[8]

8.11 This recommendation resulted in the Australian Law Reform Commission Report on Matrimonial Property[9] (the Hambly Report), published in 1987.

The Hambly Report

8.12 The Hambly Report, is the most comprehensive study of the area of property law undertaken. The report took four years to produce and covers all areas of matrimonial property. Because the report is so comprehensive and offers an excellent coverage of the major issues, the Committee considers that its findings and conclusions merit considerable attention.

8.13 Major findings included:

8.13.1 the economic consequences of marriage breakdown varied widely from marriage to marriage and often between parties to a marriage;

8.13.2 the share of property apportioned to each of the parties varied widely from case to case, and in a substantial proportion of cases the division was outside the 60% - 40% range;

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6 ibid
7 ibid, p 105
8 **Family Law in Australia**, op cit, p 107
9 Australian Law Reform Commission, op cit

8.13.3 the husband's financial contribution and the wife's contribution as homemaker and parent tended to balance one another, with other factors having a considerable bearing on the outcome. Predominant among these was the need to make provision for the custodial parent;

8.13.4 prospective superannuation benefits were not taken into account in any clear or consistent way, despite their often considerable value;

8.13.5 the reasons for non-settlement prior to a hearing related more to personal attitudes and unreasonable expectations of the parties than they did to complex legal or factual issues, requiring any changes to the law to be give clearer guidelines to help parties to settle their cases more inexpensively by negotiation.[10]

8.14 The report concluded that new legislation was required for the following reasons:

8.14.1 to provide greater clarity and consistency. The Commission concluded that the Act was so vague in expressing its basic principles and generated such a divergence of approaches to its application as to cause excessive uncertainty and confusion;

8.14.2 the emphasis of the present law upon the assessment of the parties' respective contributions to the acquisition, conservation or improvement of property and the welfare of the family was impracticable and inappropriate, involving invidious and value-laden assessments;

8.14.3 the confusion inherent in the present legislation over the relationship between property and maintenance orders and the significance of the factors to be taken into account in making each kind of order;

8.14.4 to ensure that prospective superannuation benefits could be taken into account in an appropriate and consistent way.[11]

8.15 The Commission based its findings on the following principles:

8.15.1 the equal status of spouses in a marriage;

8.15.2 the exclusion of the notion of fault;

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10 ibid, p xxvii
11 ibid, p xxviii

8.15.3 a just distribution of property, the property and finances to be rearranged as fairly as possible between the members of the family having regard to:

- the equal status of the spouses;
- any disparity, arising from the marriage, in the capacity of the spouses to achieve a reasonable standard of living after separation;
- the shared responsibility of the spouses for the future welfare of any dependent children of the marriage.[12]

8.16 The Commission made a number of recommendations to give effect to the principles stated above. In particular, the Commission recommended:

8.16.1 the amendment of defects in the present law to provide more specific guidance on financial proceedings to the Court, legal advisers and the public on:

- the objectives to be sought;
- the principles to be applied;
- the factors to be taken into account;
- the steps to be followed; and
- the orders that can be made;

8.16.2 the retention of the discretion-based system for the allocation of property, with the requirement that the Court follow a legislatively prescribed series of steps exercising that discretion, including:

- ascertaining and valuing the property of the parties;
- applying a rule of equal sharing to the value of the property;
- considering whether variation to the shares should be made on one or more of the grounds specified in the legislation; and
- making orders to give effect to the shares so arrived at;

8.16.3 from a starting point of equal sharing in the value of the property of the marriage, enabling the Court to vary the share of the parties to take account of special circumstances, such as:

- a substantially greater contribution to the marriage by one or other party;
- actions of the parties in relation to property or child care after separation;

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12 ibid, p xxix

- that one party has the benefit of financial resources built up during the marriage;
- that one party brought property into the marriage or acquired it by way of gift or inheritance or as compensation or damages;

8.16.4 the ability of the Court to further adjust the parties' shares to take into account:

- a party's responsibility for the future care of the children of the marriage;
- a party's income earning capacity having been affected by the marriage.[13]

8.17 The Commission also made specific recommendations relating to superannuation. These will be discussed in Chapter Nine.

8.18 The Hambly Report recommended that the principles behind the resolution of family property law should be clearly stated in legislation to assist and encourage parties to settle their disputes without the expense and the uncertainty of the present system, ie the establishment of a structured system of property law. However, the Report cautioned that, whilst such a system should apply to the majority of cases, there should be sufficient discretion to account for the unusual or more complex situations.

Australian Institute of Family Studies - 'Settling Up'

8.19 In 1986 the Australian Institute of Family Studies published the results of a study into the relative outcomes of property settlements for both males and females.[14] It found overwhelmingly that, following divorce, the standard of living of non-custodial parents - generally males -increased markedly, while the standard of living of custodial mothers and their children dropped from the pre-divorce situation. In its submission to the inquiry, the Law Council of Australia commented that it appears the Family Court has been awarding more favourable property settlements to custodial parents since the publication of the AIFS study. However, this may also partially result from the enactment of child support legislation and the substantially higher payments required under the formula than have been awarded traditionally by the courts. Child support is discussed further in Chapter Sixteen.

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13 ibid, pp xxix - xxxi
14 AIFS, op cit

The legislation

8.20 Property is defined under the Act to mean:

> '[P]roperty' in relation to the parties to a marriage or either of them, means property which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

8.21 Under Australian law marriage creates no special property rights, each spouse retaining whatever property they may have owned prior to marriage. During the marriage each spouse can acquire and divest property independently. The courts have a role under s79 of the *Family Law Act*, whereby they can alter the property interests of parties to a marriage.[15]

Sections 75(2) and 79(4) of the *Family Law Act 1975*

8.22 Section 79(1) of the Act states: *'...the Court may make such order as it considers appropriate altering the interests of the parties in the property....'* In altering the interests of the parties, matters to be taken into account are specified in sections 79(4) and 75(2).

8.23 Section 79(4)(e) provides that 'the matters referred to in sub-section 75(2) so far as they are relevant' are to be taken into account. Section 75(2) of the Act gives to the Court direction on matters to be taken into account in the determination of spousal maintenance. These sections state:

> *79(4) In considering what order (if any) should be made under this section in proceedings with respect to any property of the parties to a marriage or either of them, the court shall take into account -*
>
> *(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;*
>
> *(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the*

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15 The role of the courts in this area is confined to property disputes between married couples. They have no part to play under the *Family Law Act 1975* in disputes between de facto couples.

marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of the, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent;

(d) the effect of any proposed order upon the earning capacity of either party to the marriage;

(e) the matters referred to in sub-section 75(2) so far as they are relevant;

(f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and

(g) any child support under the ***Child Support (Assessment) Act 1989*** *that a party to the marriage has provided, or is to provide, for a child of the marriage.*

75(2) The matters to be so taken into account are -

(a) the age and state of health of each of the parties;
(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years;
(d) commitments of each of the parties that are necessary to enable the party to support:
  (i) himself or herself; and
  (ii) a child or another person that the party has a duty to maintain;
(e) the responsibilities of either party to support any other person;
(f) subject to subsection (3) the eligibility of either party for a pension, allowance or benefit under -
  (i) any law of the Commonwealth, of a State or Territory or of another country;

(ii) *any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia,*

and the rate of any such pension, allowance or benefit being paid to either party;

(g) *where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;*

(h) *the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;*

(j) *the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;*

(k) *the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;*

(l) *the need to protect a party who wishes to continue that party's role as a parent;*

(m) *if either party is cohabiting with another person - the financial circumstances relating to the cohabitation;*

(n) *the terms of any order made or proposed to be made under section 79 in relation to the property of the parties;*

(na) *any child support under the* ***Child Support (Assessment) Act 1989*** *that a party to the marriage has provided, or is to provide, for a child of the marriage; and*

(o) *any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.*

8.24 The problems with the inter-relationship of the two sections are well set out in the Family Court's submission. The Court points out that, while many of the matters referred to in s75(2) are usually relevant, some are not.[16] There is also the problem of the relative weight to be accorded the matters listed in the two sections and there is no guidance in the legislation, an omission criticised by the Court:

> The form in which [the matters] are presently incorporated into ss 79(4) might tend to suggest that they are of less importance than the matters otherwise spelt out in that sub-section.[17]

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16 Submission 940, Vol 30, p 5992

17 ibid

8.25 The Court points out that one result of the provisions as they are currently written is the potential to overlook relevant matters. The submission states:

> When read in conjunction with the express provision in ss79(4)(d) ('the effect of any proposed order upon the earning capacity of either party to the marriage') the obligation of the Court for instance to give consideration to the possible sale of a farming property, or the difficulties facing a spouse in financing a payment to the other spouse, may tend to be overlooked.[18]

8.26 The Court's submission refers to the High Court case in the matter of **Collins** (No. S76 of 1990), where the argument was advanced that the matters listed in s75(2) could be interpreted to be of lesser weight than the other matters listed in s79(4) because of the way the legislation was written. The High Court refused special leave to appeal, but the Court argues that the ground of appeal is symptomatic of some confusion in the interpretation of the section.[19]

8.27 The Hambly report also addressed this problem, stating that the Act provides no guidance on the relative weight of the listed matters, nor how a conflict between opposing factors should be resolved. All this is left to the Court's discretion and that of individual judges.

8.28 The problem of the Family Court's discretion was particularly highlighted in the case of **Norbis v Norbis**, [1986], FLC, 91-712, where the wife had appealed to the Full Court of the Family Court. That court held that the approach adopted by the trial judge of isolating the individual items of property and assessing the proportions in which the parties should be seen to have an interest in each item was inappropriate in the great majority of cases and was not appropriate in Norbis' case. The Full Court held that, in the case of a marriage of long duration where there have been countless changes in the family fortunes generally, and perhaps of major assets in particular, the most the Court can do is to take into account all the matters referred to in s79(4) and fix an overall proportion on a global view of the totality of the assets to be divided. The husband appealed to the High Court. The High Court upheld the appeal, stating that both the global and asset by asset approaches were valid, and while the Full Court was entitled to prescribe the adoption of the global approach as a guideline in the majority of cases, the adoption of the alternative was not an error of law.[20]

8.29 With reference to s75(2) and s79(4) the Committee considers that the legislation as it is currently written does not give sufficient guidance to the courts in the matters to be considered in the determination of a property settlement and the relative weight to be ascribed to those matters. There would be benefit in a more specific legislative scheme being developed, which gives appropriate guidance to the courts.

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18 ibid
19 ibid
20 **Norbis v Norbis**, [1986], FLC, 91-712, at 75,163

Specifically, the Committee concludes that the sections setting out the factors to be taken into account in the alteration of property interests and the factors to be taken into account in relation to spousal maintenance should be combined. This amendment to the legislation is consistent with the Committee's recommendations in relation to a structured discretion, using the relevant factors of both sections.

Recommendation

8.30 The Committee therefore recommends that:

70 the *Family Law Act 1975* be amended to combine the relevant matters to be taken into account under section 75(2) and section 79(4) for the purposes of alteration of property interests.

Submission comment

8.31 Three broad issues have been predominant in submissions:

8.31.1 the length of time and expense involved in achieving a post-separation property settlement;

8.31.2 the perceived imbalance between the percentage of property which is being awarded to custodial parents - mainly women - in recent times and that which is awarded to non-custodial parents - mainly men; and

8.31.3 costs of proceedings (which are discussed in Chapter Fourteen).

8.32 A submission from Victoria suggested that:

> Property division at the time of settlement should be set down at 50/50 division of all assets, this would, in line with the current no blame 'Dissolution of Marriage', show no blame to the other party. The effect would be threefold a) property could be divided, without blame on either party, b) court time would be minimised, in that, a hand up brief is all that would be required, c) fairness would be seen to be done to both parties.[21]

8.33 Another submission supporting equal distribution of property, stated:

> The *Family Law Act* states that property should be shared on the basis of 'contributions' made. Unfortunately many major contributions cannot be

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21 Submission 91, Vol 2, p 508

measured, eg, the value of housework, the loss of career prospects due to child rearing, etc. I suggest the practical approach is to divide the marital property equally.[22]

8.34 A further submission supporting equality as a starting point stated:

> With regards to most family houses they are started by a pool of funds either put together at the marriage or it is saved after their marriage, in the form of a deposit for a house and both pay of a mortgage. It seems that once again a 50-50 split should be the proper thing to do, regardless of where the children go.[23]

8.35 The Family Law Reform Association of Queensland stated that the division of property should not be based upon who has custody of children as this creates incentive for battles for custody of the children, and continued:

> Property acquired in the time span of the marriage should be divided equally, with both parents having to support the children according (to) their means.[24]

8.36 The submission from the Rockhampton Branch of the Lone Fathers Association succinctly summarises the sentiments of other submissions to the inquiry when it stated:

> The present division of property is inadequate. This is because there is not a basis of equality or fairness within the legislation as it exists. Far too much discretion remains with the court on this matter. The only acceptable basis is the notion of a 50/50 split in relation to the property of the marriage, ie property acquired within the marriage.[25]

8.37 The Association argued for a more defined scheme of property division:

> Property settlement, to be fair and acceptable should include:
> 1. The notion of a 50/50 split for property acquired during the marriage.
> 2. The recognition of pre-nuptial property division contracts.
> 3. The exclusion from that deemed to be property of the marriage, assets acquired before the marriage, or property which has been or is identified as belonging to a particular family line.

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22 Submission 114, Vol 3, p 589
23 Submission 180, Vol 4, p 910
24 Submission 322, Vol 7, p 1518
25 Submission 329, Vol 7, p 1606

> If this model was adopted the likelihood of disputes would no doubt disappear and a further freeing-up of the court system would provide savings to the taxpayer. Clear guidelines have to be given in the statute to allow parties to determine their legal status in relation to property.[26]

8.38 The submission from the Domestic Violence Crisis Service Inc supported the implementation of the Hambly Report. The submission stated:

> In property...matters, the present extent of discretion causes uncertainty, which in turn polarises parties, hinders early settlement, and increases costs. It enables the party in control of the assets and finances to protract the dispute and withhold financial relief to the party in need. We endorse the recommendations of the Aust. Law Reform Commission in their Report tabled on 17 September 1987.[27]

8.39 The President of the Lone Fathers Association of Australia, Mr Barry Williams, stated in support of equal sharing:

> I believe that property acquired after the marriage should be split 50:50. This includes any superannuation entitlements and insurances. The argument that the custodial parent should receive a larger amount because of the children is no longer a factor since the non-custodian now has to pay a large amount of his income in child support until the children are 18 years old.[28]

8.40 The submission from the National Women's Consultative Council (NWCC) supports the basic rationale underlying the *Family Law Act* in relation to property disputes. The NWCC stated:

> ...there be a clear recognition of the contribution of both parties to a marriage to the accumulation of assets during marriage. Prior to the *Family Law Act* there was no recognition in matrimonial law of the contribution traditionally made by women to property in marriage, namely by way of childcare, housework, husband care and home and garden maintenance.
>
> The NWCC believes the *Family Law Act* has also been important in acknowledging indirect financial contribution to property, through (for example) the payment by one party of food bills and other non-durable items, enabling the other party to make mortgage payments (or other payments directly related to property accumulation - such as renovations

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26 Submission 329, Vol 7, p 1607
27 Submission 351, Vol 7, p 1803
28 Submission 371, Vol 7, p 1876

or extensions to homes etc). A women in paid employment frequently pays for the non-durables, whilst the income of her husband is more likely to pay off the mortgage.[29]

8.41 However, the NWCC added that there are some problems with the division of matrimonial property and recommended:

> The NWCC recommends that the *Family Law Act* should be amended to ensure that the discretion of the Court in determining contributions to property is curtailed. The Act should include a provision that all property of the parties to a marriage acquired or accumulated from the date of commencement of cohabitation to the date of separation shall be deemed to be owned in equal shares by them. The Court shall have the power to depart from this deemed assessment only in prescribed limited circumstances - for example in the event of a gift or legacy from the family of one of the parties.[30]

8.42 The Council also recommended that all assets accumulated during the marriage should be seen as owned in 50/50 shares by the parties.

8.43 One submission stated that 'it would be an ideal position for all concerned that the parties should be encouraged to come to an amicable arrangement over property matters, and the court's role is to formally endorse that'[31].

8.44 The Committee received many accounts of proceedings where the parties were unsatisfied with the decisions of the Family Court. The submissions to the Committee suggest that there is a considerable amount of anguish, with the view that the 'wrong-doing spouse [is] cleaning out the other spouse'.[32] These submissions contain a strong philosophical objection to there being no consideration of fault and the perceived inequality that results in the division of property. The submissions indicate a strong feeling that the 'innocent' party is suffering financially.

8.45 While many complaints have been made to the Committee in written submissions, it is difficult to assess accurately how widespread such complaints are, given the possibility that the Committee might be hearing from a 'skewed sample', the aggrieved parties rather than from those amicably settling their proceedings. However, complaints that have been made to the Committee cannot be ignored.

8.46 The Committee has received evidence, particularly from the Family Court of Australia, that approximately five per cent of cases proceed to adjudication by a judge.

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29 Submission 873, Vol 26, pp 5199-5200
30 ibid, p 5208
31 Submission 401, Vol 10, p 2025
32 Transcript, 29 May 1992, p 1955

Notwithstanding this low percentage, one of the vexing issues in the resolution of property disputes is what happens to the other 95 per cent of matters dealt with by the Court. While the Family Court may keep an account of the outcomes of those matters which proceed to trial, there appears to be no accurate analysis of what may be called the 'mysterious 95 per cent' of cases. From evidence to the Committee, it appears that a significant proportion of the 95 per cent settle prior to trial because they are emotionally drained, they can no longer afford the escalating legal costs or they are concerned to prevent further disruption to their children's lives.

8.47 The comment has also been made to the Committee that, since the mid-1980's, the level of property awards to custodial parents, usually mothers, has increased markedly relative to the non-custodial males, and that the Court is now erring too far in favour of the custodial parent. A large number of submissions to the inquiry suggest that the balance has swung too far in the opposite direction in favour of custodial parents. Given the much higher level of support required under the Child Support Act than that which was previously awarded by the courts, the combined effect of the Child Support Act legislation and substantial property settlements to the custodial parent has been to condemn the non-custodial parent - predominantly male - to a very meagre existence.

8.48 The resolution of property disputes is often linked with the question of maintenance. While maintenance and the operation of the Child Support Scheme are outside the Committee's specific terms of reference, the Committee has been inundated with complaints on the operation of the Child Support Scheme, maintenance payouts and property settlements. There has been an extensive amount of anger and frustration expressed in submissions and correspondence to the Committee regarding the level of payments required by the Child Support Agency, and by a perceived failure to adjust the level of payments to accord with the capacity of the non-custodial parent to pay, following a property settlement. Complaints have also focused on the necessity to pay a proportion of salary/income and the requirement that the new spouse's income is taken into account in the assessment of the non-custodial spouse's income. The Committee is very concerned at the anger and frustration expressed to it by many non-custodial parents and their new spouses, many of whom are suffering the inequities only now becoming apparent in the operation of the Child Support legislation. This scheme is discussed further in Chapter Sixteen.

The Family Court's submission

8.49 The submission from the Family Court began with an analysis of the Hambly Report. However, it is clear there is a divergence of views regarding the implementation of that report within the Court. In its submission the Court has attempted to present its views on what is a controversial topic. One view is that there are now compelling reasons for a change in family law property in Australia, by providing a more structured discretion than the current system provides. This view supports the

Hambly proposals to provide specific guidance to the courts, but still retain enough flexibility to meet the special needs of particular cases.

8.50 The alternate view within the Court suggests that there should be no legislative or judicial presumption of equality of distribution of property between spouses. This view follows the High Court's decision in Mallet's case,[33] which rejected the approach taken by the Full Court of the Family Court where equality was presumed as the starting point in the division of matrimonial property in marriages of long standing.

8.51 Mr Justice Fogarty in the Family Court's submission, largely supports the direction of the Hambly proposals. His Honour stated that:

> It is important to have legislation which provides a fair, just and predictable system of property settlement for the present and the long-term future within the Australian setting.[34]

8.52 Mr Justice Fogarty argues that the 'complexities of a small minority of cases should not prevent the establishment of clear rules which will be applicable to the vast majority'.[35]

8.53 The Family Court is developing a database to give to Judges clearer guidance on the matter of property apportionment. The database will provide details of all property settlements decided by the Full Court since April 1988. The purpose of setting up the database is as follows:

> One benefit sought ... is to make available to decision makers the prompt retrieval of other decisions in like cases which can indicate awards establishing such a 'range' usually in percentage terms ... Discretions hopefully can be assisted by indications of the weight given to various factors in prior determinations, particularly in cases where decisions at first instance have been validated on appeal.[36]

The case law

Mallet v Mallet

8.54 In the case of **Mallet v Mallet**, [1983-84], 156 CLR, 605 - 650, the High Court held that in exercising of the discretion conferred by s79 of the *Family Law Act*

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33 **Mallet v Mallet**, [1984], 156 CLR, p 605
34 ibid
35 Submission 940, Vol 30, p 5972
36 Elliot, J, 'Data Base Index for Property Cases', Paper to Judicial Development Conference, Queenscliff, 12-14 February 1992, p 1

the court should not start with the assumption that the property should be divided between the parties in predetermined proportions.[37] The parties in this case had been married for 30 years and had approximately $700,000 worth of assets. Approximately one third of these were in joint names, $260,000 was in the husband's name and there were $170,000 worth of shares in a company called Mallet Holdings Pty Ltd. The case went on appeal to the High Court from the Full Court of the Family Court, to which the wife had successfully appealed a decision of a single judge of the Family Court.

8.55 In this case the High Court stated that the Parliament had not required the power granted under s79 of the Act to be exercised in accordance with fixed rules, but had conferred a very wide discretion - there were only some broad principles to which the court was required to give effect and some circumstances which it was required to take into account. The court further stated that there was no guidance as to the relative weight to be accorded to the different considerations - it was entirely a matter for judicial discretion.[38]

8.56 The court went on to say that while it had been ruled in some cases that in long marriages equality should be considered the normal starting point that:

> ...the Parliament has not provided, expressly or by implication, that the contribution of one party as a homemaker or parent and the financial contribution made by the other party are deemed to be equal, or that there should, on divorce...be an equal division of property, or that equality of division should be the normal or proper starting point for the exercise of the court's discretion. The respective values of the contributions made by the parties must depend entirely on the facts of the case and the nature of the final order made by the court must result from a proper exercise of the wide discretionary power...unfettered the application of supposed rules for which the *Family Law Act* provides no warrant.[39]

8.57 It should be noted that the judgment in this case was a 3-2 split, with the minority judges affirming the Full Court of the Family Court's decision, and noting in their judgments that the original judge had failed to give real weight to the way in which the assets which were in the husband's name had been acquired, nor to the future financial potential of the parties.[40] However, all judges agreed that there was no established principle of a 50:50 starting point and that it was properly a matter for judicial discretion. The only means of overturning a decision made by a judge exercising judicial discretion is to be able to show that the judge made some error in exercising his discretion, for example by taking into account irrelevant considerations, by failing to take into account relevant considerations or by giving undue weight to a particular factor. The

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37 at p 606
38 at p 608
39 Gibbs CJ at 610
40 Mason J at 620

decision must have resulted from an error of law and not simply be a different decision from that which could have been made by a different judge or court.

Legislative changes and subsequent case law

8.58 In 1983, Mallet's case was heard by the High Court at the same time as amendments to the *Family Law Act* were passed in Parliament. This Act amended, inter alia, s79, which prescribes the matters to be taken into account in deciding a property order. In particular, the court was to specifically consider the following:

> 79(4)(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent.

8.59 The other amendment was to subsections (a) and (b), where the following words were added:

> 'whether or not that last mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them'.

8.60 The Explanatory Memorandum to the bill contained the following explanation of the purposes of the proposed s79(4):

> ...to revise sub-section 79(4) to remove the possibility of an interpretation of the subsection requiring that there be a nexus between a spouse's contribution and a specific item of property, and also to put beyond doubt that a contribution to property subsequently disposed of can be taken into account in such proceedings.

8.61 In **Mallet v Mallet**, both the Family Court and the High Court had taken an asset by asset approach to the assessment of the property of the parties. However, the ultimate effect of the 1983 amendments was to promote what the Family Court terms the 'global' approach, where the assessment of the relative contributions of the parties is most expressed in terms of the total value of the combined assets. In **Norbis v Norbis,** [1986] FLC, 91-712, Wilson and Dawson JJ stated:

> If, as we understand to be the case, the so-called global approach requires no more than that the whole of the assets of the parties be identified and, so far as possible, assessed in value before any alteration of property interests can take place under s79, then it is a requirement, which, as a general rule, is imported by the section itself. It would not ... ordinarily be possible to assess the contributions made directly or indirectly by or on

behalf of the parties to the marriage for the acquisition, conservation, or improvement of the property or otherwise in relation to the property as required by s79(4)(a) and (b) if the whole of the property were not identified and valued.[41]

8.62 The case of **Napthali v Napthali**, (1989), FLC, 92-021 consolidated the global approach. In this case the wife appealed to the Full Court of the Family Court against the finding that the assets of the parties were in two categories. The Full Court allowed the appeal finding that:

> It was not permissible for the trial Judge to draw the distinction which she did between matrimonial and business assets. In the case of a wife whose role is primarily that of homemaker and parent, her contribution under sec. 79(4)(a), (b) and (c) is not to be taken as being confined to the former matrimonial home but extends to the whole of the parties' assets, including the business;
>
> The trial Judge did not consider the wife's contribution to the business assets as a homemaker and parent.[42]

8.63 The Full Court followed the High Court decision in **Mallet v Mallet**, where, despite the proposition of a presumption of equality being rejected, the High Court had approved statements of the Full Court of the Family Court as to the purpose of s79(4)(b), ie to give recognition to the housewife who, by her attention to the home and children, free the husband to earn income and acquire assets. The High Court had also approved the proposition that the wife's contribution as homemaker and parent had to be recognised in a substantial way.[43]

Options for reform

8.64 The Committee considers that there are two major options for the resolution of property disputes:

8.64.1 broad judicial discretion as is the case at present; and

8.64.2 the establishment of a property regime, which leaves some room for judicial discretion, based on legislative guidelines.

8.65 There are a number of major factors which should be considered in the determination of a property settlement. These factors include the length of the marriage,

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41 at p 75,173
42 **Napthali v Napthali**, [1989], FLC, 92-021 at 77,352
43 ibid

the relative contribution of each of the parties at the commencement of the marriage, the financial contribution made by each of the parties during the marriage and the contribution of the parties to the home making and child rearing responsibilities.

Judicial discretion

8.66 Unfettered judicial discretion was endorsed by the High Court in the case of **Mallet v Mallet**,[44] as discussed earlier, when that Court held that, in exercising the discretion conferred by s79 of the *Family Law Act*, the Court should not start with the assumption that the property should be divided between the parties in predetermined proportions.[45]

8.67 Judicial discretion was described as being extraordinarily wide in **De Winter** (1979) FLC 90-605.[46] As already stated, the exercise of discretion has been criticised, because it can vary from judge to judge and case to case. In another High Court case, **Norbis v Norbis** (1986), FLC 91-712, Brennan J stated that 'unfettered discretion is a versatile means of doing justice in particular cases, but unevenness in this exercise diminishes confidence in the legal process'.[47]

8.68 The boundaries of discretion may become extraordinarily wide, if a literal interpretation is to be made of another statement by Brennan, J in the case of **Norbis**:

> The 'general ambit within which reasonable disagreement is possible' is wide indeed when there are a number of factors to be taken into account and the comparative weight to be attributed to those factors is not clearly indicated by uniform standards and values of the community. The generous ambit of reasonable disagreement marks the area of immunity from appellate interference.[48]

8.69 If a trial judge prefaces a judgment by using words such as 'in the exercise of my discretion in the particular circumstances of this case', intervention by an appellate court is inhibited. Also, if a decision falls within what may be termed an acceptable range of discretion, an appeal would be unlikely to succeed. If, on the other hand, the decision does not fit within that range an appeal court would exercise its discretion to bring the decision back within the acceptable range. Guidelines are required to control the exercise of discretion.

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44 [1983-84], 156 CLR, 605 - 650
45 at p 606
46 at p 78,092
47 at p 75,176
48 at p 75,178

8.70 The Committee has received many submissions critical of the unpredictability of the outcome of cases, from individuals and from the legal profession, who find it impossible to properly advise clients as to the best course of action open to them. However, some submissions to the Committee, including that from the Law Council of Australia, suggest that the current system should be retained as the majority of property settlement cases do not proceed to trial:

> The vast majority of property settlement cases do not proceed to trial because the property settlement factors taken into account are well known to the legal profession. They are either resolved before the issue of legal proceedings or, if proceedings are issued, well before those proceedings come to trial.[49]

8.71 Advocates supporting the retention of a wide discretion argue that, because each case is different, the exercise of discretion is necessary. The submission from the Law Council of Australia states that the exercise of discretion, particularly in relation to property, should be retained and it suggests that the push to limit discretion is only coming from a limited sector of the community.

8.72 The Law Council argues that discretion should be retained, given the ability of the court to take into account a very wide range of factors.[50] The Law Council does acknowledge that such a system enables variations in approach, but concludes that 'some levels of variation in approach are inevitable in any discretionary system and alternative approaches are not suited to Australia'.[51]

8.73 The Committee has considered whether the statements concerning the exercise of judicial discretion is an accurate assessment of the situation or whether the majority of cases settle for other reasons. The discussion and case law are illustrative of, firstly, the difficulties inherent in the exercise of unfettered judicial discretion and, secondly, the absence of predictable and consistent interpretation of the Act or much guidance for parties to proceedings needing to make decisions regarding particular courses of action.

8.74 In commenting on the exercise of discretion a submission from the Northern Territory stated:

> I entered the marriage with my husband with considerable debt accrued by the husband. When I left the property accrued was a multi million dollar concern. When I eventually got to court - my exhusband did not honour two out of court property settlements - after four years - the ex husband had access to the millions. I had a debt of $260,000, he had money to pay

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49 Submission 415, Vol 11, p 2248
50 ibid, p 2253
51 ibid, p 2254

for accommodation for various people he had coerced into writing affidavits against me.

I had to prove my contribution. I ended up with a disproportionately small amount of the value of the assets - my only recourse would have been to appeal, I had considerable debts and although I was incensed by the judges' decision and comments, there was no possibility of me appealing as estimates of the cost of appeal were a minimum of $70,000.[52]

8.75 In support of equality of sharing, another submission stated:

In property (and Stage I maintenance) matters, the present extent of discretion causes uncertainty, which in turn polarises parties, hinders early settlement, and increases costs. It enables the party in control of the assets and finances to protract the dispute and withhold financial relief to the party in need.

We endorse the recommendations of the Aust. Law Reform Commission in their Report tabled on 17 September 1987. Essentially, these recommendations suggest a rehaul of the Family Court's property powers by establishing a property formula. From a starting point of equal division of matrimonial property, the Court could then vary the shares by discretion if a party can show:

- a substantially greater contribution (financial or non-financial) than the other party;
- actions of the parties in relation to property or child care after separation (such as repayment of debts, or wilful default in maintenance of children);
- that one party has the benefit of financial resources built up during the marriage;
- that one party brought property into the marriage or acquired it by way of gift, inheritance, compensation or damages.[53]

8.76 Another submission briefly stated:

Property settlement should be on the basis of a 50 50 split after taking into account the amount of property that both parties bring into the marriage and any inheritance that either party brings into the marriage. This would act as a disincentive to any person obtaining a divorce and property

52 Submission 66, Vol 2, pp 426-7
53 Submission 351, Vol 8, p 1803

settlement for great economic advantage that I believe that the custodial parent obtains now.[54]

8.77 The ACT Council on the Ageing made the following comment:

> People aged 65 years and over should be entitled to a 50/50 division of property as there is little chance of either partner re-entering the paid workforce or acquiring more assets. In such divisions of property, though the male partner may have earned the greater proportion of the assets, it should be borne in mind that the female partner will, in all likelihood, live longer. Such division of property should be subject to the exercise of residual discretion in special cases as currently applies.[55]

8.78 A submission from Professor Bailey-Harris in South Australia stated:

> I submit that the discretion currently exercised by the Family Court of Australia under s79 of the *Family Law Act 1975 (Cth)* is currently too wide, with consequent unpredictability of outcome and discouragement of settlements. More specifically, the breadth of judicial discretion leads to wide variations of outcome in two particular respects: the 'weighting' accorded to the homemaker/parent contribution under s79(4)(c), and the adjustment given for 'prospective' considerations under s79(4)(e).
>
> The simple way to solve these problems is to implement the recommendations of the Australian Law Reform Commission's **Report No. 39: Matrimonial Property** (1987). As is well known that Report recommended clearer articulation of the Act of guidelines on the process and principles of property distribution. There would be a **starting point of equal shares** of property, to recognise equality of different contributions made through role-division to a joint relationship. This would apply to business assets as well as assets such as the home, in order to remedy the injustices currently produced in the outcome of 'business empire' cases through underweighting of the homemaker/parent's contribution.[56]

A fixed formula

8.79 The other option for the settlement of property disputes is that of a fixed formula. The introduction of a formula would severely restrict the exercise of discretion by courts exercising jurisdiction in property matters. In evidence to the Committee, the Chief Justice of the Family Court stated that:

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54 Submission 458, Vol 14, p 2734
55 Submission 398, Vol 9, pp 1990-1
56 Submission 710, Vol 21, p 4095

> The only benefit of a fixed formula would be certainty. There is no doubt about that. But, I think we have seen the sorts of problems that can emerge with a fixed formula with the child support scheme. It can be productive of injustice and our system is really operated on the basis that each person's case is an individual case which should be looked at as such. If you impose a formula, I am sure that our workload would go down but I doubt whether the end result would be a particularly just one.[57]

8.80 The Chief Justice went on to say that:

> There are myriads of changes in fact situations which affect decisions in property cases. The difficulty with a formula approach is that it might be fine to say after a marriage has been in existence for 15 years and the parties have built up assets together that, sure, somewhere roundabout the fifty-fifty is a reasonable starting point. It is a bit different if the marriage has only been operating for two years and one party brought a lot of assets and the other brought nothing. There are so many variables, it seems to me that there is a risk with a formula that you will produce what more people will perceive to be an injustice than you have now.[58]

8.81 The Chief Justice stated that the Court would clearly be of the view that the existing system of discretion would be preferable to a more structured regime.[59] The Chief Justice advised that the Full Court has been setting down firm guidelines for the resolution of property disputes.[60] In evidence, it was argued that the Court is able to deal with cases individually on a just basis.[61] While the Court recognised the legal profession's concern regarding its inability to advise clients on the probable outcome of a property settlement, the Court suggested that competent lawyers ought to be able to develop a sound feeling as to the likely result of specific cases.[62]

8.82 The Law Council of Australia did not subscribe to the view that judicial discretion was a major factor in the reason behind parties settling their disputes,[63] but that people settle for a variety of reasons; some do not like the pressure involved in court proceedings, some cannot afford the costs, some want to get on with their lives, and some really do not have a factual basis for pursuing their case.

8.83 The Committee feels that the Family Court relies upon the fact that a large number of property disputes are resolved at the conciliation conference stage and that parties seem to be able to come to an agreement within a few per cent of what may have

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57 Transcript, 29 May 1992, p 1939
58 ibid
59 ibid, p 1946
60 ibid, p 1945
61 ibid, p 1946
62 ibid
63 Submission 415, Vol 11, p 2248

been the likely result had the matter proceeded to hearing. The Committee accepts that a large percentage of cases do settle, however, the reasons why these cases settle are anecdotal and as stated above, there is no accurate account of the outcomes of those matters which do not proceed to trial.

8.84 The Institute of Family Studies argues that the adjustment and post-separation opportunities for many spouses and children are likely to be more influenced by social security, taxation, employment, child care and housing policies, laws and programs than by the *Family Law Act* provisions.[64] The Institute also argues that peoples' perceptions of their experiences, and the prolongation of bitterness and conflict, may be as influenced by their distress at the relationship having come to an end or their belief that they have 'lost' their children, spouse and/or house, as by the particular provisions of the Act or the advice they have been given. The Institute states that parties bargain 'within the law's shadow, the shape of which is gleaned from lawyers and other separated people'.[65] The Institute acknowledges that while no law will be able to satisfy everyone, the lack of specificity in the relevant *Family Law Act* provisions casts doubt on the capacity of those provisions to provide just, equitable and predictable outcomes in financial settlements.

8.85 The study of the Australian Institute of Family Studies, **Settling Up**, stated that:

> The evidence in the study suggests that contributions to non-basic assets, such as businesses, other assets and superannuation, have a major impact on relative shares of property but that relative contributions to the basic assets, such as house and furniture, have little bearing on outcomes. It therefore seems that basic contributions to the family are assumed by those involved to be roughly equal and that arguments related to a greater contribution by one partner are restricted to contributions to non-basic assets.[66]

Conclusions

8.86 In analysing the approaches to the resolution of property disputes the Committee believes the major difficulty involved is in reconciling the two objectives of firstly, achieving equity, justice and fairness for parties and their children and secondly, the ability to provide more predictability and certainty in the outcome of disputes.

8.87 It was argued to the Committee that the present provisions in the *Family Law Act* provide a high degree of flexibility which enables the courts to exercise a wide

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64 Submission 777, Vol 24, p 4645
65 ibid
66 AIFS, op cit, p 192

discretion meeting the needs of individual cases and that the present legislation also achieves a balance between contributions and needs. Many submissions to the Committee referred to an imbalance between the rigidity of the Child Support Scheme and the wide discretion exercised by the courts in the allocation of property.

8.88 It is evident to the Committee that, based upon the written submissions, oral evidence and commentary on the family law system, there is a divergence of views in relation to the proper resolution of matrimonial property disputes under the *Family Law Act*. The Committee is fully aware of the emotional and financial consequences of a breakdown of the family situation. However, it is hoped that the recommendations of the Committee will assist the courts to enable parties to a dispute to come to acceptable and workable arrangements. It is important that any misleading perceptions within the community surrounding the resolution of matrimonial property disputes be clarified and that certainty and predictability in the resolution of disputes is enhanced.

8.89 While the Committee does not support the introduction of a formula for the resolution of property disputes, it considers that discretion should be more structured. Reference has been made to the uncertainty of practitioners being able to advise clients as to the outcome of cases. In this respect, the Committee agrees that it is preferable for guidelines to be established in the legislation rather than to rely upon judicial guidelines as expressed by the Full Court of the Family Court. The Committee is of the view that the existing law is too vague and general, promoting uncertainty in an area where certainty is desirable in the majority of cases.

8.90 The Committee is cognisant of the need to achieve a just and equitable outcome in the resolution of property disputes. The Committee supports the recommendations of the Hambly Report discussed in paragraph 7.16 above. Matters for consideration in the determination of a property settlement must include:

8.90.1 the custody of children;
8.90.2 the maintenance of children and the impact of child support legislation vis-a-vis property distribution;
8.90.3 the future needs of each spouse;
8.90.4 the financial impact on each of the parties;
8.90.5 property brought into the marriage (ie, the relative contribution of each of the parties at the time of the marriage);
8.90.6 the length of the marriage;
8.90.7 the home-making and child rearing contribution; and
8.90.8 the financial contribution by each person.

8.91 The Committee agrees with the conclusion reached by the earlier Select Committee 'that marriage today is coming to be recognised as a partnership equally founded in its economic aspects, upon a functional division of co-operative labour

between the spouses'.[67] A significant consideration for this Committee and for the previous Select Committee is 'the need to ensure that the law does not give the appearance that it acts in an arbitrary and capricious way to divest a person of property'.[68]

8.92 The Committee is concerned to balance the competing arguments for codification, thereby eliminating any potential capriciousness on the part of the Court, with that for judicial discretion, which gives to the Court the opportunity to take into consideration a wide variety of factors in the determination of a property settlement.

8.93 For these reasons the Committee is of the view that there should be a just distribution and the parties property and finances should be rearranged so as to enable distribution as fairly as possible between those parties. In this regard the Committee is of the view that a central point in the area of contribution is that, as a starting point, there should be a concept of equal sharing with limited exceptions enabling the exercise of discretion to depart from the equal sharing principle. The Committee is of the view that, in structuring the Court's discretion, it should not tie the hands of the Court completely to take account of the minority of unusual and complex cases. The Committee is of the view that the approach recommended will take account of the vast majority of cases and will meet community needs.

8.94 The Committee acknowledges the work of the Court in developing its database on property disputes and is of the view that the development of such a database would be a valuable assistance to Judges. The Committee firmly believes that the introduction of equality of sharing principles into a more appropriate legislative mechanism will provide a more certain guideline to the parties as to the outcome of the proceedings.

Recommendations

8.95 The Committee recommends that:

71 equality of sharing should be the starting point in the allocation of matrimonial property;

72 where a pre-nuptial or subsequent financial agreement exists, that agreement should be the starting point;

73 courts should have a discretion to depart from the equality of sharing principle to take account of exceptional circumstances;

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67 **Family Law in Australia**, op cit, p 105
68 ibid, p 106

74 **matters to be taken into account in exercising a discretion may include, but should not be limited to :**

74.1 the length of the marriage;
74.2 the care and control of children;
74.3 obligations incurred under the child support legislation;
74.4 the future needs of each spouse;
74.5 the financial impact on each of the parties;
74.6 the property brought into the marriage;
74.7 the home-making and child rearing contribution; and
74.8 the financial contribution by each person.

Order 24 Conferences

8.96 Order 24, Rule 1 of the Family Law Rules provides that:

where in any proceedings -

(a) the Court or the Registrar of a Family Court is of the opinion that it may be advantageous to do so, the Court or the Registrar may; or

(b) sub-section 79(9) of the Act makes it necessary to do so, the Court or a Registrar shall,

order the parties to attend a conference in relation to the matters to which the proceedings relate.

8.97 Under the Case Management Guidelines of the Family Court it is compulsory to attend an Order 24 conference in defended property proceedings prior to proceeding to trial. The purpose of the conference is to give the parties the opportunity to reach an agreement as to the matters in dispute prior to continuing to incur the extra expense of a trial. The Order 24 conference is an effective conciliatory procedure, with approximately 57 percent of matters being settled at this stage. Having regard to the fact that approximately only five per cent of matters proceed to trial, it may be assumed that further matters settle after the conference has been held, but prior to the hearing date.

8.98 Order 24 Conferences have a number of necessary characteristics. They are as follows:

8.98.1 parties attend in person with or without legal representation. (In practice, legal representation is encouraged at such conferences.);
8.98.2 the conferences are held in the presence of a Judicial Registrar, Registrar or officer of the Court specified. (In practice, Order 24

Conferences are conducted by Registrars or Deputy Registrars of the Court.);

8.98.3 the parties are required to make a bona fide endeavour to reach agreement on the matters in issue between them;

8.98.4 discussions at Order 24 Conferences are confidential and not admissible in a Court.

The Review of the Court

8.99 The Buckley Review acknowledged that the most common method of conducting conferences in the Court was not employed in all Registries of the Court. The submission from the Family Court provides a description of the usual format for a conciliation conference pursuant to Order 24 which is as follows:

> The usual format for an Order 24 conference is for the Registrar, having read the Court file in advance, to speak to the parties legal representatives to ensure all relevant information relied upon by the parties on the file, to determine the present position in relation to settlement negotiations, and to clarify any matters needing clarification in relation to either party's case or position in settlement negotiations. The Registrar then usually confers with both parties together and in the absence of their legal representatives, unless either party requests their legal representatives to be present. (Such requests are extremely rare).[69]

Submission comment

8.100 The Committee has received several complaints in relation to the conduct of Order 24 conferences. A common complaint is that the parties did not have the opportunity to confer with the Registrar conducting the conference and that the legal practitioners discuss matters behind closed doors with the Registrar. This would seem to be an undesirable practice as the parties are compelled to attend, often with legal practitioners, however, they are not given the 'opportunity to be heard'.

8.101 The Committee notes that there may be times when it is desirable for a Registrar to consult with one party and his/her legal adviser alone and then speak to the other party in an attempt to resolve the issue. The Family Court acknowledges that the parties have a right to be present at all stages of their conference, however, there may be exceptional circumstances where the parties will be excluded, with their consent, for a minimum period of time. There may also need to be some discretion in the conduct of Order 24 conferences, especially if, for example, domestic violence has occurred.

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69 Submission 940, Vol 30, p 6037

8.102 In evidence to the Committee the Chief Justice of the Family Court conceded that he was unhappy about the way Order 24 conferences were being conducted throughout the Court, particularly in view of the fact that the practices in relation to Order 24 conferences for historic reasons differed from Melbourne to Sydney to Brisbane to Adelaide.[70]

8.103 The Committee was advised that the Family Court has developed uniform procedures for the conduct of Order 24 conferences on a national basis. It is proposed that conferences will not be with legal practitioners alone but that the parties will be involved as far as possible throughout the whole of the proceedings. The uniform development of procedures on a national basis within the Family Court followed the Review of the Court discussed in Chapter Two.

8.104 The Committee endorses the progress of the Family Court in adopting uniform practices for the conduct of Order 24 conferences.

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70 Transcript, 29 May 1992, p 1995

CHAPTER NINE: SUPERANNUATION

The treatment of superannuation in family law
Previous reports
Submission comment

The treatment of superannuation in family law

9.1 The question of how superannuation should be taken into account in the division of matrimonial property has been a vexing problem for quite some time. The first Joint Select Committee summarised the difficulty when it said:

> The difficulty arises when one of the parties to a divorce has been a contributor to a superannuation scheme for a substantial period of the marriage and the other party claims an interest in the superannuation benefit to which the contributor will become entitled on retirement.[1]

9.2 The question of whether superannuation falls within the definition of 'property' under the *Family Law Act 1975* and how that asset is to be valued are very real problems for the courts. With the value of superannuation increasing in significance as an individual's personal savings and the proportion of the household income now being devoted to superannuation payments, the Committee feels that a just property assessment must include consideration of superannuation entitlements.

9.3 The following issues are pertinent in any discussion on the treatment of superannuation in family law:

9.3.1 whether or not superannuation can be considered to be property under the Act;

9.3.2 the characteristics of superannuation funds themselves and the implications these may have for proceedings in the Family Court;

9.3.3 the valuation of superannuation entitlements;

9.3.4 the method of effecting a final settlement which includes the consideration of superannuation.

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1 Joint Select Committee on the Family Law Act, **Family Law in Australia**, AGPS, 1980, p 95

Constitutional power of the Commonwealth

9.4 In relation to Commonwealth Constitutional power, the Attorney-General's Department discussion paper affirms the Commonwealth's constitutional power to legislate with respect to the treatment of superannuation in family law.[2] The paper states that a law enabling a court to order a trustee of a superannuation fund to comply with its directions falls within the power conferred by Section 51(xxi) and (xxii) of the Constitution.[3] These sections state:

> *s 51 The Parliament shall...have power to make laws...with respect to:*
>
> *(xxi) Marriage;*
> *(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.*

9.5 The Attorney-General's Department argues that, as part of the adjustment or alteration of financial interests of parties to a marriage, there is power to make a law enabling a court to order the trustees of a superannuation fund to pay part of the fund of the contributing spouse to the non-contributing spouse who is or was a party to the marriage.

9.6 The Committee notes that the 1987 Australian Law Reform Commission (ALRC) report[4] stated that the Commonwealth's constitutional power over superannuation is not complete. The ALRC was of the view that the powers under the Constitution in relation to insurance and financial companies could be used, but there would still be significant gaps.[5]

9.7 The major difficulty with the matrimonial causes power is that legislation empowering a court to bind third parties, in this case trustees of superannuation funds, may not be valid. In the case of **Ascot Investments Pty Ltd v Harper** (1981) FLC 91-000, the High Court held that the Family Court did not have power to make orders which would impose on a third party a duty which the party would not otherwise be liable to perform. A trustee of a superannuation fund is not liable to make payments other than in accordance with the trust deed. In his judgment Gibbs, J stated:

> It can safely be assumed that the Parliament intended that the powers of the Family Court should be wide enough to prevent either of the parties to a marriage from evading his or her obligations to the other party, but it does not follow that the Parliament intended that the legitimate interests

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2 Attorney-General's Department, **The Treatment of Superannuation in Family Law**, Discussion Paper, March 1992, p 15
3 ibid
4 Australian Law Reform Commission, **Matrimonial Property**, Report No 39, AGPS, 1987, p 208
5 ibid

of third parties should be subordinated to a marriage, or that the Family Court should be able to make orders that could operate to the detriment of third parties.[6]

9.8 In its report **Collective Investments: Superannuation**[7] the ALRC recognised the lack of constitutional power in the matrimonial causes area. The ALRC has suggested that this may be overcome by requiring superannuation schemes which seek tax concessions to have an incorporated responsible entity or to bring themselves within the ambit of the Commonwealth's power in respect of old-age and invalid pensions - that is, the corporations and/or pensions power under the Constitution. This may not, however, overcome the difficulty of binding third parties.

9.9 While the extent of constitutional power of the Commonwealth to legislate with respect to the treatment of superannuation in family law may be ultimately a matter for determination by the High Court, the Committee is of the view that legislative amendment to the *Family Law Act*, or any other appropriate legislation, wherever constitutionally possible, should be encouraged and if the power currently exists, then it should be used.

The definition of property

9.10 In relation to the distribution of assets, consideration must be given as to whether superannuation is 'property' for the purposes of the *Family Law Act*. 'Property' is defined under the Act to be:

> *in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.*[8]

Superannuation as a financial resource

9.11 Superannuation payments, either lump sum or pensions, which have already vested, form part of the pool of property, but future benefits are not property. In **Duff v Duff** (1977), FLC, 90-217 the Family Court held that 'property' is the most comprehensive of all terms and includes every possible interest a party may have. However, the leading case of **Crapp v Crapp** (1979) FLC 90-615, held that, while superannuation is a present entitlement to receive a benefit, it is not property until the event occurs which entitles the member to receive the benefit under the trust fund. The

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6 at p 76-061

7 Australian Law Reform Commission, **Collective Investment Schemes: Superannuation**, Report No 59, p 213

8 section 4(1)

Full Court of the Family Court held in **Noel v Noel**, (1981) FLC 90-035, that superannuation can be taken into account as a 'financial resource'.

9.12 The issue of whether superannuation should be matrimonial property for the purposes of the Act or continue to be considered as a financial resource is of fundamental importance. As stated, in proceedings for the alteration of property interests under s79 of the *Family Law Act*, superannuation entitlements have been considered as a financial resource, that is, a source of financial support which a party can reasonably expect to be made available in the future. Under s75(2)(b) of the Act, a financial resource is referred to as a matter to be taken into account by courts exercising jurisdiction under the Act.

9.13 In practice, it would appear that the difficulty with the financial resource approach is that it allows courts to give superannuation entitlements little weight or even to ignore the issue. It is the Committee's opinion that the case law has not provided a clear position on how superannuation should be treated.

The characteristics of superannuation funds

9.14 The number and type of superannuation schemes currently in existence in Australia vary immensely, ranging from employer sponsored schemes to schemes for the self-employed. These schemes provide various types of benefits ranging from a pension, a lump sum or a combination of both.

9.15 A superannuation fund is normally a trust. The trustee of the fund is the legal owner of the assets of the fund and administers the fund in accordance with the terms of the trust deed. It is the employee contributor to the fund who has the right to benefit under the trust deed, usually with an entitlement depending upon the occurrence of a fixed event, such as, retirement, retrenchment or death. In relation to family law the payment of an entitlement upon death causes a major problem as a 'dependent' has been defined to include a de facto spouse but to exclude a separated spouse and a former spouse.[9] Until such time as the contributor to the fund receives the benefit, s/he exercises no control over the funds, nor can the contributor 'assign their interest in the fund to a third party.

9.16 The Family Court lacks power to direct trustees to do anything that they are not legally bound to do under a trust deed in relation to any future entitlement or benefit under a superannuation fund. The High Court has held that the Family Court did not have the power to make orders which would impose on a third party a duty which the party would not otherwise be liable to perform.[10]

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9 **Public Trustee (SA) v Keays** [1985] FLC 91-651, p 80,247

10 **Ascot Investments v Harper** [1981], FLC, 91-000, and Keays case

The valuation of superannuation as a current asset

9.17 Government policy is geared towards superannuation being considered as future income. The difficulties in treating superannuation as a current asset is finding the resources to pay out the non-contributing spouse from existing assets as well as removing the retirement provision for the non-contributing spouse.

9.18 This problem was highlighted in the case of **Coulter v Coulter** (1990) FLC 92-104, where the parties were married in 1962 and separated in February 1985. At the time of the marriage the parties virtually had no assets, however by the end, actual assets had accrued to $422,000. The husband had contributed to a superannuation fund during the marriage and the trial judge concluded that part of the husband's present interest in the superannuation fund was a notional asset and valued it at $268,000. This notional asset was added to the actual assets, making the total property worth $690,000. In judgement the wife was awarded 55 per cent of the total property which meant that from the actual property available for distribution, the wife received 93 per cent and the husband 7 per cent.

9.19 The case highlights the problems inherent in paying from existing assets. It should be noted that an appeal by the husband to the Full Court was successful, the court holding that an adjustment should be made towards the husband.

9.20 The Hambly report outlined the major approaches to the valuation of superannuation adopted by the courts. These are:

9.20.1 the 'notional realisable value', which assesses the amount of benefit that would be payable if the member resigned at the date of separation or at the date of the hearing;

9.20.2 the 'discounted prospective benefit', which apportions the amount of benefit that would be payable on retirement in the same proportion that the period of cohabitation during which the member was a member of the scheme bears to the total period of membership of the scheme, and then discounts that figure to give its present value;

9.20.3 the 'take it into account' method, where the prospective benefit may be taken into account without a detailed inquiry into its value.[11]

9.21 If superannuation benefits are treated as a financial resource, the trial judge may choose any one of the above approaches in valuing a superannuation benefit to determine a settlement. The major problem facing litigants under the present system is the difficulty of predicting which of the superannuation valuation approaches will be

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11 **Matrimonial property**, op cit, pp 205-6

taken by the court and indeed how superannuation will be taken into account in the alteration of property interests between the parties. It may be argued that none of the above approaches is wrong and all are already within the discretion of a trial judge. Injustices could occur as the approaches are subjective and based on a speculative calculation.

9.22 Under the present system superannuation is an asset which is difficult to value in a justifiable manner. The 'notional realisable value' approach appears to have the advantage of certainty as a figure may be able to be determined by a trustee of the fund. The 'discounted prospective benefit' approach requires difficult calculations often needing actuarial evidence. The 'taking into account' method is also an arbitrary approach as no specific formula or figure is used as the basis of a settlement.

The approach of the courts

9.23 Any discussion on the valuation of superannuation entitlements must include some analysis of the historic approach to the problem by the courts. The Hambly report described the three ways of dealing with prospective superannuation entitlements by the courts. These are:

9.23.1 a deferred property order, where, as part of the property re-allocation, the court can order the contributing spouse to pay a lump sum or a fixed proportion of the benefit when it is received;

9.23.2 the adjournment of proceedings until superannuation benefits are received;

9.23.3 treating the entitlement as a financial resource, estimating its value and adjusting the property allocation to the non-contributing spouse accordingly.[12]

9.24 The Hambly report stated each of these approaches has some shortcomings.[13] The first two are really only realistic if the superannuation benefit is to be received in the near future. The first approach may be frustrated where the member dies before retirement as the court order is not enforceable against the trustee. The second approach is undesirable where retirement is a long way off and it is not appropriate to leave financial arrangements unresolved. Further, under s81 of the Act the court has a duty to end the financial relations of the parties - the 'clean break' principle. The third approach is unsatisfactory, in that it gives to the court unfettered discretion whether or not to include the entitlement at all and the way in which it is to

12 ibid, pp 204-205
13 ibid, p 205

be dealt with and is only suitable where there is enough property from which to compensate the non-superannuant.

9.25 Although there is power under the *Family Law Act* to adjourn proceedings until the prospective entitlement actually vests, a problem arises if the superannuant dies, in which case the benefits do not usually form part of an estate. Also, a deferred order, or deferred proceedings, are really only practicable when retirement is in the near future.

9.26 The main approach since the case of Crapp appears to be that an adjustment is made to present assets to compensate for the prospective enjoyment of superannuation benefits. This approach was endorsed by the Full Court in **Kelly v Kelly** (No 2) (1981) FLC 91-108, and supports the clean break principle in s81 of the *Family Law Act.*

9.27 Other matters which courts appear to take into account are the age of the parties, length of the marriage in conjunction with length of contributions to a scheme, the extent to which the fund has increased during the marriage, the ability of the non-member to contribute to their own scheme, other property/financial resources and the probability of future changes. In **Prestwich v Prestwich** (1984) FLC 91-569, the Full Court reviewed the three approaches listed above and held that there is no decided policy of the Family Court as to which should be its preferred approach, giving no guidance to litigants.

Previous reports

9.28 The problem has been discussed extensively in earlier reports and discussion papers. These include the report of the first Joint Select Committee on the Family Law Act, **Family Law in Australia**, the ALRC's 1987 report, **Matrimonial Property** and its 1992 report, **Collective Investment Schemes - Superannuation,**[14] a paper by the Family Law Council, published in 1987 and a discussion paper produced by the Attorney-General's department in March 1992, **The Treatment of Superannuation in Family Law.**

Report of the first Joint Select Committee

9.29 Even at the time of the first Joint Select Committee the incorporation of superannuation entitlements into property proceedings was a problem. The Committee recognised 'the increasing significance of superannuation as a family asset and the consequent necessity for the fair and proper treatment in the adjustment of property rights between divorcing spouses'[15] but, for a number of very good reasons made only

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14 **Collective Investment Schemes - Superannuation**, op cit
15 **Family Law in Australia**, op cit, p 96

limited recommendations, including the recommendation that the courts have the ability to defer the making of a final order until the superannuation benefit vests.[16]

Hambly report - Matrimonial Property

9.30 The Hambly report for the Australian Law Reform Commission discussed extensively superannuation as it related to the property of a marriage. The proposals in the Hambly report acknowledge deficiencies in dealing with superannuation which is reflected in the various approaches which have been adopted by the Courts. As the law has not changed since that report was published, many of the conclusions and recommendations in that report are still relevant.

9.31 The major problems identified and discussed in the report were:

9.31.1 the difficulties inherent in the nature of superannuation funds, where, until the contributor receives his entitlements, the interest in the fund is not something over which s/he has control; and

9.31.2 the difficulty of valuing superannuation entitlements.[17]

9.32 The report recommended that legislation ought to prescribe a general approach to the treatment of prospective superannuation benefits:

> Given the importance of the value of prospective superannuation entitlements in many marriages, and the unsystematic way in which these entitlements are, or are perceived to be, taken into account in property re-allocation, the *Family Law Act* should provide a clear method to ensure that prospective superannuation entitlements are adequately taken into account.[18]

9.33 In the report, the ALRC also recommended that there should be legislative change to include superannuation as matrimonial property. The ALRC noted the difficulty with this is that a prospective benefit would be deemed a current asset and may produce an imbalance on the division of available assets. The Commission further recommended that the value of the entitlement should be calculated on the basis of the value of the benefit that could be paid to the member spouse if he or she resigned from the superannuation scheme on the relevant day. However, the report argued that only a proportion of that value, corresponding to the length of the relationship, should be included in the property of the marriage.[19]

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16 ibid
17 **Matrimonial Property**, op cit, pp 204-205
18 ibid, p 210
19 ibid

9.34 Other recommendations included:

9.34.1 the authorisation of assignment of rights. The ALRC highlighted constitutional problems with this proposal as Section 51(xiv) of the Constitution specifically excludes State insurance schemes;

9.34.2 proposals to make a divorced spouse a beneficiary for the purposes of superannuation schemes;

9.34.3 the treatment of superannuation as a financial resource in some cases; and

9.34.4 the retention of the power to adjourn proceedings to provide flexibility.[20]

The Family Law Council

9.35 The Family Law Council (FLC) issued a working paper in 1987 entitled **Superannuation and Family Law.**[21] This paper commented on the ALRC recommendations and did not favour its approach. The FLC considered something needed to be done and that the desirable approach was to adopt the 'Singapore model'. Singapore has a national contributory superannuation system, which provides that, on separation, the fund splits the accumulated superannuation entitlements and creates a separate entitlement for each party. This effectively creates a roll-over fund for the non-contributing member. The Committee notes that the Singapore model is based upon a unitary national scheme, whereas in Australia there is a multiplicity of superannuation schemes within a federal system. The Commonwealth does not have the constitutional power over State superannuation schemes. The FLC noted that payment of notional property out of present day assets could cause hardship.[22] The FLC also considered the option of leaving the distribution of superannuation entitlements until payment was made or vested, but this view was rejected.[23]

1992 Australian Law Reform Commission report

9.36 In January 1992, the Australian Law Reform Commission published a discussion paper called **Collective Investment Schemes - Superannuation.**[24] This paper included a brief discussion of superannuation and family law issues. The ALRC noted

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20 ibid, pp 208-213
21 Submission 546, Vol 16, p 3188
22 ibid, p 3165
23 ibid
24 ALRC, **Collective Investment Schemes - Superannuation**, Discussion Paper No 59, January 1992

that, since its 1987 proposals, the position in relation to superannuation has changed markedly, particularly having regard to the government's retirement incomes policy and the integral part superannuation has in that policy.[25] This discussion paper preceded the ALRC's report of the same name. In its report the Commission identified two main issues, the principles to be applied to the allocation of interests in superannuation funds between parties to a marriage and the implementation of such principles in the most effective way.

9.37 The Commission concluded that, because the portion of the superannuation entitlements that is attributable to the period of the spouses' cohabitation should be seen as the joint product of the spouses' equal efforts, the approach that should be adopted should be that of equal sharing.[26] The Commission noted that the main problem under the present law was to find a satisfactory way to implement this principle, given the difficulty of valuing the entitlement. The Commission concluded that the most effective way to implement the principle would be to split the fund into two, giving to each spouse a continuing interest in the superannuation fund. This approach, called the 'split benefit' approach, solves the problem of 'paying out' one spouse and thereby denying that spouse a guaranteed retirement income. Each spouse would have a continuing interest in the fund and would result in an equitable solution providing retirement income.

9.38 The ALRC drew a distinction between accumulation and defined benefits schemes. In relation to accumulation schemes it recommended that the *Family Law Act* should be amended to empower a court exercising jurisdiction in proceedings with respect to the property of the parties to marriage to direct the responsible entity for the accumulation scheme, of which one of the parties is a member, to establish a new account for the non-contributing spouse. Under such a proposal the Family Court order would need to be obeyed, notwithstanding anything in the deed or other instrument establishing the scheme.

9.39 In relation to defined benefits schemes, the ALRC recommended amendment to empower the court to direct the responsible entity of a defined benefit scheme to establish a new account for the non-contributing spouse. It suggested the entitlement of the member should be divided between the parties according to a prescribed formula.

9.40 In its discussion the ALRC referred to taxation treatment of property transferred pursuant to an order of the Family Court and noted that such property is not subject to any tax or duty by reason of that transfer.[27] The ALRC recommended that this requirement should be observed in the case of superannuation schemes which are divided in accordance with an order of the court.

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25 ibid, p 123

26 **Collective Investment Schemes: Superannuation**, Report No 59, op cit, p 211

27 Section 160ZZM of the *Income Tax Assessment Act 1936 (Cth)*

Attorney-General's discussion paper

9.41 In March 1992, the Commonwealth Attorney-General's Department issued a discussion paper entitled **The Treatment of Superannuation in Family Law.**[28] The paper outlines the development of proposals in relation to the treatment of superannuation in family law and discusses current law. The Attorney-General's Department proposal is for a statutory scheme to provide for re-allocation of vested superannuation entitlements on marriage breakdown. The Department proposes that, as of the date of permanent separation, the contributing spouse's superannuation entitlement be deemed by statute to have been re-allocated between the parties. It is also proposed that a departure from the statutory scheme could be approved by a court following an application by a party who did not want the deemed re-allocation to apply. This proposal was a further development on the 'split benefit' approach contained in the 1992 ALRC discussion paper.

The New Zealand Matrimonial Property Act

9.42 In relation to the question of binding the trustees of superannuation funds, the Committee is aware that the New Zealand Matrimonial Property Act contains provisions in relation to orders concerning superannuation rights. Section 31 of that Act states that, in relation to superannuation rights, the Court may make any order under the Act:

> ...conditional on the husband or wife entering into an arrangement or deed of covenant designed to ensure that the other spouse receives his or her appropriate share of that property.

9.43 Further, section 33 of the Act enables the court to exercise ancillary powers to make orders varying the terms of any trust or settlement, not being a trust under a will. This would enable a New Zealand court to bind a trustee of a superannuation fund to divide the fund by deed and hold a separate trust deed for the non-contributing spouse.

Submission comment

9.44 The Law Council of Australia supports legislative amendment in relation to superannuation. The Council makes the point that uncertainty as to outcome is a problem, stating that:

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28 Attorney-General's Department, Discussion Paper, op cit

> ...the problem for parties in property settlement proceedings is that it is difficult to know which of the superannuation arrows a particular judge will pull from the quiver in a specific case.[29]

9.45 The Council suggests that the present approach of the court in relation to superannuation mixes ingredients of each of the various approaches in an attempt to balance precision against flexibility. The Council supports the 1987 ALRC proposals, favouring their comparative simplicity and certainty. The Council also acknowledged the difficulties in valuing prospective benefits as a financial resource. The Law Council argues that this would mean superannuation would be treated as a 'de facto' property entitlement and the non-member spouse would be entitled to a proportion of the notional value fairly attributable to the period of cohabitation. Courts could still retain a general discretion to make further adjustments based upon matters such as needs of the parties.

9.46 The submission from the Association of Superannuation Funds of Australia Ltd[30] recognises the need for the conclusion of financial matters in a final settlement. The Association notes that the court has not adopted a particular method of valuing a party's superannuation benefit, although it recognises that there is an increasingly consistent approach to valuation being adopted by the court. The view of the Association is that there is little or no evidence that the present options available to the court under the *Family Law Act* are insufficient to give the court the flexibility to bring about just and equitable orders.[31] The Association acknowledges that if parties to proceedings are to have confidence in the system and for practitioners to give accurate legal advice it is vital for the court to adopt a consistent method of valuing superannuation entitlements. In this respect the Association strongly supports the adoption of the 'net or notional realisable value' method. This method values a superannuation benefit as the value of the benefit to which the superannuant would be entitled at the date of hearing if the member were able to receive the benefit from the superannuation fund at that date. The Association believes that it is the only practical approach to valuing superannuation benefits in the majority of cases.

9.47 Other submissions to the Committee also indicate there is a need for a clarification of how superannuation is taken into account. The former Chief Justice of the Family Court, the Hon E Evatt, AO, suggests that there should be a clear formula for dealing with superannuation by implementing the 1987 ALRC recommendations. In her submission she stated that:

> In the long run, the court should have power to order that an interest in a superannuation fund be apportioned and that an identified part of that fund be preserved for the benefit of the spouse of the contributor. This

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29 Submission 415, Vol 11, p 2266
30 Submission 750, Vol 22, p 4289
31 ibid, p 4290

would ensure that the parties were able to share the provision they have made for their long term security.[32]

9.48 The National Women's Consultative Council submitted that the *Family Law Act* should be amended to include superannuation as property. The Council argues that the Family Court should make a determination as to what is to occur at the time of retirement and that trustees of superannuation schemes should be ordered to ensure that, upon the contributor's retirement, the non-contributing spouse receives his or her entitlement.

9.49 There is a strong feeling in individual submissions that the payment of an entitlement of a superannuation fund to the non-contributing spouse causes hardship and that superannuation is designed to provide for the parents upon retirement.[33] Another submission stated that 'if she is, legally entitled to 50 per cent of his super now, wouldn't the fair thing have been for the court to order his superannuation fund to pay her the $60,000, and drop his equity accordingly'.[34] Another submission stated:

> The woman having the right to claim and receive straight away the husband's Superannuation is [nonsensical]. This is the husband's future welfare and for judges to rule that the wife can have a percentage of this income 'here and now' when the husband doesn't even possess it is absurd! Let her have it when and only he receives it, if she must.[35]

9.50 There are other submissions which state that superannuation and life policies should remain the property of the owner.[36] These submissions are indicative of perceived injustices which may result from the different approaches taken by the courts under the present system.

Family Court of Australia

9.51 The submission from the Family Court of Australia limits discussion to employer sponsored schemes, and does not cover self-employed superannuants. The Court argues that a major issue in relation to superannuation is whether it is to be considered as 'matrimonial property' or as a financial resource to be relied upon in the future by the parties to the marriage.[37] The issue of whether superannuation is to be treated as matrimonial property or as a financial resource remains open from the Court's perspective. The Full Court has not expressed a concluded opinion on this matter.

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32 Submission 447, Vol 13, p 2610
33 Submission 124, Vol 3, p 632
34 Submission 150, Vol 4, p 762
35 Submission 149, Vol 3, p 761
36 Submission 327, Vol 7, p 1542
37 Submission 940, Vol 30, p 4997

9.52 The Family Court's submission seems to accept the practical problems which have been alluded to in the individual submissions, such as the necessity for the contributing spouse to borrow funds or give a larger percentage of available assets to the non-contributing spouse to pay out the obligation.

9.53 The Family Court concludes that no single approach or prescribed formula is able to cater for the variety of superannuation schemes and the many different facts of the cases. The Family Court argues that it is most important for it to retain a wide discretion in relation to superannuation.

9.54 The Family Court suggests that whether a prospective entitlement or a pension is property, or a financial resource, should be determined by suitable amendments to the *Family Law Act*, without making any recommendation as to what form of amendment should be made. The Family Court does argue, however, that any orders which are to be made in relation to superannuation should be binding upon the trustee of the superannuation fund.

9.55 The Family Court makes reference to the discussion papers issued by the ALRC and the Commonwealth Attorney-General's Department and recognises the need for steps to be taken to develop rules relating to the treatment of superannuation. The Court states that it is ultimately a matter which should be determined by the Committee and government.

Conclusions

9.56 The Committee recognises that there are differences between proposals of the various organisations, however, there would appear to be support for a uniform approach to be adopted by the courts in the treatment of superannuation in family law. The conclusions of the Committee are based upon the combination of the various views on the way superannuation should be taken into account in family law matters. The Committee is of the view that its preferred approach takes advantage of the various points of view submitted to it and believes the recommendations will produce practicable and equitable results.

9.57 The approach of the Family Court in determining spouses' entitlements to superannuation funds has not been consistent. This has partly arisen from the uncertainty surrounding the inclusion of superannuation as part of the total property, but is also a result of the many and varied types of superannuation schemes currently operating in Australia. Also, there is a major difficulty in the power of the courts to bind trustees to comply with court orders in the administration of the trust funds. These problems should not prevent the development of a more consistent and unified approach to dealing with superannuation.

9.58 The Committee concludes that there should be predictability in the resolution of superannuation disputes. It would seem that if the courts were given the power in relation to divisibility of entitlements, portability of entitlements and the maintaining of a narrow discretion to take account of the diversity of the nature of schemes within Australia, then uniformity of decisions may be ensured. It appears to the Committee that if the courts are given power to make orders binding on trustees of superannuation funds, then there may be more uniformity in the types of orders the courts could make in the knowledge that they may be enforced.

9.59 However, the Committee is not in favour of a single legislative system applying one set of guidelines to all cases, nor does the Committee favour the introduction of a strict or rigid formula to value the entitlement of a spouse to a particular superannuation scheme.

9.60 The Committee considers that it is time that a structured approach was introduced by the Court for dealing with superannuation entitlements and is in favour of the introduction of the 'split benefit' approach referred to by the ALRC and the Attorney-General's Department. In the event that the 'split benefit' approach is too difficult to achieve, due to constitutional and/or administrative barriers, then the Committee considers that the 'notional realisable value' approach should be introduced in legislation. This approach has certainty and is equitable where retirement is a long way off. The Committee is of the view that if the approach of the notional realisable benefit produces an unjust or inequitable result in a particular case, then there should be a limited discretion for the court to adopt a different approach in the proceedings.

9.61 The Committee feels that superannuation should be specifically included as a matter to be considered in the determination of a property settlement and that it is not sufficient to continue to treat superannuation under the 'financial resource' heading. The importance of superannuation provision and the significance of the direct and/or indirect contributions of both parties should be acknowledged. Superannuation is a significant asset for many families. Furthermore, the inclusion of superannuation for consideration recognises the Government's retirement incomes policy and the intention under that policy that superannuation entitlements are generally intended to provide for the needs of both parties.[38]

Recommendations

9.62 The Committee recommends that:

75 to the extent possible within constitutional power, the *Family Law Act 1975* be amended to include superannuation entitlements as property;

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38 **Collective Investment Schemes: Superannuation**, Discussion Paper, op cit, p 123

76 as a general rule, at the discretion of the court, the notional realisable value of the superannuation entitlement be the value to be taken into account at the time of the hearing;

77 the *Family Law Act 1975* be amended to empower the Family Court to order that a superannuation entitlement be split and shared between the contributing and non-contributing spouse;

78 the entitlement be shared between the parties in proportion to the length of the marriage or cohabitation by reference to the total period of contribution to the fund;

79 the power to divide the superannuation entitlement be discretionary and not automatic in all cases;

80 a court order, either a consent order or otherwise, be required to direct the trustee of a superannuation fund how to divide the entitlement;

81 the divided funds be portable between a similar superannuation scheme or approved deposit fund;

82 if the above recommendations are not achievable, the notional realisable value to be introduced in legislation as the approach to value superannuation entitlements.

83 in the event of the notional realisable value approach being introduced in legislation the court to be empowered to have a discretion to depart from this approach where it would result in an injustice or inequity.