The Parliament of the Commonwealth
of Australia

Joint Select Committee on
Certain Family Law Issues

Funding and Administration of the Family Court of Australia

November 1995

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APPENDICES

TERMS OF REFERENCE

Both Houses of the 37th Parliament resolved that a Joint Select Committee on Certain Family Law Issues be appointed to inquire into and report on:

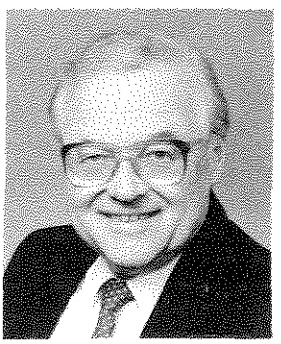
(a) the administration of the Family Court of Australia with particular reference to:

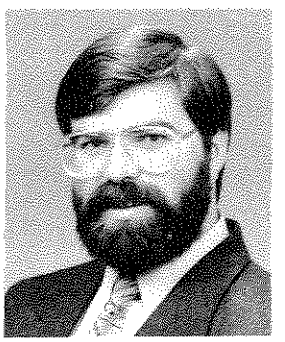
(i) the base level of funding required to enable the Court to undertake its statutory functions; and

(ii) the effectiveness of present expenditure by the Court towards undertaking those functions.

Within these Terms of Reference the Committee is also to examine whether the office of Judicial Registrar is an effective adjunct to the judicial resources of the Family Court of Australia, to determine whether measures are necessary to ensure their effectiveness or whether an alternative office should be created to enhance public access to, and confidence in, family law dispute resolution.

COMMITTEE PHOTOGRAPH





Committee Members: **(left to right)**

Standing: Mr Daryl Williams, AM, QC, MP; Ms Marjorie Henzell, MP; Ms Jane Vincent (Secretary); Mr Kevin Andrews, MP;

Sitting: Senator David Brownhill; Senator Margaret Reid (Deputy Chair); Mr Martyn Evans, MP (Chairman); Hon Roger Price, MP;

Inset: Senator Belinda Neal; Senator Sid Spindler; Senator Kim Carr.

MEMBERSHIP OF THE COMMITTEE

Chairman: Hon Roger Price, MP (to 6 June 1995)
Mr Martyn Evans, MP (from 7 June 1995)

Deputy Chair: Senator Margaret Reid

Senator David Brownhill
Senator Kim Carr
Senator Belinda Neal
Senator Sid Spindler
Mr Kevin Andrews, MP
Ms Marjorie Henzell, MP
Mr Les Scott, MP (to 6 June 1995)
Mr Daryl Williams, AM, QC, MP

Secretariat

Jane Vincent, Secretary
Robina Mills, Secretary (to March 1994)
Claressa Surtees, Acting Secretary (from 14 November 1995)
David Wallace, Legal Adviser
Matthew Mason-Cox, Senior Parliamentary Officer (to June 1995)
Susan Cardell, Research Officer (to August 1995)
Jennifer Hughson, Acting Senior Parliamentary Officer (from June to October 1995)
Denise Picker, Secretariat Support

LIST OF RECOMMENDATIONS

The Joint Committee recommends that:

3.34 *Future Reviews*

there should be regular reviews of the management and administration of the Family Court of Australia, which are external to the Court, and the Attorney-General should discuss the mechanism for the review process with the Court.

4.28 **Workload Changes**

where the Family Court of Australia believes that changing circumstances have resulted in a variation to its workloads, it should negotiate appropriate changes to the agreed workload formula with the Department of Finance, to take account of projected service demand.

4.40 **Updating Information Technology**

in order to improve client services and management efficiency, and given the failure of the existing system to meet adequately the current needs of the Family Court of Australia, the Family Court update its information technology platform and that this be funded through a resource agreement with the Department of Finance.

4.53 **Efficiency Dividend**

the Family Court of Australia continue to be subject to the efficiency dividend, noting that judicial salaries are exempt, and that the Family Court's position be re-examined when the review of the efficiency dividend, with its focus on small agencies, is carried out after the 1996-97 Budget.

4.81 **Funding Priorities**

the Family Court of Australia order its priorities to ensure that funds are available to preserve and enhance its client focus, and that the Family Court work with staff and the representatives of staff to fund adequately those aspects of Family Court administration with high levels of client contact.

4.89 Cost/benefit Analysis

the Family Court of Australia establish a mechanism to provide a cost/benefit analysis for all future expenditure proposals, to set priorities for such proposals in the context of the Family Court's budget and to review the subsequent effectiveness of those proposals which are implemented, against the criteria by which they were approved.

4.110 Efficiency Audit

the Auditor-General conduct an efficiency audit of the Family Court of Australia.

5.76 Judicial Structure

the judicial structure of the Family Court of Australia be a two-tier structure of the Judiciary and the Registrars.

5.77 Judicial Registrars

the existing Judicial Registrars be appointed Judicial Registrars under Chapter III of the Constitution to be part of the Judiciary of the Family Court of Australia with the following conditions -

(a) **they would continue to be called Judicial Registrars;**

(b) **they would exercise their current jurisdiction but as they will be exercising full judicial powers there will be no need to maintain a requirement for their decisions to be reviewed by way of a hearing de novo; and**

(c) **they would continue to be remunerated at their present level - the level of an Australian Capital Territory Magistrate.**

5.78 Ratio of Judges to Judicial Registrars

the number of Judicial Registrars be increased without increasing the total number of judicial officers of the Family Court of Australia.

5.79 Delegated Powers of Registrars

the delegated powers of existing Registrars be increased to enable them to hear any type of interim application.

5.80 Future Proposals

***in the longer term consideration be given to the Family Court of Australia* becoming a division of the Federal Court of Australia and that the establishment of a Federal Magistracy be considered at that time.**

6.24 Magistrates

(a) the Attorney-General approach the State Attorneys-General and seek agreement to the development of a comprehensive training program for a limited number of appropriate State Magistrates who would specialise in family law particularly in outer suburban, provincial and rural areas;

(b) State Magistrates exercising family law jurisdiction;

(i) have direct access to the Family Court of Australia for advice and research assistance; and

(ii) have access to the Court Counselling service, in the local area where possible;

(c) after specialist State Magistrates receive appropriate training, section *96(4)(a) of the Family Law Act 1975 be repealed to eliminate the* restriction that an appeal from a court of summary jurisdiction proceeds by way of a hearing de novo; and

(d) the jurisdiction in property matters in courts of summary jurisdiction be *increased to $300,000 (the current level of Judicial Registrars'* jurisdiction).

6.25 South Australian Magistrates

the Attorney-General seek to renegotiate the agreement with the Government of South Australia to allow the use of local courts in the areas outside Adelaide's central business district.

7.26 Alternative Dispute Resolution

alternative dispute resolution processes including mediation be pursued in the family law area but be community based rather than through existing Family Court of Australia structures.

7.34 *Development of a Best Practice Model*

the Family Court of Australia develop and implement a best practice model to ensure effective liaison and cooperation with outside service providers on a national basis.

7.49 Community Based Counselling

while recognising that the Family Court of Australia will always require direct access to counselling services, in the long term, there are benefits in having counselling based in the community through structures such as the Noble Park centre in Melbourne, community legal centres and organisations like Relationships Australia on a flexible and competitive basis.

7.50 Reconciliation Counselling

reconciliation counselling be provided by community based centres and *therefore the statutory obligation imposed on the Family Court of Australia to* provide or perform reconciliation counselling be repealed.

7.55 Information Sessions

the Family Court of Australia work with the community based sector to provide information sessions, conducted by an experienced family law practitioner, which incorporate information about the operation of the *Family Law Act 1975* and the procedures and processes of the Family Court.

7.59 Study of Legal Costs

***a study be conducted to determine what the legal costs of trials in the* Family Court of Australia are to the litigants.**

8.26 Determination of Management Structures

(a) **the judicial control of the Family Court of Australia's administrative structures be vested in a collegiate system determined by the judicial officers of the Court and expressed in the Rules of Court.**

(b) **the present regional management structure be abolished and the administrative functions of the Family Court of Australia be centralised at the principal office of the Court under the day to day management structure determined by the collegiate body of Judges.**

CHAPTER 1: THE INQUIRY

Background to the Inquiry

1.1 The inquiry into the funding and administration of the Family Court of Australia (Family Court) arose out of the inquiry into the operation and interpretation of the *Family Law Act 1975* conducted by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act (previous joint committee).[1] During that inquiry it became obvious to the previous joint committee that there was insufficient information available on the funding levels of the Family Court and on the administrative efficiency with which those funds were expended.

1.2 In addition, the previous joint committee was concerned that the Family Court had consistently and publicly commented that, so far as funding was concerned, it had not been adequately resourced to perform all its functions. Similar statements were made in an internal review of the Family Court which was undertaken in 1989-90 and chaired by the Hon Justice Neil Buckley.[2]

1.3 The previous joint committee commenced the inquiry into the funding and administration of the Family Court following receipt of its terms of reference on 16 September 1992.[3] Although the previous joint committee received evidence in the 36th Parliament, it was not able to complete its inquiry during that term.

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1 The previous joint committee was a parliamentary committee in the 36th Parliament 1991-93. Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *The Family Law Act 1975: Aspects of its Operation and Interpretation*, Parliamentary Paper No. 326/92, AGPS Canberra 1992.

2 Family Court of Australia, *Report of the Working Party on the Review of the Family Court*, Pirie Printers Canberra 1990. The Buckley review was conducted in anticipation of the transfer of responsibility for the administration of the Family Court from the Attorney-General's Department to the Court, and is discussed in more detail below in Chapter 3.

3 The resolution of appointment of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act was amended to include additional terms of reference. The amendment required the previous joint committee to also inquire into and report on:

the administration of the Family Court of Australia to assess:

(i) the base level of funding required to enable the Court to undertake its statutory functions at a level that will meet the reasonable expectations of the Parliament; and

(ii) the effectiveness of present expenditure by the Court towards undertaking those functions and meeting those expectations.

Establishment of the Inquiry

1.4 The inquiry was re-established in the 37th Parliament by the resolution of appointment of the Joint Select Committee on Certain Family Law Issues (Joint Committee) on 13 May 1993.[4] In March 1994 the Attorney-General, the Hon Michael Lavarch MP, wrote to the then Chairman of the Committee, the Hon Roger Price MP, referring an inquiry into the office of Judicial Registrar of the Family Court. The reference from the Attorney-General arose following a meeting between the Attorney-General and the Chief Justice of the Family Court (Chief Justice) who expressed concern at the standing of the office of Judicial Registrar among clients of the Court. The Chief Justice raised the possibility of a two tier structure of the Court comprising Judges and Magistrates, as exists in the Family Court of Western Australia, replacing the existing three tier structure of Judges, Judicial Registrars and Registrars.

1.5 The Chairman responded to the Attorney-General's referral of further terms of reference by noting that the office of Judicial Registrar could be examined within the Joint Committee's existing terms of reference on funding and administration.

Evidence to the Inquiry

1.6 The previous joint committee invited certain organisations to make submissions to it on the funding terms of reference; 8 submissions were received and 2 public hearings were held in Canberra on 13 and 19 November 1992. Under the Joint Committee's resolution of appointment, this evidence was available to it for use during its inquiry.[5]

1.7 The Joint Committee invited Commonwealth departments and agencies and various interested persons and organisations to provided submissions on the terms of reference. Forty six submissions and eighty three exhibits were received.[6] The Joint Committee also held public hearings in Sydney, Melbourne, Adelaide, Perth, Canberra and Brisbane.[7] It visited several registries of the Family Court, held discussions with Court staff and inspected court buildings. The Joint Committee also conducted an inspection of the Family Court of Western Australia.

1.8 Following the change in Committee Chairman in early June 1995, the new Chairman, Mr Martyn Evans MP, undertook a number of familiarisation visits to the Family Court. He met with the Chief Justice in Melbourne and visited other Court registries including Dandenong, Sydney, Adelaide and Brisbane. The Chairman also met with the Chief Judge of the Family Court of Western Australia and the Chief Magistrate of Victoria.

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4 The terms of reference resolved in the 37th Parliament were different from those resolved in the 36th Parliament.

5 The resolution provided:

> (17) *That the committee or any subcommittee have power to consider and make use of the* evidence and records of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act appointed during the 36th Parliament.

6 A list of submissions is at Appendix 1, and a list of exhibits is at Appendix 3.

7 A program of public hearings is at Appendix 2.

Dandenong, Sydney, Adelaide and Brisbane. The Chairman also met with the Chief Judge of the Family Court of Western Australia and the Chief Magistrate of Victoria.

1.9 Statistics on the work of the Joint Committee are set out in Table 1.1 below.

Table 1.1:

TYPE OF MEETING	TOTAL NUMBER
Private	17
Public Hearings	9
Inspections	7
Private briefings	1

1.10 A classification of witnesses is set out in Table 1.2 below.

Table 1.2

Date of Hearing	Government Organisations	Private Community Organisations	Individuals
20 February 1995	2	2	
21 February 1995	3	1	
17 March 1995	1	7	
4 April 1995	1	3	1
4 May 1995			1
26 May 1995	2	3	
15 June 1995	1		
3 July 1995	1		
4 July 1995	2	5	
TOTALS	13	21	2

Appearance of Chief Judges before the Joint Committee

1.11 Although it is usual for the Chief Executive Officer of the Family Court to appear when requested, members of the judiciary are not required to appear before parliamentary committees. The Joint Committee is most grateful to the Chief Justice of the Family Court, the Hon Chief Justice Alastair Nicholson AO RFD, for appearing before the Joint Committee on 4 July 1995. The Joint Committee also thanks the Chief Judge of the Family Court of Western Australia, the Hon Justice Ian McCall, for appearing before the it on 4 April 1995. They both provided every assistance to the Joint Committee during the course of its inquiry.

Structure of the Report

1.12 In order to examine the administration of the Family Court with particular reference to the base funding level and the effectiveness of the Court's expenditure, it was necessary to first review the statutory functions of the Family Court and these are considered in Chapter 2. The process of self-administration of the Court is examined in Chapter 3. The level of funding of the Family Court is dealt with in Chapter 4.

1.13 The Joint Committee examines the judicial structure of the Court in Chapter 5. Chapter 6 provides an overview of courts exercising family law jurisdiction, and Chapter 7 looks at ancillary services of the Court including its counselling, mediation, arbitration, primary dispute resolution and information services. Finally in Chapter 8, the Joint Committee examines the management structure of the Family Court.

CHAPTER 2: STATUTORY FUNCTIONS OF THE FAMILY COURT OF AUSTRALIA

Introduction

2.1 The Family Court has consistently reported that it is insufficiently funded to meet its statutory requirements. The first part of the Joint Committee's terms of reference addressed this issue, providing for an examination of the base level of funding required to enable the Court to undertake its statutory functions. The Joint Committee therefore needed to determine what are the Family Court's statutory functions. This chapter looks at the establishment of the Family Court, its functions and jurisdiction, the issue of permissive and mandatory statutory functions and the Court Plan.

The establishment of the Family Court

2.2 The functions and jurisdiction of the Family Court are derived under section 51 of the Constitution of Australia:

> **51.** The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: - ...
>
> (xxi) Marriage;
>
> (xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants: ...

2.3 The Family Court was established in 1975 under section 21 of the *Family Law Act 1975*. The Act came into operation on 5 January 1976 and replaced the *Matrimonial Causes Act 1959*. Section 21 of the Family Law Act provides:

> **21(1) [Family Court of Australia]** A court, to be known as the Family Court of Australia, is created by this Act.
>
> **21(2) [Superior court]** The Court is a superior court of record.

Functions of the Family Court

Jurisdiction

2.4 The Family Court exercises a family law jurisdiction which is conferred by the Family Law Act, the *Marriage Act 1961* and other federal Acts. The original jurisdiction of the Family Court is provided by sections 31, 33 and 34 of the Family Law Act as follows:

> SECTION 31 ORIGINAL JURISDICTION OF FAMILY COURT
>
> 31(1) [Jurisdiction of Family Court] Jurisdiction is conferred on the Family Court with respect to -
>
> (a) matters arising under this Act or under the repealed Act in respect of which matrimonial causes are instituted or continued under this Act;
>
> (b) matters arising under the *Marriage Act 1961* in respect of which proceedings (other than proceedings under Part VII of that Act) are instituted or continued under that Act;
>
> (c) matters arising under a law of a Territory (other than the Northern Territory) concerning -
>
> (i) the adoption of children;
>
> (ii) (Omitted)
>
> (iii) (Omitted)
>
> (iv) the property of the parties to a marriage or either of them, being matters arising between those parties other than matters referred to in the "matrimonial cause" in sub-section 4(1); or
>
> (v) the rights and status of a person who is an ex-nuptial child, and the relationship of such a person to his parents; and
>
> (d) matters (other than matters referred to in any of the preceding paragraphs) with respect to which proceedings may be instituted in the Family Court under this Act or any other Act.
>
> 31(2) [Jurisdiction outside Australia] Subject to such restrictions and conditions (if any) as are contained in the regulations or the Rules of Court, the jurisdiction of the Family Court may be exercised in relation to persons or things outside Australia and the Territories. ...

SECTION 33 JURISDICTION IN ASSOCIATED MATTERS

33 To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within the jurisdiction expressed by this Act or any law to be conferred on the Court that are associated with matters (including matters before the Court upon an appeal) in which the jurisdiction of the Court is invoked or that arise in proceedings (including proceedings upon an appeal) before the Court.

SECTION 34 ISSUE OF CERTAIN WRITS, ETC.

34(1) [Power to issue writs, orders, etc.] The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, and to issue, or direct the issue of, writs of such kinds, as the Court considers appropriate.

34(2) [Issue of prescribed writs, orders] Without limiting the generality of sub-section (1), the Court may issue, or direct the issue of, writs and orders of such kinds as are prescribed by the Rules of Court.

2.5 Section 39 vests the Family Court with jurisdiction in matrimonial causes:

39(1) [Institution of matrimonial cause] Subject to this Part, a matrimonial cause may be instituted under this Act -

(a) in the Family Court; or

(b) in the Supreme Court of a State or a Territory.

2.6 A definition of matrimonial causes is provided in section 4(1) of the Family Law Act which states:

"matrimonial cause" means -

(a) proceedings between the parties to a marriage, or by the parties to a marriage, for a decree of -

(i) dissolution of marriage; or

(ii) nullity of marriage;

(b) proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage by decree or otherwise;

(c) proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage;

(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings -

(i) arising out of the marital relationship

(ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or

(iii) in relation to the dissolution or annulment of that marriage or the legal separation of the parties to that marriage, being a dissolution, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that dissolution, annulment or legal separation is *recognised as valid in Australia under section 104.*

(d) proceedings between the parties to a marriage for the approval by a court of a maintenance agreement or for the revocation of such an approval or for the registration of a maintenance agreement;

(e) proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship (other than proceedings under a law of a State or Territory prescribed for the purposes of section 114AB);

(ea) proceedings between -

(i) the parties to a marriage; or

(ii) if one of the parties to a marriage has died - the other party to the marriage and the legal personal representative of the deceased to the marriage,

being proceedings -

(iii) for the enforcement of, or otherwise in relation to, a maintenance agreement that has been approved under section 87 and the approval of which has not been revoked;

(iv) in relation to a maintenance agreement the approval of which under section 87 has been revoked; or

(v) with respect to the enforcement under this Act of a maintenance agreement that is registered in a court under section 86 or an overseas maintenance agreement that is registered in a court under regulations made pursuant to section 89;

(eb) proceedings with respect to the enforcement of a decree made under the law of an overseas jurisdiction in proceedings of a king referred to in paragraph (c); or

(f) any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process) in relation to concurrent, pending or completed proceedings of a kind referred to in any of paragraphs (a) to (eb), including proceedings of such a kind pending at, or completed before, the commencement of this Act; ...

2.7 The *Marriage Act 1961* vests power in the Family Court for the provision of:

- authorisation of marriage of persons under the age of 18, or 16 in exceptional circumstances (s. 12);
- consent by a magistrate where a parent or other person, refuses to consent (s. 16);
- re-hearing of applications by a Judge (s. 17); and
- declaration of legitimacy (s. 92).

2.8 The *Child Support (Registration and Collection) Act 1988* and the *Child Support (Assessment) Act 1989* both confer original and appellate jurisdiction on the Family Court in respect of matters arising under these Acts.[1] The Family Court however, no longer has jurisdiction to assess or order maintenance for children to whom the Child Support (Assessment) Act applies. Its role, so far as these children are concerned, is limited to reviewing applications for re-assessments and other decisions of the Child Support Agency.

2.9 The Family Court has additional jurisdiction under the following Commonwealth Acts conferred by Parts IV and VII of the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988*:

- any proceedings arising under the *Administrative Decisions (Judicial Review) Act 1977* (s. 18A);
- any proceedings arising under the *Bankruptcy Act 1966* (s. 35A);
- proceedings arising under the consumer protection provisions of the *Trade Practices Act 1974* (s. 86B); and
- taxation appeals against a decision of the Commissioner of Taxation arising under the *Income Tax Assessment Act 1936* (s. 189).

2.10 The jurisdiction provided by these four Acts gives Judges of the Family Court the opportunity to hear matters which fall outside the scope of their normal work and assists the Federal Court in the exercise of its functions. It should be noted, however, that the jurisdiction conferred by the above Acts may be exercised only upon a transfer of proceedings from the Federal Court to the Family Court.

2.11 The Family Court's primary function is to resolve disputes in its family jurisdiction between parties in accordance with legal principles. Section 43 of the Family Law Act gives statutory expression to the principles to be applied by the Family Court:

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1 Sections 104(1) and 106(1) of the 1988 Act and ss 99(1) and 101(1) of the 1989 Act.

43 The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of the jurisdiction, have regard to -

(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;

(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;

(c) the need to protect the rights of children and to promote their welfare; and

(d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.

Evidence from the Family Court and the Attorney-General's Department

2.12 The Family Court has not provided clear evidence to the Joint Committee about what it considers its statutory functions to be. The Court Plan of the Family Court describes its jurisdiction over matrimonial causes and associated responsibilities as including proceedings for dissolution of marriage, settlement of property, and custody, guardianship, maintenance and access in respect of children, together with some less common legal actions.[2]

2.13 The Court Plan also states that the Family Court's objective is:

> To serve the interests of the Australian community by providing for the just and equitable administration of justice in all matters within the Court's jurisdiction, with emphasis in its family jurisdiction on conciliation of disputes and the welfare of children.[3]

2.14 The Hon Justice Barblett provided the following brief comment regarding the Family Court's statutory functions when asked by Senator Reid:

> 'Obviously, the first function of the Court, just because it is a Court, is to resolve disputes in family law area between citizens - between married persons and in relation to all children.
>
> When we come to our statutory duty it is only the way in which that basic duty is carried out. What the Family Court has done, what is unique in Australia and what is unique in the world, has been to say that the traditional method of trial

2 Family Court of Australia, *The Court Plan*, p 1.

3 Family Court of Australia, *The Court Plan*, p 1.

of all disputes is not appropriate. ... The flavour of the month is the alternative dispute resolution tag but I do not think we should be worried about labels'.[4]

2.15 Although the Family Court has not provided the Joint Committee with comprehensive evidence to date on what it regards as its statutory functions, the Court continues to make the claim that it does not have enough funding to carry out its functions. In its submission, the Family Court identified 10 parts of the Family Law Act that it believes it is unable to implement adequately due to a lack of funding:

1. s.14 reconciliation counselling. This is usually referred out to a marriage guidance organisation.

2. s.16 advertisement of court facilities. Little of this is done.

3. s.17 provision of certain documents. These suffer from lack of resources to keep them up to date and published in multiple languages.

4. s. 19A referral to arbitration. There are no approved arbitrators.

5. s. 19D referral to arbitration. There are no approved arbitrators.

6. s. 19J advice about mediation and arbitration. This is not available in other languages.

7. Division 3 generally - the extent to which counselling sessions can be undertaken is limited by resources, not by need. Urgency of need cannot be responded to in many areas of the country.

8. s. 62A family reports. These are in the main limited to being ordered at the Pre-Hearing Conference stage because resources are not available for interim or earlier reports.

9. S. 64(12) enforcement officers - none have been appointed.

10. Part VIII property - there is only one conciliation conference in each matter, regardless of need.[5]

2.16 On 4 August 1995, the Joint Committee requested the Chief Justice to provide a comprehensive statement about the Court's statutory functions. In response the Chief Justice stated "(t)he Court's statutory functions are by definition set out in the relevant statutes. The primary statute is the Family Law Act 1975".[6] The Chief Justice also listed other statutes giving the Court functions, and stated that the functions "will be readily apparent from the statutes themselves". Despite its requests, the Joint Committee has not received a

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4 *Transcripts*, p. 455.

5 Submission No. 3, *Submissions*, pp. 28-29.

6 *Exhibit 82* p. 1.

comprehensive statement from the Court about its statutory functions, and the Court has indicated that there is uncertainty about its statutory functions:

> (t)here has been some debate with the Attorney-General's Department in the past about what functions the Court is required to perform. Some debate on this issue occurred before the Committee on 13 (not 12) November 1992 from which the Justice Buckley quotation in your letter is drawn. In relation to functions like mediation, which were inserted into the Family Law Act and for which there was no accompanying funding, the Department argued that those statutory functions were permissive and not mandatory.
>
> There has never been a definitive statement (or any other kind) from the Government as to which functions are to be regarded as permissive and which as mandatory.[7]

2.17 In its submission the Attorney-General's Department identified what it considers to be the statutory functions of the Family Court:

> The statutory obligations of the Court can be summarised as being -
>
> . the provision of counselling, conciliation and reconciliation services
>
> - counselling and reconciliation is dealt with in Part III and in Part VII of the Family Law Act
>
> - the Court provides negotiation services in relation to property disputes and other financial matters arising under Part VIII of the Act
>
> . the judicial resolution of disputes
>
> - judges and judicial registrars exercise jurisdiction under the Family Law Act, the Child Support Acts and a range of other Acts within the Court's additional jurisdiction.
>
> In addition, the Court has the capacity to provide mediation or arbitration of disputes, but does not have a statutory responsibility to provide such services, which are available in the private sector.[8]

2.18 The Joint Committee concludes that the statutory functions of the Family Court of Australia are adequate to meet the Court Plan. In the following chapters, the Joint Committee considers whether the funding level of the Court is sufficient for it to meet its statutory functions.

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7 *Exhibit 82*, p. 2.

8 Submission No. 5, *Submissions*, pp. 180-181.

CHAPTER 3: THE FAMILY COURT OF AUSTRALIA AND SELF ADMINISTRATION

Devolution of functions

3.1 During 1988-89 the Government agreed that the funding of the federal courts and the Administrative Appeals Tribunal should be changed, with a view to enhancing the independence of those bodies. The *Courts and Tribunals Administration Amendment Act 1989* gave effect to that decision. It provided, inter alia, for the separate administration of the Family Court.

3.2 Separate administration of the Family Court commenced formally on 1 January 1990, although many areas of the Court's operations had been subject to independent control for some time prior to that date.[1] Since 1 July 1989 there has been a gradual process of devolution of functions from the Attorney-General's Department to the Family Court.

3.3 Following the passage of that legislation, an undertaking was given that the Attorney-General's Department would continue to provide a range of services to the Family Court or, if the Department did not wish to provide certain services, it would negotiate with the Family Court the cessation of that service and the transfer of funding to enable the Family Court to assume the responsibility. Over the ensuing years the Attorney-General's Department has progressively passed on to the Family Court responsibilities for services which it previously provided. For example, in 1992-93 the Court received funds transferred from the Attorney-General's Department for functions devolved to it in relation to personnel management,[2] and recently the Department ceased to provide mainframe computer services, transferring funding to the Court to enable it to purchase a bureau service from a third party.[3]

3.4 In its evidence to the Joint Committee the Attorney-General's Department noted that the only significant function that it now performs on behalf of the Family Court is the construction of major Commonwealth-shared court buildings. That function is retained because the court buildings are shared '...and because it would be inefficient for each court to seek to develop the particular expertise that you need to design, fund and build'.[4]

3.5 Although the Attorney-General has ministerial responsibility for the administration of the Family Law Act, the Chief Justice is responsible for the effective use of the monies appropriated by the Parliament for the operation of the Family Court. The Chief Justice is

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1 Submission No. 5, *Submissions*, Vol. 1, p. 176.

2 Submission No. 5, *Submissions*, Vol. 1, p. 178.

3 *Transcripts*, p. 362.

4 *Transcripts*, p. 362.

required to report annually to the Attorney-General in relation to the management of the administrative affairs of the Court.[5]

3.6 The Chief Justice is assisted in the management of the administrative affairs of the Family Court by the Chief Executive Officer. This position was created in early 1990, after the terms of reference of the Buckley Review were written, but before the outcome of the Review. The current Chief Executive Officer, Mr Len Glare, became acting Chief Executive Officer in early 1990. Prior to the creation of the position of Chief Executive Officer, the functions of the position were performed by the Principal Registrar of the Family Court who was legally qualified.[6]

Buckley Review of the Family Court

3.7 Late in 1988, in anticipation of the Family Court becoming administratively independent of the Attorney-General's Department, the Chief Justice, the Hon Alastair Nicholson AO RFD, proposed, and the then Attorney-General, the Hon Lionel Bowen MP, agreed that there should be a comprehensive review of the operations of the Court to enable appropriate arrangements to be made for its future needs.[7]

3.8 On the establishment of separate administration it was recognised by the Attorney-General's Department that there would be some costs that should be included in the Family Court's running costs. For that reason, $0.71m was provided to the Court in the 1989-90 Budget, in addition to $2.530 million which was provided for the Court's ex-nuptial children jurisdiction, for additional counselling services for child support cases and for work associated with the Darwin and Parramatta registries. The Attorney-General wrote to the Chief Justice to advise him of the additional amount to be provided to the Court and to confirm that a review was to be held with the object of determining the proper level of funding that the Family Court required to carry on its operations.[8]

3.9 The Review, chaired by the Hon Justice Buckley, commenced on 1 July 1989. The Review team consisted of a Steering Committee[9] and a Working Party.[10] Its purpose was:

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5 Submission No. 5, *Submissions*, Vol. 1, p. 173.

6 Submission No. 5, *Submissions*, Vol. 1, p. 172.

7 *Report of the Working Party on the Review of the Family Court*, p.1.

8 Submission No. 5, *Submissions*, Vol. 1, p. 176.

9 The Steering Committee comprised the Chief Justice, the Hon Alastair Nicholson; the Deputy Chief Justice, the Hon Alan Barblett; the Chairman of the Working Party, the Hon Justice Neil Buckley; the then Secretary of the Attorney General's Department, Mr Alan Rose; a First Assistant Secretary from Department of Finance, Mr Eric Thorn and a former Acting Principal Registrar of the Family Court, Mr Chris Spink. On his appointment as Acting Chief Executive Officer on 1 January 1990, Mr Len Glare, was coopted to the Steering Committee, *Report of the Working Party on the Review of the Family Court*, p. xiv.

> To assess the requisite services of the Court and the effectiveness and efficiency of the Court's existing operational arrangements and structures for delivering the services required of the Court by the relevant legislation with a view to making relevant recommendations to the Chief Justice and the Attorney-General on how improvements can be made and making a detailed costing of them.[11]

3.10 In June 1990 the Attorney-General wrote to the Chief Justice regarding new policy proposals put forward by the Family Court, noting that several of the proposals related to matters which were within the scope of the Buckley Review. He wrote:

> You will recall that, when my predecessor wrote to you on 5 July 1989 concerning an increase in the funding for the Court and future funding arrangements, one of the conditions upon which that increased funding was to be made available was that the Review be undertaken. It was made clear in that letter that the Review was intended to provide the Court with a forum in which to argue and demonstrate any deficiencies in funding and a basis from which to negotiate on future funding.[12]

3.11 Not all of the recommendations of the Report of the Working Party were endorsed by the Review's Steering Committee, and the Steering Committee agreed to disband the Review without completing a final report, on the basis that a summary of the Working Party's Report would be prepared to enable the Government to focus on the issues that required consideration.[13] The Chief Justice authorised the publication of the Report of the Working Party and presented it to the Attorney-General in September 1990.

3.12 The Attorney-General's Department advised the previous joint committee that it was agreed at the final meeting of the Steering Committee on 12 October 1990 that the Report was to be regarded as nothing more than the Report of the Working Party and not as the report of the Review itself. Further, the Attorney-General's Department was critical of the form of the Working Party's Report. In a letter to the previous joint committee the Deputy Secretary of the Department advised:

> In the Department's view the report was too long to enable the Attorney-General to gain a ready understanding of the major issues, and did not adequately identify problems, make recommendations and provide future plans

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10 The Working Party, chaired by the Hon Justice Neil Buckley, comprised Mr David Halligan, Registrar of the Family Court; Dr Carole Brown, a Director of Court Counselling in the Family Court; Mrs Denise Deane, an Administrative Officer of the Family Court; Mr Alan Towill, a representative from the Attorney-General's Department and Mr Brian Kimball and Mr Brian Thornton, both Assistant Secretaries from Department of Finance, *Report of the Working Party on the Review of the Family Court*, p. xiv.

11 *Report of the Working Party on the Review of the Family Court*, p. xi. The terms of reference of the Buckley Review are at Appendix 4.

12 Letter from the Attorney-General to the Chief Justice, 18 June 1990, p. 1.

13 Submission No. 5, *Submissions*, Vol. 1, p. 177.

to resolve those problems. Moreover, both the Department and the Department of Finance were critical of the ongoing failure of the working party report to include any proper detailed costings of each of its recommendations.[14]

3.13 From its own reading of the Working Party's Report (Buckley Report), the Joint Committee can understand the concerns of the Attorney-General's Department in relation to the document. It is a lengthy document which is structured in a way which does not readily lend itself to analysis. The conclusions and recommendations are not arranged in any hierarchy and nowhere are there any specific costings.

3.14 There does not appear to have been a precise objective established for the Review. The Attorney-General appeared to be of the view that the Review was to establish the level of Court activity and appropriate funding. The Court appears to have taken a much broader view of its task and produced a more detailed review of its functions than was envisaged or required by the Attorney-General.

3.15 The Joint Committee notes from the terms of reference of the Review that the Court was to undertake a review which had two quite distinct purposes:

- to assess the services of the Court and establish an appropriate level of funding, and

- to assess the effectiveness and efficiency of the Court's existing operational arrangements and service delivery structures, with a view to making recommendations for, and costing of, improvements.

3.16 If the Court had produced two separate documents, one a concise document required for the purposes expressed by the Attorney-General and which demonstrated the Court's requirements and justified appropriate funding, and the other an internal working document which contained much of the detail in the Buckley Report, the Joint Committee considers that there may have been a better outcome for the Court.

3.17 The Family Court itself noted in evidence that the Buckley Report '...did not address workload issues and baseline funding...' but that '...it confined itself to organisational, operational and procedural improvements'.[15]

3.18 The Buckley Report made detailed recommendations for change in relation to the following areas:

- the restructuring of the organisation of the Family Court into three regional administrations;

- the lack of standardised practices throughout the Court's registries;

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14 Letter from Mr S Skehill to the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, dated 11 December 1992.

15 Submission No. 3, *Submissions*, Vol. 1, p. 19.

- the non-existence of corporate and information technology plans;
- the lack of staff training for Court personnel;
- the failure to set performance standards for all levels of the Court's operations;
- deficiencies in the management and control of the counselling service;
- deficiencies in the operation and efficiency of each registry; and
- a lack of adequate statistical and management information.[16]

3.19 The Family Court proceeded to implement most of the recommendations of the Buckley Report despite corresponding funds not being made available. The Report's recommendations were costed at $3.4m but only $1.2m was provided. The Family Court claimed that because of the interdependence of many of the recommendations, '...it was not feasible to implement them only to the extent of funding'.[17] It has consistently expressed its concern that the Buckley Report recommendations were not funded and were not able to be fully implemented.

3.20 The Joint Committee is concerned that the Family Court accords the Buckley Report a significance not attached to it by the Attorney-General's Department or the Department of Finance. The Court refers to the 'numerous recommendations for efficiency'[18] made in the Report but omits mention of any evaluation mechanisms. The Joint Committee considers that the Report's failure to address workload issues and baseline funding has contributed to subsequent disputes over the Court's funding.

Resources provided to the Family Court

3.21 Prior to 1 January 1990, the Family Court was administered by the Attorney-General's Department. Funds were allocated to the Family Court by the Attorney-General's Department from the Courts and Tribunals Administration funding which also provided funds for the Federal Court, the Administrative Appeals and Security Appeals Tribunals, and the ACT Supreme and Magistrates Courts.[19]

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16 Submission No. 940 (to the Inquiry into Certain Aspects of the Operation and Interpretation of the Family Law Act), *Submissions*, Vol. 29, p. 5620.

17 Submission No. 3, *Submissions*, Vol. 1, p. 19.

18 Submission No. 3, *Submissions*, Vol. 1, p. 20.

19 Submission No. 3, *Submissions*, Vol. 1, p. 34.

3.22 In the period after self-administration was introduced the Family Court claimed that it did not get adequate funds to assume the extra functions which came to it from the Government's decision to make the Court administratively independent.[20]

3.23 The Chief Executive Officer of the Family Court recalled this period of disputation over what resources should come to the Court from the Attorney-General's Department, but noted that '[o]ver a long period of time...most of those matters were settled'.[21] He stated in recent evidence to the Joint Committee that while the central office staff have to engage in a wide range of policy work and be expert in many areas, they cope with those demands and are developing quite well.[22]

3.24 The Attorney-General's Department notes that for a period there was '...some significant disagreement between the Court and the Department...about the appropriateness of the Court's funding...' but that there was a point where '...the Department of Finance, the Attorney-General's Department, the Court and ultimately the Chief Justice and the Attorney-General came to an agreement to draw the line.'[23]

3.25 The Buckley Report recommended, inter alia, fundamental changes to the way in which the Family Court was administered. It recommended that funding be provided to the Court to deal with deficiencies in its management and administrative structures:

- The Department of Finance assessed some of this funding as being required merely to bring the Court's budget to a viable base level to service its workload and the Minister for Finance endorsed an increase of $0.6 million in the Court's 1991-92 budget allocation and an additional $0.222 million in 1992.

- Funding for mediation was seen by the Department of Finance as amenable to a resource agreement between the Court and the Department of Finance.

- The remainder of the funding identified by the Working Party was classified as being required to implement new policy initiatives to improve administrative support and Court counselling.[24]

3.26 The Government subsequently provided funding of $1.2m in the 1991-92 Budget, and $0.9m from 1992-93 onwards for a management improvement program for the Court. The Department of Finance expected that the benefits of these investments would accrue to the

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20 Submission No. 3, *Submissions*, Vol. 1, p. 19.

21 *Transcripts*, p. 457.

22 *Transcripts*, p. 458.

23 *Transcripts*, p. 357.

24 Submission No. 7, *Submissions*, Vol. 1, p. 210.

Court in part by way of operational savings in running costs.[25] The Court claimed that the funding only partly met its ongoing costs.[26]

3.27 The Court sought, without success, an amount of $1.535 million in ongoing funding in the 1992-93 New Policy Proposals to fully implement those recommendations of the Buckley Report which related to the management of the Court.[27]

3.28 The Joint Committee is concerned by the actions of the Family Court in implementing the Buckley Report's recommendations, whatever their perceived merit, without funding being approved or any undertaking having been given in relation to funding.

Evaluation of the implementation of the Buckley recommendations

3.29 The Buckley Report recommended that:

> d. 12-18 months after implementation of recommendations has commenced, the Chief Justice appoint a committee to evaluate and to prepare a report on the progress of the implementation of those recommendations;
>
> e. the committee include those members of the working Party who are then available to participate, and a representative of the Implementation Committee.[28]

3.30 These recommendations were accepted by the Chief Justice and an evaluation of the implementation of the Report's recommendations commenced in July 1995 under the leadership of the Hon Justice Buckley, the Chair of the original Working Party. The terms of reference for the evaluation cover:

- the division of functions between the Office of the Chief Executive and Regional Offices, the extent to which powers should be devolved to Registry Managers, and the adequacy of the Court's staffing in relation to policy formulation and the development of operational procedures;
- whether there should be some form of amalgamation of Registries;
- the consideration of alternative means of providing dispute resolution; and
- the standardisation and equitable provision of the Court's services throughout Australia.[29]

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25 Submission No. 7, *Submissions*, Vol. 1, p. 210.

26 Submission No. 3, *Submissions*, Vol. 1, p. 25.

27 Submission No. 3, *Submissions*, Vol. 1, p. 25.

28 *Report of the Working Party on the Review of the Family Court*, p. 445.

3.31 The Hon Justice Buckley is being assisted in the evaluation by Professor Peter Coaldrake, Deputy Vice-Chancellor of the Queensland University of Technology. The Family Court notes that 'Professor Coaldrake will pursue his enquiries as a consultant independently, but in consultation with the Hon Justice Buckley...and that he will be provided with administrative support from the Chief Justice's Chambers.'[30] Justice Buckley is to report directly to the Chief Justice. The evaluation is not yet completed.

3.32 The Attorney-General's Department acknowledges that there are various models for review and evaluation and considers that '...the choice of how the Court decides to review an aspect of its operations is...largely a matter for the Court to decide and then to stand accountable for the product that it produces'.[31]

3.33 Due to the fact that the Buckley Review was conducted by the Family Court and given the difficulties associated with the Review, the Joint Committee is concerned about the appropriateness and effectiveness of the Court's undertaking an evaluation of the implementation of its own Review. Furthermore the Joint Committee is concerned that future reviews of the Family Court's operations in the light of the recommendations contained in this report may be conducted and evaluated internally. Such review practices are unacceptable when managers and management systems, are required to be efficient, accountable and to meet performance and delivery standards.

3.34 The Joint Committee recommends that:

there should be regular reviews of the management and administration of the Family Court of Australia, which are external to the Court, and the Attorney-General should discuss the mechanism for the review process with the Court.

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29 Family Court of Australia, Supplementary Information, 30 June 1995, p. 1. The terms of reference for the evaluation are at Appendix 5.

30 Family Court of Australia, Supplementary Information, 30 June 1995, p.2.

31 *Transcripts*, p. 341.

CHAPTER 4: FUNDING OF THE FAMILY COURT OF AUSTRALIA

Introduction

4.1 In 1989-90 funding was provided to cover running costs and other services items, and funding to cover operating expenses was provided in the 1990-91 Budget. Since 1989-90 the Family Court has been operating directly in a running cost environment, and has had the opportunity to take advantage of the flexibilities of the running costs arrangements. In the last financial year the net cost of services of the Family Court was $97.3 million with the running cost budget of the Family Court in 1995-96 being approximately $67 million.[1] The increases in the running costs and property allocations for the previous five years are shown at Appendix 6.

The resource management framework

4.2 The standard budgeting structure now in place for most departments and authorities consists of the following:

- *running costs* budgets which generally incorporate all operating costs such as salaries, administrative expenses, property operating expenses and, for some agencies, the costs to the Commonwealth of employees' superannuation entitlements;

- *other services* which typically includes a separate provision for the costs of litigation and other legal services as well as for associated and other forms of compensation;

- *property acquisitions, buildings, works, plant and equipment*, if necessary, and itemised as required.

4.3 Property operating expenses became part of the running costs appropriation for most departments and agencies from 1 July 1992. The Family Court, in recognition of the special purpose nature of its property, was excluded from this exercise and has retained property operating expenses as a separate item. Running costs, including property operating expenses, are the major components of the Family Court's expenditure.[2]

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1 *Transcripts*, p. 332.

2 Submission No. 7, *Submissions*, Vol. 1, p. 215.

4.4 Outside the budgetary process the Family Court has two main channels open to it for the supply of additional resources:

(i) The first is through the new policy proposals process whereby the Attorney-General can seek funds for new expenditure (for example additional Family Court registries, new computer systems, etc) from Cabinet during the Budget process.

(ii) The second channel is through the Department of Finance which has some discretion, conferred upon it by the Government, to vary resource levels within and across years in accordance with guidelines. Different arrangements apply to the adjustment of each element of the Family Court's total budget allocation.

4.5 The Department of Finance may authorise an increase which it sees as being required under the Government's existing policies to provide a level of resources sufficient to enable the Court to meet its workload and discharge its functions to the required standards.[3] It has no authority to vary resource levels for those proposals considered but not supported by Cabinet.[4]

Funding of the Family Court

4.6 The Family Court obtains its funding base through an established mechanism which is applicable to all Commonwealth agencies. That process has a demonstrated capacity to provide an appropriate level of funds for the services that the Parliament requires an agency to perform.[5]

4.7 The general basis on which the Family Court's funding is determined is as follows:

- the Court's budget is set at a level which means that it is fully funded for demonstrated workload and activity levels; and

- future increases are negotiated by the Court with the Department of Finance in accordance with the usual processes applicable to such matters as agreed, and may be approached in any of the following ways:

  – by direct negotiation with the Department of Finance in accordance with the *running costs* rules as they apply from time to time to all Budget-funded Departments, agencies and Courts and, in particular, by renegotiation of the current *workload formula* settled between the

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3 Submission No. 7, *Submissions*, Vol. 1, p. 212.

4 Submission No. 7, *Submissions*, p. 217.

5 Submission No. 5, *Submissions*, Vol. 1, p. 177.

Family Court and the Department of Finance in the course of the most recent discussions;

- by submitting *new policy proposals* in the usual pre-Budget preparations for consideration by Government;

- by bidding for additional funding in the context of any *new legislative or administrative proposals* being considered by Government in so far as they affect the Family Court; or

- by negotiating with the Attorney-General's Department the transfer of further funds consequent upon any further *Devolution of administrative functions* from that Department to the Family Court.[6]

4.8 As a result, the amount appropriated for operating the Family Court in any year includes a number of adjustments to the amount appropriated in the preceding year.

Running costs arrangements

4.9 The Family Court has the ability to move resources between salary and administrative items. It has the ability to reallocate staff and other resources between registries and other offices as new priorities emerge. The Court can borrow from the next financial year up to six per cent of its running costs allocation or carry over up to ten per cent of its budget. It can also access multi-year borrowings to fund new initiatives or activities where it believes that efficiency gains can be achieved.[7]

4.10 *Carryovers* allow the Court to carry forward unspent running costs funds from one financial year to the next up to a limit of six per cent of its total approved running costs budget. Multiple year carryover is a facility that allows the building up of quarantined funds, over a number of years, to enable long-term planning initiatives to be funded from within long-term running costs appropriations. Multiple year carryovers need to be negotiated through a *resource agreement* with the Department of Finance.

4.11 *Borrowings* allow the Court to bring forward funding from forward year estimates to meet current requirements and to 'pay back' the funds through a reduction in the forward year estimate. Running costs arrangements provide for single year or multiple year borrowings. Multiple year borrowings arrangements must be negotiated through a *resource agreement* between the Court and the Department of Finance. Any savings through greater efficiency would normally be shared between the agency and the budget.

4.12 *Threshold arrangements* operate within the running costs arrangements to ensure that the Court absorbs minor cost increases and to eliminate the pursuit of minor bids and savings by the Department of Finance. Requests for adjustments to running costs estimates will only be considered where:

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6 Submission No. 5, *Submissions*, Vol. 1, p. 144.

7 *Transcripts*, p. 333.

- non-recurring adjustments individually exceed one per cent, or in special cases jointly exceed one per cent; of the total running costs provision, or

- ongoing workload changes exceed 0.5 per cent of the running costs provision.[8]

Baseline funding

4.13 The Government allocates a base level of funding within the running costs arrangements and changes that level incrementally as new policies or savings are agreed.[9]

4.14 The Family Court's contention is that it is in a poor financial position, in part, because it has never been adequately funded for an appropriate level of operation in respect of its statutory responsibilities and that an appropriate level of baseline funding has never been properly assessed.[10]

4.15 As the Joint Committee notes in the preceding chapter, the Family Court may have found itself in a better position had it taken the opportunity provided by the Buckley Review to establish any deficiencies in funding. Notwithstanding this, the Department of Finance states in evidence that in recent times the Family Court has not made the kind of approaches regarding inadequate levels of baseline funding that it felt constrained to make in 1991-92.[11]

4.16 In November 1992 the Department of Finance agreed to increase the Family Court's running costs base by $2.022 million beginning with the year 1992-93.[12] The Department also agreed to waive the repayment of borrowings of $1.185 million. Most of the additional funds approved resulted from the application of an amended workload formula developed within the context of the running cost budgeting rules.[13] In evidence given in 1994, the Court agreed that these additional funds improved its situation considerably.[14]

4.17 In June 1995 the Family Court welcomed the substantial funds foreshadowed in the Justice Statement of May 1995, repeating that baseline funding is still considered inadequate, but that the funds to be provided would ameliorate the situation to some extent.[15] In July 1995 the Court maintained that its running costs base was inadequate by about $2.1m. It stated that its position remained critical and that it was impossible for it to continue to provide the level of services for which is was funded in 1992-93, '...largely due to the effect

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8 Submission No. 7, *Submissions*, Vol. 1, p. 217.

9 *Transcripts*, p. 335.

10 Submission No. 3, *Submissions*, Vol. 1, p. 19.

11 *Transcripts*, p. 340.

12 Submission No. 3, (Supplementary Submission), *Submissions*, Vol. 1, p. 143.

13 Submission No. 3, Supplementary Submission), *Submissions*, Vol. 1, p. 143.

14 Submission No. 10, *Submissions*, Vol. 2, p. 20.

15 *Transcripts*, p. 451.

of the efficiency dividend in the intervening years and more recent Cabinet decisions to reduce running costs in 1995-96'.[16] As the Court explained it:

> ...we have borrowed $1.2 million from 1995-96 to cover us in 1994-95. We did have an overspend the previous year of about $1 million, which we covered by the unusual device of transferring, with the Department of Finance's approval, some money from our property operating expenses...We are still in the situation of carrying forward $1.2 million.[17]

4.18 The Court claims that the efficiency dividend, combined with the 1995-96 Cabinet decisions to reduce the running costs base by two per cent across the board and by one per cent as an offset for funds to be received in the new policy process, has reduced the Court's running costs base by a total of $3.04 million over the last three financial years. The Court claims that, without taking into account the funds from the Justice Statement, the Court's projected deficit for 1995-96 of $2.1 million indicates that the Court has made some savings within its running costs budget. Some of the areas addressed to provide savings include the centralisation in Sydney of personnel and pay processing functions and contracts for national providers for security, travel and court reporting.[18]

4.19 In May 1995 the Prime Minister announced the Government's Justice Statement. In 1995-96 the total funding provided to the Family Court by the Justice Statement is $6.758 million. Of this, $1.027 million is for property operating expenses and $5.731 million is for running costs. The breakdown of the running costs figure is $3.648 million for salaries and $2.083 million for administrative expenses. The accompanying one per cent reduction in the running costs figure (to offset new policy proposals) results in a net running costs figure of $5.176 million.[19]

4.20 The most recent figures provided by the Court, taking the Justice Statement funds into account, indicate that the Court now proposes to budget for a running costs deficit of $1.066 million in 1995-96.[20]

Workload resourcing formula

4.21 The Department of Finance is authorised by the Government to vary the Family Court's budget provision according to changes in the demand for its services.[21] The Department of Finance and the Family Court have entered into an agreement where resources are automatically adjusted on the basis of movements in the Family Court's workload as measured by an agreed workload formula. This agreement is subject to the threshold

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16 *Exhibit* 80, p. 2.

17 *Transcripts*, p. 568.

18 *Exhibit* 80, p. 4.

19 *Exhibit 81*, p. 1.

20 *Exhibit 81*, p. 4.

21 Submission No. 7, *Submissions*, Vol. 1, p. 209.

arrangements, although the Attorney-General's Department considers that it would be desirable to reassess the thresholds that apply before variations to the formula are invoked.[22]

4.22 The workload resourcing formula measures the percentage change in workload and applies that percentage to staff levels of the Family Court to determine the variation in resources. The mathematical workload formula is at Appendix 7. The process is retrospective and any additional funds calculated using this formula are not received by the Family Court until the year following the calculation.[23]

4.23 While the workload formula provides an agreed basis for incremental change from year to year, it is not designed to ascertain whether baseline funding is appropriate to the task.[24] What it does provide is a degree of certainty for managers of the Family Court as to the funding that will be available and the basis on which the resources will be provided.[25] The workload formula does not identify resources to be allocated to a particular region or a particular activity within the Court. Once the resources are appropriated, it is the Court's responsibility to determine, within the general running costs arrangements, how the money will be spent.[26]

4.24 The running costs system allows ongoing review of the workload formula.[27] The Family Court acknowledges the progress made in relation to the Court's funding by the development of the workload formula approach in conjunction with the Department of Finance. The formula is considered by the Court to be generally adequate to fund services provided in response to changes in workload. With the encouragement of the Department of Finance, the Court is continuing to work to refine the formula and validate its results.[28]

4.25 The Department of Finance has invited the Family Court to make submissions outlining its current concerns about the formula, including the weighting for voluntary counselling and the exclusion from the formula of judges and their support staff. The Court is also concerned that not all workload increases associated with the new policy proposals approved as a result of the Justice Statement will be covered by the formula in its present form. It is the contention of the Court that some workload increases are not measured appropriately by the formula or recognised by it at all.[29] There is evidence to suggest that depending on the final draft of the Family Law Reform Bill, there may be further increases in the workload of the Court.[30]

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22 *Transcripts*, p. 333.

23 Family Court of Australia, Supplementary Information, 9 June 1995, p. 17.

24 *Transcripts*, p. 342.

25 *Transcripts*, p. 333.

26 *Transcripts*, p. 337.

27 Submission No. 5, *Submissions*, Vol. 1, p. 178.

28 Submission No. 10, *Submissions*, Vol. 2, pp. 20-21.

29 Family Court of Australia, Supplementary Information, 9 June 1995, p. 17.

30 *Transcripts*, pp. 35, 122, 334, 384 and 477-479.

4.26 The Department of Finance considers that in a number of areas the formula might be improved. This includes reassessing the weightings applied to different categories of tasks within the formula. The Department of Finance also notes that the formula does not provide a precise measure of the actual workload facing the Court at a given time.[31] In an expression of its willingness to explore improvements to the formula with the Court, the Department of Finance states that it would like to assess

> ...whether the formula can be adapted to provide more robust forward-looking projections of future workload so that the court can be funded on the basis of its expected future workload, instead of the workload that actually applied in a previous period. In our view this would aid medium term planning but, clearly, it increases the complexity of the formula and places an added demand on the court to generate data.[32]

4.27 The Joint Committee recognises that there may be a trade off between improving the accuracy and sophistication of the formula and its responsiveness to the Court's needs and the need to keep the arrangement simple and easily understood. However, the Joint Committee notes that the Court is free to negotiate improvements to the formula. and considers the Family Court to be adequately resourced to undertake its statutory functions.

4.28 The Joint Committee recommends that:

> **where the Family Court of Australia believes that changing circumstances have resulted in a variation to its workloads, it should negotiate appropriate changes to the agreed workload formula with the Department of Finance, to take account of projected service demand.**

Resource agreements

4.29 To the extent that the Family Court considers that it cannot fund a new project from existing resource levels, it has two options available to it. The Court must seek new money through the *new policy process* or fund the project out of future growth or economies through a *resource agreement* with the Department of Finance.[33]

4.30 A resource agreement between the Department of Finance and an agency is defined as an agreement whereby resources are provided in return for an undertaking by the agency to act in accordance with the terms of the agreement. The objective of such agreements is to provide flexibility in the use of resources to enhance program outcomes.[34] The process is

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31 *Transcripts*, p. 333.

32 *Transcripts*, p. 334.

33 Submission No. 8, *Submissions*, Vol. 1, p. 226.

34 Submission No. 7, *Submissions*, Vol. 1, pp. 217-218.

particularly appropriate for a proposal that is expected to produce savings in the medium term but which might have an additional cost in the short term.[35]

4.31 Such agreements usually involve the Department of Finance increasing the agency's current year budget provision, with a corresponding reduction in the estimates for the forward years to fund, for example, an information technology development which will generate operational savings for the agency sufficient to offset the investment and provide some additional return. This return possibly could include some increase in client services.[36]

4.32 The Department of Finance notes, in evidence given to the previous joint committee in 1992, that a resource agreement would have been relevant to the Family Court's desire for additional resources to complete the implementation of the management improvement program flowing from the 1990 Buckley Review of the Family Court. An agreement could have been applied to fund any elements of the program which entailed improvements in the Court's efficiency and productivity. The savings in the Court's operating costs would have been offset against the implementation costs. If management improvements in any agency cannot pay for themselves in this way, they and their funding generally need to become a matter for government to consider.[37]

4.33 Mediation is another area that the Department of Finance highlighted in 1992 as being potentially suitable for the application of a resource agreement. The Department of Finance argues that if effective mediation reduced the demand on the Family Court's more formal processes and on the time of the judiciary, then there would be expected reductions in costs for the Court as well as its clients:

> These eventual savings for the Court would enable it to accommodate to the reductions in its funding levels for future years which would be required under the resource agreement to offset the initial set-up funding. In this event it would not be necessary for mediation initiatives to be treated as new policy for funding purposes because their impact on the Court's running costs over time would be neutral.[38]

4.34 Of course, there are some projects for which a resource agreement is not appropriate. This is the case where no savings are likely in the future or the amount involved is too great for the Family Court to manage through a resource agreement. In such cases, a decision on whether additional funds should be provided is made by the Government.[39]

4.35 In 1993, the Department of Finance entered into two resource agreements with the Family Court. The first agreement was to enable the Court to replace its Blackstone computer hardware which was obsolete and suffering from capacity and technical support problems.

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35 Submission No. 8, *Submissions*, Vol. 1, p. 226.

36 Submission No. 7, *Submissions*, Vol. 1, pp. 209-210.

37 Submission No. 7, *Submissions*, Vol. 1, p. 213.

38 Submission No. 7, *Submissions*, Vol. 1, p. 213.

39 Submission No. 8, *Submissions*, Vol. 1, p. 227.

The agreement involved the initial allocation of funds in 1993-94 to acquire the new equipment on the basis that this allocation would be fully offset by reductions to the Court's future budget provision in the years from 1994-95 to 1997-98. The Department of Finance expected that 'the efficiency savings flowing from these technology enhancements [would] offset the future reductions in the Court's budget'.[40]

4.36 The second resource agreement was a Section 35 Agreement which took effect from the 1993-94 Budget. This arrangement, a standard agreement applicable to other agencies whereby receipts in accordance with the agreement are retained by the agency, provides further flexibility and incentives to reduce the Family Court's call on the Budget. Section 35 receipts for the Court for 1993-94 were approximately $180,000, and are estimated at $120,000 in future years.[41] A proposal by the Family Court for a resource agreement for the provision of video-conferencing facilities was supported by the Attorney-General's Department,[42] however the Department of Finance advised the Committee that the Court decided not to proceed with the resource agreement.

4.37 Evidence from the Community and Public Sector Union suggests that many of the Court's functions could be streamlined through appropriate technology. The Union considers that there could be a much greater investment in long-term planning for efficient technology.[43] The Family Court states that it was aware that it could give no assurances in regard to its total efficiency and cites shortage of funding as preventing the attainment of greater efficiencies in areas like technology and computerisation.[44]

4.38 The Family Court informed the Joint Committee that the major deficiency in its Blackstone system software is that it does not have a built-in management information system. It is envisaged that a proposed new system would build in management, accountability and reporting requirements.[45] The Court claims that it still has a long way to go in this area because funding has not been available to proceed with sufficient speed to provide satisfactory, computer-based information systems drawing on computerised operational systems.

4.39 While the Court has taken the decision that the existing system will be replaced by a completely new system, the timing and cost details have yet to be determined. The Court reports that it has '...earmarked some pretty meagre resources to start the process of changing over'.[46]

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40 Submission No. 9, *Submissions*, Vol. 2, p. 18.

41 Submission No 9, *Submissions*, Vol. 2, p. 18.

42 Submission No. 8, *Submissions*, Vol. 1, p. 227.

43 *Transcripts*, p. 50, and Submission No. 11, *Submissions*, Vol. 2, p. 36.

44 *Transcripts*, p. 567.

45 *Transcripts*, p. 610.

46 *Transcripts*, p. 609.

4.40 The Joint Committee recommends that:

in order to improve client services and management efficiency, and given the failure of the existing system to meet adequately the current needs of the Family Court of Australia, the Family Court update its information technology platform and that this be funded through a resource agreement with the Department of Finance.

New policy proposals

4.41 In the case of new policy initiated by the Government which affects the Family Court, the new policy proposal is developed by the Attorney-General's Department which bids for resources through the new policy proposals process. The Department of Finance is involved together with other portfolios in commenting on those resource requests. The process requires consultation and agreement with the Family Court as to the amount sought for Court resources.[47] For some agreed new policies, the Family Court's workload resourcing formula makes automatic, non-debated adjustments to the Court's funding. Where new policy may fundamentally change the operations or processes of the Court, the Department of Finance reassesses and revises the workload formula as necessary.[48]

4.42 The Family Court itself has the capacity to bring forward for consideration by the Attorney-General, and if he or she so decides, by Cabinet, its own new policy proposals. The Court is responsible for the preparation and submission to the Attorney-General of its new policy proposals. The success or otherwise of such proposals is dependent on the priority given to those proposals by the Attorney-General relative to other new policy proposals that are developed within the portfolio, and by Cabinet relative to proposals from all portfolios.[49]

4.43 The Attorney-General's Department notes that the Court submitted new policy proposals for the establishment of new registry facilities in a number of locations (following recommendations in the Buckley Report), and in relation to the establishment of new services such as the provision of a mediation service pilot. While there is an acknowledgment by the Department that it is a matter for the Court as to how it seeks to finance projects such as the provision of new facilities and resources, the Department is of the opinion that in some of these cases the matters would have been more appropriately dealt with by resource agreements negotiated with the Department of Finance.[50]

Efficiency dividend

4.44 The efficiency dividend is an element of the running costs arrangements which are themselves a major component of the continuing reform of Commonwealth public sector management. Underlying the application of the dividend is that:

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47 Submission No. 8, *Submissions*, Vol. 1, p. 226. and *Transcripts*, p. 335.

48 *Transcripts*, pp. 335-336.

49 Submission No. 8, *Submissions*, Vol. 1, p. 227.

50 Submission No. 8, *Submissions*, Vol. 1, p. 227.

- there is an obligation on public sector managers to seek ongoing efficiencies;

- public sector reforms have provided the means by which these efficiencies can be generated; and

- the Government, as owner of agency operations, has a right to share in the efficiencies and to redirect a portion of them to other areas of priority.[51]

4.45 The efficiency dividend is applied to the gross running costs in government-funded agencies generally, and the level of the dividend currently applying to the Family Court is 1.25 per cent. The dividend is currently not applied to property operating expenses which are appropriated separately.[52]

4.46 While measurement of productivity in the public sector, and in the service sector generally, is acknowledged as being difficult to achieve, the Department of Finance has developed a methodology to measure productivity and has determined that there was a 2.5 per cent per annum improvement in labour productivity over the period 1987-88 to 1991-92. This figure exceeds the level of the efficiency dividend. While the rate is not specifically linked to a productivity measure, it is clear that agencies have shared in the efficiency gains over that period.[53]

4.47 In relation to the efficiency dividend itself, the Joint Committee agrees with the 1994 Report of the Standing Committee on Banking, Finance and Public Administration, (Banking Committee) *Stand and Deliver*, that the flexibilities available under the running costs arrangements provide managers with the means to achieve ongoing efficiencies and that managers have an obligation to achieve them. The devolution of responsibility for resource decisions to agencies and the guarantee of funding requires that there be a mechanism to ensure that managers focus on achieving efficiencies and return a share of those gains to government: 'The efficiency dividend performs this role in a simple, cost-effective manner.'[54]

4.48 The Banking Committee Report considers whether the efficiency dividend has become institutionalised through agencies simply looking for savings to outlays rather than focussing on increasing efficiencies. It notes that 'some agencies still appear to be adopting the approach...of eliminating activities that they can do without as opposed to looking for improvements in the productivity of the core business of agencies'.[55] That Report notes that

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51 House of Representatives Standing Committee on Banking, Finance and Public Administration, *Stand and Deliver*, May 1994, p. 6.

52 In 1994, the Government agreed to reduce the efficiency dividend to 1.0 per cent for agencies as they finalise appropriate property resource agreements and bring property operating expenses within the ambit of the efficiency dividend.

53 House of Representatives Standing Committee on Banking, Finance and Public Administration, *Stand and Deliver*, May 1994, p. 9.

54 House of Representatives Standing Committee on Banking, Finance and Public Administration, *Stand and Deliver*, May 1994, p. 38.

55 House of Representatives Standing Committee on Banking, Finance and Public Administration, *Stand and Deliver*, May 1994, p. 31.

the Family Court was one of the few organisations to claim an instance where quality of service has declined as a result of cuts arising from the efficiency dividend. The closure of the Gold Coast counselling service is identified as a measure taken which resulted in a decline in service.[56]

4.49 The Family Law Act states that the Court '...shall, as far as practicable, make [counselling] facilities available...'.[57] The Chief Justice considers that the provision of counselling facilities is a 'permissive' function under the Act in that '...it only need be done if it is practicable'.[58] The Joint Committee does not accept the Chief Justice's view that to make counselling facilities available is a permissive function. The Joint Committee considers that it is a mandatory function under the terms of the legislation but that the words 'as far as practicable' allow for limitations, including resource and geographical limitations, and the possible need for the Court to prioritise its resources.

4.50 The Joint Committee notes that it is for the Court to decide its priorities. While the Court understandably seeks to enhance the level of its services, it must take responsibility for the financing of such services and not seek to lay the responsibility elsewhere. The Joint Committee is concerned that the Court tends to view the efficiency dividend as a cut in funding rather than what it is intended to be: an incentive to take full advantage of the flexibilities offered under the running costs arrangements to ensure that the efficiency dividend obligations are being met through genuine efficiencies. The efficiency dividend is considered by the Family Court to be the substantial underlying factor in the Court's current dissatisfaction with its financial position.[59]

4.51 The Family Court contends that it should be exempt from the application of the efficiency dividend because it is driven by demand for services and does not have the flexibility to cut out a policy area or activity. Moreover, it argues that it is a small organisation and unduly affected by the efficiency dividend because of the lack of capacity to absorb it.[60] The Banking, Committee states in its report that it is not convinced that small agencies should be exempt from the efficiency dividend. However it recommends that the next review of the efficiency dividend (after the 1996-97 Budget) '...focus particularly on the situation of small agencies'.[61]

4.52 While the Department of Finance acknowledges that small agencies have less flexibility than large agencies,[62] the Family Court, like other budget funded agencies, is

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56 House of Representatives Standing Committee on Banking, Finance and Public Administration, *Stand and Deliver*, May 1994, pp. 13-14.

57 *Family Law Act 1975*, s. 16(2), s. 61A(2).

58 Family Court of Australia, *Supplementary Information*, 17 August 1995, p. 2.

59 *Transcripts*, p. 565.

60 *Transcripts*, p. 566.

61 House of Representatives Standing Committee on Banking, Finance and Public Administration, *Stand and Deliver*, May 1994, p. 42.

62 House of Representatives Standing Committee on Banking, Finance and Public Administration, *Stand and Deliver*, May 1994, p. 29.

expected to manage its workloads within its agreed budget cover. Some special allowances are made for the Court: for instance, the efficiency dividend is not applied to the salaries and allowances of Judges and Judicial Registrars.[63] The Joint Committee does not consider that the Family Court should be exempt from the application of the efficiency dividend, but wishes to ensure that the independence of the Court remains unaffected.

4.53 The Joint Committee recommends that:

> **the Family Court of Australia continue to be subject to the efficiency dividend, noting that judicial salaries are exempt, and that the Family Court's position be re-examined when the review of the efficiency dividend, with its focus on small agencies, is carried out after the 1996-97 Budget.**

Property operating expenses

4.54 Under the current arrangements, the Family Court receives additional funding for property operating expenses from two sources, namely the workload formula and ongoing funding for existing leased properties. Through the workload formula, the Family Court receives additional funding for property operating expenses to finance the Court's increasing property requirements resulting from its increased workload. The Family Court now has the facility to 'bank' workload property operating expenses funds with the Consolidated Revenue Fund that are surplus to its current needs. These funds can then be called upon at a future point in time when the Court incurs a large property expense.

4.55 The flexibilities provided through this banking facility should assist the Family Court in funding the establishment of additional registries to address changing geographical workload priorities. The Court in its plan to open a new sub-registry in the Gold Coast area utilised the property operating expenses component of the workload formula. [64]

4.56 In relation to the funding of existing leased properties, the Department of Finance considers that the zero-based estimates approach utilises none of the potential flexibilities inherent in the budgeting and management framework and that the area requires further review and streamlining. However the Department is conscious of the fact that:

> ...any variation to the existing arrangements must take into account the specific purpose nature of some of the Court's properties...court buildings often feature characteristics (eg. large purpose built court rooms, security measures) which reduce the flexibility of the Court to financially manage its properties.[65]

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63 *Transcripts*, p. 336.

64 Submission No. 9, *Submissions*, Vol. 2, p. 17.

65 Submission No. 9, *Submissions*, Vol. 2, p. 17.

Issues to be addressed by the Family Court

4.57 Since 1991 the Family Court has enjoyed administrative and financial independence. It is responsible for handling its own resources and taking its own decisions on staffing and finance. The Court is expected to adopt modern management techniques to maximise the efficient use of the resources available to it. The budgeting and management framework within which the Family Court operates is designed to facilitate flexibility and accountability: hence the consolidation of funding for staffing and other operational costs into a single running costs budget provision for the Court.

4.58 As well as encouraging accountability, the framework is also intended to encourage management efficiency and innovation. Agencies able to find ways and means to satisfy the Government's operational and service standards more cheaply than is implicit in their budget provisions are, within limits, able to allocate their resource savings to trial new approaches or extend services. The expectation is, of course, that agencies will first ensure that the Government's requirements are met before redeploying any surplus resources they may be able to generate.[66] The Family Court's reallocation of resources to pursue innovations such as mediation and the extension of pre-existing service levels such as extending the geographical spread of its registry services needs to be viewed in this light.

Funding and statutory functions

4.59 The Family Court's budget is framed to accommodate the Government's intentions regarding the scope and level of its operations and services, but the Court's management is left to determine its priorities and allocate its resources as it sees fit within this broad provision. In its 1990-91 Annual Report the Family Court asserts that government indifference to the Court left it in a position where it did not have the resources to perform its functions at the level of service built up over previous years.[67] Similar comments were made in the Court's original submission to the Joint Committee.

4.60 In 1992, the Attorney-General's Department offered to assist the Court to put forward arguments to the Department of Finance about an appropriate level of funding for the Court. The Chief Justice advised the Attorney-General's Department that the Court was underfunded for present workload and activity levels by about $1.5 million to $2.0 million. Subsequently, the Family Court presented its claims for additional funds, and the Department of Finance agreed that an amount of $2.022 million should be provided in 1992-93 and included in the forward estimates of the Court for out-years, and that the amount of $1.185 million borrowed by the Court for expenditure in 1992-92 should be waived. The Attorney-General's Department took the view that all of the additional amounts provided to the Family Court were determined by running costs rules and that the allocation of funds was:

> ...evidence of the capacity and flexibility of those rules to ensure that agencies are adequately funded for the work that they are required to do - at a standard

66 Submission No. 7, *Submissions*, Vol. 1, p. 209.

67 Family Court of Australia, *Annual Report 1990-91*, see esp. pp. 1, 2, 4, 5 and 21.

> regarded by the Government as appropriate. The additional funds...provided [were] no more than the Court could have negotiated in the pre-Budget discussions with the Department of Finance'.[68]

4.61 It was at the end of this process that the Chief Justice confirmed, on behalf of the Court, that the additional funding, and the associated process for the resolution of the few outstanding issues, met the level of funding necessary for the Court to maintain the level of service that it provided in 1991-92.[69] The last words are significant because they are a qualification. The Attorney-General's Department notes that the Chief Justice would have liked to provide services at a higher level and that that would have required additional funds. However the Department stresses that there was a clear agreement that the funding was there to perform all functions required at the standards then prevailing.[70] The view of the Department remains Family Court is adequately resourced to meet its statutory obligations.[71]

4.62 Since that time new functions and projects have been taken on and there have been changes in the workload. Each of those changes has been funded either via the workload formula or through funding under the new policy process, and in each case has been the subject of negotiation, consultation and eventually agreement between the Government and the Court.[72] However in its submission of April 1994, the Court, while acknowledging that some areas previously considered to be inadequately funded had been settled during the intervening period, concludes that:

> Although the Court's financial position is now under control in relative terms (in that it is not so heavily locked into borrowing from future years), its underlying situation is still unsatisfactory.[73]

4.63 The Family Court notes that the Attorney-General's Department describes many of the statutory functions of the Family Court as permissive, and not mandatory. In other words, there are functions which may be performed but are not necessarily required to be performed.[74] In the opinion of the Department, the Government has always sought to ensure, as best it can and subject to competing demands, that the Court has the resources that are at least adequate to meet the demands on the Court.[75]

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68 Submission No. 8, *Submissions*, Vol. 1, p. 223.

69 Submission No. 8, *Submissions*, Vol. 1, p. 223.

70 *Transcripts*, p. 363.

71 Submission No. 5, *Submissions*, Vol. 1, p. 171, and *Transcripts*, p. 363.

72 *Transcripts*, p. 363.

73 Submission No. 10, *Submissions*, Vol. 2, p. 23.

74 *Transcripts*, p. 455.

75 *Transcripts*, p. 356.

Level of service

4.64 The Family Court states that its current difficulty in saying that its baseline funding is adequate is the failure to have a definition provided for it concerning the Court's responsibilities. At its current level of service the Court claims that its baseline funding is inadequate.[76] The Family Court states that it is difficult to find an objective measure of the level of the service the Court should provide to the community.[77] In accepting the funds settlement related to levels of activity obtaining in 1991-92, the Court stated that it '...would not wish to be understood as saying that maintenance of that level of service [met] the Court's *perception of the level of service that the Family Court of Australia should provide*'.[78]

4.65 The Law Council considers that there are no proper guidelines as to what level of service is required to be provided by the Court and that the Court is unable to undertake its statutory functions at a *desirable* level because of a shortage of funding.[79] Many of the witnesses who gave evidence to the Inquiry did not consider that they were in a position to address the terms of reference relating to funding of the Family Court with any cogency, but tended to make assessments of service provision which they asserted reflected an inadequate level of funding.[80]

4.66 It is the view of the Attorney-General's Department that the Family Court's performance standards for its mandatory statutory functions provide a realistic guide to the expectations that Parliament should have of the Family Court:

> To the extent that they are being met in most regions, in some cases well within the performance standard, there is an indication that the Court is now adequately funded.[81]

4.67 It is the Joint Committee's view that the Family Court is funded to provide a level of output and a level of service quality that can be afforded in the light of all other competing priorities. By contrast, the Family Court's submission to the Joint Committee indicates that the Court's view is that an increased level of service should be provided.[82] Further, the Acting Chief Justice, in his letter of 5 November 1992 to the Attorney-General, stated that the Court '...firmly believes that it would be in the interests of the Australian community to have an increased level of service from the Court and a more equitable distribution of its services throughout the country'.[83] The Chief Executive Officer states that even taking into account

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76 *Transcripts*, p. 455.

77 Submission No. 3, *Submissions*, Vol. 1, p. 22.

78 Submission No 3 (Supplementary Submission), *Submissions*, Vol. 1, p. 144.

79 Submission No. 6, *Submissions*, Vol. 1, pp. 200 and 204.

80 *Transcripts*, pp. 144, 383. Submission No. 39, *Submissions*, Vol. 3, p. 159.

81 Submission No. 5, *Submissions*, Vol. 1, p. 180.

82 Submission No. 3 (Supplementary Submission), *Submissions*, Vol. 1, p. 144.

83 Submission No. 8, *Submissions*, Vol. 1, p. 224.

the services to be funded by the Justice Statement, there are many things which '...could usefully be done for the citizens of the country'.[84]

4.68 While the Joint Committee does not disagree with this claim, the reality is that the Court's service or any other service can be improved and decisions have to be made about relative priorities. Any need for funding for new or enhanced services may conceivably be met by the Court from any of three sources:

- redirecting resources from existing activities or by the Court achieving efficiencies in those existing activities;
- obtaining additional finance by application of the running costs rules; or
- securing new finance by Cabinet agreement, principally through the new policy process.[85]

4.69 The Joint Committee considers that there are existing and adequate procedures by which the Court may redirect its resources to provide new or enhanced services which it wishes to offer, or if such is beyond its financial capability, by which it may seek government decisions in that regard.

Priority setting

4.70 Asked by the Joint Committee how it planned to deal with its ongoing running costs deficit (projected to be $1.066 million in 1995-96), the Family Court replied that some of the deficit would be picked up by the Justice Statement which effectively 'reimburses' the Court for activities currently being provided on an unfunded basis. For instance, the Court's rural outreach information sessions, which are unfunded, will be greatly assisted by the Justice Statement funds. The Court states: 'We were doing them without funding, and that was part of our problem'.[86] The Joint Committee considers that unfunded initiatives by the Family Court are a major cause of the Court's 'problem'. The Court appears consistently to operate beyond its means, and in answer to a question from the Joint Committee in regard to that issue, the Court replied: 'That is quite true'.[87]

4.71 In its first submission, the Court told the Joint Committee that the recommendations of the previous joint committee which required funding could not be implemented:

> The Court is unable to improve its outreach to service country areas. It cannot widen its alternative dispute resolution activities in the area of Mediation.[88]

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84 *Transcripts*, p. 458.

85 Submission No. 8, *Submissions*, Vol. 1, pp. 225-226.

86 *Transcripts*, p. 477.

87 *Transcripts*, p. 567.

88 Submission No. 10, *Submissions*, Vol. 2, p. 23.

4.72 The Government's response to the previous Joint Committee's report was that funding would be considered in the Budget, and indeed funding in the last Budget provides for the implementation of quite a number of the recommendations of the previous joint committee. In the Joint Committee's opinion the Family Court should be aware that unfunded committee recommendations, like the unfunded Buckley Review recommendations, are exactly that. For the Court to undertake a new service or to raise the level of service without funding is a bid by the Court to do something beyond what is being asked of it.

4.73 While the Family Court has a clear authority to redirect existing resources to accommodate new or enhanced services which it may wish to undertake,[89] it has a responsibility to manage within the budget that Parliament appropriates to it. Decisions must be made within the Court about relative priorities, about the value placed on certain activities, and whether there are better ways of performing services.

4.74 In the Department of Finance's opinion, the Court has worked harder in recent years to make decisions about relative priorities and to redirect funds to client services. The Joint Committee notes that this is reflected in the Court's review of its payroll and finance function. The Court has identified savings that have been achieved and indicates that those savings will be redirected to client services. The Department of Finance states: 'That is the kind of reprioritisation we would hope would take place within the resource management framework government has established'.[90]

4.75 While not wishing to diminish the difficulty and complexity of the Court's task, the Joint Committee feels constrained to point out that in trying to meet the ideal, all that can reasonably be hoped for is that accessibility and quality of service can be increased over time. For instance, while the Justice Statement addresses some of the issues of outreach, it has to be recognised that some services may never be able to be provided at an ideal level and that people in far-flung parts of the country will face the same limitations in this area as they do in so many other things, such as education and health. As the Court itself acknowledges, it is difficult to withdraw a service once having begun it, and it is the Joint Committee's view that to gamble frequently on funding being forthcoming for new or enhanced services, not only lacks sophistication but may do more harm than good. In the view of the Joint Committee, the Court's practice of '...living above [its] means and hoping that there [will] be a response from the government as a result of committee recommendations and the like',[91] is not an appropriate management strategy.

Family Court staff

4.76 Labour costs are a major component of the running costs in public administration and it is to be expected that staff reductions are a significant factor in the search for productivity improvements. It is the view of the CPSU that the Family Court's efficiency dividend is being achieved by the Court's shrinking the Administrative Service Officer (ASO) staffing base.

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89 Submission No. 8, *Submissions*, Vol. 1, p. 228.

90 *Transcripts*, pp. 346-347.

91 *Transcripts*, p. 457.

The ASO 1-4 levels within the Court provide the bulk of Court Administrative Services.[92] The Court admits that it has reduced staff to stay within budget and that this has produced strain on the remaining staff. The Joint Committee notes the New South Wales Branch of the CPSU has made a staffing claim for an additional 50 staff for New South Wales and Canberra registries.

4.77 The Family Court states that it does not have enough support staff and that '...the pressure on overworked staff is great indeed and [I] have several times instructed managers to be sensitive to the need to prevent loyal and dedicated staff from working too hard to their own detriment'.[93] The Court notes that its staff are dedicated and work hard to improve the system. This view is reflected by the Attorney-General's Department.[94]

4.78 The Court has attempted to allay to some extent the effect on staff by reducing circuits and outreach. A simplified application form for divorce which reduces the staff time spent on each application was introduced in January 1995 and this took some of the pressure off counter staff.[95] The Joint Committee notes these attempts by the Court to reduce the pressure on staff of excessive workloads and encourages the Court to further extend itself in addressing this issue.

4.79 The Joint Committee heard evidence from the Family Court of Western Australia that the impact of staffing constraints in that Court has been minimised by improvements in the innovative use of staff and resources, and by the endeavours of the Court to encompass better management practices and to use information technology.[96] The Court rotates public counter staff through the work areas dealing with telephones and correspondence. This is designed to enhance staff skills and provide staff with some respite from the stressful, face-to-face contact situation.[97]

4.80 The Joint Committee was impressed by the attempts of the Family Court of Western Australia to address staffing constraints and reduce the stress of its staff - an example which should be noted. In keeping with the Family Court's own strategy towards its goal of responsible management to 'be a fair and responsible employer in the development of people management policies and practices',[98] the Joint Committee considers that the Court should give greater consideration to staff workload and stress management issues.

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92 Submission No. 11, *Submissions*, Vol. 2, p. 28.

93 *Exhibit* 65, p. 4.

94 *Transcripts*, p. 365.

95 *Transcripts*, pp. 535-536 and 540.

96 *Transcripts*, p. 236.

97 *Transcripts*, p. 242.

98 *The Court Plan*, p. 2.

4.81 The Joint Committee recommends that:

the Family Court of Australia order its priorities to ensure that funds are available to preserve and enhance its client focus, and that the Family Court work with staff and the representatives of staff to fund adequately those aspects of Family Court administration with high levels of client contact.

Efficiency and effectiveness

4.82 The Attorney-General's Department comments that the Family Court appears to be increasingly results and outcome oriented, although it questions whether this change is occurring fast enough. The Department states that it would be more encouraged if there was more information '...about effectiveness, value for money and improvement in social outcomes as opposed to emphasis on "we would like to do this and if we had more money we would do it..." '.[99] The Attorney-General's Department considers that the Family Court's approach to the matter of funding appears to be that projects should be funded by the provision of additional resources by government rather than by borrowing against the achievement of efficiencies that the Court implies will flow from those changes.[100] For instance, it is the view of the Department that the Court should provide the services that permit the most efficient method of resolution of disputes. However this does not mean that the Court should be funded to add to the range of substitute services that it provides.[101]

4.83 The Law Council is of the view that the Family Court should make an attempt to keep better statistics to measure some of the tangible aspects of the Court's service and determine how best to utilise its resources:

> ... there are some who believe that it is preferable to settle the case at the earliest possible stage thereby reducing the cost to the litigants and the community. Based on this premise a number of Court reforms have been introduced to "compel" the parties to conciliate as soon as possible. However, there is no statistical information as to when and why cases actually resolve. If there was statistical information about, for example, when and why cases were settled, this might shed light on where best to spend precious resources.[102]

4.84 The Joint Committee agrees with such an approach. Although the Family Court claims that it is not particularly well set up in terms of its costing and financial system to disaggregate and attribute costs, it is making some attempt to do so. The Court mentions that although it involved making a lot of assumptions in the absence of hard figures, it did undertake some analysis of mediation and counselling outcomes. The outcome was considered inconclusive by the Court which notes that the services were appropriate as applied, but that the cheaper service may not always be the more appropriate one. However,

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99 *Transcripts*, p. 350.

100 Submission No. 8, *Submissions*, Vol. 1, p. 227.

101 Submission No. 5, *Submissions*, Vol. 1, p. 189.

102 Submission No. 6, *Submissions*, Vol. 1, p. 201.

the Court could not claim with any certainty that one service was less expensive than the other.[103]

4.85 The Joint Committee considers it highly desirable that there be an attempt by the Court to assess the unit costs of new initiatives. While recognising that the application of a less expensive service may not be appropriate in all cases, the Joint Committee notes that such an exercise would at least indicate, that where its application was feasible and practical, that it should, on the basis of efficiency, be used. For example, in 1992 the Court began a pilot mediation scheme in the Southern Region, funding it by an internal allocation of the Court's resources. The pilot was to be subject to external evaluation.[104] The Department of Finance notes that the evaluation of the pilot by the Institute of Family Studies suggests that mediation provides better social outcomes and the Department of Finance considers that it reduces downstream costs in the Court.[105] The shift to mediation is a major change in the approach to resolving family law disputes. In the Justice Statement the Government announced that it is committing significant additional resources to family mediation. The Justice Statement repeats the view that:

> '...fewer cases will proceed to a hearing in a court. This will result in reduced costs to the parties and to the community'.[106]

4.86 The Department of Finance considers that there will be downstream savings to the Court as a result of the increased focus on counselling and mediation. In this particular case, those savings will remain with the Court to be directed, within the running costs arrangements, to other priorities.[107] The Joint Committee considers that the evaluation of the mediation pilot played an important role in the approval of further funding for the initiative.

4.87 There are a number of other proposals currently being developed by the Family Court:

- The Court is developing a proposal to establish primary dispute resolution units within its existing resources. It is assumed by the Court that at worst it will be revenue neutral and at best that the Court will get more value for its money.[108]

- A program of voluntary court-referred arbitration in property matters is being developed for trial in the latter half of 1995.[109] The Family Law Act provides for both private and court-referred arbitration. Complementary regulations are being developed that will enable family law disputants and the Family Court to use arbitration as an alternative to a court hearing. The Chief Justice is of the

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103 *Transcripts*, pp. 607-608.

104 Submission No. 5, *Submissions*, Vol. 1, p. 189.

105 *Transcripts*, p. 348.

106 *Justice Statement*, pp. 16-17 and 28.

107 *Transcripts*, p. 349.

108 *Transcripts*, p. 606.

109 *Justice Statement*, p. 32.

opinion that the program should be done as a pilot to assess demand and, if the program works, that consideration be given to extending arbitration to other registries. At this point, the issue of who will pay for arbitration, the Court or the user, is unresolved. [110]

4.88 The Committees expresses its concern at:

(a) the apparent lack of forward financial planning by the Family Court which has resulted in significant deficits being carried forward from year to year, and

(b) the way in which some new programs of the Family Court have been implemented without sufficient funding first being identified or allocated.

4.89 The Joint Committee recommends that:

the Family Court of Australia establish a mechanism to provide a cost/benefit analysis for all future expenditure proposals, to set priorities for such proposals in the context of the Family Court's budget and to review the subsequent effectiveness of those proposals which are implemented, against the criteria by which they were approved.

Benchmarking

4.90 In an exercise currently being undertaken by the Commonwealth and the States under the Council of Australian Governments' arrangements, studies are being undertaken into relative costs, performance information and benchmarks of the administrations of State Supreme Courts around Australia. The Attorney-General's Department, the Department of Finance and the various State administrations are involved in the process. It is unlikely that the family law jurisdiction would be looked at before 1996. [111]

4.91 While the Attorney-General's Department notes that it is not an easy area to investigate because processes and the nature of tasks are different in various administrations, the Department considers that this exercise is the best avenue into the area of benchmark costing available at the moment in relation to the courts, and that '...the benchmarking process is [the] best handle on unit costs or unit price of delivery'. [112]

4.92 A major problem facing that review is that most courts do not have adequate information systems to ascertain what it costs to run any service. The Attorney-General's Department is of the opinion that a lot of work needs to be done by the courts in this area. [113] The Department has signalled that it intends to pursue comparisons between the Family Court

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110 *Transcripts*, p. 616.

111 *Transcripts*, p. 344.

112 *Transcripts*, p. 343.

113 *Transcripts*, pp. 343-344.

of Australia and the Family Court of Western Australia but notes that it is no simple matter to compare one court in a particular jurisdiction with another court in another jurisdiction.[114]

Cost shifting

4.93 The Joint Committee is aware of the debate that has arisen as to whether the Court should be provided with additional funds for initiatives that have the effect of possibly reducing the cost of litigation for individual litigants but at the cost of shifting these expenses to the Court and thus the Government. This debate is demonstrated in an exchange of correspondence between the Secretary of the Attorney-General's Department and the then Acting Chief Justice of the Family Court. In a letter of 8 September 1992 to the then Acting Chief Justice, the Secretary of the Attorney-General's Department wrote, in a commentary on the need to provide an analysis of the financial impact of the Court's proposal to revise its procedures:

> I therefore urge you, when you are finalising the Court's proposals, to consider how procedures may be simplified without increasing the cost of the Family Court. If the only effect of the simplification of Court procedures is to transfer the cost of litigation from individual litigants to the Commonwealth, which already contributes substantially to the cost of family law litigation, it would be unlikely that the Government would see its way clear to providing additional resources.[115]

4.94 The then Acting Chief Justice responded:

> ...I feel constrained to observe that I would be most surprised if the Government were to adopt a policy which would involve it refusing to provide funds for initiatives which would result in a substantial saving of costs to the citizens who use the Court's services.[116]

4.95 The Joint Committee agrees with the Attorney-General's Department that the Government cannot and would not accept the proposition that it was necessarily bound to fund any initiative of the Family Court, or any other agency of the Commonwealth, even if the potential was to reduce the costs of individual citizens, particularly when that initiative simply shifts cost from the individual to the community as a whole.[117] In relation to specific proposals, it is, of course, a matter to be considered by the Government in its Budget considerations and subsequently, for the Parliament to determine the correct balance. The Joint Committee considers that while the reduction of litigants' costs to a reasonable level is an appropriate social objective it must be a matter for the Government and not the Court, to decide where the balance lies between substantial community cost and marginal savings for the individual litigant or improved court service.

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114 *Transcripts*, pp. 352-353.

115 Submission No. 8, *Submissions*, Vol. 1, p. 225.

116 Submission No. 8, *Submissions*, Vol. 1, p. 225.

117 Submission No. 8, *Submissions*, Vol. 1, p. 225.

Simplified procedures

4.96 The Justice Statement notes that the Family Court will introduce simplified procedures (commencement is scheduled for 8 January 1996) and provides resources in 1995-96 to clear backlogs in counselling and financial conciliation conferences to pave the way for the new procedures to be introduced.[118] The Justice Statement discusses simplification of rules and procedures under 'Improved Efficiencies', and states that '[s]implified court rules and procedures are vital for access to all court users and in the interests of overall efficiency'. The simplified procedures '...will allow the Court to maximise the number of cases resolved through early intervention'.[119]

4.97 The Family Law Practitioners' Association thinks it is very debatable whether the new procedures will in fact produce savings.[120] The Legal Aid Commission of New South Wales is of the view that the simplified procedures will have major resource ramifications for the Court. For instance, the document which will be filed simply presents the orders sought. The Court will have no information as to what that matter is about or the cogency of the claims. The Commission considers that there may be resource implications for Registrars who are dealing with matters at that early stage.[121]

4.98 Comments from the Law Council of Australia were that no testing had been undertaken to assess the possible outcome of simplified procedures, and that, if the 'punt' failed, there would not be a saving for either litigants or the Court. The Law Council suspects that simplified procedures will cause more work for the Court rather than less.[122]

4.99 The Family Court expects that there will be workload increases associated with simplified procedures, fundamentally because there will be less costs to the clients but more work at the earlier stages for Registrars of the Court. While most of the expected increase is expected to come via the workload formula, the Court has flagged that the formula would need to be the subject of negotiation if the amount of work for the Court under simplified procedures turns out to be more than the amount of comparable work under the old procedures.[123]

4.100 The Joint Committee is strongly of the opinion that there is a need for the Court to ensure that efficient structures are in place in relation to simplified procedures to ensure their effectiveness in terms of program delivery before the simplified procedures commence.

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118 *Exhibit* 81, p. 3.

119 *Justice Statement*, May 1995, pp. 59-60.

120 *Transcripts*, p. 302.

121 *Transcripts*, p. 164.

122 *Transcripts*, pp. 393-394.

123 *Transcripts*, pp. 493-494.

Conclusion

4.101 The Joint Committee is aware that the Family Court has a complex and difficult task, but ultimately, it recognises that the Family Court, like other budget-funded agencies, must manage in the best way it can with the resources it has available. The Joint Committee does not approve of the Family Court's past record of overspending and its inappropriate management practice of utilising the facility of borrowing against future funds. The Joint Committee is of the view that the facility for borrowing funds should only be used in exceptional circumstances and not be adopted as a normal management practice. Continual borrowing is analogous to a person living on their Bankcard.

4.102 The agreement of the Chief Justice in 1992 that funding was adequate to do existing tasks at existing standards is significant.[124] The Joint Committee considers that the running costs system of funding is a demonstrably appropriate and sufficiently flexible mechanism for funding the Family Court.

4.103 The Justice Statement provides significant funds to the Family Court and the use of those funds was outlined in the following evidence to the Joint Committee:

> Mr Andrews: - You were suggesting, I thought, by the general tenor of your remarks that the funding that is being provided in the Justice Statement, apart from meeting the long-term underlying deficit, it I could put it that way, has basically put the court on a family good footing. I was just curious to see how that was the case, given that the matters which had been identified in 1992 as the reasons for the shortfall do not seem to me to be largely the matters which are being provided in the Justice Statement. Can you deal with my apparent confusion there?
>
> Mr Glare: - I can try. To the extent to which the individual issues in that original shortfall statement are dealt with, there is not too much of the Justice Statement that goes to those, but, as I have pointed out, most of the matters have been dealt with elsewhere, just leaving us with a bit of an underlying deficit in that sense. To the extent to which a shortfall occurred in relation to the ability to provide service, the Justice Statement goes quite a distance, in rural outreach particularly, in the provision of information sessions, which were unfunded. We were doing them without funding, and that was part of our problem. To the extent to which it allows us to improve gender awareness for the judiciary and the staff of the court, to improve cultural awareness and to reach the Aboriginal and Torres Strait Islander communities, the Justice Statement does go towards some of our problems in the original submissions.
>
> Mr Andrews: - I do not wish to be taken to be politically correct with the statement I am about to make, but things like gender awareness and the specific service delivery which you have referred to seem to be, in a sense,

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124 *Transcripts*, p. 364.

> peripheral, if you like, to the main purpose and functioning of the court. It seems to me that those matters for which you have been given additional funding in the Justice Statement do not go to the core operation of the court. I am still a little confused about the statement that, in a sense, the core operation of the court is under-funded. I do not see that that necessarily lines up with what is in the Justice Statement. Perhaps you can explain this to me.
>
> Mr Glare: - Without wishing to debate the political correctness of it, you are right to a degree, in that they go to specific issues which are not the mainstream processing of the court.

4.104 The Joint Committee notes that the Family Court is still developing administrative expertise however, it is concerned at the attitude of the Court when it comes to the issue of funding. The Court stated in evidence:

> ...but you of course understand the running cost rules which allow us to borrow against future years. That is what we have been doing. As in the case of Mr Micawber, we hoped something would turn up. Something did in the form of the Justice Statement.[125]

4.105 Without the Justice Statement funds, the Family Court would have found itself in extremely difficult financial circumstances. It is unlikely that the Court will continue to be reprieved in this way.

4.106 The Attorney-General's Department is of the view that the Court has not had an easy task in assuming the responsibility for its own resources but that the Court now appears to be working better within the arrangements due to the development of expertise and familiarity with the arrangements.[126]

4.107 The Chief Justice noted '...that the resources and attention given to family law in Australia is probably as great, if not greater, than any other country in the world that [he had] encountered'.[127] Looking at the funding of the Court in recent years, the Joint Committee is inclined to agree.

4.108 The Joint Committee thinks that it should not surprise the Court that it may not have all the funding it would like to have, nor that it is expected to find ways of managing within a fixed budget. The workload formula which has been in operation for over four years is proving to be a viable approach to matching the Court's resources with its workload. The Court has available to it the flexibilities of the running costs system, including the negotiation of resource agreements, retention of receipts and the use of the carryover/borrowing facility.

4.109 The Joint Committee considers that the significant and demonstrated flexibility in the running costs rules and the potential to develop workload-related funding increases provide

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125 *Transcripts*, p. 568.

126 *Transcripts*, p. 339.

127 *Transcripts*, p. 564.

the Court with the capacity to meet increased demand for the services required of the Court under its statutory functions and to maintain services at acceptable levels. The Joint Committee is of the view that the Family Court of Australia is sufficiently funded in the light of the Department of Finance agreements and in this context the Court must reset its priorities. It is apparent to the Joint Committee that the Family Court would benefit from an in-depth, outside evaluation of its management and financial practices with its internal records open to full scrutiny. This can be done through an efficiency audit of the Court and to date no such audit has been undertaken.

4.110 The Joint Committee recommends that:

the Auditor-General conduct an efficiency audit of the Family Court of Australia.

CHAPTER 5: JUDICIAL STRUCTURE OF THE FAMILY COURT OF AUSTRALIA

Background

5.1 The Family Court of Australia is a court created by statute under section 71 of the Constitution. The Family Court is established in Part IV of the *Family Law Act 1975* and the functions and roles of its members and officers are specified therein. A history of the Family Court begins with the Family Law Bill 1974.

5.2 In 1974 the Senate Standing Committee on Constitutional and Legal Affairs reported on *The Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974*. The Senate committee favoured the creation of a federal court of record, being invested with full jurisdiction of the Commonwealth under section 51 of the Constitution in relation to marriage, divorce and matrimonial causes. The Court was envisaged to deal exclusively with family law matters. The Senate committee also proposed that the new Court would exercise not only the remedies in relation to matrimonial causes, which were then exercised in State Supreme Courts and Territory Courts, but also with maintenance, custody and family property jurisdictions which were exercised in a variety of State Courts. It is interesting to note that the Senate committee recognised that for some period the Magistrate jurisdiction then in existence would need to continue in some districts, but it was proposed that it be phased out over a period of time.

5.3 The concept of a family court was well established at that time and the Senate committee noted the establishment of a special court involving the assimilation of all family matters into one court, with active pre-divorce and post-divorce counselling not merely to assist reconciliation, but also to provide for the reduction of bitterness and stress and to alleviate on-going post-divorce problems. The concept of the family court was very much to be a 'helping court'. The Joint Committee notes that after some 21 years the Family Court has not provided the pre and post divorce services envisaged by the Senate committee.

5.4 The Family Law Reform Bill 1974 proposed that the Family Court consist of a two tier body of Judges, with the first tier having the status equivalent to District or County Court Judges and the second tier having the status of Supreme Court or Federal Court Judges. It was proposed that the court would sit in all States and Territories and appeals from a single Judge would be heard by a full court of three Judges. For the purpose of establishing a specialised family court it was recommended that the Judges appointed to the Court, both men and women, should be chosen for their experience and understanding of family problems and should be drawn from existing Judges, members of the bar and solicitors, according to their particular suitability. The Senate committee proposed that there would be a need to recognise the development of a new type of court, acting with a minimum of formality, coordinating the work of ancillary specialists attached to the court, encouraging conciliation and applying, only as a last resort, the judicial powers of the court.

5.5 The Senate committee stated there was a need for a new start in matrimonial law and administration in creating a new entity not interchangeable with existing courts. It was recognised that the court, would require new standards and methods in its physical environment, its procedural methods and in its approach to matrimonial problems. It was proposed that the court's business would be conducted in modern surroundings with small well provided court rooms which would promote easy dialogue between the court and the parties. The Senate committee was of the view that it is essential that the activity of the court be seen as a 'team' operation and not in the traditional atmosphere of the judicial separation and inflexible divisions of functions. The Committee stated:

> ...the Judge should nonetheless retain his clearly discernible role as a Judge, not as a counsellor. He should control proceedings, advance optional solutions and create 'the climate' for settlements. If there is no settlement, the necessary decrees must be judicial and must be seen to be judicial.[1]

5.6 The Senate committee concluded that it saw the creation of a family court as essential to give substance to the reconciliation provisions of the Bill. The committee noted that under the existing matrimonial causes legislation reconciliation had not been effective. It stated that reconciliation and counselling through its facilities must be available and be used before and at the early stages of matrimonial litigation if it is to achieve effect. In its vision the Senate committee saw the new court as performing this positive service, and where reconciliation failed, as playing a significant role in reducing the area of disharmony and bitterness and facilitating the settlement of custody, access and property disputes.

Structure of the Family Court of Australia

5.7 The judicial structure and order of seniorities of Judges of the Family Court are regulated by section 23 of the Family Law Act. The order of seniority of Judges of the family court is as follows:

> Chief Justice - section 23(1)
>
> Deputy Chief Justice - section 23(2)
>
> Judge Administrators and Judges assigned to the appeal division before 6 July 1988 - section 23(3)
>
> Judge Administrator and Judges assigned to the appeal division, according to the days on which their appointments as Judges took effect, or if more than one appointment took effect on the same day, according to the seniority assigned by the Governor-General - section 23(4)and (5)

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1 Senate Standing Committee on Constitutional and Legal Affairs, *The Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974,* October 1994, p. 3.

Senior Judges (other than those assigned to the appeal division) according to the day on which their appointments as Judges took effect, or if more than one appointment took effect on the same day, according to the seniority assigned by the Governor-General - section 23(6) and (7) and

Judges (other than Judge administrators, senior Judges and Judges assigned to the appeal division) according to the days on which their appointments as Judges took effect, or if more than one appointment took effect on the same day, according to the seniority assigned by the Governor-General - section 23 (8) and (9).

5.8 As noted in the submission by the Attorney-General's Department[2] it was originally intended by the Senate committee that senior Judges would hear the more difficult defended matters and appeals. The Judges would hear less complex and more routine matters. This did not however happen in practice and all Judges heard defended cases regardless of the degree of difficulty. There have been no senior Judges appointed to the court since 1982 and the salary differential between senior Judges and Judges has not been maintained in recognition of the nature of the jurisdiction exercised by all judicial officers of the Court. All Judges are remunerated on the same level as Federal Court of Australia Judges.

5.9 In summary, the present judicial structure of the Family Court is as follows:

The Chief Justice

Deputy Chief Justice

Judge Administrators and Judges assigned to the appeal division

Senior Judges and Judges.

The Family Court has an intermediary judicial structure in addition to the Judges of the court. That structure includes Judicial Registrars and Registrars. There are five levels of Registrar - Principal Registrar, Regional Registrar, Senior Registrar, Registrar and Deputy Registrar. The quasi judicial powers that may be exercised by these officers are described in section 26(B) of the Act and order 36(A) of the Family Court Rules in relation to Judicial Registrars, and section 37(A) of the Act and order 36(A) of the Rules for Registrars.

5.10 The Family Court states that the role of the Registrars of the Family Court is a unique feature of a unique court. [3] Registrars are lawyers who are experienced in family law matters. The statutory functions of Registrars are described under the Family Law Act, Family Law Regulations and Rules of Court and include exercising delegated judicial powers, conducting conciliation conferences, taxation of costs, remission of filing fees and making procedural directions in chambers. Registrars do not perform all the delegated functions, for example, Order 24 Conferences, pursuant to section 37(2) of the Family Law Act. The Principal

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2 Submission No. 8A, *Submissions*, p. 2.

3 Submission No. 243, *Submissions*, p. 53.

Registrar decides what of the delegated powers can be exercised by Deputy Registrars. For example, Deputy Registrars are not permitted by the Principal Registrar to hear undefended dissolutions of marriage. The Deputy Registrars therefore do not perform all the delegated functions of the Registrars known as the '37A Registrars'.

5.11 The delegated judicial functions of Registrars are described in section 37 (A) of the Family Law Act. Under that provision Registrars may exercise all or any of the powers of the Court delegated to them by the Judges of the Court. The powers which have been delegated to Registrars from the Judges of the Court include:

(a) the power to make procedural orders in matters before the court including orders in relation to discovery and inspection, answering particular questions, change of venue, substituted service and dispensing with service, fixing timetables for the filing of documents and making directions in relation to the conduct of the proceedings;

(b) the power to make orders in relation to the enforcement of orders pursuant to Order 33 of the Family Law Rules;

(c) to hear and determine applications for dissolution of marriage in undefended proceedings;

(d) the power to make any order by consent of the parties; and

(e) the power to make an order for costs.

5.12 These delegated powers are the most frequently used powers in the interlocutory processes of the court. As 95 per cent of cases settle, for one reason or another, prior to a hearing the effect of the delegation of powers to Registrars is that most people appearing in the Court deal with Registrars rather than the Judges of the Court. Another important and significant function of the Registrars is the conduct of conciliation conferences in property and financial matters conducted by Deputy Registrars. Section 79 (9) of the Family Law Act provides that the court shall not make an order in proceedings with respect to property of the parties unless the parties to the proceedings have attended a conference in relation to the matter to which the proceedings relate with a Registrar or Deputy Registrar of the Family Court. The conciliation conferences are conducted by Registrars in Chambers and are attended by the parties and their legal representatives. The purpose of the conference is to encourage and provide assistance to people in reaching a settlement of their dispute by the Registrar without the need to go to trial. Evidence of anything said or any admission made in the course of the conference is not admissible in a court. Conferences are ordered under Order 24 of the Family Law Rules and the parties' attendance is compulsory. During the course of the conferences Registrars may be required to assist parties on a wide range of matters in dispute between the parties. The Registrars function is complex and demanding as they are often dealing with people with high emotional stress with power imbalance between the parties. The Committee notes that Government is giving consideration to amending the legislation to permit pre-filing conferences in financial matters by Registrars under the Family Law Act 1975 which will be conducted by Deputy Registrars.

5.13 The intermediary level of judicial officer in the Family Court is the Judicial Registrar. Judicial Registrars are appointed by the Governor-General and exercise a significant part of the family law jurisdiction of Judges. A Judicial Registrar can make a final property order where the gross value of the property is under $300,000 or where there is consent from all the parties to the Judicial Registrar hearing and determining the matter.

5.14 The office of Judicial Registrar was created in 1988 when the Family Law Act 1975 was amended by inserting sections 26(A) to 26(N). As with the case of the delegation of power to Registrars, section 26(B) of the Family Law Act provides for delegation of judicial power from Judges to Judicial Registrars by Rules of Court, all or any of the powers of the court, except the power to make orders in relation to children other than interim or consent orders. The powers of Judicial Registrars include all of the powers of Registrars and more specifically powers in the following matters:

(a) the contested dissolution of marriage;

(b) the nullity of marriage;

(c) the guardianship, custody, welfare of a child or access to the child and matters under the Family Law (Child Abduction Convention) Regulations;

(d) property settlement where the property in dispute has a gross value not exceeding $300,000.00 and irrespective of the gross value where the parties consent to the exercise of the power;

(e) *leave to institute financial proceedings out of time;*

(f) orders for the personal protection of children and of a spouse;

(g) orders for the preservation of property;

(h) issue of warrants to take possession of children;

(i) orders for persons to submit to parentage testing procedures;

(j) enforcement of court orders including the Court's punitive powers for breaches of orders other than contempt;

(k) applications to review administrative decisions of the Child Support Registrar;

(l) applications to revoke the approval certain maintenance arrangements under section 87 of the Family Law Act;

(m) applications to set aside transactions to defeat claims under the Family Law Act;

(n) applications to set aside certain property orders where there has been a miscarriage of justice; and

(o) proceedings for alleged contempt in the face of a court constituted by the Judicial Registrar.

5.15 The purpose of the creation of the office of Judicial Registrar was stated in the explanatory memorandum to the Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Bill 1987 at page 5:

> to enable Judicial Registrars to exercise the powers of the Court in minor and procedural matters as delegates of the Judges without the need for the Judicial Registrars to be appointed as Judges under section 72 of the Constitution.

5.16 Several Judicial Registrars have been appointed to the Family Court and they are located one each at Melbourne, Dandenong, Adelaide, Brisbane and Parramatta, and two at Sydney. In its submission to the inquiry the Family Court stated:

> There are not enough of them to handle all of the work within their jurisdiction and Judges must attend to some matters which are within Judicial Registrars powers, particularly in locations where there is no Judicial Registrar. On occasions Judicial Registrars attend at registries where there is no permanent Judicial Registrar but that attendance needs to planned well in advance so that a list can be compiled of matters within their powers otherwise they will be under-utilised.[4]

The effect of the appointment of Judicial Registrars has been to allow more Judge time previously required to deal with matters within the Judicial Registrars powers. This means Judges may devote more time to the final resolution of contested matters not within a Judicial Registrar's powers.

5.17 With the establishment of the office of Judicial Registrar, the Family Court developed a three-tier judicial structure. Judicial power is exercised by the Judges of the Court appointed under section 72 of the Constitution, and delegated judicial power is exercised by Judicial Registrars and Registrars.

5.18 From an access to justice viewpoint, the appointment of Judicial Registrars has assisted with the earlier hearing of urgent matters such as interim custody, access and injunctions, which constitute a large proportion of the daily work of Judicial Registrars. The Joint Committee conducted several inspections of the registries of the Family Court and it was obvious that the Judicial Registrars were hearing lengthy daily lists and sat into the evenings to complete those lists.

5.19 In summary, the three-tier judicial structure of the Family Court is complex with several levels of judicial and quasi judicial officers exercising different powers. This may easily lead to confusion and frustration for litigants before the Court.

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4 Submission No. 3, *Submissions*, p. 43.

Two Tier Structure

5.20 In its submission to the inquiry the Family Court[5] stated there should be a change to the present judicial structure of the Court to simplify the structure and to make the Court's services more accessible to members of the community. The Court's submission outlined the history and development of its judicial structure and identified the following difficulties with its present judicial structure:

(a) it is unnecessarily complex;

(b) it can be confusing to litigants and to the legal profession;

(c) the narrow jurisdictional limits of delegated power is impracticable;

(d) it does not provide uniform access to the same level of justice at all registries;

(e) the orderly and timely management of cases through the Court required by the case management system. is presided over by Registrars, deputy Registrars and, to an extent, by Judges and Judicial Registrars; and

(f) reviews of decisions of Judicial Registrars and Registrars are by a hearing de novo rather than by a strict appeal.

5.21 The Attorney-General wrote to the previous Chairman of the Joint Committee agreeing that the Terms of Reference be extended to examine whether the office of Judicial Registrar is an effective adjunct to the judicial resources of the Family Court. The Attorney-General referred to a meeting he had with the Chief Justice of the Family Court who expressed significant concern at the standing of the office of Judicial Registrar among the clients of the Court. In particular, the Chief Justice stated that because of the salary on offer it was difficult to attract very high quality practitioners to take appointments as Judicial Registrars and that it was noticeable that the quality of work produced could improve. Further, there was a discernible gap in quality of the work of the Judges and that of the Judicial Registrars . The Family Court proposed that the present three tier judicial structure of the court which consists of Judges, Judicial Registrars and Registrars be replaced by a two tier structure of Judges and Magistrates. This would involve the gradual abolition of the offices of Judicial Registrar and Registrar and the establishment of the new office of specialist family court Magistrate.

5.22 In evidence to the Joint Committee the Chief Justice stated:

> I believe that the Court would be more responsive on a quicker basis to demands put upon it in emergency situations than a two tiered structure: one a summary tier ; and the other, the present judicial tier. One of the great values of Magistrates' Courts and summary proceedings is that they can deal with matters promptly, and with the minimum, hopefully, of cost and trauma. But at

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5 Submission No. 3A, *Submissions*, p. 2.

the same time, there are several big defects with the way Magistrates deliver that system in Australia. Firstly, they do not have any counselling services available to them. Secondly, the people who are delivering these services - that is, the Magistrates themselves - of necessity have to be expert in, and have many other areas of interests in family law. I see that as a dual problem.[6]

5.23 The major difficulty perceived by the Family Court with a three tiered structure is succinctly summarised in the submission from the Attorney-General's Department where it stated:

> The Family Court takes the view that the requirement for a de novo hearing is a problem as it holds the potential for parties to have a second bite at a hearing. If a party is unsuccessful before a Judicial Registrar, he or she might be able to fix the defects in their case and run it again before a Judge. To resolve the problem of needing de novo hearings, the Family Court has suggested abolishing the existing three-tier structure and creating instead a two-tier structure of Judges and Magistrates, both of whom would be able to exercise full judicial power. [7]

5.24 Further, in evidence to the Joint Committee, the Secretary of the Attorney-General's Department, Mr Skehill stated:[8]

> The question of whether or not there should be a Federal family court magistracy is a separate one, and we have given you a submission about that. At the moment, we have Judges and Judicial Registrars . Judicial Registrars exercise judicial powers under delegation from the judiciary but, when their decisions are appealed, the hearing de novo on the facts is required. You cannot have the Judicial Registrar as the final determent of fact and simply appeal on a question of law. The Chief Justice sees having a series of de novo hearings as being potentially inefficient. In theory, that proposition is right. We have been unable to find any statistical basis on which to say that that potentiality asserts itself such that it would be desirable to move from a Judicial Registrar/Judge model to a Magistrate/Judge model.

5.25 Mr Skehill continued[9]

> It is also relevant to note that in one sense you cannot have a Federal Magistrate. The Federal Magistrate, if structured to avoid the problem about which the Chief Justice refers, is a Chapter III Judge. He or she is just a Judge called a Magistrate.

The Committee concurs with this view.

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6 *Transcripts*, p. 551.

7 Submission No. 8A, *Submissions*, p. 8.

8 *Transcripts*, p. 377.

9 *Transcripts*, p. 378.

Delegation of Judicial Power

5.26 The major difficulty with the present judicial structure and with delegated judicial powers, and also with any future structure of the Family Court, is the constitutional validity of delegated powers to non judicial officers. Chapter III of the Constitution provides for the appointment tenure and remuneration of Judges and does not refer to Registrars, Deputy Registrars or Magistrates. As discussed above, the original composition of the judicial structure of the Family Court comprised two levels of Judges rather than a structure of Judges and Registrars and/or masters. This was for constitutional reasons on the grounds that it was invalid constitutionally for federal judicial power to be conferred on or exercised by a person who was not a Judge - see *Kotsis* v *Kotsis* (1970) 122 CLR 69 and *Knight* v *Knight*(1971) 122 CLR 114.

The submission from the Attorney-General's Department stated:

> ...it was not possible to appoint Registrars and masters to the family court to exercise federal jurisdiction in the less difficult and uncontested types of matters which over many years have been dealt with generally by such officers in the various state supreme courts when exercising state jurisdiction. Kotsis and Knight both concerned 'state' courts albeit exercising federal jurisdiction. In those cases the High Court held that a registrar of the Supreme Court of NSW and a master of the Supreme Court of SA (respectively) could not exercise federal jurisdiction invested in those courts.[10]

5.27 Section 71, Chapter III of the Constitution provides:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. ....

5.28 In the context of the present discussion the concept of 'the judicial power of the Commonwealth' is an important issue. In determining what is meant by 'judicial power' courts have considered what has generally been regarded as a primary function of a court. Central to this issue is the adjudication and conclusive settlement of a dispute between parties as to their rights and duties under the law. The Court Plan for the Family Court provides that the Court's objective is:

> to serve the interest of the Australian community by providing for the just and equitable administration of justice in all matters within the Courts jurisdiction, with emphasis in its family jurisdiction on the conciliation of disputes and the welfare of children.

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10 Submission No. 3A, *Submissions*, p. 3.

5.29 The constitutional difficulty with the Family Court is the exercise of the delegated powers by Judicial Registrars and Registrars. The core issue is the validity under the constitution for federal judicial power to be conferred on and exercised by the Judicial Registrars and Registrars of the court, that is, by a person other than a Judge appointed under the Constitution.

5.30 The constitutional problems were partially alleviated by the High Court in the case of the *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49. The High Court expressed the view that federal jurisdiction could be exercised properly by officers of a Federal Court who were not Judges with the proviso that the exercise of that jurisdiction was under the real supervision and control of the Judges. Following this case amendments were made to the Family Law Act to empower the delegation of judicial power from Judges to Registrars under the new section 37A of the Act. The extent of these delegated powers is discussed above. Subsequently the constitutional validity of section 37A of the Act was tested in the case of *Harris* v *Caladine* (1991) 172 CLR 84. The High Court upheld the validity of the delegation of powers by Judges to Registrars thereby removing any doubts about the validity of the jurisdiction of Registrars under section 37A of the Act and, ipso facto, the jurisdiction of the Judicial Registrars . However, the High Court in this case more clearly defined what it envisaged possible by way of delegation of judicial power. The High Court made it clear that Parliament could not provide for the establishment within a federal court of a separate tier of judicial officers who are not Chapter III Judges with their own independent jurisdiction and powers. This meant that the court officers authorised to exercise the delegated judicial jurisdiction must be under the real supervision and control of the justices of the Federal Court. (see Mason C J and Deane J at pp 90-91). The High Court considered that one factor in determining whether officers are under the supervision of the Judges is the ratio of Judges to court officers exercising judicial power.

5.31 In summary, the important issue for the Family Court in relation to the delegation of judicial powers to Registrars and Judicial Registrars is that its validity under the Constitution has been upheld by the High Court. One important issue affecting the validity of the delegation of powers is that the delegation has not been made to an independent tier exercising that judicial power and jurisdiction. Another important issue is that the delegation is valid as there is a provision for review or appeal by a Judge or the Judges of the Family Court on questions of both fact and law, that is there is provision for a review by way of hearing de novo.

Family Court Proposal

5.32 As discussed above, the Family Court has proposed that the present three tier judicial structure of the Court consisting of Judges, Judicial Registrars and senior executive service Registrars be replaced by a two tier structure consisting of Judges and specialist Family Court Magistrates. The Joint Committee notes that in practice the proposed two tier structure is in fact a three tier structure as Deputy Registrars at the Legal 2 level exercise delegated judicial functions particularly in relation to consent orders. In response to a question from the Chairman in relation to the proposed abolition of Judicial Registrars the Family Court responded in evidence as follows:

> the Registrars do most of the consent work. Judicial Registrars mostly do defended hearings we would intend to have Judges and Magistrates sitting in court. At the moment we do some consent orders by post, in effect, and they are done in Chambers by Registrars. I imagine we would still have to have that because it is a fair volume of work. As far as the courtroom goes, there will be Judges and Magistrates. There will still be some people in Chambers looking at consent arrangements that have been sent in.[11]

In reality, the proposed two tier structure will maintain a three tier structure comprising Judges, Magistrates and Deputy Registrars with delegated judicial authority. This in fact, is no different to the present structure of Judges, Judicial Registrars and Registrars. The only real difference is that the senior executive service registrar functions would be absorbed by the Magistrates and that the Registrars at the Legal 2 level would be maintained.

Solicitor-General's Advice

5.33 The Family Court proposal for a two tier judicial structure in relation to the appointment of Magistrates has constitutional implications. The Attorney-General's Department, recognising the constitutional implications, sought the advice of the Solicitor-General. The advice from the Solicitor-General identified five potential options.

5.34 The first option is the appointment of a lower level judicial officer to the Family Court and vesting judicial power directly to a Judicial Registrar as a Chapter III Judge. This involves the establishment of a two tier system with Judges and a lower level Judge which may be known as a Magistrate and the position of Registrars would be abolished. In practice both positions would be Judges, however, one would be known as a Judge and the other as a family court Magistrate. The Solicitor-General advised that there would be no constitutional difficulty in the enactment of legislation by Parliament to provide for the appointment of a new tier of Judges to an existing federal court. The Solicitor-General noted that under the Constitution there is no requirement that Judges appointed to the same federal court should have and identical status or remuneration. This indeed was a fact in the original establishment of the Family Court with senior Judges and Judges. Also there is no requirement under the Constitution to provide for a class of Chapter III Judges to be known by a title other than Judge or justice, such as Magistrates. Accordingly, under this option specialist family court Magistrates who are Chapter III Judges could exercise the full jurisdiction of the Family Court. The ratio of judicial and non judicial officers, discussed above, would not come into question.

5.35 Two further options considered by the Solicitor-General were the appointment of Magistrates to the Family Court and the upgrading of the office of judicial Registrar by increasing the delegated judicial power to the maximum extent constitutionally possible. The Solicitor-General considered that both the issues involved under the constitution are similar

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11 *Transcripts*, p. 531.

for both these proposals. The discussion above in relation to delegation of judicial powers is relevant to this option. The Solicitor-General advised:

> for constitutional purposes, I do not consider there to be any relevant distinction between judicial jurisdiction exercised by a Magistrate appointed to the court who is not a Chapter III judge, and judicial jurisdiction exercised by an officer of the court (whether described as "Registrar", "Judicial Registrar", "Master", "Magistrate" or otherwise). It is clear from Harris v Caladine that a Chapter III federal court must be composed of Chapter III judges, and that the exercise of judicial jurisdiction by a person other than a Chapter III judge is subject to the conditions described in that case.

Those conditions relate to the direct supervision of the persons with delegated judicial power.

5.36 The fourth option considered by the Solicitor-General related to the establishment of a Federal Family Court of summary jurisdiction. The Solicitor-General saw no difficulty with the establishment of summary jurisdiction, comprised of Chapter III Judges with a delineated primary jurisdiction split between that court and the present family court, and the latter court acting as a court of appeal from the decisions of a lower court. For the purposes of the constitution Chapter III Judges may consist of a court of summary jurisdiction. An example of this is the state courts which have been vested with federal jurisdiction under the family law act. It is important to note that the Solicitor-General advised that the constitution does not support the establishment of an inferior Federal Court of summary jurisdiction consisting of persons who are not Chapter III Judges. Accordingly, the Court of summary jurisdiction could not be comprised of Registrars or Deputy Registrars of the Family Court.

5.37 The final option considered by the Solicitor-General was the appointment of officers of the Family Court, that is Registrars or Judicial Registrars , as State Magistrates. The reason for this appointment is that officers of the Family Court could exercise jurisdiction in family law matters conferred upon State courts of summary jurisdiction. The Solicitor-General was unaware of any High Court consideration of the question as to whether there exists any constitutional principal at the office of a Commonwealth public servant is inconsistent with the office of a Magistrate under state law. The Solicitor-General considered that there may be an inconsistency with the doctrine of the separation of judicial powers that is established by Chapter III of a constitution if persons who are members of the Commonwealth public service, and therefore responsible to an executive government, in exercising the judicial power of a Commonwealth by being appointed as state Magistrates.

5.38 Accordingly, the Solicitor-General is of the view there is no constitutional difficulty in enacting legislation to appoint Family Court Magistrates pursuant to Chapter III of the Constitution. As discussed, there is no requirement in the Constitution that all the Judges appointed to a Court need to have identical status or remuneration. There is also no requirement that such an office need to be called a Judge or Justice. While this option may be

available under the constitution, the Attorney-General's Department in its submission[12] stated:

> 'it is not apparent why a Judge/Magistrate structure would work when the Senior Judge/Judge structure was found to be inadequate. It must be stressed that the proposed Magistrates would, despite the title be Judges appointed under Chapter III of the Constitution in just the same way as existing Judges of the Court.'

Costs of Family Court Proposal

5.39 At a public hearing on 3 July 1995 the Committee requested from the Court an estimate of costs for it's proposal of a two tier structure based upon Judges and Magistrates. The Court provided a costing on two options as follows:

Option 1- 36 Magistrates instead of 7 Judicial Registrars (but see below) and 20 SES Registrars

Net Salary Cost	$3.184 million
Net Cost in Administrative Expenses	$1.002 million
Total Additional Cost	**$4.186 million**

Option 2 - 20 Magistrates to replace 20 SES Registrars, retain 7 Judicial Registrars

Net Salary Cost	$1.610 million
Net Cost in Administrative Expenses	$0.483 million
Total Additional Cost	**$2.093 million**

These estimates address the structural issues and the relative cost of the offices identified in each Option. It is recognised that the employment of 7 Judicial Registrars and 20 Registrars could not simply be terminated. The Judicial Registrars are statutory appointees to age 65 years. For SES Registrars, in the transition from one structure to the other there would be additional costs by way of severance pay and the like. These costs have not been estimated.

The salary level assumed for Magistrates is that of an ACT Magistrate [13]

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12 Submission No. 8A, *Submissions*, p. 10.

13 Correspondence 2 August 1995.

5.40 In its submission to the Committee, the Attorney-General's Department did not agree that the estimated cost of the proposed Magistrates would be linked to the salary level for an ACT Magistrate. The Department stated:

> Salaries of Judges, and Judicial Registrars are set by the Remuneration Tribunal. Currently, the Remuneration Tribunal has set the salaries of Judicial Registrars at a similar level to salaries for ACT Magistrates but it cannot be assumed that this position would continue. It is possible that the tribunal would link the salaries of Family Court Magistrates to a percentage of Family Court Judge salaries.
>
> Apart from a salary differential, there would be very little difference between the cost of establishing a Family Court Magistrate and the cost of establishing a Family Court Judge. The Department estimates that the cost of establishing a new Judge is roughly $450,000 which is the set-up cost for a new Judge and an on-going amount of $250,000 per year with additional costs for staff. These costs decrease where the Judge is replacing a retiring Judge and can use the library, furniture and accommodation of that Judge. The floor space of a Judge and Magistrate would be likely to be the same as it may not be practical or financially sensible to make minor changes in office size to accommodate different grades of Judges.
>
> The Department's conclusion about costs are that
>
> - a Family Court Magistrate would probably cost the Budget only a little less that a Family Court Judge;
>
> - there is a potential for significant initial costs involved both in the redundancies of SES Registrars and in the appointment of Magistrates unless those costs can be offset against the retirement of Judicial Registrars.[14]

5.41 The Committee agrees with the concern of the Department that the proposed Magistrates would be remunerated at the level of an ACT Magistrate. Even if the new Magistrates are initially remunerated at that lower level, there is no guarantee that the salary differential would remain. History may repeat itself where the salary differential may be abandoned similarly when Judges and senior Judges of the original Family Court were all remunerated at the level of a Federal Court Judge. In any event, the Committee agrees that the initial salary of the proposed Magistrates would be linked to the salary of a Family Court Judge, as they are appointed as a Chapter III Judge under the Constitution.

5.42 The Attorney-General's Department also stated in its submission:

> 47. The next issue is whether the costs could be balanced against a benefit to be accrued by faster or easier access to justice for clients of the Family Court.

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14 Submission No. 8A, *Submissions*, p. 12.

This is very difficult to assess given the absence of significant statistics on appeals from Judicial Registrars .

48. The Department does not think the solution by the Family Court is necessarily the right solution to the problem the Court has identified and we have some difficulties understanding whether there is a real problem, particularly given the lack of statistics. However, in light of current significant movements in family law reform which place a large emphasis on resolution of family disputes outside the Court structure, we consider that it is not time to be expanding the judicial arm of the Court or experimenting with a new judicial structure which, once established, cannot be removed.[15]

5.43 The Committee agrees with the comments of the Attorney-General's Department and is of the view that resources must be utilised for the primary function of the court in providing for the just, fair, affordable and expeditious justice in all matters. The answer for the Family Court is not necessarily additional Judges. The Committee is concerned that the Family Court cannot provide statistical information to support its proposals in crucial areas.

Family Court of Western Australia

5.44 The jurisdiction of State Family Courts is contained in sections 41 (3) and 63 (1) of the Family Law Act. The concept of State Family Courts was introduced with the passing of the Family Law Act. Under the proposal the States were given the opportunity of establishing a separate Family Court within their own State. The only State to take advantage of this proposal was Western Australia. On 27 May 1976 the Governor-General by Proclamation declared that section 41 of the Family Law Act applied to the Family Court of Western Australia from 1 June 1976.

5.45 The Family Court of Western Australia has a limited jurisdiction which is expressly conferred on the Court by legislation. The Court exercises both Federal and State jurisdiction and the sources of its jurisdiction lie in both Federal and State legislation.

5.46 The federal jurisdiction of the Court is invested by four Commonwealth Statutes which are the *Family Law Act 1975*, the *Marriage Act 1961*, the *Child Support (Registration and Collection) Act 1988* and the *Child Support (Assessment) Act 1989*. The Family Law Act is the most important Act for the Family Court of Western Australia. The effect of section 63(1) and 41(3) of the Family Law Act is to give the Family Court of Western Australia jurisdiction in respect of all matters that may arise under the Family Law Act concerning children and all 'matrimonial causes' as defined in section 4(1) of the Act. Accordingly, the jurisdiction of the Family Court of Western Australia in these matters is much the same as that of the Family Court of Australia. The major difference is that by virtue of section 60F(2)

15 Submission No. 8A, *Submissions*, pp. 12-13.

many legislative provisions concerning children under the Family Law Act only apply in Western Australia to the children of the marriage and to the parties to the marriage.

5.47 The primary source of state jurisdiction for the Family Court of Western Australia is conferred section 27(2) of the Family Court Act 1975 (WA). This State legislation confers jurisdiction upon the Court in respect of the custody, guardianship, welfare and maintenance of children, access to children, preliminary expenses and other child expenses and the property of parties to a marriage. This legislation covers all children, including children of the marriage as well as ex-nuptial children. The other State Act which confers jurisdiction on the Court is the Adoption Act 1994.

5.48 In Western Australia there is also a Court of Petty Sessions located at 150 Terrace Road, Perth. It is a court of summary jurisdiction and is constituted by a Registrar or Deputy Registrar of the Family Court of Western Australia. The Registrar and Deputy Registrars are also State Stipendiary Magistrates. In practise the Court is part of the Family Court of Western Australia. It is important to note that the Registrars of the Family Court of Western Australia do not exercise any of the powers conferred upon the Registrars of the Family Court of Australia under section 37A of the Family Law Act as that provision only applies to the Registrars of the Commonwealth Court. The Court of Petty Sessions in Perth is the only Court of summary jurisdiction exercising family law jurisdiction in the Perth metropolitan area. It is a specialist family law jurisdiction. Outside the Perth metropolitan area family law jurisdiction is exercised by the general courts of summary jurisdiction. On an inspection of the Family Court of Western Australia the Committee was informed that there was a very close relationship between the Western Australia Magistrates' Courts and the Family Court of Western Australia. If a Magistrate has any query in relation to a family law matter advice and assistance is readily available over the telephone. Furthermore, the family law Magistrates and Judges operate regular circuits to Bunbury, Albany, Kalgoorlie, Geraldton, Karratha, Port Hedland and Broome. The counselling service and Registrars of the Court are available to local general State Magistrates' at any time.

5.49 Accordingly, the Family Court of Western Australia is a State court, not a Federal court. The Judges of the court are State Judges and the court is a part of the hierarchy of State courts in Western Australia. The Registrars of the court are given State Magisterial warrants and are called the Court of Petty Sessions. A two tier judicial structure has been developed in Western Australia of Judges and Magistrates/Registrars. There are five Judges of the Court and one Registrar assisted by six Deputy Registrars all of whom are State Magistrates. As the work of the court has increased, extra workload has been passed to the Registrars/Magistrates who hear all Form 4 applications (dissolution of marriage), a general list, an access enforcement list, the maintenance enforcement list, and a summary maintenance list. The Judges of the Family Court of Western Australia also hold judicial commissions of the Family Court of Australia.

5.50 The Registrars/Magistrates of the court attend to most of the interlocutory matters from the filing of proceedings to a directions hearing, the ordering of a conciliation conference and the placing of a matter in the defended list. The Chief Judge of the Family Court of Western Australia conducts the call over of the defended list and pre trial conferences, are conducted by Registrars prior to the trial of the matter by a Judge. If children are involved in any proceedings the parties are ordered to attend counselling and information conferences before the directions hearing. The system is based upon early intervention before

the first return date before the Registrar/Magistrate. The average length of time set by the Family Court of Western Australia for the completion of a matter from filing to trial is nine months. That time period may increase from the time of a call over to the setting down of a trial depending on the number of matters in the defended list. (see Appendix 7).

5.51 The Committee is of the view that the Family Court of Western Australia model provides an efficient and accessible model for the family law client, aspects of which could be implemented by the Family Court of Australia as discussed below.

Reorganisation of Judicial Structure

5.52 The consideration of any reorganisation of the judicial structure of the Family Court of Australia could take several directions. One suggestion which has been mooted in the past is the merging of the Family Court of Australia and the Federal Court of Australia. An attraction of this proposal is that the Federal Court of Australia has a two tier judicial structure comprising Judges and District Registrars/Registrars. The Committee acknowledges that the jurisdiction exercised by the Federal Court of Australia and the number of matters dealt with by the court vary greatly from the Family Court of Australia. However, a proposal could be that the Family Court of Australia becomes a division of the Federal Court of Australia. In a paper delivered by the Chief Justice of the Family Court[16] he favoured the proposition for the merger of both the Courts with the caveat that it would be necessary to preserve a separate structure for the Family Court in its non-judicial capacity. He stated that there would be considerable merit in the setting up of a Federal Court of Australia comprising all Federal Superior Court Judges.

5.53 The advantages flowing from such a merger were summarised by the Chief Justice as follows:

> (a)The present system of what I have described as judicial apartheid would cease and Judges of the Family Court would cease to be regarded as a peculiar and separate species of Judge;
>
> (b)The judicial resources and skills of both courts would be applied in a rational way where required. I have, for example, seen instances where a Judge of one court has flown interstate to hear motions where there has been three Judges of the other court already in that State who could have done so just as easily;
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> (c)The construction of Federal Court buildings could be rationalised to avoid the present absurd situations where separate commonrooms, separate sets of Judges Chambers, court-rooms, and even separate buildings are constructed upon the basis that the two courts are separate entities.

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16 The Idea of an Independent Family Court: 15 years on - Was it a Good Idea? page 31.

(d)There will be a cross flow of knowledge and expertise between the Judges of the Courts where all would gain some appreciation of the problems of the other;

(e)Judges who did not wish it, would not be confined to specialist jurisdictions; and

(f)The difficult problems of recruiting to both courts would be assisted by the wider range of jurisdiction offered.

(The Committee notes that Federal Court multi purpose buildings have been constructed in Brisbane and are planned for Melbourne, however, the Family Court occupies its own new building in Sydney).

5.54 The Committee is of the view that if such a merger was to proceed then the administrative functions of the Family Court and Federal Court should also be merged. The Committee notes that, for example, in Brisbane, there are three separate federal jurisdictions in the one court building. The Committee sees benefit in those three courts being administered by the one administrative unit.

5.55 As noted above, the Family Court of Australia has submitted that the existing three tier structure of Judges, Judicial Registrars and Registrars be replaced by a two tier structure of Judges and Magistrates. As discussed, the Solicitor-General has advised that Constitutionally there would be no difficulty with a two tier structure within the Family Court comprising Judges and Magistrates, provided the Magistrates were appointed as Chapter *III* Judges under the Constitution. The reason for this is that it overcomes the hurdle that a review from a delegated judicial officer, would not be by a rehearing, that is, a hearing de novo. The Family Court argues that the appointment of a specialist Federal Magistracy in family law would provide a summary jurisdiction whereby the majority of the work of the court could be dispensed with by a summary jurisdiction comprising officers exercising judicial power for the purposes of the Constitution. The crucial point is that a decision by such a Magistrate would be a 'final' decision and that any review of that decision would be by way of an appeal on a point of law. The Judges of the court would be able to concentrate on the minority of cases which proceed to trial.

5.56 In his letter referring the issue of the office of the Judicial Registrar of the Family Court to the Committee, the Attorney-General alluded to the proposal by the Court for a two tier structure of Judges and Magistrates and stated:

> Previous Attorney's-General have been reluctant to go down this path for a number of reasons. These include the need, under the Constitution, for such appointments to be tenured, the likely refusal of State Magistrates to continue to exercise their current Family Law Jurisdiction, the precedent this would set for other jurisdictions particularly Criminal Law where a great deal of State Magistrates' time is taken up with Commonwealth criminal matters and the fear that in the medium term, given the slight salary differential, these positions would be reclassified as Judges. There would be considerable cost to the Commonwealth not only in salaries for the new appointees but also in the

provision of substantial additional Commonwealth court facilities in all centres.[17]

5.57 To overcome the Constitutional difficulties referred to by the Solicitor-General the Family Court proposal would require the Magistrates to be appointed as Chapter III Judges under the Constitution. There would be considerable cost implications to the Commonwealth Government with such a proposal. It has been suggested that the specialist Family Court Magistrates would be remunerated at the level of an ACT Magistrate.

5.58 The original judicial structure of senior Judges and Judges of the Family Court did not fulfil its intended function of the senior Judges handling the more difficult cases and the Judges handling the routine cases. There is no guarantee that history may not repeat itself by the appointed Magistrates, under Chapter III of the Constitution, desiring to obtain the same status as Judges of the Court. Also, the proposed two tier system does not address the problem of the equivalent number of judicial officers dealing with the equivalent number of cases before the Court, that is, the appointment of another tier of officer exercising judicial power under the Constitution, does not necessarily relate to the dispensation of a just, fair, affordable and expeditious service delivery to clients.

5.59 The philosophy of the Family Court is to encourage people to settle disputes and emphasises the need to steer away from the litigation pathway. The appointment of another level of Judge under the Constitution does not seem to comply with this philosophy. The Committee is of the view that to achieve such a philosophy resources should not be channelled towards the judicial arm of the Court but rather to the conciliatory and first contact points of the Court. That is, more emphasis should be directed towards the officers exercising the delegated judicial powers under the Family Law Act. The High Court decision in Harris v Caladine opened the pathway for a significant diminution of judicial workloads in Federal Courts by enabling a greater delegation of judicial power to court officers than had been considered before. The implications of the High Court decision appeared to promote judicial efficiency and cost savings in the exercise of judicial power by delegated court officers. This complies with the original philosophy of the founders of the Family Court who envisaged it would be a 'court for the people'.

5.60 The original intention behind the Family Law Act was expressed by the then Attorney-General, Senator the Hon Lionel Murphy, in his second reading speech introducing the Family Law Bill in 1974. At that time he said:

> There are important provisions in the Bill for helping persons who contemplate, or have begun, proceedings under the Bill to achieve a reconciliation where possible, and for helping persons for whom a reconciliation is not possible to resolve their differences with the minimum bitterness and hostility. The reconciliation provisions extend to all proceedings under the Bill, not just divorce proceedings. Provisions have been included for more effectively bringing to the notice of parties wishing to institute divorce proceedings, the consequences of divorce and the availability of marriage

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17 Correspondence received 9 March 1994.

> counselling ..... The Bill is not presented as my ideal solution to the very difficult problems that arise in this area of human relationships, but is presented as proposals which may be generally accepted now. I would prefer solutions even more compatible with the dignity of individuals. It does not seem right to me that divorce itself should be an occasion for judicial intrusion. It may be different in custody, maintenance and property disputes but even in those the parties should be encouraged to resolve their differences themselves.[18]

5.61 These views were also endorsed by the then Prime Minister, Hon E G Whitlam QC MP, in his second reading speech on the introduction of the Bill, when he stated:

> The essence of the Family Courts is that they will be helping courts..... These courts will therefore be very different from the courts that presently exercise family law jurisdiction. The Family Court will; of course, determine legal rights which it is bound to do as a court, but it will do much more than that. Here will be a court, the expressly stated purpose of which is to provide help, encouragement and counselling to parties with marital problems and have regard to the human problem, not just their legal rights.[19]

5.62 These sentiments which were expressed at the time of the introduction of the Family Law Bill do not appear to have been carried through after a period of some 20 years. The freedom from 'judicial intrusion' envisaged by Senator the Hon Lionel Murphy certainly has not been achieved in the legal sense. Efforts by the Family Court to implement this vision have been thwarted by decisions of the High Court in relation to delegation of judicial power under the Constitution.

5.63 In considering the question of the exercise of a judicial power under the Constitution and the limitations placed upon the exercise of that power by the High Court raises an important issue concerning what is meant by the judicial power of the Commonwealth as opposed to what is a judicial function. This relates to the issue of why is a matrimonial cause, a judicial function under the Constitution. It may be the answer to this question is that it is purely historical. This was the view adopted by Dixon C J and McTiernan J in relation to bankruptcy (*R v Davison* (1954) 90 CLR 353, p365). The historical nature of this argument is highlighted in that decision by Kitto J where he stated that: 'The distinction to be maintained between powers described as legislative, executive and judicial,' refers 'not to fundamental functional differences between powers, but to distinctions generally accepted at the time when the Constitution was framed between classes of powers requiring different 'skills and professional habits' in the authorities entrusted with the exercise' (ibid p381-382). These arguments would support the constitutionality of a matrimonial jurisdiction eliminating the adversarial character of the proceedings before a court. The genesis of this argument has been carried over to the bankruptcy jurisdiction of the Commonwealth under the Constitution. Kitto J (ibid. p383) stressed that there is a civil origin and quasi-criminal character about

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18 second reading speech, Hansard 1 August 1974, pp 759-760.

19 Hansard 28 November 1974, p. 4322.

bankruptcy proceedings and that even though there may be no contentious issues between parties in relation to a bankruptcy, it affected the relative position of persons whose interests were opposed, and for that reason, it required an impartial adjudication. (ibid. p384) Even though this was the case His Honour seemed to be prepared to concede the constitutionality of a provision that might enable a debtor to bring about his own bankruptcy in consequence of a purely administrative act by an administrative official. The Committee notes that a debtors petition under the current provisions of the Bankruptcy Act may be brought about by the debtor under an administrative process.

5.64 The bankruptcy process has legal implications upon third parties. A person may also be made bankrupt upon a creditors' petition which is presented to the Federal Court and is determined by a Registrar-in-Bankruptcy. A person may be declared a bankrupt by a sequestration order by the Registrar-in-Bankruptcy in those proceedings. If a legal technicality arises in relation to that application then that particular matter is referred to a Judge of the Federal Court for consideration. This complies with the requirements of the High Court of judicial review of delegated judicial jurisdiction.

5.65 By analogy, if bankruptcy proceedings may be treated by otherwise than a judicial process, the same reasoning should apply to proceedings for a matrimonial cause. The rights of third parties in relation to matrimonial proceedings are not affected to the same extent to those under a bankruptcy proceeding. In relation to matrimonial proceedings, it appears the High Court has adopted a restrictive approach to the power of the Family Court to deal with rights of third parties. This was particularly the case in relation to proceedings concerning superannuation of married parties. The High Court held in *Ascot Investments Pty Ltd and Harper and Harper* ([1981] FLC 91-000) that the Family Court could not bind a third party to proceedings under the Family Law Act by an order of the Family Court. In that case the High Court held that the Family Court lacked power to direct a third party, that is, the trustee of the superannuation deed, to do anything that it was not obliged to do under the trust deed.

5.66 Historically, it may have been a moot point to argue that as a matter of policy it would be desirable to take divorce out of the judicial process. This argument is supported by the changes introduced under the Family Law Act for the single ground of divorce compared with the multiple grounds under the *Matrimonial Causes Act (Commonwealth) 1959*. The idea of a consensual divorce between the parties has long been recognised under the Family Law Act. An application may be made 'on the papers' where a Registrar of the Family Court may grant a Dissolution of Marriage in open Court without the parties being present. This procedure questions the need for the exercise of 'judicial power' under the Constitution. This is particularly the case in regard to the fact that the granting of a divorce is the exercise of a the primary jurisdiction under the Constitution, similarly, to the exercise of a 'judicial power' for a sequestration order for a bankrupt.

Conclusion

5.67 The Joint Committee is of the view that given the limitation of resources it is not necessary to create a second tier of judicial officer for the Family Court of Australia under the Constitution as proposed by the Family Court of Australia. Service delivery of the Family

Court of Australia may be improved by alternative proposals at less expense to the taxpayer. The Committee notes that in the long term it is feasible that a merger of the Family Court of Australia and the Federal Court of Australia may be possibility. A Family Division of the Federal Court of Australia could be created with Judges specifically appointed to that Division In that event the option of creating a Federal magistracy in the combined court could be canvassed. However, at the present time the Committee does not support the creation of a specialist Family Court magistracy for the reasons given below.

5.68 One of the main obstacles in relation to the restructuring of judicial officers in the Family Court has been the conservative approach in relation to the delegation of judicial authority under the Constitution by the High Court. The primary issue from a jurisprudence point of view is the exercise of a 'judicial power' by a person not appointed under Chapter III of the Constitution. That is, it relates to the exercise of a judicial power by a delegated person. Having regard to the initial intentions of the legislature for a Family Court without 'judicial intrusion' it would appear that the legalistic limitations imposed by the High Court concerning the delegation of judicial power to non judicial officers has contributed to the failure to meet the expectations of the founders of the Court.

5.69 *The Committee notes that the restriction on the exercise of delegated judicial powers* may be waived under the legislation with parties consent to a Judicial Registrar, Registrar or State Magistrate exercising the jurisdiction. For example, a State Magistrate may hear a *contested custody matter where the parties consent. The Committee has heard in evidence* that most parties in the Family Court come to an agreement or settle their proceedings prior to reaching trial. The emphasis on family law proceedings is for the parties to reach an *agreement and settle. Accordingly, the Committee is of the view that the resources of the* Family Court must be directed towards the structure to assist in this philosophy. The Committee acknowledges that where parties need to contest a matter to a full hearing or where the parties wish to review a decision of an officer with delegated judicial powers there is capacity to do so under the judicial structure of the court within the constitutional limitations.

5.70 In order to achieve a judicial structure which addresses the complexities of the Family Court, the Committee is of the view that one option to achieve this is by the establishment of a two tier structure of Judges and Registrars. This structure already exists within the Federal Court of Australia. It is proposed that the powers of existing Registrars be increased to hear any type of interim application and the property jurisdiction be increased. The Committee is of the view that there should be one level of Registrar with the jurisdiction to conduct a mixture of chamber and court work. The Registrar would have the capacity to deal with a case from filing to conciliation, interim orders and pre-hearing conference. The Registrars could be remunerated at the level of Senior Executive Service level 1. This would provide an accessible service by the court at less cost than the appointment of Magistrates remunerated at the level of an ACT Magistrate or a percentage of a Judges' salary.

5.71 To comply with the constitutional limitations a decision by the proposed structure of Registrar would be reviewable at any time by a Judge of the Family Court. It may be argued that this is denying people access to a decision by a Judge and that the availability of applying for a re-hearing before a Judge may prevent a matter from settling or the parties agreeing. Evidence before the Committee indicates that the number of reviews of decisions made by Registrars and Judges under the current arrangement are minimal. Furthermore, the number

of reviews overturning a decision of a Judicial Registrar of Registrar are few. The Committee acknowledges that people's legal rights and obligations must be preserved under the law, however, under the proposed structure parties who wish to litigate and pursue a fully contested hearing may do so before a Judge of the Family Court.

5.72 The Committee is of the view that funding and resources should not be targeted towards a minority percentage of the population who may fully litigate their application or who may apply for a review of a Judicial Registrar or Registrar. The Committee considers that preserving a legalistic structure where alternative methods produce the required result is more of an emotive legalistic argument than a realistic funding issue.

5.73 The Committee is aware of the Constitutional limitations concerning the issue of creating more Registrars than Judges may mean that the Registrars become the Court instead of the Judges. The Committee is of the view that Judges must always be available to review a decision of a Registrar or be accessible to hear or make a decision in relation to any matter in the proposed option for a Registrar's Court.

5.74 The Committee considers that in implementing a two-tier structure the existing Judicial Registrars should be appointed Chapter III Judges under the Constitution. The appointments could be conditional in that they do not exercise the same jurisdiction as the existing Judges and accordingly it is envisaged they would receive a lesser remuneration than the existing Judges. They would perform the more urgent applications and duty lists with the assistance of the existing Judges where needed or appropriate. As there are only 7 Judicial Registrars the additional cost of this proposal would be minimal compared with creating a new layer of Federal Magistrates in conjunction with retaining the existing Judicial Registrars . The Attorney-General advised that, subject to some legal and practical issues, the Joint Committee's proposal to appoint the Judicial Registrars under Chapter III of the Constitution would be constitutionally valid.[20] The Joint Committee sees benefit in moving in the direction of increasing the number of Judicial Registrars and decreasing the number of Judges. The Joint Committee inspected several Registries of the Family Court of Australia and it was evident that the Judicial Registrars are under pressure to handle large lists, often sitting into the evening. The Joint Committee notes that in evidence to the Senate Legal and Constitutional Committee on 6 November 1995 the Family Court advised that it has an additional part-time Judicial Registrar.

5.75 The Committee concludes there is a need to rationalise the delivery of family law services throughout Australia within the existing Federal and State jurisdictions with some more cooperation. In coming to this conclusion, the Committee does not support the Family Court proposal for the establishment of a two tier structure of Judges and Federal Magistrates in place of the existing judicial structure of the Family Court. The two tier structure of Judges and Magistrates may be a model for the future but in a time of limited resources it is not a viable option and is not recommended. The Joint Committee does not support the proposal from the Family Court of Australia for the change of the present judicial structure of three tiers of Judges, Judicial Registrars and Registrars to a two tier structure of Judges and Federal Magistrates.

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20 *Letter dated 1 November 1995.*

5.76 **The Joint Committee recommends that:**

the judicial structure of the Family Court of Australia be a two-tier structure of the Judiciary and the Registrars.

5.77 **The Joint Committee recommends that:**

the existing Judicial Registrars be appointed Judicial Registrars under Chapter III of the Constitution to be a part of the Judiciary of the Family Court of Australia with the following conditions -

(a) **they would continue to be called Judicial Registrars ;**

(b) **they would exercise their current jurisdiction but as they will be exercising full judicial powers there will be no need to maintain a requirement for their decisions to be reviewed by way of a hearing de novo; and**

(c) **they would continue to be remunerated at their present level - the level of an Australian Capital Territory Magistrate.**

5.78 **The Joint Committee recommends that:**

the number of Judicial Registrars be increased without increasing the total number of judicial officers of the Family Court of Australia.

5.79 **The Joint Committee recommends that:**

the delegated powers of existing Registrars be increased to enable them to hear any type of interim application.

5.80 **The Joint Committee recommends that:**

in the longer term consideration be given to the Family Court of Australia becoming a division of the Federal Court of Australia and that the establishment of a Federal Magistracy be considered at that time.

CHAPTER 6: COURTS EXERCISING FAMILY LAW JURISDICTION

6.1 Courts exercising jurisdiction under the Family Law Act include Federal, State and Territory Courts, that is, the Family Court of Australia, the Family Court of Western Australia, the Supreme Court of the Northern Territory and the various Courts of summary jurisdiction. The Joint Committee has not received any direct evidence to suggest that jurisdiction under the Family Law Act should only be exercised by one specialist court, that is the Family Court of Australia or, in the case of Western Australia, the Family Court of Western Australia.

6.2 In the Northern Territory, the Family Court of Australia and the Supreme Court of the Northern Territory both exercise jurisdiction under the Family Law Act. Under the Matrimonial Causes Act, which preceded the Family Law Act, the Supreme Courts of the States and Territories exercised jurisdiction in family law matters. Courts of summary jurisdiction exercise a limited jurisdiction under the Family Law Act in every State and Territory apart from Western Australia. An important innovation introduced by the Family Law Act was the possibility for a State Family Court exercising both Federal and State jurisdiction over a wide range of family matters. This development was an important step in overcoming the constitutional difficulties of Federal Courts exercising State jurisdiction without a referral of powers from those States. Alternatively, the difficulty could be overcome by State Courts being vested with Commonwealth jurisdiction. Such State Courts were to be established on the basis that the Commonwealth Government would provide the necessary funds for the establishment and administration of those courts, including counselling facilities. Further, arrangements were to be made under which Judges would be appointed to the Court with the approval of the Attorney-General of the Commonwealth. These conditions are contained in section 41 of the Family Law Act. In addition to the Federal Jurisdiction vested under the Family Law Act, the Family Court has extensive State Jurisdiction (to the exclusion of the Supreme Court of Western Australia) in matters concerning adoption, affiliation, and the custody of ex-nuptial children. The attractive feature of a State Court system is that the court avoids at first instance many of the jurisdiction limitations of the Family Court of Australia.[1]

Other State Family Jurisdictions

6.3 Supreme Courts of the States retain family law powers not covered by the Family Law Act. Previously this was particularly the case in relation to custody and maintenance of children not of a marriage as defined in the Act and currently of many independent property proceedings between spouses. Furthermore, pending a reference of powers from the States in relation to the property of de facto couples, the Supreme Courts still have jurisdiction. In each

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1 Refer to Chapter 5 for more information about the Western Australian model.

State the Supreme Court can, for the purposes of testator's family maintenance legislation, make provision for a family of a deceased person who has not provided adequately for them by will.

6.4 Pursuant to section 39(5) of the Family Law Act the Supreme Courts of the States and Territories are on the face of it vested with a federal jurisdiction with respect to matters arising under the Act in respect of which -

(a) matrimonial causes are instituted under the Family Law Act;

(b) matrimonial causes are continued in accordance with section 9;

(c) proceedings are instituted under regulation 8 for the purposes of section 109, 110, 111, 111A, or 111B, or of paragraph 125 (1F) (G) or under Rules of Court *made for the purposes of paragraph 123 (1) (R); or*

(d) proceedings are instituted under section 117A.

6.5 In practice, however, the Governor-General has limited the exercise of jurisdiction by Supreme Courts by proclamation, the effect of which has been that proceedings referred to in section 39(5) of the Act can no longer be instituted in any Supreme Court except the Supreme Court of the Northern Territory.

6.6 Another important residual jurisdiction of the Supreme Courts is the prerogative or wardship jurisdiction empowering Courts to act as custodians of the persons and property of children without guardians. This general inherent power of the Supreme Courts enables them to make a child a ward of the court and to supervise the child in a wide variety of situations. The power of the State Courts to act in this jurisdiction has been specifically preserved by section 60H of the Family Law Act which provides that State child welfare laws are not affected by the Family Law Act and limits the power of the Family Court for orders concerning children under State welfare protection.

6.7 Another significant jurisdiction exercised by Supreme Courts in relation to families is the adoption of children. The adoption of a child requires a judicial order after a Court has taken into account the welfare of the child and taken particular determination that the consent of the child's parents has been properly given. Accordingly, these specifically concern the welfare of children.

Children's Courts

6.8 The various State Children's Courts exercise an important jurisdiction in relation to the protective and criminal jurisdiction of juveniles or children. These Courts exercise a jurisdiction having another direct effect upon family life and this jurisdiction could be incorporated into a Family Court structure. However, each of the Children's Courts is a separate jurisdiction in each State and the Joint Committee is not aware of any evidence to suggest that this is likely to change. Furthermore, the Family Court of Western Australia does *not have this expanded jurisdiction.*

Courts of Summary Jurisdiction

6.9 As discussed the federal family law jurisdiction is exercised in a limited capacity by Courts of summary jurisdiction under the Family Law Act. The hypothesis that the Magistrates Courts can provide an effective, accessible, speedy, informal and inexpensive supplementary and alternative service to the Family Court needs to be tested. Representatives from the Magistrates Courts provided an insight into aspects of the operation of the present system of dealing with family law matters and made suggestions about where there are any problems which ought to be addressed and, if problems do exist, how they might best be dealt with.

6.10 The Magistrates Courts exercise limited jurisdiction which is conferred on them by sub-sections 39(6) and 63(2) of the Family Law Act. Their jurisdiction applies throughout the whole of Australia, with the exception of the Perth Metropolitan area where jurisdiction under the Act is exercised only by the Court of Petty Sessions. Under section 39(6) of the Act, Magistrates Courts can exercise jurisdiction in respect of all matrimonial causes except proceedings for a decree of nullity of marriage or for a declaration as to the validity of a marriage or for the dissolution or annulment of a marriage by decree or otherwise. However, section 44A of the Act states that regulations may provide for proceedings for a decree of dissolution of marriage to be instituted in, or transferred to, a prescribed court of summary jurisdiction. A Court constituted by a Stipendiary Magistrate who is a Registrar or a Deputy Registrar, or the Family Court of Western Australia is such a court.

6.11 A Magistrates Court cannot hear and determine proceedings with respect to property if its value exceeds $20,000 unless the parties consent. The jurisdiction is unlimited if the parties consent to the matter being heard in the Magistrates Court. If the parties do not consent and the value of the property exceeds $20,000 the matter must be transferred to the Family Court. The Magistrates Courts can, however, make interim orders pending disposal of the matter by the court to which the proceedings are to be determined. Section 63(2) of the Act provides that each Magistrates Court has federal jurisdiction in relation to all matters arising under Part VII of the Act (Children). This jurisdiction can be terminated by proclamation, but the only such proclamation to date terminated the jurisdiction of all Magistrates Courts in the Perth metropolitan area except one. A Magistrates Court cannot hear and determine contested guardianship, custody or access proceedings without the consent of the parties. If this consent is not given, the court can make interim orders but must otherwise transfer the matter to the Family Court or other appropriate court exercising full jurisdiction under the Act.

6.12 The Joint Committee acknowledges that the limitations on the State Magistrates' Court jurisdiction may impede access to readily available and relatively inexpensive justice. Further, without direct access to counselling services proceedings may need to be transferred to or commenced in the Family Court. A member of the Law Society of New South Wales stated in evidence:

> As far as the Sydney metropolitan area is concerned and our local courts around this area, for example if you even go to the local court for family matters, you have to be referred down to the Family Court for counselling and there is a time delay in doing that. Also, most of the local courts are not set up

to have the facilities available to deal with family law clients - for example with interview rooms and things of that nature. The other difficulty is that if you are going to introduce local courts dealing more with family law matters you really do have to have a process of educating the magistrates to deal in the are of family law. I think our experience as practitioners is that often they do not have that expertise.[2]

6.13 In relation to the possibility of increasing or setting new limits on Magistrates, witnesses from the New South Wales Justice Department in reply to a question about setting a new limit stated:

> Probably no limit. I would suggest that it would be a matter where, given that a magistrate may not have the total expertise of a Family court judge, if the parties concede that it is not a complex matter, it could be dealt with in a local court. They would perhaps have to satisfy some rules about complexity which would take up a lot of time in a local court. With a complex matter the time limit would probably make it such that the magistrate would not want to hear it. The Civil Claims Act - I think that jurisdiction probably will go up, which will increase the de facto property of perhaps $100,000. That is not definite but if that goes up the limit on that would go up too. That could be linked to the Family Court as well, if that is one way to go.
>
> Could I just add something there, Mr Chairman. One of the 'attractions' about the local court environment is perhaps its simplicity and its speed, depending on the application you want to bring before the court. In 1976 your originating process was a one-page document. It is currently 11 pages. A lot of places have developed a simplistic form of application and the court generally dispensed with any requirement to comply with the rules or regulations as they relate to a particular application. And lots of time that application, before it is filed, it is almost an instinctive assessment by the legal representatives and the chamber magistrate as to whether it is going to be a complex matter or a heavily contested matter, and that ultimately determines its destiny. If it is clear that we are in a situation where there is going to be quite a significant dispute in a property area, magistrates will likely of their own motion transfer the matter to the Family court anyway.[3]

6.14 Another view given in evidence to the Joint Committee on the role of State Magistrates was expressed by Mr Papas, Chief Magistrate of Victoria and Mrs Blashki, Magistrate respectively:

> From my point of view, the jurisdiction is an appropriate one, bearing in mind that we are a court of summary jurisdiction and we supposedly provide a quick, efficient and easy service - that is, a service that is accessible to people.

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2 *Transcripts*, p. 135.

3 *Transcripts*, p. 191.

Perhaps there could be some consideration of the property limit in relation to simple property matters. I do not believe we should handle contested property matters over $50,000 probably, which we thought was about the cut-off you would expect.

Bearing in mind that you have got to look at it from a federal perspective, we can only really talk about Victoria, but our civil jurisdiction within the state borders is $25,000 but it might well be going up. Other magistrates' jurisdictions have up to $100,000 civil jurisdiction. But we thought perhaps something in the range of $50,000 or maybe even $100,000 would cut out most of the seriously contested property disputes.

Senator Neal:-Most homes-

I think that is right. That is really what we are talking about; we do not think that we are really set up as a summary court to handle disputes of that level. I am not saying we cannot do it, because we do handle complex issues. In Victoria, as an example, we have a full equitable civil jurisdiction. Mr Andrews probably knows something about it, having practised in the jurisdiction. We can handle what is called Mareva injunctions, we can do all forms of equitable relief. Our jurisdiction extends quite significantly in civil areas. Having said that, the proper relationship of the summary court is one of being complementary rather than in any way competitive or replacing the jurisdiction of the Family Court. One area we identify is the level of property disputes. Are there any other matters.

Yes. To complement that, I would have thought between $50,000 and $100,000 would probably be a sensible limit. Of course, $20,000 -

Chair - It is too low

It virtually eliminates any property matters and it may well be of some assistance to the Family Court.

Chair - If a judicial registrar can handle it up to $300,000, should the level be just below that or the same? I am not aware of the proprieties in these matters.

I do not think there is any problem with that, that is that a magistrate would be able to do the equivalent work of a judicial registrar. However, I would say that a judicial registrar specialised in family law and magistrates do not purport to specialise. That might be reflected in a slightly reduced property jurisdiction.[4]

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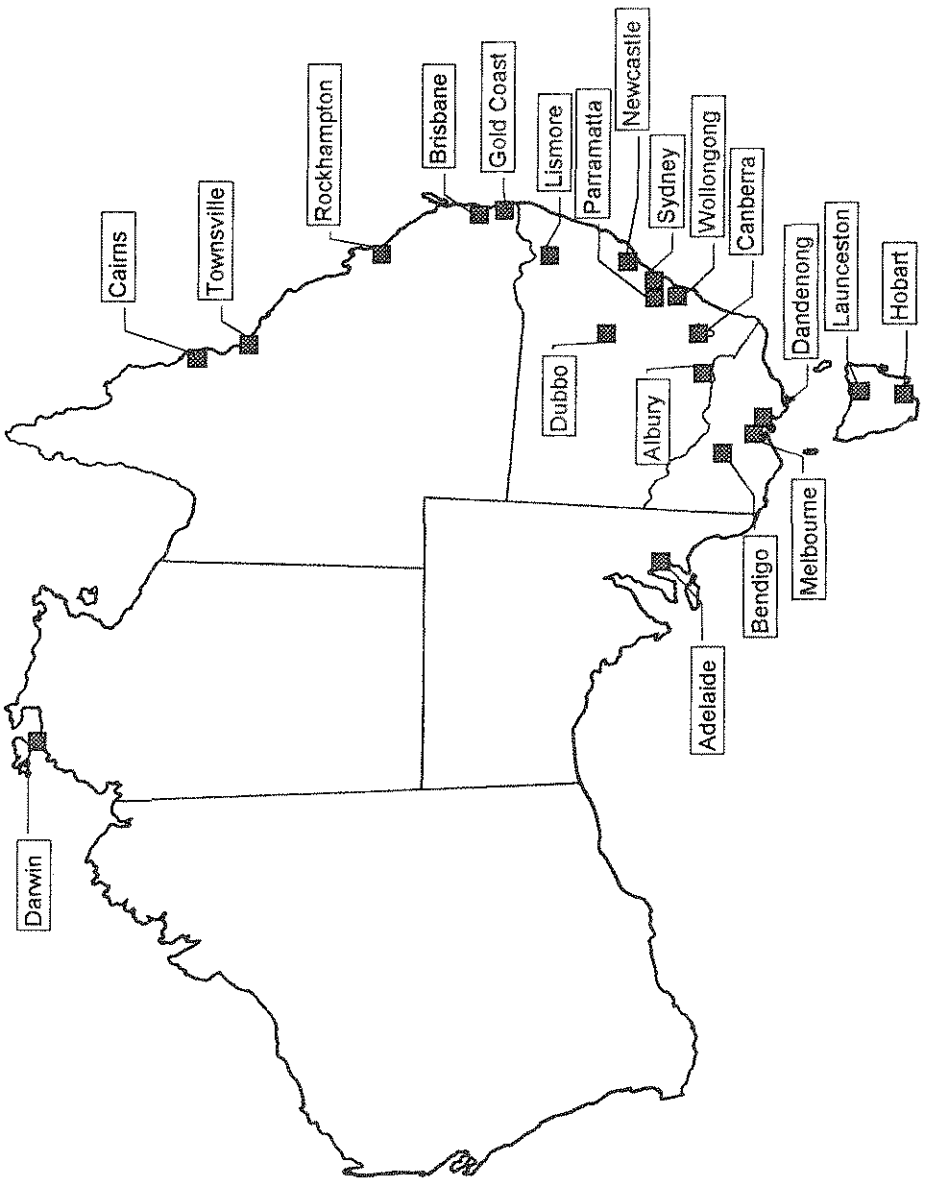
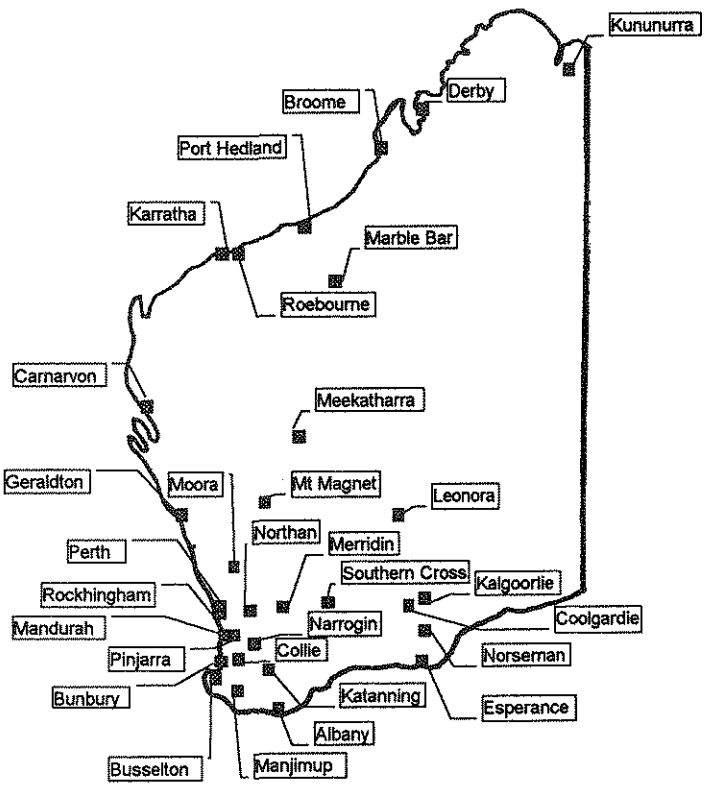
4 *Transcripts*, pp. 70-71.

6.15 The Joint Committee notes with approval the qualification of the Chief Magistrate's evidence where he stated that the proper relationship of a summary Court is one of being complementary to the Family Court. The Chief Magistrate also emphasised in evidence that "the facilities are there - lets use them."[5] The Joint Committee is of the view that more use of the Courts of summary jurisdiction could ease the burden on the Family Court. The locations of the Family Court and courts of summary jurisdiction are shown in the following diagrams.



5 *Transcripts*, p. 92.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Moora
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Leonora
Northan
Merridin
Perth
Southern Cross
Kalgoorlie
Rockhingham
Coolgardie
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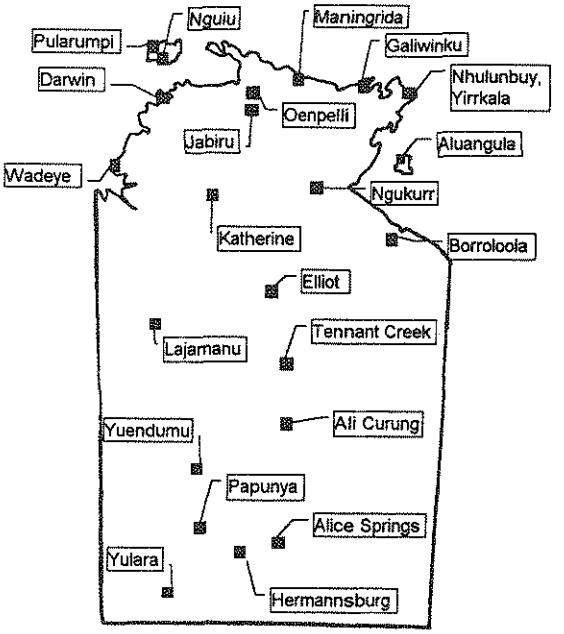
Pinjarra
Bunbury
Katanning
Esperance
Albany
Busselton
Manjimup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Ngukurr
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Papunya
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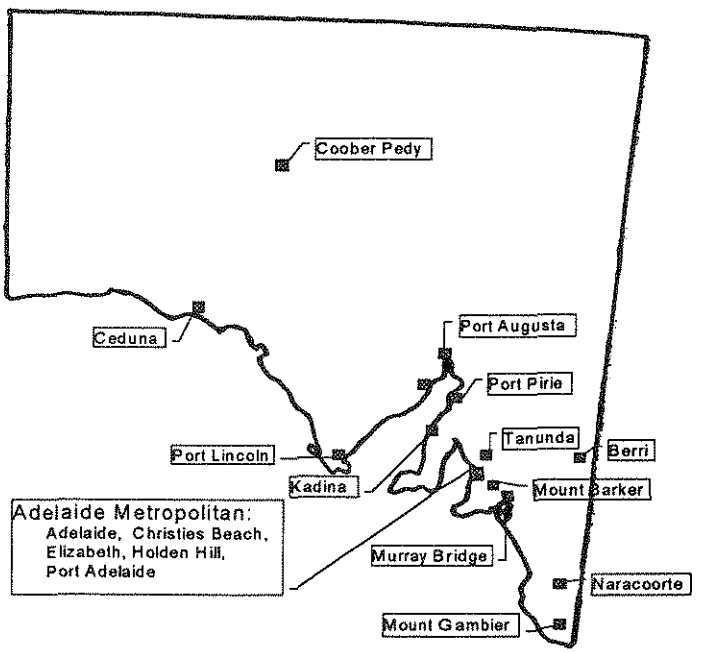
Yulara
Hermannsburg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Port Augusta
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Tanunda
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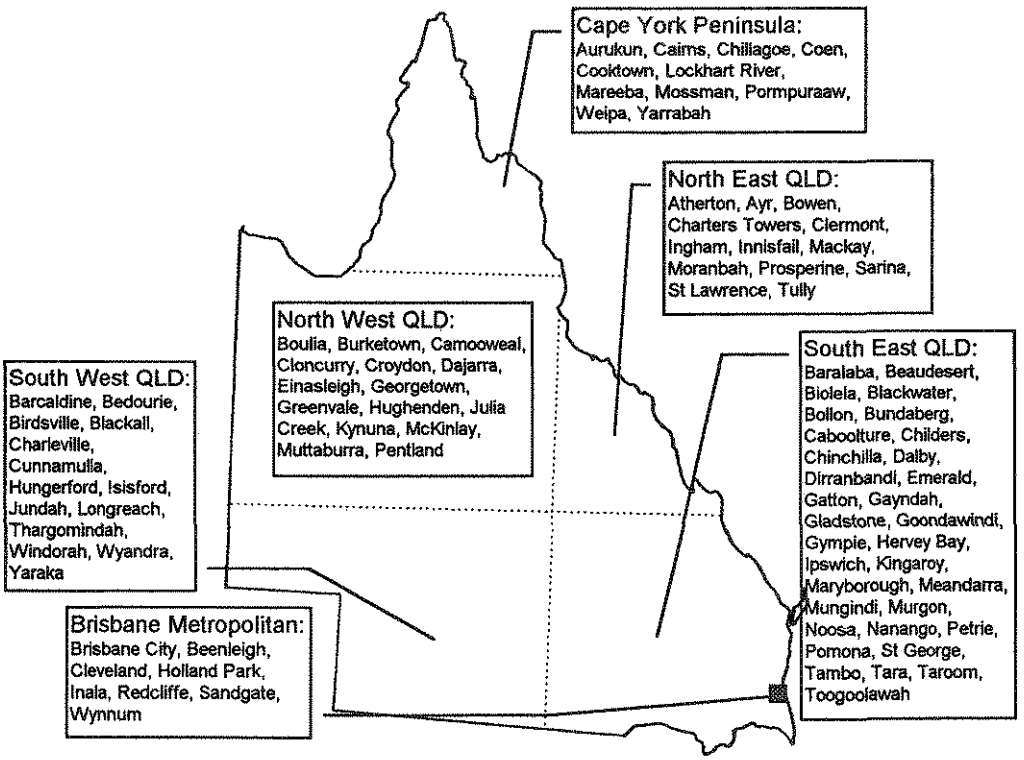
Port Adelaide
Murray Bridge
Naracoorte
Mount Gambier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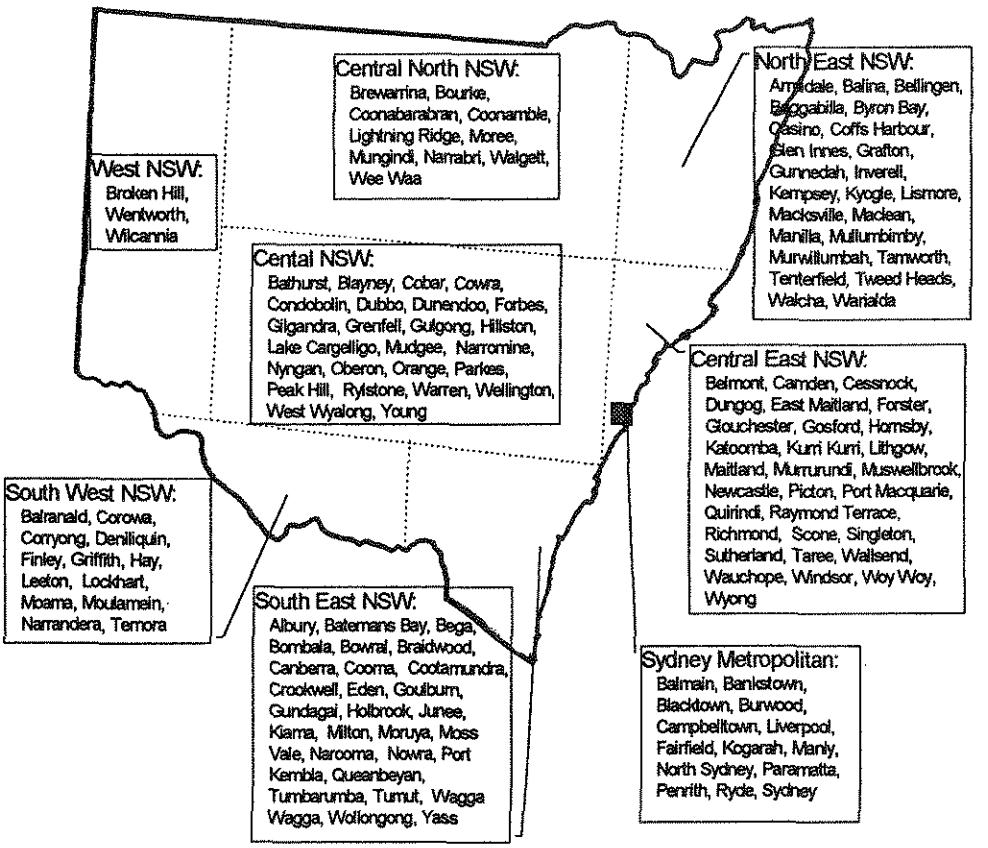
North East QLD:
Atherton, Ayr, Bowen, Charters Towers, Clermont, Ingham, Innisfail, Mackay, Moranbah, Prosperine, Sarina, St Lawrence, Tully
North West QLD:
Boulia, Burketown, Camooweal, Cloncurry, Croydon, Dajarra, Einasleigh, Georgetown, Greenvale, Hughenden, Julia Creek, Kynuna, McKinlay, Muttaburra, Pentland
South West QLD:
Barcaldine, Bedourie, Birdsville, Blackall, Charleville, Cunnamulla, Hungerford, Isisford, Jundah, Longreach, Thargomindah, Windorah, Wyandra, Yaraka
South East QLD:
Baralaba, Beaudesert, Biolela, Blackwater, Bollon, Bundaberg, Caboolture, Childers, Chinchilla, Dalby, Dirranbandi, Emerald, Gatton, Gayndah, Gladstone, Goondawindi, Gympie, Hervey Bay, Ipswich, Kingaroy, Maryborough, Meandarra, Mungindi, Murgon, Noosa, Nanango, Petrie, Pomona, St George, Tambo, Tara, Taroom, Toogoolawah
Brisbane Metropolitan:
Brisbane City, Beenleigh, Cleveland, Holland Park, Inala, Redcliffe, Sandgate, Wynnum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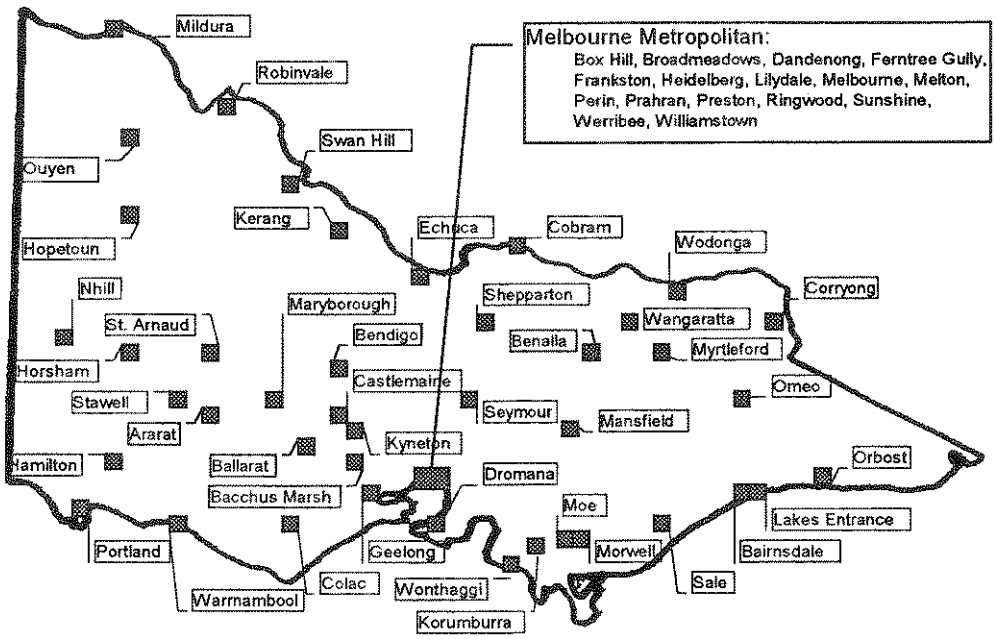
North East NSW:
Armidale, Balina, Bellingen, Boggabilla, Byron Bay, Casino, Coffs Harbour, Glen Innes, Grafton, Gunnedah, Inverell, Kempsey, Kyogle, Lismore, Macksville, Maclean, Manilla, Mullumbimby, Murwillumbah, Tamworth, Tenterfield, Tweed Heads, Walcha, Warialda
West NSW:
Broken Hill, Wentworth, Wilcannia
Cental NSW:
Bathurst, Blayney, Cobar, Cowra, Condobolin, Dubbo, Dunendoo, Forbes, Gilgandra, Grenfell, Gulgong, Hillston, Lake Cargelligo, Mudgee, Narromine, Nyngan, Oberon, Orange, Parkes, Peak Hill, Rylstone, Warren, Wellington, West Wyalong, Young
Central East NSW:
Belmont, Camden, Cessnock, Dungog, East Maitland, Forster, Glouchester, Gosford, Hornsby, Katoomba, Kurri Kurri, Lithgow, Maitland, Murrurundi, Muswellbrook, Newcastle, Picton, Port Macquarie, Quirindi, Raymond Terrace, Richmond, Scone, Singleton, Sutherland, Taree, Waltsend, Wauchope, Windsor, Woy Woy, Wyong
South West NSW:
Balranald, Corowa, Corryong, Deniliquin, Finley, Griffith, Hay, Leeton, Lockhart, Moama, Moulamein, Narrandera, Temora
South East NSW:
Albury, Batemans Bay, Bega, Bombala, Bowral, Braidwood, Canberra, Cooma, Cootamundra, Crookwell, Eden, Goulburn, Gundagai, Holbrook, Junee, Kiama, Milton, Moruya, Moss Vale, Narooma, Nowra, Port Kembla, Queanbeyan, Tumbarumba, Tumut, Wagga Wagga, Wollongong, Yass
Sydney Metropolitan:
Balmain, Bankstown, Blacktown, Burwood, Campbelltown, Liverpool, Fairfield, Kogarah, Manly, North Sydney, Parramatta, Penrith, Ryde, Sydney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Swan Hill
Ouyen
Kerang
Echuca
Cobram
Wodonga
Hopetoun
Nhill
Maryborough
Shepparton
Corryong
St. Arnaud
Bendigo
Benalla
Wangaratta
Myrtleford
Horsham
Castlemaine
Omeo
Stawell
Seymour
Mansfield
Ararat
Kyneton
Hamilton
Ballarat
Dromana
Orbost
Bacchus Marsh
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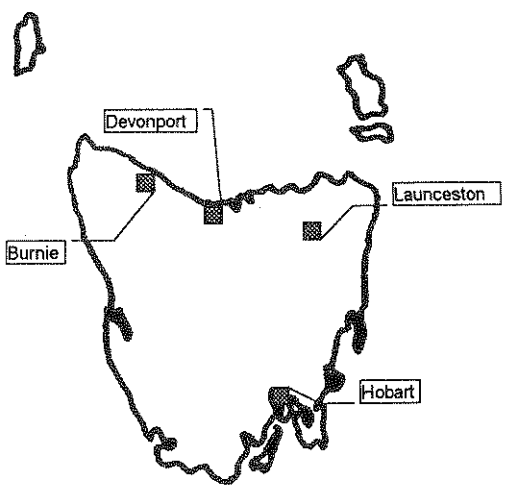
Devonport
Launceston
Burnie
Hobart

Family Law Council

6.16 A report by the Family Law Council on an evaluation of the exercise of summary jurisdiction to improve access to family law, was tabled in the House of Representatives on 24 October 1995. The former Chairman of the Family Law Council, Justice Faulks, stated in evidence to the Joint Committee that:

> the Council considered in essence that the issue of creating a Federal Magistracy or a summary jurisdiction in the Family Court is a question of access to justice.[6]

This involves the issues of the need to provide quality justice and the need for ready access geographically.

Justice Faulks continued

> while there are some differences between the Court and the Family Court proposal for the establishment of a Family Court Magistracy, there was no dispute abut the need to establish the Magistracy. The Family Law Council recognises that there will always be what is in effect a sharing of jurisdiction between the Commonwealth and the states on family law areas, particularly in remote country and regional areas.[7]

6.17 The Joint Committee agrees with this view and also considers there is a need for the 'sharing' of jurisdiction in outer metropolitan areas. The concept of developing one specialist Magistrates' Court in a city region, such as, in Perth and Sydney, has merit, however, in the large metropolitan areas access to local Courts in family matters is essential. Justice Faulks acknowledged this need in evidence to the Joint Committee.

6.18 *In utilising State Magistrates Justice Faulks identified the following matters requiring* attention to ensure the delivery of quality services:

- copies of the relevant legislation must be available;
- a telephone hotline for any Magistrate in Australia exercising family law jurisdiction to a duty Registrar or Judge of the Family Court for assistance;
- the regionalisation of Magistrates who are interested in family law matters -- with cooperation in the development of circuits;
- the provision of manuals to Magistrates including draft forms of orders; and
- the provision of training facilities within the Family Court.

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6 *Transcripts*, p. 427.

7 *Transcripts*, p. 428.

6.19 The Joint Committee endorses the provision of these facilities to provide and ensure the delivery of consistent and quality services in family law. In particular, the Joint Committee supports the introduction of the hotline service, which has been established in Western Australia, and education and training for Magistrates exercising family law jurisdiction. The Joint Committee is of the view these initiatives will enhance the delivery of family law services from an access to justice perspective, without the need for the appointment of another tier of Federal Judges.

Conclusion

6.20 The Joint Committee notes that there has been a variety of Federal and State Courts exercising Family Law jurisdiction. However, the Joint Committee is of the view that the benefits of a diverse availability of jurisdictions should not be dismissed. In a time of limited resources the Joint Committee is of the view that more use could be made of the existing facilities. The Family Court is not the only court exercising jurisdiction in relation to families and does not have exclusivity to any expertise in dealing with family problems. Whilst acknowledging that access to justice is an important issue for Australian citizens, this does not mean that all existing resources should be provided with maximum amounts of funds at the optimum level. There should be more cooperation within the existing Courts structure with the aim of providing cost effective services and not of maintaining separate and disparate court structures. Such an aim may require a change in attitudes and approaches for exercising the family law jurisdiction with claims for exclusivity in the exercise of that jurisdiction.

6.21 In summary, the Joint Committee is of the view that the Family Court should not have or aspire to a monopoly of jurisdiction in relation to Family Law matters requiring additional resources and expanding structures. One such example is the claim by the Chief Justice of the Family Court that it could play a greater role in protecting the best interests of children by considering the cases of asylum-seeking children. This suggestion was made in relation to the detention of asylum seekers and Australia's obligation to protect their rights under international law.

6.22 The Joint Committee does not favour the establishment of Federal Magistrates in family law. The Joint Committee supports the wider use of the existing infrastructure of courts exercising family law jurisdiction in Australia. This could be achieved in every State by uniformly designating or encouraging State Magistrates to continue, or acquire familiarity, with the exercise of jurisdiction in family law matters. In some cases, this will be an extension of their existing experience.

6.23 A significant factor to be taken into account in supporting more use of the existing infrastructure of courts exercising jurisdiction in family law is access to those courts in regional and outlying metropolitan areas. The Joint Committee is concerned that the people under a significant disadvantage are those in the regional and outlying metropolitan areas having no access to Courts regularly exercising jurisdiction to solve their family problems. This is a matter of major importance for those people. The Joint Committee has been impressed by the structure in Western Australia, but people in the outlying suburbs of Perth

are required to travel to the city for their family law matters. In South Australia, residents in Noorlunga and Elizabeth need to travel to Adelaide City for access to a court exercising family law jurisdiction. Furthermore, the Joint Committee received evidence that in Gippsland in Victoria, people could not obtain direct access to the Family Court. Similarly, this is the case at the Gold Coast. The Joint Committee is aware that there are numerous localities Australia-wide where the public will have no direct contact with the Family Court, but may, on the other hand have direct contact with a local court.

6.24 The Joint Committee recommends that:

(a) the Attorney-General approach the State Attorneys-General and seek agreement to the development of a comprehensive training program for a limited number of appropriate State Magistrates who would specialise in *family law particularly in outer suburban, provincial and rural areas*;

(b) State Magistrates exercising family law jurisdiction:

(i) have direct access to the Family Court of Australia for advice and research assistance; and

(ii) have access to the Court Counselling service, in the local area where possible;

(c) after specialist State Magistrates receive appropriate training, section 96(4)(a) of the *Family Law Act 1975* be repealed to eliminate the restriction that an appeal from a court of summary jurisdiction proceeds by way of a hearing de novo; and

(d) the jurisdiction in property matters in courts of summary jurisdiction be increased to $300,000 (the current level of Judicial Registrars' jurisdiction).

6.25 The Joint Committee recommends that:

the Attorney-General seek to renegotiate the agreement with the Government of South Australia to allow the use of local courts in the areas outside Adelaide's central business district.

CHAPTER 7: ANCILLARY SERVICES OF THE FAMILY COURT OF AUSTRALIA

Introduction

7.1 The Family Court provides various services to assist parties to resolve disputes without the need to resort to a trial at the end of the litigation pathway. It should be noted that most of the services offered by the Family Court are a part of the litigation track.

Alternate dispute resolution processes

7.2 The same words are used to describe different processes associated with alternate dispute resolution and there is considerable debate over terminology. Many of the terms are used interchangeably and dispute resolution practitioners often provide a mixed package of skills and processes to achieve a variety of goals which makes distinctions difficult if not impossible.[1] The Family Law Council reported to the Minister for Justice on Family Mediation in June 1992 and drew the distinction between the processes of counselling, conciliation counselling in the Family Court, negotiation, conciliation, arbitration and adjudication.

Reconciliation and Conciliation counselling in the Family Court

7.3 Counselling assists family members to resolve conflict about the nature of their relationships and individual interpersonal emotional difficulties. Reconciliation counselling is aimed at re-uniting parties to a matrimonial dispute whereas conciliation counselling is aimed at assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or separation, by reaching agreement or giving consents or reducing the area of conflict upon custody, support, access to education of the children, financial provision, and disposition of the matrimonial home, lawyer's fees and every other matter arising from the breakdown, which calls for a decision of future arrangements.

7.4 The Family Law Council notes that, "frequently the primary focus of counselling is on effecting change in family relationships. Counselling employs a range of methodologies, some of which are similar to the family mediation process.[2]" The Joint Committee recognises that reconciliation counselling or pro-active counselling to keep families intact has not been a role of the Family Court. The emphasis of the Family Court has been on dealing with

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1 Family Law Council, *Family Mediation*, June 1992, p. 5.

2 Family Law Council, *Family Mediation*, June 1992, p. 5.

shattered marriages and there has not been an expectation that the Family Court will provide reconciliation services. The Chief Justice of the Family Court conceded this where he stated:

> Originally it was thought that the court would play a role in the promotion of reconciliation, but the experience of the past 15 years has been that by the time that a couple approaches the court, there is little room for reconciliation, and such reconciliations that do occur are of uncertain and doubtful duration.[3]

7.5 Family Court counsellors assist parties to reach practical parenting agreements by methods which work with the emotional distress of the clients to achieve a resolution of underlying family relationship disputes. In addition, counsellors are required to maintain a focus on the best interests of the children and to educate parents accordingly.[4] Many people seek counselling voluntarily before instituting court proceedings. The Family Court advises that this constitutes 50 percent of it's counselling workload. The Court may advise parties to attend counselling if it appears in the interests of parties or children for there to be counselling or if counselling appears desirable to enable parties to improve their relationship to each other.[5] One party may ask the Court Counselling Service to arrange counselling in which event the other party will be asked if he or she will attend.[6] Courts and legal practitioners are required by the Family Law Act to have regard to the need to draw to the attention of the parties the availability of counselling and procedures available for resolution of matters by conciliation.[7]

7.6 Counselling is encouraged in relation to issues involving children[8] and there is a general requirement that an order should not be made in relation to contravention of access orders unless the parties have attended counselling.[9] After the institution of proceedings for dissolution, custody and/or financial matters the Court has the power to refer parties to counselling. A referral is nearly always automatic in children's matters. In dissolution and financial property matters there is not usually an initial referral, although counselling may take place as matters progress. The parties to a marriage may request Court counselling or attend a counsellor outside the Court. Court counselling is free and confidential.[10]

7.7 The Joint Committee is of the view that as the Family Court of Australia has not provided pro active or reconciliation counselling services, the statutory obligation imposed on the Court should be taken away and those services should be provided by community services outside of the Court.

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3 "Family Court Chief Calls for More Marriage Education" Threshold No 34, December 1991, p. 6.

4 Family Law Council, *Family Mediation*, June 1992, pp. 5-6.

5 *Family Law Act 1975*, s. 14(2A), s. 14(4) and s. 14(5).

6 *Family Law Act 1975*, s. 15.

7 *Family Law Act 1975*, s. 16 and s. 16A.

8 *Family Law Act 1975*, s.61, s. 61A and s. 61B.

9 *Family Law Act 1975*, s. 112AD(5).

10 'Trans-Tasman Family Law: First impressions of a New Zealand Family Solicitor practising in Australia', New Zealand Law Journal, September 1991, p. 301.

Mediation

7.8 Mediation is not easily defined or described. Amendments to the *Family Law Act 1975* introduced the word 'mediation' but did not define it.[11] However the Family Court, in its mediation pilot program, adopted the Folberg and Taylor definition:

> ...a process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate dispute issues, in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs. Mediation is a process which emphasises the participants' own responsibilities for making decisions that affect their lives.[12]

7.9 Mediators provide a process and structural framework to enable parties to make decisions. Mediators act as neutral parties and have no involvement in content as such. They do not give advice or make suggestions and do not influence the parties' decision or make a decision themselves.[13] The Court may provide mediation either before proceedings are issued or in proceedings by consent order.[14]

Conciliation

7.10 According to the Family Law Council conciliation appears to be used in three distinct ways.

> ...Conciliation is sometimes used as a generic term for any non-adversarial dispute resolution process. It is often used to describe the processes which precede negotiations, for example, efforts to persuade the parties to come to the negotiating table. However in family law matters it is more usually used to describe a process in which a third party not only manages the negotiations but makes recommendations (as opposed to suggestions) concerning solutions.[15]

7.11 The Court may order parties to attend a conference with a court counsellor or welfare officer in relation to the custody, guardianship or welfare of, or access to, children. Except in special circumstances there is compulsory conciliation counselling before the Court determines issues involving children.[16] There is a requirement that, except in special circumstances, there be a compulsory attendance at a conference at the Court with a Registrar before the Court determines issues involving property.[17] A conciliation conference at which legal representatives attempt to settle a matter is the step following upon the first determined

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11 Family Law Council, *Family Mediation*, June 1992, p. 1.

12 Family Law Council, *Family Mediation*, June 1992, p. 1.

13 *Transcripts*, p. 686.

14 *Family Law Act 1975*, s. 19A and s. 19B.

15 Family Law Council, *Family Mediation*, June 1992, p. 6.

16 *Family Law Act 1975*, s. 64(1AA) and s. 64(1B).

17 *Family Law Act 1975*, s. 79(9).

date before a Judicial Registrar. It is considered that a number of matters are amenable to resolution by this method.[18]

Negotiation

7.12 Negotiation by the parties, or by their legal representatives, does not involve a neutral third party in the process.[19]

Arbitration

7.13 Arbitration is a process which involves the imposition of a decision by a neutral third party on the parties involved.[20] The Court may order arbitration either by consent or of its own motion. The Family Law Act also provides for private arbitration and the registration of resulting awards.[21]

Primary dispute resolution

7.14 In the later of two discussion papers prepared in July 1994 and August 1995 by the Chief Executive Officer of the Family Court, Mr Len Glare, on a new organisational approach to client service in the Court, it is stated that:

> The term 'Primary Dispute Resolution' was used initially because it reflects the outcome achieved by the Court in disposing of 95% of matters by means other than litigation. In such circumstances it seems ludicrous to speak of 'alternative dispute resolution' when in fact means other than litigation have long been the primary means of resolving disputes in the Court.[22]

7.15 The clear inference is that alternative dispute resolution is responsible for the resolution of 95 percent of matters before the Court. However, this premise cannot be maintained. There is no statistical evidence available to support Mr Glare's claim and no information on the reasons why or how people settle matters in the Family Court. In evidence to the Joint Committee the Chief Executive Officer stated:

> The Chief Justice is on record as saying that people discontinue actions for all sorts of reasons, including financial reasons and the lack of legal aid.[23]

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18 *Transcripts*, p. 623.

19 Family Law Council, *Family Mediation*, June 1992, p. 6.

20 Family Law Council, *Family Mediation*, June 1992, p. 6.

21 *Family Law Act 1975*, s. 19D and s. 19E.

22 Family Court of Australia, *Supplementary Information*, 4 September 1995, p. 1.

23 *Transcripts*, p. 480.

Further, in discussing settlement rates the Principal Registrar, Mr Ian Loughnan, stated in evidence that:

> I guess my difficulty was that I did not have the sort of information [on figures at other points in the litigation pathway] that led to the 18 [per cent of applications filed that are listed for hearing] and 5 per cent [of cases that proceed to trial]. I did not have that available. Our system just does not allow for that.[24]

7.16 In the discussion papers referred to above a proposal for the future structure of the Court in relation to primary dispute resolution is canvassed. The papers note that the Court has traditionally been structured along functional lines reflecting the disciplines which are found amongst its staff. There has always been a Registrar's unit based on legal qualifications, a Counsellor's unit based on social science qualifications, an administrative/support unit based on generalist staff and a judicial unit based on judicial officers.[25] The papers argue that the Court tends to be organised on the basis of its constituent components, rather than organised to provide service to its clients in the best and most cohesive way practicable, and that this issue has been highlighted by the addition of mediation and the possibility of the addition of arbitration to the range of services offered in the future.[26]

7.17 It is proposed that the Court should not be organised on an internal focus to reflect its own differences in discipline but on an external focus of the service it wishes to provide. Under this proposal service delivery would be gathered under four groups:

- litigation services (judicial and judicial support, family reports, court ordered supervision, directions hearings, pre-hearing conferences, taxation of costs, consent orders, orders, outcome entry);
- primary dispute resolution (mediation, conciliation, conciliation counselling, information sessions, centralised information, appointments, listing, community education);
- operations (counter, mail, records), and
- administration.[27]

7.18 The July 1994 paper notes that the term 'mediation' is being used as a generic term for alternative (or primary) dispute resolution and that in the latest new policy proposal process, the Attorney-General's Department and the Department of Finance have rolled together

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24 *Transcripts*, p. 485.

25 Family Court of Australia, *Supplementary Information*, 4 July 1995, pp. 2 and 4 September 1995, pp. 1-2.

26 Family Court of Australia, *Supplementary Information*, 4 July 1995, pp. 2-3.

27 Family Court of Australia, *Supplementary Information*, 4 September 1995, p. 3.

mediation and conciliation counselling for funding purposes. The Court suggests that the term 'mediation' be used for the whole of what is now called mediation, conciliation counselling and conciliation conferences.[28]

7.19 The Court states in the later discussion paper that ' "[p]rimary dispute resolution" will allow resources to be deployed more flexibly to meet the needs of the case and because of this those resources are likely to be used more effectively'. The Court notes that as it will be organised along service lines it will be easier to structure the chart of accounts to reflect more accurately how resources are being used. This will improve the assessment of the cost-effectiveness of various service options.[29] The Court notes that while the funding allocation would have to be reframed to any new arrangement of the organisation, overall it would probably involve the same funds but in a different grouping.[30] The Court states that it is '...hopeful of gaining efficiencies from it...that will lead to savings'.[31]

7.20 The Joint Committee is in agreement with the need for alternate dispute resolutions, however, it is of the view that, professional counselling services should be more readily available in the community, rather than being provided by the Family Court.

Mediation in the Family Court

7.21 The Family Law Reform Bill, introduced into the Parliament in October 1994, greatly expands the options for dispute resolution by making mediation and counselling the primary ways to resolve disputes, and litigation the final avenue for those cases where the primary mechanisms fail to achieve agreement between the parties. Significant additional resources are being committed to mediation both in the community and attached to the Family Court.[32]

7.22 It appears to be generally accepted that mediation, as a form of alternative dispute resolution, is an attractive and useful option, particularly as it may lessen or even avoid litigation. However, the Family Law Council reports that attempts in Australia and overseas to evaluate the effectiveness of family mediation services have encountered enormous methodological difficulties and results have generally been inconclusive.[33]

7.23 In the opinion of the Joint Committee the high settlement rate after mediation (approximately 85 to 95 per cent)[34] is due largely to self-selection on the part of participants and the fact that the cases are sifted to a degree that only the most tractable cases are chosen

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28 Family Court of Australia, *Supplementary Information*, 4 July 1995, p. 3.

29 Family Court of Australia, *Supplementary Information*, 4 September 1995, p. 3.

30 Family Court of Australia, *Supplementary Information*, 5 July 1995, p. 12.

31 *Transcripts*, p. 579.

32 Justice Statement, pp. 16-17.

33 Family Law Council, *Family Mediation*, June 1992, p. 58.

34 *Transcripts*, pp. 137 and 175.

for mediation.[35] The Joint Committee considers that the criterion of 'settlement' in relation to the evaluation of the 'success' of mediation is not a useful one. The Joint Committee is also concerned that the extensive list of attributes which render parties 'unsuitable' for mediation results in this form of dispute resolution taking on a distinctly 'educated, middle-class' quality. This concern is reinforced by the comment of the Chief Justice:

> Some of the figures from our evaluation rather suggested that the people using mediation came from a different socioeconomic group - the sort of people who might have read about mediation and who understand its possible benefits.[36]

7.24 The Family Law Council concedes that mediation can take place under other names which have as their principal focus other activities, such as counselling, conciliation and negotiation.[37] The Joint Committee notes that the Family Court already provides dispute resolution which includes aspects of mediation.

7.25 The Joint Committee is concerned that mediation services should be extended only after it is clearly shown that the method is cost effective and responsive to consumer and government funding requirements. It also considers that assessment of demand and location of any extended services are issues for consideration. In this respect the Joint Committee has formed the view that the Family Court has not managed its non-judicial services over the last twenty years very successfully. Accordingly, more use should be made of the existing community services, and the existing funding arrangements of the Attorney-General's Department. This may hopefully keep people out of the courts.

7.26 The Joint Committee recommends that:

> **alternative dispute resolution processes including mediation be pursued in the family law area but be community based rather than through existing Family Court of Australia structures.**

Mediation outside the Family Court

7.27 The Family Law Reform Bill currently before the Parliament expands the existing mediation provisions in the Family Law Act to enable the Court to refer parties to approved mediators rather than just to Court mediators.

7.28 The Bar Association of Queensland expressed concern that there may be a growing perception that mediation should be offered only within the Court structure. The Association's view is that people's perception may be that they have a reduced freedom to engage mediators of their choice, and that it may exclude a number of trained mediators who have been doing this work for a significant number of years and who have a great deal to offer.[38]

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35 *Transcripts*, p. 668.

36 *Transcripts*, p. 562.

37 Family Law Council, *Family Mediation*, June 1992, p. 1.

38 *Transcripts*, p. 644.

7.29 There are a number of private organisations providing mediation in Australia, most notably Relationships Australia (formerly the Marriage Guidance Council). There are training courses in mediation offered by the Law Society Continuing Legal Education, Legal Aid and various universities throughout Australia. However there is little publicity about the availability of mediation and the proper way to use the service. The Chief Justice states that he is '...not sure that the concept is well understood in the community'.[39]

7.30 Witnesses to the inquiry see a role for the Family Court in the provision of mediation services inasmuch as mediation is part of a package of methods to resolve disputes. However they also see a role for mediation services outside of the Family Court provided those services involve accreditation and monitoring of the quality of the service provided.[40] Relationships Australia states that there is a perception that the Family Court and approved agencies are in competition. The view of Relationships Australia is that the services are complementary: '...they have different objectives as well as different audiences'. The organisation notes that while it occasionally hears from the Court:

> ...that perhaps they will set up groups and perhaps they will do a bit more ongoing work and so on...we start to wonder what their charter is and what our charter is and how we distinguish between what they are there to do and what we are there to do.[41]

7.31 Relationships Australia thinks that as Commonwealth funding is involved in both cases there should be more collaboration in and definition of the services.[42] The organisation considers that a process should be evolved, whereby the limited funding of both the service functions of the Family Court and the functions of the approved agencies is rationalised as complementary operations, coordinated and cooperatively planned.[43] Relationships Australia states that it is less concerned about who provides mediation and counselling but considers that a coordinated and planned approach would

> ...[preserve] what rare dollars we have and [expend] them to the best effect...[44]

7.32 The organisation is concerned that even though Commonwealth funding is involved in both the Family Court and Relationships Australia, the latter is required to charge fees for mediation while the Court is not, regardless of the income of the parties concerned or the amount of property they may be dividing.[45]

7.33 The Court's view is that there is no duplication in the Court's services and outside services although there is no agreed formal protocol. Liaison is at a local network level. The

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39 *Transcripts*, p. 562.

40 *Transcripts*, p. 270.

41 *Transcripts*, p. 415.

42 *Transcripts*, p. 416.

43 Submission No. 16, *Submissions*, Vol. 2, p. 68.

44 *Transcripts*, p. 421.

45 *Transcripts*, p. 422.

Court states that it is meeting with Relationships Australia and other interested groups to discuss the Justice Statement funding, any possible areas of overlap in service provision and cooperative arrangements.[46] The Joint Committee notes that the Court says it is beginning to address the issue of liaison with outside service providers. With the Justice Statement funding and the new legislation putting more emphasis on the provision of services by outside agencies, the Joint Committee considers that the Court should develop and implement a best practice model to ensure that there is liaison between themselves and other mediation and counselling services and that the fields of work of both are well-defined.

7.34 The Joint Committee recommends that:

the Family Court of Australia develop and implement a best practice model to ensure effective liaison and cooperation with outside service providers on a national basis.

Family Court Counselling Service

7.35 There are legitimate arguments for both a Court-based and an outside, independent counselling service, although the former Chairman of the Family Law Council, Justice John Faulks, notes that the issue of whether the counselling service ought to be attached to the Family Court or dealt with separately has not been a project of the Court for some time.[47] He states that good links with other counselling organisations within the community enable necessary ongoing counselling to take place, and thinks that the extent to which the different organisations are able to cooperate is the important issue. Australia, like New Zealand, places great emphasis on counselling. Family Court counselling in Australia is done 'in-house' by Court counsellors at the Court. This is in contrast to the New Zealand system of coordinating counselling from the Court but using outside counsellors.

7.36 The Joint Committee notes that the Family Court agrees that '...cooperation between disciplines [within the Court] has been rather strained and sometimes downright dysfunctional'.[48] The Joint Committee wants to ensure that the Court is 'client-based', and considers that the Court should put greater effort into resolving any tensions there may be between the counselling service and the legal arm of the Court.

7.37 An amount of $1.221 million is provided in the Justice Statement for a reduction in waiting times for counselling, provision of a limited after-hours counselling service and extension of visiting counselling services to outlying areas. The Family Court states that additional counselling funds have been allocated to the regions generally to reduce waiting

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46 *Transcripts*, pp. 523-524.

47 *Transcripts*, p. 431.

48 Family Court of Australia, *Supplementary Information*, 4 September 1995, p. 5.

times. On a full year basis, these allocations equate to 33.5 additional counsellors and 4 additional support staff.[49]

7.38 Evidence given to the Joint Committee concerning the benefits of Court counselling was generally highly complimentary. Counsellors are considered to be very experienced in terms of the sorts of issues that come before the Family Court and highly effective in assisting parties to arrive at a settlement.[50]

Provision for counsellors to provide financial counselling

7.39 Under family law legislation there is no provision for counsellors to provide financial counselling, and it is Court policy for counsellors not to become involved in financial counselling.[51] The Court states, however, that '[c]ounsellors are not prevented from taking a therapeutic approach to emotional blocks arising from property matters where that affects the settlement of matters related to children'.[52] The Joint Committee notes that where there is a need joint conferencing is available by a Court Counsellor and Deputy Registrar of the Court. Evidence given to the Joint Committee suggests that this limitation handicaps the counsellors in the service they provide.[53]

7.40 It is the Joint Committee's view that apart from property matters involving companies, trusts and large amounts of private superannuation, counselling would be more effective and efficient if counsellors were able to give financial counselling. The Joint Committee considers that counsellors who are not qualified to give financial counselling should receive appropriate training.

7.41 The present legislation provides for conciliation in children's matters before filing but not for conciliation conferences in financial matters before filing.[54] The Court has asked the Government to include in its family law reform bill series the power for the Court to conciliate before the commencement of proceedings so that voluntary conciliation in financial matters can be undertaken.[55]

Contract counselling

7.42 In its evidence to the Joint Committee the Legal Aid Commission of Queensland thought that the Court should look at the counselling service it provides to its clients and whether or not it could decentralise some of these operations by tendering out counselling services to community agencies or by having Court counsellors making use of community

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49 August 1995, p. 3.

50 *Transcripts*, p. 634.

51 Submission No. , *Submissions*, Vol. 2, p. 315.

52 Family Court of Australia, *Supplementary Information*, 13 June 1995, p. 3.

53 *Transcripts*, p. 315.

54 Family Court of Australia, *Supplementary Information*, 5 July 1995, p. 11.

55 *Transcripts*, pp. 482, 561.

facilities.[56]The Joint Committee is aware that in certain areas some contracting out to professionals already takes place under regulation 8 of the Family Law Act. In this instance outside contractors are engaged to write family reports when there are not enough counsellors to provide the service.[57] Most witnesses who appeared before the Joint Committee did not see a difficulty in relation to the contracting out of counselling services, provided that the quality of the counselling remained at a high level.

7.43 The Chief Magistrate of the Victorian Magistrate's Court states that people coming to the Magistrate's Court in Victoria cannot get access to the Family Court's counselling services as the Court does not have the staff to take referrals from the magistrate's court. The Chief Magistrate considers that if potential savings could be identified in the overall budget of the Family Court for some funding for counselling to be diverted to the magistrate's court, there might be a good financial result.[58] The Joint Committee is aware that on occasion in New South Wales, Family Court counsellors go to local courts and provide counselling.[59]

7.44 The Legal Services Commission of South Australia notes that one of the major problems in Adelaide is the lack of sufficient resources in the counselling area. The Commission claims that there was little incentive for parties to try to resolve a matter without entering into litigation when '...you could almost get a court hearing date quicker than you could get a counselling appointment.'[60]

7.45 The Joint Committee considers that there should be a reallocation of resources to enhance the counselling function and that, as part of a client service focus, consideration should be given to providing more counselling services in the community and not just at registries.

Telephone counselling

7.46 The Family Court Counselling Service provides a limited telephone counselling service to assist people in crisis situations or who reside a long way from a registry. According to Legal Aid Western Australia, telephone counselling services are readily available and well organised in the Family Court of Western Australia. The service can be easily arranged by the counselling service for parties who live at some distance from the Family Court in Perth.[61] The service is aimed at assisting people, particularly in the remote areas, to solve their problems without the need to attend court.

7.47 As the Justice Statement notes, flexibility in service provision is an important feature of a more consumer-oriented court system. Easy access to processes such as counselling is most important, as they are designed to provide early settlement of disputes or to prevent

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56 *Transcripts*, p. 656.

57 *Transcripts*, p. 67.

58 *Transcripts*, p. 85.

59 *Transcripts*, p. 87.

60 *Transcripts*, pp. 7-8.

61 *Transcripts*, pp. 260-261.

disputes arising in the first place.[62] As the Court itself notes, a greater percentage of circuit cases are being set down for trial. .'They are not settling earlier in the proceedings like the rest of the country'. There are '...four or five times the number of defended hearings on circuits than what you have in main registries...'[63]. The Court states that it is examining whether its services to circuit areas are adequate in terms of information and early counselling.

7.48 The Joint Committee considers that the Court should undertake to offer greater community access to counselling services through telephone counselling.

7.49 The Joint Committee recommends that:

while recognising that the Family Court of Australia will always require direct access to counselling services, in the long term, there are benefits in having counselling based in the community through structures such as the Noble Park centre in Melbourne, community legal centres and organisations like Relationships Australia on a flexible and competitive basis.

7.50 The Joint Committee recommends that:

reconciliation counselling be provided by community based centres and therefore the statutory obligation imposed on the Family Court of Australia to provide or perform reconciliation counselling be repealed.

Information services and advice

7.51 For approximately 18 months the Court has been holding information sessions for clients which must be attended, subject to the client's distance from a Court. Registrars and Judicial Registrars have the power to stand a matter down if a party has not attended an information session.[64] The information sessions held by the Family Court aim to increase access to justice and client confidence and are considered by most witnesses to be a step in the right direction. The Queensland Law Society thinks that a significant number of matters settle when parties become aware at an early stage of what they can expect and what the likely outcome will be.[65]

7.52 The Court recently aired a proposal to have a common information and intake procedure for clients, where information would be given about the range of Court services as well as services available outside the Court. During the intake process an assessment would be made of the service most suited to the individuals concerned and clients would be encouraged towards an appropriate dispute resolution service. The Court assesses that control

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62 Justice Statement, p. 65.

63 *Transcripts* pp. 556-557.

64 *Transcripts*, p. 622.

65 *Transcripts*, p. 633.

of appointments and listings for this process would be in a single, centralised unit within a registry which would be able to assess the best utilisation of time and resources across the whole registry. In utilising such a management technique the Court considers that it would be better able to carry out differential case management.[66]

7.53 The Joint Committee is concerned that the information sessions currently held are directed at random groups of clients who are at different levels in terms of their anger, education and insight. The Joint Committee considers that a greater concentration on the provision of information to clients would be beneficial if information was presented to clients in a way and at a time when they were capable of processing it.

7.54 There has been a suggestion that information sessions should be available to people to attend prior to filing an application, so that people have the option, and are aware of the issues and can attempt solutions before coming to court. One of the community legal centres in Western Australia has organised information sessions on separation issues in response to the large number of inquiries it was receiving.[67] Increasingly, consumers are seeking access to counselling facilities after normal working hours. The Joint Committee notes with approval the provision of evening information sessions at Parramatta and some other registries. The Justice Statement funding should enable the Family Court to expand its after hours services and it would be desirable if this could be provided at centres easily accessible to the community.

7.55 The Joint Committee recommends that:

the Family Court of Australia work with the community based sector to provide information sessions, conducted by an experienced family law practitioner, which incorporate information about the operation of the *Family Law Act 1975* and the procedures and processes of the Family Court.

Conclusion

7.56 The allocation of the majority of the resources of the Family Court to the five per cent of cases that proceed to trial reflects an unbalanced allocation of the Court's resources. The Joint Committee considers that the large majority (90 to 95 per cent) of the Court's clients should not be affected by administration difficulties. The Court itself notes that for some years it has '...been constrained from the front end of it - the reconciliation services...' In terms of increasing the level of early intervention counselling and mediation, which we think would be a better service and more productive in the long run, we are prevented from doing that by the requirement to service the hard line of the court ordered material.'[68]

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66 Family Court of Australia, *Supplementary Information*, 4 July 1995, p. 4.

67 *Transcripts*, p. 281.

68 *Transcripts*, p. 573.

7.57 The Joint Committee considers that there should be much greater effort directed to the 'front end' of the Court process in terms of both the resources and skills available to the Court. A reallocation of the Court's resources is required to ensure that the majority of clients passing through the Family Court receive just, fair, inexpensive and expeditious treatment.

7.58 While the costs of legal services in family law matters is not within the Joint Committee's Terms of Reference the issue has been raised with the Joint Committee on several occasions. There have been instances of extremely high fees being charged for trials in the Family Court. The Joint Committee is concerned about the effect increasing costs may have upon the access to justice in family law matters. The Joint Committee acknowledges the importance of the reforms outlined in the Justice Statement released in May 1995, and, the cost of the Justice Report in February 1993. The Joint Committee is not aware of any detailed study or survey on the legal cost of family law matters and the impact that legal fees may be having on family law litigants. The Joint Committee is of the view that this is a matter that should be the subject for a survey or study by an independent academic or research group.

7.59 The Joint Committee recommends that:

a study be conducted to determine what the legal costs of trials in the Family Court of Australia are to the litigants.

7.60 The Joint Committee considers that current case management in the Court is too bureaucratised and that the Court should attempt to carry out differential case management as outlined in its recent paper. The Joint Committee is of the view that greater flexibility must be retained in case management to achieve effective and efficient alternate dispute resolution.

7.61 The Joint Committee considers that great care should be taken that scarce resources are not thrown at new systems of primary dispute resolution which will serve a very small fraction of clients, at the expense of the broader benefits to clients which may be achievable by an alternative use of the resources. Above all, the Joint Committee wants to ensure that the Court has a client focus and a family-based orientation. It considers that it is a responsibility of leadership to protect the least powerful and the minorities and that the Court must address the issue of resources in terms of its clients.

CHAPTER 8: MANAGEMENT STRUCTURE OF THE FAMILY COURT OF AUSTRALIA

Outline of Management Structure of the Family Court

8.1 Section 21B of the Family Law Act gives the Chief Justice of the Court the responsibility for ensuring the orderly and expeditious discharge of the business of the Court. Section 38A of the Act confers upon the Chief Justice the responsibility for managing the administrative affairs of the Court and empowers the Chief Justice for that purpose to do all things that are necessary or convenient to be done on behalf of the Commonwealth. Further section 38D(3) empowers the Chief Justice to give directions to the Chief Executive Officer regarding the exercise of his powers. Accordingly, the Chief Justice is conferred with not only the traditional powers of a Chief Justice, but is also conferred with the sole administrative control over the Court. The Family Court has a Chief Executive Officer who is responsible to the Chief Justice for the management and co-ordination of the Court's administrative component. The administrative structure of the Court is separate from the judicial structure of the Court.

8.2 The Family Court's objective stated in its Corporate Plan is to serve the interest of the Australian community by providing for the just, equitable and timely administration of justice in all matters within the Court's jurisdiction, with emphasis in its family jurisdiction on the conciliation of disputes and the welfare of children.

8.3 The Family Court operates under a matrix structure, being organised managerially at three levels - national, regional and registry. From a functional point of view the Court is organised at all three levels into four groups - judiciary, management/operations, Registrars and counsellors. Subject to the provision of the Family Law Act concerning the powers of the Chief Justice, the management line is from the Chief Executive Officer to Regional Managers to Registry Managers. A diagram of the organisation of the Court at Appendix 9. The Chief Executive Officer is the head of the Office of the Chief Executive and coordinates the administration of the Court at the national level. Each Regional Office is headed by a Regional Manager who coordinates the administration of the Court at the regional level. Each Registry of the Court has a Registry Manager who is responsible for coordinating the administration of the Court at the registry level.

8.4 The Office of the Chief Executive is located in Sydney. It provides direct administrative support to the Chief Executive Officer and comprises 40 staff. The Principal Registrar, the Principal Director of Court Counselling, the Principal Director of Administration and the Principal Director of Information Services are all members of the Office of the Chief Executive and are responsible for a particular function of the Court at the national level. The major objectives of the Office of the Chief Executive are:

- to provide accurate, practical and timely advice to the Chief Justice and the Chief Executive Officer;
- to manage the use of the resources at a national level and to assist Regional Managers to manage at the regional level; and

- to develop, implement and monitor the application of administrative policies within the Family Court.

8.5 The Family Court commenced operations in January 1976 and up until January 1990 was managed by a Principal Registrar who was required to hold legal qualifications. This management was subject to the Chief Justice and the Secretary of the Attorney-General's Department.

8.6 The management structure of the Family Court is based upon a regional organisation which replaced a centralised structure. Each region is administered by a Judge Administrator and a Regional Manager. Judge Administrators report directly to the Chief Justice of the Court and the Regional Managers report directly to the Chief Executive Officer of the Court. Each region also has a Regional Registrar, a Regional Director of Court Counselling, a Regional Resource Manager, a Staff Development and Training Manager, a Senior Personnel Officer and a Regional Librarian. These respective officers report directly to the Regional Manager and to their relevant Principle Director or Director, such as, the Director of Human Resource Management and the Director of Library Services.

8.7 Each region of the Family Court has a series of Registries or Offices, such as, the Sydney Registry or Melbourne Registry. The Registries of the Family Court are usually the first contact points for members of the public with the Court. Registries are managed by a Registry Manager who reports to the Regional Manager. Each major Registry also has a Senior Registrar, Director of Court Counselling and an Operations Manager.

8.8 The Joint Committee notes that the Family Court is different in many respects from any other Court in Australia either at the Federal or State level. In a given year, over 40,000 marriages end in divorce in Australia and there may be more than 100,000 adult litigants involved in proceedings before the Family Court affecting thousands of children. Approximately one marriage in three in Australia ends in divorce. Having regard to the size of the Court, the number of Australian citizens coming into contact with the Court, the number of Court staff and its wide geographical distribution, there is a need for an efficient and workable management structure within the Family Court.

8.9 This complex organisational structure reflects a bureaucratic nightmare. This disparate style of management structure does not seem to be the optimum structure having regard to modern management styles in developing flatter management structures and goes against the trend in public bodies.

8.10 Under the regionalisation of the Family Court there are several regional officers which make up the structure of the Court. This raises the issue as to what extent has the regionalisation benefited the Court and to what extent is there potential to gain savings through centralisation. In evidence to the Committee, the Chief Executive Officer[1] mentioned that the Court is working on the regionalisation of a number of functions. Obviously, the Court has been reviewing the balance between regionalisation and centralisation, which raises the important issue of what cost savings could be achieved by bringing back the regional functions of the Court to a more centralised structure.

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1 *Transcripts*, p. 499.

The Family Court Submission[2] stated that regions were introduced because it was impossible to manage the network of registries effectively from a single central point, but gave no reasons for reaching this conclusion. The major outcome of the Buckley review of the Family Court was the regionalisation structure of the Court whereby three separate regions were established, under the control of the Office of the Chief Executive, to manage the operational Registries of the court. The Regions are managed by a Regional Manager who works closely with the Judge Administrator responsible for that region. In implementing regionalisation the Buckley review recommended that there should be three regions, under the control of Judge Administrator and a Regional Manager. The statutory function of a Judge Administrator is contained in section 21B(3) of the Family Law Act which provides:

> A Judge Administrator shall, in relation to such part of Australia as is from time to time assigned by the Chief Judge, assist the Chief Judge and Deputy Chief Judge in the exercise of such of the functions conferred on the Chief Judge by sub section (1) as are from time to time so assigned.

The Committee is concerned that the following matters do not appear to have been addressed in developing regionalisation for the Court:

- an explanation of the specific inefficiencies that existed in the former centralised system and how they could be rectified with regionalisation;
- in what way was there a lack of coordination in the former system; and
- why there could not be effective coordination in a centralised system.

8.11 Accordingly, the functions of a Judge Administrator may only be ascertained from the terms of assignment made by the Chief Judge. The Committee was advised that the role of Judge Administrator was primarily for the supervision of judges. In commenting on the role of Judge Administrators in evidence to the Committee, the Chief Justice and Deputy Chief Justice stated respectively:

> ...the responsibility is really to do with cases in Court and the allocation of Judges to the hearing of cases - if you like, the supervision of judges. I do not use that in the classic sense, but they supervise what is happening, make sure that sufficient judges are allocated to appropriate circuits and generally take care of the day-to-day matters arising in relation to judges, such as travel and that sort of thing They also act, in effect, as a representative of the judges and put to me the views of the judges. They take a very active interest in listings because listings, of course, are vital to the operation of the hearing system.[3]

> The basic duty of a Judge Administrator is to administer the judges. The whole function of a Court sitting - which judge sits, where they sit - is a big administrative task. Then you have the other matters which are personal to the judges in the region. You probably have twenty judges to administer, and you have to see where they sit daily. Calendaring all that material is what the Judge Administrator does. That is his basic task.[4]

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2 Submission No. 3, *Submissions*, p. 20, first inquiry.

3 *Transcripts*, p. 54, 13 November 1992.

4 *Transcripts*, p. 55, 13 November 1992.

8.12 In relation to the role of Judge Administrators the Chief Justice also stated:

> Perhaps I could mention one additional thing. All this does impact on administration, so it is vital that the Judge Administrator has a close association with a Regional Manager in a consultative role, and that happens.[5]

8.13 As mentioned, the Regional Manager is responsible for the management of the functions and operations of the Court within the Region. The Regional Manager is responsible to the Chief Executive Officer for the efficient operation of the Registries within their region and has authority over all resources, including staff. The emphasis on the appointment of Regional Managers is on management expertise.

8.14 The Committee is concerned about the comment by the Public Sector Union in its submission that "there is now a range of conflicting management styles, philosophies and priorities within the Court which serve only to confuse and polarise the workforce" [6]In evidence to the Committee the Union stated:

> In the minds of the people who are working at the grass roots level, if you like, there is confusion about why some of the policies are not operating across the board, which is no doubt part of change, but on the other hand is just adding to the stress of the people who are trying to provide a service within the Court.[7]

The Committee is concerned with the element of duplication and the complex and top heavy management structure of the Family Court. It also appears to the Committee that there may be unnecessary administrative functions being performed by Judges and an overlap of functions with Regional Managers. Another matter of concern to the Committee is that having regard to the regionalisation of the Family Court, the Office of the Chief Executive has developed a large staff establishment.

8.15 In evidence to the Committee the Chief Executive Officer stated:

> The case for a regional structure was essentially set out in the Buckley review. It was also set out quite strongly in the 1980 Joint Select Committee report, and it did not happen at that time. The regional structure really does two things: it allows the central office to concentrate on overall management and policy issues; and it gets the actual operational management of the court closer to the place where it happens at the coalface. Before regionalisation, every registry manager, or registrar as he was then, reported directly to the principal registrar. That was impossibly complex. There were too many reporting lines and that pushed up the line all sorts of issues which were not worthy of attention at the central level. They took too long for answers and they got no real operational assistance. That meant that the central people were effectively desk bound dealing with the paper, and there was nobody out there looking at the operations of the court.

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5 *Transcripts*, p. 55, 13 November 1992.

6 Submission No.4 , *Submissions*, p. 152.

7 *Transcripts*, p. 52, 19 November 1992.

The regional managers at least are much closer to that. They relate directly to the judge administrator, who looks after judicial operations in the region. That gives you a good local focus and a much better control. One of the issues that the Buckley review brought out was the lack of uniformity among registries. Regional management allows us to pay closer attention to that. You are right in that we have already taken some of the initial regional operations back to the centre to save money and the personnel— the human resource management function— has come back.

There is really not much in the regional offices. There is a regional manager, who has to manage the operations, the budget and the personnel for the entire region. There is a resource manager who assists in that and does the accounting part of it, the financial figuring and all of the administrative type work. There is a regional registrar who actually sits in court as a registrar for about 80 per cent of the time. The rest of the time is spent providing policy advice to the principal registrar and myself and providing overall professional supervision to the whole of the region. There is a regional director of court counselling who provides professional supervision for all of the counsellors in the region and advises the principal director of court counselling as well. Apart from that, at the moment there are a couple of training people there. We are considering whether we might take their line of control back to the centre and rationalise those a little. But there is not really much in that, no matter what you do with it.

I cannot think of anything else much that is out there any more. There is an accommodation or property type person who does all the repairs and maintenance and scheduling of property for the whole region. If you did not have that you would have people doing it inexpertly in the registries or someone trying to do it nationally from the centre. That would involve quite a convoluted arrangement.[8]

8.16 The Committee is of the view that the existing management structure of the Family Court is unnecessarily complex and is not the optimum structure for the court. The complexity and duplication lead to unnecessary expense. Particularly in the form of travel which could be replaced by a national system of video conferencing to be utilised for administrative purposes as well as for litigation. As stated above the Family Court adopted the option of pursuing funding for video conferencing with the Department of Finance by a resource agreement, however, the Family Court decided not to proceed with the proposal (para 4.50). This proposal could have had long term savings and resulted in management improvement for the court. The Federal Court provided the Committee with details of how video conferencing has been effectively implemented on a national basis. Examples provided by the Federal Court are in Appendix 10.

8 *Transcripts*, pp. 499-500.

8.17 In a letter to the Committee the Chief Executive Officer stated the Family Court "is required by law to operate as the equivalent of a separate department of state."[9] The Committee is unaware of any "law" specifically requiring the Court to operate as the equivalent of a department of state. In fact, in an earlier letter to the Committee commenting on evidence and submissions made to the Committee by the Department of Finance and the Attorney-General's Department the Chief Executive Officer stated:

> A Court's primary function is the resolution of disputes between citizens in accordance with law. The Family Court of Australia endeavours to achieve this by using all available dispute resolution techniques and to do so justly and efficiently. It is not a trading corporation or for that matter a Department of State, and should not be treated as such. It is submitted that it is a fundamental error for Government to treat Courts as mere agencies to which the same methods of Government financing can be applied.

The Committee agrees that the Family Court should not be treated as a Department of State and that it should not have a complex top-heavy bureaucratic structure which may be over-managed. The Committee is strongly of the view that resources of the Court must be focussed on its primary function.

8.18 The Committee is of the view that the complex matrix of management should be replaced by a centralised management structure utilising effective local regional personal management. The Committee formed the view that in practise the effectiveness of management in the regions of the court depends upon the personnel. The current disparate style of management is not necessary. The Committee was impressed by the management of the Family Court of Western Australia. The Committee also cannot see the need for the regionalisation of the Court when different practices exist in different States. If uniformity of practices and standards have not been achieved by now it is unlikely it ever will be achieved. One witness stated:

> We are talking about almost, as I understood it, a cultural difference between the courts. I will give you an example of something which is now changing. The situation so far as separated representation of children in the Sydney court and the Parramatta court is concerned has always been something that the Judges and Judicial Registrars have dealt with and we have got a lot of separate representation of children long before the recent case, which has now made it much clearer on which occasions the separate representative should be appointed.
>
> That was a very foreign concept to the Victorian courts. I was before a Melbourne Judge on one occasion, in Sydney, and he said, "Can you tell me why you want a separate representative in this case? They are very rare birds in Melbourne." I do not understand why there would be that cultural difference but obviously there was, which means that there was a different dimension. Now with the judgment in the Re: K all the legal aid commissions - and I know they will be addressing that later on - are reeling from the number of

9 *Exhibit No 65*, Correspondence 13 June 1995.

cases for separate representations that are coming through. So that is just another layer that is going on. Fortunately, we have always had a lot in Sydney anyway, but that is going to increase.[10]

8.19 The Committee is also concerned about the prioritisation of expenditure of funds on an unnecessary over bureaucratic management structure. A former Judge of the Family Court stated in evidence:

> I can indicate that the court seems to have improved in terms of the facilities that are offered to the public as a result of whatever extra money has been spent. I have not been aware, until you told me, how much extra has been spent, but I do not think any of us can talk sensibly about the priorisation of the money because we do not have access to those sort of accounts. In general terms, it seems to me that, if you want a feeling, about all I can say that I would rather see the money spent at the very top and the very bottom of the structure. I think one of the problems which as practitioners we face is getting judge time or judicial registrar time as quickly as necessary in a lot of urgent interlocutory matters ad the first stage. If that can happen, quite often it prevents things from developing into a full blown tangle at a later stage. I am very conscious that somewhere in the middle between the top and the bottom there has been a fairly heavy expansion of administration staff. There are in fact three levels now. You have a principal registry, you have a regional registry and you have a registry, and they all to an extent cover similar tasks and functions. One could ask whether or not that is all necessary when down at the coal face I know that judges cannot get a lot of things done because there are not enough Indians to do the work, like getting files for them, for instance. I have heard it said amongst some of them that is a problem. From a practitioner's point of view, the court has improved vastly by the expenditure of the additional money, in terms of facility that it offers to the public.[11]

8.20 The Committee acknowledges that most Australians courts have been undergoing considerable changes in recent years, particularly in relation to self administration. The public is becoming more aware and critical of the practices and procedures of courts, particularly the Family Court which affects so many Australians. Courts must be responsive to this scrutiny. Accordingly, the Committee has formed the view the court must develop more local regional personal management, with individuals having more effective management and more centralised functions.

8.21 The Committee notes that the Merit Protection Review Agency in giving evidence to the Senate Finance and Public Administration Committee stated that poor staff management was to blame for increasing stress and low morale in the public service. The Agency said decentralising the functions of the service were partly to blame for staff problems. The Committee is of the view these comments may well apply to the Family Court.

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10 *Transcripts*, pp. 128-129.

11 *Transcripts*, pp. 117-118.

8.22 In conclusion the Committee is of the view that the court should strip its bureaucratic and administrative layers and complexities, abolish regional management and establish its principal office in Canberra.

Appointment of the Chief Executive Officer

8.23 The Chief Executive is appointed under section 38C of the Family Law Act by the Governor-General on the nomination of the Chief Judge. Under section 38F of the Act the Chief Executive Officer holds office on such terms and conditions (if any in respect of matter not provided for by this Act as are determined by the Chief Judge). The Office of the Chief Executive is located in Sydney. The Chief Executive Officer, however, lives in Canberra and commutes to Sydney. The Committee is concerned that the Chief Executive Officer has been appointed as an officer resident in Canberra, whereas the Office of the Chief Executive Officer is in fact in Sydney. This has necessitated over a period of years additional expenditure for the Court including travel allowance. Details provided by the Family Court of Australia are at Appendix 11.

8.24 The Committee is concerned about the conditions of the Chief Executive Officer's appointment. It is not aware of any other public service appointment where the officer is located permanently in one location, while the section of which he/she is head is located in another distant location. The costs in time and money are considerable, the Committee is even more concerned with this condition of appointment when the Family Court has consistently and persistently proclaimed its chronic lack of funds, to the extent that it has had to withdraw client services. The Committee's concern about the priorities seemingly exhibited by the above inconsistent courses of action is considerable. All of the attendant costs mean that the appointment of a Chief Executive Officer established in Canberra and commuting to Sydney on a very frequent basis is an expensive exercise, necessarily diverting resources from areas of arguably greater need.

The Committee is not convinced that the concept of a Chief Executive Officer fits in the mould of a court system or judicial structure. The Registrar model fits more comfortably in the culture of a court as they are part of the legal structure of the court. The Chief Justice is conferred with the sole administrative control over the court. This is not consistent with the traditional philosophy that the judges of a court are the court with administrative responsibility vesting in the judges of the court. Traditionally, administrative responsibility was vested in all the judges of a court and not a separate administrative structure that exists in the Family Court. Originally registrars of the Family Court performed managerial, administrative and quasi-judicial functions. The Joint Committee is of the view that a new management utilising effective local regional management, should be established, which is an option which may be adopted is the use of Registrars in the administrative functions of the Court under the direction of a Principal Registrar. The Joint Committee is also of the view that it is a matter for the Judges to determine how they would establish the office of Principal Registrar, however, there should be a shift over time to establish the office in Canberra. This would bring the management functions of the court closer to primary objectives of the court. This would also be consistent with the practice in the High Court of Australia and the Federal Court of Australia.

8.25 The Joint Committee recommends that:

(a) **the judicial control of the Family Court of Australia's administrative structures be vested in a collegiate system determined by the judicial officers of the Court and expressed in the Rules of Court.**

(b) **the present regional management structure be abolished and the administrative functions of the Family Court of Australia be centralised at the principal office of the Court under the day to day management structure determined by the collegiate body of Judges.**

Martyn Evans MP
CHAIRMAN

November 1995

APPENDICES

APPENDIX 1

LIST OF SUBMISSIONS

1	Registrar, Administrative Appeals Tribunal (36th Parliament)
2	Child Support Registrar, Child Support Agency (36th Parliament)
3	Family Court of Australia (36th Parliament)
3a	Family Court of Australia (37th Parliament)
4	National Secretary, Public Sector Union (36th Parliament)
5	Secretary, Attorney-General's Department (36th Parliament)
6	Law Council of Australia (36th Parliament)
7	Assistant Secretary, Department of Finance (36th Parliament)
8	Deputy Secretary, Attorney-General's Department (36th Parliament)
8a	Attorney-General's Department
9	Secretary, Department of Finance
10	Chief Executive Officer, Family Court of Australia
11	Assistant National Secretary, Public Sector Union
12	Local Court, Family Court of New South Wales
13	Gosnells District Information Centre (Inc)
13a	Gosnells District Information Centre (Inc)
14	Mr L J Matthews
15	Mr M Haseman
16	Marriage Guidance Australia Inc
17	Illawarra Legal Centre Inc
18	Associated Mens Electoral Network Inc
19	Norwood Community Legal Service (Inc)
20	Legal Services Commission of South Australia
21	Northern Territory Legal Aid Commission
22	Secretary, Attorney-General's Department
23	Family Law Council
24	Attorney-General, Australian Capital Territory
25	Attorney-General, Western Australia,
26	The Family Law Practitioners, Tasmania
27	Attorney-General, and Minister for Consumer Affairs, South Australia,

28	Secretary, Department of Justice, Victoria
29	New South Wales Attorney-General, and Minister for Justice
30	Attorney-General, Northern Territory
31	Minister for Justice and Attorney-General, Queensland
32	Mr M Clark
33	Mr B Williams, President, Lone Father's Association
34	Mr L Newman
35	Mr P Hloda
36	Mr P Johnson
37	Local Courts Administration, New South Wales
38	Illawarra Legal Centre
39	Legal Aid Commission of New South Wales
40	Mr G Wiseman
41	Mr T O'Donohue
42	Ms D Luadaka
43	Mr M Scalzo
44	Mr G Preston
45	Family Law And Marriage Environment (FLAME)
46	Ms M Irvine

APPENDIX 2

PROGRAM OF PUBLIC HEARINGS

36th Parliament

13 November 1992 at Canberra

Family Court of Australia
- Hon Justice Alastair Nicholson AO RFD, Chief Justice
- Hon Justice Alan Barblett, Deputy Chief Justice
- *Hon Justice Neil Buckley, Judge Administrator, Northern Region*
- Mr Leonard Glare, Chief Executive Officer
- Mrs Jill Townsend, Principal Director of Information Systems
- Dr Carole Brown, Principal Director of Court Counselling
- Mr Bruce Frankland, Principal Director of Administration

19 November 1992 at Canberra

Attorney-General's Department (Canberra)
- Mr Stephen Skehill, Deputy Secretary
- Mr John Broome, Deputy Government Counsel, Civil Law Division
- Mr Peter May, Senior Government Counsel, Courts & Tribunals
- Mr Richard Morgan, Senior Government Counsel
- Mr John McGinness, Principal Counsel, Family & Administrative Law

Child Support Agency
- Mr David Lewis, First Assistant Commissioner
- Mr Phillip Dwyer, Director, Compliance

Department of Finance (Canberra)
- Mr Brian Thornton, Assistant Secretary, Parliament & Government
- Mr Matthew Taylor, Senior Finance Officer

Public Sector Union
- Ms Meral Turner, National Vice President
- Mr Brian Dittman, Member, Professional Division (Lawyers)
- Ms Bronwen Davis, Member, Professional Division (Lawyers)
- Ms Felicity Rafferty, National Industrial Officer

37th Parliament

20 February 1995 at Adelaide

Legal Services Commission of South Australia
Mr Graham Russell, Manager, Family Law Section

Adelaide Magistrates Court
Mr James Cramond, Chief Magistrate

Norwood Community Legal Service
Ms Helen Cox, Solicitor/Project Officer
Mrs Anne Harrison, Solicitor

21 February 1995 at Melbourne

Community and Public Sector Union
Ms Maria Robbins, National Industrial Officer
Ms Susanne Scobie, Family Court Delegate

Magistrates' Court of Victoria
Mr Nicholas Papas, Chief Magistrate
Mrs Susan Blashki, Magistrate

Legal Aid Commission of Victoria
Ms Cathy Lamble, Acting Director, Family Law Division
Mrs Vera Levin, Section Leader, Family Law Section, Assignment Division
Mrs Susan Miller, Solicitor in Charge, Gippsland Regional Office

17 March 1995 at Sydney

Law Society of New South Wales
Mrs Meryl Shenker, Councillor of the Law Society of New South Wales, Chairperson of the Family Law Committee
Mr David Tonge, Member, Family Law Committee
Ms Barbara Coddington, Member, Family Law Committee

New South Wales Bar Association
Mr Peter Rose, QC, Chairman, New South Wales Bar Council's Family Law Committee
Miss Robyn Druitt, Member, Family Law Committee

Legal Aid Commission of New South Wales
Mr Terence Murphy, General Manager, Legal Services
Ms Judith Ryan, Manager, Family Law Division

Australian Dispute Resolution Association
Mr Paul Lewis, Secretary and Convenor of Family Division
Ms Debra Oddi, Treasurer

Attorney-General and Minister for Justice Department, New South Wales
Mr Steven Horder, Director, Local Courts Administration
Mr Timothy McGrath, Acting Assistant Director, Court Administration
Mr James Martyn, Clerk of the Local Court, Family Matters & Chamber Magistrate
Mr William Williams, Executive Officer, Local Courts Administration

Illawarra Legal Centre
Ms Helen Spowart, Solicitor
Ms Reesa Ryan, Solicitor, Women's Legal Resources Centre
Miss Susan Gibbs, Resource Worker, New South Wales Aboriginal Women's Legal Resource Centre

4 April 1995 at Perth

Family Court of Western Australia
Hon Justice Ian McCall, Chief Judge
Ms Carolyn Martin, Registrar/Stipendiary Magistrate
Mr Bryan Merritt, Executive Officer

Legal Aid, Western Australia
Mrs Elizabeth Ilarda, Solicitor in charge

Mrs Margot Lang, Chief Legal Writer, West Australian Newspapers

Gosnells District Information Centre
Mrs Linda Saverimutto, Solicitor

Family Law Practitioners Association of Western Australia
Mr Stephen Thackray, President

4 May 1995 at Canberra

Mr Terence O'Donohue, Director of Court Counselling, Family Court Counselling Service, Family Court of Australia, Newcastle

26 May 1995 at Canberra

Department of Finance
Mr Tony Boxall, Acting Director, Attorney-General's Section
Mr Roger Fisher, Assistant Secretary, Communication, Arts & Attorney-General's Branch

Attorney-General's Department
Mr Stephen Skehill, Secretary
Mr Norman Reaburn, Deputy Secretary
Mr Richard Morgan, Senior Government Counsel, Family & Administrative Law Branch
Mrs Maggie Jackson, Government Counsel, Civil Law Division
Ms Susan Bromley, Acting Senior Government Counsel, Courts & Tribunals Branch
Dr Margaret Browne, Acting First Assistant Secretary, Legal Aid & Family Services Division

Law Council of Australia
Mr Michael Taussig, Chairman, Family Law Section
Mr Christopher Crowley, Executive Member

Relationships Australia
Mrs Caroline Prior, Deputy Chief Executive Officer

Family Law Council
Justice John Faulks, Chairman

15 June 1995 at Canberra

Family Court of Australia
Mr Leonard Glare, Chief Executive Officer
Mr Ian Loughnan, Principal Registrar
Dr Carole Browne, Principal Director of Court Counselling
Mr Bruce Frankland, Principal Director of Administration, Office of the Chief Executive
Ms Jill Townsend, Principal Director, Information Services

3 July 1995 at Canberra

Family Court of Australia
Hon Justice Alastair Nicholson AO RFD, Chief Justice
Mr Leonard Glare, Chief Executive Officer
Mr Bruce Frankland, Principal Director of Administration

4 July 1995 at Brisbane

Queensland Law Society
Mr Peter Carne, Chairman, Family Law Committee
Mr Peter Sheehy, Member, Family Law Committee

Bar Association of Queensland
Ms Michelle May, QC, Chairperson, Family Law Panel
Mr Frank Wilkie, Member, Family Law Panel

Legal Aid Commission of Queensland
Mr John Hodgins, Director

Associated Mens Electoral Network Inc
Mr Leonard Matthews, Treasurer

Department of Justice, Queensland
Mrs Bernene Allen, Acting Director, Court Practice & Procedures, Policy & Legislation Division
Mr Barry Read, Executive Manager, Magistrates Court, Magistrates' Courts Branch
Mr Michael White, Registrar, Brisbane Magistrates' Court
Ms Kathleen McCormack, Manager, South-East Queensland, Alternative Dispute Resolution Division

Family Law Practitioners Association of Queensland
Mr Robert Grant, President

Magistrates' Court
Mr Stanley Deer, Chief Stipendiary Magistrate
Mr Keith Krosch, Stipendiary Magistrate

APPENDIX 3

LIST OF EXHIBITS

1. *Family Law matters dealt with in Magistrates Court of SA* (supplied by Mr James Cramond, Chief Magistrate, South Australian Magistrates Court).

2. *1993-94 Annual Report of the Legal Services Commission of SA* (supplied by Mr Russell Graham, Legal Services Commission of South Australia).

3. *Commissioner's Assignments Policy Manual* (supplied by Mr Russell Graham, Legal Services Commission of South Australia).

4. *Adelaide Registry Considerations* (supplied by the Judicial Registrar, Family Court of Australia, Adelaide Registry).

5. *Crimes, Family Violence Act - 1993-94 monitoring report* (supplied by Mr Nick Papas, Chief Magistrate, Victorian Magistrate's Court).

6. *Family Law Act - 1993-94 Hearing statistics - Victoria Magistrates' Courts* (supplied by Mr Nick Papas, Chief Magistrate, Victorian Magistrate's Court).

7. *Family Law booklet - A guide for people in married and defacto relationships considering separation and divorce* (supplied by the Legal Aid Commission of Victoria).

8. *Legal Aid Commission of Victoria 15th Statutory Annual Report 1993-94* (supplied by the Legal Aid Commission of Victoria).

9. *Legal Aid Commission of NSW 1994 Annual Report* (supplied by NSW Legal Aid Commission).

10. *Constitution - Australian Dispute Resolution Association Inc.* (supplied by Australian Dispute Resolution Assn).

11. *Some Counselling Issues in Separate Representation of Children* by Joyce Grant, Family Law Counsellor Sydney Registry (supplied by Australian Dispute Resolution Assn).

12. *Submission to Senate Standing Committee on Legal and Constitutional Affairs* (supplied by Australian Dispute Resolution Assn).

13. *Letter to the Attorney-General re Family Law Reform Bill (Nos 1 & 2) from the Womens Legal Resources Centre* (supplied by the Illawarra Legal Centre).

14. *Rural and Remote Issues - a submission by NSW Regional Community Legal Centres in response to: "Access to Justice - An Action Plan"* (supplied by the Illawarra Legal Centre).

15. *A Human Right to Justice - experiences of women and the law in the Illawarra region* (supplied by the Illawarra Legal Centre).

16. *Women's Legal Resource Centre - Annual Report 1993-94* (supplied by the Illawarra Legal Centre).

17. *Quarter Way to Equal - a report on barriers to access to legal services for migrant women* (supplied by the Illawarra Legal Centre).

18. *Location and Jurisdiction of Courts of Summary Jurisdiction* - (supplied by the Family Court of Western Australia).

19. *Location and Jurisdiction of Courts of Summary Jurisdiction* - (supplied by NSW Department of Courts Administration).

20. *Family Law matters dealt with in the Magistrates Court of South Australia* - (supplied by the States Courts Administrator)

21. *Jurisdiction of ACT Magistrates Court* - (supplied by ACT Attorney-General's Department).

22. *The Northern Territory's Court of Summary Jurisdiction* - (supplied by NT Attorney-General's Department).

23. *Legal Aid Commission of NSW - Budget* - (supplied by Mr Terry Murphy Legal Aid Commission of NSW).

24. *Jurisdiction of Queensland Magistrates Courts* - (supplied by Minister for Justice & Attorney-General's Department).

25. *Family Law Act Monitoring Report* - (supplied by the Victorian Department of Justice).

26. *Law Calendar 1995* - (supplied by the Victorian Department of Justice).

27. *Family Law Act Hearings Table FLA 2.1* - (supplied by the Victorian Department of Justice).

28. *Family Law Act Hearings Table FLA 2.3* - (supplied by the Victorian Department of Justice).

29. *Funding Figures of the Family Court of Western Australia* - (supplied by Family Court of Western Australia).

30. *Agreement between the Commonwealth of Australia & the Family Court of Western Australia* - (supplied by Family Court of Western Australia).

31. *You and Family Law* - (supplied by Legal Aid Western Australia).

32. *Submission to the Australian Press Council* - (supplied by Ms Margaret Lang).

33. *Table 5 Family Court Counselling Service* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

34. *Counselling Information for Media Visit* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

35. *Court Counselling Workload Report July/December 1993/94* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

36. *Proposals for New Program Structure 1994* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

37. *Management Information Report 31 December 1994* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

38. *Management Information Report 30 September 1994* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

39. *Family Court of Australia - Management Information Report for year ending 30 June 1994* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

40. *Counsellor's Work Program* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

41. *Correspondence from the Family Court of Australia to T M O'Donohue 9/11/89* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

42. *Memo to the Registrar 10/11/83* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

43. *Memo to the Registry Manager 1/4/94* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

44. *Memo to J A Rowlands 10/4/95* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

45. *Memo to Registry Manager 13/10/93* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

46. *Memo to Registry Manager 28/11/91* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

47. *Memo to Registry Manager 17/3/94* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

48. *Submission to Eastern Regional Case Management Committee 17/3/94 from Registry Manager* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

49. *1995 Counselling Circuits* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

50. *Family Court of Australia Duty Statement SPOG A* - (supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

51. *Provisional Position Classification Standards* - (Supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

52. *Code of Professional Conduct* - (Supplied by Mr Terry O'Donohue, Director, Court Counselling, Newcastle Registry).

53. *Parent Inquiry into Children Under Protection* - Copy of submission to the inquiry into the Victorian Child Protection System and its handling of allegations of child sexual abuse(supplied by Christine Assange & Bev Fisher - PICUP).

54. *Staffing Formula* - (Supplied by Department of Finance).

55. *Family Law in Magistrates Courts* - Discussion Paper (supplied by Justice John Faulks).

56. *Family Law Council* - advertisement for submissions (supplied by Justice John Faulks).

57. *Family Mediation* - a Report by the Family Law Council June 1992 (supplied by Justice John Faulks).

58. *Arbitration in Family Law* - (supplied by Justice John Faulks).

59. *Commonwealth Expenditure Reports* - (supplied by the Office of Legal Aid & Family Services, Attorney-General's Department).

60. *A call for a Parliamentary inquiry into the Operations of the Family Court of Western Australia - made by 'The Council for Civil Liberties in Western Australia* - (supplied by FLAME).

61. *Family Court has been "bureaucratised"* - a news article - (supplied by FLAME).

62. *Bid to expose Family Court errors, abuse* - (supplied by FLAME).

63. *Husband's anger at 'unjust' ruling* - (supplied by FLAME).

64. *Submission to Commission on Government'* - (supplied by FLAME).

65. *Correspondence from Mr Len Glare dated 13 June 1995 re: Mr Terry O'Donohue's evidence to the Committee.*

66. *Comparison between Adelaide Registry and the Family Court of Western Australia* - (supplied by Mr Len Glare, Chief Executive Officer, Family Court of Australia).

67. *Family Court of Australia - The Court Plan* - (supplied by Mr Len Glare, Chief Executive Officer, Family Court of Australia).

68. *Magistrates Remuneration and Allowances* - (supplied by Hon Justice A Nicholson, Chief Justice, Family Court of Australia).

69. *VOICE - newsletter of the Office of the Chief Executive, Family Court of Australia* - (supplied by Hon Justice A Nicholson, Chief Justice, Family Court of Australia).

70. *Domestic Violence* - (supplied by the Qld Department of Justice).

71. *Child Abuse* - (supplied by the Qld Department of Justice).

72. *Specialist Practices* - (supplied by the Qld Department of Justice).

73. *Family Mediation Training* - (supplied by the Qld Department of Justice).

74. *We Can Work It Out* - (supplied by the Qld Department of Justice).

75. *Alternative Dispute Resolution* - (supplied by the Qld Department of Justice).

76. *Victim Offender Mediation* - (supplied by the Qld Department of Justice).

77. *Conferencing in Family Law* - a discussion paper (supplied by Mr Hodgins, Director, Legal Aid Office, Queensland).

78. *Primary Dispute Resolution Update* - (supplied by Mr Hodgins, Director, Legal Aid Office, Queensland).

79. *Key Centre in Strategic Management* - (supplied by Mr Hodgins, Director, Legal Aid Office, Queensland).

80. *Correspondence from Mr Len Glare, Chief Executive Officer, Family Court, dated 5 July 1995, in response to questions raised by the Committee.*

81. *Correspondence from Mr Len Glare, Chief Executive Officer, Family Court, dated 16 August 1995, in response to questions raised by the Committee in public hearing.*

82. *Correspondence from the Hon Chief Justice Alastair Nicholson AO RFD, dated 17 August 1995, in response to questions raised by the Committee on the Court's statutory functions.*

83. *Correspondence from the Hon Justice Alan Barblett, Acting Chief Justice, dated 2 November 1995, in response to questions raised by the Committee on the travel expenses of the Court's Chief Executive Officer.*

APPENDIX 4

TERMS OF REFERENCE FOR THE BUCKLEY REVIEW

Purpose

To assess the requisite services of the Court and the effectiveness and efficiency of The Court's existing operational arrangements and structures for delivering the services required of the Court by the relevant legislation with a view to making recommendations to the Chief Justice and to the Attorney-General on how improvements can be made and making a detailed costing of them.

Scope

1. The application of judicial and quasi-judicial resources to the jurisdictions of the Court

2. The provision of other direct Court services including Registrars and Counselling services

3. Administrative support to the Court

APPENDIX 5

TERMS OF REFERENCE FOR THE EVALUATION OF THE REVIEW OF THE FAMILY COURT

In the context of the Court's Corporate Plan, examine and report on -

1. the adequacy and appropriateness of the current organisational structure and staffing of the Court, as implemented following the Review, to meet current needs. This topic covers the central and regional levels and down to the level of the senior management team in registries, ie Registry Manager, Senior Registrar and Director of Court Counselling. Matters for consideration on this topic include the division of functions between the Office of the Chief Executive and Regional offices, the extent to which powers should be devolved to Registry Managers and the adequacy of the Court's staffing in relation to policy formulation and the development of operational procedures.

2. an examination of whether the current structure and arrangement of Registries (both filing and counselling), which produces Registries of widely divergent sizes and a variety of organisational relationships, are appropriate or whether there should be some form of amalgamation of Registries and Sub-Registries bearing in mind that new and upgraded Registries are likely to emerge in the medium term.

3. the effectiveness of the Court's dispute resolution arrangements (other than litigation) as to structure, staffing and output and the consideration of alternative means of providing such services including the current proposals for primary dispute resolution.

4. the standardisation and equitable provision of the Court's services throughout Australia.

5. the Court's effectiveness in meeting the public need for information in relation to its jurisdiction including a consideration of centralised information, enquiries and appointments.

6. communication within the Court - its style, effectiveness and impact.

APPENDIX 6

FAMILY COURT RUNNING COSTS & PROPERTY ALLOCATIONS 1989-90 TO 1994-95

FAMILY COURT RUNNING COSTS & PROPERTY ALLOCATIONS
1989-90 to 1994-95

Financial year		1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1989-90 to 1994-95 avg ann inc %	1989-90 to 1994-95 total inc %
Running Costs:									
Nominal	$'000	37,529	42,901	48,547	49,030	56,002	56,540		
	% change		14.3	13.2	1.0	14.2	1.0	8.5	50.7
Real (a)	$'000	41,331	45,350	50,360	50,287	56,797	56,540		
	% change		9.7	11.0	-0.1	12.9	-0.5	6.5	36.8
Property Operating Expenses:									
Nominal	$'000	13,391	15,051	22,098	21,889	31,758	29,783		
	% change		12.4	46.8	-0.9	45.1	-6.2	17.3	122.4
Real (a)	$'000	14,748	15,910	22,923	22,450	32,209	29,783		
	% change		7.9	44.1	-2.1	43.5	-7.5	15.1	101.9
Total Expenditure (b):									
Nominal	$'000	50,920	58,445	71,074	70,919	88,145	87,030		
	% change		14.8	21.6	-0.2	24.3	-1.3	11.3	70.9
Real (a)	$'000	56,079	61,781	73,728	72,737	89,397	87,030		
	% change		10.2	19.3	-1.3	22.9	-2.6	9.2	55.2

(a) Converted to average 1994-95 prices using the implicit price deflator for Gross Non-Farm Product.
(b) Includes Judges' Long Leave

Sources: 1989-90 to 1991-92 expenditure data as supplied
Family Court of Australia, Annual Reports, 1992-93 to 1994-95
Australian National Accounts ABS (5206.0).

APPENDIX 7

MATHEMATICAL WORKLOAD FORMULA

Workload Resourcing Agreement with the Court

The Department of Finance and the Family Court have entered into an agreement where resources are automatically adjusted on the basis of movements in the Court's workload as measured by an agreed workload formula. This agreement is subject to the threshold.

The workload formula measures the percentage change in workload and applies that percentage to staff levels of the Court to determine the variation in resources. Mathematically, the formula reads:

$$\{[((t1 - t0) / t0) \times (r0)] \div [(0.5 \times ((t1 - t0) / t0)0 \times c0]\}$$

where t1 = workload in the current year

$$= \{(A1 + B1 + (C1\ \ 1.5) + (D1 \times 5) + (E1 \times 9) + (F1 \times 1.5))\}$$

where t0 = workload in base year

$$= \{(A0 + B0 + (C0 \times 1.5) + (D0 \times 5) \div (E0 \times 9) + (F0 \times 1.5))\}$$

where r0 = registry staff in base year

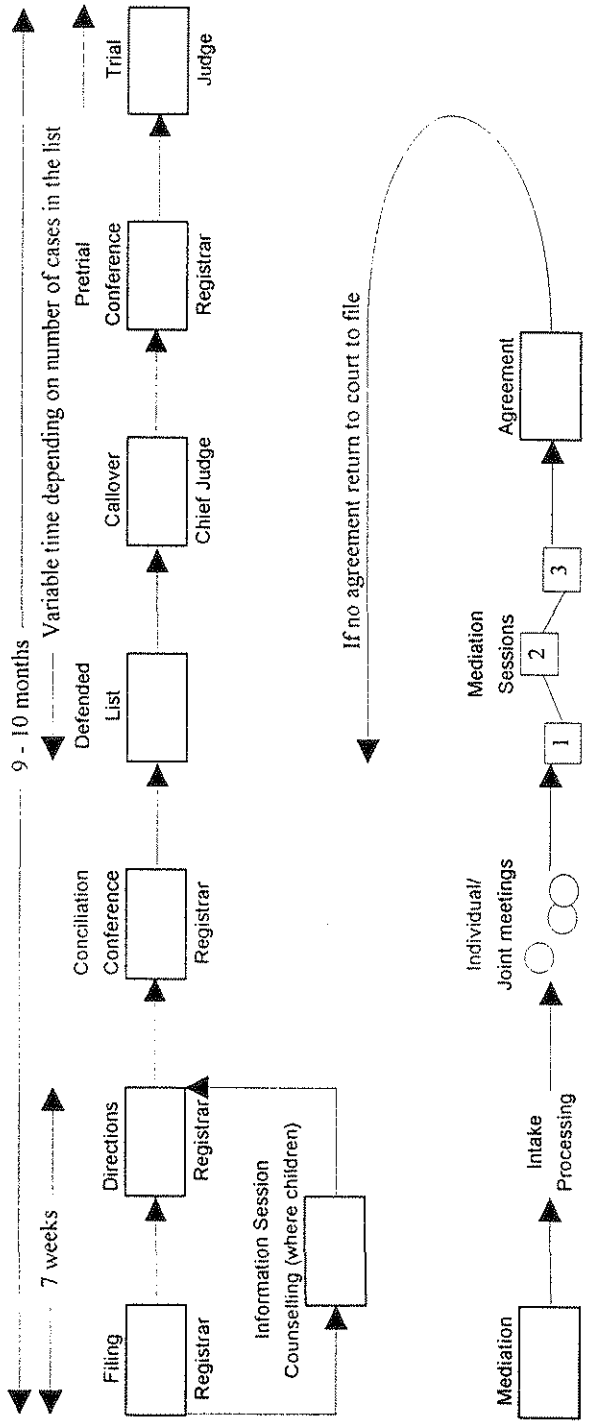
where c0 = central office in base year

and where
A = number of files opened
B = number of forms 4 & 5 - applications for divorce (represented)
C = number of forms 4 & 5 - applications for divorce (in person)
D = number of forms 7 - custody application (married) - weighted by 5
E = number of forms 7 - custody application ex nuptial) - weighted by 9
F = voluntary counselling matters

The resulting staff figure is converted to dollars in the following manner:

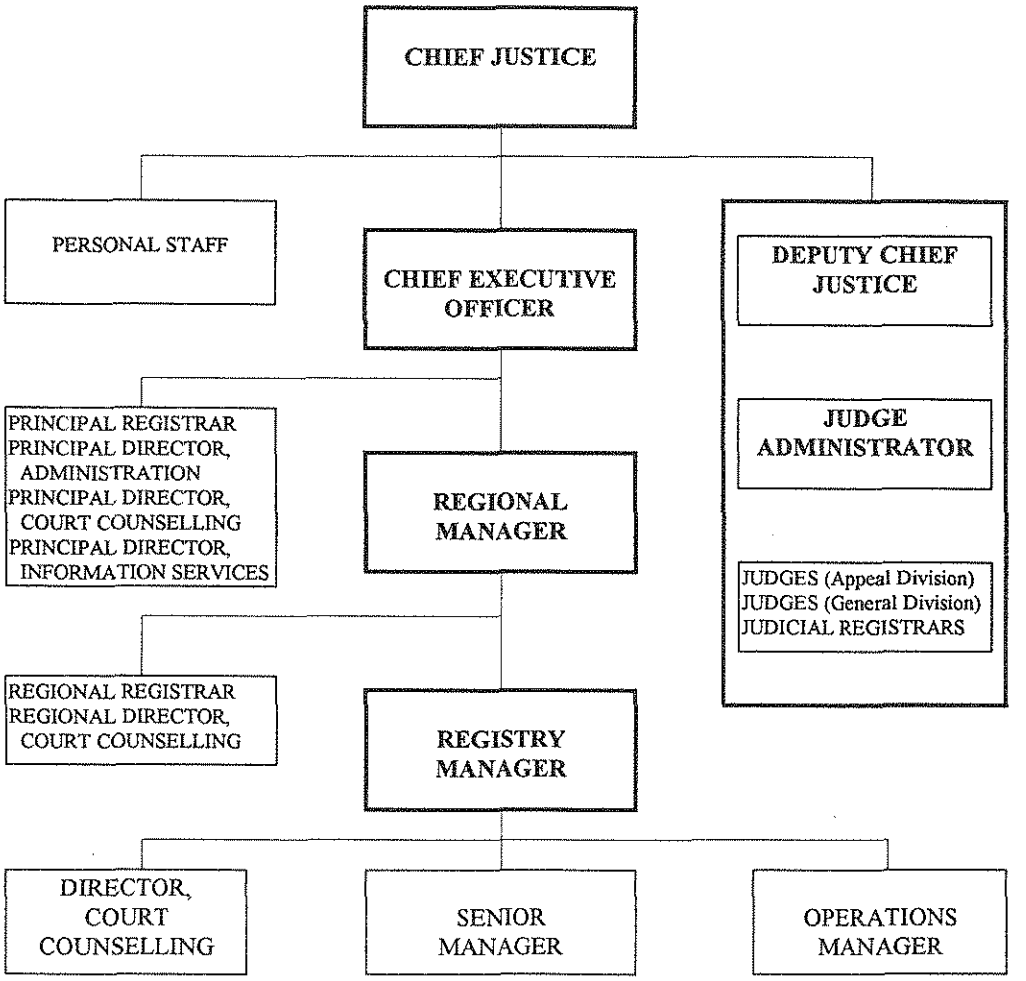
staff figure × $32,400 (salary and oncosts)	= salaries
salaries × 33%	= administrative expenses
salaries × 23.5%	= property expenses

CASE MANAGEMENT IN THE FAMILY COURT OF WESTERN AUSTRALIA



APPENDIX 9

FAMILY COURT OF AUSTRALIA ORGANISATIONAL STRUCTURE



REGIONS		
NORTHERN:	REGISTRIES -	BRISBANE, DARWIN, TOWNSVILLE, CAIRNS, ROCKHAMPTON, GOLD COAST, LISMORE
EASTERN:	REGISTRIES -	SYDNEY, NEWCASTLE, WOLLONGONG, PARRAMATTA, DUBBO, CANBERRA, ALBURY
SOUTHERN:	REGISTRIES -	MELBOURNE, BENDIGO, DANDENONG, ADELAIDE, HOBART, LAUNCESTON

APPENDIX 10

EXAMPLES OF THE USE OF VIDEOCONFERENCING

Year of Use	Court/ Tribunal	Facilities Used
1987-1992	High Court of Australia	The High Court has conducted special leave applications using videoconferencing equipment located in Courtroom No. 1 in Canberra and facilities in Telecom Studios in Brisbane, Adelaide and Perth since 1987. There have been three or four transmissions each year. The majority have been between Canberra and Brisbane.
1988	Supreme Court of New South Wales	VCF facilities were used during the examination of a witness in Boston before Young J. The court sat in the OTC Studio in Sydney; the witness in a commercial studio in Boston.
1990	Industrial Commission of New South Wales	A witness in New York was examined before Sweeney J. The Commission sat in the OTC Studio in Sydney; the witness in a commercial studio in New York City.
1991 (March)	Federal Court of Australia	Transmissions between OTC Studio Sydney and Telecom NZ Studio, Wellington and between AAP Communications Studio in Perth and Telecom NZ Studio Wellington. Eichelbaum CJ and Barker J (High Court NZ), Black CJ, French and Lee JJ (Perth), Sheppard and Beaumont JJ (Sydney) of the Federal Court participated. Simulated hearing concerning pending closer economic relationship amendments to the *Federal Court Act* and *Trade Practices Act* which would enable witnesses in either New Zealand or Australia to be examined from the other country using VCF.
1991 (March)	Copyright Tribunal	Sheppard J gave extensive directions to an applicant in person located in Perth. The respondents in Sydney were represented by counsel. The Tribunal sat in the studio of AAP Communications in Glebe; the applicant in the AAP Communications Studio in Perth.
1991 (April)	Supreme Court of Victoria	An orthopaedic specialist in London was examined before Ashley J in a jury trial (industrial accident). The court sat in the OTC Studio in Melbourne; the witness in the British Telecom Studio in London.
1991 (June)	Supreme Court of New South Wales	Transmissions between OTC Studio, Sydney and commercial premises in Los Angeles and San Francisco of two witnesses in a defamation action - evidence taken before Smart J.
1991 (July)	Copyright Tribunal	A witness in Chicago was examined then extensively cross-examined before Sheppard J. The Tribunal sat in the AAP Communications Studio in Glebe with counsel for parties, the witness sat in a commercial studio in Chicago.
1991 (July)	Federal Court of Australia	Transmission between OTC Studio, Sydney and General Council of the Bar Gray's Inn, London involving Lord Donaldson (Master of the Rolls), Lord Justice Neill (Court of Appeal) and Davies and Einfeld JJ (Federal Court).

Examples of the Use of Videoconferencing (VCF) in Australian Courts and Tribunals

Year of Use	Court/ Tribunal	Facilities Used
1991 (October)	Federal Court of Australia	Simulated hearings using VCF facilities in courtrooms of the Federal Court in Sydney and Melbourne. Simulated hearings also conducted in association with the High Court of New Zealand. Simulations involved examination and cross examination of witnesses in each country, the NZ witnesses and counsel being in Telecom NZ Studio in Wellington, the Australian witnesses and counsel being in Federal Court courtrooms in Sydney and Melbourne. The VCF equipment was supplied on trial by AAP Communications.
1991 (December)	Supreme Court of New South Wales	Examination of three witnesses in London before Young J. The Court sat in the OTC Studio in Sydney while the witnesses were examined from the General Council of the Bar Studio in London.
1992 (February)	Supreme Court of New South Wales	Rogers J, Chief Judge, Commercial Division appointed Sir Laurence Street a referee under Part 72 Supreme Court Rules. Two witnesses were examined before Sir Laurence who sat in the OTC Studio Sydney with counsel for the parties, the witnesses being examined in the General Council of the Bar Studio in London.
1992 (13 March to 20 March inclusive)	Federal Court of Australia	Simulated hearings using VCF facilities in courtrooms of the Federal Court in Sydney and Melbourne. Communication made with representatives of the Federal Court in Telecom VCF Studios in other capital cities. Communication also made with compatible equipment overseas. The equipment was provided on trial by Telecom Australia.
1992 (June)	Federal Court of Australia	Ryan J in Melbourne heard evidence from a witness in London in a taxation appeal being heard in the Federal Court of Australia. Telecom's Melbourne studio was used for the VCF.
1992 (June)	Federal Court of Australia	Wilcox J (a Sydney-based judge who was hearing a matter in Adelaide) heard evidence from a witness in Sydney (examination and cross examination) in a matter being dealt with in the Federal Court in Adelaide. The Court sat in the OTC studio in Adelaide. Later the judge (back in Sydney) together with counsel for one of the parties also in Sydney, heard submissions using a video link to Adelaide where counsel for two of the parties was located.
1992 (21 & 22 October)	Supreme Court of the Northern Territory	Asche CJ heard evidence on a link between the Tanami Network in Alice Springs and Telecom's Adelaide studio. Evidence was taken from two medical experts in a damages claim.

APPENDIX 11

CHIEF EXECUTIVE OFFICER'S TRAVEL EXPENSES

From The Hon Chief Justice Alastair Nicholson, AO RFD

FAMILY COURT OF AUSTRALIA
CHIEF JUSTICE'S CHAMBERS

GPO Box 3991
MELBOURNE VIC 3001
Telephone: (03) 9242 5888
Facsimile: (03) 9602 2105

Marland House
570 Bourke Street
MELBOURNE VIC 3000

2 November 1995

Mr Martyn Evans MP
Chairman
Joint Select Committee
on Certain Family Law Issues
Parliament House
CANBERRA ACT 2600

Dear Mr Evans

On 28 September 1995 you wrote to the Chief Justice about costs incurred as a result of the Chief Executive Officer of the Court residing in Canberra and travelling to duties in the Office of the Chief Executive (OCE) which is primarily located in Sydney. The Chief Justice responded to you in a general way on 12 October 1995 and said that detailed work was proceeding to extract the information needed to respond to your specific questions. That work has been completed and, in the absence of the Chief Justice, I now provide the remainder of the response.

Background

It needs to be understood that the position of Chief Executive Officer is a statutory office to which an appointment cannot be made for a period in excess of five years. There is no guarantee of reappointment. The Committee is already aware that the Buckley Review recommended that OCE be in Canberra but that the Department of Finance and the Attorney-General's Department opposed that. When the position was advertised in August 1990 the location was described as follows, "The location will be Sydney, Melbourne or Canberra. In any event, extensive travel in Australia will be required." The assumed requirement for travel has proved to be correct. The Sydney location was not confirmed until October 1990.

Basis of Calculations

Detailed figures are attached for the financial years 1992/93, 1993/94 and 1994/95 as well as for 1995/96 to the end of September.

The Sydney expenditure has been broken into duties at OCE and other work in Sydney. Sydney/Parramatta are large areas of activity for the Court and a considerable amount of travel

to Sydney will always be necessary. The basis of this division of expenditure, as for all the figures, is the proportion of time devoted to each activity wherever there was more than one reason for the travel.

The car hire figures proved impracticable to break down in detail so the Sydney OCE figures have been estimated for the cost of travel between the airport and the city multiplied by the number of such trips. The total car hire figure is the actual figure from the financial records. Car hire charges frequently involve the carriage of other officers of the Court in addition to the Chief Executive Officer.

Where travel to Sydney was en route to another location the cost of the fares has been regarded as a charge to the other location. Travelling allowance for time en route spent in Sydney has been recorded against Sydney.

Offsetting Factors - Canberra

Under the present arrangements, where the Chief Executive Officer has control of the timing, he schedules Canberra work on Monday or Friday to minimise cost.

The cost of travelling to Sydney needs to be offset against the cost of travel to Canberra should the Chief Executive Officer's head station be declared to be Sydney. Figures previously provided to the Committee showed that an average of 46 days a year was spent in Canberra in the calendar years 1990, 1991 and 1992. Since then the Canberra contingent of OCE has increased with the addition of Management Information, Research and Senior Project Officer functions as well as growth in the Information Technology function. It is already planned to add the Library function. The requirement to attend Parliamentary Committees, meet with the several central coordinating agencies, the Australian Federal Police, the Attorney-General's Department, Ministers and their staff and other Departments and agencies is a constant one. There is now complete administrative independence from the Attorney-General's Department which means that the Court has to deal for itself with the major bodies. The Chief Executive Officer usually assists the Chief Justice in briefing Shadow Ministers and senior figures in the minor parties. Following the Government's Justice Statement, there will be a need for regular liaison with the peak bodies in the mediation industry, all of which are located in Canberra. (The Committee remarked on the need for this liaison earlier this year). Visits to Canberra Registry, as to all Registries, need to be made by the Chief Executive Officer as a matter of regular routine and also to deal with specific industrial and operational problems.

Assuming 25 trips to Canberra for 2 days each (involving one overnight stay) the cost would be $5313 per annum in Travelling Allowance and $9800 per annum in airfares (the airfares being calculated as Business Class one way and Economy the other although the entitlement is to First Class). Obviously, other combinations of travel are likely; day trips would increase the cost of fares and reduce travelling allowance and longer trips would have the converse effect.

Offsetting Factors - Terms and Conditions

The Chief Justice pointed out that there would be costs involved in moving the Chief Executive Officer from Canberra to Sydney. The approved terms and conditions for the position (being a term appointment) include rental assistance should the incumbent choose to live away from home and also reunion visits in that event. Rental assistance is paid for 52 weeks a year whereas travelling allowance is paid only for the periods spent in Sydney. The cost of reunion fares is only $232 per annum less than the average expenditure on airfares to work in the Sydney office. The estimated cost of rental assistance, based on the current Sydney

market for a two bedroom unit, is $26,000 per annum. This considerably exceeds the cost of travelling allowance paid.

Conclusion

When the background to the present situation is understood, including the fact previously alluded to by the Chief Justice that the present incumbent was clearly superior to all other applicants, it is clear that the present arrangement is cost effective.

Future

The Committee has explored the question of the optimum location for OCE and it has been suggested to it that the Buckley Review conclusions were correct in that Canberra is the most appropriate location. There seemed to be some support among Committee members for that proposition. Professor Coaldrake, the consultant presently engaged by the Court to evaluate the effectiveness of the Buckley Review and following events, has not quite completed his work but he has authorised me to say that he will be recommending that OCE move to Canberra.

The Committee has been given, in response to a request by it, an estimate of the cost of removing OCE to Canberra as a one-off exercise. However, there is also the option of a more gradual transfer as positions become vacant which would be considerably cheaper. Certain processing functions would not need to move from Sydney in any case and the media relations and public information functions have already been moved to Melbourne. As Professor Coaldrake has pointed out, removal to Canberra is a much more feasible option now that the Court is installing a Wide Area Network for E-Mail. If the Committee is disposed to support a relocation to Canberra, that would no doubt assist the Court in putting a proposal of this nature to Government.

Yours sincerely,

ALAN BARBLETT
Acting Chief Justice

Travel Expenditure

	92/93	93/94	94/95	95/96 (to Sept 95)
Attending Duties at OCE Sydney				
TA	21413	16694	22460	6406
Airfares	8313	5145	8443	2035
Car Hire	1645	1081	1363	329
Total	31371	22920	32266	8770
Attending Other Duties in Sydney Area				
TA	3378	4131	2875	669
Airfares	2608	4914	3853	1622
Car Hire	470	893	658	235
Total	6456	9938	7386	2526
Other Travel				
TA	7617	8378	4701	1127
Airfares	15756	15401	13380	4571
Car Hire	5501	7526	1398	1334
Total	28874	31305	19479	7032
Total Travel Expenses				
TA	32408	29203	30036	8202
Airfares	26677	25460	25676	8228
Car Hire	7616	9500	3419	1898
Total	66701	64163	59131	18328