

A New System? Affordable Family Law?

Proposed Amendments to the Family Law Act explained

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The first comprehensive review into the Family Law system in more than 40 years includes a plan to spend \$12.7 million to create Parenting Management Hearings – designed to simplify Family Law disputes between self-represented litigants. However the proposals could go well beyond that and potentially could fundamentally change the practice of Family Law in Australia. Are there any alternatives to reform a system so badly in need of repair?

Proposed Reforms

As part of the May 2017 budget Federal Attorney-General George Brandis QC announced an overhaul of the Family Law Act and other initiatives. He has directed the Australian Law Reform Commission to conduct a comprehensive review of the Family Law system to report by the end of 2018 with interim reports to be delivered on key issues, providing recommendations to change the system.

Mr Brandis also announced amendments to the Family Law Act to ensure that victims of family violence are not cross-examined by perpetrators, or required themselves to cross-examine the perpetrator.

The Federal Circuit Court of Australia, the Family Court of Australia and the Family Court of Western Australia will receive \$10.7 million to engage more family consultants. The Government is also spending a further \$3.4 million over two years to expand the domestic violence unit pilot, established as part of the Women's Safety Package in September 2015. A Parliamentary Enquiry was set up to enquire into changes in the Family Law system to better protect those affected by Family Violence.

New Parenting Management pilot scheme

The centre-piece of the announcement was funding of \$12.7 million over four years to establish Parenting Management Hearings (PMH) as an alternative to the current Family Law Court system. It is tasked, at least initially, to deal with self-represented litigants in parenting disputes.

The introduction of the PMH trial follows repeated calls from the Family Law profession and their clients for greater funding of Family Law Courts to clear the delays now endemic in a system that has been increasingly under-funded and under-resourced for many years.

Although details of the PMH scheme are yet to be announced, it has been reported that it will comprise a panel of lawyers, psychologists and social workers or other child development experts. It is likely that there would also be a children's representative in some cases. The budget papers state that the PMH pilot "will be given powers to make binding determinations on simple Family Law matters, which would otherwise require consideration by the Family Law Courts". The initial pilot of

PMH is scheduled to commence in mid-2018 in Parramatta, with a second location yet to be identified.

United States models

It is understood that the PMH scheme is to be based on two pilot programs in the United States; the Idaho Informal Custody Trial (ICT) rule, which has operated since 2008 and the Informal Domestic Relations Trial (IDRT) process adopted by the Deschutes County, Oregon, Circuit Court which commenced in 2012.

Neither process has progressed to completely replace the traditional adversarial Family Law systems in their respective states although expansion of the IDRT has been recommended to Oregon's Chief Justice and apparently is underway. The Idaho Informal Custody Trial rule, as its name suggests, is confined to parenting and child maintenance matters while Oregon's IDRT includes parenting, property and child and spouse maintenance issues as well. Lawyers have a limited involvement in the trials as described below.

IRDT

Since Oregon's IRDT was inspired by its older cousin from Idaho, an explanation of the former describes the processes of the latter. The primary goal of the IDRT was to deal with the growing pressure of self-represented litigants on their Family Law system.

If the parties opt into the IDRT process the trial judge takes full control of procedure and actively investigates the facts in a case, rather than acting as a neutral umpire between the two litigants. The parties speak under oath directly to the judge with no formal evidence in chief, nor any cross-examination. While the judge may ask questions, parties may only do so if the Court permits it. The only witnesses permitted apart from the parties themselves are experts. The rules of evidence generally do not apply. Any exhibits sought to be tendered by the parties usually are admitted subject to the weight to be attributed to them by the judge unless they are deemed to be irrelevant and are then excluded.

To opt into the IDRT parties must both sign a form to waive certain statutory rights relating to standard judicial procedure and appeals. In effect they are electing to have their dispute determined by an inquisitorial judicial system.

Appendix A sets out the rules of procedure for an IDRT hearing.

The IDRT system is available to represented parties as well. At a trial legal representatives may summarise the issues and may advise their clients during the process but cannot lead evidence, cross-examine witnesses nor tender documents, or make submissions. The only exception is that the role of legal representatives and trial procedure generally may be varied at any stage of the hearing by the judge.

One of the “advantages” touted by the IDRT process is that it gives lawyers the opportunity to offer “limited scope representation” or “unbundled” legal services. This is an alternative to the traditional full-service model where a lawyer can limit their role to a specific task such as document assistance or procedural advice. It includes pre-trial preparation as well as being available at Court to advise but not to appear for a client.

Rapid preparation, hearings and determinations

IDRTs are scheduled for about 2 hours of trial time. Judges dedicate about 30 minutes before the hearing for review of the case and set aside an hour to reach their decision and, in self-represented cases, complete, sign, and present the final judgment to the parties. Things may take longer if the procedure is varied and a lawyer is permitted to participate.

Appeals

Whilst appeals are permitted to a Superior Court, the waiver signed by the parties is intended to limit their right of appeal. To date it appears no one has challenged the validity of the waiver with regard to appeals from the IDRT.

Evaluation - IDRT

Between 2013 and 2015 the IDRT process was evaluated with the assistance of the Institute for the Advancement of the American Legal System (IAALS) by way of questionnaires administered to litigants, 3 Deschutes County judges and 3 lawyers who represented clients in IDRT proceedings. No statistically meaningful result was obtained from the litigants due to an inadequate number of responses. IDRT trials comprised between 9% and 22% of all trials depending on the subject matter. The purpose of the evaluation was in part to determine which cases were most suitable for the process.

The widest category of cases found to be suitable was where both parties were unrepresented, where their financial circumstances were straightforward, and where lay witnesses were not critical. As the judge controlled procedure their lack of familiarity with the law and procedure was less critical than in an adversarial format.

The survey also produced a rather surprising finding, namely that cases involving domestic violence where both parties are self-represented were viewed as particularly well suited for the IDRT process. It was suggested that the IDRT rules permitted a victim to tender medical and law enforcement reports without having to call witnesses. Further the victim could avoid cross-examination by the alleged perpetrator and the judge was able to control the focus of the trial and limit the obvious imbalances between perpetrator and victim.

Feedback received from the judges and lawyers was that the IDRT process reduced conflict at trial for the following reasons:

- The absence of evidence from friends and supporters reduced the range of allegations.
- Parties lost the opportunity to provoke the other via cross-examination.
- The issues were contained by the judge.
- Simpler procedures made the whole exercise more accessible.

Evaluation - ICT

In 2010 a survey was carried out by the Planning and Research Administration Office of the Courts of Idaho concerning the Idaho ICT which by then had been in operation for 2 years. In that survey 52% of self-represented litigants reported that they were glad they opted into the system with 35% saying it decreased conflict and 55% saying they considered the outcome was good for the children.

Application to Australia

Despite the positive assessments of the Idaho and Oregon models there can be no guarantee that transplanting them to Australia will deliver significant cost savings and improvements to Australia's Family Law system. Some of the reasons include:

Jurisdiction

Federal judicial powers must be exercised by the judges of a Court constituted under Chapter III of the Constitution.¹ Judicial power may be delegated to a non-judicial agent provided the judges still bear the major responsibility for exercise of the power and the exercise of power is subject to Court review.² As the PMH will not be exercising judicial power it will have limited scope when making parenting orders. For example it could not make orders altering parental responsibility. These limitations are likely to extend to the determination of financial matters. This is in contrast to the ICT and IDRT which operate without significant jurisdictional constraints.

Cost savings

Whilst the cost of running the existing Family Law system has been rising steadily over time this is undoubtedly due to many factors other than just efficiency. Society has remained anything but static over the 41 years since the Family Law Act commenced. Our population has been increasing, rates of relationship breakdown are steadily rising and there have been changes to a myriad of cultural and social factors putting pressure on the Family Law system many of which could never have been anticipated in the 1970s.

¹ NSW v The Commonwealth [1915] HCA 17; 20 CLR 54

² Harris v Caladine [1991] HCA 9

Therefore measuring the cost efficiency of the Family Law Courts by reference only to gross expenditure alone is too simplistic. In any event there is as yet no research which compares the relative costs of setting up and running a PMH process with the existing Family Law system.

Neither the Oregon IDRT nor the Idaho ICT models nor its equivalents have seen any widespread adoption to date. The reviews of those pilot schemes have not addressed cost savings and focus largely on assessing litigant satisfaction and their effectiveness.

Further, any cost savings arising from a merger of the Family Law Courts would have to be balanced against the extra costs of setting up, transitioning to and running a new PMH system. Chaired by a lawyer and including a community representative, social worker or other expert and in some cases a children's representative, no one could say at the moment whether the overall cost savings will be significant.

Restructure of existing Family Law Courts

It also seems likely that if the PMH process operated nationwide that it would not be economically viable to maintain the existing Family Law Courts as well. The two Family Law Courts probably would have to merge although it not known whether any merger would produce significant savings. Previous mergers of government authorities in this country have not always resulted in substantial budgetary benefits.³ There is no research or modelling to assist us.

Role of lawyers

The press releases and other information to date shed no light on whether lawyers will have any role in the proposed new system. We are told that PMH will be tasked with dealing with unrepresented litigants in less contentious cases. As many Family Law hearings involve only one self-represented litigant these may be deemed unsuitable for the PMH process.

Inquisitorial systems like PMH are more document dependant than traditional adversarial proceedings. Given the prohibition on cross examination, comprehensive documentation becomes pivotal to effective presentation of a case. To correct imbalances between the presentational abilities of self-litigants, some of them are likely to seek out legal assistance to prepare their material.

The ICT and IDRT permit limited involvement of lawyers, which is mostly restricted to the preparation of Court materials, giving advice and in some exceptional cases appearing for their clients. Whilst unbundled legal services are not unknown in Australia they are certainly not common, particularly in Family Law. There are many reasons why practitioners would be reluctant to undertake limited

³ Managing Departmental Amalgamations NSW Auditor General's Performance Audit (2008)

scope representation in Family Law, an area where continuity of instructions is often essential. It also requires that any unbundled services comply with the relevant professional conduct rules. For many Family Law practitioners the adjustment to this style of work might be quite problematic particularly if the matter has any complexity.

Imbalance between litigants

A fundamental concern is whether a PMH can compensate for imbalances between an articulate, organised and confident applicant and an inarticulate, disorganised and/or weak respondent. In theory in an IDRT style of hearing a judge takes charge to try to rectify the imbalance. However judicial intervention to assist one side often leads to claims of bias. Indeed claims of bias in inquisitorial hearings are much more common than in the adversarial system.⁴

There is also an anomaly about an IDRT survey finding that self-litigants involved in cases concerning domestic violence are particularly well suited for the system. This seems counterintuitive particularly where a victim's fear of their perpetrator is often activated just by having to confront them let alone be cross-examined by them.

Voluntary or compulsory participation

It is not known whether participation in PMH system is ultimately intended to be voluntary or compulsory for a certain type of case. Nor do we know whether it is proposed to transfer existing cases from the Family Law Courts. The government has not indicated if it has any target for the proportion of litigants to be removed from the existing system. Even if it were intended to be a compulsory for reasons previously discussed it could not cover the field, for example, for changes to parental responsibility. Many might question the efficiency of setting up a new tribunal with such limited jurisdiction.

Appeals

No information is available about rights of appeal. There are at least three possible pathways, the first is to limit appeals by waiver of rights, the second is for appeals to be heard by the Family Court, and the third is a right appeal to the Federal Court. Consistent with appeals from many non-judicial bodies, the grounds of appeal may be limited, for example, to errors of law.

Alternate approaches to Reform

These is an urgent need to overhaul and streamline case handling procedures in the existing systems used by the Family Law Courts (some of which have not changed very much since the Act commenced). The changes required need to be fundamental not cosmetic. Extensive research undertaken across jurisdictions in Australia and

⁴ Apple, J.G., & Deyling, R.P. (1995) A Primer On The Civil-Law System. New York: Federal Judicial Center

overseas could be used to locate and to adopt the best, most modern and efficient Court procedures. Some of these are discussed below.

A significant number of delays and inefficiencies in the present system relate to weakness in processes not designed to handle the current intensity and volume of work. Although it will require a cultural change in the administration the Courts and significant adjustments of attitude in the profession, important changes have been implemented in the past (although not always sustained).

There are at least seven areas where reforms could be introduced in Family Court and the Federal Circuit Court which should lead to significant improvements. They are:

1. The widespread adoption of new technology;
2. Restoring past innovations;
3. Stricter compliance with Orders, directions and Rules of Court;
4. Tighter control of interlocutory and final hearings;
5. The out-sourcing of some trial procedures;
6. Maximising the use of Arbitration and ADR;
7. Special assistance for self-represented litigants and changes to legal aid.

1. Widespread adoption of new technology

In this area the Family Law Courts are lagging far behind other jurisdictions both in Australia and overseas.

Technologies have developed to replace some of the face-to-face interactive parts of the justice process. Software is being written to organise files to simplify the process of case review and analysis. The growth of the use of broadband has permitted the use of video-conferencing to replace, speed up and/or simplify case management so as to do away with the need for parties and their lawyers spend hours at Court on multiple occasions. High definition video-conferencing is now widely available to the general public on smart phones, tablets and computers at low cost.

There are e-callosers utilising video-conferencing in many jurisdictions in Australia. They can be scheduled across the day with the advantage that a practitioner has only to set aside only 15 - 30 minutes to deal with a Court matter. Video-conferences can be linked so that the client can participate from home or work. It also reduces the need for solicitors to engage agents to appear at mentions, avoiding "double handling" and extra costs.

By way of example in September 2015, the New South Wales Civil Courts were first to introduce some innovative online services. In addition to e-filing, represented parties may also opt into an "online Court" which removes the need to appear in Court in person in order to deal with preliminary and interlocutory matters. Solicitors have the option to appear at most pre-trial directions and call-overs via a secure video-conferencing portal.

The other benefit is to reduce the time judicial officers spend on face-to-face case management. It thereby increases the productivity both of the Court and the lawyers who appear before it. By way of example, a 2015 pilot e-callover scheme in the Downing Centre Court in Sydney was found to measurably reduce the delay before final hearings.

For people who do not have access to digital technology, the alternative of telephone conferences and traditional face-to-face Court attendances, would still be available so they are not disadvantaged.

2. Restoring past innovations

There are some past innovations in Family Law that have been discarded even though they were found to be successful.

Ironically in the 2015 IDRT evaluation, Australia was praised as the first jurisdiction to introduce an informal children's case procedure - the Children's Cases Pilot Project which began in 2004 and which ultimately became the Less Adversarial Trial (LAT) system. It shared many of the essential elements of the IDRT.

Unfortunately however for whatever reason, the LAT system more or less exists today in name only with the "first day" of the trial often now resembling no more than a call over and the final hearing conducted in much the same way as any trial in the Family Court.

It is also undoubtedly true that the Family Law Courts have failed to follow through on some innovative ideas to limit and dispose of new cases quickly, for example, by failing to fully enforce pre-action procedures and making maximum use of alternative dispute resolution systems. To be fair however, some of this is due to inadequacies in the Family Law Act and Rules that need to be addressed (see section 6 below).

3. Stricter compliance with Orders, directions and Rules of Court

Failure by litigants to comply with Orders, directions and the Rules causes a significant waste of judicial time and resources. Cases are listed for hearing that are not ready, adjournments are applied for at the last minute and matters come back to Court repeatedly when judges are trying to get them back on track. To rectify this:

- a. Strict obligations ought to be imposed on the profession to treat all rules and procedures as mandatory with appropriate incentives and sanctions. In the past costs orders were made against legal representatives personally (not exactly unpalatable but avoidable if the practitioner is efficient).
- b. The rules ought to be amended to make compliance avoidance much more difficult so that a failure to comply becomes the exception rather than the rule.

- c. To support this, the Court would respond by enforcing its own Orders, directions and Rules of Court much more strictly.

4. Tighter control of Interlocutory and final hearings

A whole book could probably be written on this topic. In summary however, there does need to be tighter regulation of interlocutory cases with regard to limiting the amount of material filed in support, at the stage of filing when Registrars determine the priority of matters filed and by the duty judge who determines how much time ought to be allocated to them in Court. The rules limiting the volume of material that can be filed could be as simple as "matters that do not comply are simply not listed until the material is reduced".

In most Australian Superior Courts it was common for judges to strictly ration hearing time for interlocutory cases. Over the last decade or so that practice has more or less been abandoned, possibly due to the increasing volume of work. Despite this, the Full Court as far back as *Collins and Collins* (1990) FLC ¶92-149 made it clear that, subject to affording the parties natural justice, a judge has full control over the trial process including the allocation of time. Such control when applied to final hearings can have the added benefit of ensuring that each side has an equal opportunity to present their case within those time constraints about which the parties would be informed from the outset of the trial.

5. Outsourcing of some trial functions

The use of depositions in Family Law cases is widespread in the United States. In those instances oral testimony is taken well in advance of the trial and outside the Court system. It is an expensive form of outsourcing to the private sector but could be offered as an option, particularly in "high-value" cases where the parties can afford it. The incentive would be a shorter delay before a final hearing and less time spent in Court to deal with complex hearings.

6. Maximising the use of Arbitration and ADR

To aid settlement negotiations the parties could be directed to obtain an opinion from an independent counsel as to the merits and prospects of each case together with an opinion as to the likely range of outcomes.

The Act and Rules also ought to be amended to provide for compulsory referral to mediation where appropriate with the rules also to provide for an evaluative model to give mediators greater scope to facilitate settlement. With an evaluative model the mediator is free to express a view about certain issues in dispute and also about the likely range of outcomes. This strengthens the mediator's position and gives them more authority to broker a settlement.

The mediator ought to be able to certify in appropriate cases that both parties have made a genuine attempt to settle their case so that the judge may consider whether this should give them any priority notwithstanding the failure to reach agreement.

Where mediation fails, amendments are required to give the judges powers for compulsory referral of suitable matters to Arbitration. The Rules ought to be further refined to strengthen the arbitration system so that decisions are binding in appropriate cases.

7. Special assistance for Self Litigants

This last topic concerns handling the significant increase in the number of self-litigants in the Family Law system, the very task for which the PMH system is intended. There are measures that could be applied to the existing system to help manage the problem which include:

- a. Compulsory external programs to inform self-litigants about their obligations and the procedures of navigating the Family Law Court system. Such programs are likely to be more cost-effective than burdening judicial officers with a similar function during the course of proceedings.
- b. Some existing programs could be expanded and tailored specifically to self-litigants; for example:
 - Better dispute resolution procedures and Family Relationships resources for parenting cases to assist self-litigants to understand whether their expectations are realistic; and
 - Improvements to pre-action procedures for financial cases to ensure there is uniformity between represented and unrepresented parties.
- c. Legal aid could be expanded to provide more assistance to self-litigants by relaxing the means test but at the same time tightening the merit test. In this way public funds would not be wasted on arguing cases that are not worthwhile. In the past legal aid was provided to some litigants for financial matters on the basis that they would pay their fees out of their property settlement.
- d. Presently in parenting cases conducted by self-litigants on both sides, the independent children's lawyer is forced to undertake a type of pseudo-representation of both parties which is both inefficient and not part of their role. Common experience tells us that once a self-litigant becomes represented their case is presented in a more sensible and efficient way. Therefore the money spent on expanding legal aid is likely to achieve cost savings well in excess of the increased legal aid dollars spent.

- e. Finally, the Less Adversarial Trial ought to be restored. It inspired many of the processes of the ICT and IDRT and is an effective way to regulate unrepresented parties without the need to establish a new tribunal.

Dated: 15 September, 2017

A handwritten signature in black ink that reads "Richard Maurice". The script is cursive and elegant, with the first letters of each word being capitalized and prominent.

Richard Maurice
Barrister

Appendix A – Oregon Informal Domestic Relations Trial procedure

SLR 8.015(2) provides that an IDRT will be conducted as follows:

- (a) At the beginning of an [IDRT] the parties will be asked to affirm that:
 - (i) They understand the rules and procedures of the [IDRT] process; and,
 - (ii) They are consenting to this process freely and voluntarily and that they have not been threatened or promised anything for agreeing to the [IDRT] process.
- (b) The Court may ask the parties or their lawyers for a brief summary of the issues to be decided.
- (c) The moving party will be allowed to speak to the Court under oath concerning all issues in dispute. The party is not questioned by counsel, but may be questioned by the Court to develop evidence required by any statute or rule, for example, the applicable requirements of the Oregon Child Support Guidelines if child support is at issue.
- (d) The Court will ask the moving party (or the moving party's attorney if the party is represented) whether there are any other areas the party wishes the Court to inquire about. The Court will inquire into these areas if requested.
- (e) The process in subsections (c) and (d) is then repeated for the other party.
- (f) Expert reports will be entered into evidence as the Court's exhibit. If either party requests, the expert will be sworn and subjected to questioning by counsel, the parties, or the Court.
- (g) The parties may offer any documents they wish for the Court to consider. The Court will determine what weight, if any, to give each document. The Court may order the record to be supplemented. Letters or other submissions by the parties' children that are intended to suggest custody or parenting preferences are discouraged.
- (h) The parties will then be offered the opportunity to respond briefly to the comments of the other party.
- (i) The parties (or a party's attorney if the party is represented) will be offered the opportunity to make a brief legal argument.
- (j) At the conclusion of the case, the Court shall render judgment. The Court may take the matter under advisement but best efforts will be made to issue prompt judgments.
- (k) The Court retains jurisdiction to modify these procedures as justice and fundamental fairness requires.

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About the Author

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He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged clients and as a duty solicitor in the Family Court, in NSW State Children’s Courts and in many NSW Local Courts. In 1988, he was called to the private bar. Since then he has practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate. He also works as a Mediator in Family Law financial and parenting matters. He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like *Pierce and Pierce* (1999) FLC 92-844 and *Black v. Black* (1991) DFC ¶ 95-113 and *Jonah & White* [2011] FamCA 221 and more recently *Sand & Sand* [2012] FamCAFC 179 and *Vega and Riggs* [2015] FamCA 797

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