

Child-related proceedings - Key Literature

Chisholm, Richard, ““Less adversarial” proceedings in children's cases’ [2007] (77) *Family Matters* 28.

The author discusses the ‘Less Adversarial Proceedings’ approach in relation to hearing child related proceedings, introduced in 2006 amendments to the Family Law Act. This article overviews the less adversarial principles and duties under the new legislation (at 31-32).

Family Court of Australia, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (April 2007).

This document contains a general overview of the Family Court’s transition from the traditional common law adversarial trial to the less adversarial trial (LAT). It contains a history of procedural reforms to the Family Court. It discusses the differences between adversarial and inquisitorial systems, and contains detailed discussion of the operation of the LAT model.

See in particular at pp 6-7, where it is noted that traditional adversarial processes such as cross-examination present particular difficulties in family disputes which are often compounded when there are family violence allegations or more subtle imbalances of power in the relationship.

Family violence generally is discussed at pp 55-56 - ‘The frequency with which issues of both child and spousal abuse are raised in Family Court proceedings makes it vital that any procedural changes provide at least the same level of protection to possible targets of violence as did the processes which they replaced.’

The LAT improves the Court’s responses to family violence allegations through

- > Early consideration of the issue;
- > Determination of single issues of disputed fact separately and;
- > Judicial consistency (the same judicial officer handles the case for its duration).

See further - ‘The direct dialogue between the judge and the parties enables the judge to assess the circumstances of the family without the buffer of formality and, hopefully, without the parties being intimidated or overwhelmed by the courtroom environment. There is a need for care in dealing with such cases particularly where one party may be in fear of the other. A party may well have concerns about speaking freely in the presence of the other party and the judge must be conscious of such a possibility. Arrangements can include changes to the format of the courtroom, permission to have additional companions present or special arrangements for a party being able to participate by video as is consistent with the Court’s family violence strategy. Family consultants may play a significant role in such cases,

especially where they have had prior involvement with the family' (pp 55-56).

Family Court of Australia, 'Implications of the Australian Institute of Family Studies "Allegations of Family Violence and Child Abuse in Family law Children's Proceedings" report: Response from the Family Court of Australia' [2007] (77) *Family Matters* 16.

This article emphasises the value of reliable evidence and guidelines in judicial decision making, and highlights Family Court initiatives in improving practices and outcomes, such as the Less Adversarial Trial, the Child Responsive Model, and staff training.

See in particular at p 17 – 'The issue-based focus of the Less Adversarial Trial and the greater control exercised by the trial judge over the conduct of proceedings, including the evidence to be relied upon, enables the Family Court to bring a more structured and purposive approach to its consideration of allegations of violence and abuse'... 'Although the report highlighted the lack of expert evidence in particular cases, the new Less Adversarial Trial process will allow the judge to identify issues of violence or abuse at an early stage and direct the appropriate evidence to be put before the Court.'

Higgins, Daryl, 'Cooperation and coordination: An evaluation of the Family Court of Australia's Magellan case-management model' (Report, Australian Institute of Family Studies, 2007).

[Magellan case management](#) is an interagency collaborative model of case management in the Family Court of Australia for cases where serious allegations are raised about sexual or physical abuse of children in post-separation parenting matters. The aim of this study was to evaluate Magellan against its intended goal of being an effective mechanism for responding to such allegations.

At p 3 the 'Less Adversarial Trial' (LAT) is outlined. The report identifies that "LAT" is based on the [Children's Cases Program \(CCP\) pilot](#). The primary focus is to achieve better outcomes for children. The main ways in which the less adversarial approach varies from a traditional hearing are that the Judge controls the hearing process and its inquiry, not the lawyers; a Family Consultant is in Court from the first day as an expert adviser to the Judge and parties; and parties can speak directly to the Judge to tell in their own words what the case is about and what they want for their children. The Judge, rather than the parties or their lawyers, decides how the trial is run. Most of the rules of evidence do not apply (e.g., hearsay may be admissible).

See further at p 47 – some of the key features of LAT are:

- > to have the optimal procedures to ensure the needs of the child concerned are paramount;
- > the procedures are to be conducted in a way that safeguards children and parties from violence;
- > cooperative and child-focused parenting are promoted; and

- > undue formality and delays in court proceedings are to be avoided.

LAT is designed so that judges seen by litigants on the first day will see that matter through to completion (p 47).

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files.

See further in section 14.3 (p 328-330) which contains qualitative insights into less adversarial proceedings. Some judicial officers and legal practitioners expressed reservations about the way family violence cases were handled within the less adversarial framework. The report notes: 'There were two aspects to these concerns. First, some believed the more personal nature of LAT proceedings, where parties speak directly to the judge, may not be optimal for parties who have experienced family violence. Second, some maintained that the informality of the LAT may not be the best approach for determining allegations that often concern serious criminal offences.'

Views that the less adversarial processes achieved appropriate outcomes for cases involving allegations of family violence or child abuse were expressed less frequently. However, those who espoused this view suggested that less adversarial trials allowed a broader picture of a child's circumstances, including in relation to family violence and child abuse, to be put before the court (p 329).

Kaspiew, Rae, et al, 'Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases' (Commissioned Report, Australian Institute of Family Studies, 2012).

This report presents an evaluation of the Coordinated Family Dispute Resolution model piloted in the community sector. The evaluation also examines challenges and advantages due to the interdisciplinary nature of the model. This was not intended to be integrated into court-based practice.

See generally chapter 7 – 'CFDR negotiation in the shadow of family violence'. It is noted that 'The application of mediation-based processes in circumstances where there has been a history of family violence raises significant challenges to some of the core notions that underpin approaches to mediation. For a range of reasons linked primarily to the power imbalances that ensue from a history of family violence, facilitated processes such as mediation have frequently been thought to be inappropriate for these cases. At the same time, empirical evidence and the practice literature demonstrate that such processes are quite widely applied in circumstances in which family violence has been alleged. Sometimes

the process can be an empowering one for the victim, but sometimes it can engender fear and/or leave the victim in an even more vulnerable position' (p 102).

Kaspiew, Rae, et al, '[Independent Children's Lawyers Study](#)' (Final Report (2nd Edition), Australian Institute of Family Studies, June 2014).

This report has examined the role of ICLs in the family law system. The findings indicate that considerable value is placed on the role, especially by judges. There are three overlapping aspects to the ICL role, relating to participation, litigation management and evidence gathering. In fulfilling the litigation management and evidence-gathering role, ICLs are seen to bring a child focus to proceedings that would otherwise be conducted bilaterally and adversarially. The capacity of many ICLs is recognised to be excellent. It is also clear from the range of responses across participant groups that there are concerns about the capacity and commitment of some practitioners. (p xii)

It was found that ICLs play an important role 'in influencing the focus of proceedings that would otherwise be conducted bilaterally in an adversarial manner' (p 53). See also section 8.4.3 (p 127) – 'ICL involvement in cases of family violence and child abuse'. There was a strong theme from parental interviews that the ICLs 'did not maintain a position of impartiality and that this in turn influenced the stance adopted in relation to their evidence-gathering role', particularly in relation to cases where family violence and child abuse concerns were present. Further, 'Almost all of the women who reported a history of family violence or concerns about child safety identified the ICL as having had a negative effect on the case, from their perspective' (p 130).

Kaspiew, Rae, et al, '[Responding to Family Violence: A Survey of Family Law Practices and Experiences](#)' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014. See in particular section 6.3.2 – lawyers (p 124). This section contains family lawyers' views of the 2012 family violence reforms.

Maloney, et al, '[Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study](#)' (Research Report No. 15, Australian Institute of Family Studies, 2007).

'The study examines (a) the prevalence and nature of allegations of family violence and child abuse in family law children's proceedings filed in 2003 in selected registries; (b) the extent to which alleging parties provided evidence in support of their allegations, and to which allegations were denied, admitted or left

unanswered by the other party; and (c) the extent to which court outcomes of post-separation parenting disputes appeared to be related to the presence or absence of allegations.'

Qu, Lixia et al, 'Post-separation parenting, property and relationship dynamics after five years' (Commissioned report, Australian Institute of Family Studies, December 2014).

'The Longitudinal Study of Separated Families examines the experiences, circumstances, and wellbeing of separated parents and their children in Australia. It was commissioned as part of the evaluation of the 2006 Family Law reforms, and three waves of surveys have now been conducted. This current report presents findings from wave 3, conducted in 2012 with 9,028 parents five years after separation. It explores the opinions and experiences of separated parents regarding: quality of inter-parental relationships; child-focused communication between parents; safety concerns and violence and abuse; use and perceived helpfulness of family law services; pathways for developing parenting arrangements; family dispute resolution; stability and change in care-time arrangements; property division and their timing and perceived fairness; and child support arrangements and compliance. The report also asks parents about their child's wellbeing, and compares this with care-time arrangements and family dynamics.'

See in particular at p 13 where it is noted that 'How to create and maintain child-focused dialogues against a background of high levels of emotion, disappointment and anger has been recognised as an important challenge for family dispute resolution practitioners and service providers. Approaches that involve greater collaboration between lawyers and less adversarial processes within courts have also been developed as steps in the direction of discouraging the conflation of interpersonal difficulties and the resolution of parenting disputes.'

Ralph, Stephen, 'Indigenous Australians and Family Law Litigation: Indigenous perspectives on access to justice' (Family Court of Australia and the Federal Magistrates Court of Australia, 2011).

This paper discusses Indigenous perspectives on access to justice in the family law context.

See appendix 3 – Family law practitioner comments. These comments addressed the question: 'Are there any changes the Family Law Courts could make to improve its services for Aboriginal and/or Torres Strait Islander families when they are going to court?' The responses indicated support for a less adversarial approach to trials (p 73).