'Less adversarial' proceedings in children's cases

RICHARD CHISHOLM[1]

The extensive amendments to the **Family Law Act** *in 2006 included provisions establishing a new, 'less adversarial' approach to the hearing of children's cases. This article describes the new approach, where it comes from, and its likely significance.*

The adversary system

Among the many changes to children's law made by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* was the introduction of Division 12A of Part VII, containing provisions that "provide for a less adversarial approach to be adopted in all child-related proceedings under the Act".[2]

The words 'less adversarial' have become familiar in family law. They refer to court proceedings that depart in significant ways from the distinctive, traditional common law model of court proceedings, generally referred to as the 'adversary system'. So let's first look at that system.

In the adversary system, the initiation and control of the proceedings is largely in the hands of the parties. They essentially control what happens. There will be no proceedings, of course, unless someone – the 'applicant' in family law cases – starts a case, seeking some remedy against another party ('the respondent'). It is for the applicant to decide what orders to seek, and what evidence and argument to put before the court. Similarly, it is for the respondent to decide whether to defend the proceedings, and what evidence and arguments to use. The judge's task is essentially to let each party put their respective cases, ensuring that the rules of evidence and procedure are complied with, and then, when they have finished, decide the case on the basis of the relevant law and the evidence and argument the parties have chosen to put before the court. Traditionally there is a single trial, or hearing, in which the evidence and arguments are presented, at the end of which the judge makes orders that dispose of the case and delivers a judgement that makes the necessary determinations of fact and applies the relevant rules of law, and thus contains the reasons for the orders.

Such proceedings are characterised as 'adversarial' because the conduct of the case is in the hands of the adversaries, the parties. It is sometimes said that the adversarial system is not really a search for the truth, only for the better of the two stories presented to the court. There is some substance in this. Because the judge does not conduct any independent inquiry or investigation, the court is indeed limited to hearing the stories the parties tell and, while its task is to assess the plausibility of these stories, it has no way of knowing whether either is true: the court will never know whether there might have been other evidence, not called by either party, that would have led to a more accurate result. Thus, if neither party presents the true facts, the judge might perform the task impeccably, judging the two cases presented to the court, but reach a result that does not reflect what is actually true.

On the other hand, those who favour the adversary system would say that although in this system *judges* are concerned only with choosing between the cases presented by the parties and not with finding the objective truth, the *system* is, in fact, well designed for discovering the truth. They would say that the best way to discover the truth in a dispute between two parties is to hear what each party has to say. There are some other things that can be said, too, in defence of the adversary system. In particular, it appeals to liberal democratic notions, in that it is for the individuals concerned, not the state, to investigate the matter. Arguably, it is easier for the judge to be impartial if the judge does not conduct an inquiry into the facts.

All this is about the model, or pure form, of the adversary system. In reality, the contemporary practice of courts in our system departs significantly from it in various ways. But it is still a useful guide to the basics. And it has been profoundly influential. It affects, for example, the way we think about lawyers and judges. Lawyers have a duty to their client, to present the client's case, albeit subject to various constraints, including the lawyer's duty to the court. Their fundamental duty is not to conduct their own investigation into the truth. Similarly, the appointment of judges has reflected their traditional role in the adversary system: we tend to look for people who would be good at being impartial, assessing evidence, ensuring that rules of evidence and procedure are adhered to, and being able to know and apply the relevant rules of law.

Why are we now departing from it, seeking a system that is less adversarial?

A nice coincidence: Court experiment and parliamentary report

The inclusion of the new 'less adversarial procedures' in the legislation is the immediate result of a remarkably nice coincidence between two events.

Firstly, when Parliament was considering proposals for the reform of Part VII, a committee had recommended the creation of a new tribunal (in which the parties were to be unrepresented) to deal with most children's cases (*Every Picture Tells a Story*). That proposal did not find favour, but there was political support for the view that *something* needed to be done to improve the way children's cases were conducted. What, though?

Well, as it happens the Family Court had been experimenting with a pilot project, the *Children's Cases Program*, in which, with the consent of the parties, children's cases were dealt with in a new way, a way that

involved the judge taking much greater control of the proceedings than was possible under the traditional, adversarial approach.

It was a nice coincidence because the Government – and the Parliament – seized upon the Family Court's experiment as the solution to the problem. There would be no tribunal, but there would be a new approach: the legislation would provide that the courts should apply something like the less adversarial approach developed in the *Children's Cases Program* to all children's cases, not just those cases in which the parties had consented to the less adversarial approach. And this is what the legislation does.

The Family Court's Children's Cases Program

The program and its background have been fully and expertly documented by Margaret Harrison, whose recent booklet is an authoritative treatment of the subject.[3] For present purposes, it is necessary only to sketch the key features.

One of the many strengths of Margaret Harrison's work is that, while she rightly emphasises that the scheme marks a striking departure from the traditional approach,[4] she also shows the continuity between the program and certain ideas and modifications that had previously been made in children's cases. Over the years, the adversarial system had been considerably modified in children's cases. Under the *Family Law Act*, children were often represented,[5] there were often independent family reports[6] or other expert reports on the children's needs, and some exceptions had been made to the rules of evidence.[7] Even with these modifications, however, judges often expressed disquiet about the underlying adversarial structure of the litigation. Before and after the *Family Law Act*, judges had often remarked emphatically that cases in which the child's best interests were paramount were not strictly adversarial:

> . . . it is well established that proceedings in relation to the best interests of children are not strictly adversarial. The wellspring for departure from a strictly adversarial approach to proceedings is found in the Court's obligation to treat the best interests of the child the subject of proceedings as the paramount consideration.[8]

These were pointed comments, but it was never very clear exactly *where* they pointed. Looking back, we can see that they seem to express a yearning for a different system, but not a clear idea of what such a different system might be like. The Court still had no investigative arm,[9] and procedural fairness seemed to limit the extent to which the Court could depart from traditional procedures.[10] The quest for a better system gained urgency because of cuts in legal aid and growing numbers of unrepresented litigants. Whatever merits the adversary system might have, it is a system that depends absolutely on both parties being able to present their cases properly, something that, in my experience, hardly any unrepresented parties can do.

The model for a different system emerged from the vision of the previous Chief Justice, Alastair Nicholson, and O'Ryan J, who conducted a study tour on the subject and came back much influenced by continental models, especially the German model. This led to an experiment: the Children's Cases Program.

As the words 'less adversarial' suggest, the scheme departed significantly from the adversarial model. There have been some differences of practice over time and perhaps between one judge and another, but the key features, as developed by the Family Court prior to the 2006 amendments, may be described as follows. The judge had a more controlling role, and became heavily involved in the way the case was presented. By the first day of the hearing the parties would have filed their affidavit evidence and the judge would have read it, and on that first day the judge would discuss in some detail how the case would proceed, and work out with the parties what evidence would be of most assistance. Indeed, the judge could legally *prevent* the parties from calling evidence that, although relevant and legally admissible, was considered by the judge to be unhelpful. In practice, this rarely happened: more often, the parties and their lawyers accepted the judge's suggestions about what evidence should be called. The more controlling role of the judge was linked to some other changes. Normally, even when the parties were legally represented, the judge invited them to make a brief (10 minutes or so) opening statement, explaining their case in their own words. Although the lawyers were involved in the discussion, and of course made submissions and led evidence in much the same way as usual, the more controlling role of the judge required a somewhat different role from them.

There were two other ways in which the judge was liberated from the constraints of the traditional system. The judge could dispense with the application of the rules of evidence. And the hearing was treated as being extended over a series of court occasions – the parties were sworn in on day one, so that everything they said from then on was on oath, and the judge could make binding rulings about particular issues at various stages of the hearing; a contrast to the traditional system where all the rulings come at the end.

Finally, another big change, which I think developed in importance as the system was put into practice, was that a 'Family Consultant' – previously known as a Family Court counsellor or mediator – was involved from the start and acted as a kind of advisor to the court and to the parties, and as an expert witness. The judge engaged the Family Consultant in discussion, in open court, about the needs of the children and the best way to deal with issues.

How was it possible, you may ask, for judges, in the absence of any new legislation, to liberate themselves from the rules of evidence and procedure to the extent necessary to conduct trials this way? The answer, under the Children's Cases Program, was consent: the new approach was used only where the parties had consented to having their cases dealt with in this way.

The new system was an experiment and, as was always the Court's intention, it was evaluated. To date, two evaluations have been conducted, one by Professor Rosemary Hunter[11] and the other by Dr Jennifer McIntosh.[12]

The idea of a pilot program, reviewed and finetuned over a period of time, was somewhat caught up by events: the political imperatives of the time led to the scheme (or something like it) being embraced and built into legislation, although the scheme was still in an experimental stage. However, no harm seems to have been done by this, since there was

An evaluation of the prototype: The Children's Cases Program

The less adversarial trial procedures contained in Part VII, Division 12A of the *Family Law Act 1975* were closely modelled on the Children's Cases Program (CCP), an opt-in pilot program run in the Sydney and Parramatta registries of the Family Court from 2004 to 2006. The program, a Family Court initiative conceived under the stewardship of the former Chief Justice of the Court, the Hon. Alistair Nicholson, was evaluated separately by Professor Rosemary Hunter (Hunter, 2006a), Professor of Law, Griffith University (now at the University of Kent), and Dr Jennifer McIntosh of Family Transitions (McIntosh, 2006). A summary of both reports follows.

The key aims of the Hunter study were threefold: to determine whether the CCP was meeting its objectives; to assess its resource impacts; and to identify a best practice model for the wider roll-out of less adversarial measures in children's matters in the Family Court. The main issues explored in the study included: the types of cases participating in the CCP pilot; whether the CCP procedures produced better outcomes for children; the financial costs and legal aid implications of the program; and the new roles required of judges, lawyers (including children's representatives) and mediators involved in the proceedings. The McIntosh study focused on how the program affected parental relationships and children's adjustment.

Following 168 cases from the CCP and 168 control cases (matters using mainstream court processes) that had been finalised by December 2005, the Hunter evaluation provided a statistical analysis of the processes and outcomes involved in the two samples, surveyed the parties involved in both, and included interviews with a range of stakeholders.

Dr McIntosh used telephone interviews with parents from both samples (with a total sample size of 84 adults[1]) to assess the impact of the two different litigation streams on parenting capacity and children's wellbeing three months after court proceedings had concluded.

The authors found a number of clear differences between those matters where parties elected to participate in the Children's Cases Program and the control cases. Professor Hunter found that the former were more likely to have one or both parties self-represented. They had significantly fewer issues in dispute and fewer disputes relating to residence than the control group. The McIntosh study found that control group cases were more likely to be involved in chronic serial litigation over their children than those in the CCP. The two groups were involved in matters of similar complexity, and the parents presented with similar levels of ego maturity and post-separation conflict.

The pilot was found by both studies to have been successful in a number of key indicators. Cases in the pilot program involved shorter proceedings (less court time), and the more flexible and responsive processes allowed for a greater ability to focus on the needs of children. However, while the median time to finalisation of matters was around half that of the control cases, Professor Hunter noted that the level of resources available for the pilot was unlikely to be sustainable in the long term, and that greater delays will be inevitable when the procedures become part of mainstream practice.

There was also some cause for cautious optimism in relation to outcomes for children. Dr McIntosh found that in the CCP sample litigation caused 'no further harm' to the co-parenting relationship and to their children's post-court adjustment, and was associated with greater protection of parental capacity. The CCP sample reported significantly lower levels of acrimony and conflict and better emotional functioning of their children. The findings also indicated greater parental satisfaction with the legal processes and outcomes associated with the CCP stream. However, according to findings in the Hunter study, this did not equate with greater durability of arrangements, as a higher proportion of CCP cases involved subsequent litigation, in particular for contravention or variation of orders. Neither is it clear that the positive results found would remain under a system in which greater delays were experienced.

The report highlighted the fact that cases involving allegations of domestic violence may prove the most problematic for Div. 12A proceedings. According to Professor Hunter, the very premise of the CCP, based as it is on the objective of parents setting aside their (presumed mutual) conflict and working cooperatively with a future focus to achieve a (preferably) shared parenting arrangement, may work against the interests of the party escaping violence. The report stressed the need for careful screening for violence at an early stage of proceedings and, where domestic violence is identified, a swift factual determination as to the veracity of the allegations. The author suggested that the less adversarial procedures need to be modified to allow for a greater focus on the safety of children and other parties, and to ensure the disempowered party has the capacity to engage effectively in the process.

The Hunter study found that while the CCP proceedings were objectively cheaper for parties, this did not necessarily translate into greater satisfaction for parties regarding costs. In relation to the cost in judicial time, the CCP was found to be, at worst, cost neutral and, at best, resulted in savings. However, this was not presented as a robust finding given the differences between registries and the great variation in the approach of individual judges participating in the pilot. Judicial style and personality attained particular importance in the CCP cases. One recommendation arising from the report is for the standardisation of proceedings in line with the approach taken at the Parramatta Registry, which was found to represent judicial 'best practice'. It remains to be seen how the 'bare bones' of the amendments introducing less adversarial procedures are put into practice on the ground in registries across the country. The report also suggested that clearer boundaries needed to be formulated regarding judicial interviews with children.

Endnote

1. Note the caveat in the Hunter study (Hunter, 2006b) that, given the small sample size, the McIntosh study is unlikely to be representative and, as is evident from the title, is an exploratory study only.

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McIntosh, J. (2006). *The Children's Cases Pilot Project. An exploratory study of impacts on parenting capacity and child well-being. Final report to the Family Court of Australia.* Melbourne: Family Transitions.

already good reason to think that there were benefits in the scheme, and because the legislation is so flexible that there is plenty of room for modification and development of practice, as everybody learns from experience.

The background of civil procedure reforms

Even though the new approach has a specific history and rationale in the Family Court's efforts to find a more child-focused approach, understanding the change also requires brief reference to a wider reform background, relating to civil procedure generally. Changes famously championed by Lord Wolfe in England in the 1990s involved increased judicial case management and, more generally, required the courts to take on a greater responsibility for the swift and efficient disposal of cases. These changes challenged the old idea that the judge's responsibility is simply to sit quietly and let the parties slog it out for as long as they choose, and then to decide the case on the basis of what the parties have chosen to put forward. Instead, the judge has a responsibility to ensure that public and private resources are not wasted by inefficient conduct of litigation. The use of single expert witnesses is an example of this approach.[13] These ideas, in their turn, had been much influenced by European systems.

In Australia, similar ideas have been explored and similar developments have occurred, in various jurisdictions. In the Family Court, numerous efforts have been made over the years to avoid inefficiencies and delays, with some success.[14]

I suggest, therefore, that it is easiest to understand the place of the less adversarial procedures in the *Family Law Act* if we look at both the history that is specific to children's cases, and also the more general reforms that have been going on in relation to civil procedure. This explains the otherwise startling idea, now embedded in the legislation, that the less adversarial procedures might be valuable not only for children's cases, but also for other cases.

Less adversarial proceedings under the new legislation

The legislative provisions relating to the new approach, contained in the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, came into effect on 1 July 2006. They are contained in Part VII, Division 12A, under the title 'Principles for Conducting Child-Related Proceedings'. They apply to proceedings in the Federal Magistrates Court as well as proceedings in the Family Court of Australia.

Application to non-children's cases

The title of Division 12A is actually misleading, because the less adversarial provisions can apply to other cases as well. It is not necessary in this article to describe the detail of the legislation.[15] The bottom line is very simple: *The less adversarial procedures apply to children's cases, and to other cases if both parties consent.* How the new approach will work in non-children's cases is a fascinating and largely unexplored question. And it will remain unexplored for the moment, because the focus of this article is on children's cases.

The less adversarial proceedings principles and duties for the court

The Act sets out five 'principles'.[16] They are, in brief:

1. The court should "consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings".
2. The court should "actively direct, control and manage the conduct of the proceedings".
3. The court should conduct the proceedings in a way that will safeguard the children concerned against family violence, child abuse and child neglect; and safeguard the parties against family violence.
4. The court should, as far as possible, conduct the proceedings "in a way that will promote cooperative and child-focused parenting by the parties".
5. The court should conduct the proceedings without undue delay and with as little formality, and legal technicality and form, as possible.[17]

The Act then imposes a set of duties[18] that reflect much of the thinking of the Children's Cases Program. The court must:

(a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily;

(b) decide the order in which the issues are to be decided;

(c) give directions or make orders about the timing of steps that are to be taken in the proceedings;

(d) in deciding whether a particular step is to be taken, consider whether the likely benefits of taking the step justify the costs of taking it;

(e) make appropriate use of technology;

(f) if the court considers it appropriate, encourage the parties to use family dispute resolution or family counselling;

(g) deal with as many aspects of the matter as it can on a single occasion; and

(h) deal with the matter, where appropriate, without requiring the parties' physical attendance at court.

The new provisions also allow the court to do various things at any stage of the hearing, such as making findings or fact, determinations of issues, or other orders.

Rule of evidence modified

There are also provisions relating to the law of evidence. Some of them are specific, such as enabling the Family Consultants to perform the role previously indicated.[19] There is also a more general provision to the effect that most of the rules of evidence, such as the hearsay rule, do not apply unless the court, in exceptional circumstances, decides that they should.[20] This rule has been the subject of controversy, but my own view is that it is actually a fairly unexciting change, for two reasons. First, by and large the things that were excluded by rules of evidence were the sorts of things that judges would disregard or consider of minimal importance, and the judges can still disregard or

attach minimal weight to such material under the new system.[21] Indeed, they have additional powers to control evidence.[22] Second, there are longstanding examples of legislative provisions that exclude the rules of evidence in relation to other types of children's proceedings,[23] such as adoption and child welfare, and the sky does not seem to have fallen in.

Making it work

Will the new system lead to improvements? There are good reasons for optimism. Firstly, as I have tried to indicate, for all its novelty the system continues, and develops ideas and changes that seem to have made the adversary system a little better adapted to the needs of children, and are consistent with a wider reform movement relating to civil procedure generally. Secondly, the evaluations of the Children's Cases Program to date, by Dr Jennifer McIntosh and Professor Rosemary Hunter, are encouraging while being sensibly cautious and circumspect.

I believe that the new system has potential for providing real benefits for children and families. We have a new model, and the real challenge now will be to make it work. Its success will depend, to a large extent, on resources and training. As Margaret Harrison (2007) rightly emphasises, it involves a modified role for judicial officers, and no doubt some will take to it more readily than others. It will be important to have sufficient resources for helping judicial officers develop the skills and understanding that the new role requires. This is particularly so in relation to the important and challenging task of making children's cases more child inclusive – a development that has, I think, great potential to help children, but also some dangers. The legal profession, too, will need continuing assistance in learning how to combine the proper representation of their clients with the new approach to children's cases. The profession and the Family Court did a lot of valuable educational work as the new program was introduced, and this will need to continue.

There is to be an evaluation of the 2006 reform package by the Australian Institute of Family Studies and the relevant government departments, and the Child Responsive Program[24] that is linked to the less adversarial trial will be implemented; a necessary thing, because the scheme requires substantial input from Family Consultants.[25] Getting the words into the legislation was the easy bit. The safety and healthy development of many children will depend on whether there is to be a collaborative effort by government, courts, and legal and other professionals in family law to make the new system work.

Endnotes

1. BA, LLB, BCL; Hon. Professor of Law, University of Sydney, Visiting Fellow, College of Law, ANU; formerly a Judge of the Family Court of Australia. This article draws somewhat on material first published in the Lexis/Nexis family law service, *Australian Family Law* (looseleaf, online and CD-ROM).
2. Revised Explanatory Memorandum (Senate) to the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p. 2.
3. Harrison (2007).
4. Harrison uses the words "revolutionary" (p. 58), "radical" (p. 56), and "bold" (in the title).
5. Section s 68L. The origins stem, at least in part, from the unreported decision of Selby J in *Dewis v. Dewis* to allow children to be represented at the request of the children's rights organisation *Action For Children* (noted at (1973) 47 ALJR 548–549). The children's counsel in that case, Ray Watson QC (later Watson J), was to play a significant part in the drafting of the *Family Law Act 1975*.
6. Section 62G.
7. Section 69ZV (formerly s 100A).
8. *Re Lynette* (1999) 25 Fam LR 352; FLC 92–863 (FC). The early influential comments were made in *Reynolds v. Reynolds* (1973) 1 ALR 318 were later taken up by the High Court, notably in *M v. M* (1988) 166 CLR 69, 76; and by the Full Court of the Family Court, e.g. in *In the Marriage of D and Y* (1995) 18 Fam LR 662; FLC 92–581. See Harrison's thorough treatment of these cases at 9–15.
9. The Family Law Council's recommendation that the Commonwealth should establish a child protection service has never been implemented: see its Report, *Family Law and Child Protection* (2002).
10. See e.g. Northern Territory of Australia v GPAO (1999) 196 CLR 553; 161 ALR 318; 24 Fam LR 253; FLC 92–838, noted at Harrison 14.
11. See Harrison (2007).
12. McIntosh, J. Cited in Harrison (2007).
13. See NSW Law Reform Commission, *Expert witnesses* (Report 109, 2005).
14. The ideas I have mentioned are reflected in the *Family Law Rules 2004*. Again, Harrison's work provides a detailed account.
15. I explored the details in 'The Rise and Rise of "Less Adversarial Hearings"': *LexisNexis Family Law Service Bulletin*, *906*, April 2007.
16. Section 69ZN.
17. This principle essentially repeats, less succinctly, s 97(3), a provision that was in the original 1975 Act and which continues to apply to all proceedings.
18. Section 69ZQ.
19. Sections 69ZU, 69ZV, 69ZW.
20. Section 69ZT(3).
21. This is made explicit by s 69ZT(2).
22. Section 69ZX.
23. See e.g. *Adoption Act 2000* (NSW) s 126.
24. Briefly described by Harrison at 52.
25. See the column 'From the Chief Justice' in the Family Court's newsletter *Courtside*, May 2007.

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Professor Richard Chisholm is Hon. Professor of Law, University of Sydney, Visiting Fellow College of Law, ANU, and formerly a Judge of the Family Court of Australia.