

# 14

## The implementation of Division 12A of Part VII: Principles for conducting child-related proceedings

This chapter examines how Division 12A of Part VII, “Principles for conducting child-related proceedings”, has been implemented by the courts.<sup>1</sup> The way in which the Family Court of Australia (FCoA) and the Family Court of Western Australia (FCoWA) have changed their case management approaches to support the implementation of Division 12A of Part VII has been described in Chapter 13. The Federal Magistrates Court’s (FMC’s) approach has also been described in Chapter 13, but while many aspects of the FMC approach are considered to be consistent with Division 12A of Part VII (Henderson, 2008), this court did not change its model as the FCoA and the FCoWA did in the post-reform period.<sup>2</sup>

The material in this chapter is relevant to fulfilment of policy objective 2 of the 2007 Evaluation Framework (Appendix B) concerning encouraging greater involvement of both parents in children’s lives after separation, and to assessing the extent to which the changes have meant that litigated cases are resolved in a more child-focused manner.<sup>3</sup> In considering the issue of using a child-focused approach, the trends in filing patterns discussed in Chapter 13 are pertinent, in that the bulk (84%) of parenting matters are handled in the FMC, where processes are considered by most professionals to be closer to traditional adversarial models, as discussed in Section 14.2. Thus, while the FCoA has implemented a model intended to be less adversarial and more child-focused, the shift in filing patterns means this model has been applied in a diminishing minority of cases.

The analysis in this chapter is based on the following studies:

- Qualitative Study of Legal System Professionals (QSLSP) 2008;
- FCoA, FMC and FCoWA court files pre- and post-1 July 2006; and
- Family Lawyers Survey (FLS) 2006 and 2008.

The extent to which Division 12A of Part VII represents a desirable departure from the norm, particularly the case management model within which it is implemented, is a key issue in this discussion, with professional views on the efficacy of the model implemented by the FCoA being particularly mixed. While most judges and family consultants perceive the model to be more child-focused and that it has led to a less adversarial approach to children’s matters, many lawyers are less positive about it.

In considering this material, some important caveats must be borne in mind. The data discussed in this chapter provide limited insights into the operation of Division 12A of Part VII in the respective courts. They do not provide a basis for a comprehensive evaluation of each court’s model, given the small sample size and the fact that this report is broadly concerned with views about the impact of the family law reforms generally, with the implementation of Division 12A of Part VII being one aspect of this inquiry. Any criticisms or strengths suggested in the discussion should be seen only as providing a basis for further consideration and inquiry.

It is important to note that this evaluation has not considered the experiences of families in the FCoA’s less adversarial trials (LAT) model or the FCoWA’s child-related proceedings model. An evaluation of the FCoA’s model by McIntosh and Long (2007), which focused on the impact of the processes on families, revealed positive results. However, such an approach was beyond

1 As noted in Chapter 13, Division 12A of Part VII reflected the case management practices trialled by the Family Court of Australia (FCoA) in its Children’s Cases Program prior to the reforms.

2 The court is considering further ways of implementing less adversarial processes (FMC, 2009, p. 22). As noted in Chapter 13, the court has only recently been allocated additional family consultant and registrar resources.

3 2007 Evaluation Framework, p. 8 (see Appendix B).

the scope of this evaluation, which considered the operation of Division 12A of Part VII as part of a broader set of questions. Nevertheless, some of concerns raised in this section are consistent with those flagged by Hunter in her evaluation of the pilot for Division 12A, the FCoA's Children's Cases Program (Hunter, 2006).

The intention in introducing Division 12A of Part VII was “to provide legislative support for a less adversarial approach to be adopted in all child-related proceedings under the Act” (Explanatory Memorandum ¶ 339). Division 12A of Part VII was described in Chapter 1. Key provisions provide that:

- the court must consider the needs of the child and impact of proceedings upon them in determining the conduct of the proceedings (s69ZN(3));
- the court is to actively direct, control and manage the proceedings (s69ZN(4));
- the proceedings should be conducted in a way that safeguards the child against family violence, child abuse and neglect, and the parties to the proceedings against family violence (s69ZN(5));
- the proceedings are to be conducted in a way that promotes cooperative and child-focused parenting by the parties (s69ZN(6));
- judges have the power to decide which issues may be disposed of summarily and which require full investigation (s69ZQ(1)(a));
- judges have the power to give directions and make orders regarding procedural steps (s69ZQ(1)(c)), subject to deciding whether a step is justified on the basis of likely benefits, considered against the cost of taking it (s69ZQ(1)(d)).

This discussion first presents insights based on quantitative data from the FLS 2006 and 2008, followed by discussion of strengths and weaknesses based on qualitative data. Differences in approach between the FMC and FCoA are examined in Section 14.2. The FCoWA approach is discussed at Section 14.4.

## 14.1 Key insights from the FLS 2006 and 2008

The FLS 2006 and 2008 examined lawyers' views of Division 12A of Part VII through a series of statements seeking to elicit views on some important aims of the changes. The purpose of including these in the survey was to gauge professionals' responses to the aims and implementation of Division 12A of Part VII, in the overall context of the 2006 reform package. In addition to examining professionals' views through a series of specific propositions, FLS 2008 participants were also given the opportunity to make open-ended comments.

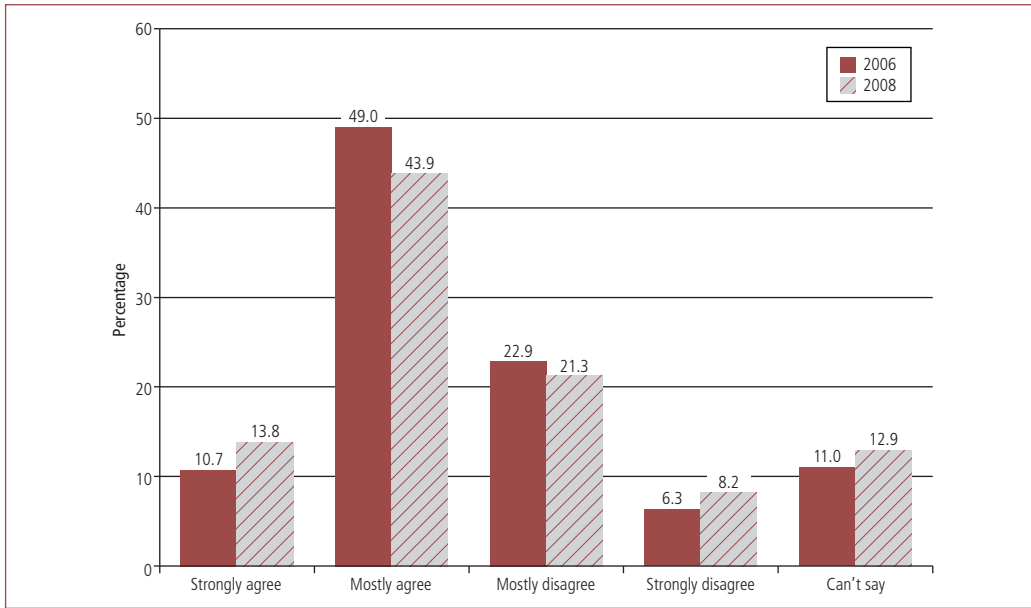
Professionals' views were sought concerning the desirability of Division 12A of Part VII, and the extent to which key philosophical objectives of Division 12A were likely to be (FLS 2006), or were being met (FLS 2008). The issues were framed as propositions requiring participants to indicate the strength of their agreement: “strongly agree”, “mostly agree”, “mostly disagree”, “strongly disagree”, and “can't say”. Propositions and responses are summarised in the following text and accompanying figures.

### The Division 12A process is a desirable change

As shown in Figure 14.1, in each survey, an aggregate of 58–60% of respondents strongly or mostly agreed with this proposition, while 29–30% mostly or strongly disagreed (can't say: 11% in 2006 and 13% in 2008).

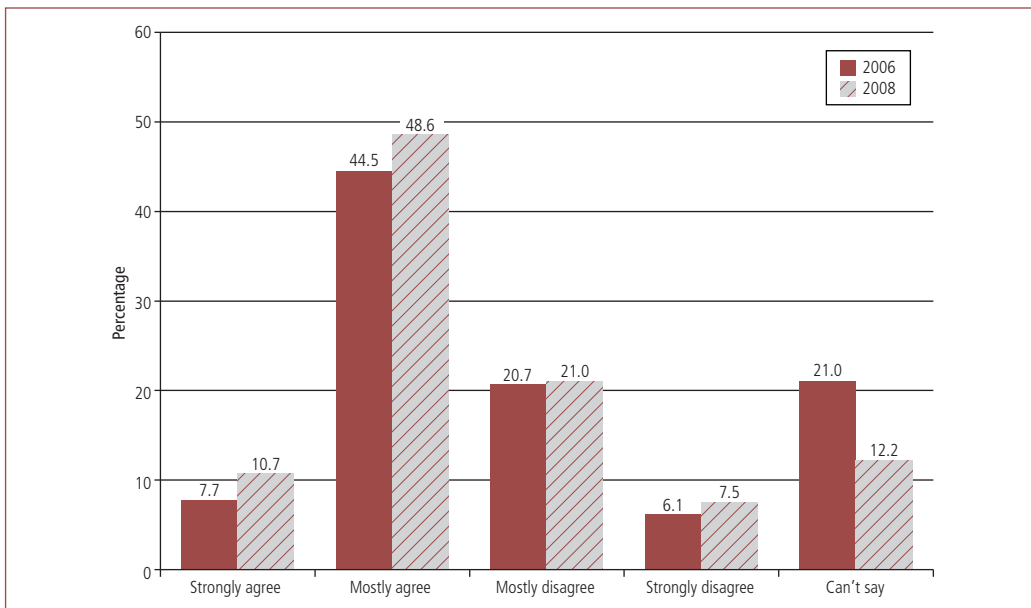
### The less adversarial court processes in the Division 12A reforms will be/are more attentive to the interests of the child

In 2006, 52% of family lawyers either strongly or mostly agreed, compared with 59% in 2008 (Figure 14.2). The slight increase in the pattern of positive responses in 2008 is attributable to a reduction in the “can't say” response categories, which fell from 21% in 2006 to 12% in 2008. Differences in response patterns in the negative categories were negligible, with an aggregate of 27% disagreeing in 2006, compared with 29% in 2008.



Note: Four respondents in the FLS 2006 did not answer. Percentages may not total exactly 100.0% due to rounding.  
 Source: FLS 2006 and 2008

**Figure 14.1 Agreement with the statement: "The Division 12A process is a desirable change", 2006 and 2008**

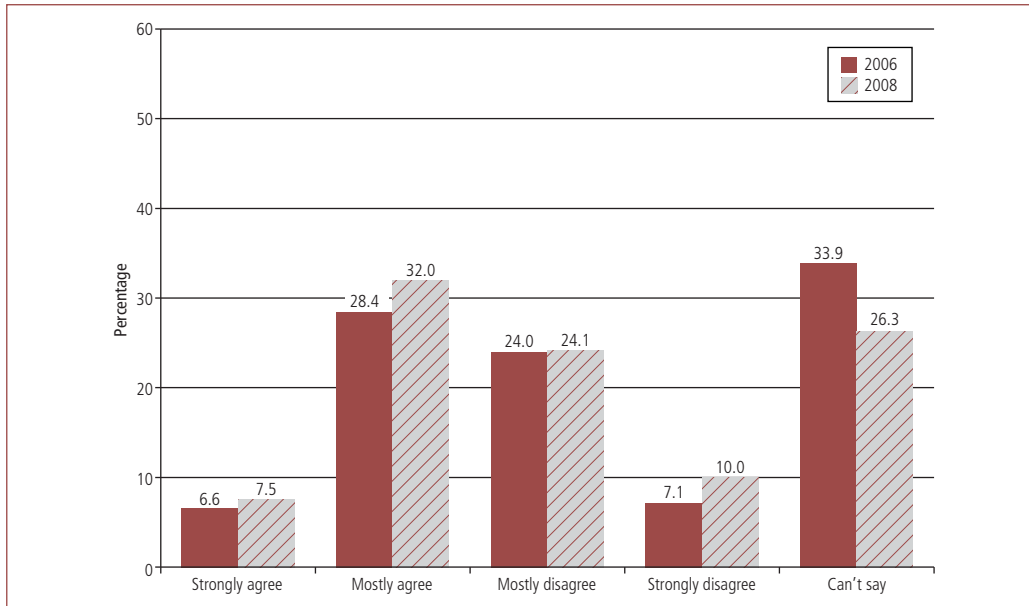


Note: Five respondents in the FLS 2006 did not answer.  
 Source: FLS 2006 and 2008

**Figure 14.2 Agreement with the statement: "The less adversarial court processes proposed by the Division 12A reforms will be/more attentive to the interests of the child", 2006 and 2008**

**For most children the less adversarial court processes in the Division 12A reforms will deliver/delivers better outcomes than the traditional court process**

In 2006, an aggregate of 35% of family lawyers agreed that the Division 12A reforms will deliver better outcomes than the traditional court process, 31% either strongly or mostly disagreed and 34% could not say (Figure 14.3). In 2008, 40% agreed, 34% disagreed, while 26% could not say.

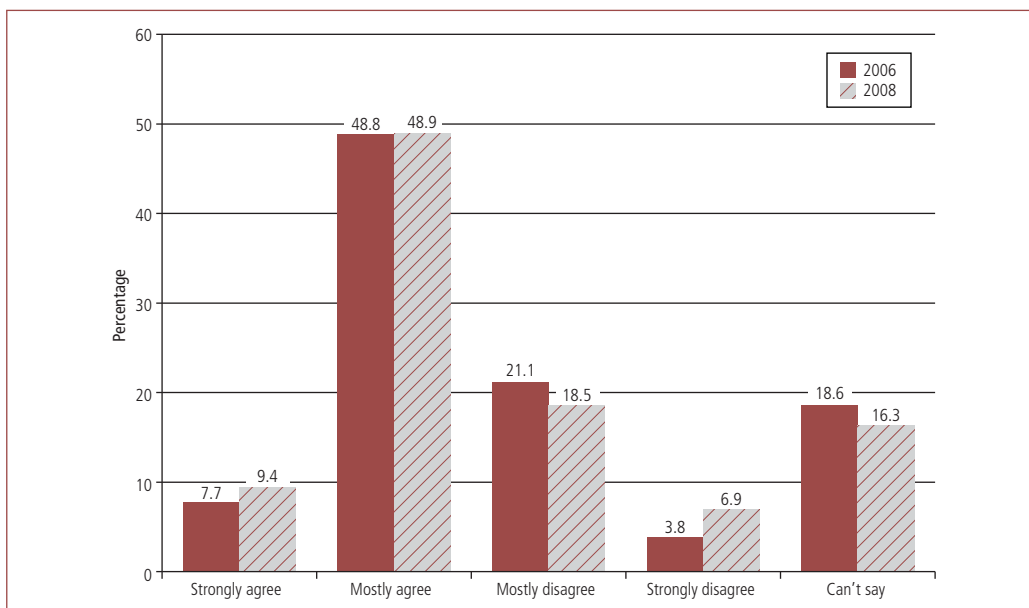


Notes: One respondent in the FLS 2006 did not answer. Percentages may not total exactly 100.0% due to rounding.  
 Source: FLS 2006 and 2008

**Figure 14.3** Agreement with the statement: "For most children the less adversarial court processes in the Division 12A reforms will deliver/delivers better outcomes than the traditional court process", 2006 and 2008

### The less adversarial court processes in the Division 12A reforms will be/are more attentive to the goal of future parental cooperation

In both 2006 and 2008, the majority of family lawyers (close to 60%) were positive that the less adversarial court processes in the Division 12A reforms were more attentive to the goal of future parental cooperation (Figure 14.4). That is, just under 60% of the 2006 and 2008 respondents agreed, 25% disagreed, and approximately 17% expressed uncertainty.

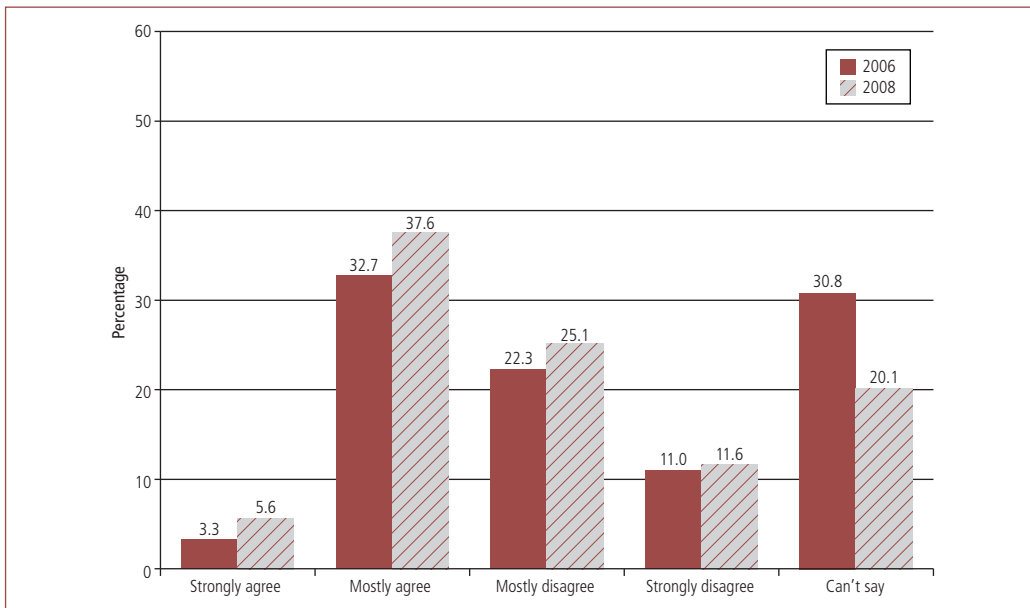


Note: Two respondents in the FLS 2006 did not answer.  
 Source: FLS 2006 and 2008

**Figure 14.4** Agreement with the statement: "The less adversarial court processes in the Division 12A reforms will be/are more attentive to the goal of future parental cooperation", 2006 and 2008

## Division 12A provides sufficient flexibility to deal appropriately with allegations of violence and abuse

Response patterns indicate views were noticeably divided on this issue in both FLS periods, with an aggregate of 43% of the sample showing a positive response in 2008, compared with 36% in 2006 (Figure 14.5). In 2008, 37% of the sample showed a negative response, compared with 33% in 2006. A reduction of responses in 2008 in the “can’t say” category—20% in 2008 compared with 31% in 2006—is offset against marginal increases in both positive and negative categories.



Notes: Three respondents in the FLS 2006 did not answer. Percentages may not total exactly 100.0% due to rounding.

Source: FLS 2006 and 2008

**Figure 14.5 Agreement with the statement: “Division 12A provides sufficient flexibility to deal appropriately with allegations of violence and abuse”, 2006 and 2008**

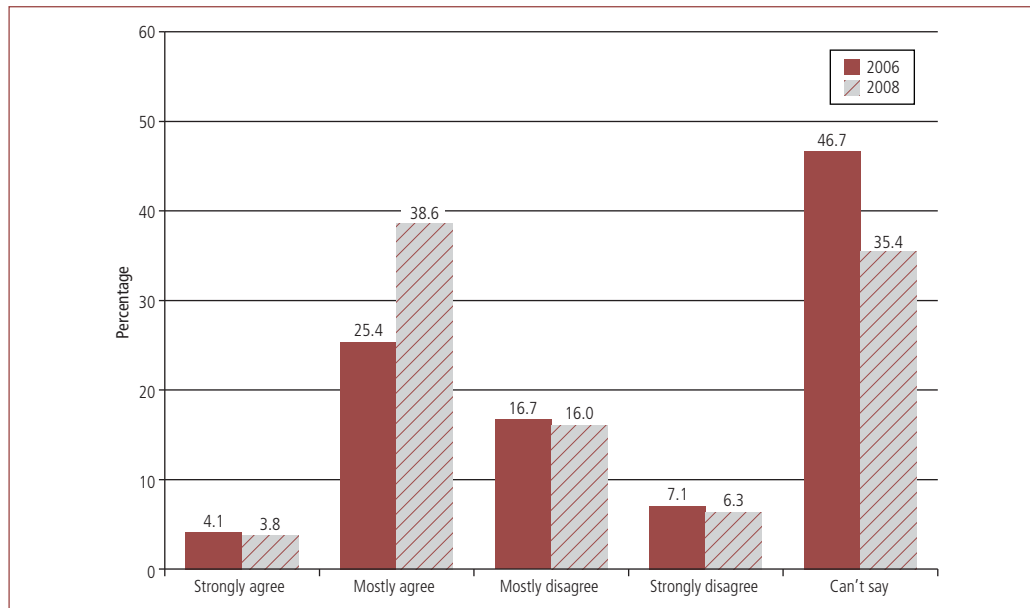
## Most litigants will feel/feel they got a fair hearing in the Division 12A process

Support for this proposition increased in 2008, with 42% of the sample responding affirmatively in 2008, compared with 30% in 2006 (Figure 14.6). In 2008, 22% disagreed compared with 24% in 2006. A high number of “can’t say” responses—close to half the sample in 2006—dropped in 2008, but the proportion of participants (35%) indicating uncertainty was still high. This may reflect a lack of direct experience with Division 12A processes among this part of the sample and caution in commenting on an issue of which they have no direct knowledge.

## 14.2 Differences between the FMC and the FCoA

In order to gain insight into whether lawyers perceived that Division 12A had had an impact on substantive outcomes (to gauge any perceived connection between process and outcome—Division 12A was not intended to change substantive outcomes), participants were asked to indicate (separately for each court) the extent of their agreement with this proposition: “The Division 12A process will not/has not made much difference to the outcome of judicial determinations in the FCoA/the FMC”. In 2008, a proposition applying to the FCoWA was added.

Overall, respondents were more likely to agree than disagree that the Division 12A process has not made much difference to judicial outcomes, and there was little difference in response patterns between the two survey periods. It is noteworthy that roughly a third of family lawyers expressed uncertainty regarding this issue in both years.



Notes: One respondent in the FLS 2006 did not answer. Percentages may not total exactly 100.0% due to rounding.

Source: FLS 2006 and 2008

**Figure 14.6** Agreement with the statement: "Most litigants will feel/feel they got a fair hearing in the Division 12A process", 2006 and 2008

In relation to the FCoA, the proportion of participants who predicted Division 12A would not affect judicial determinations in 2006 stood at 47%. There was a reduction in the proportion who said this in 2008, with an aggregate of 40% of participants who agreed that Division 12A had not made a difference to the outcomes of judicial determinations. Roughly commensurate numbers indicated disagreement (i.e., they agreed Division 12A would or had made a difference) in 2006 (21%) and 2008 (23%). The 2008 survey yielded an increase in the "can't say" category, which came in at 36% in 2008, compared with 32% in 2006.

In relation to judicial outcomes in the FMC, in 2006 more than half of the respondents (52%) either strongly or mostly agreed that Division 12A would not make much difference to the outcome of judicial determinations, and changes were only marginal in 2008, with 50% of the sample agreeing. A similarly consistent pattern is evident in the other response categories, with disagreement with the proposition standing at 16% in both 2006 and 2008. In the "can't say" category, 32% of the sample responded in this way in 2006 compared with 35% in 2008.

These data raise some interesting issues. The most common response of the 2006 and 2008 samples predicted or saw little difference in judicial determinations in relation to the reforms, with these responses being only slightly higher in relation to the FMC compared with the FCoA. There are very significant differences in the way in which Division 12A of Part VII has been implemented in the FCoA compared with the FMC. However, the patterns arising from the FLS data suggest that, despite differences in processes, participants perceived there had been little change to substantive outcomes. Also relevant in this regard may be the fact that the second most common response category was "can't say", suggesting two possibilities: either that the participants did not have direct experience of Division 12A of Part VII processes that would allow them to make informed comment, or that even if they had such experience, they did not have empirical and comparative insight on which to base informed comment.

Many responses to the open-ended question in the QSLSP 2008 tended to suggest that Division 12A of Part VII had made no change to FMC processes,<sup>4</sup> and a number of participants noted that this meant that there was no access to such processes in regional areas. However, a small number of respondents suggested that they preferred the FMC approach anyway. The following comments are characteristic of responses such as these:

<sup>4</sup> As discussed in Chapter 13, more Family Consultant resources were allocated to the FMC in 2009.

Family Court's Division 12A is too expensive for litigants and takes too long. I prefer the FMC's more ad hoc approach to the less adversarial [trials process]. Best thing about Division 12A is reduced role of rules of evidence.

I file more readily in the FMC now to avoid the Division 12A process of the FCoA. Clients want certainty of process and the process in the [FCoA] is so varied and unpredictable that filing in the FMC gives them greater certainty.

The QSLSP 2008 qualitative data suggest that there are differing views on the extent to which FMC processes are consistent with Division 12A of Part VII. The predominant suggestion was that little had changed in FMC practice and it remained a traditional, adversarial legal forum. The alternative view, expressed by some practitioners and judicial officers, is that FMC processes—particularly in relation to active judicial officer management of proceedings (stemming from the use of the docket system) and the application of procedures consistent with a less formal approach to proceedings from inception (*Federal Magistrates Act 1999* (Cth) s42)—are consistent with Division 12A of Part VII principles anyhow.

Most legal practitioners expressed the view, quite strongly, that the FMC had not changed its processes in line with Division 12A. For example, one ICL commented:

But their line [FMC] has always been: "We've always been less adversarial, so we don't need to change anything about the way we do things" ... I mean the way they run trials is the adversarial way. It's the traditional applicant goes first ... cross-examination. There's nothing different in the way trials are run between now and the reforms.

Participants argued that this undercuts the overall goal of more child-focused processes. One CLC lawyer, for example, mused that it was bewildering that the FMC had not implemented the less adversarial process for children's matters, when it conducts around 80% of children's cases and the LAT was designed to improve outcomes for children. Family consultants' reflections were mostly consistent with this view, with marked differences between FMC and FCoA practices being observed.

Some federal magistrates held a very different view of the extent to which Division 12A of Part VII had been implemented by the FMC. Several magistrates made comments that the FMC had always had a flexible approach or attitude to the way in which they dealt with cases and that the way trials are conducted in the FMC are less adversarial in any event. For example:

In this court we have always had a very hands-on approach. You get one of us on your first return date and we sit there and ask what is the case about and doing things like identifying issues for the family report writer.

### 14.3 Less adversarial trials in the FCoA: Qualitative insights

Overall, the qualitative data from both the QSLSP 2008 and the FLS 2008 suggest that views on the efficacy of the process are split. The data from QSLSP 2008 reflect significantly different views among different professional groups about the effectiveness of the Family Court of Australia's LAT process. Most, but not all, judicial officers, in very frank reflections on its operation, suggested it was a largely positive development. Family consultants were mostly positive in their responses, but legal practitioner views were significantly more mixed, with both positive and negative views being expressed. The majority of open-ended responses in the FLS 2008 were negative, with roughly fewer than 20% of respondents making positive comments. It is important to note in this regard that most participants (i.e., 58–60%) agreed with the Division 12A reforms in principle, and 29–30% strongly or mostly disagreed in each survey year.

#### 14.3.1 Views of family consultants and judges

Family consultants were largely positive about the implementation of the FCoA's LAT model and the Child Responsive Program (CRP) aspect of it (see Chapter 13 for a discussion of LAT and CRP). A feature that attracted particularly positive comment was the ability to work with families early in the process and to encourage a child focus from the first contact with the family. For example, one family consultant said: "The program has actually brought the kids into the process at a more early stage than might have been the case in the past".

More generally, this involvement was seen as having an influence on identifying and framing issues and redirecting the focus onto the needs of children. One family consultant illustrated this point by referring to a matter where consent orders had been agreed to with the assistance of the ICL, but the judge had asked the family consultant for their view:

I was horrified to discover that this child, everyone had caved in at the 11th hour and said, “It’s OK, we’ll send this child off for contact with Dad”. This child has actually witnessed a significant violent event or incident on Christmas Day. It was the second or third time the child has seen his father punch someone’s lights out ... I had to argue the case as to why the judge shouldn’t agree with the consent orders ... It was sent off for formal assessment and counselling.

Some family consultant comments indicated that the understanding between judges and family consultants of the family consultant’s role in the process was still being developed. Some family consultants suggested that their expertise was at times not fully utilised, depending on the approach of the judge. This comment reflects this view: “Some judges want your input and elicit that input. Other judges are more traditional”. Another participant in this same focus group agreed, saying, “When you deal with the judiciary, they hold all the cards”.

This was not a universal experience, and appears to be linked to personal judicial style. Family consultants in another state reported that judges would speak to them prior to the proceedings, just to provide information about how they planned to run the proceedings: “And you sort of felt like—wow, you know, I’m part of this team”.

In common with family consultants, a majority of judges interviewed suggested that the introduction of the LAT process was positive and had led to more of a child focus. Judges particularly noted that the flexibility provided by the legislatively defined case management powers was effective in getting to a decision about what is in the child’s best interests. A judge noted that: “I certainly feel much more able to be involved and run things the way I want in the sense of asking questions whenever I want, without feeling guilty about it”.

Consistent with family consultants, judges tended to suggest that Day One of the LAT and the CRP phase enabled early assessment of the key issues. One judge described the advantages in this way:

I found by having the continuous hearing, instead of the common law climactic hearing, was very beneficial. In terms of parties reaching agreements, [it was] often earlier than would have been the case, or failing agreement, reducing the issues.

However, some judges also made the observation that the LAT process is a cultural change that is difficult to effect without sometimes falling back into traditional methods. One judicial officer participant noted that, while some judges were very good at applying Division 12A, not all judges, including themselves, fell into this category: “We come from a background which is completely foreign to Division 12A ... that is, the whole concept of judicial intervention in the way a case is prepared and run. We’ve got to learn a whole lot of new skills”.

Illustrating the way this can play out in practice, other judges suggested there was a mismatch between Day One of an LAT trial and the remainder of the proceedings. In these participants’ views, the first day tended to work well, but as the trial progressed, the remainder of the defended hearing tended to play out more traditionally. Ingrained professional habits, among both judges and legal practitioners, were seen to be somewhat difficult to shift.

Some judicial officers, consistent with the concerns of some legal practitioners, also expressed some reservations around the way in which cases with family violence were handled within the LAT framework. 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.

This comment from a judicial officer participant illustrates these concerns:

I think that it’s wholly inappropriate where serious allegations like serious violence or child sexual abuse and those sorts of issues are raised ... It’s the wrong atmosphere, in terms of hard issues that might need to be addressed by decision, by a court, and I think

it also risks treating women in particular, who have been the subject of violence, badly, because I think it limits the seriousness of what they allege.

In contrast to such concerns, a less frequent view was expressed that the LAT facilitated the achievement of appropriate outcomes where there were allegations of family violence or child abuse. Participants who espoused this view suggested that the LAT allowed a broader picture of the child's circumstances to be put before the court, including in relation to family violence and child abuse. A further point raised was that the involvement of the family consultant from the first day of the trial could also help to clarify the relevance of such issues.

### 14.3.2 Views of legal practitioners

Positive comments from legal practitioners (overall representing a minority in the qualitative data obtained in the FLS 2008 and QSLSP 2008) welcomed active judicial management, child focus and the ability for clients "to be heard" in the process. The following quotations reflect such views:

Division 12A are overall beneficial to clients and practitioners, as they allow for case management and reduce delays in directional matters. The FMC would benefit from the use of Division 12A hearings.

Narrows the disputed issues, limits the evidence, reduces the length of hearing, maximises the chance of agreement on more issues and reduces costs.

A positive process [but] more involvement of children is needed.

Clients really like being able "to say their bit" to the judge. Their frustration with the system appears lower.

A range of concerns were raised by legal practitioners, as summarised in the next sections.

#### Inconsistent practices

Legal practitioners consistently referred to inconsistencies in judicial practice as being a significant disadvantage. At a broad level, this inconsistency was seen to impinge negatively on the courts' ability to effectively implement Division 12A of Part VII. Some responses suggested that judicial officers (and practitioners) needed more training to operate optimally in the model. Participants regularly made the point that it was difficult to prepare cases and advise clients in the context of this inconsistency.

One respondent who raised the issue of judicial inconsistency also raised the concern that, depending on judicial style, some clients could feel bullied. This was a concern raised by several participants across both the FLS 2008 and the QSLSP 2008 samples, and is reflected in this comment:

Much depends upon the manner in which each judge deals with the process. All are different; some impose their view on the parties, others let the process evolve. The imposition of a view very much reflects the outcome of a matter and often causes a client to settle on terms with which they are most unhappy.

Another respondent framed the issues this way:

The judges are too busy to manage the matters and, alternatively, each judge approaches these in a different manner, making it very difficult to prepare your client. All in all a disappointing delivery of justice to all-too-stressed clients.

#### Impact on clients

A range of views about what it was like to be a parent participating in the Division 12A of Part VII model was evident. On the one hand, some lawyers suggested clients felt intimidated and were unable to take effective advantage of the opportunity to tell the judge about their case. In contrast, some lawyers suggested that clients "felt heard" in the process and that it was less intimidating for them.

Some participant comments directly contradicted concerns raised by other participants, suggesting a range of experiences and views that may also be linked to the issue of judicial inconsistency.

The first area of concern was that some inarticulate, uneducated or nervous clients were unable to effectively use the opportunity to speak directly to the judge and in some cases presented themselves badly, prejudicing the outcome. This was seen to be particularly problematic where there was an imbalance of power between the parties (for a range of reasons, including possibly a history of violence). These comments from the FLS 2008 reflect such concerns:

The real issues in a matter are often not explored in a way that allows the court to know what dynamics exist in the parental relationship. It favours bullies who can wear down the other party. It favours the articulate over the less confident.

The process favours those litigants who are articulate, self-confident and have a dominant personality, at the expense of those who lack confidence and are intimidated by the court setting and procedure. The process sometimes takes on the flavour of “tell the judge what you think she/he wants to hear”, even from family consultants who give evidence.

In contrast to the concerns represented in these comments, other respondents suggested that, in their view, the more personal format did have advantages. These included the opportunity for the judge to hear from the parties without being mediated by their lawyers, a sense from clients that they felt “heard” in the process and more focus on the child in the process. These quotations reflect such views:

I believe that the process is more likely to achieve the best outcome for children as the court has more opportunity to see what parents are “really” like. Lawyers have less “control” over the clients, which is difficult for the lawyer but ultimately better for children.

Parents appreciate being able to participate in the proceedings to a greater extent than previously.

### More delays, higher costs?

A significant issue raised by numerous legal practitioners in the QSLSP 2008 and FLS 2008 was an increase in delays and client costs associated with the LAT. Legal practitioner participants also raised concerns about a lack of resources being directed into the system and adding to problems concerning delays and cost. For example, one asserted that: “There is simply not the resources for matters to be dealt with in a proper and timely fashion. The delay is prejudicial to all involved”. This is a summary of these concerns:

- LAT processes were said to require more preparation and more court events, and were seen as consuming more judicial resources. Several participants made mention of the need to prepare or “coach” clients prior to trial and to think quite carefully about the evidence that was to be presented. This required clients to engage more resources and therefore money in preparing for the first part of the court process.
- LAT trials were said to be associated with multiple court events. Participants noted that, along with the obvious financial costs that multiple appearances entail, clients also face an emotional cost, as the reforms have resulted in multiple court events that heighten conflict and have a negative impact on children.
- Judicial time was used inappropriately, with judges assuming some tasks previously done by registrars. This meant clients faced increased costs, as more senior practitioners are required for court events involving judges. Registrars made the point that this re-allocation of workload had decreased job satisfaction for some registrars.
- LAT processes were largely seen to be inappropriate for property matters, and when proceedings combined a property and children’s matter, LAT (used for the children’s matter) was perceived to “gum up the works”.

## Rules of evidence

A further area where opinions were divided was on the question of evidence. Under Division 12A of Part VII, certain provisions of the *Evidence Act 1995* (Cth) do not apply in child-related proceedings (FLA s69ZT). The court retains the discretion to apply any of these provisions in certain circumstances (FLA s69ZT) and it also retains discretion as to the weight accorded to any piece of evidence (s69ZT(2)). In the QSLSP 2008, views of a wider range of participants (i.e., including judicial officers) were nearly evenly divided on whether this was a good or bad thing, although lawyers' views tended to be more negative.

Most, but not all, judges welcomed the flexibility that s69ZT had brought to the evidence-gathering process, although some were concerned about the poor quality of affidavit material being put before the court. Most judges expressed the view that their discretion as to weight (s69ZT(2)) was sufficient to deal with any dubious evidence put before them, with such evidence being assessed according to well-honed professional judgment and dealt with accordingly.

Some judges also noted that they retained the discretion to apply the rules (s69ZT) and would do so in cases where there were allegations amounting to serious criminal conduct, including family violence and child abuse. For example, one judge said that they applied the rules in a minority of cases where "there are serious allegations of violence or abuse or other allegations which are in the nature of serious criminal offences".

Lawyers' views tended to be mostly negative. The following comments give a flavour of the issues raised:

Evidence is coming before courts which is suspect. Parties and lawyers and judges think that almost anything is relevant. Professional standards are falling as a consequence.

Sloppy or incompetent lawyers are encouraged to include unnecessary and irrelevant material in affidavits because there is no one to stop them.<sup>5</sup> This usually has the effect of escalating tension.

## Are the right cases getting the right processes?

Finally, a general point emerging from some comments suggests that there is a perception among some practitioners that some of the cases being handled in LAT are inappropriate for such a process and that some cases that are appropriate for LAT are not being handled in this way because they go to the FMC. This relates to a perception, also reflected in the views expressed in the QSLSP 2008, that the very hardest cases go to the FCoA, partly because of the "sifting out" that occurs as a result of family dispute resolution with exceptions. This comment reflects this type of thinking:

Its [i.e., Division 12A of Part VII in the LAT model] application in the Family Court is misconceived. By the time the more difficult and complex matters get to trial in the Family Court, it is time for a decision on evidence according to law. I think that, if this approach has any application, it should be in the FMC where they deal with less complex matters which often have less entrenched conflict. I have expressed this view to federal magistrates, but they do not have time to use the techniques available to them under Division 12A.

## 14.4 The Family Court of Western Australia model

The case management model reflecting the FCoWA's implementation of Division 12A of Part VII was described in Chapter 13. As with the data relating to the FCoA's implementation of Division 12A of Part VII, participants in WA suggested both positive and negative aspects to the WA model. A significant point is that the data suggest that, while there is not complete consistency among judicial officers in the application of their case management powers, there is less inconsistency than in the FCoA in the implementation of the model. Further, the responses of judicial decision-makers and family consultants suggest a particularly strong awareness of the

<sup>5</sup> Note, however, that the relevance requirement for admissibility (*Evidence Act 1996* (Cth) s55, 56) has not been lifted.

importance of identifying and dealing with concerns relating to family violence and child abuse, and this is borne out by the earlier examination of patterns in the filing of Form 4 notices. However, the data, particularly those emanating from legal practitioners, suggest this awareness is not universal and that there are some areas where the WA model could be improved.

Views expressed by WA participants in the FLS 2008 were fairly evenly balanced on the question of whether Division 12A had made any difference to judicial outcomes. Nine participants either strongly or mostly agreed that Division 12A had made a difference to judicial outcomes, while eight strongly or mostly disagreed and two were unsure. Given the small sample size, these data do not produce statistically reliable measures, but they do provide some insights.

A broad point highlighted by Western Australian judicial officer participants in the QSLSP 2008 was the importance of spelling out legislatively the need for court processes to be child-focused. A magistrate said: “That whole concept about saying that the actual conduct of the proceedings is important in terms of being child-focused was, I think, a major development in the law”.

Among the WA judicial officers interviewed, responses to the implementation of Division 12A of Part VII were largely positive. This group of participants commonly welcomed the increased flexibility offered by Division 12A of Part VII, particularly the ability to identify the issues in dispute early and guide the way in which evidence would be collected to address them. One magistrate, for example, noted that they found these powers useful to: “narrow down the issues and put aside the ones that can be agreed or don’t need to be argued ... I confine the evidence where possible and keep the inflammatory stuff out of it ... and keep the parties homing in onto the issues that need a determination”.

Practitioner participants were mainly positive about the way in which these powers were applied, though some suggested there were inconsistencies between decision-makers. The level of concern over this did not seem to be as great as that reported by Sydney, Melbourne and Brisbane QSLSP 2008 participants. A further benefit identified was that, in combination with the Case Assessment Conference (CAC), the application of powers to identify and define issues in dispute and specify what evidence should be collected, had promoted pre-trial settlements. In addition, another advantage identified was that limitations on the filing of affidavits reduced both conflict and cost.

Another strength of the model, identified by participants across the range of professional groupings, was that the model was more client-friendly. Participants noted that clients seemed to both understand the process better and feel as though they had been heard within it. Rather than sitting at the back of the courtroom not understanding what was going on, one lawyer commented that “a lot of clients have felt more heard”.

A further strength, identified spontaneously by a number of legal practitioner participants was the quality of magistrates who handle the post-CAC interim and procedural hearings. These decision-makers were said to be operating in a semi-therapeutic way—ensuring that the families felt heard—and understood that the welfare of the family was a core concern. A practitioner noted that: “We are all in awe of [their] patience and their extraordinary ability to make everybody that comes before them feel like they’re really listening to their case and they’re trying to find a way to do the best they can for the family and the children particularly”.

A particular area where the WA model attracted both praise and criticism was in the conduct of the CAC. Participants’ responses suggest a number of strengths and weaknesses of this aspect of the FCoWA model.

Concerns about the model included both substantive and operational issues. There were two main operational concerns. The first was that the pool of family consultants employed to staff the new model was comparatively inexperienced in the family law system. Their social science input was valued considerably, but practitioners noted it could take some time for them to become accustomed to working in the legal context and that further training for this could perhaps be provided. This comment illustrates the issues:

They have to come to grips with what the issues are in a short time frame and then get in the witness box and summarise that for the magistrate very quickly, which is more legal training than it is social work type training.

A further issue identified in this regard concerned training in weighing evidence, since this is a relevant aspect of the family consultant role but not part of social science training.

The second concern arose from the compressed time frame—one hour—in which the CAC process unfolds. Participants, including family consultants themselves, noted that this was a very short period in which to discuss a range of potentially quite complex issues, including those prescribed by the parenting questionnaire concerning family violence and child abuse. This was of concern, given the potential significance of the outcomes of the interim hearing, as suggested by these comments:

[The] initial summary by the consultant at the first case assessment hearing might be based on not a lot and yet still carries quite a weight in terms of where it's going. Particularly compared to previously, where you would have had full affidavits by that stage.

A related observation was made by a magistrate, who suggested that a potential disadvantage of reaching outcomes as a result of the CAC process was the absence of evidence at this stage:

A lot of brokering and a lot of negotiations go on without evidence. The only evidence we've got is that from the family consultant and sometimes it's a "he said, she said" thing and I find that to be a little difficult.

Family consultant participants suggested that the issues arising from the compressed time frame were alleviated to some extent by the steps that follow the interim hearing, and in the CAC, at which "the flags" in any particular case could be identified. These may include collecting more information from parties and agencies, organising follow-up appointments and, in some instances, conducting a child dispute conference. Issues related to timing constraints and experience are linked to some of the more substantive concerns raised in relation to the CAC. These concerns had several aspects, and reflect some of the same concerns that were discussed in relation to the FCoA's LAT process in Section 14.3. As with the LAT, there was some concern that the CAC process contributed to delays in matters that required expeditious handling in order to proceed to hearing. Further, there was concern that the process could lead to an increased number of court events in comparison to the previous model. A solicitor gave this example: "[A client] got very frustrated by having to do an initial CAC and then getting it adjourned off for several further interim hearings and then being listed for a conciliation conference".

A further concern was raised by legal practitioners who reported having clients who had felt pressured in the CAC process into making agreements with which they were not entirely happy. This issue was raised specifically in connection with clients who had reported a history of family violence. One practitioner, for example, reported clients feeling "quite a lot of pressure to agree to orders" for a child to spend time with the father. It was suggested that "the effects of that, I think, can be quite damaging as well, because often that is felt as minimising the seriousness of the family violence".

More broadly, views on whether the FCoWA model, and the CAC process in particular, was effective in dealing with family violence were diverse. The views expressed were similar in substance and diversity to those reported in relation to the FCoA's LAT model. In addition to concerns about pressure to reach agreement, further issues were raised, particularly in relation to self-represented parties who had experienced family violence. These concerns suggested that in addition to being susceptible to pressure to agree to inappropriate outcomes, such litigants found it difficult to speak personally to the magistrates.

In contrast, other participants, including judicial officers, indicated that the screening process carried out as part of the CAC was invaluable in identifying concerns related to family violence, child abuse and issues related to mental health and substance misuse. As social science professionals, family consultants were seen to be particularly well-qualified to identify and assess the relevance of these issues and to bring them to the attention of the court. Further, judicial officers and family consultants emphasised the importance of having ready access to information from the WA Child Protection Department. Judicial officers from WA spontaneously raised the use of s69ZW orders, which require state and territory agencies to provide documents or information, more frequently than judicial officers in Brisbane, Melbourne and Sydney.

## 14.5 Summary

A majority of family law system professionals endorsed the introduction of Division 12A of Part VII. Each of the three courts has implemented Division 12A of Part VII in varying ways and to

different extents, with FMC processes seen as being the least affected. Both the FCoA and the FCoWA have implemented case management systems to support the approach in Division 12A of Part VII, based on the pre-trial involvement of family consultants and the early identification of issues, evidence and procedures. Outside of WA, the extent to which Division 12 of Part VII can be said to have meant matters are generally resolved in a more child-focused way under the reforms is limited because the FMC handles some 84% of children's matters.

While family consultants and judges were generally favourably inclined towards the LAT approach in the FCoA, and some professionals from all groups saw the lack of availability of this model as a disadvantage in areas not serviced by the FCoA, many practitioners expressed concern about the model. To some extent, these concerns reflect the difficulties inherent in attempting to change ingrained professional habits and approaches, as some participants recognised. However, judges also expressed some concerns about some aspects of the model, suggesting further refinements and possibly education of professionals in working with the model may be needed.

The main concerns expressed by legal practitioners were that the LAT process had led to more costs through more hearings and that there were delays because of a shortage of judicial officers. Some lawyers were also concerned that clients who were not articulate or well-educated may be disadvantaged in the part of the process where they may speak directly to the judge. Conversely, some lawyers said that clients felt "heard" in the process and appreciated the opportunity to speak in court. Practitioners expressed concern about inconsistent judicial approaches to the application of case management powers, observing that some judicial officers were interventionist, while others were more traditional in their approach. This made it difficult to prepare clients and cases for hearing.

Some of the concerns expressed in relation to the FCoA model were also relevant to the FCoWA model, although there were generally fewer concerns about the FCoWA model. Practitioners in WA also commented that the FCoWA model had led to increased costs and delays. The CAC process in WA was also a source of concern in some areas. There were reports that clients could feel pressured to agree to arrangements and there were doubts that the one-hour timeframe in which the CAC was conducted could allow sufficient exploration of complex issues.