

Improving access to justice – a better framework for federal courts

Consultation on Review of Future Governance Options for
Federal Family Law Courts in Australia

Submission by the Law Council of Australia to the
Commonwealth Attorney-General's Department

February 2009

Introduction

1. The Law Council of Australia appreciates the opportunity to contribute to the discussion on the future governance options for federal family law courts in Australia.
2. It is the strong view of the Law Council that the focus of any change should be based on what structure will meet the needs of the community most effectively (with the internal structure, case management and administration of the courts being considered primarily from that perspective). Parties to litigation need a court system which provides reasonable outcomes within a reasonable time frame at reasonable cost.
3. The Law Council supports vertical integration of the two family courts into a single, coherent structure with a common pool of resources delivering family law services at the appropriate level and divided into two divisions (each with its own head and under the overall control of the Chief Justice) comprising:
 - A General Division (equivalent to the current Federal Magistrates Court)
 - A Superior and Appellate Division (equivalent to the current Family Court of Australia).

Consultation Paper Questions

If there is to be a single family law court, what should it be called?

4. If a single family law court is created it should be called the Family Court of Australia.

What new procedures should be adopted in the new court to ensure the timely, efficient and informal resolution of matters? Should these be different depending on the Division in which the matter is dealt with? If so, how?

5. The overarching focus of the new court should be servicing the needs of the community.
6. The new court should have:
 - 6.1 A single point of entry. This will avoid confusion for the community.
 - 6.2 A single set of simplified rules. The rules should be modelled on the current Federal Magistrate Court Rules and developed in consultation with the profession. The rules should apply across the entire court and accommodate only the basic matters of procedure. If the necessity arises in either Division additional rules or practice directions may be required but they should be limited to that which is necessary for the conduct of the court (again developed in consultation with the profession).

- 6.3 A single set of forms. There should be a limited number of forms which are simple, flexible and designed to elicit only that information that is necessary. Parties should not be burdened with lengthy, repetitive or generic forms that may not be appropriate for their particular case. The forms should be developed in consultation with the profession.
- 6.4 Differential case management. One size does not fit all. A differential case management system is vital. The procedures in the General Division should be quick, efficient and suit shorter and relatively simpler cases. The General Division should retain the existing service culture and expeditious handling of matters currently exercised in the Federal Magistrates Court. Wherever possible this culture should also extend to the work undertaken in the Superior and Appellate Division. To the greatest extent possible the procedures in the Superior and Appellate Division should simply build upon those in the General Division.
- 6.5 A single administration. A Chief Executive Officer – who would be responsible to the Chief Justice – should have carriage of all corporate and financial services across the court. The Government may wish to consider the appropriateness of moving all provisions in relation to the structure and administration of the court to a separate Act.

What kinds of matters should be heard by each Division?

7. The allocation of matters and the efficient management of cases coming before the court should be the responsibility of the Chief Justice and the heads of the each Division. The Chief Justice, in consultation with the heads of each Division, should be responsible for deciding what constitutes a complex matter, balancing the workload of the court and allocating resources appropriately. The Chief Justice should manage both Divisions but not be directly responsible for either.
8. All matters should commence in the General Division by an application and an affidavit (of limited size) which identifies the issue/s. Thereafter, the (differential) case management system should take over so that each case is assigned to the appropriate Division after an initial assessment event (which should be undertaken by a registrar). If a matter is complex, the supporting affidavit should set out the complexities.
9. The Chief Justice and heads of Division should ensure that appropriate and flexible procedures are in place to enable referral between Divisions. For example, if a matter is initially assigned to the General Division and at any subsequent time it appears that the matter should be in the Superior and Appellate Division, it should be possible for an application to be made to transfer the matter, or this could be done by the court's own motion. Similarly, flexible transfer arrangements should be available to matters which are initially assigned to the Superior and Appellate Division.

10. Transfer arrangements should not however restrict in any way the ability of any judicial officer, irrespective of Division, to be able to deal with individual issues on any occasion. For example, if an urgent Order is required in a Superior and Appellate Division matter and a General Division judge is available, he or she should be able to deal with the matter without formal transfer. Divisions must not be permitted to become silos, and great care should be taken to ensure the efficient flow of work throughout the Court in a flexible manner and without undue regard to its Divisions.
11. Only a limited number of the judicial officers of the Superior and Appellate Division should be assigned to the appeal branch of that Division. The Chief Justice should have the authority to allocate judicial officers to sit on appeal matters as required. All judicial officers of the Superior and Appellate Division should be available to hear the complex and lengthier first instance cases.

What should judicial officers of the general Division of a single family law court, and of the proposed new Division of the Federal Court, be called?

12. The judicial officers of the General Division (that is the existing Federal Magistrates) of the single family law court should be called Judges of the General Division of the Family Court of Australia, and the judicial officers of the Superior and Appellate Division (that is the existing judges of the Family Court) should be called Justices of the Superior and Appellate Division of the Family Court of Australia.
13. When a judicial appointment is made to the single family law court there should be a greater focus on specialist knowledge, experience and expertise. This should lead to appointees being equipped to deal with the complex legal and other issues which arise on family breakdown. All judicial officers appointed to the single family law court should have the expertise required to adjudicate on family law matters.
14. All judicial officers should receive proper remuneration, and terms and conditions, commensurate with their level of responsibility. Further, the existing parity in relation to the alignment of salaries of judicial officers of the Federal Court of Australia and the Family Court of Australia should continue. This should be entrenched in legislation to retain parity and avoid the necessity for continual review.

What further court services are needed to achieve early, non-adversarial resolution of issues?

15. The Law Council strongly supports the use of community-based family dispute resolution services.

16. Further, the Law Council strongly encourages the appropriate use of primary dispute resolution resources and services which are available outside the court system (including counseling, conciliation, mediation and arbitration) with the Courts making referrals for interventions of this nature wherever appropriate.
17. However it is important to recognise that no matter how effective non-Court services are there will always be a significant number of families who are unable to resolve their parenting and/or financial issues through community-based or non-litigious services and require assistance through the Court system.
18. Historically, early court-annexed non-adversarial interventions at or shortly after intake have been highly effective in assisting with resolution of cases without the need for judicial involvement but, over time, funds and resources have been diverted from the Courts and early-intervention services progressively reduced.
19. Consideration should be given by Government to reinstating these court-annexed services either by fresh funding or by diverting funds from other parts of the family law system to provide, in particular, family consultants who can assist parties to identify and consider options for resolution of parenting issues, and registrars who can assist with resolution of financial matters.
20. The Law Council also notes that the efficiency of the Court is significantly impacted by a consistent increase in the number of self-represented litigants, and a steady decrease in the appointment of Independent Children's Lawyers, in parenting cases, resulting from inadequate legal aid funding.
21. It is fundamental to the successful operation of the Less Adversarial Trial processes, and even more so for the effective conduct of complex children's matters, that adequate resources be available for the appointment of Independent Children's Lawyers in keeping with the criteria established in *re K* (1994) FLC 92-461 to ensure that the voice of the child is heard, to assist parents to focus on the best outcomes for their children rather than their conflicts, and to facilitate the exploration of non-adversarial resolution of issues.
22. It is also strongly recommended that adequate legal aid funding should be available for parents to obtain legal advice and representation when dealing with difficult issues concerning their children on relationship breakdown in order to enable the Court to deal with issues of this nature more efficiently, and to ensure that all matters impacting on decisions relating to the welfare of children are fully and effectively presented.

Further Consultation

23. The Law Council looks forward to working with the Government and the courts with respect to the practical aspects of implementation once a decision has been made on the model, and would be happy to participate in any working group established for this purpose.

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.