



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

Australian Attorney-General's Department

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Thank you for the opportunity to comment on the Semple report and the Attorney-General's related consultation paper of November 2008.

Unfortunately the short time frame to comment coupled with the holiday period has limited the matters which we were able to comment on. Nevertheless there are a number of issues and comments which we believe are important.

This submission does not include comments relating to the restructuring of the Federal Court and the general law functions of the Federal Magistrates' Court.

The Law Institute of Victoria (LIV) agrees with the proposals for change and strongly supports the recommendation to merge the family law functions of the Federal Magistrates' Court and the Family Court.

The LIV's response to the questions posed at the end of the Attorney-General's Department paper and to other points which arose from the Semple report appear as follows:-:

1. The single family law court should be called the "Family Court of Australia". It is unrealistic to create a new name with new expectations. There will be improvements because of the proposed changes but retention of the Court name which has been in existence since 1976 simplifies publicity and greatly simplifies the processes of change for litigants in person in particular.
2. Federal Magistrates' should be called Judges but in the manner of a District Court or County Court Judge rather than a Superior Court Judge (e.g. Family Court or Supreme Court). Hence the formal title in the superior/appellate division remains "His/Her Honour Justice Smith" whilst in the general division a former Federal Magistrate will be known as "Judge Jones". In Court, both divisions of Judges are referred to as "Your Honour".

The LIV suggests that this makes for simplicity for litigants in person (in particular). The title of "Federal Magistrate" is a "mouthful" as are titles such as "Associate Justice" or similar.

For the litigant in person, it is not necessary that the different status of the tiers of Judges be transparently obvious; the Court staff and the profession can easily look after that. The profession will have no difficulty in handling two closely related titles.

The similarity of the title to that of the superior/appellate Judge emphasises the status of both the general division decision-makers and their decisions.¹

3. In the interests of keeping the Court structure as simple as possible, the LIV suggests that the "higher division" simply be called the "Appellate Division". With the quite rapidly reducing number of Family Court Judges at this time, it may be that the Appellate function of that division will become the principal function in terms of judicial time in any event. For ease of reference, we will refer to that division as the Appellate Division throughout the rest of this paper.
4. It is important in our view that all applications without exception have an initial hearing or mention before a General Division Judge. It has been too easy in the past for people to claim complexity or to hypothesise complexity which in practice does not eventuate and to issue proceedings needlessly in the Family Court.

The Judge of the General Division would have the clear power to make interim orders in all matters no matter how complex and that Judge would by discretion decide whether the matter is so complex that it should be transferred to the Appellate division.

¹ See generally: Snooks & Co., *Style manual: For authors, editors and printers*, 6th edition (Barton ACT: John Wiley & Sons Australia, Ltd), pp 515, 516.

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5. The LIV believes that rules can be drafted to give significant concrete assistance to a Judge in deciding the complexity issue and we suggest something along the following lines (which is more narrowly drafted but inspired by the Court's draft Practice Direction No 2 of 2007 referred to in paragraph 105 of the Semple Report):
- (a) serious, complex, relevant mental health issues of both parties (the mere existence of mental health issues is common place in family law matters, hence the requirement must be for something more than the mere existence of such issues);
 - (b) allegations of sexual abuse or serious physical abuse (mere allegations are not enough. The allegations in the case of sexual abuse should appear to have some substance and preferably over a period of time whilst the physical abuse allegations must be of a serious nature);
 - (c) Hague Convention matters;
 - (d) international adoption matters;
 - (e) medical procedure permission cases;
 - (f) property matters involving more than two parties but only if one or more parties appears to be genuinely independent of the two principal parties and also provided that there are substantial assets involved or allegedly involved;
 - (g) complex valuations of businesses, companies and/or trusts which appear to be of substantial value; ("complex" valuations of real estate or chattels are clearly within the competence of the General Division); and
 - (h) complex questions of law and/or jurisdiction including accrued jurisdiction matters.

Investigations by child welfare agencies are not inherently complex. Similarly if more than two parties are involved in a children's matter it is not inherently complex.

6. To facilitate the handling of the large number of first instance matters by General Division Judges, Registrars should also sit in Court in conjunction with General Division Judges (in a neighbouring Court). When the parties have agreed on consent procedural directions and have no need for an interim hearing the matter would be automatically referred to the Registrar's Court for those directions to be given including the granting of dates such as conciliation conferences and trial dates.
7. The current rules applicable to Federal Magistrates' Court procedures should with no substantial amendments continue to apply to the work of the General Division. The simplicity of the Federal Magistrates' Court process which is one of its greatest attractions would be retained.
8. The Appellate Division of the Court would retain procedures for its trial work which are similar to and derived from the current procedures existing in the Family Court. Clearly, the cases will be complex, they will need more Court events than in the General Division and they need careful Judge case management.
9. Paragraph 82 of the Semple Report refers to the Federal Magistrates' using individual discretion as to procedures including "significant regional variations". Paragraph 83 emphasises that the Federal Magistrates' wish to continue the "highly regionalised approach to case management". We support this and believe it should occur in both divisions in relation to trial work. There is no significant value in having precisely uniform rules (as applies in the Family Court at present) around the country. It is uncommon for a lawyer in one state to run litigation in another state

without reference to a solicitor or barrister in the other state who can give guidance about the differences between the states.

There are differences between cities and regions. The individual regions therefore should be entitled to "tweak" their procedures while obviously having a similar broad framework for processing cases. An insistence on uniformity of procedure around the country is counter-productive and introduces rules which in some places are completely unnecessary.

10. The Attorney-General's paper asks what further Court services are needed to achieve early, non-adversarial resolutions? The LIV believes that the advent of Family Relationship Centres and Family Dispute Resolution Practitioners and the associated new legislative regime has provided substantial support at the front end of the legal process and has facilitated early resolution. It is too early we believe for this to be significantly altered or added to. This regime should have more time to be properly assessed before significant changes are made.

Too much change occurs in family law practices and procedures. We believe very firmly that family law practice and procedure remains at the forefront of World's best practice. The sheer number of people involved in the process and the inherent unhappiness involved in relationship breakdown in our view inevitably brings a number of people out the other end of the process who are unhappy. The trouble is that they were unhappy in the first place and even if they had an ideal process they may well still feel unhappy at the other end. Often their complaints do not mirror problems with the system but are more reflective of their emotional difficulties (which are perfectly understandable). What we believe the Court must do regardless of how and when it comes into contact with families is reinforce the non litigious methods of dispute resolution available to clients, be they happy or unhappy. The law should also ensure that all those involved in the family law system, when working with families, fully explore referring the family for professional assistance (including psychological or psychiatric) in order to minimise stress, unhappiness and frustration for the litigants but more importantly for the children.

The AG should have regard for appropriate level of funding of Independent Children Lawyers (ICL's) who frequently perform a non adversarial role when initially working with a family. As the only "neutral" participant, apart from the judicial officer, the ICL could be an effective means of assisting families with dispute resolution if properly trained, financed and the role developed.

We think it is very important that more time be allowed for the new changes from 2006 to be assessed before significant changes at the "front end" of the process be considered.

We urge the Attorney General's department to ensure that the Family Court provides comprehensive training of relevant court personnel in relation to all methods of Alternative Dispute Resolution (ADR) available to members of the public. The Chief Justice has indicated her support for such initiatives as Collaborative Law as an alternative to the Court system. We believe there is scope for Collaborative Law to be supported in the Court processes and indeed for all methods of ADR to be explored throughout the life of any given case.

11. The current Federal Magistrates are in our view inadequately remunerated and inadequately superannuated for the nature of the work they perform. We believe that they should be equivalent to a District Court or County Court Judge in both status and benefits received. If some Magistrates are reluctant to move to the new structure, an improvement of their conditions may assist their decision making.
12. The Chief Justice of the new Court should be directly responsible for both divisions, both the General Division and the Appellate Division. The LIV believes that it is unnecessary to have the Chief Federal Magistrate as the separate head of the General Division. This would encourage competition between the two divisions and is a duplication which is reminiscent of the existing structure of the two Courts. Furthermore, we note that the description of the roles

of the Chief Federal Magistrate and the Chief Justice in the new structure (page 9 of the report) seems to conflict with the proposed structural chart of the new Court in Attachment G of the report.

13. The LIV is concerned about the discussion under the heading of "Standardised Counting Rules" from page 36 of the report. It is not possible or useful to compare the throughput of cases between the two divisions of the Court. This again sets the divisions up in competition with each other and again threatens to continue the problems of having two separate Courts.

It is also extremely difficult to compare throughput between states. We mentioned above the different legal culture in different states. Such a culture is not relevant only to the family law jurisdictions of the states. The different culture stems from the entire legal practice of a state. Procedures in the Family Court in our view will probably not have much impact on a culture which is embedded in a whole state or a major city's practices.

The Chief Justice should be responsible for the throughput of both divisions. Externally imposed "counting rules" are in our view likely to be anathema to justice being properly done. This is especially so when more than 30% of litigants are litigants in person for whom rules have to regularly be relaxed or else cases would never be able to be finalised.

In our view, the merger of the two Courts should occur as soon as possible as the benefits both for revenue, for litigants and for their advisors are numerous.