

Your Ref:

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Dear Attorney

IMPROVING ACCESS TO JUSTICE – A BETTER FRAMEWORK FOR FEDERAL COURTS

I refer to your request for comments regarding the recommendations made in the report, *Review of Future Governance Options for Federal Family Law Courts in Australia – Striking the Right Balance* (the "Report"), prepared by Des Semple, and the Consultation Paper titled, *Improving Access to Justice – A better Framework for Federal Courts*.

The Queensland Law Society strongly supports the development of one Federal Family Court in Australia. Not only should Parliament utilise and be seen to utilise its budget effectively and efficiently, but, from an access to justice perspective, it is extremely valuable for self represented litigants to only have to deal with one court and one set of rules and procedures.

Nonetheless, as is so often the case, the devil is in the detail. While it is a relatively simple matter to combine the Federal Magistrates Court ("FMC") with either the Family Court ("FC") or the Federal Court, so as to leave in place only one Federal Family Court and one Federal Court, such an approach raises a number of issues that will need to be addressed:

- (a) The Society has concerns that a new organisational structure within the courts will not necessarily lead to the development of a new organisational culture. There is a well known tension between FC and FMC staff. If two separate divisions within one court are created i.e. where FC Judges make up a "superior or appellate division" and Federal Magistrates ("FM's") make up a "general division", it is likely that people will perceive that the general division Judges are in some way lesser or inferior to Judges who sit in the superior division. Such a perception may be hugely problematic to organisational culture, particularly as the general division Judges will be undertaking 98% of the day to day workload of the Court.
- (b) At paragraph 119 of the Report Mr Semple states that the establishment of a single court "is not planned as a takeover of one court by the other and should not be seen as such". However, the Society holds concerns that this is exactly what the perception will be.

Towards the end of 2008 the Chief Executive Officer of the FC was appointed as the Chief Executive Officer of the FMC. It is also our understanding that the administrative functions of the FMC, including budget, payroll, HR and IT services, are currently undertaken by and/or approved by the equivalent administrative section of the FC. Consequently, it may appear that the FC is in fact taking over the FMC.

Additionally, it is concerning that the ongoing development of procedures in the FMC's will be determined by the financial control of its administration by the FC.

- c) The Report suggests that each division will continue to have its own set of rules and procedures. Accordingly, from a litigant's point of view, the amalgamation of the courts will not change anything i.e. solicitors will still be required to explain to litigants why their matter is being heard in the general division and not the superior division, why their case may in fact be transferred between divisions, and why different rules may apply to different parts of the proceedings.

The Society advocates for the adoption and simplification of the current FMC rules and procedures. In the first instance, 98% of practitioners filing a family law matter choose to file in the Brisbane FMC. Likewise, our regional members report similar preferences for filing in the FMC in regional centres.

- d) When the FMC was established, it is our understanding that the FM's were advised that the FMC would exercise a broad jurisdiction and, accordingly, FM's would gain experience across a broad range of practice areas. The Society has been made aware that some FM's have expressed concern as to having to specialise in either federal law or family law, as they perceive that having a balance of work across both jurisdictions enhances their ability to remain impartial, interested, mentally alert and that a variety of work enhances their professional working life.

The reason that the FMC has been so successful is the calibre of persons appointed as FM's. If the FM's are now forced to specialise you may find some attrition from the ranks of the FM's or, alternatively, there may be an increased rate of dissatisfaction among the FM's.

In addition to the above concerns, the Society wishes to provide the following comments in response to the questions proposed in the consultation paper, *Improving Access to Justice - A Better Framework for Federal Courts*.

1. If there is to be a single family law Court, what should it be called?

Unless the Government proposes to combine the FC and the Federal Court into one Federal Court with separate divisions, the Society supports the naming of a single family law court to be the "Family Court of Australia" or the "Family Law Court of Australia".

Having said that, the Society agrees with the submission made by Clive Price, Nikky Davies and John Wade, that two divisions of a Family Court should not be created based on some concept of senior judges or general division judges. In order to properly integrate the Judges and other staff of the FMC and FC, a more appropriate organisational structure would be "Judge" and "Senior Judge" of the Family Court.

The Society does not suggest that there would be an automatic elevation to Senior Judge rank for all current Judges of the FC. The title of Senior Judge should perhaps be reserved for those Judges who have a commission to undertake appellate work. All other Judges, no matter whether they originated from the FC or the FMC, should have the title of Judge. The Society believes that creating a position of Judge and Senior Judge will provide some sort of pathway/promotion for Judges currently working within the court system.

2. What new procedures should be adopted in the new court to ensure the timely, efficient and informal resolution of matters?

Consultation with the Women's Legal Service indicates that Family Relationship Centres ("FRC's") are not necessarily achieving appropriate and sustainable resolutions for separated families, particularly in high conflict separations. We have been advised by various members of the profession that each FRC has different procedures, processes and time frames. For example, some FRC's will provide a party with a section 60I certificate when allegations of child abuse are made, without even involving or hearing the other party's side of the story. Other FRC's, on the other hand, won't provide a section 60I certificate where the parties have reached only a partial agreement. Additionally, some FRC's will attempt to mediate matters where there is an issue of significant domestic violence.

Of concern is the complete lack of understanding of the 2006 amendments and the equal shared care presumption, with many families assuming that regardless of the problems within their family they will end up with equal shared care, even when there are very young children involved or it is a high conflict situation. Of particular concern is the feedback that this incorrect view of the legislation may be shared by some FRCs.

Consultation with the Women's Legal Service also suggests that dispute resolution in family law matters seems to work better for their clients when it is undertaken within the Court setting, as the Court's consultants are generally provided with better specialised training and exposure to issues for separated families.

If FRCs are to be retained, and are to assist parties in achieving appropriate and sustainable solutions for separated families, better training needs to be provided to all staff at FRC's in relation to the current legislation and issues of domestic violence, child abuse, drug and alcohol addiction, and mental health problems in the context of separated families.

It is also essential that there be established protocols in place for liaison between FRCs and the courts and, FRCs and other services that may benefit separated families.

Once a matter reaches court however, it is the Society's opinion that the way to ensure the timely and efficient resolution of matters is for the new court system to adopt one set of rules, similar to the current FMC rules. The FMC has adopted a flexible approach to case management, adapting its case management to what is required in different regional registries and developing case management measures as its budget allows.

It is important that ample budgetary allowance is available to enable continued innovation, improvement and change to be made to the already simplified FMC procedures, as the need is foreseen by Judges. For example, currently there is a growing use of Family Consultants to prepare urgent oral interim reports to the FM's conducting interim hearings. To date, the FMC has only been able to utilise this on an ad hoc basis as the facilities of Family Consultants are made available by the FC. This has led to situations such as occurred in the Lismore Registry, where the FMC was informed that they had "used up" their allocation of Family Consultants, yet the Family Consultant stationed at the Lismore Registry was not fully occupied completing work for the FC. This type of situation occurs throughout Queensland from time to time and should be addressed.

It is our experience that the use of trained Family Consultants early in the proceedings can have a significant benefit to the timely and efficient resolution of a matter. Family Consultants assist parties, lawyers and Judges in properly identifying what a family's issues might be and, ultimately, improve the chances of an early resolution.

If a single court is formed then it is equally important to ensure that adequate resources are made available to ensure appropriately qualified Family Consultants are employed by the Court and that ongoing specialised training is provided to Family Consultants and Judges in all areas, particularly in relation to domestic violence, child abuse, drug and alcohol addiction, mental health issues, and family dynamics, as these are the most significant and reoccurring issues faced in matters that end up in Court.

In some cases, despite the best will in the world, the use of appropriately trained and experienced Family Consultants, lawyers and Judges, matters will not settle early or at all. It is a sad fact that about 5% of the current Courts' matters take up a significant proportion of their time. Families remain in high conflict and use the Court process time and time again to try to resolve their ongoing disputes. A number of these matters have been referred to the Child Dispute Services section of the Family Court under a process known, colloquially, as Section 65L. This is a process whereby a Family Consultant supervises compliance with the orders and assists parties to resolve disputes they may have about the meaning of orders, communication issues between the parties, or the way in which minor changes can be made to the orders. The Family Consultant usually has the ability to contact a Judge to have the matter re-listed should the need arise and, in some cases, will provide a report at the end of the time set for supervision to occur. This process can be very successful in keeping highly conflicted parties from returning to the court repeatedly, for what can be minor interpretation or communication issues.

However, currently this process is only available to Judges of the FC, not the FMC. The FMC can, where available, refer parties to programs run by community organisations, sometimes referred to as Children's Orders Programs. However, such community referral is often not as successful due to issues regarding training, lack of experience and lack of communication protocols between the community organisation and the court.

3. What kinds of matters should be heard by each division?

This issue has been addressed earlier in our submission. However, additionally, the Society is of the opinion that the current informal structuring whereby certain Judges are nominated in each registry to address certain matters, for example, the "Magellan Judge", or where a FM who has developed particular expertise i.e. in child support matters, should be maintained if a single court is established and a general division is set up.

4. What should the judicial officers be called?

As outlined above, the Society suggests the names "Senior Judge", being the current appellate division of the FC, and "Judge", being the balance of the Judges having a commission in the FC and any FM's who take up a commission in the new court.

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

Given the objectives and principles set out in the 2006 amendments on parenting matters, the need to identify and assess allegations of domestic violence and child abuse takes on added significance. A large proportion of the matters that are now filed in the FC and the FMC involve allegations of child abuse, domestic violence, drug and alcohol addiction or mental illnesses, and each issue requires an early assessment to ensure appropriate and sustainable arrangements can be made to safeguard children. It is therefore important that the use of Family Consultants by the FMC, or the Judges of a combined court, continues to exist in its current form and is not curtailed or hampered by budgetary constraints.

The Society thanks you for the opportunity to provide comments on this important issue and looks forward to future consultation on the issues raised above.

Yours faithfully

Ián Berg
President