

6 February 2009

The Proper Officer
Federal Courts Branch
Australian Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
Barton ACT 2600

By email: fedcourtsconsultation@ag.gov.au

Dear Madam or Sir,

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

1. Women's Legal Services Australia (WLSA) welcomes the opportunity to provide comment to the review of future governance options for federal Family Law Courts (the Report).
2. WLSA is a network of the National Association of Community Legal Centres (NACLC) and is made up of community legal centres specialising in women's legal issues. We represent women in every state and territory in Australia -- in cities, regional centres, rural and remote areas.
3. WLSA members regularly provide advice, information, casework and legal education to women on a wide range of legal issues. A large proportion of our work is in the area of family law and family violence matters. We have a particular interest in ensuring that women experiencing family violence are adequately protected in the family law process, and that disadvantaged women, such as those from culturally and linguistically diverse backgrounds, Indigenous women, women with disabilities and rural women are not further disadvantaged in the process of negotiating the family law system.

General comments

4. The Report recommends a particular structure for a new combined family court comprised of two separate judicial divisions dealing with matters of different complexity. It makes further recommendations about how the administration and management of the new court could be organised with the aim of achieving economies of scale in corporate and financial services that are not possible with the current separation of the Family Court of Australia and the Federal Magistrates Court.
5. WLSA agrees with the central proposal of the review, which is to combine the existing Family Court of Australia (FCA) and the family law registries of the Federal Magistrates Court (FMC) into a single court with a single entry point. One of the ongoing issues in the current family law system is confusion among those involved in family law

matters about what the two courts actually do and what they can offer. It is sensible that the new court be identified with an obvious name with a single entry point. This should be called the "Family Court of Australia" to avoid confusion in the public.

Recommendation 1: WLSA recommends that the new family court be called the Family Court of Australia

6. WLSA has no particular comment about the recommendations relating to the amalgamation of court administration and management structures. The courts themselves are best placed to improve efficiencies through the process of amalgamation. The amalgamation is a valuable opportunity to look further towards improving the ability of the court to respond to the challenges inherent in it's jurisdiction.

7. This is an opportunity for the new family court to put in place further procedures and to continue to improve its response to family violence.

8. There are ongoing problems with access to the range of services the FMC and FCA have for people living in rural and remote areas which lead to matters not being assessed comprehensively.

9. The new family court and stakeholders will need to ensure that they meet the needs of people:

- living in rural and remote areas, and
- who are vulnerable and disadvantaged,

to access family court services, legal advice, family dispute resolution ("FDR") and representation.

Recommendation 2: WLSA recommends that any cost savings made be re-directed towards improving court services in the areas outlined in this submission.

Proposal that two separate and different divisions be created in the new family court

10. The proposal that the new court have two divisions dealing with matters of different complexity reflects the existing arrangements between the FCA and the FMC. WLSA agrees that it makes sound sense to retain the ability of the family court system to have complex matters dealt with at a higher level.

11. However, the proposed structure highlights the need for the court to have very clear guidelines for how and when matters are referred as complex matters. In our experience working with women who have experienced family violence and are involved in children's matters, there is a lack of consistency about when a matter is flagged as needing referral as a complex matter. There is an urgent need for a consistent approach to determining what matters should be dealt with by the Court as complex.

What kinds of matters should be heard by each division?

12. WLSA is of the view that complex matters should be dealt with by the proposed superior division. Our experience of the current system of referral to the FCA leads us to identify two main issues. The first is the difficulty in identifying potential complex matters early in the process particularly where family violence is involved. Secondly, there are no formal guidelines or rules to assist:

- judicial officers to determine which matters should be referred to the FMC or FCA;
- court registry staff to determine whether matters should be commenced in the FMC or FCA, and
- legal practitioners to determine whether matters should be commenced in the FMC or FCA.

13. Simplified procedures in the FMC have contributed to a lack of procedural fairness. This exacerbates the impact of the significant variations and inconsistencies between individual Federal Magistrates and results in a lack of predictability of process for parties.

14. The fast, efficient, inexpensive philosophy currently influential in the FMC, has, at least in part, contributed to a lack of identification of abuse and violence and the impact of abuse and violence on a party and the capacity to effectively engage in the court process. This difficulty is exacerbated where a party is unrepresented.

15. Early identification and thorough assessment of family violence and child abuse will contribute to less adversarial and earlier resolution of issues. A focus on speed alone militates against this outcome.

Recommendation 3: WLSA recommends that the new family law court develop formal guidelines about identifying complex matters for referral to the superior division and that these guidelines become a Case Management Direction or be incorporated in the Rules. The following should be included in any list of the criteria to be used to determine if a matter is complex: allegations of family violence or child abuse; mental health issues involving one or both parties; where an Independent Children's Lawyer ("ICL") needs to be appointed; a family consultant recommends referral or where the matter is intractable.

Recommendation 4: WLSA recommends that the new family law court standardise processes to identify complexity in parenting matters at the outset.

The proposed division of judicial officers between divisions

16. Many of the problems in the existing system have their origins in inadequate resourcing of the courts. WLSA is concerned that the structure proposed by the Report appears to reduce the number of judicial officers in the superior division.

17. The Report suggests that the number of judicial officers in the superior division be 25. However, the existing FCA, which in effect operates as a 'superior division', has 44

judges and struggles with the workload. There is no information in the Report about the number of judicial officers who will be appointed to the general division.

18. The current practice between the two existing courts allows for more complex matters to be referred to the FCA. An effective reduction from 44 to 25 in the number of judges at the level that deals with complex cases will impact on the new family court's ability to respond to these matters.

19. WLSA anticipates that this could have two effects. Firstly, matters may be inappropriately referred by the General Division to family dispute resolution as a strategy for managing court workloads. Secondly, the threshold for when a matter is seen as complex will be raised in practice, as the Superior Division will not have the capacity to deal with all properly identified complex matters.

Recommendation 5: WLSA recommends that there should be no reduction in the number of judicial officers available to deal with complex matters.

The Courts ability to respond family violence and child abuse

20. There is little mention of family violence in the Report. However research indicates that over half of the parenting cases dealt with by the FCA and FMC involve serious allegations of family violence and / or child abuse¹. WLSA is of the view that it is essential that the new family court engage fully with the challenges of responding to family violence. Responding to family violence should be the cornerstone of the new family court's operations.

21. In addition to the comments we have already made about family violence, we observe through our work with women and children who have experienced family violence additional obstacles including:

- an inconsistent approach by the courts to identifying when family violence and /or child abuse are an issue;
- where there have been allegations of serious family violence there are inappropriate referral and re-referral of parenting matters to FDR;
- inconsistency across the FMC registries in the management of court lists;
- inconsistency across the FMC and FCA in the use of family consultants, family reports and the appointment of ICLs;
- the lack of coordination and collaboration between Federal and State agencies and courts in responding to child abuse and family violence, and

¹ L. Moloney et al (2007) *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A pre-reform exploratory study*, Research Report No 5, AIFS, Canberra.

- difficulties for both legal representatives and their clients in obtaining effective safety plans at the FMC and FCA, where violence is an issue.

22. WLSA is concerned that the strong emphasis on informal resolution of children's matters, combined with the current ad hoc approach to assessing family violence, has led to parenting agreements and consent orders that are unworkable and potentially risky for women and children who have experienced family violence.

23. Currently, matters where 'agreement' is reached are counted as a success of the family law system even if those agreements may have been reached under forms of duress due to family violence and an emphasis on informal resolution.

Recommendation 6: WLSA recommends that a comprehensive audit of the family law system's response to family violence be undertaken with a view to addressing safety and increasing consistency and accountability. The audit should include Family Relationship Centres, other Family Dispute Resolution Providers and the family law courts.

24. A significant issue in children's matters, where there are allegations of family violence and child abuse, is the ability of the court to recognise these matters early and manage them appropriately.

25. Within the current family law system, there is a significant risk that matters involving allegations of family violence are dealt with inappropriately and the individuals involved are unable to have their concerns presented to the court.

26. In interim proceedings, due to a lack of court time and court resources, family violence issues are not assessed comprehensively. In interim proceedings there appears to be a priority given to time parents have with children, rather than safety. This can cause significant safety concerns as interim orders are often in place for considerable lengths of time due to court workloads.

27. The new family court will need to implement systems at the initial stages of application to comprehensively explore issues of family violence and child abuse. The family consultants within the new family court should have a significant role in this process. We propose that the role (and number) of family consultants be expanded to allow for assessment of all children matters where there have been allegations of family violence and child abuse to inform case management.

Recommendation 7: WLSA recommends that the role and number of family consultants be expanded to allow for assessment of all children matters where there are allegations of family violence and child abuse.

28. This approach will require the development of clear guidelines about how these assessments should be undertaken, the need to comprehensively assess for risk where family violence and child abuse is a factor. It will require the development of competency standards for all family consultants, family report writers and ICLs with regard to family violence. Continuing training for judicial officers in current issues in family violence and child abuse is also essential.

29. The development of clear guidelines about what is necessary to cover in the development of family reports are essential as there is a lack of consistency in the approach of family report writers. Some report writers will investigate matters with regard to available documents, in addition to spending adequate time with the parties involved, to generate a comprehensive assessment. However, WLSA is aware that some report writers will undertake assessments based on interview only. While WLSA respects that professional capacity of report writers to determine what level of assessment is required, we are concerned that inadequate assessment may occur and that this can have a serious effect on the outcomes, particularly for the safety of the parties and the children.

Recommendation 8: WLSA recommends that the new family court develop guidelines for the early identification of matters where family violence and / or child abuse are occurring or are alleged. This should include mandatory screening for family violence and child abuse for all new matters by including a question in the Application and Response forms about whether there are allegations of family violence or child abuse and if so, prompt parties to complete a Form 4 Notice of Child Abuse or Family Violence.

Recommendation 9: WLSA recommends that when an application indicates that family violence and / or child abuse is a factor that the matter be referred to the new family court's family consultants early in the process for further assessment and that clear guidelines be developed for this process and for the court to address these issues.

Recommendation 10: WLSA recommends that the new family court develop specific accreditation/competencies and annual compulsory professional development requirements (including a family violence component) for report writers.

Recommendation 11: WLSA recommends that the new family court develop clear guidelines to ensure that family report writers adequately investigate issues of family violence, by spending sufficient time with the parties and reviewing the available material, to undertake a comprehensive assessment.

30. The FCA has established a number of initiatives to manage complex children's matters where child abuse is present, including the Magellan process. These are valuable initiatives and have the benefit of allowing judicial officers to develop their expertise in dealing with these types of matters. However, family law practitioners have reported that they experience difficulties having matters placed in the Magellan list where it is available. The Magellan process only operates from selected registries.

31. The FCA has also developed the Less Adversarial Trial (LAT) process across all registries. The FMC has developed it's own processes. There are distinct advantages in the LAT process as it enables matters to be case managed in a more flexible way to accommodate the issues that the parties present.

32. The LAT process should be included in the new court structure. There needs to be a consistent approach by all judicial officers. All participants should feel heard in the process. Since there is potential for pressure to settle matters early, the need for family violence and child abuse to be identified and assessed early is crucial to the efficacy of the LAT process being used across the new family court.

Recommendation 12: WLSA recommends that the new family law court be properly resourced to respond to child abuse through the expansion of the Magellan list across all registries.

Recommendation 13: The new family court should consider developing a specialist case management program for cases where there is family violence.

Recommendation 14: WLSA recommends that the Less Adversarial Trial process should be part of the new family court, in the General and Superior division, in all court registries.

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

33. A significant proportion of litigants in the family court system are unrepresented. This creates significant challenges for the court and judicial officers. The court has made progress in identifying issues for self-represented litigants. The new family court will need to implement processes to effectively address the issues for self-represented litigants.

Recommendation 15: WLSA recommends that the new family court establish court support programs to work with self-represented litigants. These programs could be based on the models operating in many domestic violence courts.

Recommendation 16: WLSA recommends that adequate resources be allocated to establish specialist services to work with diverse communities (for example specialist Indigenous consultants) to ensure appropriate access to court services.

34. We appreciate the opportunity to contribute to this review. WLSA is keen to participate in any further consultations about the proposed restructure of the FMC and FCA.

35. If you would like to discuss any of the issues raised in our submission in more detail please contact either Dianne Hamey at Women's Legal Services NSW on (02) 9749 7700 or Dianne.Hamey@clc.net.au or Edwina MacDonald, Law Reform Coordinator of WLSA on (02) 9749 7700 or Edwina.MacDonald@clc.net.au.

Yours faithfully,

WOMEN'S LEGAL SERVICES AUSTRALIA

Dianne Hamey

Committee Member WLSA