

SUBMISSION IN RELATION TO CONSULTATION PAPER

"IMPROVING ACCESS TO JUSTICE – A BETTER FRAMEWORK FOR FEDERAL COURTS" A DECENTRALISED ALTERNATIVE

Major Omission from Consultation Paper

I have recently read the discussion paper in this matter and it was with some alarm that I read the following paragraph (paragraph 51):-

"All submissions to the review, except the Federal Magistrates' Court submission, considered that the most effective model for the delivery by the Courts of family law services would be a single Family Court, with two separate judicial divisions serviced by a single administration"

With respect to the eminent and learned authors of the submissions made to the Attorney-General's Department, there is an alternative model which cries out for consideration.

Historical Background

When the *Family Law Act* was established in 1975 (with operation from 1976), the legislators envisaged, amongst other things, two outcomes:-

1. That the States would establish their own Family Courts; and
2. That the smaller family law disputes would be dealt with by the State Magistrates' Court.

As we all know, only Western Australia opted to establish its autonomous Family Court.

As a practitioner admitted in 1979, I can clearly recall that, in the earlier years of the operation of the *Family Law Act*, many of the simpler family law property and spousal maintenance cases were dealt with in the State Magistrates' Courts. However, the jurisdictional limit (effectively \$20,000.00) meant that, with time, fewer and fewer cases were dealt with by the State Magistrates' Courts and, as you would now expect, almost none are now dealt with in that way. Furthermore, prior to the enactment of the Child Support

Scheme in the late 1980s, the jurisdiction of the State Magistrates' Courts in relation to family law property matters dovetailed neatly with their jurisdiction in relation to child maintenance matters.

For this reason, when the Federal Magistrates' Court was first being discussed, it was a wide spread (but erroneous) belief amongst the profession that the Federal Magistrates' Court would be set up in a *decentralised* way.

However, it transpired that the Federal Magistrates' Courts were co-located with Family Court Registries, necessarily sharing the same resources, including administrative and support staff. As a result of this, the Federal Magistrates' Court quickly came to be seen by members of the public (ie. those who were even aware of its existence) as merely the lower division of the Family Court itself.

It is submitted that this collocation of the Federal Magistrates' Court with the Family Court Registries lies at the heart of the present difficulties.

Whom should the Federal Magistrates' Court be serving?

The Federal Magistrates' Court should, in my view, aim to serve "*the mums and dads*" of Australia. The broad principles under Part VIII of the *Family Law Act* are now well established and are backed by over 30 years of case law. As a result of this, the outcome of approximately 85% to 90% of all *property* cases is broadly predictable (within a confined 'range') by experienced practitioners. These matters, if not settled beforehand with the assistance of mediation or legal practitioners, should be capable of *summary* determination by an appropriately experienced Magistrate (Federal or State).

The same may be said of interim children's matters and uncontested divorces.

Indeed, as previously stated, this was clearly the view of the authors of the *Family Law Act* in 1975.

What level of documentation is required to determine such cases?

When the *Family Law Act* first came into effect, and for some years thereafter, applications were determined solely on the basis of **affidavits** filed. There was simply no such document

as an "*Application*". It was only later when "*simplified*" procedures were introduced that a multiplicity of forms proliferated.

For the vast bulk of "*mums and dads*" cases, (property and/or interim children's matters) a short standard form affidavit of the "*insert the date - fill in the blank*" style, together with a simplified Financial Statement (of approximately four rather than 20 pages as exists presently) would suffice. In the early days of the *Family Law Act*, many hundreds, if not thousands, of cases proceeded to swift and proper judicial determination with no more than that level of documentation.

What to do with cases that are more complex than this?

This question is easily answered since the *Family Law Act* already provides for transfer of cases from courts of summary jurisdiction to the Family Court itself – either on application of the parties or of the courts on motion (Section 46 *Family Law Act* 1975). Similarly, appropriate rights of appeal to the Family Court are also enshrined in that legislation – to guard against Magisterial error. Jurisdiction to make *final* children's orders would revert to the Family Court (together with the resources that jurisdiction requires).

If a decentralised model is to be adopted, which venues would be chosen?

In Victoria, at least, we no longer have the scattering of small court houses throughout the suburbs and small towns as was the case when the *Family Law Act* came into operation. The vast bulk of those court houses have now passed into history and large Magistrates' Court complexes have been placed at various population centres or "*nodes*": such as Frankston, Dandenong, Broadmeadows and Sunshine. These complexes provide large and modern facilities which could, in my view, readily accommodate the sorts of modest additional personnel required to deal with the "*mums and dads*" cases referred to above. Moreover, where Federal Magistrates found they had a less than full family law case load, a '*dual commission*' would allow them to assist their state colleagues in non-family law matters.

Who would be appointed to deal with these sorts of cases?

Obviously, the existing Federal Magistrates, if not elevated to judges of the Family Court, would be the first to fulfil that role. Furthermore, a number of existing State Magistrates

already have, as a result of their preceding professional life, substantial knowledge of family law and would be therefore capable of accepting a dual commission.

If those two areas of recruitment were to prove insufficient, there remains a substantial “pool” of accredited Family Law Specialist lawyers who could be recruited and also given dual commission under State and Federal law to act as Magistrates.

What then are the key features of the alternative or decentralised model proposed?

The key features of this model may be summarised as follows:-

- Family Court to retain full powers to make final orders in relation to children and property matters exceeding, say, \$1m net assets.
- Federal Magistrates to be appointed with dual commission as State Magistrates and located within State Magistrates’ Court complexes.
- Power of those Magistrates enhanced so that they can deal with property disputes up to \$1m, spousal maintenance matters, interim children’s matters and undefended divorces.
- “Bare bones” documentation required to conduct such matters – with retention of existing transfer and appeal rights.
- Any additional family law Federal Magistrates to be recruited from amongst experienced family law specialist practitioners (with preference for those exhibiting a capacity to deal with matters in a robust and summary way, as befits the types of cases which would typically come before them).
- Necessary administration to be undertaken by existing “family law/intervention” clerks already operating within the State Magistrates’ Courts.
- Retention of existing Family Relationship Centres and “family consultants” to service, predominantly, the needs of prospective Family Court litigants.

Background of the author

- Admitted as a barrister and solicitor of the Supreme Court of Victoria 1979 and practising continuously in that area since that time.

- Barrister at the Victorian Bar 1980-1993.
- Solicitor in private practice from 1993 to date.
- Law Institute of Victoria Accredited Family Law Specialist – July 1996 (still current).

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