

**Submission in relation to the consultation paper:**

**Improving access to Justice – a better  
framework for federal courts – November 2008**

**6 February 2009**

As a sole parent of three children from two marriages, with a tertiary education and a career in mid level government, I feel that I have the experience to raise key issues and comment on current reports relating to the “Striking the Right Balance” (StRB) produced by Dessemple of Dessemple & Associates. I have been the respondent in a series of cases and one appeal over the last eight years in the Federal Magistrates Court, Magistrates Court and High Court. All but the High Court case got to the ‘the case heard to judgment’ stage. All the points I raise are from experience and cases I have been involved in personally however talking to other parties and clientele from the court systems and women’s groups, I know that many of these points affect others whom go through the current court administration process. I will talk from the litigant’s point of view.

I do agree with a one court system but acknowledge the issues relating to blending the two courts FMC (Federal Magistrates Court) and CFoA (Family Court of Australia). However I do not agree with the FMC’s belief that their culture and administration of short term cases because of the speed and numbers dealt with are managed effectively and that their system is well structured having a “highly effective Culture.” My experience is that the cases have not been equitable or highly effective, and orders are inadequate. It seems to me each time orders are issued, we are then counted as a new case rather than a badly handled one back again under a new pretext.

If the FMC is to be retained it should only deal with administrative cases such as divorces and approving family plans that should have already been negotiated elsewhere. I do not believe the FMC can adequately identify difficult cases or deal with them. If there are many like me the numbers may not be increasing, rather the cases are not being handled properly and retuning but counted as new cases.

My preference would be to see a restructure along the lines put forward by the (EPTS) “Every Picture Tells a Story” produced by House of Representatives, Standing Committee on Family and Community Affairs. I feel this is a viable long term option, and will expand on this to raise a range of equity problems that currently exist within the FMC administrative culture that have not yet been raised.

I am unclear about the role of the magistraights court in abuse cases but feel this also should become a division under this system or dealt with within a single court system.

Due to a writing and spelling disability I apologies for the length and spelling in this submission. Please do not confuse my disability with intelligence they are not the same. Also the information is highly emotional and distressing to me because it is based on personal experience. So I apologies if the facts are not fully filtered form emotional comments at this stage.

Post order reviews should be mandatory. It provides feedback and resolves any conflict unsuitable orders may cause early. If the orders do need rewording to effectively reflect the judgment in a functional way, they could be done then or through the mediation process depending on the time required to resolve them and submitted to the General division for processing. If they are more difficult to deal with they may require the family tribunal to resolve them. If they are simply an issue of non compliance as opposed to inappropriate orders, they can be dealt with by enforcement.

Enforcement should initially consist of mandatory training or rehab relevant to the issues. Another possibility is a more in-depth analysis of the relationships involved and then counseling on how to change these behaviours for example substance abuse or codependency relationships.

The two-way process between the shop front, family tribunal and post order support should negate the need for an appeal process. If the mandatory post order support is outsourced to a mediation service that does parenting plans, a report should go back to the Family tribunal about what is and is not working and why. It is important the tribunal hears cases where orders are not working so that they learn what is and is not functional. If the family is back a third time due to deliberate breaches of the orders as opposed to changing circumstances there should be clear enforcement strategies.

Cases may still need to go to the high court or full court unless the feedback loops within this system have been proven to be adequate in changing the legal process to achieve equity and conflict resolution. I do not support single judge appeals by the court that is being appealed against. There is also a danger that if a vexatious litigant knows they can still access adversarial systems they may do what it takes to drive the case to them.

This or any other system will only work if three main issues are addressed. The system is not adversarial, is accessible to the average Australian and services have the numbers and money to function properly without strain. Currently it is the cost and time lag that is prohibitive and destructive to families. Lack of financial assistance also makes it inequitable. The other issue is not enough staff providing the service. For example if there are not enough court cancellers those in the system will become overworked and stressed. This in turn affects their ability to perform appropriately. It is vital all staff remain engaged if we truly intend to treat cases individually.

I believe numbers will initially blow out, as cases that would normally leave the legal system return and vexatious litigants take a while to realize the system is no longer useful to them. Because there are non issues and deliberate blocking is diffused by common sense and better coping skills. However over time numbers will reduce and society will become healthier.

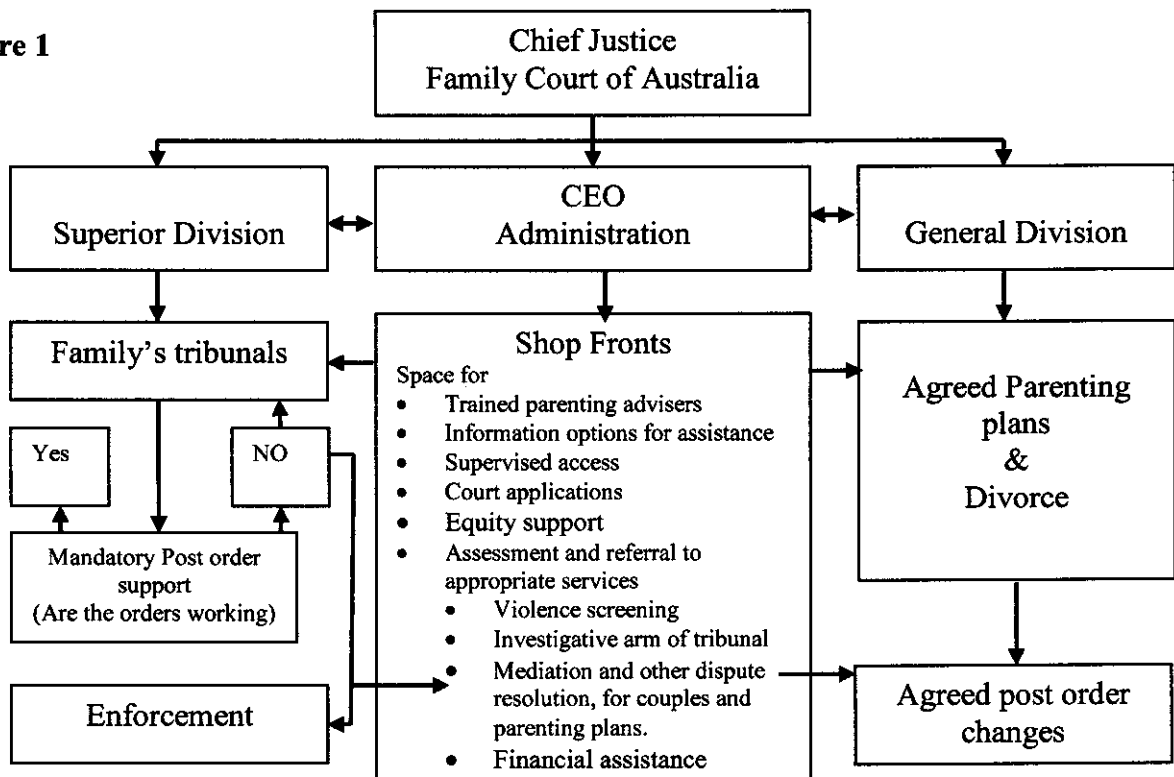
Staffing numbers will be difficult at first. A trial model should be set up first. If not successful we should not go back to the old ways but forge forward to find the right way. If it is successful some important questions are; where are the extra solicitors, counsellors etc going to come from and how will the sudden excess of lawyers be dealt with? Could they be reskilled in the system? Many of the place FMC magistrates are ready to retire. Some would already have good counseling skills/ others not.

Training is also vitally important as are regular meetings and planning days where issues can be discussed, skills shared and problems identified and resolutions instigated.

Teams could be the individual tribunal groups including stenographers etc. But weekly or monthly meetings should occur amongst alike professions. Teleconference services can be used for regional areas.

Partnerships and knowledge brokering with other services like Police, legal aid, Child support Agency, counseling and psychology report agencies, among others are also important if the court is going make effective decisions and effect change.

**Figure 1**



My reasons for preferring the Tribunal approach to the adversarial FMC approach despite the clear cost saving by government means the taxpayer in legal process of individual cases is that it is not working nor is it cost saving to the individual litigant or the other services that often have to pick up the pieces of broken lives during and after such events. Subjecting illiterate people to the highly academic processes and expecting vulnerable members of the public to articulate under stress why they should get more than an opponent is not equitable or encouraging healthy relationships between the parties. Also subjecting victims of domestic violence to cross examination by their abuser because the abuser is acting for themselves in my opinion unlawful. Another aspect of this process is that there is a danger when one authority holds the power over both the process and appeals against the process. Especially when both are above reproach from other sectors. People can not sue the courts for damages of wrong decisions, yet there is the justice when it is well known those decisions are damaging but change is not or can not be instigated. The poorer people cannot access appeals and high court to set precedents. By having a tribunal of various professionals the system of reproach is spread sideways instead of hierarchical. If there are problems with the system there is more than one departmental perspective on the matter. Current integrity of the departments should not be the argument for not having a method of change and accountability in place. If one department does not agree with another's the power is more equitable than underprivileged individual people against the law. Even getting politicians involved takes a lot of effort and many bad cases as well as depending on elections etc.

## **Other Recommendations**

1. One system will not fit all families. The legal process and solutions should cater for various different family dynamics.
2. Vindictive cases should not ever get to the current FMC. This is where they want to be to do the most damage.
3. Multiple litigations by the same parties should be considered as one unresolved matter not new cases because orders were issued. Clearly if they are back it was not resolved properly. Changing circumstances are catered for in the lower levels of the system.
4. Adequate funding
5. Adequate data collection and review.
6. Orders have a set format. Details have to be addressed in each section to prevent being missed. The litigants should nominate what sections they are willing to label "as agreed by the parties" and those they need orders on.
7. Set out standard rites. These can only be changed if all parties agree, not one making a better argument over the other. For example;
  - a. How do we protect children from bullying and bribing parents, yet give them access to have their say in a context where they understand the consequence of their answer.
  - b. How long can children cope with being away from their main care givers, how long do they take to settle into different households. Even in shared care, it is my experience that young children need shorter periods between change-overs than older ones. Could you spend two to six weeks over the other side of the world, return late on the night before work and front up to work the next day and function properly for a whole term. Children are expected to.

- c. What are acceptable behaviors under the circumstances. Parent should not be blamed for inadequate parenting when the environment dictates the behavior, the environment needs changing.
  - d. Have the rites of everyone been considered and how.
8. If a tribunal is the way to go. It would be very daunting to get a room of strangers who have to make a decision with out knowing them. The danger with this is that it could become what we have now if not properly set up and funded.
  9. The family relationship members of the tribunal should be the case workers who know the people and the case. So the more clinical psychologist report has some context to be compared to.
  10. None of the tribunal member should do this roll fulltime, they will become stale and desensitized to the issues before them. They need time to analyze the themes of issues that get to them and be involved in the partnerships required to effect change. The tribunal members should be informed of the post order support required for there decisions.
  11. Enforcement is vital but is only effective if post order support is effective at resolving the genuine cases that need change as opposed to being used as harassment.
  12. Have a form that can be filled out early on with the help of advisers if needed. To set out important details. They could cover the five Ws: who, what, why, where and when. They could be as simple as tick boxes and small comment boxes at the end of each section. There could be a few extra boxes left blank for people to add what they think important.  
eg

Parenting style

- Stay at home
- Working and childcare

Life style

- Alternative
- Sporty
- Academic
- Casual

How would a parenting plan look when combining the various parties choices.

Reason for change

- Changing needs
- Breach of plan/order
- Inadequate pan/order

What needs have/need change and why

Access/residency (Parental time): time, dates, frequency, type.

- Safety
- Equity
- Child support

Life style

- Occupation
- Health
- Education
- Finance
- Accommodation
- Extended family

Who's needs have/need change ( above points can be for both yet different ones for each.

- Childs needs
- Parent needs
- Siblings
- ½ siblings
- Grandparents
- Extended families
- Is this reasonable or not.

Open comment.

- 18 Every litigation step should also have a set of summary sheets, one each from Applicant, respondent and legal process (counselor, judge etc). The main points, issues and reasons eg. Why the issues were resolved the way they were. Was the issues stated the real issues etc. If the family returns to the system the second half of the sheet on what did not work and why could be filled out. Each party should have an opportunity to agree or comment on the others views. Not extensive affidavits but again possibly tick boxes with small comment boxes. I do or do not agree and why eg out of context, not true, not relevant, inequitable. For cases like ours it would help not get off track on character assassination and ensue the basic needs are covered. Also it would be good statistical material as well as provide condensed background information about past cases from each perspective. The content of the tribunal could retain confidentiality for a number of years about the exact details while the summary sheets are not confidential and mention the issues not personal content especially where explicit sexual and other details are concerned.
- 19 I do believe there is a place for written affidavits but in a format that prompts the important issues.
- 20 Separating property, family and child support has pros and cons. I am undecided because as a litigant concerned about my children current unfair funding is what would encourage me to separate them. Legal funding for the family home would almost be impossible to get but would ensure a higher chance of funding for family matters. But My experience is that altria motives for residency have been because of child support and this cannot be fully explored when the issues are separated. This sways me towards keeping them together. I would prefer to see property and family matters dealt with like child support, free and accessible, only leavening appeals for the court. But they can all be dealt with together in the court. I would hate to see the change management feedback loops for this proposal or any other to be as difficult as they have been for the Child Support Agency though. I am sure that has cost lives

## **My evidence of what is sacrificed for the FMC's administration**

1. An affidavit affidavit was not accepted because the signature was missed not because it was irrelevant or incorrect.
2. I have been expected to be in two court rooms at the same time for different cases. (where there is more than one relationship/marriage sometimes another partner will attempt to file for residence knowing there chances are higher because another partner is also character assassinating. Most cases I know of, child support payments have driven residency cases because the high litigation costs become viable)

3. Would not order adequate professional advice regarding substance abuse in a access/residency case because it would take to long. Instead accepting an unqualified letter form a preist who had not been confided in about the problem.
4. Would not get involved or release security footage regarding an assault in the court. The case had to go to another court without evidence.
5. A Transcript of my testimony was lost during a case. This meant there could not be a fair hearing unless the case was reheard. But I was told this would be at our own cost.
6. The judge allowed so much time to argue over individual chattels that legal costs made it unviable to challenge. The commonsense of one of the litigants had to stop it, based on what legal costs they could afford as opposed to equity or need. This is were vexatious litigants win because they don't care how much it costs or will affect providing for the children, they are driven by other motives.
7. So much time is allowed for cross examination and character assassination that there is no time for the practical things like access times etc.
8. Maintenance debts are not dealt with, even though it is known the payer has adequate funds to pay. (to some extent though this may be because it is well known poor people can not get leagal aid if they will win money in a case because it is then considered that they could pay there own legal fees even if the amount is less than what it would cost to go to court. For me the well being of my children was more important than the vary needed child support, I am sure there are many others like me.)
9. Breaches in orders are not delt with, new orders are simply given. Often in my case favoring the vixatous litigant that breached them with out consequence. I can not afford to go back to court simply to prove the action my expartner deemed important enough to breche orders for he now dose himself. The difference is that the same action is not in the context of what is best for the child at the time.
10. Yet acting within the minimal orders protecting my rites can be considered unreasonable. I can only get one months notice that access will occur. This is not a reasonable amount of time to orgnise childcare or time off. Yet if this time frame is breach it is considered unreasonable to not provide access if tickets do eventually come, even when other circumstances are involved like unsafe premises and leaving our 10 year old son unattended to work at night. (he was living in a hostel that did not accept children under 18years because of a club as part of the premises. From memory I think the argument was that he had been mugged and needed to see his son.)
11. One FMC judge claimed he would not have awared shared care to my expartner if he had known what he was like. Instead of the child being protected from what was now apparent. My expartner was able to make the judge to step down because of predegous. How can you be predegous about what is real?
12. The last judge took one look at our files standing about a foot high on his desk and exclaimed I don't have time to read that. So he judged the case without any past background. Yet my application to transfer to the Family court was not granted. I was considered Judge shopping by my expartner. There was discussion about weather the case would take more than two days or not. I did not understand why at the time.
13. The partner that has repeatedly breached orders, not had the child's best interest at hart and been court out lying, now has won residency. While honesty is not always apparent in the beginning I believe it can become so over time. But this is not considered of value administration time was more important.

These accumulative injustices resulted in children exposed to situations that were life changing, emotionaly, physically, psychologically socially and financially. Ones I have had no power to protect them from. My son in shared care did not have a similar life style in both

homes. My rites to the way I wanted to raise my children have not been heard or respected. I have been emotionally unavailable to my children because of stress and depression caused by litigation and work not suited to my health just to provide for them after the appeal on the property. My children have been tawn apart by inequitable treatment. Social networks disappeared because of our move and the assault case on my friend that occurred in the FMC.

When considering the viability of the Federal court framework please don't forget what the framework is supposed to achieve.

### **Equitable justice for families and their individual rights.**

Not just a process that gets the cases through the system quickly and cost effectively, though this is very important as well.

## **My Views on the current system**

Australia's social fabric and policies do not support good long-term family and community relationships. Added to this are financial discriminations determining accessibility to family support services. Good support services are isolated. What is the point in fixing some thing if you then put it back in the same environment that broke it in the first place? When people find them selves in a difficult situation they do one of four things; fight, flight, frees or suicide. I believe these behaviors are determined by learned responses and the individuals innate personality and evolve in this order.

Initial stages of interacting with the law for Australian families could be; police in a domestic disturbance, and the Magitraits court; family services; Center link; and / or Child support agency. These services often add more burden to the families social fabric exacerbating the problems because there processes do not deal with peoples real needs causing the problems in the first place. They also force people in to psychological corners they feel trapped in or have to escape from. This then drives the need to break the law and/or go against social norms.

By the time people get to the family court system emotions and behaviors are entrenched and often the initial driving forces are lost from view making resolution difficult. My experience is that most cases are not resolved, they drop off the courts lists because one party gives into the other realizing there is inadequate justice and the cost is to high. I have seen people walk away from everything including the children because they could not cope with the system and yet they would have been the better parent. What you are left with is litigants that find the court system a useful abusive tool or martyr that believes justice comes at a cost. Both end up sacrificing the children for the cause weather they realise it or not. The difference is the martyr believes that by giving up they have sacrificed the children any way. The abusers by this stage will seldom be happy with a win long term because it is the act not the end result that drives them.

Currently there seems to be no attempt at by the FMC to obtain feed back loops that would provide the court with any reality of the real dispute or the effectiveness of their decisions. In order to do this the court needs knowledge brokering and partnerships with; Police, legal aid, Child support Agency, counselling and sycology report agencies, among others, in order to

understand their systems and make effective decisions that will resolve the true cause of peoples disputes.

Police will not even attend many domestic abuse cases at the family home because the abusers name is still on the lease or mortgage. Legal aid will not fund Child support cases or litigation they think will fail in court even if a litigant qualifies for legal aid. Sycology reports are done by overworked staff who have limited access to the family

One of the big dangers is the children grow up with role modles that break the law and undermine loved ones with out social cocsequence. So the socal fabric for cociety degrades. In my situation my ex-partner is repeating his families history of abuse including the legal system.

I believe suicide is the ultimate measure of the inadequacy of social justice and the legal system. In a Queensland study of 4000 male suicides at least 70% were associated to relationship breakups. Men were 9 times more likely to take their own lives following a breakup than women. Yet what I think is less well known is that more Australian women attempt suicide than men. The difference is that men use more aggressive/successful methods and sadly are more likely to kill there children as well. I believe as the ratio between male and female sole parents becomes smaller the male suicide rate will rise because the social injustice traditionally against woman has not changed only now it is labeled the resident parent.

After a 50 year career in suicidology Shneidman says:

*"Suicide is caused by psychache. Psychache refers to the hurt, anguish, soreness, aching, psychological pain in the psyche, the mind. It is intrinsically psychological - the pain of excessively felt shame, or guilt, or humiliation, or loneliness, or fear, or angst, or dread of growing old, or of dying badly, or whatever. When it occurs, its reality is introspectively undeniable. Suicide occurs when the psychache is deemed by that person to be unbearable. This means that suicide also has to do with different individuals thresholds for enduring psychological pain."*

Adversial legal systems essentially expose and exploit many of these psychological pains.

I believe the difference between the past and now is that law has evolved to support dominance over others not equity and conflict resolution. As the lines have become blurred between male dominance over women, adults over children, corcations over indigenious and governments over their people, social Justice has outgrown the legal system. But we all carry the behavioral scars and equity blindness of the past.

The question is how do we build a system that protects individuals rights as well as social justice at a time when we do not know what that fully looks like and our behaviors don't mach what we want.

My children are a perfect example of why these are such hard times. I raised my children by example, respect, honesty and time out. We discussed issues at there level of understanding and they were involved in life changing decisions. I constantly received complements about how well behaved and self reliant my children were. This changed when my second husband brought his abuse into the home. We no longer had a voice and dominance overpowered honesty and respect. The children learnt dominate or be dominated, they express this in very different ways such as charm or power. It then becomes very hard to undo this behavior.

The parenting techniques that worked so well before the abuse no longer did even once my second husband had gone.

How then do we build a better framework for a family federal court system to improve access to justice in these changing times for both the seasoned litigants and the new unexposed ones.

Personally within the scope of the review I support an administration model that fits into the model described in some detail on pages 89 to 102 of the EPTS report. Some of this model has already been put in place such as the mediation and dispute resolution services. And I have added my views. This model would require invitation to a working group from each profession involved to develop the working model. Also some aspects may be required to deal with today's social aspects that with time will fade. There are many positive changes occurring in the last few decades some successful, others not. It is important to recognize the changing times we are in and create a model that can cope with them without risking the integrity of true justice.

Thank you for the opportunity to submit my comments

Name not disclosed for legal reasons