



UNIT 4
86 GILES STREET
KINGSTON ACT 2604
PH 62394650

P.O. BOX 492
CANBERRA ACT 2601

Federal Courts Branch
Australian Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600
fedcourtsconsultation@ag.gov.au

Dear Sir/Madam

Improving access to justice – a better framework for federal courts

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

The following is a submission by the Lone Fathers Association (LFAA) to the consultation on the above Review.

Executive Summary

The "Review of future governance options for federal family law courts" by Mr Des Semple and the AG's Department proposes a restructuring of the family law court system in Australia. The proposed restructure would establish a single administration for the Family Court of Australia and the Federal Magistrates Court (family law jurisdiction), while retaining the present arrangement under which the two courts exercise a large measure of judicial autonomy. The main reasons for the restructure are stated to be improved efficiencies and financial savings.

The LFAA believes that the problems in the family law system are more fundamental than those identified by Mr Semple, and can be attributed in part to the over-leisurely, expensive, and lawyer-driven culture in the FCA, which places more emphasis on the pomp and ritual of the court than on delivering timely and fair outcomes to families.

Would the restructure proposed by Semple significantly change this present situation? The LFAA believes that such a result would be quite unlikely. And any financial savings that might (in theory) be achieved would be likely to quickly disappear.

The measure of success of any reform to the family law system will be what it delivers to the clients of the courts, namely separating parents and their children. By comparison, the convenience of the legal profession is a secondary issue.



OFFICE OF THE STATUS
OF MEN AND THEIR FAMILIES

The restructure, if adopted, would pose a significant threat to the effectiveness of the former Federal Magistrates Court (to be renamed the "General Division" of the combined court), because the relative efficiency of the Federal Magistrates Court would be eroded as a result of the merging of administrative procedures with the Family Court of Australia. If that should happen, any restructure will be accounted a failure.

Whatever type of restructure occurs, it will, in the LFAA's view, be important that the court system performs much more effectively in future in dealing with contact/access issues. To this end, the courts should operate in collaboration with a future "Child Orders Enforcement Agency", which would play a similar role to that of the CSA in the enforcement of child support. Also, legal aid should in future be made available on a fair and equal basis to both parties in disputes.

Given that the recommendations of the Semple/AG's Review intimately involve the interests of fathers, mothers, grandparents, and children, fathers' groups will need to closely monitor the development of any new legislation at every stage.

The details of the reform proposed by the Review appear to be closely similar to the recommendation made by the Chief Justice of the FCA. There is, however, an unresolved question about the judicial role of the CJ if she is to be outside the "Superior and Appellate Division" of the court.

Given the serious questions hanging over the recommendations of the Review, it would be very unwise for the Government to proceed to make decisions based on it without first submitting the Review report to the scrutiny of a full Parliamentary inquiry. The LFAA recommends that such an inquiry be held.

History and background

The Attorney-Generals Department, assisted by consultant Mr Des Semple, conducted a review and prepared a report on the delivery by the federal courts of family law services. The report of the Review, *Future Governance Options for Federal Family Law Courts in Australia - Striking the Right Balance* provided a blueprint for achieving a more integrated and efficient family court system, and proposed changes in the ways in which general federal law services are delivered.

The Federal Magistrates Court was established in 1999 in order to change the culture of the family law system, by providing "a quicker, cheaper option for litigants". It has to a very large extent achieved that result. The family law system is now in a consolidation/rationalisation phase. It is important that this phase in the development of the family law system should be handled effectively and efficiently.

Review terms of reference and recommendations

Submissions made to the Review

All submissions to the Review, except one, expressed a wish to see a *single court* with all judicial officers appointed as Chapter III judges. The exception was the

submission from the Federal Magistrates Court itself. But the Federal Magistrates Court was very clear about its opposition to a single court.

The Terms of Reference for the Review

The Terms of Reference for the Review were to advise on:

1. Governance options to
 - (A) achieve a more integrated family law system, while
 - (B) continuing to tailor the system to the nature of the work
2. Structures and processes necessary to improve effectiveness, efficiency, and integration
3. Possible changes in structures and reporting relationships
4. Administrative efficiencies, and
5. Possible impact on the other administrative and judicial structures.

The report of the Review recommended that a single family court should be established headed by the Chief Justice of the Family Court, with two separate judicial Divisions reporting to the Chief Justice, but a single administration including corporate and financial services.

Family law culture

The LFAA believes that family law changes implemented over the last five years or so are here to stay.

The process of changing the culture surrounding family law is proceeding apace. The Chief Justice has said that she would like to see all Family Court judgments published. Family Relationship Centres are functioning as an important mediation and information back-up to the judicial institutions of the family law sector. And shared parenting has been firmly established in the public mind as a desirable objective.

Need for a coherent vision

It will be necessary to now provide a clear vision as to the roles of the various Courts in the family law system. This vision must come to a significant extent from the Government itself. There is sufficient information available for such a vision to be developed and publicised, and the LFAA and other fathers' groups would be pleased to make a contribution.

The need for reform, and who would benefit

What is needed?

The question arises as to what further reform (if any) to the family law court system is actually required. Is the supposed “duplication” of activities between Courts complained of in the Review really of major proportions?

Australia already has a “superior (family) court” in the form of the Family Court of Australia, and a (reasonably) effective appeals system. Also, the two Courts concerned already use a range of standardised forms.

Who would benefit from the proposed reform?

The key question is: what would the proposed reform do for the principal clients of the courts, namely, separating and separated parents?

The convenience of the legal profession should be seen for what it is, namely a secondary issue.

Perceptions by the public

The world has changed in significant ways in recent decades – and many people now believe that it is necessary for the family court system to meet the same standards of efficiency and accountability as any other public institution.

The establishment of a “stakeholders” group to monitor activities and changes in the courts would help greatly in achieving the above objective.

Information required for assessments

Before any proposed reforms to the system are further pursued, there should be a careful analysis carried out of the effect of the Family Court of Australia’s appeal decisions on Federal Magistrates Courts decisions and approach.

Statistical information on actual decisions made by the family courts on shared parenting time since the reforms of 2006 should be available by now, as a basis for further decision making, and it is a serious failing by the Family Court that they have not yet been compiled and disseminated.

Workloads of the courts

Utilisation of resources

The report of the Review says that “ there is a widespread agreement that the current arrangement does not enable the most efficient utilisation of the resources provided to the family law system”, and that “data collected by the review supports this view”. It goes on to say that, “the combined future levels of expenditure will, under current arrangements of the Family Court and FMC, significantly exceed their annual

allocations and are unsustainable for future years". This presents a problem at the present time when Government revenues are rapidly contracting because of the world financial crisis and subsequent economic recession.

The statement is made in the Review report that, "Allocation of judicial support resources, in particular family consultant services, has not reflected fully the shift in workload and has been a source of tension in the Family Court and Federal Magistrates Court". The two courts have attempted to establish where matters should be transferred from one court to the other – in a de facto division of responsibilities. A fuller explanation should be provided of the basis on which this has been done.

Definition of "complexity"

No agreement has to date been reached between the Federal Magistrates court on how the degree of "complexity" of cases might be defined. There is a question, under the proposed new rules, as to who would/should have the power to decide such matters in practice.

Financial aspects

Basic information has been provided in the Review report on expenditure estimates. More evidence, however, needs to be provided to support the claim that no reductions in present expenditure by the courts should be contemplated.

A key point is that the Review should not be primarily about saving money. It should be about establishing the correct approach to the handling of family law issues, in order to assist Australian families in the best possible way.

Proposed role of the Chief Justice

It is proposed in the Review report that "The Chief Justice would manage across both divisions and not be directly responsible for either". There would be an Executive Officer responsible for transparent and equitable mechanisms for allocating judicial support resources. Some matters may be referred back to Family Relationship Centres for resolution where appropriate.

The proposed Superior and Appellate Division of the Family Court would have a separate head - i.e., not the Chief Justice. Explanation is needed as to how a judicial division of the court dealing with superior and appellate matters could operate with the Chief Justice not being a member of it.

The Family Court

Legal practitioners have traditionally had an overly influential role in the conduct of the affairs of the Family Court, and there are/have been frequent unnecessary postponements in proceedings without penalties being imposed on those responsible. Also, the cost to clients of transcripts of proceedings has been too high.

It is a matter of concern that the Court has in recent years failed to meet any of its key performance indicators. The approach of the Court appears to be overly focused on the pomp and ceremony of the law rather than the efficiency of proceedings.

The Court seems in many cases to be either unable or unwilling to uphold its own orders. In such cases only one of the parties may receive justice. .

An efficiency analysis of the activities of the Court is sorely needed and long overdue.

The Federal Magistrates Court

The Federal Magistrates Court has established a reputation for efficiency since its commencement in 1999. It has been able to do this, in part, because it was established free of any dependence on pre-existing traditional culture. Any problems with the Court are largely attributable to shortage of resources - the Court being typically "time-poor."

The question is: would merging the courts in the way proposed by the Review lead to an undesirable erosion of the culture of the Federal Magistrates Court?

The Federal Magistrate's Court believes that it would. Federal Magistrates noted (unanimously) that "to change the present structure is to place at risk the very essence of the culture that has made (the Court) successful", and that "the morale of the court would be destroyed". It is essential that these views of Federal Magistrates be closely examined, fully understood, and respected.

The Review report stated that "we do not want to damage the culture of the Federal Magistrates' Court". The question, however, is whether the necessary procedures will be in place to ensure the achievement of that objective.

An example of the performance of a Federal Magistrate is:

Example 1

"I have had the pleasure of watching (FM A) on a few occasions.

"He always gives the guy off the street a fair chance; he also explains the options and the judgements to them.

"He has also made some courageous judgements of late."

Where a person represents themselves, Magistrates should make a serious effort to assist the person. Personnel from domestic violence crisis services should not be permitted in the Court to speak on one side, unless a case of significant gravity has been proved against the other person.

The Federal Magistrates Court believes that much of its strength lies in its capacity to do work in a broad range of federal law - not just family law. This consideration should not be disregarded. Dual appointments of some Federal Magistrates/judges to

both the Federal and Family Courts would allow this type of benefit to continue to be received.

A substantive policy issue for the family court system

Enforcement of child contact orders

The LFAA, in evidence to the House of Representatives Standing Committee Inquiry in 2003, stated that:

“An effective administrative mechanism for enforcing court orders is essential to restore balance in a system which rigidly enforces child financial support obligations, in part for the benefit of residential parents (and with draconian child support percentages in some cases), but effectively ignores enforcement of contact orders designed to provide for the emotional support and guidance of their children by non-residential parents”, and

A similar recommendation was made by the Family Law Council in October 2007 that:

“The Government establish a child orders enforcement agency, or in the alternative that the government provide additional specified funding to enable the State and Territory legal aid commissions to assist parents to bring applications that serious contravention to parenting orders before the family courts”.

The Child Orders Enforcement Agency would, where a complaint has been received that access is not been provided (or not been provided on a satisfactory basis), examine and evaluate the case and provide prompt advice to the Federal Magistrate/Judge dealing with the case.

In order to make maximum use of the staff and other resources available within the public service (both federal and State), it could be appropriate to establish the Child Orders Enforcement Agency at least initially as a semi-autonomous area within the Child Support Agency. Existing staff from the Child Support Agency engaged in investigation could be seconded to duties in the Child Orders Enforcement Agency area. This would create a capability for establishing whether access has been provided in accordance with court orders in particular cases.

The Child Orders Enforcement Agency would compile and maintain a database on amounts of access time specified in court orders and parenting agreements and amounts provided in cases where there was a dispute, and would organise this information in a way which would enable it to provide useful advice to any enforcement process that might be required.

Possible role for the CSA

The CSA holds a considerable amount of information in relation to court-ordered access and access actually provided, as part of their current activities in assessing

child support obligations, and would be able (if authorised to do so) to assist also in cases where there is non-compliance with access.

As part of this, some surveillance staff who currently investigate failure to pay child support could be used to investigate failure to comply with access court orders.

The President LFAA, who has been involved with the CSS since the concept was first mooted, has had recent meetings on these issues with the Minister for Human Services and Child Support, the General Manager CSA, officers of FaHCSIA, and the Chief Federal Magistrate.

Possible role for the Federal Magistrates Court/General Division

The present Federal Magistrates Court (proposed by the Review to be rebadged as the General Division of the new Family Court) requires additional powers to be able to effectively deal with cases of non-compliance with child access orders.

Both federal and State police should have power to implement access enforcement orders made by the Federal Magistrates Court/General Division.

Systems in other countries

Of systems in other countries examined, one in particular that seems to work especially effectively is the system employed in Denmark. Although that experience cannot be directly translated to Australia, because of constitutional differences, there are many features from the Danish system which could in practice be adopted here.

As Professor Parkinson has pointed out:

“First of all, initiating action (in Denmark) to resolve a conflict problem is simple, and does not involve any need for legal representation. Because there are no forms to fill in, there are no procedural hurdles to overcome, and nor are there impediments for people for whom English is not the first language or who have literacy problems. Secondly, the system is not adversarial ... Thirdly, the system is quick. Contact disputes have to be resolved speedily ... Fourthly, it is cheap. The system is free to users ...”

The Danish experience demonstrates that informal processes - that is, office-based rather than court based- work best in this area. For constitutional reasons, a Child Orders Enforcement Agency in Australia probably could not make decisions which have immediate legal force as can be done in Denmark. However, this need not be a problem in practice, because it might be expected that the Federal Magistrates Court/General Division which makes legally binding decisions would in the great majority of cases adopt the recommendations made by the Child Orders Enforcement Agency.

It is noteworthy that in Denmark decisions in relation to access are enforced by a court whose *specific role and function* is to enforce the orders made by other courts. A section of the FMC/General Division could be proposed to carry out this function in relation to access in Australia.

Other areas of the family law system

Family Relationship Centres

The full “roll-out” of Family Relationship Centres throughout Australia has only recently been completed – and is not yet possible to be definitive about what the effects of these Centres on results for parents have been/will be in the future. Reports to the present on the FRC’s have been mixed, but with more good than bad.

The claim in the Review report that Family Relationships Centres have not significantly reduced filings in the courts to date needs to be investigated.

The court system more generally

The system of *non-federal* magistrates’ courts remains a fundamentally important part of the court structure – and of particular significance in the area of domestic violence. Note should be taken of the current discussion in the community about whether and how domestic violence and child protection should be brought more prominently into the federal system.

Legal aid made available should be provided on a fair and equal basis for both parties involved.

Need for monitoring of developments

The recommendations of the Review intimately involve the interests of fathers, mothers, grandparents, and children, and fathers’ groups will need to closely monitor developments at every stage. There are questions about both the form that legislation may take and the timetable for implementation. There will be severe criticism of the new legislation if the ongoing concerns of fathers and other family members are not properly taken into account.

It would be very short-sighted for the Government to seek to limit and/or make more difficult the necessary close involvement by fathers’ groups in this monitoring process. Such action could give rise to an impression that the Government wishes to hamstring these groups.

Father’s organisations should be given the minimum of support required to enable them to play an effective role in this monitoring process. It would be most unfortunate for the failures of the Family Court over long periods in the past to be repeated, with the resulting years of disruption followed by eventual necessary radical reform.

The LFAA had been providing valuable advice to successive governments for more than three decades. It is able to make a contribution to every stage of the legislative process, and has over many years played an especially significant role in putting forward new and innovative ideas - for example, the Family Relationship Centres concept, which was advocated in LFAA submissions to Government in 1980, 1982, 1986, 1990, 1999, and 2004.

Questions raised by Attorney-General's

The following answers are provided to the questions asked by Attorney General's in connection with the Review report.

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

The court should be called the "Family Court of Australia as at present.

2. What new procedures should be adopted in the new court to ensure the timely, efficient, and informal resolution of matters? Should these be different depending on the division in which the matter is dealt with? If so, how?

The Federal Magistrates/General Division should be given additional powers to deal with access cases, working in collaboration with a new Child Orders Enforcement Authority.

The Division should retain its current practice directions and rules, in order to be able to ensure that it maintains its current culture.

Standardised "counting rules" should be used in accounting for matters before the Courts.

Documented case management practices should be designed to effectively assist users to understand what will happen at court, what is expected from them, how best to prepare, the period of time involved, and the likely cost.

The cost of transcripts of court proceedings should be greatly reduced.

Personnel from domestic violence crisis services should not be permitted in the Court to speak on one side, unless a case of significant gravity has been proved against the other person.

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

Enforcement issues should be dealt with summarily by judicial officers in the Federal Magistrates/General Division.

Perjury (as, for example, in DV cases) should be dealt with by the (new) Federal Magistrates Court.

DV cases should be dealt with promptly, rather than allowed to cause unjustifiable interruptions to child-parent contact.

4. What should judicial officers of the General division of a single family Law Court, and of the proposed new division of the Federal Court, be called?

A. Should be called "Judges".

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

The Federal Magistrates/General Division should be given additional powers to deal with contact/access cases, working in collaboration with a new Child Orders Enforcement Authority (see above).

Legal aid should be provided on a fair and equal basis for both parties involved in disputes.

The Lone Fathers' Association will be happy to supply any further information in relation to this submission that may be required.

B C Williams BEM JP
President

J B Carter
Policy Adviser

Lone Fathers Association (Australia) Inc.
Tel 6239 4650

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