

**Response to “Improving Access to Justice – A Better Framework For Federal Courts” (The Semple Report) – November 2008**

This is a response from a group of three within the Family Law Council. By agreement, the four judicial officers on the Council were not members of the small group which drafted these responses.

The responses are based on the five questions on p 7 of the summary of the Semple Report.

It must be emphasised that these responses have been drafted quickly, without the benefit of consultation with the many sectors of clients and service providers in this large field of family conflict management both in Australia and overseas.

Of course, we are very willing to discuss these suggestions further with anyone involved in implementing change to the Family Court structures.

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**(1) What should the single family law court be called?**

We recommend that the new single Family Court be called:  
the Australian Family Law Court

This label is one that is used commonly by the person in the street.

We prefer that the judges of that court be labelled:

Judge of the Australian Family Law Court and Senior Judge of the  
Australian Family Law Court

This language enables:

- (a) gradual attrition of “senior” judges into an appeal group; and/or
- (b) possible promotion of “judges” to “senior judges” where considered necessary and appropriate;
- (c) equal title status except for the word “senior”;
- (d) and most importantly encourages workloads to be assigned between **individual** judges according to skill, interest, and sharing routine work, and **NOT** according to some artificial division of “complex” and “not complex”

**(2) In our opinion, it is essential:**

- (a) **NOT** to create two “divisions” of the court with the implication that cases may/will be “transferred” between divisions. This creates an immediate framework for structural conflict whereby lawyers and judges can make expensive and confusing moves to transfer cases based on perceptions of speed, overwork, available resources, “complexity”, delay etc. That potential should be immediately excised.
- (b) That clients, judges and lawyers know that upon filing, each case will be assigned to a “judge” (whether senior or otherwise), not to a “division”.
- (c) That **all** judges (senior or otherwise) are assigned a quota of routine and “complex” cases based on skill, interest and sharing the shifting workloads. To divide work based on skill rather than historical notions of status arguably reflects good work practices and recognises the sensitive nature of a “merger”, rather than a “takeover”.

**(3) The third questions expressed on p 7 of the seven page summary of the Semple Report states -  
What kinds of matters should be heard by each Division?**

To repeat, we consider that this is the wrong question. As mentioned, this question will quickly entrench gamesmanship, strategy, struggle for resources,

and perceptions of “status” work. We consider that the question should be: “What kinds of matters should be heard by each judge in the new merged Australian Family Law Court?”

And the initial answer should be:

“Similar work based on skill, interest and shifting workloads.”

As the new court matures, management should diagnostically assign different cases to different individual judges based on judicial interest, skill and shifting volumes of “routine” or other work.

To repeat, it is **essential** that the “old” Family Court institution not be perceived to manage fewer, long, lawyer controlled, high finance, high profile disputes, while the bulk of the DIY, self represented, routine and messy low profile disputes be handled by the “junior division” (of ex-Federal Magistrates). This perception or reality will guarantee lowered morale, conflict, client confusion and “transfer” strategies.

#### **(4) Names for Judicial Officers?**

See the suggestions at question (1) for names for the judicial officers.

#### **(5) What further court services are needed to achieve early, non-adversarial resolution of issues?**

This is an ongoing debate around the world with cycles of experiments taking place in different countries. The topic is too large to address in a short space. Here are some arguably “common” principles:

- (a) Courts should continue to issue a stream of clear, short and well-publicised precedents. These clear precedents assist legal practitioners, Family Relationship Centres, legal aid officers and other family dispute resolution practitioners and FRCs to give clear advice, and to sustain the rate of “settlement” over 90% of filed disputes. And importantly, the repetition of clear precedents also assists to refute gossip law, pub law, and sensationalist media reports which tend to promote conflict, especially since the 2006 amendments to the *Family Law Act*.
- (b) Without a steady stream of clear precedents, some angry spouses are encouraged to engage in long, intimidating and expensive combinations of negotiation, mediation and litigation in an attempt to wear out the other spouse/parent. (Some will continue to do that even when the precedents are short, clear and accessible! – see (e) below).
- (c) There should remain in place the facilities and incentives to take family conflicts early to FRCs, counselling, mediation, and children’s counselling; and post-court filing to counselling, mediation and conciliation.

- (d) There remains an important category of disputes which need court filing for complex reasons. Some other disputes unnecessarily use court filing.
- (e) Post-court filing, the vast majority of family disputes should be “case managed” towards an “abbreviated” judicial process. Presumably, less than 10% of court filings will reach a “full-blown” hearing. Again, it should be well publicised and researched on how any abbreviated decision-making works.
- (f) The features of existing and future abbreviated decision-making processes should include:
  - \* management of each court filing by a single judge
  - \* early identification and narrowing of issues and evidence
- (g) It seems that approximately 5% of “high conflict” families take up approximately 80% of the resources of courts (and perhaps also of FRCs and the child support agency?). The many recycled “solutions” to this dilemma have had high hopes, high costs and low returns. Nevertheless, comparative options for these “high conflict” cases need some realistic ongoing consideration. There is no evidence of easy solutions in Australia or elsewhere for high conflict families via therapeutic, mediation, legal or judicial interventions.
- (h) Page 52 of the Semple Report suggests that there is a “reduction in filings of more complex matters”. We are not sure of the various possible meanings of “complex”. Moreover, even if there is a general reduction in the total number of *filings* in Family Law Courts in Australia, anecdotally there appears to be ongoing “complexity” for those statistically few cases which reach “*full-blown hearings*”. This appears to reflect international trends.
- (i) The Federal Government should continue to provide research funding to the AIFS and to the Australian Family Law Court so that clear statistical information on (a)-(h) above is available on patterns of settlement in family disputes.