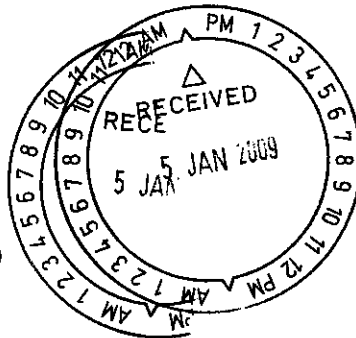




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By email to: fedcourtsconsultation@ag.gov.au

22nd December 2008

Dear Sir/Madam,

Re: Report on the Review of Future Governance Options for the Federal Family Law Courts in Australia - NLA comments

I refer to the request for comments/submissions on the recommendations made by the Report of the Review of Future Governance Options for Federal Family Law Courts in Australia ("the Report").

In responding we refer to the National Legal Aid (NLA) submission dated 30 May 2008 (a copy of which is attached) to the Review. We are pleased that the Report recommends the establishment of an integrated court system.

On the five discrete issues raised by the Review referred to in the consultation paper "Improving access to justice - a better framework for federal courts", (November 2008) we make the following submissions;

1. If there is to be a single family law court, what should it be called?
NLA's preference is for a name that is simple and understandable so that it promotes accessibility and reduces confusion for users. A simple description such as the 'Family Law Court' would meet this criterion. We note that our clients, who are users of the system, generally tend to call the courts the "Family Law Court" now.

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 matters is dealt with? If so, how?

NLA recommends the adoption of the following procedures:

- one set of simplified court forms and Rules,

- one clearly identifiable entry point
- documented case management practices which provide both consistency and flexibility
- continuance of a docket system of judicial case management as utilised in the Federal Magistrates' Court (FMC)
- referral of matters to, and involvement of social science and other expert evidence, including Family Consultant services at early stage of matter

NLA supports the current approach to court documents adopted by the FMC. The FMC model is preferred because there are fewer forms, the forms are simpler to complete and therefore more cost effective for litigants, and the legal aid system. A process should be adopted which will allow the Court to quickly determine relevant matters such as compliance with section 60I requirements and the complexity of a matter, at its outset. A pro forma document could be developed to the matters currently contained in the Parenting Questionnaire are addressed.

The new court should not adopt as a matter of course all of the existing Family Court (FCA) Rules. NLA is of the view that the FMC Rules are reflective of that court's 'service culture'. Simplified and plain English rules such as those on 'Documents' (part 2), 'Starting Proceedings' (part 4), 'Service' (part 6), 'Litigation Guardian' (division 11.2) and 'Divorce' (part 25) should be preferred over the FCA Rules governing these aspects of proceedings.

As set out in our previous submission, documented case management practices will 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. Flexibility should be sufficient to enable individual cases to be responded to as appropriate. From a legal aid perspective documented case management procedures assist with management of case load and cost, and enable the effective and efficient use of limited resources. Generally, the sooner the parties get before a "Federal Magistrate" the better.

NLA would welcome the ability for practitioners and litigants to work more closely with family consultants at the front end of a matter. The early referral of matters to family consultants ensures that litigants are given the opportunity for a simple, speedy and inexpensive resolution of their matters.

NLA supports the application of rules of evidence in the family law jurisdiction. The use of rules of evidence in child related proceedings allow for greater consistency in judicial decision making. The application of Division 12A of the Family Law Act to child related proceedings, particularly in so far as it relates to the hearsay rule, has overcomplicated matters, led to hearings taking longer, uncertainty and at times hostility on the part of litigants.

Any new case management procedures should take into account the need for parties to participate in mediation at all times and particularly closer to a final hearing. In some states currently expert reports (including Family Reports) are often not released until a week prior to a final hearing. This does not allow parties to explore alternative dispute resolution such as those offered by Legal

Aid Commissions which achieve high levels of settlement or narrow down the issues in dispute thereby saving valuable court time.

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

The FCA's draft Practice Direction No.2 of 2007 is a means of identifying matters appropriate for filing in the Superior/Appellate Division. By adopting and expanding on the main elements of those Practice Directions and having regard to the current judicial officer allocations, it is likely that the following matters could be heard in each division:

General division

- General parenting disputes
- General property matters (no jurisdictional monetary limit)
- Applications for Divorce and Nullity
- Child Support matters
- De Facto matters

Superior/Appellate Division

- Property matters involving third party creditors, multiple parties or complex valuation, business structure or trust issues
- Magellan matters
- Parenting matters in which welfare authorities choose to intervene
- Applications for medical procedures such as sterilisation
- Hague matters
- International adoption matters
- Matters involving complex questions of law and/or jurisdiction
- Appeals

It is not uncommon for a matter to involve complex property issues and non complex parenting issues. Our view is that in such cases, it may assist if the matters were severed or capable of being dealt with separately to an appropriate extent. It is in children's best interests that the resolution of parenting matters be given priority. This would also 1) allow children's matters to be resolved applying simpler, speedier and inexpensive procedures, and 2) avoid the need for an Independent Children's Lawyer funded by Legal Aid to provide representation throughout a lengthy hearing where most of the time is spent on evidence relating to property.

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?

NLA supports a conclusion of the review that all Federal Magistrates should be titled judges consistent with their appointment as Chapter III judges. If there is a need for a distinction then an existing Family Court judge could be referred to as Justice.

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

NLA strongly agrees with the conclusion that "court resources (in particular, Family Consultants) should be deployed as early as possible to enable a greater number of disputes to be resolved".

NLA suggests that appropriate active referral services to legally supported FDR, such as Legal Aid Commission FDR where one of the parties is legally aided are needed. This would rely on established agreed procedures and protocols so that matters appropriate for referral are identified as early as possible in the Court process.

Additional social science and other expert resources, including Family Consultants (at the expense of outsourced services) should be considered. This would ensure that;

- appropriate Family Consultant resources are available from as early as possible in proceedings,
- greater consistency in the evidence later put before the court,
- better quality control of the family reports being prepared, and
- family reports being released in a timely manner, thereby allowing parties to focus on settlement options before a hearing rather than on the day of a hearing.

Conclusion

Thank you for the opportunity to respond to the Report and the issues raised by it. If you would like to discuss any aspect of this submission or require any information from us please do not hesitate to contact Ms Smith who will refer matters accordingly.

Yours sincerely,

Mr N. Reaburn
Chairperson
National Legal Aid