



FAMILY COURT OF AUSTRALIA

CHAMBERS OF THE HONOURABLE DIANA BRYANT AO
CHIEF JUSTICE

Commonwealth Law Courts
305 William Street
Melbourne VIC 3000
Mail: GPO Box 9991
Melbourne VIC 3001

4 November 2013

Dr Warren Mundy
Presiding Commissioner
Access to Justice Arrangements
Productivity Commission
PO Box 1428
CANBERRA CITY ACT 2601

By email: access.justice@pc.gov.au

Dear Commissioner Mundy

PRELIMINARY SUBMISSION TO THE ACCESS TO JUSTICE ARRANGEMENTS INQUIRY

Further to our earlier discussions, this letter represents my preliminary submission to the Productivity Commission's Inquiry into Access to Justice Arrangements. It has been prepared by reference to the issues paper released in September 2013. As there are a number of matters contained in the issues paper that are of interest to me as the Chief Justice of the Family Court of Australia, I intend to make a more detailed submission in due course. I anticipate this will be provided to you no later than 13 December 2013. In the interim, I thought it would be of assistance to you and Commissioner MacRae if I identified the specific chapters I will be responding to and adumbrated the likely content of my submission on those chapters.

By way of initial comment, I confirm that I will only be discussing matters that are of particular relevance to the Family Court of Australia and not those that pertain to the civil justice system as a whole. As the Law Council of Australia observed in its preliminary submission (submission no. 11, 17 October 2013), there has been a vast amount of work on access to justice already undertaken by high level agencies, and I do not wish to revisit broad access to justice issues that have already been the subject of inquiry and report. I will also be raising one matter that I believe fits within the rubric of 'unmet need' but, understandably, has not been specifically addressed in the issues paper; namely the involvement of children in family law proceedings. As I will discuss in my substantive submission, that is an area in

which the Family Court is undertaking considerable activity. Finally, I wish to clarify that this preliminary submission, and indeed my substantive submission, are made in my capacity of Chief Justice of the Family Court of Australia. The views expressed herein, although developed in consultation with the Family Court's Law Reform Committee, do not purport to represent those of other Family Court judges or of the Court as a whole.

It is also important to record that Justice Cronin and I met with Commissioner MacRae for approximately ninety minutes on 8 October 2013 in what I hope was a productive meeting to discuss relevant issues. This followed a day spent in the Federal Circuit Court and the Family Court viewing cases. I remain open to further discussions if it will assist in clarification of issues.

The chapters I intend to respond to follow.

Chapter 3: Exploring legal need

How many Australians experience legal need?

I will look to provide you with statistical data from the Family Court's Casetrack electronic data collection system as to numbers of filings, settlement rates and, where matters settle, the stage of the case management process where settlement occurs.

Chapter 4: The cost of accessing justice

Timeliness and delays

I will discuss the use of particular processes in the Family Court of Australia which are intended to improve timeliness and reduce delays in certain types of cases. I will do this by reference to the Magellan case management system, which was designed to ensure that the cases which are the most resource intensive, and which involve the most vulnerable children, are dealt with as effectively and efficiently as possible. Magellan was the subject of a formal evaluation by the Australian Institute of Family Studies and I will be drawing on the findings emerging from that evaluation for the purpose of this discussion.

Chapter 5: Unmet need

Self represented litigants

Although I recognise that the issues paper refers to "self represented litigants", I prefer the term "unrepresented litigants" as I believe it more accurately describes their status.

Unrepresented litigants represent a significant proportion of the Family Court's client base, far higher than that which presents in the general federal law jurisdiction. It is an area in which the Family Court has historically devoted significant time and resources. I will survey available literature on unrepresented litigants in the Family Court of Australia and augment that with any data that the Court may hold as to the prevalence of unrepresented litigants, at first instance and (as is becoming an increasing issue) on appeal. I will discuss some of the challenges unrepresented litigants present for the Court as a whole and judicial officers in particular. I will then turn to some of the initiatives the Court has developed to better meet the needs of this client group. This will include discussion of the Full Court decision in *Re F: Litigants in Person Guidelines* (2001) FLC 93-072 and the work of the Self Represented

Litigants Committee, which has recently been renamed the Unrepresented Litigants Committee.

Appointment and funding of case guardians

Although it is not adverted to in the issues paper, I also intend to refer to the appointment of and funding for case guardians in Family Court proceedings as an area of unmet need. I will refer to Part 6.3 of the Rules and to relevant authorities, such *White v Green and Others (No 2)* (2009) 41 FamLR 185, which discuss the role and responsibilities of case guardians. I will also explain the long-standing difficulties the Court has experienced in securing the appointment of suitable case guardians when required, which is largely attributable to a lack of funding available to enable them to conduct proceedings. I will consider the implications for litigants who are under a disability as far as their ability to access justice is concerned and suggest possible ways of addressing this growing problem.

Chapter 11: Improving the accessibility of courts

The discussion of issues in chapter 11 is also relevant to some of the matters contained in chapters 6 and 8.

The conduct of parties

Here I will discuss vexatious litigants. I will first explain the relevant provisions of the *Family Law Act 1975* (Cth) (“the Act”) and *Family Law Rules 2004* (Cth) (“the Rules”), with a particular focus on section 118 and now section 102QB of the Act. I can provide information as to the number of people subject to an order made under section 118 and the number of orders currently operative. Again, I will discuss the challenges vexatious litigants present for the Family Court. In considering responses, I will refer in detail to Schedule 3 of the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth), which is designed to provide “a consistent and more comprehensive legislative framework for the federal courts to deal with vexatious proceedings brought by persons who have frequently instituted or conducted vexatious proceedings in Australian courts and tribunals, or who are acting in concert with others who have done so.” (Explanatory Memorandum to the Access to Justice (Federal Jurisdiction) Amendment Bill 2011)

Court processes

Here I will consider the following:

- Division 12A of the Act: what it is, how it came to be inserted into the Act, what it does and does not do, and how effectively it is operating in my view.
- The use of single experts and Part 15.5 of the Rules, which governs expert evidence. I will explain the salient features of the rules and the rationale for their introduction, as well as proffering an opinion as to how effectively they are working to achieve their objective, namely:
 - To ensure that parties only obtain expert evidence in relation to a significant issue in dispute.
 - To restrict expert evidence to that necessary to determine a case

- To ensure that expert evidence is given by a single expert, where that is practicable and in the interests of justice
- To avoid unnecessary costs
- To enable a party to seek permission to appoint an adversarial witness if the interests of justice require it.

In light of a passage contained in the issues paper, I will also refer in particular to the Family Court's ability to call its own witnesses, especially absent a party's or parties' consent.

- Discovery and disclosure obligations. I will discuss Chapter 13 of the Rules and some of the most significant cases that concern the issue of discovery in Family Court proceedings, including *Black & Kellner* (1992) FLC 92-287, *Weir & Weir* (1993) FLC 92-338 and *Chang & Su* (2002) FLC 93-117.

Reforms to court processes

Here I will explain the Family Court's case management system, with a particular emphasis on the use of registrars and conferencing in financial proceedings. Importantly, given that the Family Court was a leader in the institution of pre action procedures, I will discuss the relevant provisions of rule 1.05 and Schedule 1 of the Rules and explain what obligations are imposed on prospective parties and the consequences of non-compliance with the pre-action procedures.

Costs awards and court fees

This discussion will focus on section 117 of the Act and principally on section 117(2A), which contains the matters judicial officers need to have regard to in considering what order, if any, should be made for costs. I will refer to some of the leading decisions on costs, and the recent jurisprudence about awarding indemnity costs.

Court fees are a topical issue in the Family Court. I will discuss them by reference to the *Family Law (Fees) Regulation 2012* (Cth), some of the challenges the Court is experiencing in collecting daily hearing fees and various options the Court is considering to improve fee collection.

The use of technology

In discussing the use of technology, I will refer in detail to e-filing and the Commonwealth Law Courts Portal. Should you wish to obtain information about these services in advance of my submission, that can be found on the Family Court's website at:

<http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/eservices>

Finally, as I earlier foreshadowed, I will inform you about the way in which the 'voice of the child' is heard in family law proceedings, with specific reference to the use of independent children's lawyers and family reports. Funding for independent children's lawyers is a particularly important access to justice issue in a family law context; something that I understand the Australian Institute of Family Studies will be addressing in its forthcoming report on independent children's lawyers in the family law system. I will also provide an overview of the work of the Family Court's Children's Committee.

I trust the above is of assistance and I look forward to providing you with my substantive submission in December 2013.

Yours sincerely

Diana Bryant AO
Chief Justice