
Access to Justice (Federal Jurisdiction) Amendment Bill 2011

The Legal and Constitutional Affairs Committee

January 2012




Table of Contents

Introduction	3
Schedule 1: Discovery	3
Schedule 2: Supression and non-publication orders	4
Schedule 3: Vexatious proceedings	5
Schedule 4: Transfer of proceedings from courts of summary jurisdiction	5
Schedule 5: Administrative Appeals Tribunal fees	6
Attachment A: Profile of the Law Council of Australia	8

Introduction

1. The Law Council of Australia (**the Law Council**) exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law. For further information on the Law Council, please see **Attachment A**.
2. The Law Council is pleased to provide the following comments on the Access to Justice (Federal Jurisdiction) Amendment Bill (**the Bill**). The Law Council's Family Law Section; Federal Litigation Section; and Access to Justice Committee have all provided input into this submission.
3. In summary the Law Council submits the following:
 - (a) The Law Council has no objection to the approach taken in Schedule 1 of the Bill in relation to discovery cost orders.
 - (b) In relation to Schedule 2, the Law Council has some concerns with the drafting of section 102PF, which may exclude appropriate factual circumstances from being the subject of an order.
 - (c) The Law Council supports a consistent and more comprehensive legislative framework for the federal courts and tribunals to deal with vexatious proceedings as provided in Schedule 3 of the Bill.
 - (d) In relation to Schedule 4, the Law Council has concerns that the proposal to 'align' the jurisdictional limit of the matters heard by Family Law Magistrates in Western Australia with that of Federal Magistrates may be based on a misconception.
 - (e) The Law Council supports the amendments outlined in Schedule 5 of the Bill, as they will give greater flexibility to the AAT in administering fees, limiting the impact of the reduced fee on disadvantaged applicants and also encouraging early resolution of matters by primary decision makers.

Schedule 1: Discovery

4. Schedule 1 of the Bill clarifies the Federal Court's powers in relation to discovery, to make an order that:
 - (a) some or all of the estimated cost of discovery be paid for in advance by the party requesting discovery,
 - (b) a party requesting discovery give security for the payment of the cost of discovery, and
 - (c) specifies the maximum cost that may be recovered for giving discovery or taking inspection.
5. If Schedule 1 is enacted in its present form, the Law Council is concerned that parties may begin to routinely apply to the Court to exercise the above powers, potentially resulting in increased costs at the outset and place a significant barrier to

seeking discovery. This may potentially undermine access to justice. In particular, requiring a party seeking discovery to pay or provide security for costs in advance will disproportionately affect poorly resourced plaintiffs bringing claims against comparatively well resourced defendants.

6. However, the Law Council notes that the Court is best placed to determine whether such orders should be made and, in any event, it is likely that the general powers of the Court under the *Federal Court Rules 2011* already enable it to make such orders.¹ The effect of these amendments therefore is merely to highlight and clarify those powers. The Law Council has no objection to this approach.

Schedule 2: Suppression and non-publication orders

7. Item 1 of Schedule 2 inserts a new Part XIA (suppression and non-publication orders) into the *Family Law Act 1975*.
8. The proposed Part XIA introduces a new section 102PF which sets out the grounds for making a suppression order or non-publication order. Such orders can only be made if one of the grounds set out in that section has been satisfied.
9. The Law Council is concerned about the 'specific' nature of the drafting of section 102PF which may exclude appropriate factual circumstances from being the subject of an order. The Law Council suggests the addition of 2 additional sub-paragraphs so that section 102PF provides as follows:

102PF Grounds for making an order

- (1) The court may make a suppression order or non-publication order on one or more of the following grounds:
 - (a) the order is necessary to prevent prejudice to the proper administration of justice;
 - (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
 - (c) the order is necessary to protect the safety of any person;
 - (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency);
 - (e) where the best interests of a child of the parties or a child of a party to the proceedings requires it;
 - (f) in any other circumstance that the court considers just.
- (2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

¹ Rule 20.25 of the *Federal Court Rules 2011* (Cth) provides for non-party discovery costs and expenses. Sections 37P and 43 of the *Federal Court of Australia Act 1976* (Cth) confer broad powers of the Court including to make costs orders, and s.56 of the Act confers broad powers to order security for costs.

Schedule 3: Vexatious Proceedings

10. The Law Council supports a consistent and more comprehensive legislative framework for the federal courts and tribunals to deal with vexatious proceedings as provided in Schedule 3 of the Bill.
11. Item 2 of Schedule 3 introduces a new Part XIB (vexatious proceedings) into the *Family Law Act 1975*.
12. The proposed Part XIB introduces a new section 102QC which allows a person to request a certificate from a court stating whether the person named in the request is or has been the subject of a vexatious proceedings order.
13. The Law Council notes that there is nothing in section 102QC that relieves a court of its obligation to provide a certificate. Given the potential for a vexatious litigant to repeatedly and without proper justification request the issue of a certificate, the Law Council suggests that the proposed section be amended so that a court has discretion to refuse to issue a certificate in circumstances where the court concludes that the request(s) itself for the certificate are, by their repeated nature, vexatious.

Schedule 4: Transfer of proceedings from courts of summary jurisdiction

14. Items 2 and 5 of Schedule 4 remove the current monetary limit (\$5,000,000) on family property jurisdiction excisable by Family Law Magistrates in the Magistrates Court of Western Australia under section 46 of the *Family Law Act 1975*.
15. The Law Council is concerned that the proposal to 'align' the jurisdictional limit of the matters heard by Family Law Magistrates in Western Australia with that of Federal Magistrates (appointed to the Federal Magistrates Court) may be based on a misconception.
16. All current Federal Magistrates were appointed to their positions so as to be members of a trial Court (the Federal Magistrates Court). The selection process for Federal Magistrates in respect of each appointment proceeded against that background, and with an eye to that 'job description'. The same is not the case in relation to Family Law Magistrates in Western Australia. Most of the present Family Law Magistrates in Western Australia were appointed to their positions at a time when that position did not involve trial work of any nature, let alone trial work with unlimited jurisdiction in financial cases.
17. In a very real sense, therefore, the proposed amendments go much further than, as stated in the Explanatory Memorandum (page 3), to '...align the jurisdictional limit for matters heard by Family Law Magistrates in Western Australia with that of Federal Magistrates in the Federal Magistrates Court in other States and Territories' – rather, it grants judicial officers who in many cases were appointed to a dual role as a Registrar (presiding over conciliation and other conferences) and a Magistrate (presiding over interlocutory matters) unlimited jurisdiction to conduct trials.
18. While that is a matter for government, it is important that the decision is made properly informed of that background.

-
19. It follows that the Law Council suggests that the reference in the Explanatory Memorandum (page 3) to the achievement of 'national consistency' should be viewed against the same background.
 20. The Law Council notes also that in exercising non federal jurisdiction under the *Family Court Act (WA)* the Family Law Magistrates presently operate (other than with the consent of the parties) with a jurisdiction limited by a 'ceiling amount' defined to have the same meaning as in section 46(1AA) of the *Family Law Act*. The Law Council does not know whether there has been any consultation with the government of Western Australia in that regard, or whether the potential for Family Law Magistrates to have unlimited jurisdiction in cases involving married couples, but limited jurisdiction in cases involving de facto or same sex couples, has been considered.
 21. The Law Council acknowledges that the amendment would provide the Family Court of Western Australia with greater flexibility to allocate work between its Judges and the Magistrates of the Magistrates Court of Western Australia. The Law Council notes, however, that the current inadequate funding of the Family Court of Western Australia renders that additional flexibility moot. Regardless of the additional flexibility proposed, there will remain a very significant short fall in the judicial resources available to hear trials, and delays will remain unacceptable.
 22. There is a further element to the observations above. In recent years judicial resources have been provided to the Family Court of Western Australia by a series of short fixed-term appointments of Acting Magistrates. Apart from the obvious failure of that approach to address what are long term issues, the limitation of the appointments to a fixed and temporary term severely limits the range of candidates who apply for the positions, and excludes suitable candidates who are unwilling to give up permanent positions elsewhere to take up a temporary judicial post.
 23. If the proposal to remove jurisdictional limits for Family Law Magistrates in Western Australia proceeds, that issue must be addressed so as to ensure that the best possible range of candidates apply - rather than limit the field to those prepared to take on a temporary appointment in the hope it might be extended.

Schedule 5: Administrative Appeals Tribunal fees

24. In September 2010 the Federal Government introduced changes to the Administrative Appeals Tribunal (**AAT**) fee structure which replaced the AAT's powers to waive application fees with a flat fee of \$100, which is now levied in respect of any application to which a fee exemption previously applied. The Law Council has previously expressed its concerns to the Attorney-General's Department in relation to the introduction of the reduced application fee, which imposes an additional cost burden on disadvantaged applicants and a significant administrative burden on the AAT.
25. The amendments will allow the AAT to defer payment of the reduced fee to a later date. The Law Council believes that this would relieve some of the hardship faced by applicants unable to pay the reduced fee immediately upon lodgement of an application.
26. The Bill also empowers the AAT to prescribe fees on government agencies that unsuccessfully appeal or defend decisions before the Tribunal, providing a financial

incentive to promote better primary decision making and early resolution of issues where possible.² The AAT will also have the power to waive the fee in appropriate circumstances.

27. The Law Council supports the amendments outlined in Schedule 5 of the Bill, as they will give greater flexibility to the AAT in administering fees, limiting the impact of the reduced fee on disadvantaged applicants and also encouraging early resolution of matters by primary decision makers.

² *A Strategic Framework for Access to Justice in the Federal Civil Justice System: Report by the Access to Justice Taskforce, Attorney-General's Department, September 2009, recommendation 10.5.*

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.