



FEDERAL
MAGISTRATES
COURT OF
AUSTRALIA

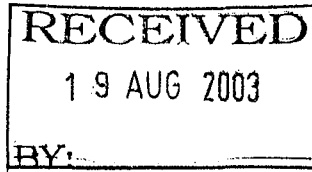
House of Representatives Standing Committee
on Family and Community Affairs

Submission No: 741

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Ms Kay Hull MP
Chair
House of Representatives Family & Community
Affairs Committee
Parliament House
CANBERRA ACT 2600

Dear Ms Hull

I attach the submission of the Federal Magistrates Court in relation to the Committee's inquiry into parenting and child support.

Please do not hesitate to contact me if the Committee requires additional information.

Yours sincerely

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FEDERAL MAGISTRATES COURT OF AUSTRALIA

Submission to the House of Representatives Family & Community Affairs Committee

The Federal Magistrates Court is a federal court of record established under the Constitution by the *Federal Magistrates Act 1999*. The Federal Magistrates Act commenced on 23 December 1999 when the Act received royal assent. Applications were first filed in the court on 23 June 2000.

Jurisdiction is conferred on the Federal Magistrates Court by laws of the Commonwealth other than the Federal Magistrates Act. The initial jurisdiction of the court was conferred by the *Federal Magistrates (Consequential Amendments) Act 1999*.

The court's objective is to provide a simple and accessible alternative to litigation in the superior courts. The Federal Magistrates Court encourages the use of alternative dispute resolution methods such as counselling, mediation and conciliation in every case before it.

Jurisdiction

The Federal Magistrates Court shares jurisdiction with the Federal Court and the Family Court. The Federal Magistrates Court currently has eight principal areas of jurisdiction.

Much of the court's workload focus is on family law, which constitutes about 80 per cent of the court's work. The areas of family law in which the Federal Magistrates Court has jurisdiction are:

- Applications for divorce.
- Applications concerning spousal maintenance.
- Property disputes where the property in dispute is worth less than \$700,000 or property disputes worth more with the consent of the parties.
- All parenting orders, whether the parents are married or unmarried.
- Enforcement of orders made by either the Federal Magistrates Court or the Family Court.
- Location and recovery orders and warrants for the apprehension or detention of a child.
- Determination of parentage and recovery of child bearing expenses.

The Federal Magistrates Court has the same jurisdiction as the Family Court in matters under the child support acts and the *Marriage Act 1961*.

This means that the Federal Magistrates Court exercises jurisdiction that is very similar to the Family Court, with the exception of adoption, property disputes concerning property worth more than \$700,000 unless both parties consent to the Federal Magistrates Court hearing the proceedings, and applications concerning nullity or validity of marriage.

In general federal law matters, the Federal Magistrates Court shares jurisdiction with the Federal Court in:

- Unfair trade practices matters arising under Division 1 of Part V of the *Trade Practices Act 1974* and product safety and information matters arising under Division 1A of Part V with power to award damages up to a maximum of \$200,000.
- Matters arising under the *Bankruptcy Act 1966*.
- Applications made under the *Administrative Decisions (Judicial Review) Act 1977*.
- Appeals from the Administrative Appeals Tribunal that are transferred to the Federal Magistrates Court by the Federal Court.
- Unlawful discrimination matters under the *Human Rights and Equal Opportunity Commission Act 1986*.
- Enforcement of determinations of the Privacy Commissioner and private sector adjudicators pursuant to the *Privacy Act 1988*.
- Concurrent jurisdiction with the Federal Court to review visa-related decisions of the Migration Review Tribunal, Refugee Review Tribunal and the Administrative Appeals Tribunal.
- some matters arising under the *Copyright Act 1968*.

The court's interest in the terms of reference

The committee's terms of reference raise important questions of public policy about matters that the court is required to determine, in accordance with law, daily. Parenting proceedings, particularly residence and contact disputes comprise a substantial component of the courts family law workload. Approximately 6 900 applications, or 75% of the final orders applications filed in the court, in 2002-03 involved an application for childrens orders. Child support proceedings are predominantly the domain of this court in those locations where the Family Court and FMC are co-located.

Because the court is so extensively involved in the adjudication of the types of cases with which the committee is concerned it is considered that it is inappropriate for the court to participate in the policy debate. Essentially, the court's role, through its federal magistrates, is to bring to each case an open mind and their legal expertise. Participation in the formulation of government policy or parliamentary debate has the potential to undermine public confidence in the court's independence and its capacity to deal with matters on a case by case basis. Accordingly while the issues raised in the inquiry are important and of interest to the court it is inappropriate for the court to participate in the committee's deliberations by offering a view about what the law should be.

On the other hand, because the court has considerable experience in the types of disputes that are the subject of the inquiry it considers that it has a responsibility to provide such information as it has to hand. It should inform the committee about the work of the court and the manner in which decisions are made under the current law. The purpose of this submission is, therefore, to provide relevant information in relation to the committee's terms of reference.

The court is concerned that any change in the law should only be made with full regard to the resource implications for it of the change. Major law reform in family law has in the past been accompanied by increased activity within the jurisdiction. People who may be disappointed by earlier outcomes take the opportunity to review their circumstances. In the contentious area of post-separation parenting many people to take their disagreements to a court, notwithstanding the availability of non-litigious courses of action. It is difficult for us to anticipate how changes to the law may affect demand for judicial time and primary dispute resources. We note, however, that there has been a discernible increase in the number of applications for shared parenting orders made to the court, including in pending proceedings, since the commencement of the committee's inquiry.

Perhaps the Australian Institute of Family Studies could inform the committee of trends in court filings after major law reform initiatives became law. If not, then some form of scoping study may assist in understanding the cost ramifications for courts (if any) of any changes to the family law jurisdiction that are recommended by the committee.

Conduct of the Children's jurisdiction

The children's jurisdiction is the jurisdiction of the court under Part VII of the Family Law Act.

The objects of the part are set out in subsection 60B(1) of the Act. They are to:

“ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.”

Principles underlying the objects are set out in subsection 60B(2). They are:

- "..... except when it is or would be contrary to a child's best interests:
- children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together
 - children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development parents should agree about the future parenting of their children."

Although the court keeps all orders that issue, it does not capture detailed data about the variables of outcomes of proceedings. For example, the court can identify the number of residence orders made but is unable to say whether the orders were for shared or sole residence. Additionally, the information that is needed to determine the prevalence of shared parenting arrangements can also be held in contact orders, without being expressed in the residence order itself. Given the broad range of orders that are made data collection would be complex and not be of value to the operation of the court.

Many parenting orders are made by consent before an application for final orders in the Family Court and State Magistrates Courts under procedures available under the Family Law Rules. This is an administrative procedure to simplify the making of consent orders when parties have reached agreement without the need for litigation. There is no similar procedure in the Federal Magistrates Service. This work is generally performed by Deputy Registrars (FCA) or Registrars (State Courts). The FMC has not established a separate hierarchy of registrars and in circumstances where our information suggests that demand for this work is met within the current system, we saw no reason to duplicate the existing service. Doing so seemed neither cost effective nor necessary.

Other factors to be taken into account

For the reasons already explained the court has no comment to offer in relation to the factors that might be taken into account when making children's orders under the *Family Law Act 1975*.

The factors that tend to suggest that one style of parenting orders suit a particular family's circumstances in preference to others, examined from the perspective of the child's best interests, are considered in many of the published judgments delivered by federal magistrates. Many of the judgments are published on the internet at http://www.fms.gov.au/judge/html/family_law.html, particularly under the headings: best interest of the child, contact, parenting, shared residence and residence. Time constraints and volume means that most judgments are not published on the internet. A complete collection of relevant judgments can be made available to the committee on request.

The circumstances in which contact with other persons should be ordered

The court has no comment to offer in relation to the circumstances in which contact with other persons might be ordered. The court has a judicial role in relation to applications for orders under Part VII of the *Family Law Act 1975*. The court notes that subsection 60B(2) of the Act provides that it is a basic principle, subject only to considerations of the best interests of the child, that all children should have contact on a regular basis with other people significant to their care, welfare and development.

Four of the court's decisions in relation to applications for contact with grandparents are published on the internet at http://www.fms.gov.au/judge/html/contact_grandparents.html. Some judgments are not published on the internet. A complete collection of relevant judgments can be made available to the committee on request.

Does the child support formula work fairly?

The court has no comment to offer in relation to the fairness of the operation of the child support acts. The court has a judicial role in relation to appeals and departure applications, which involve the court making a non-formula determination of child support. There are relatively few appeal matters, most applications being for departure from the application of the formula.

The basic policy of the child support scheme is that the financial obligations of separated parents for the welfare for their children will be assessed administratively. Most child support questions should be resolved without any court proceedings.

A parent cannot apply to the court for child support orders unless he or she has:

- already exhausted rights to administrative review of the Child Support Agency decisions;
- related proceedings before the court and the court considers that it would be in the interests of the carer and the parent to make an order in substitution for an administrative assessment; or
- there is an urgent need for an order for maintenance before an administrative assessment can be made, or
- a variation to a previous court order or child support agreement is sought, or
- an order for child support other than as a periodic payment is sought.

Many of the court's decisions in relation to child support applications are published on the internet at http://www.fms.gov.au/judge/html/child_support.html. A complete collection of child support judgments can be made available to the committee on request.

While this is not an issue that goes to the heart of the committee's reference, ie the fairness of operation of the scheme, the court offers the view that there is scope for simplification of some of the legislated procedures related to the conduct of departure applications. Simplification could benefit all parties to proceedings.