Family Law Council

07/10991

9 December 2008

The Hon Robert McClelland MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney-General

Family Law Council advice on amendments to the *Family Law Act 1975* regarding mental health issues in the family law system

1. TERMS OF REFERENCE

On 5 July 2007 the Family Law Council received terms of reference from the Attorney-General. The Council has been asked to examine whether there should be amendments to the *Family Law Act 1975* ("the Act") to give courts a wider jurisdiction to make orders in proceedings where mental health issues arise.

The terms of reference are:

A. Whether the *Family Law Act 1975* (Commonwealth) should be amended to allow a court exercising jurisdiction under the Act to make orders:
   (a) relating to the assessment of, and reporting on, a party's mental health, and the treatment of the party's mental health.
   (b) relating to the assessment of, and reporting on, whether a party has a physical or mental disability affecting his or her understanding of the nature or possible consequences of the case, or affecting his or her

capacity to adequately conduct, or give instruction for the conduct of, a case.

B. How the costs of obtaining a report as to a party's mental health should be funded.

INTRODUCTION.

The Council adopted the following approach to the Terms of Reference:

(1) While Council members decided it was not necessary to seek to amend A(a) in the terms of reference, the Council determined that "*mental health*" should be considered in the context of whether a litigant posed a danger to themselves and/or others.
(2) The Council also considered, in circumstances where the litigant lacks the capacity to conduct, or give instructions for the conduct of a case, the practical difficulties encountered in appointing a litigation guardian.

The Council recommends legislative reform to give courts a wider discretion to order a party to undertake an assessment as to mental health status and to obtain a report. Council does not recommend that the court be given additional power to compel a party to accept treatment. State legislation already provides for voluntary or involuntary treatment for those suffering mental illness.

Council also recommends legislative reform in relation to the question of whether a party has a physical or mental disability affecting his or her understanding of the nature or possible consequences of the case, or affecting his or her capacity to adequately conduct, or give instruction for the conduct of, a case.

In Council's view such legislative reforms will better provide for the immediate safety of the parties and/or a child, the subject of proceedings, and are likely to improve the procedure for the appointment of a case/litigation guardian.

2. CURRENT POSITION

There is no express provision in the Act giving the Courts jurisdiction to order a party to submit to a psychiatric or psychological assessment. However, the Courts may use the powers set in out in ss.65D(1), 67ZC, 68B and 114 to do so. In addition or as an alternative, a court can order an expert report pursuant to S. 62G(2).

In *L & T* the Full Court of the Family Court of Australia set aside an order made by the trial judge that the wife under go psychiatric assessment and treatment. The Full Court held that the Court has power to order a party to attend upon a psychiatrist and undergo treatment as a condition of a parenting order under ss.65D(1), 67ZC, 68B or 114, but not otherwise. In *Hunt & Hunt* Barlow J held that the Court has power (in spousal maintenance proceedings) to make an order that the wife attend upon a doctor for a medical examination under ss.72, 74, 75(2), 79, 80(1)(k). His Honour distinguished the decision in *L & T* on the basis that the orders made in *Hunt & Hunt*

were interlocutory orders and the making of such orders was incidental and necessary to the exercise of the Court's jurisdiction.

The Court is entitled to rely on its own observations to make an assessment about the capacity of a party: see, for example *Murphy v Doman* (2003) 58 NSWLR 51 at 37 (Handley JA); *AJI Services Pty Ltd v Manufacturers Mutual Insurance Ltd* (2005) NSWSC 709 (Bell J)[1]. However, the Court generally requires medical evidence to determine the mental health status of a litigant where incompetence or incapacity is alleged by another party or where a lack of capacity is apparent from a litigant's behaviour in the courtroom. For example, a litigant may be repeatedly disruptive, may appear to have limited understanding of what is happening or fail to understand the meaning of court orders and the need to comply with orders.

Without the power to compel a party to undergo a mental health status assessment, the court can face an insurmountable problem. The court may be unable to protect the safety of a child or another party and may be unable to determine whether or not a party requires a case/litigation guardian. Council has decided the court needs a mechanism to protect its process and to protect the rights of a litigant where another party requires the appointment of a litigation/case guardian.

3. LITIGATION GUARDIANS

Under Rule 11.11 of the *Federal Magistrates Court Rules 2001* the Federal Magistrates Court may appoint, on its own motion, a litigation guardian and a person becomes a litigation guardian if he or she consents to the appointment. The Family Court can use Rule 6.10(1) of the *Family Law Rules 2004* to appoint a case guardian or litigation guardian, subject to the requirements of Rules 6.08 and 6.09 being satisfied. The Attorney-General may also nominate a person to act as a case/litigation guardian.

The powers, obligations and liabilities of litigation guardians are provided for in the Rules and in the common law.

The Council has decided the current arrangements for the appointment of a litigation guardian are unsatisfactory. There are a number of problems. Solicitors are often reluctant to act as a litigation guardian because of perceived exposure to liability and the uncertain funding of the litigation. There are particular problems in property proceedings when a litigation guardian cannot obtain adequate instructions to identify the asset pool, to assess contributions or s. 75(2) factors, leaving himself/herself exposed to an inability to be remunerated out of the asset division awarded to the party for whom he or she is litigation guardian or even possibly a personal costs order. The Council recommends that the Government consider legislative immunity, limited by an obligation of bona fides. Council members agree that arrangements which involved State Trustee Offices were never satisfactory because suitable persons were not made available in a timely manner, and sometimes a relative or friend had a conflict of interest because of their relationship with the litigant.

[1] Referred to in *L v Human Rights and Equal Opportunity Commission* [2006] FCAFC 114.

The Council recommends that:

(a) Litigation guardians be appointed by an independent body in the same way that Independent Children's Lawyers are appointed by Legal Aid bodies from a panel of specialists. If Legal Aid bodies cannot assist then Community Legal Centres might agree to nominate a panel of litigation guardians whom the Centres can then support.

(b) The Legal Aid bodies be approached with a suggestion that funding of litigation guardians in property cases be reimbursed out of the assets of the parties in a pre-determined formula manner or by an apportionment to be determined at trial or by agreement between the parties. In children's cases such funding could be provided by Legal Aid bodies who would have a right to seek contribution from one or both parties. The Commonwealth would need to provide adequate funding.

4. COSTS OF MENTAL HEALTH STATUS ASSESSMENTS

Council recommends that the costs associated with any assessment and reporting as to a party's mental health status and its impact on a party's ability to understand the court process or adequately conduct or give instructions in proceedings, be borne by the parties in the first instance. In property proceedings, these costs can be taken into account in the property adjustment. In parenting proceedings or property proceedings when funding is not available at the time of the order, these costs can be met by the Legal Aid bodies. Those bodies will then require the ability to recoup their costs from the parties at the conclusion of the proceedings. Again, the Commonwealth would need to provide adequate funding. The Rules of each Court are likely to require amendment to accommodate these funding arrangements.

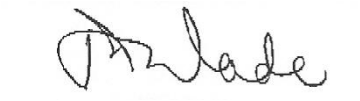
5. PROVISION OF FUNDING BY THE COMMONWEALTH

Council is aware that Legal Aid bodies may claim to have insufficient funding to meet any of these costs. In Victoria, not all orders made for the appointment of an Independent Children's Lawyer are funded by Victoria Legal Aid and thus those orders become incapable of practical effect. Presently there is a quota system in place which provides for a certain number of appointments to be made each month. Those appointments are made on the basis of the first received in each month, ceasing when the quota number is reached. There has not been a consideration of which cases deserve funding above others. The approach has been that a judicial officer determines in accordance with the law which cases require the appointment of an Independent Children's Lawyer and no further classification is undertaken by the Legal Aid body.

In relation to the appointment of a litigation guardian Council suggests there be some guidelines developed by Legal Aid bodies to distinguish between cases so that in the instance of a litigation guardian being unable to be funded by the parties themselves, some cases will be found to be more deserving of funding than others based on an

objective set of criteria in circumstances where funding is curtailed. It is not anticipated that any considerable funding would be required. The need for a litigation guardian in proceedings is limited. In those cases where it is necessary there is often funding available from the parties themselves. The costs associated with assessment and reporting would be more problematic but the Courts themselves have some ability in this regard through the preparation of court-ordered reports. In addition within some relationship centres (such as the Drummond Street Relationship Centre) there is a family mental health support service providing a "spectrum of interventions" to include promotion, prevention, early intervention, treatment and continuing care. Assessments and a form of reporting as determined by the service provider could be provided to the Court from these relationship centres.

Yours sincerely,



Professor John Wade
Chairman