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Family Law Council

05/12735

13 December 2006

The Hon Philip Ruddock MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

**Family Law Council advice on the recommendations made in Council's 2000 report:
*Litigants in Person***

In August 2000, the Family Law Council (Council) prepared a report titled *Litigants in Person* (copy enclosed). The report made a number of recommendations about possible responses to the needs of self-represented litigants. To date, Council has not received a government response to this report. Therefore, Council, with the approval of the Attorney-General, reconsidered the recommendations in the report to ascertain whether they have been implemented or superseded by other developments and if they have any ongoing relevance. This letter of advice sets out the results of Council's investigations and the status of each of the recommendations.

Council established a subcommittee to conduct this review of the recommendations. Members of the committee were the Hon Susan Morgan, retired judge of the Family Court of Australia; Justice Garry Watts, judge of the Family Court of Australia; and Ms Nicola Davies, Senior Legal Consultant (Family Law) at Legal Aid Queensland. The committee consulted with all legal aid commissions around Australia about relevant recommendations, and the Family Court of Australia's Litigants in Person Committee was also sent a draft of this advice to consider.

In summary, Council recommends that Government action is still required in relation to the following recommendations. The Government should:

- consider the cost effectiveness of providing legal aid compared to the costs created by self-represented litigants in the court system (see discussion of Recommendation 9, below)
- give further consideration to increasing the availability of legal aid in family law matters so that there may be fewer self-represented litigants in the system (Recommendation 10, below)
- give attention to the coordination of community legal education services as part of the roll-out of Family Relationship Centres (Recommendation 11, below), and
- consider expanding the Court Network model in Victoria to all Family Court Registries, bearing in mind the Combined Registry Project between the Family and Federal Magistrates Courts (Recommendation 12, below).

STATUS AND DISCUSSION OF THE RECOMMENDATIONS

Council's *Litigants in Person* report made 18 recommendations. In summary:

- Two recommendations have not been implemented.
- Six recommendations have been partially implemented.
- Eight recommendations have been fully implemented.
- Two recommendations have been superseded.

A. RECOMMENDATIONS THAT HAVE NOT BEEN IMPLEMENTED

<p><u>Recommendation 12</u>: The Commonwealth Government, in consultation with the Family Court, should consider expanding the Court Network model in Victoria to all Family Court Registries.</p>
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Court Network is a non-legal court-support service which currently provides services to clients of the Family Law Courts in the Dandenong and Melbourne Registries. Court Network received funding from the Federal Attorney-General's Department to conduct a pilot Court Network service in the Commonwealth Law Courts in Brisbane. As such, the Court Network service commenced operation in December 2006. The purpose of the pilot is to provide comprehensive, empirical data on the outcomes of Court Network's services to assist in the proposal for a national expansion. Court Network will provide non-legal, non-aligned support, information and referral to Family Law Court clients. All other registries have basic volunteer networks to assist clients but these are provided by various different groups; for example, Adelaide has the Justice of the Peace Program, Townsville has a volunteer program.

Council advises that this recommendation should at this time be considered by the Government in light of the Combined Registry Project, which involves the Family Court and the Federal Magistrates Court working together to implement a combined courts registry that will simplify the path into the family courts system.

B. PARTIALLY IMPLEMENTED RECOMMENDATIONS

Recommendation 8: That National Legal Aid and the Attorney-General's Department work together to develop coordination points to:

- (a) provide coordinated assistance for applicants for legal aid, to ensure that applicants provide all relevant information, so that merits assessment decisions are fully informed
- (b) provide coordinated referral or assistance for legal aid applicants whose assistance is terminated, such as procedural assistance, and
- (c) In partnership with the legal profession, develop a coordinated family law duty lawyer or similar services.

Recommendation 8 (a) and (b) have not been implemented. Recommendation 8 (c) has been implemented.

Recommendation 9: That additional legal aid funds be targeted to ensure that family law matters receive greater and wider assistance, by revising the legal assistance guidelines to ensure:

- (a) greater priority to family law
- (b) to address family law domestic violence issues, and
- (c) to ensure merits tests are applied more consistently by legal aid commissions.

Parts (a) and (b) of this recommendation have been implemented as the legal assistance guidelines have been revised to ensure priority is given to family law and to address family law domestic violence issues.

Part (c) of the recommendation remains outstanding as the merits test is still not applied consistently. Professor Rosemary Hunter (et al) prepared research on the issue of legal aid and self-represented litigants, *Legal Aid and Self-Representation in the Family Court of Australia*.¹ The research found that between one half and two-thirds of the self-represented litigants who had applied for legal aid had been unsuccessful. Approximately 25% of litigants were rejected on the basis of the means test, 25% on the basis of guidelines, 5% on the basis of the legal aid funding cap, 15–20% for other reasons and 30% on the basis of merit.

The report found that, between the different Registries included in the research, there were differences in success rates and the reasons for rejecting applications.² The differences can be attributed to the family law funding positions of the legal aid commissions. For example, in Brisbane, the high demand for family law legal aid funding resulted in an increased likelihood that applications would be rejected. Most applications for legal aid in Brisbane were rejected on the basis of merit (72%). By contrast, in Melbourne, where the demand for family law

¹ Socio-Legal Research Centre, Griffith University, May 2003.

² Registries included, Brisbane, Perth, Canberra and Melbourne.

funding is lower, applications for legal aid were more likely to be successful and more likely to be rejected on the basis of means.

The report found that there was a problem with the ‘shortage of funding relative to the demand and objective eligibility’ of the legal aid commissions, which can only be alleviated by placing stringent barriers on the application of the merits test.³ Legal Aid Queensland’s ‘narrow reading’ of the merits test can be assumed to be a result of the obvious funding constraints.⁴

Council recommends that the Government consider the cost effectiveness of providing legal aid compared to the costs created by self-represented litigants in the court system.

Recommendation 10: Assistance models that address the needs of unrepresented litigants should be evaluated, and their expansion to areas that lack services for unrepresented litigants should be considered.

The part of the recommendation about expansion of services for self-represented litigants has been partially implemented by the duty lawyer service provided by legal aid commissions.

Pursuant to an Australian Research Council Discovery Grant, Professor Rosemary Hunter and Professor Jeff Giddings have undertaken an evaluation of a range of ‘new’ services provided by legal aid commissions. These services are either directed towards assisting self-represented litigants, or may provide such assistance. The case studies included in the evaluation that directly or indirectly assist self-represented litigants in family law are as follows.

- (a) Self-help kits: Legal Aid Queensland’s Domestic Violence Protection Order Kit and Victoria Legal Aid’s Family Law Self-represented Litigants Kit.
- (b) Group-based services: Victoria Legal Aid’s Family Law Self-represented Litigants Workshop and Western Australia Legal Aid’s Child Support Forum.
- (c) Duty lawyer services: Victoria Legal Aid’s Family Law Duty Lawyer Service.
- (d) Technology-based services: Legal Aid Queensland’s Legal Information Kiosk, Legal Aid Queensland’s Western Queensland Justice Network (which aims to provide legal advice to remote clients by means of videoconferencing), and the Commonwealth’s Family Law and Regional Law Hotlines.

The finalised report concerning the evaluation of these assistance models will be provided to legal aid commissions in February–March. This evaluation only partially implements the recommendation as it is not evaluating all kinds of assistance models for self-represented litigants.

³ Professor Rosemary Hunter (et al), *Legal Aid and Self-Representation in the Family Court of Australia* (2003) Socio-Legal Research Centre, Griffith University, p. 34.

⁴ *ibid.*, p. 25.

Council sought the view of the National Association of Community Legal Centres about this recommendation. They commented that '[t]o the best of our knowledge recommendation 10 has not been implemented. Neither has it been superseded. Whilst our services provide invaluable support and assistance to self-represented litigants we caution against seeing service provision to self-represented litigants as the principal solution to the problems posed by the high numbers of self-represented litigants in the family law system. In our view, the government should first give further consideration to increasing the availability of legal aid in family law matters so that there may be less self-represented litigants in the system. In particular, urgent consideration should be given to implementing the relevant recommendations made by the Legal Aid and Access to Justice Inquiry'.

<p><u>Recommendation 11</u>: The National Association of Community Legal Centres and National Legal Aid should coordinate community legal education services.</p>

A number of local pathways groups provide community education and most of these groups have National Association of Community Legal Centres and National Legal Aid representatives. This is along the lines of the recommendation, although it is not coordination.

There is a State-specific booklet called *Untying the knots* currently produced by National Legal Aid. The Attorney-General's Department will take over the funding of this booklet; however, production will remain with National Legal Aid. The booklet is aimed at assisting in community education. The National Association of Community Legal Centres intends to produce a booklet on an annual basis commencing 2007. The booklet will provide a listing of all community legal education resources produced by community legal centres, and will be widely available.

These initiatives do not achieve the coordination role Council recommended. The National Association of Community Legal Centres advises that it works cooperatively with National Legal Aid on a number of small projects, principally through the Australian Legal Assistance Forum. However, this work is limited due to resource constraints of both organisations. The National Legal Aid Secretariat has only recently increased its staffing to two positions, and the National Association of Community Legal Centres has three full-time positions. The National Association of Community Legal Centres indicated that, unfortunately, without additional resources, it is not in a position to coordinate community legal education services with National Legal Aid.

In light of recent reforms, Council recommends that the Family Pathways Branch of the Attorney-General's Department consider this recommendation as part of the roll-out of Family Relationship Centres and community education campaign, so that the task of coordinating community legal education services is not specifically left to the National Association of Community Legal Centres and National Legal Aid.

Recommendation 13: Legal professional bodies, in cooperation with National Legal Aid, should develop and coordinate the delivery of unbundled legal services, especially in family law matters.

This recommendation has been partially implemented. The Law Council of Australia, in response to the Federal Civil Justice Strategy paper, has formed a subcommittee to report in respect of discrete task representation, which is akin to unbundled legal services. The Family Law Section of the Law Council is represented on the Law Council's subcommittee.

Council is aware that the Californian Family Court has put together model cost agreements for unbundled legal services, also known as Discrete Task Representation or limited scope representation. There are four types of fee agreement:⁵

1. Single Consultation Agreement
2. Consulting Services Agreement
3. Ongoing Consulting Agreement, and
4. Limited Representation Agreement including Court Appearance.

Recommendation 14: The Commonwealth Government should consider revising its legal assistance guidelines to allow legal aid commissions to deliver unbundled services.

Unbundled services are being delivered by a number of legal aid commissions and the Directors of National Legal Aid have provided a best-practice framework for the provision of discrete task legal services.

Recommendation 18: That the Pathways Advisory Group consider the coordination of services required by unrepresented litigants, and the most effective means of meeting the needs of unrepresented litigants, including:

- (a) the development of coordinated on-line legal and information services
- (b) the coordination of services by the Federal Magistrates Service, State and Territory Magistrates Courts and the Family Court, and
- (c) coordination of referral services, including counselling and PDR service providers.

This recommendation is in the process of being implemented. Part (a) will be achieved by the family law on-line and the telephone advice service.

Part (b) will be achieved by the Combined Registry Project.

Part (c) is being achieved with the rollout of Family Relationship Centres. The Government in its 2005 Budget announced funding of \$188.7 million from 2005–2009 to establish Family Relationship Centres.

The Government has also set aside additional funding of \$13.4 million over the four years to go towards expanding dispute resolution services. This funding will go towards the expansion of community-based mediation and similar services. The Government has also committed a 30% increase in funding for community based services, which will deal with counselling and PDR services.

⁵ These are available on the State Bar of California website at <<http://www.calbar.ca.gov>>.

C. FULLY IMPLEMENTED RECOMMENDATIONS

Recommendation 1: The Family Court and the Federal Magistrates Service should consider education and training for registry staff who assist unrepresented litigants.

Council is aware that such training is provided by the two courts.

Recommendation 2: The Family Court and the Federal Magistrates Service should consider providing specialist information sessions for unrepresented litigants, and for agencies that assist them, in addition to current information sessions.

The duty lawyer service provided by legal aid commissions performs this function and, once Family Relationship Centres are established, they will also provide information sessions.

Recommendation 3: The Family Court and the Federal Magistrates Service should identify and collect data to ascertain the needs of unrepresented litigants.

In 2002–03 the Family Court’s Self-Represented Litigants Committee released a report on the achievements of the first two years of its project to better assist clients’ use and understanding of the Family Court’s services. The Family Court has established a working group including representatives of key external bodies such as Legal Aid, other courts and the legal profession, which works in partnership to continue to deliver better services for self-represented litigants.

The Family Court collects data on litigants in person which assists this work. The latest data shows that, of cases that had a defended hearing during the 2005–06 financial year, 36% had at least one party self-represented at the trial. Of final orders applications during the same period, 32% had at least one party self-represented.⁶

The Federal Magistrates Court released a report about self-represented litigants in October 2004 titled *An Evaluation of Services for Self-Represented Litigants in the Federal Magistrates Court*.⁷

The project involved two phases. During phase one, three independent consultants were employed to pose as self-represented litigants in the court and provide feedback about their experiences. During the second phase, 70 self-represented litigants were surveyed. The survey covered topics such as contact with the Federal Magistrates Court, primary dispute resolution, preparing documents, the court hearing and overall experiences with the Federal Magistrates Court.

⁶ Family Court of Australia, *Annual report 2005–06*, Sydney, 2006, viewed 4 December 2006, <http://www.familycourt.gov.au/presence/connect/www/home/publications/annual_reports/2005_2006_annual_report>.

⁷ Available in the ‘reports’ section of the Australian Institute of Judicial Administration website at <<http://www.aija.org.au>>.

The results provided the Federal Magistrates Court with an insight into the needs of self-represented litigants. The findings also assisted the court to identify the positive work and initiatives already implemented as well as areas requiring attention or improvement.

Recommendation 4: Family Court procedures should be revised with a view to providing services and greater guidance specifically for unrepresented litigants, and to developing guidelines and a judicial protocol.

The Family Court offers self-represented litigants specific assistance in preparation for their final hearing. They are contacted through telephone and letter by client services staff and offered procedural assistance with preparation for their hearing. The Family Court also developed an online ‘Step by Step Guide’ for self-represented litigants which now forms the basis of information provided on the Family Law Courts website launched on 1 July 2006. The guide provides information about the procedures and forms that need to be completed by the litigant at the commencement of proceedings, at the resolution phase and the determination phase. The guide provides litigants with knowledge to enable them to complete the necessary requirements prior, during and at the conclusion of the proceedings to ensure that litigants comply with the relevant Rules of court.

Council is also aware that a self-represented litigants’ information kit was developed and trialled by the Family Court in collaboration with the Federal Magistrates Court and other agencies.

The Family Court and Federal Magistrates Court both provide a variety of brochures, booklets and do-it-yourself kits which provide information on common problems and questions that arise in court proceedings and assist litigants to complete court forms.

Both courts have useful information on their websites and on the Combined Registry Family Law Courts website. For example, the Family Court developed an on-line virtual tour about going to court (now located on the Family Law Courts website), which provides information about forms, the conduct and structure of the Court, and how litigants should act and dress. The Federal Magistrates Court offers an on-line interactive divorce form, which provides a step-by-step guide to completing the Application for Divorce.

The Federal Magistrates Court also has a Simple Divorce Kit available to self-represented litigants. The kit includes a divorce application and a guide on how to complete, file and serve the application.

Other procedures that are in place to assist self-represented litigants are that all registries now have duty lawyers provided by legal aid commissions, and these duty lawyers are available to self-represented litigants. The Family Court’s Less Adversarial Trial (formerly Children’s Cases Program) provides a hearing process that is easier for self-represented litigants to understand and negotiate.

Recommendation 5: The AIJA, the Family Court and the Federal Magistrates Service should consider a training program to increase judicial awareness of the issues surrounding unrepresented litigants.

The Family Court addresses issues relating to self-represented litigants as part of its judicial education program and has developed a training package to assist court staff to better understand the needs of self-represented litigants for procedural assistance.

Council is aware that the National Judicial College delivered training for federal magistrates on 18 October 2004, which covered the subject matter of Litigants in Person.

The Federal Magistrates Court has indicated that it is open to further training to increase and improve judicial awareness of the issues surrounding self-represented litigants and welcomes the opportunity of working with the Family Court and Federal Court to achieve this. Also, over time, the Federal Magistrates Court will need to conduct similar training programs to those conducted in October 2004, aimed at new appointees, and may use those opportunities to refresh the exposure of federal magistrates who completed earlier programs.

Recommendation 6: The Family Court, legal assistance service providers and the Commonwealth Government should consider providing education following final orders, to include an explanation of what orders mean, how to make the best of the outcome and compliance. Coordination of support and assistance for unrepresented litigants who have finished litigation should also be considered.

Recommendation 7: Court and community providers of PDR counselling services should consider delivering post-order counselling for unrepresented litigants.

Recommendations 6 and 7 are linked, as both concern courts and community services providing support to self-represented litigants after proceedings have been completed.

Council is aware that, at present, Family Court judges do make orders at a final hearing requesting additional assistance be provided to self-represented litigants post hearing. However, there are no specific statistics kept on how often this occurs. The Family Court is currently piloting a mediation program at the Melbourne Registry that incorporates following up with clients post hearing to provide limited ongoing support and referral to other support agencies. The Family Court has received further one-year funding only to support the additional resource demands of this program, titled the 'Child Responsive Model'. The model also has a number of other features besides post-litigation support.

The Federal Magistrates Court indicated that federal magistrates can and do send parties to post-order counselling so that orders can be explained and parties can be counselled about how to make orders work. It is also noted that there is an increasing trend for federal magistrates to order parties to a post-separation parenting program in matters other than contravention applications. Current enhancements are being made to the PDR database so that the Federal Magistrates Court can collect statistics on this.

Outside the courts, the development of Family Relationship Centres will allow easy and appropriate referral to community organisations to provide such counselling services. The increased availability of post-parenting order programs has opened new possibilities for longer-term post-order therapeutic family counselling.

The Contact Orders Program delivers post-order counselling for self-represented litigants. Council notes that additional funding has already been provided for these services.

Recommendation 16: Professional bodies should consider what sort of professional conduct rules, if any, it should develop to guide legal practitioners in their dealings with unrepresented litigants.

Part 4 of the *Best Practice Guidelines for lawyers doing family law work* is about self-represented litigants.⁸ It provides a guide for legal practitioners in the following areas:

- lawyers acting against a self-represented party
- lawyers who are engaged by an otherwise self-representing litigant for specific aspects of a matter, and
- lawyers acting as Child Representatives in matters in which either or both parents are self represented.

The Bar Associations of all States and Territories except Tasmania have rules under the subject of ‘duty to opponent’ or ‘communication’ which provide a guide for barristers in dealing with self-represented litigants.⁹

D. RECOMMENDATIONS THAT HAVE BEEN SUPERSEDED

Recommendation 15: The use of technology, such as the information booths provided by Legal Aid Queensland, should be encouraged and coordinated by National Legal Aid and the Commonwealth Government.

The information booths are no longer used in Queensland. This recommendation has been superseded by use of the internet and is no longer relevant.

For example, the following websites provide access to information about family law, legal services and processes:

- courts (Family Court of Australia, Family Court of Western Australia and the Federal Magistrates Court)
- National Legal Aid
- Family Law Section of the Law Council of Australia
- State and Territory law societies
- National Association of Community Legal Centres, and
- Australian Law On-line.

⁸ The guidelines were prepared jointly by the Family Law Section of the Law Council of Australia and the Family Law Council and are available on both websites.

⁹ These are available on the Bar Association websites.

Recommendation 17: The Commonwealth Government should consider re-examining the apportioning of costs, including the issues surrounding security for costs, under the *Family Law Act 1975*.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'P. N. Parkinson', with a horizontal line extending to the right.

Professor Patrick Parkinson
Chairperson