

Mr Des Semple  
Chairperson  
Family Law Council  
KPMG  
Level 25  
45 Clarence Street  
SYDNEY NSW 2000

24 August 1999

The Hon Daryl Williams AM QC MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General

**Commonwealth priorities and guidelines for legal assistance in respect of matters arising under Commonwealth law**

Your Department wrote recently to the Family Law Council seeking Council's comments on the Commonwealth's legal assistance priorities and guidelines in the context of their review.

Council considered the priorities and guidelines at its recent meeting in Brisbane on 12-13 August 1999. I have provided Council's comments and suggestions directly to Dr Browne in the Family Law and Legal Assistance Division of your Department for consideration in the review process.

I enclose a copy of my letter to Dr Browne for your information.

Yours sincerely

Des Semple

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23 August 1999

Dr Margaret Browne  
First Assistant Secretary  
Family Law and Legal Assistance Division  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

Dear Dr Browne

### **Commonwealth priorities and guidelines for legal assistance in respect of matters arising under Commonwealth law**

Thank you for your letter dated 21 July 1999 providing an opportunity for the Family Law Council to comment on the Commonwealth's priorities and guidelines in the context of their current review.

Council was able to consider the priorities and guidelines at its Brisbane meeting on 12-13 August 1999, and is pleased to be able to offer comments and suggestions.

#### **Priority for child representation in parenting cases.**

Council took the view that it may be desirable to consider the relative advantages of providing legal assistance for children as distinct from the parties, where funds do not permit both to be represented. Arguably, in some or even most cases there will be more benefit for the court if the children are represented and both parties are unrepresented than if legal aid is provided for the parties to be represented and the children are unrepresented. The child's representative can act to some extent as *amicus curiae* in helping the court establish what is in the best interests of the children.

Council recommends that consideration be given to a possible general guideline that legal representation for the children might be more beneficial than legal aid for the parties.

#### **Account to be taken of the degree of difficulty in parenting cases.**

While the Court's task of determining what will be best for the children will always be more difficult when there are unrepresented parties, some cases will prove more difficult than others. For example, unrepresented litigants might have some ability to tell their story and call witnesses in their case where the issues are relatively straight forward, but be quite unable to cross-examine, issue subpoenas, and engage in the other tasks necessary to establish, for example, an allegation of abuse.

Council recommends that consideration be given to including among the guidelines the notion that the argument for funding a party's case may be stronger where the nature of the issues in the case make it less likely that the court will be able to identify the best interests of

the child, unless the party is represented. This would be relevant especially where the lack of representation entails a risk of an outcome that would put a child at risk (eg where an allegation of abuse cannot be adequately considered because neither party is able to present a case properly).

### **Costs Management: Family Law Matters (Family Law Guideline 12)**

Concern has been expressed by some members of Council about the Family Law Costs Management Guideline which caps expenditure on an individual assignment by grouping together legal costs and disbursements, including the costs of experts. There is concern that with the increasing fees being charged by experts, members of the legal profession will delay incurring the costs of engaging an expert until a late stage in the proceedings.

Members of the profession have expressed concern that in some cases the fees charged by the expert are so high there is little or no money left to meet their own fees, under the capping arrangements. The Court and the parties are often greatly assisted by the obtaining of an expert report, especially at any early stage of the proceedings. Any guideline which discourages the obtaining of such reports in a timely fashion in appropriate cases is a matter of concern to Council.

Having regard to the potential for high experts' costs, Council recommends that consideration be given to separating the legal professional costs and experts' costs when capping the level or levels of fees.

### **Property (Family Law Guideline 8)**

Council also considers that there would be benefit in clarifying the current guideline 8.2. Council considers that it could be interpreted to mean on the one hand, that the net assets are less than \$100,000; or on the other hand, that the gap between each party's claim is less than \$100,000.

Council recommends that the meaning of the guideline be clarified.

Council appreciates this opportunity and looks forward to continuing involvement in the review process. In addition, Council notes the benchmarking process under way for family law assignments and will be pleased to be consulted as suggested.

Yours sincerely

Des Semple