

# Keynote address: The proposed reforms and the Federal Magistrates Court

Chief Federal Magistrate John Pascoe, AO, Federal Magistrates Court of Australia

Transcribed address

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John Pascoe was appointed as Chief Federal Magistrate on 14 July 2004. Mr Pascoe is a graduate of the Australian National University and, after admission as a solicitor, became a partner in the legal firm, Stephen Jaques & Stephen in 1977. Prior to his appointment, Mr Pascoe was Managing Director in the national law firm Phillips Fox and has been a solicitor whose practice has been in insurance law, risk management and government regulation. He has broad commercial experience, including a period as CEO of a public company and has been chairman of a number of listed companies and statutory authorities. He is a member of the Council of the University of New South Wales and the Deputy Chair of the Institute of Early Childhood Foundation. He is also a member of the Board of Trustees of the Duke of Edinburgh's Award International Foundation (UK). He was appointed a member in the General Division of the Order of Australia in 1994 and an Officer in the General Division of the Order of Australia in 2002. He was awarded a Centenary Medal in 2003.

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The Federal Magistrates Court is a 'can do' court which seeks to bring about expeditious, practical and just solutions without undue legalism and formality.

Family law is an important part of its overall workload; currently about 50 per cent overall filings continue to rise by up to 40 per cent in some registries. It is the area where the courts interface with Australian families is most direct and visible.

The Court does not operate in isolation. It is part of a much wider network that includes non-government organisations such as those represented here today; all working to assist Australian families at a time of transition and often significant distress.

The Court's role is, of necessity, limited to judicial determination. We see it as important to involve litigants, especially litigants in person, in finding workable solutions. However, if there is no compromise, the Court will make a decision that sees people out of the Court as soon as possible and linked to appropriate support networks.

The Honourable Philip Ruddock, Attorney-General; the Honourable Kay Patterson, Minister for Family and Community Services; Professor Alan Hayes, Director, Australian Institute of Family Studies; Chief Justice Bryant Diana Bryant; distinguished guests.

I acknowledge the traditional owners of the land.

It is a great privilege to be part of the proceedings today, especially given the wide range of organisations represented.

The House of Representatives Standing Committee chaired by Mrs Kay Hull, MP, heard harrowing—and sadly repetitive—tales all around Australia of how the system had failed Australian families.

Certain themes emerged:

- a perception by fathers that they were disadvantaged in relation to shared parenting responsibilities
- an inability on the part of the system to protect women and children from violent partners
- feelings of hopelessness and despair at being trapped for long periods of time in a system which did not deliver outcomes that allowed the parties in a failed marriage—and more importantly their children—to move on.

No one can doubt there was a problem that government needed to address.

Earlier this year, Prime Minister Howard issued a discussion paper entitled *A New Approach to the Family Law System*, and formally tabled the government's response to the House of Representatives Standing Committee on Family and Community Affairs 2003 report, *Every Picture Tells a Story*.

The proposed reforms we are discussing today are, for the Federal Magistrates Court, merely a further step on a long and arduous journey towards stronger and more resilient families—of which the courts are only a part. I hope that in time, the courts will be an increasingly minor part.

I do not intend to discuss the changes in detail. Rather, for an audience such as today, I felt it better to concentrate on a few aspects which reflect the experience of the Federal Magistrates Court and may be of interest to the wider family support networks.

Spend one day with me at the Federal Magistrates Court, or work at the coalface of family welfare and support like many of you here today, and you know that one of the biggest challenges facing our nation is to develop emotionally resilient adults, who in turn will build stronger families which endure.

Let me give you a sample of the sort of crises the Court must make orders to try to resolve:

- A parenting order for a teenage man whose one-night stand has resulted in the pregnancy of a married woman more than twice his age. He does not wish to see the child, but must now support it.
- Orders for a DNA test to try to identify the father of a baby after a woman's wild night of partying with multiple partners. DNA testing did not identify the father.
- Residence orders for a father whose access to his children has been thrown into disarray due to his ex-wife's sudden relocation, without warning, from the city to a country town many miles away, and to which he will find it very difficult to travel.
- Orders to give residence to a mother and prevent access to her two daughters by their father, who has been charged with incest in relation to another of his children.
- Orders to change the full-time care arrangements for a 14-year-old boy from the mother to the father, where there is serious conflict between mother and son, and the teenager has become suicidal.

I do not believe the new legislation will, at least in the short term, greatly change the way in which the Federal Magistrates Court does its work. I do, however, want to highlight a number of issues.

A general initiative is the move to a single registry for both the Family Court and the Federal Magistrates Court in family law. This is but another step in the journey, whereby the courts have to become more integrated in order to provide the best and quickest service to family law litigants.

Eventually, it is intended that all family matters will be streamed through the Federal Magistrates Court, although this may take some time as there are currently insufficient judicial and other resources within the Court to enable this to happen immediately.

In this regard, I note that the Federal Magistrates Court has a very heavy workload. It is not unusual for duty lists to have 40 or more matters in a single day. Federal Magistrates often sit well beyond normal court hours to assist those who appear before the Court and save costs to the parties.

Ultimately, when resources are available, streaming should result in quicker resolution of family law disputes and more specialisation between the courts. However, it is not just judicial resources that are required. The need for additional non-judicial resources is nowhere better illustrated than the issue of family reports. To make constructive and informed decisions, the Court needs to be kept informed of the latest research on how to achieve optimum outcomes for children from separated families, including, in particular cases, professional reports on family dynamics. Without such reports in appropriate cases, the chances of reaching the right conclusion are diminished, to the detriment of the children involved. Such reports are, however, expensive.

I note that, in some instances, children need separate legal representation. This must also be funded, as so many of the most difficult cases involve families with limited means. If the family law courts are not properly funded, both in relation to family reports and more generally, a single registry will not work and the courts will be left to squabble over inadequate resources.

The Chief Justice has mentioned some specific initiatives on the part of the Family Court, including the Children's Cases Program. The Federal Magistrates Court will monitor that program closely. However, at the present time, many of the elements of the Children's Cases Program are already applied in the Federal Magistrates Court and the legislation provides sufficient flexibility for this to continue.

I note that the reforms do nothing to tackle the disconnection between the state courts and the Commonwealth courts. This is a matter of great concern and it is most heartening to hear that the Attorney-General is seeking to remedy this situation. Often, where there is criminal behaviour being dealt with in the state courts and a related family law matter being addressed in the Federal Magistrates Court, each court acts without regard to what is happening in the other.

For example, in the matter to which I previously referred, where the father was charged with incest, he was released by the state courts on bail. It is alleged that he immediately made threats against the mother and her daughters because of her efforts to stop his contact. Although this was probably a breach of his bail conditions, it was not possible for the Federal Magistrates Court to do anything about it. The

only (unsatisfactory) option was to write the orders in a way in which the father could be arrested if he were to attempt to breach the prohibition on contact.

Experience in the Court indicates that, to be effective, long-term family law reforms must tackle the issues of poverty, education, community support and financial aid to give all Australians the best possible chance to be part of the family they deserve. We need to help our families before they get to crisis point and end up in the courts, and have adequate facilities and services in place for immediate access to a safety net when things go wrong. Without this, the vicious cycle that we sometimes see in the courts will continue and repeat from generation to generation.

In this regard, I strongly support the establishment of the Family Relationship Centres and their focus on shared parenting. However, many questions remain about their operation. For example:

- Will the proposed Family Relationship Centres be staffed and adequately funded to handle the heated and complex issues of problem-solving, family guidance, child residence and contact arrangements?
- What will be the connection between our Court and the Family Relationship Centres? It is a terrible waste if each was to exist in isolation from the other, especially as the Federal Magistrates Court, given the nature of its work, is so closely engaged with a very wide range of people and problems.

In short, all elements of the family law system must work together to benefit both the parents and the children locked in the midst of an often bitter, emotional, physical and even violent parental tug-of-war.

We must all be accountable.

In the legislation, the Government has proposed the establishment of sixty-five Family Relationship Centres. I support the Centres, not as a single entry point into the family law system but, more importantly, as a part of an effort to build stronger and more resilient families. It is in this endeavour that their success should be judged.

The theory is that by establishing these Centres and proposing various amendments to court processes, the government will encourage parties to come to an agreement about parenting rather than resorting to litigation. We must provide adequate training and resources if this is to happen.

I am interested in the issue of who will run the Centres, what will their training and expertise be, and what is the availability of their support services to the broader community. There has been no guarantee of uniform training for people staffing the sixty-five Centres.

However, although there may be difficulties to start with, I believe that one benefit from the Family Relationship Centres will be to create over time a strong pool of well-trained professionals. There need to be strict quality control measures in place to protect all those using the Family Relationship Centres and access to the best-trained mediators. It may be useful if guidelines were to stipulate that all mediators be trained in recognising domestic violence in a relationship.

Funding for these Centres should not be based only on the number of cases the Family Relationship Centres each deal with, and allowances should be made in their budgets for follow up consultation. I note in this regard that Relationships Australia

alone supports more than 90 000<sup>1</sup> families each year. It also runs intensive, well-regarded training programs. It is but one of many effective organisations.

Already, our family support and welfare services are overstretched—something perhaps best illustrated by the fact that in Sydney alone there are only two contact centres for non-resident parents to spend supervised time with their children. The waiting list at one of these centres is eight months long.

Family Relationship Centres alone will not solve the problems. At the Federal Magistrates Court, we remain seriously concerned about the lack of contact centres. Can the Family Relationship Centres also provide these services? If not, it is important that the centres do not come to be regarded as the only answer, with less money available for other organisations active in this area.

Government, community groups supporting our families and the courts have a major stake in all the issues confronting families. The services that NGOs provide in terms of education, promoting and aiding parenting and communication skills is also vital for the long-term wellbeing of all Australian families. We need to ensure that there is open and regular dialogue between all stakeholders.

Family law is heated, and even after the legislative changes, will remain controversial, emotional and often confrontational. There is nothing glamorous, nothing nice, about a failed marriage, particularly where violence towards one partner or children is apparent. Abuse, anger and fury often go hand-in-hand with divorce, and while on paper the Family Relationship Centres have been touted to mediate marriage break-ups, this mediation presumes both parties can, and want to, speak freely as equals. It is often difficult and dangerous for a victim of violence to mediate because of the power imbalance between the victim and the perpetrator. Further, experience shows that many victims of violence identify with the perpetrator and do not tell the truth, even under oath.

In the matters that come to the Federal Magistrates Court, around half have some allegations of abuse or violence. That is not expected to change as a result of the reforms. This is a long-term problem. A report released by the World Health Organization just last week states that one in six women worldwide suffers from domestic violence.<sup>2</sup> Security is paramount in these situations and, much like our courts, the Family Relationship Centres must be able to provide adequate protection and counselling for people at risk during any mediation process.

One of the government's stated aims is to make the law more responsive to children's needs and their right to know and relate to both parents. It does so through the proposal to give both parents equal rights in relation to key decisions concerning their children.

Lobbying from men's groups may have been one of the factors which influenced the government's focus on shared parenting, with a push for fifty-fifty direct shared time between the mother and father. Certainly there was much evidence given to the House of Representatives committee by fathers who felt shut out of their children's lives. Again, this is not generally in the interest of the child. Whilst I support the government's changes in relation to shared parenting, one has to be realistic when addressing this issue in a court context.

1 Relationships Australia Federal Budget Submission 2005.

2 García-Moreno, C., Jansen, H. A. F. M., Ellsberg, M., Heise, L., & Watts, C. (2005). *WHO multi-country study on women's health and domestic violence against women: Initial results on prevalence, health outcomes and women's responses*. Geneva: World Health Organization.

As mentioned by the Attorney-General, in Australia today, there are 1.1 million children under the age of 18 living away from one parent due to separation or divorce<sup>3</sup>, and each of these cases needs to be judged on its own merits. Put simply, one has to have regard to all the factors:

- What effect does equal time with each parent have on the child?
- Can feuding parents develop a workable family plan?
- Is it reasonable to expect parents who have previously developed an eighty–twenty share, due to work and home commitments, to suddenly revert to fifty–fifty?
- What aspects of a child’s life should be open to mutual consent? Schooling, religion and social restrictions come to mind.
- Is equally shared residence logistically possible?
- And importantly, we must consider how this assumed role of shared parenting affects those children and partners who are trying to escape domestic violence.

Joint parental responsibility or equal shared parenting time should depend on the abilities and capacity of individual families, with the best interests of the child always paramount. It must be judged on a case-by-case basis and it is commendable that the legislation allows this.

For an unemployed Melbourne-based father—divorced from his wife in Sydney since his son was born—wanting to have fifty–fifty access to his two-year-old without the financial and social network to support his request—although desirable—may be unrealistic. This is not to say that the Court and the wider community network should not help him find solutions so that he can play a major role in his child’s life. This is in the best interest of the child.

On the other hand an eight-year-old girl who wants to maximise the time she spends with each parent by having a one-week-on, one-week-off arrangement with parents who live in close proximity, will be among those who may benefit from the proposed legislation.

For many Australian families, fifty–fifty shared parenting will, quite properly, become the starting point for discussion or negotiation. Flexible parenting is often essential for older children, who prefer a single home—their own space—but equal access to each of their parents for emotional support when required.

The greatest danger of any legislation about shared parenting would be if it encouraged anything other than to weigh the individual facts and judge each case on its merits. In the Federal Magistrates Court we will continue to do so.

As part of this, we must also ensure that orders are understandable, current and workable. They must also be capable of being enforced. There is no point in any court-making orders if they are not able to be enforced and one party is able to manipulate the system in order to deny the other—often, but by no means always, the father—access to children in accordance with the decision of the Court. The availability of contact centres to ensure safe and appropriate handovers can be important for compliance. The Family Relationship Centres may also play a role here.

Ladies and Gentleman, we stand on the cusp of great opportunity.

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3 ABS. (2004). *Family characteristics Australia 2003* (Catalogue No. 4442.0). Canberra: Australian Bureau of Statistics.

The Australian Government has indicated strongly its desire to build stronger families and to do this in a variety of ways. This commitment is important to all of us. Over time, I hope that by addressing the issues which cause stress to families, from poverty to violence, drug abuse, generational cycles of bad parenting and psychological illness, we will, by working together, reduce the stress on families.

In doing so, we will ensure that only the most difficult and intractable cases come to the courts, and that, once there, they can be dealt with quickly and effectively within an overall community framework of support for both parents and children.

The Court by itself can not—now or in the future—fix broken hearts. Working together, all of us can. More importantly, we can not only fix broken hearts, we can, over time, as the Attorney-General said in his opening address, change behaviours and thereby help prevent broken hearts.