

WHEN ROLLS ROYCE AND HOLDEN JUSTICE COLLIDE: AN ANALYSIS OF THE OPERATIONS OF THE FEDERAL MAGISTRATES SERVICE IN QUEENSLAND IN THE FAMILY LAW ARENA

DONNA COOPER*

I INTRODUCTION

In July 2002 the Federal Magistrates Service ('FMS') celebrated its second anniversary.¹ To acknowledge this milestone the Commonwealth Attorney-General, Daryl Williams released a press release declaring that the Service 'has proven itself to be a very successful addition to the federal judicial system.'² Since the FMS commenced sitting on 3 July 2000 the Attorney-General has repeatedly proclaimed that the Service has achieved the goals for which it was established by providing cheaper, faster, more streamlined processes for family law matters than the Family Court, with the majority of matters resolving in six months or less.³

* Associate Lecturer, Faculty of Law, QUT. This article has been derived from research conducted during the course of a Masters of Law degree undertaken at QUT. The author would like to gratefully acknowledge the mentoring support and editorial assistance of Rachael Field, Lecturer, Justice Studies and the research assistance of Tamara Walsh when Senior Research Assistant, QUT, and Shelley Clark.

¹ Also known as the 'Federal Magistrates Court', it was established by the *Federal Magistrates Act 1999* (Cth) and the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth) gives the Court its jurisdiction. It commenced sitting on 3 July 2000. It was primarily established to deal with family law matters and to a lesser extent deals with other areas of federal jurisdiction such as administrative law, bankruptcy, human rights and trade practices. By the *Federal Magistrates Service Legislation Amendment Bill Act 2001* (Cth) its jurisdiction was extended to migration cases: The Attorney-General, Commonwealth of Australia, 'Federal Magistrates Service Jurisdiction Extended' (Press Release, 30 August 2001) 1.

² The Attorney-General, Commonwealth of Australia, 'Federal Magistrates Service Two Years Old Today' (Press Release, 28 June 2002) 1.

³ Ibid. Commonwealth Attorney-General, D Williams, 'State of the Nation Address' (Paper presented at Tenth National Family Law Conference, Melbourne, 18 March 2002) 1, 6. See also, The Attorney-General, Commonwealth of Australia, *Second Federal Magistrate for Brisbane*, Press Release, (20 December 2000); The Attorney-General, Commonwealth of Australia, 'Federal Magistrates Service – The First Six Months' (Press Release, 8 January 2001); The Attorney-General, Commonwealth of Australia, 'Federal Magistrates Service in Townsville Delivers

To put these claims in perspective it should be noted that the establishment of the first lower level Federal Court in Australia was initially met with great controversy and much opposition, as previously the Family Court of Australia had been the principal court in Australia dealing with family law matters. Its creation followed years of debate between the Commonwealth Attorney-General and the Chief Justice of the Family Court, Alastair Nicholson.⁴

Both parties agreed in principle with the concept of establishing a new level of judicial officer, the Federal Magistrate, to deal with less complex matters.⁵ Their debate concerned whether Federal Magistrates should be housed within the Family Court or in a completely separate court structure. Throughout the 1990s practitioners supported the appointment of Federal Magistrates as judicial officers of the Family Court⁶ yet the Attorney-General persisted with his vision and on 8 December 1998 announced that Cabinet had approved the establishment of the FMS.⁷

The justification given by the Attorney-General for this move was that the new service would 'have streamlined procedures and a less formal judicial culture. This will reduce litigants' costs and the length of time involved in resolving disputes'.⁸ The Attorney-General asserted that the new court would 'free up superior court judges to deal with more complex disputes' and that 'the service will promote the use of alternative dispute resolution, complementing the Government's initiatives to encourage people to resolve disputes away from the courts particularly in family law matters'.⁹

The decision continued to face strong opposition from the legal profession. Such was the extent of negative sentiment that in 1999 the Law Council of Australia formally resolved to oppose the establishment of a Federal Magistracy, and prepared a Position Paper that stridently set out its objections.¹⁰ The Law Council argued that increasing

Results' (Press Release, 8 January 2001); The Attorney-General, Commonwealth of Australia, 'Federal Magistrates Service in Queensland Delivers Results' (Press Release, 8 January 2001).

⁴ Chief Justice Nicholson has announced his retirement effective from 31 March 2004 and he will cease sitting on that date. Family Court of Australia, 'Chief Justice Nicholson to Continue Sitting' (Press Release, 17 January 2003) <<http://www.familycourt.gov.au/media/html/cj1.html>>.

⁵ The idea of Federal Magistrates originated from the Family Court in the early nineties. It was proposed as a cost-effective way to manage the bulk of the court's workload comprising less complex matters that did not warrant the resources of superior court judges: Family Court of Australia, *Submission to the Joint Select Committee on certain aspects of the operation and interpretation of the Family Law Act* (1991) 1, 12.

⁶ Family Law Section, Law Council of Australia, *Magistrates in Family Law* (July 1995); Law Council of Australia, Response to Attorney-General's Discussion Paper, *A Federal Magistracy* (February 1997).

⁷ Commonwealth Attorney-General, D Williams, 'Federal Magistracy to be Established' (Press Release, 8 December 1998) 1. From the outset the FMS was to share many of the resources of the Family Court, both in terms of accommodation and staff. These arrangements are set out in the Memorandum of Understanding between the Family Court of Australia and the Federal Magistrates Service for the provision of services (17 April 2001) and the Memorandum of Understanding between the Federal Magistrates Service and the Federal Court of Australia ('the Courts') in relation to co-operation and service support arrangements (17 April 2001).

⁸ Commonwealth Attorney-General, D Williams, 'Federal Magistracy to be Established' (Press Release, 8 December 1998) 1.

⁹ Ibid.

¹⁰ Law Council of Australia, *The Policy Position of the Law Council, Federal Magistrates Bill 1999/ Federal Magistrates (Consequential Amendments) Bill 1999 on Federal Magistrates* (16 August

delay in the Family Court was a resource problem that should be resolved by the appointment of more judges, and that the government funds to be transferred to the FMS could have been better spent on allocating more judicial resources within the Family Court.¹¹ The Chief Justice of the Family Court estimated that these initial monies could have been used to fund the appointment of fourteen Federal Magistrates within his own court.¹²

Due to the controversy surrounding the creation of the FMS and the overwhelming opposition to its establishment from the legal profession at the outset, it is vital that the efficacy of the FMS in achieving the goals set for it be independently examined. To date, there has not been any independent research into the operations of the FMS, although the service itself engaged consultants to conduct a survey of legal practitioners who had used the court during the course of its first twelve months of operation.¹³

This article presents the findings of an independent research project that considered the practical impact of the introduction of the Federal Magistrates Service into the family law system.¹⁴ Part one of the article examines a number of background contextual issues to the establishment of the FMS that are relevant to any assessment of its operations. Part two presents the results of the research and an analysis of the research findings including a comparison with the results of the FMS survey, and part three discusses the implications of the research findings for the future.

1999) 1. It noted that the twelve Bar Associations and Law Societies of Australia were unanimous in their opposition to the new court. In particular at 3 the Law Council objected to the 'bureaucratic' expenses involved in setting up a separate court including personnel expenses and infrastructure costs.

¹¹ 'Council Opposes Federal Magistrates Court', *Australian Lawyer* (October 1999) 1. The FMS was established with \$27.9 million over four years. The Family Court transferred \$3.1 million to the Service in 2000/2001 and in addition to these funds the budget of the Family Court was reduced by \$2.1 million. Attorney-General, Commonwealth of Australia, 'Family Court and Federal Magistrates Service Funding' (Press Release, 12 May 2002) 1.

¹² The Hon A Nicholson, Chief Justice of the Family Court of Australia, 'Issues Facing the Court and Future Directions' (Paper presented at the Queensland Family Law Practitioners Association Residential Conference, Coolumb, 30 July 1999) 1, 8.

¹³ FMS, *Results of the 2001 Survey on Awareness and Performance* (1 September 2001) <<http://www.fms.gov.au/services/html/survey.htm>>. Profmark Consulting Pty Ltd conducted the survey. The main aim of the survey was to seek feedback 'regarding whether clients were satisfied that their disputes had been handled quickly, simply and economically and whether there was sufficient information available about the service'. The survey was not confined to family law however 82% of respondents had been involved in family law matters. The FMS has followed up with a second survey, *Results of the 2002 Survey on Awareness and Performance* <<http://www.fms.gov.au/services/html/survey2002.htm>>.

¹⁴ 'Family law system' is a term derived from the Family Law Pathways Advisory Group Report, *Out of the Maze, Pathways to the Future for Families Experiencing Separation, 'Pathways Report'* (July 2001) and was defined at page ES1 as '[t]he family law system is much broader than the courts. It also embraces the many service providers and individuals who help families to resolve legal, financial and emotional problems, and is centred around the family members themselves'.

II BACKGROUND CONTEXTUAL ISSUES TO THE ESTABLISHMENT OF THE FMS

To understand how an idea emanating from the Family Court to create another stratum of judicial officer within its own court evolved into the creation of a separate service provider, several underlying factors must be examined.

A *The Application of Market Ideology to the Family Law System*

The first contextual issue is that the FMS appears to be the result of the application of market ideology, often termed in Australia 'economic rationalism', to the family law system.¹⁵ Nowhere is this more evident than in the Attorney-General's statement that the FMS 'will be a lean, cost-effective court that will deliver speedy and efficient access to justice for ordinary Australians'.¹⁶ This emphasis on cost-effectiveness in the running of courts replicates the requirement that the public service generally conduct its administration in a more businesslike fashion with a focus on economy, efficiency and effectiveness.¹⁷ Courts, as a result, are now more focused on the importance of minimising costs to litigants and reducing case delays.¹⁸

Perhaps one of the most concerning results of this application of market ideology is that the FMS, in having a concurrent jurisdiction with the Family Court in less complex matters, has been placed in direct competition with the Family Court.¹⁹ In this regard the FMS has been given a clear advantage as the government has determined that filing fees will be approximately half that of the Family Court, which from the outset has meant that a level playing field has not been set.²⁰ On 1 January 2002 the Attorney-General shifted the pendulum further in favour of the FMS by increasing its property jurisdiction from \$300 000 to \$700 000.²¹

¹⁵ Chief Justice JJ Spigelman, 'Economic Rationalism and the Law' (2001) 24 *University of New South Wales Law Journal* 200. In this article the Chief Justice examines the effect of the application of commercial values to courts and at page 203-204 argues that there are fundamental errors in the resulting 'approach to the administration of justice as a service'.

¹⁶ He also said 'the service will be established with a minimal administrative structure and will share facilities with existing courts wherever possible': The Attorney-General, Commonwealth of Australia, 'Federal Magistracy to be Established', above n 7, 1.

¹⁷ This has been termed the 'new public management', a term referring to the organisation of governmental activity: Chief Justice JJ Spigelman, 'The "New Public Management" and the Courts' (Paper presented at the Family Court of Australia 25th Anniversary Conference, Sydney, 27 July 2001) 1.

¹⁸ It has also filtered down to the judiciary with the questioning of judicial activity and productivity: Justice S O'Ryan and T Lansdell, 'Benchmarking and Productivity for the Judiciary' (Paper delivered at AIJA Conference 'Judicial Accountability' Darwin, July 2000) 1.

¹⁹ 'While there is no strict indicator of complexity, a general guide is that less complex matters will require less than 2 days court hearing time': FMS, *About the Court, Introduction to the FMS* <www.fms.gov.au/html/introduction.htm>. 'The rules do not proscribe the length of cases to be undertaken by the FMS, but the court has determined that, to meet its role of hearing less complex cases and to enable it to list matters for hearing within its benchmark of six months, the court should confine itself to cases which are estimated to be up to two days in length': Chief Federal Magistrate D Bryant, 'Federal Magistrates Service – The First Twelve Months' (2001) 7 *Current Family Law* 117, 119.

²⁰ The *Federal Magistrates Regulations 2000* (Cth) establish the fees payable in the FMS. For example the filing fee initially set for divorce applications in the FMS was \$250, less than one-half of the fee set in the Family Court. The FMS fee has since risen to \$273 and remains more than half the Family Court filing fee of \$574. *Federal Magistrates Service, Family Law and Child Support Fees* <http://www.fms.gov.au/html/fees_family.html>.

²¹ *Family Law Amendment Regulation 2001* No 3: *Statutory Rule 2001* No 264.

The Chief Federal Magistrate of the FMS, Diana Bryant has stated:

It's competition. The courts are competing with each other where the jurisdiction overlaps to see who can provide the best service at a particular level. I don't see that as necessarily a threat. I see it as healthy for everybody to work out where their niche market lies.²²

It is also clear that as a result of this application of market ideology the FMS perceives itself as a provider of a consumer service to litigants, and this role is not only supported, but even mandated, by the Government.²³ This approach, however, conflicts with more traditional notions of a court system where litigants are considered as citizens with rights, not as consumers with needs.²⁴ The Chief Federal Magistrate has also stated, 'as there is concurrent jurisdiction, practitioners may choose the court in which they wish to litigate and will no doubt do so based upon the type of matter involved and the perceived value to the benefit of their clients'.²⁵ The Service quickly achieved a proportion of 'market share' and at the end of its first year of operation in June 2001 the FMS was receiving nearly one-third of all family law filings in the places where Federal Magistrates were located.²⁶

B *Reduced Government Funding to Family Law Litigation and Shift to Distributive Justice*

The second contextual issue relevant to the establishment of the FMS is a related economic matter, namely decreasing levels of government funding over the last decade being directed to family law litigation.²⁷ This directly resulted in major cutbacks to legal aid funding in the 1990s²⁸ that in turn resulted in an increase in the

²² M Brown, 'Builder of a New Court' (2000) 74 *Law Institute Journal* 24, 25.

²³ The concept of the application of market ideology to the courts has been discussed by Chief Justice M Gleeson, 'Valuing Courts' (Paper presented at the Family Court Conference, Melbourne, 27 July 2001) 1, 3; in the Report, *Access to Justice – An Action Plan 1994*, the Access to Justice Advisory Committee encouraged the courts to take even further the development of a more 'consumer-orientated approach to their work': Commonwealth of Australia, Access to Justice Advisory Committee, *Access to Justice – An Action Plan 1994* (1994) xli.

²⁴ M Gleeson, 'Valuing Courts' (Paper presented at the Family Court Conference, Melbourne, 27 July 2001) 1, 7 and see also Chief Justice JJ Spigelman, 'Economic Rationalism and the Law', above n 15, 203.

²⁵ J Miller, 'Judicial Discretion' (2000) 14 *Australian Family Lawyer* 23, 25.

²⁶ N Wahhab, 'The Federal Magistrates Service: A Family-Friendly Court' (2002) 88 *Lawyers Weekly* 18, 18. See also The Federal Magistrates Service, 'Federal Magistrates Service Completes First Year' (Press Release, 29 June 2001) 1.

²⁷ This led to Family Court staff numbers being reduced by 30% from 1990 to 2002. The numbers of judges and judicial registrars have declined over this period from 49 judges to 48, and 8 judicial registrars to 6. See R Foster, 'Triage in Family Court Services: Doing More with Less' (Paper presented at 39th AFCC Annual Conference, Hawaii, 5-8 June 2002) 1, 4.

²⁸ These funding cutbacks have resulted in access to legal aid being severely restricted. In Queensland, access to legal aid for family law clients is primarily directed to matters concerning children and entry is usually via a dispute resolution process, the 'family law conference'. Legal Aid Queensland, Policy Manual, State-Commonwealth Government Priorities, Family Law, Primary Dispute Resolution <<http://www.legalaid.qld.gov.au>>. For a description of the impact of these changes, see J Dewar, J Giddings and S Parker, *The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland*, Report for the Family Law Practitioners Association/ Queensland Law Society Faculty of Law, Griffith University (1998) Chapter 2. See also J Dewar, J Giddings and S Parker, 'The Impact of Legal Aid Changes on Family Law Practice' (1999) 13 *Australian Journal of Family Law* 33, 36.

number of litigants in person.²⁹ This funding frugality contrasts starkly with a strong trend over the same period for heightened consumer demand as increasing numbers of couples were separating and requiring legal assistance.³⁰

The resultant situation was that government bodies were faced with providing a justice process to increased numbers of consumers with limited available resources. It is argued that this has resulted in a move away from the concept of individual justice (where a litigant can have unlimited access to the family law legal system) to a system of distributive justice (where processes have evolved to allocate the limited resources available to an ever increasing number of people seeking assistance).³¹ Clear evidence of government policies reinforcing distributive justice can be found in the increasing focus throughout the last decade in resolving disputes through dispute resolution processes rather than by litigation.³²

The Family Court from the outset was focused on assisting separating couples to resolve their own disputes.³³ In the mid-1990s, however, the former Labor Government, with the release of the Access to Justice Report, heightened the focus on dispute resolution.³⁴ In 1995, amendments to the *Family Law Act 1975* (Cth) consolidated this shift in thinking to dispute resolution being the primary way of resolving family law disputes³⁵ and the current Liberal government has increased this focus.³⁶

²⁹ It is estimated between 35-41% of litigants in the Family Court are unrepresented. See J Dewar, B W Smith and C Banks, *Litigants in Person in the Family Court of Australia. A Report to the Family Court of Australia*. Research Report No 20 [11]. In a case file survey sample conducted by the Australian Law Reform Commission 41% of cases involved at least one unrepresented or partially unrepresented party and in 6% of cases both parties were fully or partially unrepresented: Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999) ('ALRC 62') [11.160].

³⁰ From 1990 to 2000 there was a 17% increase in the total number of divorces in Australia, from 42,600 to 49,900. Australian Bureau of Statistics, *Australian Social Trends 2002, Family - National Summary Tables, Family Information* (2002) <<http://www.abs.gov.au/>>. According to the total numbers of orders sought the workload of the Family Court of Australia increased by approximately 60% from 76 860 in 1990/1991 to 126 793 in 1999/2000 financial year: Family Court of Australia, Court Statistics, *Total Numbers of Orders Sought 1977 and 1988/89-1999/2000* <<http://www.familycourt.gov.au/court/html/statistics13.html>>.

³¹ It has been said, 'perhaps the greatest challenge facing the administration of justice and the legal profession is the establishment of a rational relationship between the resources consumed in litigation and the value of what is at stake': Chief Justice JJ Spigelman, above n 17, 2.

³² D Bagshaw, 'The Move Towards Primary Dispute Resolution in Family Law: The Role of Government and Implications for Justice (1997) 2 *Flinders Journal of Law Reform* 1, 10.

³³ *The Family Law Act 1975* (Cth) requires the Court to provide voluntary and mandatory dispute resolution options; see Parts II and III and Division 3 of Part VII. See A Nicholson, 'Setting the Scene: Australian Family Law and the Family Court - A Perspective From the Bench' (2002) 40 *Family Court Review* 279, 285.

³⁴ *Access to Justice - An Action Plan* (1994), above n 23, lxi.

³⁵ *Family Law Reform Act 1995* (Cth) implemented on 11 June 1996. The provisions regarding 'Primary Dispute Resolution' are contained in Part III of the *Family Law Act 1975* (Cth.)

³⁶ The current government has moved the focus to dispute resolution services being provided by community based agencies rather than by the Family Court. The Attorney-General has also announced that his department is undertaking a review of the primary dispute resolution provisions of the *Family Law Act 1975* (Cth). The review is to 'look to improve the clarity, workability and flexibility of the Act': The Commonwealth Attorney-General, Daryl Williams, 'Opening Address' (Paper presented at 6th National Mediation Conference, Canberra, 18 September 2002) 1, 3.

Although there are often benefits in the early resolution of family law disputes through the use of what is now termed 'primary dispute resolution' ('PDR'),³⁷ it is clear that it has also been used by successive governments as a tool to provide a less expensive justice process than litigation. This has resulted in many potential litigants being steered away from the court process.³⁸ It can be argued that in some cases it has been used as a barrier to entry to the court system, for example, if people are required to attend a compulsory PDR process as a condition of their grant of legal aid and are then not funded beyond such a process, many are unable to ever access the judicial justice system.³⁹

C *Increasing Consumer Dissatisfaction Leads to Policy Reform Within Family Court*

A further contextual issue, arising against this backdrop of economic change, is one of a steady rise in consumer dissatisfaction with the Family Court.⁴⁰ This discontent was fuelled by a climate of increasing court backlogs and self-imposed procedural reforms that failed to solve these delays.⁴¹ The Chief Justice of the Family Court argued that the delays in the Family Court were due to a need for the appointment of more judges,⁴² however, there was clearly a growing school of thought that the Family Court could do more through internal management to resolve these problems.⁴³

³⁷ *Family Law Act 1975* (Cth) s 14 sets out that the object of the Act is to encourage people to use primary dispute resolution to resolve their disputes, where appropriate.

³⁸ D Bagshaw, 'The Move Towards Primary Dispute Resolution in Family Law: The Role of Government and Implications for Justice', above n 32, 10.

³⁹ State legal aid bodies are funded by Commonwealth monies to provide family law services to clients. The Commonwealth priorities direct: 'Applicants for legal assistance are required to use primary dispute resolution services before any grant of legal assistance is made for court proceedings. Aid for litigation should be pursued only as a last resort': Legal Aid Queensland Policy Manual, above n 28. Research has identified concerns with a compulsory primary dispute resolution ('PDR') process being used as a prerequisite to a grant of legal aid, particularly that it has been used in inappropriate cases and that the PDR process, in Queensland a 'family law conference' has the dual purpose of attempting resolution of the dispute together with assessing the applicant's merit for future legal aid: J Dewar, J Giddings and S Parker, *The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland*, above n 28 [84]. Since this research was conducted Legal Aid Queensland have introduced an intake process aimed at excluding inappropriate matters from the conference process: Legal Aid Queensland, Family Law Conferencing, Chapter 2, 23.

⁴⁰ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) ('ALRC 89') [Chapter 8, Practice, Procedure and Case Management in the Family Court of Australia]. The primary criticism of the court was in relation to its case management system. However at 8.15 there was also criticism regarding court staffing levels, in particular that the court was 'overloaded with bureaucrats'. See also ALRC 62, above n 29.

⁴¹ ALRC 89 [Chapter 8, Practice, Procedure and Case Management in the Family Court of Australia].

⁴² Chief Justice A Nicholson, 'The State of the Court' (Opening address at the Third National Family Court Conference, 20 October 1998) 1, 2.

⁴³ For example, the following was quoted in relation to the Family Court in the Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, above n 40 [8.17]: 'Politicians do not believe that the way to reduce delays is to provide more resources. The road back to adequate funding starts with judges, lawyers and administrators putting their own house in order so that they can demonstrate to those who control the strings of the public purse that they have done all within their power to see that the court system is being run as efficiently and effectively as possible on the resources available and so that they can show that any further resources that are made available will be used productively': I Scott, 'Is Court Control the Key to Reduction in Delays?' (1983) 57 *Australian Law Journal* 16, 18.

The application of market ideology to the courts, and the growing consumer dissatisfaction with the performance of the Family Court, formed the impetus for a strong drive for policy reform in the family law system. This impetus was fuelled and informed by the Australian Law Reform Commission's release of the discussion paper, *Review of the Federal Civil Justice System* ('ALRC 62') which provided strong political justifications for a separate court to effect 'a change of judicial culture to deal with less complex federal disputes'.⁴⁴ The Commission's follow-up report, *Managing Justice: A Review of the Federal Justice System* ('ALRC 89') that was released after the Federal Magistrates Bill 1999 (Cth) had been passed, recommended major reform in the Family Court and provided guidance in the setting up of the FMS.⁴⁵

D *Worldwide Trend Towards Stronger Judicial Control of the Civil Process*

The adoption by the FMS of a 'docket system'⁴⁶ emanated from the strongest recommendation of ALRC 89 that in family law matters there should be continuity of the decision-maker.⁴⁷ It also links to a further contextual issue, a growing worldwide trend towards stronger judicial control of the civil process. Although the Commission shied away from abandoning the adversarial system it can be argued that it recommended that some aspects of the inquisitorial system be adopted particularly in the form of greater judicial control of case management.

The recommendation for a 'docket system' lends even greater weight to the argument of a shift to distributive justice in family law. If one judicial officer follows a case through to conclusion they can ensure that the quantum of resources devoted to any one matter are appropriate to the perceived value of that case.⁴⁸ The docket system is therefore yet another process by which limited resources can be distributed more widely.⁴⁹

⁴⁴ Commonwealth Attorney-General's Department, *Response to Submissions Made to the Committee, Senate Legal and Constitutional Legislation Committee Inquiry into Federal Magistrates Bill 1999 and Federal Magistrates (Consequential Amendments) Bill 1999*, 1.

⁴⁵ ALRC 89, above n 40. See also D Weisbrot, 'Reform of the Civil Justice System and Economic Growth: Australian Experience' (Paper presented at the ICO Conference, Madrid, 19 October 2000) 1. Weisbrot at 16 of his paper reported that some key aspects of the Family Court performance that consumers were dissatisfied with were procedures being too inflexible and a lack of consistent oversight of cases.

⁴⁶ A 'docket' system is one in which each case is randomly assigned at the time of filing to an individual judicial officer who takes responsibility for the progress of the case until resolution. This can be contrasted with a 'master list' system in which all cases are controlled by the court registry and are assigned to different judicial officers at different times for case events: ALRC 62, above n 29, [9.14], [11.153-11.159, Proposal 11.8]. See also ALRC 89, above n 40, [Recommendation 114].

⁴⁷ 'The Commission considers that many of the problems relating to case management in the Family Court arise from the lack of consistent overview of cases, and the related lack of attention to the particular needs and circumstances of the case': ALRC 62, above n 29, [11.153].

⁴⁸ Spigelman, above n 17, 2.

⁴⁹ The advantages of a 'docket system' were identified by the ALRC as 'the continuous oversight of matters to ensure satisfactory progress to resolution within a reasonable (benchmarked) period, by a judge or senior judge with sufficient 'clout' to make certain of compliance with court orders and processes, the early identification of issues, problems and settlement prospects and the willingness and ability (sometimes creativity) to customise court processes to the circumstances of each case, and to provide a sensible array of dispute resolution options': Weisbrot, above n 45, 17.

This trend can be linked with increasing number of litigants in person in family law matters. In the Second Reading Speech of the Federal Magistrates Bill 1999 (Cth) it was asserted, '[T]he Government proposes that the Federal Magistrates develop a new culture, with an emphasis on user-friendly, streamlined procedures. This will be especially important for litigants who do not have legal representation'.⁵⁰ Chief Justice Nicholson has said, '[W]e're moving towards an inquisitorial system, especially in the Family Court, with registrars becoming more and more interventionist and taking control of the proceedings. The problem is that an inquisitorial system needs proper funding of the inquisitor'.⁵¹

E *Fragmentation of the Family Law System*

The final contextual issue is that the creation of the FMS has exacerbated the fragmentation of the family law system.⁵² This concern about further fragmentation of the family law system was one of the Family Court's major objections to the setting up of the FMS as a separate entity.⁵³ This was because prior to the introduction of the FMS, the Australian family law system was already fragmented due to the division of responsibilities between the Commonwealth, States and Territories.⁵⁴ The Family Court of Australia, the Family Court of Western Australia and courts of summary jurisdiction around Australia all have jurisdiction under the *Family Law Act 1975* (Cth).⁵⁵ Australia also has State and Territory Children's Courts providing eight different systems in relation to child protection and juvenile justice.⁵⁶

In 1999 the Chief Justice of the Family Court expressed a need for a unified system to deal effectively with issues affecting children.⁵⁷ His Honour advised that the worldwide

⁵⁰ Commonwealth, *Senate Hansard*, Second Reading Speech, Federal Magistrates Bill 1999, Federal Magistrates (Consequential Amendments) Bill 1999, 10 November 1999, 10067, Ian Campbell, Senator, Western Australia.

⁵¹ A Crossland, 'Nicholson's Turbulent Reign', *Australian Financial Review* (Sydney), 19 July 2002, 2.

⁵² In its submission to the Pathways Advisory Group the FMS admitted that its existence could further fragment the family law system: Federal Magistrates Service, 'Submission to the Pathways Advisory Group' (2001) [4] <<http://www.fms.gov.au/papers/pathways.html>>.

⁵³ Family Court of Australia, *Submission to Senate Legal and Constitutional Legislation Committee, Inquiry into the Federal Magistrates Bill 1999 and Federal Magistrates (Consequential Amendments) Bill 1999* (August 1999) 1.

⁵⁴ Federal Parliament has power to make laws relating to marriage, divorce and related parental rights and custody and guardianship of infants: *The Australian Constitution* s 51(xxi), (xxii). However, the Family Court does not have jurisdiction over child protection, juvenile justice, adoption, financial disputes between unmarried couples or domestic violence. These areas all fall within the realm of state law.

⁵⁵ In Queensland, even prior to the establishment of the FMS, the Family Court shared some jurisdiction with the State Magistrates courts – ss 39(6) and 63(2) of the *Family Law Act 1975* (Cth). Queensland's State Magistrates Courts have jurisdiction to make interim orders in child matters and final parenting orders where the parties consent. Their property jurisdiction is limited to \$20 000 unless the parties otherwise agree.

⁵⁶ Chief Justice A Nicholson, 'Dinner Address' (National Children's and Youth Law Centre, Children's Lawyer of the Year Awards, Melbourne, 22 October 1999) 1, 4.

⁵⁷ *Ibid.* Justice L Dessau has supported the Chief Justice's vision supporting a single uniform court for children, incorporating care and protection matters, adoption and civil and criminal cases where children are both the alleged perpetrators and victims: Justice L Dessau, 'Children and the Court System' (Paper delivered at The Australian Institute of Criminology Conference, Brisbane, 17 June 1999) 1.

trend was to move towards a unified family court exercising all types of family jurisdiction including child protection and juvenile justice.⁵⁸ The Commonwealth Attorney-General has acknowledged that the possibility of establishing such a court is a desirable goal, however there are major constitutional impediments.⁵⁹

In July 2001 the report of the Family Law Pathways Advisory Group⁶⁰ acknowledged the difficulties that separating families face when they encounter the complicated family law system. A recurring theme of the report was that families wanted a 'one-stop shop', a central location where they seek assistance for their family law problem. This conclusion echoes research that the Family Court itself had previously conducted⁶¹ and contradicts the move to fragment the family law jurisdiction even further through the introduction of the FMS.⁶²

These issues illustrate the problems associated with the introduction of the FMS and inform the analysis below of its ability to fulfil its practical goals. Due to the controversy surrounding the creation of the FMS and the overwhelming opposition to its establishment from the outset, it is vital that the efficacy of the FMS in achieving the goals set for it is independently examined.

III RESEARCH QUESTIONS AND HYPOTHESES

Against this backdrop the researcher concentrated upon the following five research questions.⁶³

The first research question was in two parts, firstly: 'Are Queensland practitioners using the FMS' and secondly; 'If so, for what types of matters?' It was primarily aimed at ascertaining whether Queensland practitioners were aware of and choosing to use this new court and whether there were initial indications that they were favouring the FMS for particular types of matters, such as for divorce applications. From the outset the FMS was established to deal with less complex matters and it was envisaged that it would handle the bulk of divorce applications and less complex parenting and property matters.⁶⁴

⁵⁸ Ibid 5.

⁵⁹ D Williams, 'Family Law - Past, Present and Future' (Paper presented at 25th Anniversary Conference of the Family Court of Australia, Sydney, 26 July 2001) 1, 12. The *Commonwealth Powers (Family Law-Children) Amendment Act 2001* (Qld) now enables the Family Court and FMS to make orders relating to children who are subject to an order under the *Child Protection Act 1999* (Qld) with the consent of the relevant State Minister.

⁶⁰ A joint initiative of the Attorney-General and the Minister for Family and Community Services.

⁶¹ *Pathways Report*, above n 14 [ES9], Family Court of Australia, *Submission to the Senate Legal and Constitutional Legislation Committee* (1999), above n 53, 4.

⁶² The Attorney-General's response has been to establish Australia Law Online, a free national website and telephone hotline that provides a central gateway for people to gain access to the family law system: D Williams, above n 59, 7.

⁶³ A further three research questions were considered. The research findings in relation in relation to two questions, 'What are practitioner's perceptions of the docket system and what do they see as the advantages and disadvantages' and 'Is the FMS utilising dispute resolution?' were reported in D Cooper, "'Quicker, Cheaper, Less Formal": does the Federal Magistrates Service Mantra Conflict with an Emphasis on Dispute Resolution?' (2002) 13 *Australasian Dispute Resolution Journal* 115. The final research question was, 'What has been the effect of the FMS on the Family Court?'

⁶⁴ S Pidgeon, 'New Federal Magistrates Service Legislation and Procedures' (Paper delivered to the Law Institute of Victoria, Family Law Series, 29 July 1999) 1, 3.

When the research commenced, the Attorney-General announced that in its first six months of operation, 2100 applications had been filed with the FMS in Queensland, with 76% of these applications being for divorce.⁶⁵ By the end of 2001 the number of applications filed in the FMS represented approximately 30% of total family law filings for Queensland.⁶⁶ It was therefore hypothesised that a minority of the sample of practitioners would be utilising the FMS and primarily for the filing of divorce applications.⁶⁷ The questions asked of practitioners tested this hypothesis.

The second question was also two pronged, firstly: 'What effect, if any, has the FMS had on practitioners' workloads' and secondly; 'Are clients aware of the FMS as an additional option?' This question linked to the contextual issue of the effects of competition. The Law Council of Australia had expressed concern that by setting up another court in competition with the Family Court this would lead to an increase in overall demand in the family law jurisdiction.⁶⁸ It stated, 'the Government seems to have failed to take into account that the creation of an entirely separate court will most likely result in an increase in demand for court services'.⁶⁹

It was therefore hypothesised that increased overall demand on the family law system would be reflected in an increase in practitioners' workloads. The Law Council had also expressed concerns that litigants would not understand 'the significance of their choice of court' and would be 'consenting to the jurisdiction of the Federal Magistrates Court without understanding the significance of that decision'.⁷⁰ This led to asking practitioners whether their clients were aware of and understood this new service option. Due to the early timing of interviews it was expected that the majority of clients would not be yet be aware of or understand this new service.

Question three related to one of the pivotal aims of the research: 'Is the FMS providing a quicker, cheaper forum for resolving disputes than the Family Court?' and was founded on the hypothesis that the FMS would indeed provide a faster, less expensive service for resolving disputes than the Family Court. This hypothesis was based on the fact that the primary purpose behind the creation of the new court was to 'help reduce legal costs and expenses and result in litigants saving both time and money'.⁷¹ It was also based on the repeated assertions of the Attorney-General since its establishment that the FMS was achieving these goals and in particular that the majority of matters were being resolved in six months or less.⁷²

⁶⁵ The Attorney-General, Commonwealth of Australia, 'Federal Magistrates in Queensland Deliver Results' (Press Release, 8 January 2001) 1. Of the 2100 applications filed in the FMS in the first six months, 1600 were applications for divorce.

⁶⁶ Family Court of Australia, *Court Statistics – 1 July 1999 to 30 June 2000* <<http://www.familycourt.gov.au/court/html/statistics9.html>>.

⁶⁷ Federal Magistrates Service, *Family Law and Child Support Fees*, above n 20.

⁶⁸ Commonwealth, *Submissions Made to Legal and Constitutional Legislation Committee, Federal Magistrates Bill 1999 and Federal Magistrates (Consequential Amendments) Bill 1999*, Senate, 17 August 1999, 3-5 (F Dixon, President Law Council of Australia).

⁶⁹ Law Council of Australia, *The Policy Position of the Law Council*, above n 10, 18.

⁷⁰ *Ibid* 11.

⁷¹ Commonwealth, *Senate Hansard*, Second Reading Speech, Federal Magistrates Bill 1999, Federal Magistrates (Consequential Amendments) Bill 1999, above n 50.

⁷² For example, The Attorney-General, Commonwealth of Australia, 'Federal Magistrates in Queensland Delivers Results' (Press Release, 28 June 2002) 1; The Attorney-General, Commonwealth of Australia, 'Second Federal Magistrate for Brisbane' (Press Release, 20

Research question four, was firstly: 'Is there evidence that the FMS provides more streamlined procedures' and secondly; 'and is a less formal court with a different judicial culture than the Family Court?' It was aimed at ascertaining whether practitioners could provide anecdotal evidence of these attributes. The chief justification given by the Attorney-General to establish the FMS as a separate court was 'that the Federal Magistrates develop a new judicial culture, with an emphasis on user-friendly, streamlined procedures'.⁷³ It was hypothesised that, as the FMS is specifically directed by legislation that it 'must proceed with undue informality and must endeavour to ensure that proceedings are not protracted',⁷⁴ it would be regarded by participants as less formal than the Family Court.

The final question was divided into two parts: 'Are practitioners engaging in forum shopping' and; 'If so, between which courts and on what basis?' It was directed at examining whether fears expressed that the jurisdictional competition between the Family Court and FMS would result in 'litigants choosing the most advantageous 'forum' for their case'⁷⁵ had been realised. In his second reading speech the Attorney-General stated that 'the FMS is intended to help ease the existing workload of the Family Court and Federal Court. It is not intended to take away federal work currently performed by state and territory courts'.⁷⁶ It was therefore hypothesised that practitioners would be forum shopping between the Family Court and FMS to advantage their clients as they are trained to act in their clients' best interests. It was expected that they would shop on the basis of the lower filing fees for divorces.⁷⁷ It was further hypothesised that in parenting and property matters they would forum shop primarily on the basis of, and in order of priority complexity, filing fees and speed of resolution of a matter.⁷⁸

IV METHODOLOGY

The methodological framework for this study was qualitative, due to the nature of the research questions and limitations on the researcher's resources. A small sample of twenty-five practitioners⁷⁹ and thirteen court staff participated in the study, a total of thirty-eight participants. The practitioners were self-selected from a larger group of

December 2000) 1; The Attorney-General, Commonwealth of Australia, 'Federal Magistrates Service in Townsville Delivers Results' (Press Release, 8 January 2001) 1.

⁷³ Commonwealth, *Senate Hansard*, Second Reading Speech, Federal Magistrates Bill 1999, Federal Magistrates (Consequential Amendments) Bill 1999, above n 50. It was also said, 'This change of culture could not be achieved by appointing more judges to the existing courts'.

⁷⁴ *Federal Magistrates Act 1999* (Cth) s 42.

⁷⁵ Law Council of Australia, *The Policy Position of the Law Council*, above n 10, 17.

⁷⁶ Commonwealth, *Senate Hansard*, Second Reading Speech, Federal Magistrates Bill 1999, Federal Magistrates (Consequential Amendments) Bill 1999, above n 50.

⁷⁷ Filing fees for divorce in the FMS are less than half that of the Family Court. Federal Magistrates Service, *Family Law and Child Support Fees*, above n 20.

⁷⁸ This was based on the philosophical framework to the establishment of the court that it would deal with less complex matters and be quicker and cheaper than the Family Court: Commonwealth, *Senate Hansard*, Second Reading Speech, Federal Magistrates Bill 1999, Federal Magistrates (Consequential Amendments) Bill 1999, above n 50.

⁷⁹ Twenty-five practitioners (three barristers and twenty-two solicitors) from the following areas agreed to participate: Bundaberg, Brisbane city, Brisbane suburbs, Cairns, Gympie, Mackay, Rockhampton, Townsville, Southport, Sunshine Coast and several towns in Western Queensland. Solicitors and barristers were approached in relatively equal numbers, however, far more solicitors than barristers consented to participate in the process.

potential participants. Forty-six Queensland lawyers⁸⁰ were approached and twenty-five chose to participate.⁸¹ The majority of practitioners interviewed were Queensland Law Society accredited family law specialists.⁸² Family Court staff were identified using a snowball sampling technique facilitated by His Honour, Justice Buckley.⁸³ Two Federal Magistrates and two management staff of the FMS were approached directly and agreed to participate.

Once the list of participants was compiled, practitioners and court staff were invited by telephone or email to participate in the study.⁸⁴ Semi-structured interviews were used to collect the data. The interview schedules contained open-ended questions grouped under each research question.⁸⁵

There were some limitations to the methodology of this study. Firstly, as the study was local to Queensland we cannot know, except by comparing results with similar studies conducted elsewhere, whether respondents' perceptions, opinions and experiences were typical of practice in and around the Family Court in all registries, or peculiar to Queensland. Fortunately the FMS itself commissioned consultants to conduct research that involved interviewing practitioners throughout Australia as to their experiences in its first year of operation. As both research projects involved the same time period the results can be compared to form a broader picture.⁸⁶

Secondly, the sample size is relatively small and as such the research findings cannot be considered representative of the experiences of all family lawyers across Queensland and statistical generalisations cannot be made. The geographical and numerical limits of the sample mean that the results of this study are not generalisable.

Nevertheless, the data yields a richly textured picture of experienced professionals reflecting on their own perceptions, and some interesting and informative results were

⁸⁰ Initially identified as solicitors who had obtained family law specialist accreditation from the Queensland Law Society and barristers specialising in family law.

⁸¹ Names of practitioners were obtained from the list of Queensland Law Society accredited family law specialists and from the Family Law Section of the Law Council of Australia. This list was then supplemented by lists of practitioners obtained from the general list of solicitors maintained by the Queensland Law Society, by location. This ensured that a spread of practitioners was obtained from around Queensland.

⁸² However, a minority number of practitioners interviewed were not specialists. They were included as in some regional areas, particularly in far west Queensland, there are no accredited specialists. Further, in some areas there are so few specialists that there were not enough practitioners to participate and give a representative voice for the particular region.

⁸³ Justice Buckley suggested some staff members as potential participants, and those who consented to participate referred the researcher on to other interested staff members. A total of nine Family Court staff, three judicial officers and six management staff were interviewed.

⁸⁴ Those who agreed to participate were sent an information sheet explaining the nature of the study, a consent form and a copy of the interview schedule. Participants were invited to select a means of returning the data to the researcher: some chose to be interviewed over the telephone, others emailed or mailed their responses and others opted for a face-to-face interview. Interviews conducted either over the telephone or face-to-face were of one to two hours' duration.

⁸⁵ Different interview schedules were used for each professional group, reflecting their different roles, one interview schedule was used for the practitioners, and another for the court staff. Initial interviews were conducted in June/July 2001 and some follow-up interviews were conducted in September/November 2001.

⁸⁶ FMS, *Results of the 2001 Survey on Awareness and Performance*, above n 13.

obtained. This study represents an introductory examination of the research questions, and provides a basis for further research on this subject.

V MAJOR FINDINGS, ANALYSIS OF RESULTS AND COMPARISON WITH FMS SURVEY

The timing of the interviews for this research overlapped with the timing of a survey commissioned by the FMS through external consultants.⁸⁷ It should be emphasized, however, that our research differed from the FMS survey in that it was completely independent and went further than the FMS survey in the scope of its investigation. The FMS survey overlapped with our research questions three and four and is predominantly of interest as it was conducted throughout Australia. One limitation to be noted when comparing results is that the FMS survey was not limited to family law matters. The large majority, however, being 82% of the practitioners interviewed were involved in family law matters in the FMS.⁸⁸

Despite this limitation the survey results are of interest, as they proved to be entirely consistent with the findings of our research. They also serve to highlight some concerns that were uncovered during this project that in turn link to the contextual issues previously discussed.

A *Research Question 1 - (a) Are Queensland Practitioners Using the FMS and if so, (b) What Types of Matters are they Choosing to File in this Court?*

1 *Findings*

Of the twenty-five practitioners surveyed, a large majority of twenty-two reported that they were using the FMS. Of these twenty-two, three practitioners were utilizing the Service for only divorce applications. Thirteen practitioners, slightly more than half the sample, reported that they would take all types of suitable applications being defined as 'less complex matters' to the FMS.⁸⁹

A majority of practitioners interviewed were choosing to file all of their divorces in the FMS due the substantially lower filing fee.⁹⁰ Three practitioners were choosing not to file parenting applications in the FMS. Their primary motivation was either a preference for the personality of the decision-makers in the Family Court or as they felt that in some matters, a quick turnaround to final hearing may not be appropriate.⁹¹ The majority of practitioners, however, reported that in most cases a speedy resolution in parenting matters was preferable as this keeps the client's level of anxiety down and prevents the parties becoming entrenched.

⁸⁷ Ibid. A further survey was performed in the following 2002 year, *Results of the 2002 Survey on Awareness and Performance*, above n 13.

⁸⁸ In 2001, 100 practitioners overall were interviewed, 11 had bankruptcy matters, 5 discrimination and 2 administrative matters. In 2002, 182 practitioners were interviewed, 132 had been involved in family law matters. *Results of the 2002 Survey on Awareness and Performance*, above n 13, 1.

⁸⁹ A general guide is that less complex matters will require less than 2 days court hearing time: *Introduction to the FMS*, above n 19.

⁹⁰ Federal Magistrates Service, *Family Law and Child Support Fees*, above n 20.

⁹¹ For example, in matters where there are very young children and contact arrangements may need to be tested and refined.

Four practitioners stated that they would take divorces and parenting, but not property matters to the FMS. A concern as to lack of appropriate discovery was the chief reason that these practitioners would not take property matters to the FMS. One practitioner, reported that they would no longer file property matters in the FMS as they did not feel confident that the rules of evidence would be properly administered and that they would be granted orders for discovery.⁹²

One regional practitioner filed all matters in the FMS that were within its jurisdiction. This practitioner also sought the consent of the other side to file larger property matters stating, '[t]here is no matter that I think is too complicated for the FMS'. Another practitioner felt confident that because of the personality and experience of the Federal Magistrates that they could handle any matter that fell within their jurisdiction.

Some practitioners perceived that the FMS 'specialises in relocation'. They stated that because the matter could be finally heard much faster in the FMS it was advantageous to take relocation matters there. The Federal Magistrates confirmed that they were hearing many relocation applications.⁹³

Of the three remaining practitioners who were not using the service at all one was a family law specialist from a regional area who reported being satisfied with the service provided by the Family Court circuits.⁹⁴ This practitioner had also chosen not to utilise the FMS due to concerns that the faster process would not provide as considered an approach as the Family Court. The second practitioner was a general practitioner from far western Queensland who was undertaking 20% of their practice as family law work. This practitioner reported not being aware of the cheaper filing fees in the FMS. The third practitioner was a junior solicitor from Brisbane city with one year's experience undertaking only legal aid work. This practitioner was using the Family Court as filing fees were not an issue to clients.⁹⁵

Interviews revealed a level of confusion amongst practitioners as to the matters they could take to the FMS. The Federal Magistrates corroborated these observations particularly in relation to those practitioners not specialising in the family law jurisdiction. Further the Federal Magistrates reported that since the introduction of the service there have been several legislative changes and that their perception was that the non-specialists were not keeping abreast of the changes.⁹⁶

⁹² *Federal Magistrates Act 1999* (Cth) s 45(1) provides that 'Interrogatories and discovery are not allowed in relation to proceedings in the Federal Magistrates Court unless the Federal Magistrates Court or a Federal Magistrate declares that it is appropriate, in the interests of the administration of justice, to allow the interrogatories or discovery'.

⁹³ In late May 2001 the Federal Magistrates reported that they could conclude such an application within approximately three months.

⁹⁴ This practitioner reported a twelve month time to final hearing in June 2001, practitioners in Brisbane were reporting a twenty month turnaround.

⁹⁵ Legal Aid clients obtain a waiver of filing fees in both the Family Court and FMS. Legal Aid Queensland Policy Manual, above n 28.

⁹⁶ Initially the FMS could only hear residence applications with the consent of both parties. The *Family Law Amendment Act 2000* (Cth) amended the *Family Law Act 1975* (Cth) to confer original jurisdiction on the FMS in final residence proceedings. The property jurisdiction of the FMS was initially \$300 000 and increased to \$700 000 on 1 January 2002, *Family Law Amendment Regulation 2001* (Cth), above n 21.

2 Analysis

The findings of this research were not consistent with the original hypothesis that only a minority of the sample of practitioners would be using the service and primarily for divorce applications. Practitioners revealed a level of usage of the court for parenting and property matters that had not been anticipated. Only three practitioners in this small sample were choosing to utilise the service solely for divorce applications. Court statistics corroborate this finding and the FMS was used extensively in its first year of operation.⁹⁷ Table one shows that in this first year 5734 family law applications were filed with the FMS in Queensland, approximately 30% of total family law filings in Queensland.⁹⁸

	1998/1999	1999/2000	2000/2001	2001/2002
FMS	N/A	N/A	5734	6161
Family Court	14 021	14 176	9790	8903
State Mags Ct	4267	3376	3789	4065
	18 288	17552	19313	19 129

Table 1: Number of family law files opened in Queensland⁹⁹

Usage of the FMS linked to practitioners' level of satisfaction with the Family Court and their knowledge of and level of comfort appearing as an advocate in the FMS that was at that time a new judicial forum. In turn practitioners' awareness of the FMS appeared to be dependent on the percentage of family law work they undertook.

The published FMS survey results do not report on the proportion of practitioners choosing to use the Service. However they do reveal that in 2001, 75% of practitioners surveyed were satisfied with the level of information provided to them by the FMS about its services.¹⁰⁰ Further, 87% of practitioners stated that the FMS had kept them sufficiently informed about their matters.¹⁰¹

⁹⁷ In its first year of operation (excluding divorce applications) the FMS was receiving 23% of national family law filings. In comparison New South Wales filed 38% of total national family law filings and Victoria 30%. The service was dealing with the vast majority of divorce applications with 23500 applications filed in the first twelve months: D Williams, Federal Magistrates Service - One Year On' (Press Release, 3 July 2001) 1; L Boulle, 'First Year of the Federal Magistrates Service' (2001) 4 *ADR Bulletin* 15.

⁹⁸ In its first twelve months of operation the FMS filings in Queensland represented 21% of the total family law applications across Australia, apart from divorce, were filed with the FMS. It was also stated that 'an early analysis of these fears stated that "about half the filings are for matters which would otherwise have been filed in the Family Court and about half are matters which would previously have been filed in the State Magistrates Court or not at all": Email from B Doyle, Member Family Law Section, Law Council of Australia, to author, 31 July 2001.

⁹⁹ Statistics obtained from the following sources: Email from P Ryle, Project Officer, Department of Justice Strategic Project Unit to author, 1 October 2002; Email from D Henderson, Executive Assistant to Principal Registrar, Family Court of Australia to author, 2 October 2002; FMS, Statistics, Files Opened/Applications Filed in FMS for July 2000-June 2001, Files Opened/Applications Filed in FMS for July 2001- June 2002 <<http://www/fms/gov.au>>.

¹⁰⁰ FMS, *Results of the 2001 Survey on Awareness and Performance*, above n 13, 2. This level of satisfaction has since increased in the 2002 year to 79%. FMS, *Results of the 2002 Survey on Awareness and Performance*, above n 13, 2.

¹⁰¹ *Ibid*, 3.

B *Research Question 2 – (a) What Effect, if any has the FMS had on Practitioner’s Workloads and (b) Are Clients Aware of the FMS as an Additional Option?*

1 *Findings*

Most practitioners interviewed did not perceive that the addition of the FMS had increased their overall workload. The majority, however, commented that their family law work in general was extremely busy and some practitioners stated that it was steadily increasing. The Federal Magistrates reported that their perception was that family law work in general was increasing in Queensland. In June 2001 when they were interviewed they were not able to link this to any key factor.

A minority of practitioners reported that their workload had increased since the establishment of the FMS and attributed this to ‘file velocity’ rather than an increasing number of clients coming through the door. These practitioners reported that their matters in the FMS were concluding more quickly due to the shorter time frame to final hearing.¹⁰²

The majority of practitioners interviewed stated that their clients were not aware of the existence of the FMS. Their perception was that they did not have additional numbers of clients approaching them for assistance due to a level of awareness of this new service. Practitioners painted a picture of client confusion with clients in general not having a sophisticated enough knowledge to appreciate the different jurisdictional options available to them. Practitioners reported that they decided what court a matter should be filed in and then justified their choice to their client.

2 *Analysis*

The findings did not support the hypothesis that the introduction of the FMS has led to increased demand on the family law system. The majority of practitioners and the Federal Magistrates reported a perception that family law work in Queensland had been steadily increasing over a period of time, however were not prepared to link this increase to the establishment of the FMS. Statistics, however, support fears that the addition of another service provider has increased the overall family law litigation workload. Statistics obtained from the FMS, Family Court and State Magistrates Courts show that in Queensland the number of family law applications has increased approximately 5% since the establishment of the FMS in July 1999.¹⁰³ They also support the concern that the FMS would take some work away from the State Magistrates Courts with a 5% overall decrease in matters being filed.

¹⁰² At that time practitioners estimated that the time to final hearing was approximately five to six months in the FMS and eighteen months to twenty-four months in the Family Court.

¹⁰³ See Table 1 on page 16 of this article. From the 1998/99 financial year just prior to the establishment of the FMS to the 2001/2002 financial year. Chief Justice Nicholson has reported that overall family law filings have increased across both the Family Court and FMS by 10% however filings in the Family Court have decreased by only 5%. He speculated that this could be because the FMS has taken some work from the State Magistrates Courts; Chief Justice A Nicholson, ‘Food for Thought: The State of Family Law and the Family Court of Australia 2002’ (Paper presented at Law Council of Australia, Family Law Section, 10th National Conference, 18 March 2002) 1, 11.

The findings provide strong support, however, for the hypothesis that clients were unaware of and did not understand the jurisdiction of the FMS. Practitioners echoed submissions made by the Family Court in opposing the establishment of the FMS, when arguing that it would result in fragmentation: 'The reality for families that have a family law problem is that they just want to go to court and get it fixed up. They do not really care about the structure of the whole system'.¹⁰⁴ The FMS's own survey results are consistent with this finding. The 2001 FMS survey reported: 'Legal practitioners believed that the general public did not have sufficient information about FMS'.¹⁰⁵

C *Research Question 3 – Does the FMS Provide a Quicker, Cheaper Forum for Resolving Disputes than the Family Court?*

1 *Findings*

In June/July 2001 when initial interviews were undertaken, practitioners stated that the FMS was a quicker forum for final hearings in both the Brisbane and Townsville registries. Practitioners in Brisbane were reporting a turnaround of approximately five to six months to a final hearing in the FMS and approximately eighteen months to two years to a final hearing in the Family Court.¹⁰⁶ Practitioners reported, however, that it was faster to take an interim hearing to the Family Court. They stated that their matters were taking approximately four weeks in the Family Court and approximately six weeks in the FMS to reach an interim hearing.

In September/October 2001 the waiting time in the FMS had increased, although practitioners reported that they were still confident that they would obtain a faster final hearing date in that court. Time to final hearing was then approximately six to seven months in the FMS in Brisbane. By November 2001 practitioners were reporting delays in the delivering of judgements.¹⁰⁷ Several practitioners voiced concerns as to whether the FMS could continue to deliver quicker, cheaper service than the Family Court. They noted that the FMS had the luxury of a fresh start without any backlogs and questioned whether it could remain a faster judicial forum as it became busier.

The majority of practitioners were aware that FMS filing fees were cheaper than in the Family Court,¹⁰⁸ however, in Brisbane practitioners talked of often having to offset to their client the cost of them being required to wait around at court for long periods of time. Several practitioners voiced concern at the resulting high legal costs to their clients. In addition some practitioners noted that there was increased time and cost in dealing with this additional court system and that those costs would inevitably be passed on to clients.¹⁰⁹ Some practitioners reported difficulties with transfers between courts increasing legal costs to their clients. Regional practitioners reported

¹⁰⁴ Commonwealth, *Submissions Made to Legal and Constitutional Legislation Committee*, above n 68, 67 (Justice L Dessau).

¹⁰⁵ FMS, *Results of the 2001 Survey on Awareness and Performance*, above n 13, 2.

¹⁰⁶ In Rockhampton practitioners reported a much shorter time to final hearing through their circuit being twelve months.

¹⁰⁷ One practitioner stated that for one matter heard in late May, the decision was handed down in mid-September, a delay of almost four months.

¹⁰⁸ Federal Magistrates Service, *Family Law and Child Support Fees*, above n 20.

¹⁰⁹ For example the FMS has its own Act and Rules, and there is a separate CCH service that the practitioner had bought to keep them informed of the FMS practices and procedures.

that some matters had to be transferred from the State Magistrates Court to the Family Court and then on to the FMS. They perceived that this convoluted process caused unnecessary delays and additional expense to their clients.¹¹⁰

A minority of practitioners predominantly using the FMS reported that they perceived it was a cheaper forum for clients than the Family Court due to 'file velocity'.¹¹¹ They also reported cost savings to their clients as the FMS was more inclined to allow flexibility of hearing structure.¹¹² Some practitioners reported that they were more likely to perform their own advocacy work in the FMS than in the Family Court rather than brief counsel. The Federal Magistrates corroborated this by their observations that solicitors were less inclined to brief counsel in their court, particularly for interim matters.

2 Analysis

The hypothesis for the third research question: 'Is the FMS providing a quicker, cheaper forum for resolving disputes than the Family Court?' was that the FMS would be a more expeditious judicial forum. Our findings supported this hypothesis with some reservations. Practitioners reported that throughout the course of 2001 the time to final hearing in the FMS gradually increased as the Service became busier. Further, over the same timeframe the time to interim and final hearing in the Family Court reduced.¹¹³ The conclusion being that the FMS was a quicker process for final hearings, however not for interim hearings.

This is consistent with the 2001 FMS survey results where 88% of respondents believed that the FMS were providing 'a quicker and simpler outcome for their clients'.¹¹⁴ The survey report, however, cautioned that 'many practitioners commented that, due to its success, the court was becoming busier and this was affecting hearing dates and, therefore, accessibility'.¹¹⁵ Reports by respondents to this research that delays in the delivery of judgments were starting to form were also consistent with the findings of the 2001 FMS survey.¹¹⁶

¹¹⁰ State Magistrates courts have no power to transfer to the FMS.

¹¹¹ They perceived that as the time to final hearing was much earlier, a client's matter will be resolved more quickly and the legal fees are then minimised.

¹¹² For example, consenting to Directions hearings, Conciliation conferences and interim hearings being conducted by telephone link-up. This flexibility would reduce clients costs by cutting out the need for personal appearances and in regional areas in dispensing with the need for court appearances by town agents.

¹¹³ This is consistent with the FMS survey result for 2002 where the percentage of practitioners that agreed with the statement that the FMS 'has resulted in a quicker and simpler outcome for clients' has decreased from 88% in 2001 to 76% in 2002, a considerable drop of 12%: FMS, *Results of the 2002 Survey on Awareness and Performance*, above n 13, 4.

¹¹⁴ FMS, *Results of the 2001 Survey on Awareness and Performance*, above n 13, 4. The survey question asked was 'The FMS was established to provide a simple and accessible forum for the resolution of less complex matters. Do you think your involvement with the FMS has resulted in quicker and simpler outcomes for clients?'

¹¹⁵ FMS, *Results of the 2001 Survey on Awareness and Performance*, above n 13, 4.

¹¹⁶ It was reported 'The Chief Federal Magistrate is monitoring the time taken to deliver judgements and has already instituted arrangements that provide judgement writing time for Federal Magistrates': FMS, *Results of the 2001 Survey on Awareness and Performance*, above n 13, 3.

The findings do not provide clear support for the hypothesis that the FMS is a cheaper process than the Family Court. Practitioners expressed concerns that cost savings to clients in the simpler process had to be weighed up against charges for long hours of court waiting time and the added complexity of them having to deal with yet another court system. These findings echoed the FMS survey where it was noted that practitioners could be required to 'wait all day for a simple matter'.¹¹⁷ There was some evidence that the process may be cheaper if file velocity was maintained, that is, if the time to final hearing in the FMS remained far shorter than in the Family Court. There was also some evidence of a cheaper process in cost savings to clients in the use of solicitor advocates and in flexibility of hearing structure.

D *Research Question 4: Is There Evidence that the FMS is a Less Formal Court with a Different Judicial Culture?*

1 *Findings*

The majority of practitioners reported that the Federal Magistrates had a more informal approach and a different judicial culture to that of the Family Court. Anecdotal evidence offered by practitioners included that in general, the Federal Magistrates had a friendlier manner towards the parties, directed remarks more to the parties than to the legal representatives and robustly directed parties to the issues they should be focusing on. Practitioners reported that the Federal Magistrates were working longer hours than the majority of judicial officers in the Family Court, commencing cases earlier and finishing later, sometimes late into the evening so that a case could be concluded.

Several practitioners noted that the Federal Magistrates did not adhere as rigidly to the rules of evidence as the judicial officers in the Family Court and as a result they felt comfortable appearing themselves as advocate in the FMS in interim matters without the need to brief counsel.¹¹⁸ One solicitor reported that they even felt comfortable taking on the role of advocate in final hearings.

Regional practitioners were most enthusiastic about what they described as a judicial culture of informality and flexibility and the advantages that this provided to clients who often hail from remote areas of Queensland.¹¹⁹ Examples they gave were the conduct of mentions¹²⁰ and hearings by telephone link-up, dispensing with the need for appearances by parties in divorce matters and tailoring the timing of evidence to work around travel and work commitments of witnesses.¹²¹

¹¹⁷ FMS, *Results of the 2001 Survey on Awareness and Performance*, above n 13, 4.

¹¹⁸ Some stated that this was also due to the matters being shorter and less complex.

¹¹⁹ Regional practitioners applauded the willingness of the Federal Magistrates to conduct Directions hearings and interim hearings by telephone link-up which result in costs savings to clients by not requiring the appearance of parties or town agents. One practitioner from Gympie stated that their understanding was that as they were within 300km of Brisbane they had to have special circumstances to apply for this type of flexibility in the Family Court.

¹²⁰ The Federal Magistrates stated that they would rather conduct telephone link-ups and deal with the regional solicitors acting for parties than require appearances and deal with town-agents who sometimes did not have adequate instructions.

¹²¹ Practitioners reported the FMS permitted divorces to be heard where there are children under 18 without the need for their client to appear. An affidavit setting out the arrangements for the

A minority of practitioners voiced concerns about what they perceived was the negative impact of this informality. They reported that this flexibility could be used by litigants to their advantage, particularly litigants in person. One practitioner commented that evidence by telephone link-up was not always as reliable as when delivered in the formality of a court setting. Another practitioner reported that the impact of court orders on clients was not as great as made by the Federal Magistrate over the telephone and in their experience had affected compliance.

A judicial officer of the Family Court made the comment that in some matters, informality would simply be inappropriate. Cases such as those involving allegations of sexual abuse of children require a very rigid application of the rules of evidence and need the formality of the court process to ensure that witnesses appreciate the implications of their evidence.

2 Analysis

The findings clearly supported the hypothesis that the FMS is a less formal court with a different judicial culture than the Family Court. This was consistent with the FMS survey where 85% of respondents 'commented that the FMS Magistrates were appropriately informal while maintaining the decorum and dignity expected of a court'.¹²²

In our research practitioners generally regarded this attribute in an extremely positive light, however, some practitioners pointed out that this informality can sometimes work to the detriment of their client, particularly when opposed by a litigant in person. This was consistent with the FMS survey where it was reported 'some respondents were concerned that proceedings may be too informal, particularly with evidence'.¹²³ The FMS survey report also echoed the comments of some of our practitioners, 'clients find it user-friendly but need to realise they need to comply with orders'.¹²⁴

E *Research Question 5: Are Practitioners Engaged in Forum Shopping and if so, Between which Courts and on What Basis?*

1 Findings

The majority of practitioners reported that they were forum shopping between judicial forums for clients. Practitioners reported that for divorce applications their primary criteria were filing fees and speed, that is time to final resolution in the court. For parenting and property matters filing fees were not a priority and other factors were considered far more important. Factors such as speed, personality of the decision maker and tactical considerations were uppermost in the minds of practitioners.

children was sufficient and the Federal Magistrate would satisfy any queries by arranging a telephone link-up.

¹²² The survey question asked was, 'The FMS operates as informally as possible. In your experience, have the Federal Magistrates been less formal than judicial officers in other superior courts?': *Results of the 2001 Survey on Awareness and Performance*, above n 13, 4. This percentage dropped to 77% in the 2002 survey. *FMS, Results of the 2002 Survey on Awareness and Performance 2002*, above n 13, 4.

¹²³ *FMS, Results of the 2001 Survey on Awareness and Performance*, above n 13, 4.

¹²⁴ *FMS, Results of the 2001 Survey on Awareness and Performance*, above n 13, 7. The FMS identified this as an issue to be addressed by the court, and indicated that 'Federal Magistrates will wear robes when making final orders to strengthen the perceived authority of the court'.

In general practitioners reported that they valued certain key attributes in their decision-makers. They valued positive qualities such as consistency in making decisions, flexibility, being client, settlement and child focused, an effective presence in encouraging parties to settle, hardworking, even-handed and fair and not biased towards male or female litigants. They viewed negative qualities as being unpredictable in the making of decisions, abrupt with the parties and inflexible.

A minority of practitioners reported choosing their judicial forum on a tactical basis. Some practitioners spoke of the importance of 'status quo' in parenting matters and of taking a matter to a particular court depending on how long it would take to obtain a date for interim hearing.¹²⁵ One practitioner reported choosing a judicial forum based on the imminent changes to the superannuation laws.¹²⁶ This practitioner reported that some practitioners were filing these matters in the FMS so that their client's property settlement would be resolved before these changes took effect.

Regional practitioners and practitioners in outer suburbs of Brisbane were also using the State Magistrates Courts in addition to the Family Court and FMS. A minority of solicitors in Brisbane city also reported using the State Magistrates Court on a limited basis. Practitioners reported that they liked to use the State Magistrates Courts for urgent matters, particularly when filing applications for recovery orders.¹²⁷ One practitioner on the Queensland/New South Wales border filed applications in the three different courts and three different locations, Brisbane, Newcastle and Sydney.

2 Analysis

It had been hypothesised that practitioners would be forum shopping and the research findings clearly support this. It was expected that their criteria would be based solely on the basis of lower filing fees for divorce applications. To the contrary, the findings revealed that practitioners were shopping on the basis of both filing fees and speed.¹²⁸

For parenting and property matters it had been hypothesised that practitioners' criteria would be filing fees, complexity and speed. The findings did not support this.

¹²⁵ 'Status quo' or ensuring stability in a child's life is an important factor that the court takes into account in interim parenting hearings. 'Where at the date of the hearing the child is well settled in his environment, that stability will usually be promoted by an order providing for a continuation of that arrangement, unless there are overriding indications relevant to the child's welfare to the contrary...': *Cowling and Cowling* (1998) FLC 92-801, [85002].

¹²⁶ *Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2002* (Cth).

¹²⁷ The Magistrates Court has limited jurisdiction under ss 39 (2) and (6) of the *Family Law Act 1975* (Cth) in parenting and property matters. 'For the court to hear applications for parenting orders beyond the initial stages or property settlement and lump-sum spousal maintenance with a property pool with a gross value exceeding \$20 000, the parties must consent. This consent is regularly given, as our courts have been able to list such matters for hearing on final basis often within six to nine months of filing': Queensland Magistrates Courts, *Annual Report of Queensland Magistracy* (2001) 17.

¹²⁸ It had not been anticipated that due to the majority of divorce applications being filed in the FMS that a practitioner could obtain a much earlier hearing date in the Family Court. Further, clients eligible for a remission of filing fees are not concerned with the higher Family Court filing fee. Applicants can request the filing fee to be waived if they can show that payment will cause financial hardship. Family Court of Australia
<<http://www.familycourt.gov.au/forms/html/fees.html#guidelines>>.

Practitioners were most concerned about the personality of the decision maker and then, less importantly, about speed and tactics. They did not regard filing fees as a priority.

VI IMPLICATIONS OF THE FINDINGS

A *Advantages and Disadvantages of the Application of Market Ideology to the Family Law System*

The findings of both sets of research highlight some of the positive and negative effects of the application of market ideology and the resultant judicial competition to the family law system. On the positive side the FMS has made a clear stance as a judicial service provider and has used its consumer focus to provide, at the time this research was conducted, a quicker, less formal process for family law litigants. The research findings also provide support for the Attorney-General's primary justification for placing Federal Magistrates within a separate court, that it would effect a clear change of judicial culture.¹²⁹ In its most favourable light this has led to increased informality and flexibility that, in particular, increases access to justice for regional litigants.

The findings lend some support, however, to fears that market ideology cannot be applied to the court system without some loss of procedural fairness and effectiveness of the justice process.¹³⁰ It has been argued that there is a conflict of interest between the notion of courts providing a service to consumers and courts providing a just outcome to litigants.¹³¹ Both this research and the FMS's own survey results lend some support to this argument as there is anecdotal evidence that by treating litigants as consumers this enables some to manipulate the justice system to their own advantage.

The Law Council of Australia had expressed concern that the establishment of the FMS 'has the potential to create two separate classes of justice – a "superb" justice system for the wealthy and a "rough" justice system for the poor and legally aided'.¹³² It had also expressed concern that quick, inexpensive justice may not equate with quality of justice.¹³³ This research lends some support to these fears, that in cutting procedural corners, the FMS can offer a faster, simpler process however there have been some concerns raised by practitioners as to the quality of the process. It is also clear that for some matters informality is inappropriate. Further research needs to be conducted on the effectiveness of the process and the longevity of the outcome. A concern is whether the FMS is able to resolve matters effectively and finally or whether litigants will need to come back to court in the future to deal with unresolved issues.

B *Judicial Competition Results in Forum Shopping Highlighting the Role of Judicial Discretion in Family Law Matters*

This research has confirmed fears expressed by the Law Council that the FMS 'will largely function in direct jurisdictional competition with the Family Court. That is,

¹²⁹ Commonwealth, *Senate Hansard*, Second Reading Speech, Federal Magistrates Bill 1999, Federal Magistrates (Consequential Amendments) Bill 1999, above n 50.

¹³⁰ Spigelman, above n 15, 203

¹³¹ *Ibid.*

¹³² Law Council of Australia, *The Policy Position of the Law Council*, above n 10, 2.

¹³³ *Ibid.*

there will be two separate courts dealing with the same laws. It will inevitably lead to forum-shopping by litigants'.¹³⁴ The Attorney-General has argued that the key distinction between the core business of each court is one of complexity of matter.¹³⁵ At the time when this research was conducted, practitioners were not simply filing less complex matters in the FMS. They were forum shopping for their less complex matters between the FMS, Family Court and in some cases the State Magistrates Courts for the judicial forum most suited to the needs of their client.

For matters apart from divorce the research findings pointed to the key forum shopping factors of speed and personality of the decision maker. The importance to practitioners of the personality of the decision maker raised an unexpected outcome of this research in that it reinforces the role of judicial discretion in family law matters.¹³⁶

C *Confirmation of the Pivotal Role of Family Lawyers as 'Gatekeepers'*

A further unexpected outcome of this research was the reinforcement of the pivotal role of lawyers as 'gatekeepers' in the family law system, often being the client's first point of contact in the system, charged with guiding them into the pathway that best suits their needs.¹³⁷ Of concern is that this research revealed some confusion amongst family law practitioners as to the jurisdiction and services offered by the FMS. It also revealed that in 2001 some practitioners were not informing their clients of this further judicial option either because they were unaware of it, did not understand it sufficiently, or did not feel comfortable appearing in the new judicial forum.¹³⁸

D *Further Fragmentation of the Family Law System Increases the Need for Specialisation*

The research findings therefore reinforce initial concerns that the establishment of the FMS would lead to further fragmentation of the family law system. It can be argued that the findings reveal the value to clients of specialist accreditation.¹³⁹ The majority of practitioners who were family law specialists revealed a sophisticated awareness of the advantages and disadvantages of the FMS for their particular matters. Due to the increasing complexity of the family law system there is now a greater onus on family lawyers to properly advise their clients of suitable options. Family lawyers now have

¹³⁴ Ibid 17.

¹³⁵ D Williams, 'State of the Nation Address', above n 3, 6.

¹³⁶ J Dewar, 'Reducing Discretion in Family Law Matters' (1997) *Australian Journal of Family Law* 309.

¹³⁷ *Pathways Report*, above n 14 [Recommendation 8, ES12].

¹³⁸ This is consistent with a recent report 'Notwithstanding that the Federal Magistrates Court has now been in operation for 20 months, it is perceived that there is still a degree of confusion among lawyers and litigants in person as to the appropriate court in which to commence proceedings, or when to seek a transfer from the Family Court of Australia to the Federal Magistrates Court': 'When to Transfer proceedings from the Family Court to the Federal Magistrates Service' (2002) 15 *Australian Family Lawyer* 23.

¹³⁹ To qualify as an accredited specialist in Queensland a lawyer applies through the Queensland Law Society and must be a member of the Queensland Law Society and hold a current Queensland Practising Certificate, have at least five years experience in the practice of law and at least three years substantial experience in the area of practice; provide references from other lawyers or professional that confirm the ability and experience of the solicitor and successfully complete a series of assessments of their knowledge of all facets of practice, including a written examination: Queensland Law Society <<http://www.qls.com.au/default.aspx?pid=74>>.

a more challenging role in keeping abreast of jurisdictional and procedural changes in several different courts. It is desirable that practitioners undertaking family law work become accredited family law specialists or at the very least, be required to undertake regular education and training to keep abreast of developments.¹⁴⁰ In turn there is now a greater onus on the body that accredits family law specialists to ensure that their practitioners are keeping up with changes in the family law system.¹⁴¹

E *Need for Further Refinement of the Relationship Between the Two Courts*

The issues identified in this research lead to a key question arising as to what should be the continuing roles of the FMS and Family Court. For the current family law system to operate in the most efficient way there needs to be further refinement of the relationship between the two courts. There is a tension between the Family Court and the FMS as to which court should be hearing interim matters.¹⁴²

The Attorney-General himself had envisaged that the FMS 'is designed to take the pressure off the Family Court so it can concentrate on more detailed and complex cases'.¹⁴³ The Chief Justice of the Family Court, however, has complained, 'the establishment of the FMS has not resulted in a significantly decreased workload for the Family Court of Australia in discharging its obligation to deal with contested trials'.¹⁴⁴ The Chief Justice continued, 'There is still no agreement as to the type of defended work that the FMS should undertake and there is evidence that it is performing some of the more complex work that should be the province of this court from time to time'.¹⁴⁵

This debate is clouded by the fact that at present practitioners are allowed to choose their judicial forum.¹⁴⁶ The only definition the FMS provides of matters appropriate to

¹⁴⁰ It is noted, however, that the *Pathways Report* concluded 'Whilst accepting the benefits of specialist accreditation ... there should be no move to restrict family law practice to certified specialists or to limit specialists to their own fields. Most generalist practitioners and those in rural and regional centers provide advice on family law matters as part of the service they offer to their clients. It is essential that this access to legal advice is not limited': *Pathways Report*, above n 14, 29.

¹⁴¹ There are 113 accredited family law specialists in Queensland. In the *Pathways Report* it was said, 'The Advisory Group notes that it is not necessary for a lawyer to be accredited as a family law specialist to practice in a field although it may be attractive for a prospective client to select a lawyer with such accreditation': *Pathways Report*, above n 14, 29.

¹⁴² The Chief Justice has complained that 'The original rationale for the establishment of the Federal Magistracy – that it would deal with interim, summary or less complex matters – cannot be said to have eventuated in the manner envisaged': Chief Justice A Nicholson, 'Food for Thought: The State of Family Law and the Family Court of Australia 2002' above n 103, 11.

¹⁴³ D Williams, 'Family Law - Past, Present and Future', above n 59, 5.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid. The FMS stated 'the reduction in numbers of SES Registrars in the Family Court has raised questions about whether Federal Magistrates should hear interim hearings with the final hearing to be in the Family Court. As a matter of principle the court does not consider that to be the best use of its judicial resources and has encouraged the Family Court to consider other options for handling the demand on it for interim decisions': Federal Magistrates Service, *Annual Report 2000-2001*, 16.

¹⁴⁶ Although the FMS has wide discretion to transfer matters to the Family Court if there are associated proceedings pending in that court, if it does not consider it has sufficient resources to hear and determine the matter or in the interests of the administration of justice: *Federal Magistrates Act 1999* (Cth) s 39. The Family Court has a similar discretion to transfer matters to the FMS, *Family Law Act 1975* (Cth) s 33B. See also Order 8A Rule 6 of the *Family Law Rules 1984* (Cth) which sets out the factors the the Family Court can take into account in deciding

file in its court is that they are 'less complex'. Some refinement of the definition of 'less complex matters' has occurred with an agreement that certain applications relating to maintenance, enforcement of orders, child support and contravention applications be filed in the FMS.¹⁴⁷

A more comprehensive definition of the matters suitable to file in the FMS court should be made. For example, are cases with issues concerning allegations of child abuse or domestic violence 'less complex' if they will take less than two days to hear or should these matters be filed in the Family Court?¹⁴⁸ This issue was raised in the FMS 2001 survey results where it was suggested that the FMS should, 'redefine a "simple" hearing - not just related to time'.¹⁴⁹

It is to the litigant's advantage if their practitioner is able to choose their judicial forum and the notion of competition can certainly work to the client's benefit. The question that must be asked, however, is whether it is the family law practitioners or the courts that should be controlling where matters are directed? If litigants can choose their forum this raises a concern as to how the judicial resources allocated to each court can be distributed in proportion to workload. Initial concerns raised by the Law Council that the FMS would not be adequately resourced still remain.¹⁵⁰ Since its inception the FMS has experienced an enormous increase in consumer demand and the Commonwealth Attorney-General has been extremely slow to appoint further magistrates to cope with the ensuing workload.¹⁵¹

VII CONCLUSION

This study yielded some interesting observations of practitioners and court staff in relation to the efficacy of the FMS in achieving the goals that were set for it, and the level of acceptance it has received amongst family law practitioners and their clients. This research set out in essence to examine the success or otherwise of the establishment of the FMS from a consumer's point of view. It concentrated on interviews with family law practitioners and therefore looked at this question from the perspective of legally represented clients. The essential question was whether as a

whether to transfer a matter: whether the proceeding is likely to involve questions of general importance, whether the matter would be decided at less cost and more convenience, whether the matter will be heard earlier, the availability of appropriate procedures and the wishes of the parties.

¹⁴⁷ Family Court of Australia, Practice Direction No. 7 of 2001, *Filing of Discrete Applications Requiring Summary Determination* (5 December 2001). The Practice Direction provides that the following matters should be filed in the FMS: Form 12 (Summary Maintenance), Forms 45B and 46 (Enforcement of Money Orders and Child Support), Forms 63 and 64 (Applications and Appeals Under the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988*, Form 48 (Contravention of Order) and Form 49 (Contravention of Child Order).

¹⁴⁸ Concerns had been expressed prior to the formation of the FMS that the less formal process may not be appropriate for matters involving domestic violence: Women's Legal Service, Brisbane, *Submissions Made to Legal and Constitutional Legislation Committee, Federal Magistrates Bill 1999 and Federal Magistrates (Consequential Amendments) Bill 1999* (August 1999) 1, 4.

¹⁴⁹ FMS, *Results of the 2001 Survey on Awareness and Performance*, above n 13, 4.

¹⁵⁰ Law Council of Australia, *The Policy Position of the Law Council*, above n 10.

¹⁵¹ In the 2003-04 Commonwealth budget, funding has been made available for the appointment of a further four Magistrates, one to be located in Queensland, in Brisbane: The Attorney-General, Commonwealth of Australia, 'Four New Federal Magistrates' (Press Release, 22 May 2003) 1.

result of the establishment of the FMS as a separate court family law clients were in a better position?

The findings of this research create a dilemma in this regard. On the one hand they are testament to the foresight of the Attorney-General in that establishing the FMS as a separate judicial entity it has been able to achieve many of the goals it was established for. It is clear that the Family Court is now a large organisation and to effect core changes regarding its judicial culture would be a very difficult task. The Family Court is also dealing with many extremely complex cases for which these simplified processes would not be appropriate. The philosophy of the FMS has been described as 'an everyman's court, not trying to be the Rolls Royce model of justice, but a quick, speedy, cheap functioning court of justice'.¹⁵² The Chief Magistrate Diana Bryant has agreed with this: 'Not everybody needs the Rolls Royce court; many people simply need to have their case dealt with expeditiously, get a decision, and go away and get on with their lives'.¹⁵³

Interviews with practitioners revealed a high level of acceptance and support for the FMS. This is corroborated by Michael Lavarch, the head of the Law Council who has said, 'the Law Council took the view when the Federal Magistrates Court was set up that it should have been located within the Family Court. However, the Federal Magistrates Court has been a success. It has operated well'.¹⁵⁴

A key question remains as to whether file velocity can be maintained so that the FMS can continue to provide a quicker, cheaper service. Linked to this issue is whether court backlogs can be reduced. The time to final hearing in the FMS has gradually increased and continued to increase since this research was conducted.¹⁵⁵ The FMS had stated in response to concerns about delays, 'the ability of the FMS to deal with increasing levels of work is limited by the number of Federal Magistrates, which is ultimately a matter for government'.¹⁵⁶ It has been clear for some time that further judicial appointments were necessary for the FMS to continue to achieve its goals as file velocity is crucial to the Attorney-General's mantra of 'quicker, cheaper service'.

At the time of writing the Attorney-General has just announced the appointment of four new Federal Magistrates, one to be located in Queensland, in the Brisbane Registry.¹⁵⁷ Many would argue that these further appointments are long overdue. The Family Law Practitioners Association of Queensland has lobbied since 2002 for a further appointment in Brisbane. As an indication of the increasing level of court delays forming while awaiting further judicial appointments, in May 2003 they

¹⁵² D Carrick interview with D Bryant, M Chesterman, J Marsden, C Counsel and A Lanterri, *The Law Report*, Radio National (3 July 2001) 1, 11.

¹⁵³ *Ibid.*

¹⁵⁴ P Bone and F Shiel, 'In the Court of the Man Who Loved Children', *The Age* (Melbourne) 10 July 2002, 2.

¹⁵⁵ In August 2002 it was reported as 12-18 months in the Family Court and 6-8 months in the FMS, exceeding the FMS benchmark of 6 months: Email from K Prior, CaseFlow Manager, Family Court of Australia at Brisbane to author, 7 August 2002.

¹⁵⁶ FMS, *Results of the 2001 Survey on Awareness and Performance*, above n 13, 3.

¹⁵⁷ The Attorney-General, Commonwealth of Australia, *Four New Federal Magistrates*, above n 151, 1.

estimated that the time to final hearing in the FMS in the Brisbane Registry for matters involving a two-day hearing or longer was in excess of eighteen months.¹⁵⁸

A further refinement of the role of each court would help to allay fears that the overlapping existence of Rolls Royce justice and Holden justice in family law may lead to two separate classes of justice. This research reveals that it is the concurrent jurisdiction in 'less complex matters' that has led to forum shopping which in turn has further fragmented the family law system. Defined judicial roles would result in litigants filing applications according to the attributes of their case rather than according to a preference for the personality of the decision maker or for tactical reasons. Then only matters suited to the simpler court process would be filed in the FMS and this would prevent concerns that quick, inexpensive justice may not equate with quality of justice, from translating into reality.

Regardless it now seems that the FMS is now entrenched as another judicial option in the family law system. With its continually expanding jurisdiction it now seems it was with great foresight that the Chief Justice of Australia, Murray Gleeson made the following prediction of the FMS: 'I expect that, within the next 20 years, it will become one of the largest courts in Australia'.¹⁵⁹

¹⁵⁸ Letter from *Family Law Practitioner's Association* to D Williams Re: Funding for the Continued Appointment of SES Registrar Leanne Spelleken (May 2003).

¹⁵⁹ Chief Justice M Gleeson, 'A Changing Judiciary' (Paper presented at the Judicial Conference of Australia, Uluru, 7 April 2001) 1, 1.