

Our ref. CJC-A3
Your ref.

6 June 2008

Mr Des Semple

ADDRESS

Dear Mr Semple

Submission of the Chief Justice of the Family Court to the Review

Thank you attending the Judges' meeting in Adelaide to explain the nature of the Review and allow discussion with the Judges. Subsequent to that meeting I have had the opportunity to consult extensively with you in relation to the Review. The views expressed in this brief submission are a summary of those discussed. They are my views but the other members of the court are aware of the models being discussed. Whilst I could not say that all of the matter raised here will be uniformly agreed to throughout the court the thrust of submission is.

1. Administration

I accept that there is a major resource issue in family law which needs to be addressed. It is my understanding from discussions with the Attorney that consistent with Government policy, there is not likely to be any significant input of funds to either the Family Court or the Federal Magistrates Court and that the necessary funding for the courts must be found internally. At the present time, my understanding of the budgetary needs of both courts is that unless there is some further funding found internally, the Courts will have recurring deficits over the next budgetary period.

I anticipate that with the efficiencies that can be achieved through a truly joint administration, sufficient savings can be made to ensure future judicial support for both Courts and meet the ongoing resourcing needs of each of the courts for the foreseeable future.

The administrative structure must be one that transparently operates for the benefit of both Courts. I have not been able to satisfy myself that one administration could function effectively with the responsibility for two separate courts whose governance gave them independence.

Despite the best efforts of the two heads of jurisdiction and Chief Executive Officers in establishing the Family Law Courts Board it was of only limited success because the two courts remained independent of each other. I do not see an easy way to resolve this with one administration serving two entirely independent courts.

An alternative that provided for the Chief Justice of the Family Court to have ultimate control (something like the South Australian model) would in my view be equally difficult.

As the Chief Justice would remain head of the Family Court, the role is likely to be viewed with suspicion by both courts and it would not remove the tensions over resourcing between the courts even with an outcomes based model for some of the resourcing. In this model if the ultimate decision maker was the Chief Justice of the Family Court it is difficult to imagine how the Federal Magistrates Court would see themselves as having an equal voice, however well that function was performed.

2. The structure of the courts

Ultimately the courts operate for the benefit of the litigants and both Courts have responsibility to ensure that the system and structure devised is the most effective for the users of the courts.

The Federal Magistrates Court has specialists in family law and general federal law. The degree of specialisation has reached the stage where the court is already considering provision of two separate divisions. Whilst there is some overlap the fact is that the vast majority of the work is family law.

It is my understanding that the legal bodies making submissions to the Review favour judicial officers with specialist knowledge and experience.

From the perspective of the community and the litigants therefore, there are at present two courts with concurrent jurisdiction doing first instance family law work with no legislative differentiation. Understood norms on which existing protocols were based have changed as a result of increasing numbers of Federal Magistrates and less Judges.

Thus the relevant matters in my view that suggest the appropriate model of one court containing separate divisions include:

- the most effective way for one administration to operate
- the acknowledgement that the overwhelming majority of the work in the Federal Magistrates Court is family law
- the ability to appoint those with appropriate expertise to different levels of one court concentrating on family law
- better capacity for both levels to work more effectively together to provide:
 - one registry
 - one point of entry
 - one set of appropriate rules
 - one pool of resources (Registrars and Family Consultants) sufficient to provide effective interventions suitable to the needs of each level of court
 - more seamless transfer of work between courts
 - more effective capacity to distribute work equitably between courts having regard to changing numbers
 - greater certainty for the litigants about what is the appropriate court and what are the appropriate criteria

The benefit of this model I suggest would be that the head of the Court is responsible for both divisions and for the administration, which would be applied for the benefit of the whole court. Neither division would have any more nor less entitlement than the other, save for those based on appropriate work based outcomes and other appropriate criteria.

In addition:

- the Chief Justice of the court would not be partisan in relation to either division
- the culture and work practises of the Federal Magistrates Court would be retained in their own separate division
- synergies should be achieved but in the interests of litigants and only at a pace deemed appropriate by the divisions

Superior and Appellate Division

The Superior and Appellate Division would comprise the existing members of the Family Court of Australia who would have appellate function and first instance function in the most complex parenting and property disputes.

General Division

The General Division would constitute existing Federal Magistrates Court.

Name of the court

It would be helpful if the Court could be given a new name. Nomenclature is important in culture and would in my view acknowledge that this is the creation of a new court by the bringing together of two existing courts, rather than the absorption of the Federal Magistrates Court into the Family Court. I think it would give a positive message to the judicial officers of both courts that they were truly in a new Chapter III structure and were all Chapter III judicial officers.

I appreciate that there might be impediments by virtue of existing Commissions but if this could be overcome I can suggest suitable nomenclature for the Court that acknowledges both courts and the work being done.

Name of Judicial Officers

In my view the members of the Superior and Appellate Division should be called Justices (the nomenclature would be The Honourable Justice X) and the members of the General Division should be called Judge (the nomenclature would be His/Her Honour X).

I see no need for concern about the nomenclature of 'Judge' to the General Division. There are several reasons for this:

- the members of the Federal Magistrates Court are already Chapter III Justices under the Constitution
- They are and have been from inception of the court, addressed in court as Your Honour and are described by third parties as "Judge"
- At the inception of the court it may arguably have been a more accurate description of their then jurisdiction to call them Federal Magistrates. However, once they

acquired increased general federal jurisdiction and concurrent jurisdiction with the Family Court, particularly unlimited property jurisdiction and jurisdiction to make orders in contested residence cases, they were no longer exercising the kind of functions that state Magistrates exercise (if they ever were).

- The jurisdiction exercised by Federal Magistrates is commensurate with that of District Courts throughout Australia. They are seeking to be remunerated as such, appropriately in my view, and if they are remunerated as such it would be equally appropriate in my view, to call them judges. They are in an entirely different position from State Magistrates who have sitting above them the judicial structure of a District or County Court. In the Federal structure there are only the Superior courts above them.
- If the Family Court is to decrease in size then many of the cases that judges of that court are currently hearing will be heard by members of the General Division. They will be doing the same work as judges are currently doing and there seems no reason why they should not be appropriately titled as such.

I have not addressed the issue of general federal law but support the notion of dual commissions for existing judicial officers.

I have not touched in detail upon how the provision of resources might be allocated between the courts or divisions because you have kept me advised during the consultation as to the methodology you are employing and I am in agreement with it.

I would be happy to provide you with any further assistance.

Yours sincerely

Diana Bryant
Chief Justice