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Barry Walsh & Associates Pty Ltd

[Australian Company No. 101 051 147]

25 Harrow Road Auburn NSW 2144,
Sydney, Australia

The Hon Robert McClelland MP
Attorney-General, Commonwealth of Australia
Federal Courts Branch
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

CC. The Hon. Laurie Ferguson, MP, Member for Reid

6 January 2009 - by email - fedcourtsconsultation@aq.gov.au

Dear Attorney-General

Consultation on Review of Future Governance Options for Federal Family Law Courts in Australia

This is a submission in response to the consultation process invitation issued by your Department in November 2008. Although I am not currently associated with any court or family law professional organisation, I used to be the chief executive officer and registrar of the Industrial Relations Court of Australia from 1994 to 1997 and, as a state court administrator after 1997, was a close observer of the processes that led to the establishment of the Federal Magistrates Court of Australia in 2000. Since 2000, however, I have worked almost exclusively in international justice sector development consultancies, specialising in advising on justice and court administration. I have never been directly associated with the Family Court of Australia or with any law firm practicing family law. I spend most of my time advising on the development of court systems in other countries, relying largely on my experience of the development of the Australian court systems and my active interest in observing their development. So I read the consultant's report posted on your Department's website as someone who is not presently of the Australian court system, but who can interpret the implications as a relatively well informed observer.

I recommend that you consider rejecting the consultant's report as insufficient to justify the radical recommendations that have been put forward. The report is deficient in the depth of the evidence it offers and in its explanation of the rationale that leads to its recommendations. From the point of view of practitioners of family law or Family Court administration, the report may seem like a sensible adjustment that offers hope of stemming the inexorable growth in the cost of the Family Court and family support services institutions. But from the perspective of the application of sound judicial and court system policy development considerations, it offers a piecemeal, premature and flawed answer to that problem with ramifications for the wider court system. It proposes an unprecedented and undesirable change to the structure of the federal judiciary extending beyond the family law jurisdiction and which is also likely to fail to achieve its stated aims.

The essential objection to the proposals the report makes is that it recommends abolishing the biggest, most effective and efficient federal court and merging it with the most expensive and troubled federal court. In doing so, it also recommends the creation of a novel, single tiered federal judiciary in which each commonwealth court (Federal Court



and Family Court) will have two kinds of chapter III judges – senior judges and junior judges. The report opines, quite incredibly, that this merger will not stymie the proven effectiveness and efficiency of the federal magistracy and, at the same time, will result in the gradual reduction in the number of Family Court judges. The evidence offered for this is rudimentary, largely based on supposition, the views of select and vested interests and unsatisfactory thoroughness of financial analysis. I can offer the following details to support these views:

Inadequate terms of reference and scope of consultation. The consultant's report was always going to be focused on family law, as that is what his terms of reference specified. And yet it recommended abolishing Australia's biggest generalist court. In view of that recommendation, it should have been considered essential that the view of a wider range of interests be gathered by the consultant before reaching that conclusion. It is not clear from the report that the views of state court judicial leaders and attorneys general had been sought, especially the views of the attorney general of Western Australia, who has a direct interest in the administration of the Family Court of Western Australia. Also, there is no reference to consultations that might have been had with the chief justice of Australia, the Council of Chief Justices or the Australasian Institute of Judicial Administration. The consultant naturally consulted the chief federal magistrate, and of course the chief justices of the Family Court and Federal Court. But none of those people could be considered to be without a vested interest in shoring up the administrative and operational independence of their respective courts. The gathering of a broader range of independent opinion seems not to have been vigorously pursued, or even pursued at all, although the recommendations will affect the whole of the federal judicial system.

Scope of information collected. The range of reported submissions made to the review is surprisingly narrow. With the exception perhaps of the submission from the FMC, all of the submission authors have a potential vested interest in shoring up the status of the Family Court or the Federal Court. Everyone is likely to acknowledge that since its establishment in 1976 the Family Court of Australia has been controversial at both state and federal levels, and also within the federal bureaucracy, for its constant growth and the criticisms of it by ministers, MPs and lobby groups. Over the last 30 years, largely due to community interest in family justice issues, the size, budget and range of services provided by the Family Court has grown constantly. The review demonstrates that this trend continues. It would be common ground to all concerned that the family law reform area is a discrete industry within the legal profession and many have profited from it, despite reforms aimed at reducing the cost of family law disputation. It is predictable that lawyer and family law advocacy organisations would advocate the establishment or bolstering of specialised family courts with judicial officers of high rank that are active in resolving disputes, using a wide range of well paid professionals at their disposal. A re-unified Family Court is good for business for those who are focused largely on family law. They are unlikely to be interested in whether or not the basis for reunification is justified or real, such as the claim that it will reduce the costs overall. The trend since 1976 has been for growth in costs, both of the Family Court and the family law professions, boosted largely by the ever increasing jurisdiction and service standards that the community has been told the government will resource for family law matters.

A dubious reverse takeover. The review report says that all submissions received acknowledge that the culture and methods of the FMC are superior to those of the Family Court. And yet the review says that this culture would not be compromised under the merger it proposes, that it would *not* be a "takeover by the Family Court". This argument is not credible. The Family Court judges lost jurisdiction to the FMC in 2000 and, under the review's proposal, would regain it again soon. I suggest that for as long as Family Court



judges have salaries and status above federal magistrates, the reunification could only be considered a resumption of lost territory. The establishment of a separate division within the Family Court for junior judges is unlikely to affect the attitudes and expectations of judges who are part of the proposed superior division. They will rightly consider themselves to be pre-eminent in the carve up of priorities and resources. A merger will only have the effect of shifting arguments about resource question so that the Attorney-General's Department and Treasury need not be so directly involved, as they have been since 2000. While this may make the job easier for the two ministries, it will not necessarily result in a reduction in demands for more resources from a reunified Family Court.

Dubious claims of confusion among litigants/ legal profession. The review report claims that there is continuing confusion among parties to family disputes about which court should be the place to file proceedings in. This is despite the fact that, as the review report points out, common registry services have already been established and are well known to the legal profession and other family law professionals. Nonetheless the report relies on views expressed in the few submissions it received about this issue that it is still a problem. My question is: how is it possible that there is still confusion among qualified and active family law professionals when there is no apparent reason for confusion? The report does not answer that question. The reliance on the truth and significance of this confusion claim is flawed and unsubstantiated, although it is offered as a major part of the justification for the proposed abolition of the FMC.

Financial justification for reunification. The financial information justifying change offered by the review is very limited. Although there is some financial information provided, it does not quantify the savings that can be expected to be made by merging FMC with the Family Court. The claim is made repeatedly that corporate support service duplication is a source of savings, but does not specify in numerical terms which cost items can actually be saved. While some corporate support costs may be considered duplicative, such as a separate office for the FMC's CEO (which is now vacant), clearly other parts of corporate support costs apply immutably as a percentage of costs of each judicial officer or support employee on the payroll. The administrative cost formula used in assessing the budgetary allocations for courts is based on the number of judges or magistrates attached to each court. If the budget was shifted from the FMC to the Family Court, that formula is not likely to be adjusted downwards, leaving doubt as to whether any administrative savings can be expected at all.

Assumed savings from fewer administrative systems. The review offers the anecdotal example that the FMC has been using MYOB software (which is designed largely for home office and small business users) as a financial management tool and that FMC intends to acquire a better system which is different from what the Family Court or Federal Court use. This anecdote is implicitly offered as an example of duplicative excess. But it seems to be a poor example. It should not follow that the acquisition (by Australia's largest national court) of a new financial management system to replace home office software, whether or not the new system matches those used by other courts, would be recurrently expensive or even a significant cost compared with overall court operational costs. And the example seems incautiously presumptive that a decision by the FMC, which is still an independent court, to use a system that is different from those used by other courts would be excessive or profligate. The evidence offered by the review report of significant corporate support costs savings flowing from reunification of family law courts lacks detail or rigour. The consultant should be asked to provide validated and reliable savings estimates before the government should accept a recommendation to abolish a court on cost savings grounds.



Case management. The review makes some largely cryptic references to the need for improvements in the methods used to count cases in the family law jurisdiction, in some parts suggesting that double counting should not occur (e.g. when a case is transferred from one registry to another). When I read this I wondered whether the review consultant was hinting that the formula used to report the volumes of family law work absorbed by the FMC may be inflated statistically. The report is inconclusive and incomplete about this question. It is unclear what point is being made. What it does make clear is that the case management systems used by federal magistrates courts and by family court judges are quite different, confirming the sharpness of “cultural” differences between the two courts. Despite this illustration of the difference, the report persists with the unsubstantiated opinion that this difference would be preserved merely by creating separate court divisions in both the Family Court and the Federal Court. This claim is not only lacking evidence, it lacks any precedent.

Implications for state courts. Up to the time of the establishment of the FMC in 2000, state magistrates courts were administering a range of first instance family law applications on behalf of the Family Court and it was then expected that this workload would be absorbed by the new FMC. But the review does not mention this factor as an element of the FMC’s current jurisdiction or describe whether or not that shift from state to federal systems has occurred. In fact, there is very little analysis of the publicly reported figures in terms of the proportion of FMC family law workloads which was not borne by the Family Court prior to 2000. The statistical analysis in the review report is incomplete and inconclusive, serving only to demonstrate the dramatic shift in family law work from the old Family Court to the newer FMC. Also, the state courts and the Family Court of Western Australia remain an integral part of the national family law and related dispute resolution systems, a factor not even addressed in the review. No mention is made, for example, of the option of asking more states to establish their own family courts as was done in Western Australia in the 1970s.

The specialist court solution. The report raises a common argument proffered by advocates of specialist courts across the world, usually fallaciously – that having judicial appointments of people with prior specialist expertise (in family law) is better than having appointees with generalist experience. That argument cannot be raised in regard to the enormous range of trial work administered by first instance, intermediate or even superior courts of the state systems. And yet it is considered important in family law trial courts at the federal level, even for cases administered competently by magistrates. This highlights the bias in Federal Government legal aid and court administration policies and legislative priorities since 1975 which have been disproportionately skewed toward the priority of family law at the expense of other aspects of federal law litigation. Your Department says that although 85% of commonwealth legal aid budget is spent on family law (largely the result of cuts to other areas by the first Howard Government), around one third of commonwealth outlays to courts are for those in courts not concerned with family law administration. And yet the review treats the perceived needs of family law interests as paramount and gives little attention to the implications for the rest of the court system. This limited view of the role of the priorities of federal courts is manifested in the review report by the attention it gives to the non-family law jurisdiction of the FMC – treating it as something that may be handed back to the Federal Court for others to work out the details. This is despite the indifferent views offered by both the chief justice and registrar of the Federal Court, as indicated in the report. This leaves the question: what process will be applied to considering the role of a new type of chapter III judges in the Federal Court and, presumably, any new courts that may be established in future? The review offers no guidance on that question, naturally because other aspects of court administration were outside its terms of reference.



The South Australian model. The review report dismisses the South Australian court administration model too readily, relying chiefly on the lack of support from either the chief justices of the Federal Court or the Family Court or from the chief federal magistrate. The South Australian model, so far limited to that state but perhaps likely to be adopted in Western Australia, involves the administration of all courts by a board comprising the heads of jurisdiction of each, but which does not disturb the judicial independence of any one court. This model has been a proven success in South Australia over the last 30 years and should not be overlooked as a model for federal courts. The merit of that model should not depend on the opinion of the current heads of jurisdiction of federal courts. Each of those officers can only be expected to resist any proposal which might disturb their current pre-eminent role in administering their own courts. The South Australian model was resisted by South Australian courts before the Court Administration Authority was established in the 1970s, but has since gained the general support of all the courts in South Australia as being superior to the prior models. The review ought to have had terms of reference wide enough to consider the South Australian model, or any other model, and should have been obliged to examine the issue comprehensively.

Other options for restructuring the federal judiciary. The report mentions that there is an option to consider establishing a single national court incorporating both the Federal Court and the Family Court, but dismisses this as outside the review's terms of reference. And yet the recommendations propose abolishing the largest and most successful commonwealth court, which is a general trial court, as if the terms of reference were not intended to be seriously adhered to.

Continued overlapping jurisdiction. The review report notes that to date no court rule or process has been developed or applied that would distinguish between family matters to be determined by FMC magistrates and matters to be determined by Family Court judges. The explanation, seemingly taken at face value by the consultant, is that it is difficult to define how to distinguish them, as it is generally determined as a matter of judicial discretion according to the complexity of each case. However, the recommendation to create two new Family Court divisions does not answer the overdue need for a clear distinction to be drawn. A wider review would have scrutinized with more rigour the view that distinguishing the jurisdiction of judges and magistrates prescriptively by rule or legislation is not an option. Clearly it should be. If the role of family law judges was made distinct from that of federal magistrates in 2000, then it would have eliminated the argument mentioned in the report that the FMC and the Family Court are competing for work (which is itself a curious argument when competition results in such rapidly improved standards of service). There needs to be a rational and substantial debate about whether the legislature should consider limiting the role of Family Court judges to appellate work and work which is defined clearly by statute, allowing other work to flow to magistrates or a new type of chapter III general trial court. The supposition that "complexity" in family law disputes cannot be defined except on a case by case basis is readily open to challenge at both administrative and jurisprudential levels. But the report does not foster consideration of that issue. In fact, it implies that it is an issue that should be left to the judges of the Family Court. More than likely a merged Family Court would approach the issue in the same way it does now – i.e. most cases are already processed by the federal magistrates, giving rise to the question of just how useful a judge of superior court rank may be in a system in which most trial work is done by lesser ranked judges. Problems of overlapping jurisdiction will not be resolved by the recommendations the review has made, although the report implies that they will.

A one tier federal judiciary. The adoption of the review's recommendation would introduce the novel concept at the federal level of a two tiered judiciary without a two tiered



court system. The model in state courts is that there are three tiers generally (excluding the High Court of Australia) – i.e. basic trial courts, intermediate trial courts and appellate courts (with appellate courts also doing a proportion of high level first instance trial work). Right now in the federal system there are only two levels (excluding the High Court of Australia) – the federal magistracy and the superior Federal and Family courts. The review recommendations would reduce the federal system back to one tier of courts but with the novelty of two tiers of judges within each; and without any associated reforms. This is unprecedented either at state or federal level in Australia. In fact, I cannot think of a similar system in any other country. The Family Court of Western Australia has magistrates as well as judges, but the WA court system also has a separate tier of courts for its magistracy. If the establishment of a single federal court for all commonwealth litigation was outside the review's terms of reference, then surely the system recommended is also outside those terms.

What should have been done? The word around legal circles in the closing months of the Howard Government was that a comprehensive review of the whole of the system of federal courts was under consideration. Somewhere after the Rudd Government was elected that translated in to a review of family law administration only, resulting in recommendations which are not confined to that field. I think the Rudd Government should put its stamp on the question of reviewing the whole structure of the federal court system from a truly federal perspective, rather than pick up the narrow focus that led to the current report. The review report is so poorly argued, and seemingly hurriedly put together, that it is difficult to see it surviving as a credible basis for the enduring and costly changes it proposes. The review should have been broader and led by a retired judge or other person with wide experience of judicial administration and should have been given an independent research capacity and adequate time to offer advice.

As I understand it, the CEO of the Family Court has recently been appointed as acting CEO of the FMC. If that arrangement persists over the coming months, it would secure the only savings that are likely to flow in the short term from adoption of the report's recommendations. Over a longer period savings can be achieved by gradually reducing the number of Family Court judges as current appointees retire. No other savings can be reasonably expected during 2009 or even 2010 because, as I suggest above, the savings will not be there – they are only likely to come from having fewer judges. On that basis, there is no case for arguing that the adoption of the review's recommendations are urgent and must be adopted by the government now. On the contrary, the points made in this submission demonstrate that the argument for rejecting the report entirely is strong. The government should then consider launching a fresh, broader inquiry that may consider, not just the pinch issue of family law, but the long overdue need to overhaul the whole federal courts administration system, including its relationships with state court systems.

I am happy to discuss any aspect of this submission with your officers if further information or views are of interest to them.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Barry Walsh', is written over a horizontal line.

Barry Walsh
Director and Principal Consultant
Barry Walsh & Associates, International Law and Justice Sector Development Consultants