

Review of the delivery of family law services by the Family Court of Australia and the Federal Magistrates Court

Submission by the Law Council of Australia

to the Commonwealth Attorney-General's Department

16 May 2008

1. The Law Council of Australia appreciates the opportunity to contribute to the Review.
2. It proposes to approach the Review holistically, rather than to respond specifically to each of the Terms of Reference individually.
3. It is the strong view of the Law Council that the focus of any change should be on what structure will meet the needs of the community most effectively (with the internal structure, case management and administration of the courts being considered primarily from that perspective).

Scope of Review

4. The Terms of Reference (apart from Term 5 which refers to the potential impact of changes on other administrative or judicial structures) relate to the delivery of family law services by the Family Court and the Federal Magistrates Court.
5. The Federal Magistrates Court is now the largest of the federal courts and it works closely with both the Federal Court of Australia and the Family Court of Australia. If the positions of Federal Magistrates which are currently being advertised are filled, the Court will have a total of almost 60 judicial officers, many of whom are family law specialists.
6. The Law Council is conscious of the Government's policy, as expressed in its pre-election national platform, to:
 - Review the interaction between all federal courts – as a result of a growing federal judiciary - to ensure proper resource distribution and their effective operation; and
 - Achieve the maximum possible uniformity in the structure and operation of the courts system throughout Australia; and
 - Ensure that the courts are managed effectively and that the judicial system is efficient, accessible and accountable (including the use of benchmarking to evaluate and improve the delivery of services by courts to the public).
7. While this submission recognises that the most significant impact of any changes which take place will almost certainly be to the inter-relationship of the Federal Magistrates Court and the Family Court of Australia, any structural

changes that are made will necessarily also impact on the Federal Court of Australia. Any changes to the structure of the Federal Magistrates Court should be consistent with a template which would not preclude an overall review of the federal courts structure in the future if and when the Government decides to implement its policy. The Law Council would seek to actively participate in any such general review with input from its constituent bodies and specialist Sections. However, the needs of the family law system are sufficiently pressing that it would be unacceptable to delay their resolution to await any broader review of the federal courts system.

Need for Change

8. The Family Law Section of the Law Council holds the view that the current arrangement in the family law area of separate Chapter III courts exercising largely identical jurisdictions, with separate administrations and competing for funds and resources, is wholly unacceptable and that rationalisation and integration of the two federal courts exercising family law jurisdiction is urgently required.

Criteria for Change

9. It is noted that the Review does not extend to the delivery of services in the Family Court of Western Australia given its unique nature as a State court (although FCWA may provide a useful model as to how an integrated court might work).
10. The family law courts provide a vital resource for those members of the community who are unable to resolve the issues arising on the breakdown of family relationships by other means or through non-court based interventions.
11. Any change should focus on what is best for the community - and any new system should be based on providing services that those using the family law courts really need; and how these services can best be delivered; while preserving the advantages of accessibility, reduced complexity and greater cost-effectiveness currently offered by the Federal Magistrates Court.

Key Considerations

12. The Law Council has sought comments on the Review from its constituent bodies (the State and Territory Law Societies and Bar Associations), its Sections and the Family Law Practitioner Associations in Queensland, Tasmania and Western Australia. A number of key points relating to the interests of the community, legal practitioners, the judicial structure and the administration of the family law courts emerge consistently from the responses and can be summarised as follows.

Community interests

13. The community-based interests which emerge most strongly are the need for a family court system which provides:
- Efficiency;
 - Timely resolution;
 - Cost-effectiveness;
 - Proportionality;
 - Flexibility;
 - Accessibility (especially in regional and remote areas).
 - A single point of entry (to avoid confusion to the public).
14. In short, what the parties using the family law courts need is an integrated system focusing on reasonable outcomes for parties within a reasonable time frame at reasonable cost.

The legal profession

15. Legal practitioners using the family law courts on a day to day basis consistently emphasise the need for:
- One registry/one point of entry;
 - One set of (appropriate) rules;

- One set of forms;
- Uniformity of procedures;
- Consistency of practice;
- One pool of resources (Registrars/Family Consultants) sufficient to provide effective door of court interventions;
- Preservation (and enhancement) of the current level of service provided in particular by the Federal Magistrates Court.

Administration of Courts

16. Themes which emerge concerning the criteria for effective administration of the family law courts include:

- A single budget;
- A single (non-judicial) administration.
- Adequate resources (including to facilitate the proper functioning of the less adversarial trials mandated by Division 12A of Part VII of the *Family Law Act 1975*). It is noted that there is currently no reliable evidence that the creation of a national network of Family Relationship Centres and the introduction of other early intervention initiatives has significantly affected the number of court filings or reduced the level of resourcing required for the family law courts;
- The appropriate use of external primary dispute resolution resources (including counselling, conciliation, mediation and arbitration).

Judicial structure

17. Any restructuring of the family law courts should include:

- Recognition of Federal Magistrates as Chapter III judges under the Constitution;
- Proper remuneration, terms and conditions of employment for all judicial officers at each level;

- A greater focus on specialist knowledge, experience and expertise in making judicial appointments. In the Family Law arena this should lead to appointees being equipped to deal with the complex legal and other issues which arise on family breakdown.

Recommendations

18. The structure of the Federal Magistrates Court - and its place in the federal courts system - was poorly conceived and was opposed by the Family Law Section of the Law Council at the time. However, having said that, it is recognised that as an operating court, the Federal Magistrates Court has delivered significant value; and that it is important, in any changes which might be made, that the current culture of that court is maintained.
19. The Law Council recommends a structure which:
 - Recognises and preserves the culture of the Federal Magistrates Court but integrates it into a unified family court structure which meets the criteria of the community, the legal profession and the administrative and structural requirements set out above;
 - Recognises Federal Magistrates as Chapter III Judges (with appropriate changes in nomenclature to reflect this);
 - Retains a higher level of judge (currently the judges of the appeal and general divisions of the Family Court) to hear appeals and the more complex and lengthy cases.
 - While addressing the immediate problems of two family courts, results in a structure which would not preclude a future review of the federal court system in accordance with the Government's stated policy.
20. The preference of the Family Law Section of the Law Council is for vertical integration of the two family courts into a single, coherent structure with a common pool of resources delivering family law services at the appropriate level. This model should provide significant efficiencies and cost savings.

Further Consultation

21. Whatever model is chosen, further detailed consideration will be required to address a broad range of practical issues, such as:
 - Governance;
 - Administrative structures;
 - Allocation of work between the levels of judiciary (including any perceived need for a “gatekeeper”)
 - Provision and management of judicial support services.
22. The Law Council looks forward to further consultation and discussion with respect to the practical aspects of implementation once a general approach and/or tentative model has been decided upon, and would be happy to participate in any working group established for this purpose.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.