FAMILY COURT OF AUSTRALIA

CHAMBERS OF THE HONOURABLE DIANA BRYANT
CHIEF JUSTICE

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Our ref: CJC-A3
Your ref:

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The Hon Robert McClelland MP
Attorney-General
Parliament House
Canberra ACT 2600

By e-mail to: fedcourtsconsultation@ag.gov.au

Dear Sir/Madam

CONSULTATION ON THE REVIEW OF FUTURE GOVERNANCE OPTIONS FOR FEDERAL FAMILY LAW COURTS IN AUSTRALIA

Thank you for the opportunity to make a submission in response to the consultation paper 'Improving Access to Justice – a better framework for federal courts' ("the consultation paper"). The consultation paper was issued following the release of the report *Future Governance Options for Federal Family Law Courts in Australia – Striking the Right Balance*, which arose from the review into the delivery of family law services by federal courts ("the Semple Review"). The consultation paper is seeking comment on recommendations made and issues raised by the Review. I am making this submission in my capacity as Chief Justice of the Family Court of Australia, in consultation with Judges and Judicial Registrars of the Court.

I made a submission to the Semple Review on 6 June 2008. That submission has been made publicly available. In the submission, I addressed the two broad issues of administration of federal family courts and court structure. I indicated that a truly joint administration would result in efficiency savings, the deployment of which would benefit litigants in family law proceedings. I identified potential problems associated with having one administration responsible for two courts, and equally with the Chief Justice of the Family Court having ultimate control over one administration or administrative

authority. I supported the establishment of one court with two separate divisions, with the Chief Justice at its apex. I identified a range of benefits associated with such a model, including the independence of the Chief Justice from either division, the ability to retain the existing work practices and cultures of both courts in separate divisions, and the capacity for both divisions to work more productively together to provide more efficient and effective services. The recommendations contained in the report *Future Governance Options for Federal Family Law Courts in Australia – Striking the Right Balance* largely mirror those advanced by me and thus I do not intend to revisit matters already canvassed in my submission.

The purpose of this submission is to draw the Attorney-General's Department's attention to issues that require further consideration if the recommendations of the Semple Review are implemented. I note that the consultation paper poses five questions. I am confining my comments to those directed towards organisational and operational matters, which fall under the general rubric of questions 2, 3 and 4. I will also raise some matters that have not been addressed in the current consultation paper, as I believe these too need to be taken into account in the transition to a new federal family court structure.

I welcome the opportunity to make preliminary comments and look forward to being consulted in the course of implementation of any recommendations, including the form and content of legislation necessary to establish a single court comprised of two divisions.

For ease of reference I have used the terms 'appellate and superior division' and 'general division' in this paper. I appreciate however that the nomenclature used to describe each division is ultimately a matter for Government.

Issues arising from questions posed in the consultation paper

Establishment of the Court and commissions

The Family Court of Australia is created under section 21 of the *Family Law Act 1975* (Cth) and is created as a superior court of record. Section 21(3) provides that the court consists of a Chief Judge (known as the Chief Justice), a Deputy Chief Judge (known as the Deputy Chief Justice), and Judge Administrators, Senior Judges and other Judges not exceeding a total as prescribed. There are no longer any judges serving who were appointed as Senior Judges or Judge Administrators.

Section 21A creates two divisions, the Appeal Division and the General Division. Pursuant to section 22(2AF), a judge who is not assigned to the Appeal Division is deemed to be assigned to the General Division.

If the recommendations of the Semple Review are adopted, the Government will need to consider how to effect the creation of a Court comprising an 'appellate and superior division' and a 'general division'. If federal magistrates accepted commissions as judges of the Family Court and sections 21A and 22(2AF) were retained in their present form,

they would be deemed judges of the General Division and have the same entitlements as family court judges, including pension rights.

It appears to me, from my reading of the report arising from the Semple Review, that it is not the Government's intention to create an entirely new Family Court composed of two divisions and to (re)assign Family Court judges to one division and assign federal magistrates to the other. I think this is sensible. A problem would certainly arise with respect to the one Family Court judge who is over 70 years of age and attendant issues associated with acknowledging and maintaining judicial seniority, particularly in the senior division of the court, would also emerge.

Proceeding then on the assumption that the Family Court will remain, a new division below the existing two divisions of the Family Court could be created. It would be to this new division of the Family Court that the federal magistrates would be offered commissions (at a different salary level and without the current judicial pension).

The questions would then be:

- whether the two existing divisions of the Family Court would remain as they are (thus creating a court of three divisions); or

- whether the existing Appeal Division would become a sub-division of the new superior division (with the (existing) requirement that a Full Court comprise at least two judges of the appellate sub-division); or

- whether there would be no formal distinction so far as appellate work is concerned between all members of the superior division, with the result that a Full Court could comprise any three members of the superior division.

Abolition of the existing Appeal Division would disturb existing seniority arrangements within the Court, although this could be avoided by legislatively preserving the current position as was done in 1988 (see s 23(3) of the Family Law Act).

There is also the important consideration of the need to ensure consistency in appellate decision-making which was the reason for the original creation of the Appeal Division (see *Report of the Joint Select Committee on the Family Law Act* (1980)).

If the new division of the court to which the federal magistrates are to be appointed is to be named the 'General Division' the name of the superior division, or divisions, would have to be changed. It is suggested it be the 'Appellate and Superior Division.'

Whatever approach is preferred, I would also encourage the Government to have regard to section 21(3) of the Act and take the opportunity presented by a restructure of the federal family law court system to 'tidy up' that section. The office of Judge Administrator is redundant, the position not having been occupied for many years, and reference to it should be deleted. Depending upon how the 'appellate and superior

division' is ultimately structured, reference to the Deputy Chief Justice may also need to be removed upon the retirement of the current office holder.

It is not clear from the report of the Semple Review how the Government proposes to create the position of Chief Justice of the new Family Court. Consideration will need to be given to whether a new commission to that position would be required or whether the existing commission of Chief Justice of the Family Court of Australia would suffice. As is clear from the model proposed in the Semple Report, the position of Chief Justice of the new Family Court must be and must be seen to be free of any partisanship to either the 'appellate and superior' or 'general' divisions.

The report arising from the Semple Review states at paragraph 112:

> *The Chief Justice would manage across both Divisions and not be directly responsible for either. The head of the 'general division' would be responsible for ensuring that the existing service culture, expeditious handling of matters, and effective case management procedures of the Federal Magistrates Court be maintained and enhanced.*

The report of the Semple Review does not set out clearly or prescriptively the role and function of the Chief Justice. If the Chief Justice is to remain the Chief Justice of the Family Court of Australia and a new division is to be folded into the Court then my present commission would remain unaltered although the extent of my responsibilities would of course be expanded. Notwithstanding the comments made in paragraph 112, the Chief Justice would remain responsible for **all** of the Court and for **both divisions** of the Court. The positions of the principal judges in each of the divisions would then be similar to those applying under section 21B of the Family Law Act as follows:

> ***Arrangement of business of Court***
>
> *(1) The Chief Judge is responsible for ensuring the orderly and expeditious discharge of the business of the Court and accordingly may, subject to this Act and to such consultation with the Judges as is appropriate and practicable, make arrangements as to the Judge or Judges who is or are to constitute the Court, or the Full Court, in particular matters or classes of matters.*
>
> *(2) The Deputy Chief Judge shall assist the Chief Judge in the exercise of the functions conferred on the Chief Judge by subsection (1).*
>
> *(3) A Judge Administrator shall, in relation to such part of Australia as is from time to time assigned by the Chief Judge, assist the Chief Judge and the Deputy Chief Judge in the exercise of such of the functions conferred on the Chief Judge by subsection (1) as are from time to time so assigned.*

The principal judges would assist the Chief Justice in accordance with arrangements made by the Chief Justice in the same way as the Deputy Chief Justice carries out his or her duties under the existing statutory provisions. The legislation could, if thought

desirable, set out matters of practice and procedure for the 'general division' so as to enshrine those practices thought necessary to preserve the present culture of the Federal Magistrates Court.

Regardless of the preferred option for the structure of the new Court, the position of judges holding dual commissions as judges of the Family Court of Western Australia and the Family Court of Australia will need to be taken into account.

Jurisdiction and work allocation

Government will also need to decide on how jurisdiction is to be conferred on the new Court and how the work of the two divisions should be differentiated. Presently, jurisdiction in family law matters is conferred concurrently on the Family Court of Australia and the Federal Magistrates Court, with the exception of proceedings for nullity of marriage. The allocation of work between the two Courts, which has proceeded on the basis of the Federal Magistrates Court being established as a court dealing with the less complex matters, has been achieved by agreement and to some extent embodied in practice directions.

As the Semple Review highlighted, the absence of clear distinction between the work of the two Courts has caused confusion for litigants. Accordingly, Government may wish to consider conferring exclusive jurisdiction on each division in particular proceedings (for example, the general division could have exclusive jurisdiction in proceedings including contraventions, child support and divorce, and the 'appellate and superior division' could have exclusive jurisdiction in proceedings including Hague Child Abduction Convention applications, special medical procedures, international relocation and (self evidently) appeals (whether heard by an appellate sub-division or by the 'appellate and superior division' as a whole, depending on the preferred model). There would then have to be a concurrent jurisdiction exercised by the two divisions comprising the Court.

In the absence of clear jurisdictional delineation between the two divisions, how should the work of each division be defined?

Although it is of course a matter for Government I believe there are advantages associated with providing legislative guidance as to the type of work each division undertakes, including clarity and certainty for the Court, Court users and the broader family law system. Such a definition need not be unduly prescriptive and could be based on the complexity criteria already utilised by the Family Court. These criteria are:

- Parenting cases including those that involve a child welfare agency and/or allegations of sexual abuse or serious physical abuse of a child (Magellan cases), family violence and/or mental health issues with other complexities, multiple parties, complex cases where orders sought having the effect of preventing a parent from communicating with or spending time with a child, multiple expert witnesses, complex questions of law and/or special jurisdictional issues, international child abduction under the Hague Convention, special medical procedures and international relocation.

- Financial cases that involve multiple parties, valuation of complex interests in trust or corporate structures, including minority interests, multiple expert witnesses, complex questions of law and/or jurisdictional issues (including accrued jurisdiction) or complex issues concerning superannuation (such as complex valuations of defined benefit superannuation schemes).

The definition will require revision to take account of the Court's new jurisdiction in de facto property proceedings.

Alternatively, the Government may prefer to leave it to the Court (whether through its rules or otherwise) to decide which matters are of sufficient complexity to warrant being heard in the appellate and superior division. Were that to be the case, I anticipate that criteria similar to the complexity criteria referred to above would be employed.

As I stated earlier, I favour a legislative approach. Experience has shown that, regrettably, although there are rules, practice directions and guidelines governing the allocation of work between the Family Court and the Federal Magistrates Court, these have not been rigorously adhered to, with unfortunate consequences for the parties involved (and particularly for their children).

One Court would arguably overcome the existing inability to uplift cases which require the attention of the 'appellate and superior division' but would not necessarily overcome the practical problems of identifying such cases and/or a reluctance to comply with guidelines or directions as to the type of work appropriate for hearing in each division.

A solution may be that the Chief Justice be given the power to transfer matters from the 'general' to the 'appellate and superior division' in consultation with the Principal Judge of the 'general division'. If it were thought this proposal has merit some further attention would need to be paid to the drafting and practical implications.

Irrespective of which approach is ultimately preferred, the work of each division should be the determinant of the number of judicial officers required to ensure cases are disposed of in a timely and just manner.

Initiating process

Government will need to decide whether parties filing initiating process in the new court will have the ability to file directly in the 'appellate and superior division' or the 'general division', depending on the nature of the dispute, or whether proceedings will be filed in 'the court' and subsequently allocated to the appropriate division by, for example, a registrar. If there were concerns that a party could seek to obtain an advantage by filing proceedings in the 'appellate and superior division' when a matter was clearly not appropriate for hearing in that division, a regime could be established whereby leave to file in the 'appellate and superior division' is required. Alternatively, costs penalties could be imposed on parties who knowingly filed initiating action in a clearly inappropriate division.

Rule making power

Legislation will need to confer the power to make its own rules on the re-structured Court. This power is currently found in section 123 of the *Family Law Act 1975* (Cth).

A decision will be required as to whether to provide a separate rule making power for each division, enabling each division to make their own rules, or to create one rule making power for the Court as a whole. As it is the Government's intention, as I understand it, to preserve the culture and case management systems of each Court, it would be necessary for the rules of court – were there to be one set of rules only – to be of a relatively high level of generality and for each court's case management system to be promulgated through practice directions or like means. I understand this is the case in the Supreme Court of New South Wales, whereby there are uniform rules that apply to the Court and practice directions are utilised to set out the process and procedure followed in the Common Law and Equity Divisions. Realistically however, my expectation is that there would be a gradual progression towards rule harmonisation.

The Court's appellate function

The Semple Review recommends that the new Court's appellate function be vested in the superior division. An allied issue arises as to whether appellate jurisdiction should be exercisable by all members of the appellate and superior division (as is the case in the Federal Court) or whether a dedicated appellate sub-division should be created. Since 1983, the appellate jurisdiction of the Family Court has been exercised by the Appeal Division. Pursuant to section 22(2AA) of the *Family Law Act 1975* (Cth), the members of the Appeal Division are the Chief Justice, the Deputy Chief Justice and such other judges that are assigned to the Appeal Division. The Act and Regulations presently allow for nine members of the Appeal Division, in addition to the Chief Justice and Deputy Chief Justice (see section 22(2AC) of the *Family Law Act 1975* (Cth) and regulation 12AB of the *Family Law Regulations 1984* (Cth)). There are currently seven assigned members of the Appeal Division (including the Chief Judge of the Family Court of Western Australia, who also holds a commission as a judge of the Family Court of Australia). Appeals are heard by the Full Court, which is defined as three or more judges of the Family Court where a majority of those judges are members of the Appeal Division. Thus, the Full Court can be, and frequently is, constituted by two judges of the Appeal Division and a judge of the General Division.

There is much to commend the retention of a specialist appellate division in the Family Court. Appellate work is qualitatively different to trial work and judges of the Appeal Division bring specialised skills to the task of hearing and determining appeals. It is also my view that having appeals heard by a discrete appeal division promotes consistency and predictability in outcomes and contributes to the development of a stable body of jurisprudence. The present arrangement whereby the Full Court can be comprised of two members of the Appeal Division and one member of the General Division introduces a degree of flexibility and provides valuable exposure to appellate work by trial judges.

I am aware there is not a uniformity of view about this matter in the Family Court. There are some judges of the Family Court who favour the Federal Court's approach, whereby any judge of that Court, subject to availability, can sit as a member of the Full Court, while others share the view I have expressed above.

Another matter worthy of consideration is how the bench should be constituted when hearing appeals from judges of the new 'general division'. At present, section 94AAA of the *Family Law Act 1975* (Cth) provides that appeals from the Federal Magistrates Court are heard by the Full Court of the Family Court, unless the Chief Justice considers that it is appropriate for the appeal to be heard by a single judge. There is no statutory requirement for the single judge to be a judge of the Appeal Division. Approximately half of all appeals from the Federal Magistrates Court are heard by a single judge and the Family Court's practice is to allocate such appeals to Appeal Division judges where possible. If federal magistrates are appointed as judges of the Family Court, and have comparable status to district court judges, it would be fitting for all appeals to be heard by the Full Court sitting as a bench of three. I note that would be consistent with the position in New South Wales, Victoria and Queensland, whereby the Court of Appeal, comprised of three appeal judges, hears civil appeals from district courts. Were this suggestion to find favour, the Government would need to take account of the impact this would have on the workload of the 'appellate and superior division'.

My own view is that there is some merit in having the flexibility to determine some obviously unmeritorious appeals with one judge, particularly as the respondent to such an appeal should be entitled to have the matter dealt with as little cost as possible. Regrettably, costs are not always able to be recovered from unsuccessful appellants.

Other issues for consideration

I wish to bring four further matters to the Government's attention.

The first of these concerns judicial registrars, whose position is not traversed in the consultation paper. Judicial registrars hold office under the *Family Law Act 1975* (Cth) and exercise delegated judicial power. With the exception of the ability to make final orders in parenting proceedings, they have virtually the same powers and functions as judges and routinely preside over complex and difficult cases. They have been part of the Court for many years and over a number of years several have been appointed as Judges. I think it is appropriate to consider their appointment to the 'appellate and superior division' of the restructured Court and thus remove another layer of judicial officers.

The second of these concerns the statute under which the new arrangements will be put in place. The Family Court of Australia is created under section 21 of the *Family Law Act 1975* (Cth) and Part IV and IVA are directed towards the Court and its management. This is in contrast to the Federal Court and the Federal Magistrates Court, both of which are established pursuant to their own Acts of Parliament, namely the *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth). The Family Law Act is a voluminous statute that is difficult to navigate, particularly for people without

legal training. At the very least, placement in a separate statute (if this is now technically possible) of provisions concerning the establishment of the court and its powers and functions would reduce the length and complexity of the Family Law Act.

The third of these concerns the name of the restructured Court. While the judges of the Family Court of Australia are not necessarily wedded to retaining the name 'Family Court of Australia', I understand that its retention is supported by the Federal Magistrates Court. On the basis that federal magistrates will constitute the new 'general division', I am therefore supportive of retaining the name 'Family Court of Australia'. If any change were thought desirable the term 'Australian Family Court' might be a suitable minimalist change.

The fourth of these concerns dual commissions. I have previously indicated my support for the opportunity for dual commissions to be available to those judicial officers who want them in recognition of their original appointments. I also support the federal magistrates who may become part of the Federal Court having the same terms and conditions as those who accept commissions in the Family Court.

Once again, I appreciate the opportunity to respond to the consultation paper. I would be happy to elaborate on any aspect of my response if that would be of assistance. As I earlier stated, I am desirous of ongoing consultation occurring between the Family Court and the Attorney-General's Department during the formulation of any legislative response to the Semple Review.

Yours faithfully

Diana Bryant
Chief Justice