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Dear Sir,

Report of the Review of Future Governance Options for Federal Family Law Courts in Australia

This letter is in reply to the invitation to consider the Recommendations in this Report.

I was a Deputy Registrar of the Family Court of Australia, Brisbane, from 1978 to 1981. Between 1981 and 1999, I was the Registrar, then Regional Registrar (Northern), and an SES Registrar. From 1999 to the present, I have been in private practice exclusively in family law in Brisbane.

The Recommendations propose a single court consisting of an Appellate/Superior Division and a General Division, and a streamlined administration. The Review then seeks views on: the name of the new court; the procedures to ensure timely, efficient and informal resolution of disputes; the matters to be heard in each Division; the appropriate title for the judicial officers of the General Division, and what further court services are required to achieve early, non-adversarial resolution.

It is unfortunate that the Terms of Reference excluded consideration of the law administered in the family law system. This is very much a part of the problem the Review is asked to resolve, and its exclusion limits a response to the matters in the previous paragraph.

The Recommendations respond to commonly agreed problems in the present family law system. These include the Family Court of Australia and the Federal Magistrates Court as dual points of entry, and their different practices and Rules of Court. Less evident, but a significant cost to government as the provider of legal services, is the competition for resources between parallel administrations. This leads to the Recommendation for sustainable court resources through a single administration.

Differences in the practice and procedure of each Court, especially in the Rules, are confusing. It is hard to see why the Family Court, in particular, requires such detailed and extensive Rules, given that its jurisdiction is not broad at all. There can be a significant cost in complying with these. The setting out of its Rules is complex, and it presents litigants in person with a major barrier to understanding what the Court expects of them. In some cases, the Rules frustrate the purposes they are intended to achieve.

The Recommendations are worth supporting provided that a number of potential difficulties are carefully weighed. The Review has identified these as: the allocation of work between the Divisions of the single court, and the retention of the 'culture' of the Federal Magistrates Court in the General Division.

1. The Recommendation for a Single Court

The proposed single court would consist of an Appellate/Superior Division and a General Division. The Appellate/Superior Division would comprise Judges of the Family Court. Those Federal Magistrates determining family law matters who accepted a commission to the General Division would constitute the other.

(i). The allocation of work between the Divisions

The Report envisages that 'more complex matters' will be heard in the Appellate/Superior Division, but it does not consider what is meant by this term, or how matters are allocated to the Division. Instead, it throws the issue open for comment. There are provisions in section 39(4) of the *Federal Magistrates Court Act, 1999* about the transfer of matters to the Family Court, and these provisions are supplemented by Rule 8.02(4) of the *Federal Magistrates Court Rules, 2001*. They provide a 'broad brush' classification of matters. They are not adapted to the more precise management of workload that the Review has in mind. There is also a draft Practice Direction No 2 of 2007 by the Chief Justice of the Family Court, but it has not been issued. Its contents are referred to in the Report (paragraph 105).

Closely linked to this 'is a threshold question about whether the matter should be before the Court at all.' (paragraph 114). The Report proposes that family consultants could be used to assess whether cases are suitable for family dispute resolution and referral to outside services. A recommendation might then be made to a Federal Magistrate or Registrar that such an Order should be made. Presumably, a 'family consultant' has the same meaning as in section 11B of the *Family Law Act, 1975*, and referred to in

numerous sections as providing counselling services as distinct from the legal services provided by Registrars.

(a) Draft Practice Direction No 2 generally conforms to the current practice of the Family Court. It remains, at this time, a suitable guideline because the Court has developed a particular expertise in the management of certain types of complex cases. This is not currently available in the Federal Magistrates Court. A problem may arise as the Appellate/Superior Division contracts and the General Division grows because the expertise will be confined to a diminishing pool of judges that is insufficient for the workload.

The Review does not deal with more than the immediate future of the Appellate/Superior Division. It leaves open whether the Division is ultimately to perform an appellate function only, or retain a measure of the more complex cases. There seems no reason that the Chief Justice could not adjust the mix of cases as circumstances require. This might include determining that matters are assigned to one Division or the other on a case by case basis. Where a class of matters ceases to be heard in the Appellate/Superior Division, the Chief Justice might designate suitably qualified members of the General Division to hear them. This would not be dissimilar to present arrangements under section 21B(1) of the *Family Law Act*, although it would require suitable legislative changes.

In the long term, it is doubtful that some of the practices above could survive. They do not address, for example, the inconsistency of hearing apparently similar cases in separate Divisions of the one court, with different procedures and potentially significant variations in legal costs.

(b) The proposal of assessment for dispute resolution by family consultants is unusual. The Report does not explain why it is thought that this task, which is a legal skill especially in financial matters, should be undertaken by family consultants. It seems likely that the assessment would rely heavily upon the view of the lawyers for the parties, especially in complex or difficult matters. Another possibility is that it may lead to an almost routine referral of matters for dispute resolution. A more serious concern is that the flow of matters out of the court to dispute resolution is likely to disrupt case management practices as unresolved matters come back into the court system, possibly to a different Division. One needs to ask why it is thought that turning matters over through dispute resolution will lead, presumably, to significant settlements. At one time, several registries of the Family Court offered multiple conciliation conferences in unresolved matters as further attempts at settlement. Although the conferences were timed to take advantage of key points in the litigation, they were not particularly successful.

(ii). Retaining the culture of the Federal Magistrates Court

This might well be the most important task facing the Chief Justice and the head of the General Division.

The Report refers to the single court as 'a merger' that should not be seen as a 'takeover' of one court by the other, presumably the Family Court (pages 11 and 12, and paragraph 119). The emphasis in the merger is to retain the culture of the Federal Magistrates Court, although it does not say how this might be done. The Chief Federal Magistrate is pessimistic about this. Change, he says, threatens the 'essence' of its culture and '(t)he morale of the Court would be destroyed.'

The philosophy behind the Federal Magistrates Court is well known, but it takes imagination and persistence to turn that into an identifiable set of values, and unite an organisation behind them. The Court has been remarkably successful in its execution of this task, and the claim by the Chief Federal Magistrate deserves close examination.

The Family Court has a formal, traditional culture similar to that in other superior courts. The creation of the Federal Magistrates Court was intended to break from this model, and to avoid the delay and cost inherent in it. The question then becomes: if the two Courts merge, can they operate independently, but in harmony?

A number of factors suggest difficulty in making this a success. They may be considered under these headings: the autonomy of the General Division; the value system within the present Federal Magistrates Court, and the effect of the merger.

(a) Some loss of autonomy will follow from the merger because it is part of the price of having a single court. Each Division will have its own separate head with the Chief Justice of the Family Court responsible for the whole. Inevitably situations will arise in which the requirements of the single court need to be balanced against those of an individual Division, and it may require compromises affecting the work of the General Division.

Second, the General Division is likely to grow, but the Appellate/Superior Division is expected to contract. The Report assumes this. Growth is apt to introduce more differences that will need to be absorbed within the culture of the General Division. As it presently operates, this requires active management by the Federal Magistrates Court. However, as part of a larger organisation, which would have its own goals, the General Division is not spontaneously free to do this. Even the single administration will have the effect of circumscribing the freedom of the General Division to act independently.

(b) The success of the Federal Magistrates Court is due to the way in which it has taken a legislative philosophy and turned it into a dominant and logical culture within the organisation. The key ingredients of this are: success at what the Court sets out to do, and innovation in the way that it does this. It is a culture aimed squarely at the consumers of its services, and its values of success and innovation are powerful stimulants towards excellence and cohesion across the organisation.

It is a significant concern that the single court may impinge upon the values that underpin this culture, causing it to weaken or collapse. Therefore, this problem needs careful, prior evaluation.

(c) Finally, merger may encourage a shift towards the culture of the Family Court, especially if there are notable differences in terms and conditions of office for judicial officers. It may also cause dissatisfaction for non-judicial officers in both Courts if their terms and conditions are detrimentally affected in the single court. The writer understands that these are not necessarily identical for the staff of the two courts.

2. A Single Administration

A single administration is a sound proposal. Indeed, one could go further and say that this should ultimately include the Federal Court of Australia. There are potentially significant financial gains that could then be applied for the benefit of all federal courts. The effect of this on the terms and conditions of clerical staff, and referred to in the last paragraph may need to be considered.

3. Matters on which Comment is Sought

(i) The name of the new court

One could simply give up and follow the lead of the community. From 1976, it (and the media) has christened the Family Court the 'Family Law Court'. To paraphrase Cole Porter, employees do it, clients do it, and, occasionally, Attorneys-General do it. The temptation to give in and just call it the Family Law Court is almost irresistible. However, resisted it should be.

For all the criticism to which it has been subjected, the Family Court has been, and continues to be, a leader in its field in numerous ways. The writer has heard it praised at several international conferences, and in respected journals – and always by its correct name. The Family Court has earned the right to have its name applied to the single court.

(ii) New procedures to ensure timely, efficient and informal resolution of disputes

The number of matters that proceed to a final hearing is not high. Considerable resources, however, are consumed to achieve that result. Since 1976, many procedures have been tried in order to resolve disputes with the most economical outlay of those resources, but with varying degrees of success.

Australia is not the only jurisdiction where this has been a problem, and it is not restricted to adversarial systems. Some courts and individual lawyers in the United States have enjoyed success by matching intensive dispute resolution techniques to the client. Costs are rarely disclosed, but the impression is that they are high, and the process does not appear suited to disposing of a large number of matters quickly. In this country, the most successful initiative was to attempt counselling prior to the first return date. Its success lay in tapping into the belief that children should not be victims of their parents' separation, and responsible parents made arrangements for their children ahead of themselves. No belief of similar force underlies the division of property.

Taken together, these facts suggest that there is little room to develop new administrative or quasi-legal procedures likely to have a significant effect on the number of matters progressing through the legal system.

This observation questions the proposal about family consultants mentioned above at 1(i)(b). Lawyers routinely attempt to settle matters, often with the early intervention of mediators. Matters proceeding beyond that to the filing of an Application tend to be more difficult matters where there are important questions of law or fact to be resolved, or they involve high levels of anger by one or both parties. It is unlikely that additional dispute resolution will lead to any significant change in the resolution of these matters.

Casting upon the parties some of the cost of providing certain services might create more ownership of the result and encourage resolution. Charges for conferences with family consultants and registrars come to mind. But there are serious objections to such a proposal. It is unlikely to fall evenly on the parties in many cases, and the use of fees to force a settlement is obnoxious. Nor is there evidence to suggest that fees would lead to significant settlements. On the other hand, trial fees that increased with the number of trial days might cause some parties to consider settlement, but this is unlikely to produce resolution at an early point in a matter. One could go further and consider a requirement that matters not exceeding, say, $100,000.00 are to be dealt with on the papers only. Registrars could be given a 'small claims' jurisdiction to, say, $25,000.00. However, if one embarks on this, one might as well consider whether other statutory changes could more effectively bring about the desired changes.

(iii) The matters to be heard in each Division

This has already been referred to above at paragraph 1(i)(b).

(iv) The appropriate title for the judicial officers of the General Division

The tendency seems to be towards a uniform title for judicial officers. It can be confusing for clients to try and explain the difference between magistrates in the State courts and the Federal Magistrates Court. Occasionally clients may think that a magistrate is less qualified than a judge. It is probably better, given the provisions of Chapter III of the Constitution, that the judicial power of the Commonwealth should be exercised by those styled 'judge', and, in court, 'your Honour'.

(v) What further court services are required to achieve early, non-adversarial resolution

One would like to say that there is a procedure or group of procedures awaiting discovery, and these will achieve early, non-adversarial resolution. Unfortunately, the experience since 1976 convinces most in family law that there is none. We have exhausted the limit of procedural change that might make a difference. It is difficult to think of any procedure that has not been tried at one time or another. We are not alone in

this. The writer has some familiarity with family law systems in a number of countries, and they struggle with much the same issues.

We are beginning to find out more about who litigates, why they do so, and what causes (or might cause) them, to settle a matter, but we need to know more. It is not encouraging for early resolution that the answer, at least in financial matters, is that parties want to have full financial disclosure, and this takes time. In children's matters, parties increasingly wish to see a Family Report before making a decision. Again, this takes time. Perhaps we have become too reliant on Family Reports, and the belief that they provide a more certain form of justice.

There is evidence that legislation can influence behaviour. Court services might work more effectively if they were backed by legislative expectations that were carefully aimed at couples and promoted. It is simply not enough to put these into legislation. As the Federal Magistrates Court has shown, one has to be able to turn wishes into values that the community accepts and supports. Too often a common failing has underlain family law in Australia, and that is the belief that behaviour can be modelled simply by changing the legislation.

4. An Alternative Proposal

The Review noted a proposal for a single Federal Court to include the Federal Court of Australia, Family Court and Federal Magistrates Court, but concluded that this was outside its mandate (paragraph 142). It is the view of the writer that it is worth considering at this time because it offers some advantages.

It is a more logical structure for there to be a Federal Court consisting of 2 divisions. The first would handle the general work of the existing Federal Court. To it would be attached the judges of the Federal Court and those Federal Magistrates appointed for their expertise in that jurisdiction. The other division would be responsible for the family law jurisdiction, and consist of the judges of the Family Court and Federal Magistrates appointed for their expertise in that field. The Chief Judge of the Family Division would enjoy a dual appointment as a judge of the General Division of the new Federal Court.

Another change should be to adopt the existing Rules of the Federal Court as the model for all Divisions. Appropriate changes could be made for particular matters in the Family Division. This is not dissimilar to the present practice in which the Federal Magistrates Court adopts certain Rules of the Family Court. That this can work across quite large court structures is evident from the *Uniform Civil Procedure Rules* in Queensland. These apply to the Supreme Court and District and Magistrates Courts, with appropriate changes. These are kept to a minimum, and help ensure uniform practice across the different jurisdictions. An initiative of this kind would provide a large degree of consistency in the Rules across the federal courts, and could be expected to yield financial savings that might be applied towards court services.

It follows from the above that the single administration, as noted earlier, should accompany any change.

Thank you for the opportunity to comment on the Report.

Yours faithfully,

(Dr Peter McManus)