

**Submissions on the Recommendations made by the Report of the  
Review of Future Governance Options for Federal Family Law  
Courts in Australia**

The proposal for a merger of the administration of the Family Court of Australia and the Federal Magistrate's Court is obviously sensible and should have been introduced in the first place.

However the achievement of this does not of itself solve the problems facing the Courts, either separately or as part of the Divisional structure envisaged by the Review. They will still be exercising the same jurisdiction and operating to an extent in competition under the model proposed, which is really an administrative merger with the courts carrying on as separate entities as they were before. I think that the merger must go further and involve a more unified approach.

One matter that does not appear to have been properly addressed in the review is the position and powers of the Chief Justice, the heads of jurisdiction or the judicial officers of both courts, and the way in which they are to achieve a central direction for the new Court. This is vital to its successful operation in the future.

The proposal seems to contemplate the two courts having the same leadership structure as at present, with the Heads of the two Divisions reflecting the present positions of Chief Justice of the FCA and Chief Federal Magistrate and having the same responsibilities. At the same time it is far from clear what the responsibilities, if any, of the Chief Justice are.

The Review states:

*“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 FMC be maintained and enhanced.”*

The review is silent as to the role of the head of the Superior and Appellate Division, but presumably it would be similar to that of the head of the General Division.

We therefore have a picture of the Chief Justice having no direct responsibility for the operation of either Division. What then is the role of the Chief Justice? What would be the situation if the Chief Justice was to form the view that either or both Divisions were operating inefficiently, or using inappropriate case management methods?

What would be the situation if the Chief Justice wished to relocate judicial officers in the greater interests of the Court?

The report appears to proceed upon the basis that it is essential that “the existing service culture” of the FMC should be retained and this remains the responsibility of the head of the General Division and not of the Chief Justice. What then would be the situation if the Chief Justice formed the view that the head of the General Division was not preserving the ‘existing service culture’, or formed the view that the culture was inadequate?

It is I think vital to clarify the position of the Chief Justice under this proposal and it is equally vital that the Chief Justice should exercise the same powers over the two Divisions that is presently exercised by the Chief Justice over the FCA and the Chief Federal Magistrate over the FMC. In particular, the Chief Justice should be responsible for and have the final say over the service delivery mechanisms of both Divisions.

This also raises the question of the powers of the Heads of Divisions, about which the Report is silent and the relative status of judicial officers of the two Divisions.

I should add that I have difficulty in understanding the rather vague concept of 'culture' that is used by the Semple Review and the Attorney-General as well as the Department. I note that the Attorney-General has even described the proposal as involving a reverse takeover of the FCA by the FMC and the enshrinement of the 'service culture' of the FMC.

I am not sure what the 'culture' of either court is or was. At the time of the introduction of the FMC the then Attorney-General talked about a 'quicker cheaper option for litigants' in the FMC and then proceeded to set up a structure which arguably gainsaid this while effectively preventing the FCA from operating efficiently as it then was in relation to interim matters.

The FCA was said to have a rigid formalistic 'culture' which it never had, but it proved to be a useful term of abuse when applied to it which still seems to be extant.

I have no doubt that the sins of rigidity and formalism could be levelled at a small minority of the judicial officers of both courts but I do not believe that it ever represented the 'culture' of either.

I also have difficulty in making any objective assessment of this 'existing service culture' of the present FMC which appears to claim as its virtue the absence of any case management principles and the dealing with matters upon a regional basis without any evaluation of its efficacy. This is not to criticise the Federal Magistrates themselves but rather the lack of any ordered system which appears to be claimed as a culture worth preserving. Similarly there appears to be a lack of any detailed statistics as to the nature of the various matters dealt with or even any agreement until recently as to how matters should be counted. All of these issues were addressed long ago by the FCA. The absence of this material makes it extremely difficult to test the validity of these claims as to the virtue of the FMC 'service culture'.

As applied to the FCA the accusation of a formal legalistic culture on its part seems to ignore the integral role of the former counselling service in the FCA. It also ignores innovations such as expanded

judicial education, Magellan, Indigenous Consultants, programs for litigants in person, expanded multicultural contacts, gender education and the less adversarial program.

Similarly, in 2003 the FCA completely upgraded and revised its Rules to bring them into line with modern rule systems around the common law world. This is not to say that they do not require further revision, because by their nature, Rules of Court require a continuous process of revision to meet new circumstances and this will be necessary in the context of the new structure.

These innovative approaches have continued under the present Chief Justice.

No doubt, there have been many useful approaches taken by the FMC as well, but the couching of the discussion in terms of the preservation of the alleged culture of either court seems to me to be less than helpful.

I think that this point should be made, because if it is not, the whole discussion proceeds upon a false premise.

The present proposal seems to envisage the creation in the General Division of judges at county or district court level, similar to the former junior judges in the FCA. Although their description remains uncertain, it is suggested that they should have a new title which 'recognises their constitutional status as Chapter III judges'. Presumably this means either 'Justice' or 'Judge'. There is of course nothing in the Constitution that prevents magistrates from being Chapter III Judges.

One concern about the change of title proposed is that it may recreate a problem that early bedevilled the FCA, namely the appointment of senior and junior judges and the difficulty of determining in advance which cases should be referred to the senior judges. That then left a situation where judges doing the same work received a pay differential and led to unhappiness and jealousies. I subsequently suggest a way in which this problem may be addressed, but it remains a matter of concern.

Secondly, I wonder whether the setting up of a new Court and the issuing of new commissions is really necessary. While there are constitutional problems about abolishing a court, I cannot see any obvious constitutional problem about amalgamating two courts into one by simply legislating to the effect that the FMC forms part of and becomes the General Division of the FCA. The same process could be employed in relation to the non family law magistrates in relation to the Federal Court.

That would leave the judicial officers of the General Division with the title of Magistrate. In my view there are strong arguments in favour of this. This would reinforce the concept that the intention of the legislation is to ensure that the general Division will deal with all summary matters and matters that can be dealt with swiftly and economically. I would be concerned that the change in their designation to that of judges would carry with it connotations of a much lengthier and more detailed consideration of cases.

If the judicial officers of the General Division continue to be described as magistrates, such an approach remains feasible and achievable.

I appreciate that the numbers of magistrates appointed is such that practicality presently requires that they conduct some of the general run of trials previously conducted in the FCA.

However a number of the present magistrates would be well suited as judges of the FCA and this problem could be overcome by appointing them as such. This would involve a re-think of the present proposal to reduce the number of judges of the Superior and Appeal Division. It would also be more in line with the original thinking behind the Family Law Act where significant family disputes were thought to be appropriate to be dealt with in a superior court.

I consider that so far as possible, the respective jurisdiction of the two Divisions should be set out in legislation.

The Superior and Appeal Division's jurisdiction should obviously include all appeals together with specialist jurisdiction such as cases under the Hague Conventions and medical treatment of children.

On any view it should also include complex cases for trial at first instance.

However the identification of cases as complex cases presents more difficulty, particularly in a family law context where it is often the personality of the parties rather than the subject matter which render a case complex and this does not manifest itself until the case has been in the system for some time.

Nevertheless there are some cases that are obviously complex. These include property disputes involving substantial assets which usually involve intricate valuation issues and difficult issues as to the identification of assets and respective contributions of the parties. They also include disputes over children involving allegations of sexual abuse, deep religious differences between the parents and the like. Another example would be cases involving Indigenous issues or cultural matters such as traditional adoption, as practiced by Torres Strait Islanders.

Perhaps the best solution is for the legislation to simply provide that cases involving complex issues of fact or law should be within the sole jurisdiction of this Division, without defining it further.

The legislation should require the transfer of such cases from the General Division and should also give Superior and Appeal Division Judges power to uplift from or remit any case whether complex or otherwise to the General Division, either of their own motion or on application by the parties.

A general discretion to do this is important. If it is to be a genuine Superior Division its judges should have appropriate powers to determine which cases should come before it. It would enable those cases not initially identified as complex to be uplifted when it becomes apparent that they are complex. There are also practical reasons for the exercise of this power because for example an Appeal and Superior Division judge sitting on circuit may find it

convenient to also deal with matters normally allocated to the General Division that are ready to proceed before him or her, or to make interim orders in such cases.

As to the General Division, legislation should first provide that it deal with cases that normally should be dealt with summarily.

Obvious examples are interim matters, holiday and birthday disputes, minor property matters and most enforcement applications, but there are many others where the facts are within a limited compass and are eminently suited to summary determination. It should also provide for a general jurisdiction which could be defined as those cases not falling within the jurisdiction of the Appeal and Superior Division.

A matter that severely hampered the efficient operation of the FCA during my time as Chief Justice was the inability to set up such a summary jurisdiction except for interim matters. Everything else had to go through the procedural hoops before a judge as if it was a major piece of litigation. The above suggestions seek to address this problem.

The success of the Senior Registrars for the short time that they operated in the FCA despite the fact that they were confined to interim matters provides strong evidence of the value of effective summary determination of matters.

Such a scheme would sit well with a requirement that all cases should be filed in the General Division. The filtering process to determine which cases should be heard in which Division should take place in the General Division in a similar way to that performed by the magistrates in the Family Court of Western Australia. I note that a similar process takes place in the UK.

I also regard the concept of appointing all of the Judges of the Superior and Appeal Division as Appeal Division Judges to be a retrograde step. The Supreme Courts of NSW, Queensland and Victoria have all moved in the direction of a separate Court of Appeal. The fact that the Federal Court has not done so seems to me to be no argument in favour of such a proposition but rather may

explain the high rate of successful High Court appeals against Federal Court judgments.

There can be little doubt that some judges are better appeal judges than trial judges and vice versa. The performance of the Family Court's Appeal Division improved immeasurably when its numbers were limited, particularly in comparison to the early days of the Court when there were many inconsistent decisions.

However, I consider that the system of trial judges of the Superior and Appeal Division being able to sit on the Appeal Division should be preserved, subject to the present limitation as to numbers being retained. It has a number of benefits, including judicial education, enabling the use of particular trial judges in appropriate cases and improving the mutual understanding of trial and appeal judges as to the respective problems facing each other.

I note that the possibility of renaming the new court is flagged by the Semple Review and the Department. I regard this suggestion as inappropriate. The Court will be exercising family law jurisdiction as the FCA has done for 32 years under that name. The only reason to change it would be as a gesture to those in the FMC who are opposed to the merger of the two courts. It would only create further confusion in the minds of the public. The public makes little distinction between which judicial officers are hearing a case in any event and if the title of the Court was its original one there would be no reason for confusion. A new one would only add confusion.

As to court services I think that it is essential to further expand and develop the less adversarial approach to family law matters. Although this approach emanated from the FCA, it is also most appropriate for matters within the present FMC and future General Division jurisdiction. The achievement of this requires that the Chief Justice be equipped with appropriate powers to ensure that it happens.

To summarise my views I consider that at the very least there must be a head of jurisdiction with adequate powers to administer the Court and to be responsible for case management of the cases

coming before it and their disposition. This must involve a consistent and clear approach throughout both Divisions of the Court.

It is inappropriate in the pursuit of what I suspect is a mythical 'culture' to preserve inconsistent regional variations of methods of disposition. In an Australian Court I do not believe that there is any replacement for proper structures to achieve these objects and it should be possible to walk into any court in Australia exercising family jurisdiction and expect the same treatment.

6 February 2009