



Law Council  
OF AUSTRALIA

*From the Office of  
the President*

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The Honourable Robert McClelland MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General

**Future Governance Options: Federal Court of Australia & Federal Magistrates Court (General Federal Jurisdiction)**

In February 2009 the Law Council made a submission to your Department as part of the process of consultation that followed the release in November 2008 of the report titled “*Future Governance Options for Federal Family Law Courts in Australia – Striking the Right Balance*”.

That February 2009 submission, like the Law Council’s initial submission of 16 May 2008 on the “*Review of the Delivery of Family Law Services by the Family Court of Australia and the Federal Magistrates Court*”, was specifically concerned with future governance options for Federal Family Law Courts in Australia, that being the clear focus of the terms of reference for the Review.

In its 16 May 2008 submission the Law Council therefore expressly recorded that:

*“[a]ny structural changes that are made [to the Federal Magistrates Court] will 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 Court structure in the future if and when the Government decides to implement its policies. The Law Council would seek to actively participate in any such general review ...”*

The Report release in November 2008 contained various recommendations for “*Governance and Structural Change*” in the Federal Magistrates Court.

The majority of those recommendations and the analysis, assessment and discussion that Part 6 contained was focussed on the restructuring of the family law jurisdiction. However, paragraph 116 in the section titled “*Implementation*” contained a recommendation that:

*“Federal Magistrates with non family law expertise ... be appointed ... to a newly created Division of the Federal Court. The existing general federal law jurisdiction of judicial officers appointed to this Division ... be expanded over time.[116].”*

Importantly given the reservation that the Law Council expressed in its 16 May 2008 submission, while there were passing references to the general federal jurisdiction of the Federal Magistrates Court in the Review, there was no analysis of the wide range of important issues to which any change in the current structure of that Court in the exercise of its general federal jurisdiction might give rise. This was in stark contrast to the detailed analysis, assessment and discussion of the issues that might arise in relation to the structural change recommended in the Report for the family law jurisdiction.

Notwithstanding this, paragraph 116 concluded with the statement that the recommendation there made would:

*“... have the advantage of enabling more matters to be dealt with in Federal Courts at an appropriate jurisdictional level”*

The Law Council does not understand on what basis that last statement was made. While there is a short record of nature and extent of the general federal jurisdiction of the Federal Magistrates Court at paragraphs 21 to 23 of the Report, there appears to be no analysis anywhere in the Report of the consequences of a change such as that proposed for the administration of justice in the general federal jurisdiction.

The Law Council had therefore anticipated that your Department might consult further with the legal profession and with other users of the general federal jurisdiction of the Federal Magistrates Court (the community and in particular, litigants) before finally resolving on a response to the recommendation at paragraph 116 of the report and proceeding with any reform in the general federal sphere.

However, we are concerned that we may have been mistaken in that belief and we write to request, lest that be the case, that you provide an opportunity for further detailed consideration of the options for *“Governance and Structural Change”* in the general federal jurisdiction of the Federal Magistrates Court

The Law Council has also noted in this regard the content of the letter from the Chief Justice of the Federal Court to you of 11 February 2009. While the Law Council is not privy to any response by you to the Chief Justice’s letter, it does raise matters that while in some cases are within the specific purview of the Court, nevertheless seem to the Law Council to warrant careful consideration by the legal profession and the community of users of the two Courts.

In summary therefore, the Law Council is concerned that because of the over-riding focus on the family jurisdiction thus far there appears to have been no (or no proper) consideration of important issues that arise in the context of any restructure of the general federal jurisdiction, such as:

- the impact of the differences in the nature and extent of the general federal jurisdiction currently exercised by Federal Magistrates Court and the Federal Court. Importantly, unlike family law the two do not have almost entirely concurrent jurisdiction. This has important ramifications for both the substantive law and for the practice and procedure of the two courts. It also means that there is not (with limited exceptions) present in the general federal jurisdiction the kind of competition for parties and resources that is argued to occur in the family jurisdiction;

- the differences in practice and procedure in the Federal Magistrates Court (exercising general federal jurisdiction) and the Federal Court, the advantages and disadvantages of those different practices and procedures and the issues that will arise if the two are to be in some way merged, with the compromise potentially adversely affecting the culture and quality of justice administered by the two;
- whether it is appropriate that the Federal Magistrates Court (or some similar Court) become part of the hierarchy of a superior Court of record. If that were to occur it would be unique, if not in the world then certainly in Australia; and
- (most importantly) the interests of litigants.

The Law Council therefore remains keen to engage with the government in wider and more substantial consultation in relation to (and consideration of) any proposals for change in the structure of the Federal Magistrates Court in the general federal jurisdiction, particularly if the proposed change is of the kind recommended in paragraph 116 of the Report.

We note in that regard that Mr Ian Govey, Deputy Secretary of the Attorney-General's Department, has kindly offered to meet with representatives of Federal Litigation Section of the Law Council to discuss the Simple recommendations in relation to the general federal jurisdiction. The Federal Litigation Section is very keen to take up this opportunity and will be liaising with Mr Govey's office further in that regard.

Yours sincerely



John Corcoran

15 April 2009

cc: Mr Ian Govey, Deputy Secretary, Attorney-General's Department