Law Council
OF AUSTRALIA

Courts and Tribunals Legislation Amendment (Administration) Bill 2012

Senate Legal and Constitutional Affairs Legislation Committee

Submission by the Family Law Section and Federal Litigation Section of the Law Council of Australia

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GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

The Family Law Section and the Federal Litigation Section (the Sections) of the Law Council of Australia have examined the *Courts and Tribunals Legislation Amendment (Administration) Bill 2012*, and make this joint submission.

1. The Sections make the following brief observations on the Bill:

    - The Bill will merge the administrative functions of the Family Court of Australia and the Federal Magistrates Court of Australia (soon to be the Federal Circuit Court of Australia).
    - The two courts will be established as a single agency for the purposes of the *Financial Management and Accountability Act 1997* (Cwth) and Regulations.
    - There will be a single Chief Executive Officer for both Courts. There will, however, still be separate heads of jurisdiction for each Court, with a Chief Justice of the Family Court and a Chief Judge of the Federal Circuit Court. The Chief Executive Officer will report to each head of jurisdiction and each head will be able to direct the Chief Executive Officer.
    - This will formalise administrative arrangements that have been in place since about 2009, with the Chief Executive Officer of the Family Court having also acted as the Chief Executive Officer of the Federal Magistrates Court since that time and with the two Courts sharing many administrative resources.
    - If the Bill is passed in its present form, there will thereafter be two primary Federal Court agencies for the purposes of administration and financial reporting, the combined Family Court/Federal Circuit Court and the Federal Court of Australia.
    - The jurisdiction of the Federal Magistrates Court will not change when it becomes the Federal Circuit Court of Australia or as a consequence of this administrative Bill.

2. The Family Law Section has consistently maintained that the policy decision by the Government to maintain two separate Courts exercising family law jurisdiction is fundamentally flawed. Part 4 of this submission sets out further detail on the Family Law Section's reasoning regarding this.

3. Notwithstanding the Family Law Section's opposition to this policy position, if the Government is intent on pressing ahead with its plans to establish separate Courts under a single administration, the Sections make the comments below in relation to a number of important practical matters and potential future issues for the future of the Federal Circuit Court of Australia as an independent court.

    a. The Federal Circuit Court will continue to have both a family law and a (increasingly broad) general federal jurisdiction. However, there are still only a handful of magistrates/judges with specific general federal backgrounds and thus, expertise. While some federal magistrates sit in both the family jurisdiction and the general federal jurisdiction out of necessity, that is not a desirable position either from the perspective of the Court or the legal profession and their client litigants. There is general support in the profession for the lower cost/expeditious procedures that the Federal Circuit Court is intended to offer in general federal matters and for it having a place as a lower level trial Court. However, it will not attract the work necessary to generate the jurisprudential experience and the jurisdictional reputation necessary to support it as a preferred forum for such matters unless it is adequately resourced by the appointment of judges with appropriate general federal law background and experience.

b. The fact that there will be one appropriation for both the Family Court and the Federal Circuit Court as a single agency begs a question as to allocation of financial resources, not just as between the two Courts, but also as between the family law "division" and the general federal "division" of the Federal Circuit Court. It would be desirable for the government/the department to provide some guidance or clarity around the issue as to whether each Court will be (or have) a separate program under the one appropriation and what commitment the department and the government will make to the further development of the general federal jurisdiction. A competition between jurisdictions for resources is clearly undesirable.

c. There is also an issue for the Federal Circuit Court in relation to physical resources that ought be addressed lest it be lost (or take a lower priority) as a consequence of this "one agency/one appropriation" outcome: that of Court rooms, infrastructure and equipment.

   As an example of the issue regarding Court buildings, it might be noted that filings in the general federal jurisdiction are made in the Federal Court Registry under administrative arrangements that have been in place since the Federal Magistrates Court was established. In Sydney, there is no separate Commonwealth Courts building in which the various Federal courts might all be accommodated. As a result, registry services for general federal law matters in the Federal Circuit Court are provided from the Federal Court registry in the Law Courts Building, Queens Square. However, the matters are subsequently heard in a court building some considerable distance away in Goulburn Street and William Street. The connection between administration and place of hearing is therefore fractured, to the disadvantage of the Court and, more importantly, the litigants, who find it all very confusing (and many of whom, it must be remembered are unrepresented).

   Another example of physical resource issues that must be addressed now that the future of the Court is assured arises when the Court is on circuit and must use State court facilities. On occasions, for example, the Court will wish to sit outside of State court hours and is unable to do so because there is no provision for such matters as security or air-conditioning at that time. Such issues must be addressed at both an administrative and financial resources level if the Court is to be able to function as a true "circuit" court. Again, it will be important if this is to occur that there be a proper balance in both the allocation of administrative and financial resources between the Family Court and the Federal Circuit Court.

   The Family Law Section is already aware of a range of problems in relation to the Federal Magistrates Court's existing circuit sittings, including where the physical environment of the circuit court is not conducive to dealing safely with Family Law matters and where conciliation conferences have been cancelled due to the lack of rooms.

d. Although the heads of jurisdiction, that is, the Chief Justice of the Family Court and the Chief Judge of the Federal Circuit Court will each retain ultimate responsibility for the administration of their own Court, there will be the one public service employee (and those who report to him or her) carrying out the primary administrative role of Chief Executive of the two Courts. While it might be anticipated that the heads of jurisdiction will work together and co-operate, as has been the case to date, it would not be in the interest of the administration of justice and the effective conduct of the business of the two Courts for there to

arise a position in respect of which the two heads did not agree and which placed the Chief Executive in the unfortunate position of having to address inconsistent directions. The present model does not address or provide a means for resolving such a situation.

Similarly, the CEO is to be appointed by the Governor-General on the joint nomination of the Chief Judge of the Family Court and the Chief Judge of the Federal Circuit Court under amendments proposed to section 38C of the Family Law Act. There is no process to address the situation where the heads of jurisdiction may not agree on a suitable candidate for CEO. As the Courts themselves would acknowledge, each has a different culture and it is quite possible that two separate organisations would look for different features/abilities in their needs for a CEO.

e. While not an issue arising directly as a consequence of this Bill, the future financial resourcing of the Federal Circuit Court must also be considered in the context of the pressures that apply to the Federal Courts generally as a result of the ongoing demand for "efficiency dividends". The most recent example of this in the Federal Court, and the manner in which impacts on the Federal Circuit Court, is the voluntary redundancy of a Registrar in Sydney. The Registrars of the Federal Court sit in Bankruptcy matters in both Courts. They also perform an increasingly well recognised and very effective role as mediators in both Courts. The loss of a Registrar adversely impacts on both the Federal Court and the Federal Circuit Court in their capacity to provide these valuable (indeed, essential) court services.

f. Whilst administrative changes such as are provided for in the Bill may achieve some immediate economic efficiencies, they may also significantly inhibit both the future development of the Federal Circuit Court and its present capacity to deliver the lower cost and expeditious outcomes for litigants that were a prime objective when it was established. It is therefore important that there be clear lines of authority and responsibility in each of the Family and the Federal Circuit Courts and that there be a program for the future development of the latter that is clearly articulated and appropriately resourced.

4. The Family Law Section maintains that the Federal Magistrates Court has suffered from insufficient resourcing since its inception. Furthermore it is the Family Law Section's view that the Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia all remain significantly under-resourced, and no administrative changes or savings will adequately address that issue.

As recently as 13 April this year, the Law Council wrote to the Attorney- General to emphasise its support for a '*single court dealing with family law matters*' (a copy of that letter is attached). The Family Law Section continues to be concerned about the problems that will arise from having two separate Courts exercising family law jurisdiction, and the Bill illustrates how those concerns can permeate even apparently innocuous administrative arrangements.

It is the Family Law Section's view that the Bill appears simply to be designed to give a legislative basis to the joinder of administrative functions informally put in place by the two Courts, without thought being given to the long term sustainability of those structures. Those arrangements are entirely dependent on the co-operative personal and professional relationships of the current incumbents - the Chief Justice, the Chief Federal Magistrate and Chief Executive Officer; as a blueprint for

a long term structure, where agendas and incumbents will change over time, they are fundamentally flawed.

The Family Law Section's view is that further thought needs to be given to an appropriate, inherently sustainable structure for the long term. The difficulties inherent in the decision to maintain separate Courts while simultaneously trying to achieve cost savings by merging administrative functions are not open to a simple solution, and again serve to illustrate the point that the Family Law Section has consistently made - that the policy decision to maintain two separate Courts exercising family law jurisdiction is wrong.

The Federal Litigation Section makes the point however that if there were to be a single court dealing with Family Law Matters this should not suggest that there would not be a place for a separate court exercising general federal jurisdiction.