

11 January 2016

Ms Shennia Spillane  
Inquiry Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Ms Spillane

**Courts Administration Legislation Amendment Bill 2015**

1. The Law Council of Australia welcomes the opportunity to provide comments on the Courts Administration Legislation Amendment Bill 2015.
2. The Law Council is the national peak body for the legal profession. Further information about the Law Council is at **Attachment A**.
3. The Executive of the Family Law Section, and both the Federal Court and Federal Circuit Court Liaison Committees of the Law Council's Federal Litigation and Dispute Resolution Section, contributed to this submission.
4. This submission also includes comment from the Family Issues Committee of the Law Society of New South Wales. That Committee represents the Law Society of New South Wales on family law issues as they relate to the legal needs of people in NSW, and includes experts drawn from the ranks of the Law Society's membership.
5. The Bill was introduced into the House of Representatives on 2 December 2015. If passed, it will amend the:
  - *Federal Court of Australia Act 1976 (Cth)* (**Federal Court Act**)
  - *Family Law Act 1975 (Cth)*
  - *Federal Circuit Court of Australia Act 1999 (Cth)*; and
  - *Native Title Act 1993 (Cth)*.
6. The Bill proposes to combine the Federal Court of Australia (**Federal Court**), the Family Court of Australia (**Family Court**) and the Federal Circuit Court of Australia (**Federal Circuit Court**) as a single administrative entity, and make legislative provision for the three courts to share corporate services.
7. In so doing, the Bill would primarily affect the courts' administrative and corporate operations by consolidating the corporate services of communications, finance, human resources, information technology, libraries, procurement and contract

management, property, risk oversight and management; statistics and any other matter prescribed by a determination issued under s 5 of the Act.<sup>1</sup>

8. Those consolidated and thereafter shared corporate services would be managed by the Federal Court Chief Executive Officer and Principal Registrar (CEO) appointed under the Federal Court Act, effective from 1 July 2016.<sup>2</sup>
9. The statutory independence of the three courts would be preserved.
10. The responsibility of the heads of each court (the two existing Chief Justices and the Chief Judge) for the business of their respective courts and for managing their administrative affairs (other than corporate services), would continue without interference.
11. The Bill would also not affect the substantive rights of court users.
12. The Bill also provides for a CEO for each head of jurisdiction to assist with the management of the administrative affairs of that jurisdiction. The Federal Circuit Court would have its own CEO and no longer be required to share a CEO with the Family Court.
13. The new administrative courts entity would have a single appropriation allocated by the Australian Parliament. The management of the courts' budgets will continue to be at the discretion of the courts. The CEO would be the accountable authority under the *Public Governance, Performance and Accountability Act 2013* (Cth) in relation to the spending of allocated monies for the courts entity.
14. Proposed amendments of the *Federal Court Act* would provide a constraint on how the CEO spends money. In particular, where outcomes for a particular court are identified within the single appropriation, the CEO would be required to ensure that the amount relating to that outcome is only spent for that outcome unless the consent of the relevant Chief Justice or Chief Judge (or of the Commonwealth Attorney General after consultation with the heads of jurisdiction) to the spending of the amount for another outcome has been obtained.
15. Each court's ability to decide how to spend the money allocated in its budget will further help safeguard the courts' independence.
16. The Bill is intended to generate efficiencies through the establishment of the shared corporate services functions and reduce unnecessary duplication and consequent inefficiency.

#### **Contingent Law Council support for this Bill**

17. The merging of the corporate services functions of the Federal Court with those of the Family Court and Federal Circuit Court to create a single administrative entity is expected to save \$9.4 million over six years to 2020–21 and \$5.4 million annually after that.
18. On 3 December 2015 the Law Council welcomed commitments made by the Attorney-General, Senator the Hon George Brandis QC, that all savings accruing from this measure would be reinvested in the court system, and that judicial vacancies in the Federal Circuit Court would be filled.

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<sup>1</sup> Clause Item 1, Schedule 1 — Amendments to s 4 of the relating to the *Federal Court of Australia Act 1976* (Cth), proposed new subsection 18A(1B).

<sup>2</sup> Clause Item 1, Schedule 1 — Amendments to s 4 of the relating to the *Federal Court of Australia Act 1976* (Cth).

19. The Law Council had been in discussions with the Attorney-General concerning the importance of ensuring the federal court system is both financially sustainable and properly resourced to meet the community's needs, and had sought assurance that the efficiencies derived through the merging of corporate services functions would be reinvested in the federal court system. The timely filling the vacancies in Federal Circuit Court judicial positions has also been a significant concern of the Law Council.<sup>3</sup>
20. The reinvestment of those savings in the courts is consistent with the objective of sustainable long term funding of the federal courts.
21. The Law Council remains concerned about the immediate lack of judicial resources in the Family Court and the Federal Circuit Court and the delay before the savings accruing from the passage of this Bill will be realised. Judges in these courts are already under significant pressure due to increasing workloads, the stressful nature of high-conflict proceedings, and the failure to quickly fill all judicial vacancies as they occur.
22. Judicial vacancies result in unacceptable delays in the listing of matters. The earliest first return date for some matters filed in the Sydney Registry of the Family Court as at December 2015, was May 2016, with delays exceeding three years for some matters to reach trial.
23. The Law Council notes that the human right to a fair hearing under art. 14(3)(c) of the International Covenant on Civil and Political Rights 1966, applies in both civil and criminal proceedings and in courts and tribunals. The obligation on States to ensure the expeditious resolution of civil disputes applies particularly in family law matters.<sup>4</sup> The United Nations Human Rights Committee has advised in a General Comment that

*An important aspect of the fairness of a hearing is its expeditiousness ... delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing ... Where such delays are caused by a lack of resources and chronic under-funding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice.*<sup>5</sup>
24. The provision of adequate judicial resourcing for both the Family Court and Federal Circuit Court, and ensuring that judges are replaced in a timely manner, are matters requiring urgent attention.
25. The filling of judicial vacancies arising as a result of statutory retirement can be planned for well in advance of each retirement. Retirements due to ill-health are also often able to be planned for.

### **Resource needs of the Federal Circuit Court**

26. The Federal Circuit Court should be a particular focus of such reinvestment.

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<sup>3</sup> Law Council of Australia, "Law Council welcomes commitment from Attorney-General regarding court reinvestment, judicial appointments", *Media release #1558*, 3 December 2015.

<sup>4</sup> OSCE Office for Democratic Institutions and Human Rights (ODIHR), [Legal Digest of International Fair Trial Right](#) (Poland, 2012) p 28, 32, 130–132.

<sup>5</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, [UN Doc. CCPR/C/GC/32 \(2007\)](#), para 27.

27. The Federal Circuit Court is the largest of the Federal Courts. It has a Family Law jurisdiction that is largely concurrent with that of the Family Court and now undertakes more than 87% of the family law workload of the federal courts (excluding matters in Western Australia).<sup>6</sup>
28. In addition, the Federal Circuit Court has an increasingly broad general federal jurisdiction in which the filings, particularly in industrial law and especially in migration matters, continue to grow strongly, and unsustainably.
29. The provision of a separate CEO to support the Chief Judge of the Federal Circuit Court in the administration of that court and the safeguarding of portions of the single appropriation that might be earmarked for it are, in the view of the Law Council, both necessary and appropriate if the Court is to meet its objectives.
30. The importance of the Federal Circuit Court to the Australian community in the provision of court services in the area of family law is demonstrated by the volume of matters that are brought to it and which now comprise more than 90% of filings. However, as the *Annual Report* noted, it is of concern that disposition rates have declined and delays in the allocation of hearing dates have resulted. This is, as the *Annual Report* notes, a consequence of current limitations on judicial resources and overall increase in the workload of the court, particularly in the area of migration.<sup>7</sup>
31. The Federal Circuit Court's caseload in migration matters continues to increase substantially. In 2014/15 a total of 3896 migration matters were filed. The court was able to dispose of 3009 matters in the same period. The volume of migration filings in the ordinary course is unlikely to abate in the near future. The passage of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* and the commencement of processing of the approximately 30,000 persons who comprise the "migration legacy caseload" is expected to result in an unprecedented volume of migration filings that will be beyond the existing judicial resources of the court.
32. The Chief Judge of the Federal Circuit Court, the Hon John Pascoe AO CVO, wrote in the Court's *Annual Report 2014/15*:

*The Court's caseload in migration continues to increase substantially. Over the past five years the number of migration filings has grown nearly four-fold. This is, in itself, a daunting amount of work and filings this financial year alone totalled nearly 3900. Following the passage of new legislation aimed at dealing with the tens of thousands of as yet unprocessed protection claims, the Court expects to see an even greater increase in filings. This will result in the Court facing an unprecedented volume of work in this jurisdiction. This workload cannot be met with the current judicial resourcing.*<sup>8</sup>
33. The jurisdiction of the Federal Circuit Court in general federal matters is at the same time continuing to grow as a result of, for example, the incremental conferral of jurisdiction as Commonwealth legislation provides for recourse to the Court in a

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<sup>6</sup> Federal Circuit Court of Australia, *Annual Report 2014/15* (Commonwealth of Australia 2015), p 46.

<sup>7</sup> *ibid.* p 51.

<sup>8</sup> *ibid.* p 4.

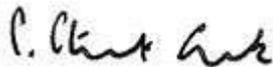
diverse range of commercial and other general federal areas for which the Commonwealth has responsibility.<sup>9</sup>

34. The expansion of the Court's general federal jurisdiction in this manner is consistent with the intended role and function of the Federal Circuit Court as an intermediate federal court that relieves the workload of the superior Federal Courts (in this instance, the Federal Court) by resolving less complex disputes in a timely and cost effective manner.
35. The further expansion of the Court's general federal jurisdiction is also desirable in situations in which an existing conferral of jurisdiction is insufficient, or leaves a gap in jurisdiction that inconveniences or embarrasses litigants, and may frustrate or delay the administration of justice, and add unnecessary cost for the parties. This can arise, for example, as a consequence the Federal Circuit Court's lack of jurisdiction in relation to corporate insolvency matters.
36. The Senate Economic References Committee recommended in December 2015 that the Australian Government give serious consideration to extending the jurisdiction of the Federal Circuit Court to include corporate insolvencies under the *Corporations Act 2001* (Cth).<sup>10</sup> This can be achieved through amendments to the Corporations Law progressed through the [Legislative and Governance Forum for Corporations](#), the body with oversight of corporate and financial services regulation. The Law Council's submission on this issue is available [online](#).
37. In order to be able to discharge the workload it already has, and the additional workload that arises from the Federal Circuit Court's expanding general jurisdiction, increased funding and the appointment of additional judges in each of its jurisdictions in a timely manner is critical.

## Conclusion

38. In summary, the Law Council welcomes the Bill, but the Council and the Law Society of New South Wales are particularly concerned about the capacity of the Federal Circuit Court to perform its important role as an intermediate federal (and federal *circuit*) court, and about delays in the Family Court, due to the constraints on the courts' financial and judicial resources.
39. The Law Council recommends that the level of resourcing for federal courts and the level of savings and reinvestment accruing as a result of this measure be a particular focus of the Senate Standing Committees on Legal and Constitutional Affairs during the Committees' inquiries into Estimates and annual reports.

Yours sincerely



S. Stuart Clark AM  
**President**

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<sup>9</sup> In 2015, for example, jurisdiction in relation to Commonwealth tenancy disputes was conferred on the Court under the [Federal Courts Legislation Amendment Act 2015](#) (Cth). See also: Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015.

<sup>10</sup> Senate Standing Committee on Economics, [Insolvency in the Australian construction industry Report](#) (2015), Recommendation 44 [12.68], p 193.



## **Profile of the Law Council of Australia**

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The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on national issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.