

Family Law Practitioners' Association of Western Australia (Inc)
Submission to
the Senate Legal and Constitutional Affairs Legislation Committee
inquiry in relation to
the *Federal Circuit and Family Court of Australia Bill 2018*
and
the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018*

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Overview

1. The Family Law Practitioners' Association of Western Australia (Inc.) ('FLPAWA') provides the following submissions about the proposed structural changes to the federal courts that deal with family law matters.
2. The proposed changes involve creating a new Court, namely the Federal Circuit and Family Court of Australia ("**FCFCA**"), through the *Federal Circuit and Family Court of Australia Bill 2018* ("**FCFC Bill**") and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* ("**CATP Bill**").
3. In broad terms: -
 - a) the FCFC Bill creates the FCFCA by continuing the Family Court of Australia as Division 1 of the FCFCA, and continuing the Federal Circuit Court as Division 2 of the FCFCA; and

- b) the CATP Bill provides for the consequential amendments to other Acts, Regulations and Rules to support the creation of the new FCFCA.

Scope of submission

- 4. The focus of this submission is on aspects of FCFC Bill and the CATP Bill that FLPAWA has identified as having a potentially significant impact in Western Australia ("**WA**"). This submission does not seek to address the question of what might be the impact of the Bills elsewhere in Australia.

Timing

- 5. FLPAWA submits that, as a matter of timing, consideration of any changes to the structuring of the federal courts that deal with family law matters should await the completion and release of the Final Report from the Australian Law Reform Commission on the Review of the Family Law System, which is scheduled to be completed in March 2019.

Position overall

- 6. FLPAWA does not support the FCFC Bill or the CATP Bill.

Retention of specialist courts

- 7. FLPAWA submits that the proposals for restructure do not properly appreciate the complex nature of family law proceedings, and the benefits arising from having family law matters dealt with by Judicial Officers who have both expertise and experience in the practice of family law and all its facets.
- 8. FLPAWA supports the retention of specialist courts to deal with family law matters.

Courts dealing with first instance *Family Law Act 1975* proceedings in WA

- 9. Currently, the Federal Circuit Court of Australia does not sit in WA to exercise jurisdiction pursuant to the *Family Law Act 1975* ("**FLA**"). Instead, those proceedings are dealt with by the Family Court of WA and the Magistrates Court of WA ("**WA Courts**").

10. FLPAWA supports the continuation of the current position, namely the continuation of the WA Courts as the only courts dealing with first instance FLA proceedings in WA.

Appeals from Courts of Summary Jurisdiction in WA

The Current Position

11. In proceedings under the FLA in WA, decrees can be made by: -
- a) WA Family Law Magistrates – being a Magistrate who holds concurrent office as a Magistrate, and either as Principal Registrar or a Registrar of the Family Court of Western Australia; and
 - b) all other Magistrates exercising jurisdiction under the FLA but who are not ‘Family Law Magistrates’.
12. The current legislation provides a different path, and different nature, for appeals against decrees, depending on whether they were made by a Family Law Magistrate or an ordinary Magistrate¹.
13. The current position in relation to appeals from courts of summary jurisdiction in WA in respect of decrees made under the FLA can be summarised as follows:

	Family Law Magistrate	ordinary Magistrate
Heard by	Heard by the Family Court of Australia ² , to be heard by the Full Court (three Justices) unless the Chief Justice of the Family Court of Australia considers it appropriate for the matter to be heard by a single Judge ³	Appeals from ordinary Magistrates are to the Family Court of Western Australia ⁴

¹ The expression “ordinary Magistrate” is used here and at other places in the submission as a shorthand way of distinguishing between Family Law Magistrates and non-Family Law Magistrates without intending any disrespect.

² s94AAA(1A) FLA

³ s94AAA(3) FLA

⁴ ss96(1) and 41(3) FLA

	Family Law Magistrate	ordinary Magistrate
Leave	Leave to appeal is required from, amongst others, interlocutory decrees other than a decree in relation to a child welfare matter ⁵	
Nature of hearing		Appeals proceed by way of a hearing de novo ⁶ .
Effect	For the purposes of appeals of decrees pursuant to the FLA, Family Law Magistrates are treated as equivalent to Judges of the Federal Circuit Court	

Proposed Changes

14. Appeals are currently provided for in Part X of the *Family Law Act*.
15. Section 114 (Schedule 1 Part 1) of the CATP Bill repeals Part X. Sections 25 and 102 of the FCFC Bill vest jurisdiction in Divisions 1 and 2 of the FCFCA to determine appeals from courts of summary jurisdiction.
16. Section 72 (Schedule 1 Part 1) of the CATP Bill provides for the addition of s47A in the FLA, dealing with appeals from courts of summary jurisdiction.
17. The Bills provide that appeals from courts of summary jurisdiction will have the following characteristics:

Heard by	Section 47A provides that an appeal lies from a court of summary jurisdiction to the FCFCA or the Supreme Court of that State or Territory. FLPWA understands that, references to the Supreme Court of WA are taken to be a reference to the Family Court of WA.
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⁵ s94AA(1) FLA and reg 15A *Family Law Regulations* 1984

⁶ s96(4)(a) FLA

Leave	Leave is not required to appeal a decree from a court of summary jurisdiction except under Child Support legislation (proposed s47B).
Nature of hearing	By the proposed s47A(5)(a) FLA, the court hearing the appeal "must proceed by way of a hearing de novo".

18. Proposed new sub-regulation 39BB(2)(e)(iii) of the *Family Law Regulations* 1984 provides that the FCFCA cannot sit in WA to hear appeals from courts of summary jurisdiction. Consequently, such appeals may only be to the Family Court of Western Australia, and this is made clear at paragraph 148 of the Explanatory Memorandum to the CATB.
19. The effect appears to be that in WA, all appeals from a decree of a court of summary jurisdiction exercising jurisdiction under the Family Law Act (including a decree made by a WA Family Law Magistrate) will lie to the Family Court of Western Australia, and not the FCFC. This is a significant difference to the present position, which provides for an appeal against a decree of a WA Family Law Magistrate to be made to the Full Court of the Family Court of Australia.
20. This raises several issues for FLPWA namely: -
 - a) Additional jurisdiction would be placed upon the resources of the Family Court of Western Australia by virtue of the proposed changes;
 - b) It appears that appeals from Family Law Magistrates would proceed by way of hearing 'de novo'.;
 - c) It appears that there would be no requirement for leave to appeal a decree from an interlocutory decree of a Family Law Magistrate (other than a child welfare matter).
21. The above issues are considered by FLPWA to be significant given that: -
 - a) FLPWA understands that, quantitatively, Family Law Magistrates hear and determine more final hearings per annum than Judges of the Family Court of WA.
 - b) the resources of the Family Court of WA would, pursuant to the proposed changes, be placed under further pressure by way of every appeal from a

Family Law Magistrate or Magistrate in WA exercising jurisdiction under the
Family Law Act now proceeding to the Family Court of WA.

Solution

22. FLPAWA's preferred solution to Family Law Magistrate appeals is that they follow the same pathway as Appeals from Judges.
23. FLPAWA supports the continuation of the Full Court of the Family Court of Australia (rather than appeals being transferred to the Federal Court).

Dual commissions

24. Until now, Judges appointed to the Family Court of WA have also received commissions as Justices of the Family Court of Australia.
25. FLPAWA supports future Judges appointed to the Family Court of WA continuing to receive dual commissions.

Dated the 23rd day of November 2018

William Sloan

President

Family Law Practitioners' Association of Western Australia (Inc)

Appendix: About the Family Law Practitioners' Association of Western Australia (Inc)

Incorporation

The Family Law Practitioners Association of Western Australia (Inc) ("**FLPAWA**") is an Association incorporated in Western Australia.

FLPAWA was incorporated in 1980.

Membership

Membership of FLPAWA is open to legal practitioners in Western Australia practicing in the field of family.

As at 12 November 2018 FLPAWA had 489 members.

FLPAWA can be distinguished from other legal organisations as follows:

- membership of the Law Society of WA is open to all legal practitioners in WA, whereas membership of FLPAWA is confined to legal practitioners practicing in the field of family;
- membership of the Family Law Section of the Law Council of Australia is open to legal practitioners across Australia, whereas membership of FLPAWA is confined to legal practitioners practicing in WA.

Activities

FLPAWA activities include:

- an education program for FLPAWA members; and
- advocacy on behalf of FLPAWA members.

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