



FAMILY COURT OF WESTERN AUSTRALIA

**Submission to the Senate Legal and Constitutional Affairs Legislation
Committee inquiry into the structural reform of the federal courts and, in
particular, the Federal Circuit and Family Court of Australia
(Consequential Amendments and Transitional Provisions) Bill 2018 (Cth).**

November 2018

Introduction

1. The Family Court of Western Australia (“the FCWA”) welcomes the invitation to comment on the reform of federal courts exercising family law jurisdiction contained in the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) (“the Bill”).
2. The FCWA is largely unaffected by the Bill other than in one significant respect. As explained below, a very high proportion of family law decisions made in Western Australia are made by specialist Family Law Magistrates. This submission is confined to the impact that the legislation will have on the appellate pathway in relation to those decisions.

Background

3. It is important to understand the fundamental differences between the structure of the FCWA and the current structure of the Family Court of Australia and the Federal Circuit Court.
4. The FCWA is the only state family court in Australia. It was established in accordance with s 41 of the *Family Law Act 1975* (Cth). It exercises both state and federal jurisdiction pursuant to the *Family Law Act 1975* (Cth) and the *Family Court Act 1997* (WA).
5. The FCWA exercises additional jurisdiction under state legislation, for example, the *Children and Community Services Act 2004* (WA), thus enabling the Court to deal concurrently with federal parenting proceedings and state child protection matters. The inability of the Family Court of Australia and the Federal Circuit Court to deal with state child protection matters is widely recognised as one of the greatest challenges faced by the federal family law system.
6. The FCWA is a vertically integrated court, comprising judges who hold state and federal commissions as judges of both the FCWA and the Family Court of Australia; state magistrates who are specialists in family law; and registrars exercising delegated powers.

7. Following the reconstitution of the Federal Magistrates Court as the Federal Circuit Court, and the associated change to the designation of the judicial officers assigned to that court, the FCWA is now the only court in Australia using magistrates who are specialists in family law. A proper understanding of the role of our specialist magistrates is fundamental to an appreciation of our submission.
8. Western Australian Family Law Magistrates are appointed pursuant to the *Magistrates Court Act 2004* (WA). They all have substantial family law experience, the great majority having practised in the area for more than 25 years – and in some instances having been on the bench for more than 25 years. The specialist nature of their appointment is recognised by the *Family Law Act 1975* (Cth) and the *Family Court Act 1997* (WA), which specifically differentiate their powers from those of general magistrates of courts of summary jurisdiction.
9. Our Family Law Magistrates are appointed after a rigorous selection process. Three of the current FCWA judges, including the Chief Judge, were formerly Family Law Magistrates, and one of the current Family Law Magistrates recently served as an Acting Judge in the FCWA.
10. Western Australian Family Law Magistrates have the same jurisdiction as that exercised by FCWA judges. Between them, the judges of the FCWA and the specialist Family Law Magistrates have exclusive jurisdiction in family law matters in the Perth metropolitan area.
11. Magistrates in Western Australia who are not designated Family Law Magistrates are permitted to exercise jurisdiction in family law matters only outside the Perth metropolitan area. As with magistrates in other parts of Australia, their jurisdiction is extremely limited, reflecting legislative acknowledgement of the fundamentally different nature of their work and expertise.
12. Cases in the FCWA are streamed pursuant to an integrated process with a view to ensuring that the more complex trials are usually heard by a judge. Work is further streamed so that some Family Law Magistrates primarily conduct final hearings (including long trials), while others conduct a mixture of interim and shorter final hearings. However the system is designed to achieve maximum flexibility to ensure

the efficient disposition of cases. Accordingly, a case that may have been listed to be heard by a judge may be transferred for hearing by a magistrate, for example, if the judge's cases are running overtime.

13. In the result, the work of some of the magistrates (those undertaking the longer trials) more closely resembles that performed by the judges of FCWA, while the work of the other magistrates more closely resembles that performed by the judges of the Federal Circuit Court.
14. The importance and complexity of the work undertaken by specialist Family Law Magistrates bears no resemblance to that performed by non-specialist magistrates. It is this factor which is particularly relevant to the consideration of the amendments to the appeal pathway for decisions of our Family Law Magistrates.

The current appeal pathways in Western Australia

15. Western Australia has elected not to refer power to the Commonwealth to legislate in relation to ex-nuptial children and in relation to financial matters between parties to a de facto relationship (subject to one exception). These matters are dealt with by the FCWA pursuant to state legislation which mirrors federal law. The pathway for appeals therefore differs depending on whether the matter has been heard in state or federal jurisdiction.
16. Appeals in matters coming under federal law are determined by the Full Court of the Family Court of Australia, whereas appeals in matters in state jurisdiction are determined by the Full Court of the Court of Appeal of the Supreme Court of Western Australia (subject to one exception relating to interim/interlocutory decisions of Family Law Magistrates).
17. Appeals from a judge of the FCWA exercising federal jurisdiction are currently heard by a bench of three judges of the Full Court of the Family Court of Australia. This mirrors the appeal provisions relating to decisions of judges of the Family Court of Australia who will be appointed to Division 1 of the proposed merged court. The current judges of FCWA will also be appointed to Division 1, as they currently hold equivalent federal commissions.

18. Appeals from a specialist Family Law Magistrate exercising federal jurisdiction are currently heard by a bench of three judges of the Full Court of the Family Court of Australia unless the Chief Justice of the Family Court of Australia determines it is appropriate for the appeal to be heard by a single Judge. This mirrors the appeal provisions relating to decisions of judges of the Federal Circuit Court, who will be appointed to Division 2 of the proposed merged court.
19. Appeals from judges of the FCWA and from specialist Family Law Magistrates exercising state jurisdiction are heard by a bench of three judges of the Court of Appeal of the Supreme Court of Western Australia, save in the case of interim/interlocutory decisions of Family Law Magistrates which are dealt with by a single judge of the FCWA. This is recognition of the fact that the powers and expertise of the Family Law Magistrates are such that appeals from their decisions should be considered by the highest court in the state judicial hierarchy.

The proposed new appeal pathway for Western Australia

20. The Bill is difficult to follow without an understanding of the scheme and history of the legislation. However, properly construed, its effect is to overturn the existing arrangements for appeals from WA Family Law Magistrates.
21. In summary, in cases involving the exercise of federal jurisdiction:
 - Appeals from WA Family Law Magistrates will be heard by a single judge of the FCWA in the same way as would occur if the decision was made by a regional magistrate with no family law experience. No matter how complex or important the decision, there would be no capacity for the appeal to be considered by a bench of three judges;
 - A precisely equivalent decision made in any other state by a judge assigned to Division 2 of the new court would be heard by an appellate judge sitting in the new Family Law Appeal Division of the Federal Court of Australia; however, if deemed appropriate, such an appeal could be heard by a bench of three judges;

- Appeals from FCWA judges will still be dealt with in the same way as appeals from judges of Division 1 of the new court – i.e. by a bench of three judges of the new Family Law Appeal Division of the Federal Court of Australia.

Our submission

22. FCWA submits that the appeal pathway for WA specialist Family Law Magistrates should continue to remain tied to the pathway for appeals from judges of Division 2 of the new court.
23. Acceptance of this submission will ensure that litigants in Western Australia are treated in the same way as litigants in other states. It will also ensure that proper recognition continues to be given to the fact that WA Family Law Magistrates have a far wider jurisdiction than non-specialist magistrates and collectively have much greater relevant experience.
24. While not the primary reason for urging acceptance of this submission, FCWA also points out that there are some logistical reasons why it would be undesirable for FCWA judges to be required to hear all appeals from their colleagues who are Family Law Magistrates.
25. First, the FCWA judges and Family Law Magistrates work alongside each other. They sit together on court committees, have a common Continuing Legal Education programme and socialise together. Importantly, as in any court, colleagues discuss cases as they progress and sometimes use each other as a “sounding board”. This close working relationship is integral to the success of the family law system in Western Australia and would be compromised in the event that all judges had to guard against possible disqualification from hearing an appeal.
26. Secondly, FCWA is a small court. Occasions will arise where most or all judges are disqualified from hearing an appeal. In fact, there is currently an appeal pending in Western Australia in which all of the five judges are disqualified. Under present arrangements, this will not impact negatively on the litigants, as a bench can be formed from judges of the Full Court of the Family Court of Australia. This would not be possible under the proposed new arrangements if similar circumstances arose in relation to a decision of a Family Law Magistrate. The only remedy would be to seek the

appointment of an Acting Judge, but this takes much time, effort and expense. In the meantime, an appeal may require urgent attention.

27. Thirdly, the FCWA already struggles with its workload. While that workload theoretically already includes hearing appeals from regional magistrates, in reality there are virtually no such appeals since all work of complexity and substance in Western Australia is undertaken by the FCWA judges or by the Family Law Magistrates on their regional circuits. On the other hand, there are appeals from Family Law Magistrates, since they hear and determine matters of considerable consequence to litigants. These appeals are often complex and time consuming. For example, the landmark decision of the High Court in *Stanford v Stanford* (2012) 247 CLR 108 arose from a decision of a WA Family Law Magistrate.

Further information

28. FCWA can provide any further information or clarification that the Senate Committee requires. We respectfully suggest that the Committee also seek the views of Chief Judge Alstergren of the Federal Circuit Court of Australia on the issue raised in this submission. The Chief Judge of the FCWA recently met with his Honour and the issue was discussed. It is the hope of the FCWA that there will be consensus among the courts on this issue.