

# Submission to the Legal and Constitutional Affairs Legislation Committee

## Inquiry into the family law courts

**To: Senator the Honourable Ian MacDonald**

**Date: Friday 23 November 2018**

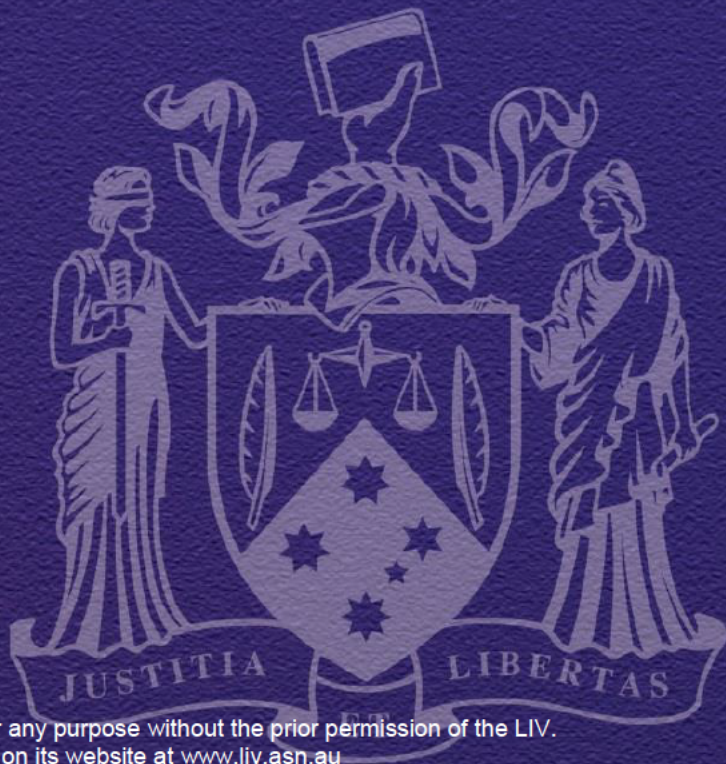
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## LIST OF ABBREVIATIONS

Term	Abbreviation
Australian Law Reform Commission	ALRC
Federal Circuit Court of Australia	FCC
Federal Circuit and Family Court of Australia	FCCA
Federal Circuit and Family Court of Australia Bill 2018	FCFCA Bill
Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018	FCFCA (CATP) Bill
Family Court of Australia	FCoA
Federal Court of Australia	FC
Law Council of Australia	LCA
Law Institute Victoria	LIV

# INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and represents more than 19,500 people working and studying in the legal sector in Victoria, interstate and overseas. The fundamental purpose of the LIV is to foster the rule of law and to promote improvements and developments in the law as it affects the public of Victoria. Accordingly, the LIV has a long history of contributing to, shaping and developing effective state and federal legislation, and has undertaken extensive advocacy and education of the public and of lawyers on various law reform and policy issues.

As a constituent body of the Law Council of Australia (LCA), the LIV has contributed to and supports the LCA submission on the inquiry into the family law courts. The LCA submission represents a multitude of constituent bodies throughout Australia, and provides a comprehensive analysis of the national issues. The LIV submission is based on the unique experience of Victoria and has been prepared by representatives of the LIV's Family Law Section, which is comprised of over 2,500 members working and studying in the legal sector in Victoria.

The LIV is grateful for the opportunity to provide the Legal and Constitutional Affairs Legislation Committee (the Committee) with a submission on 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*. The LIV welcomes any further opportunity to provide feedback and be consulted on any proposed changes to the family law courts.

Please contact [FamilyFawSection@liv.asn.au](mailto:FamilyFawSection@liv.asn.au) if you have any queries in relation to this submission.

## Reporting date

The LIV respectfully recommends the Committee sets a reporting date of 15 April 2019. The LIV notes the Committee have agreed to report at a time subsequent to 26 November 2018, and urges the Committee to adhere to the reporting date set by the Senate of 15 April 2019.

The LIV submits adhering to the set date will enable proper consideration of the ALRC Report of the Review into the Family Law System (the Review), which will be released 31 March 2019. The LIV considers the Review will add valuable context to any reform proposals, and notes the object of the Review is improvement of the family law system, which includes consideration of the various methods by which people access or come into contact with the family law system.

Further, in light of the magnitude of the proposed changes, the LIV recommends the Committee allow ample time for public hearings.

The LIV recommends a ‘look before you leap’ approach, which is best suited to such a complicated proposal, noting that unintended consequences flowing from the implementation of a hasty proposal without proper consideration or consultation will have most impact on the vulnerable participants in the family law system.



# EXECUTIVE SUMMARY

The LIV wishes to express its members' support for reforms to the family law system to improve outcomes for children and families in the family law jurisdiction of the federal court system.

The LIV acknowledges the Australian family law court system is considered a pioneer around the world. In particular, the LIV notes use of in-house family consultants, the introduction of alternative dispute resolution in the form of conciliation conferences, and the specialist appellate division in the Family Court of Australia (FCoA) as innovations that have provided a leading model for the international community.<sup>1</sup>

The LIV cautions that any changes to the structure of the family law courts should not undermine the innovative and world leading features of the Australian family law system. The LIV is particularly concerned that community access to a specialist family law court be maintained.

The LIV agrees with the Government's assertion that family law is a 'key pressure' on the civil justice system, and reform is necessary to ensure the family law system meets the Australian community's expectation of swift and just resolution of family law disputes.<sup>2</sup> In particular, the LIV notes the significant and ever increasing workloads of the federal courts exercising family law jurisdiction. Deputy Chief Justice Alstergren has highlighted this issue by asserting 'there are over 105,000 family law proceedings issued each year' and that at least 20,000 of those require judicial determination, which has led to unacceptable costs and delays.<sup>3</sup>

The LIV commends the objectives of the proposed structural reforms: to protect the people that use the federal family court system, and to resolve 'confusion, delay and unnecessary cost'.<sup>4</sup> Any reforms must protect vulnerable children and families from the adverse impacts of an imperfect system on family relationships, as well as the mental health and wellbeing of the individuals traversing the family law system. The LIV further notes the ALRC has recently advocated for a similar 'client-centred approach' to any reforms of the family law system, that focuses on meeting the needs of the families

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<sup>1</sup> Chief Justice Diana Bryant quoted in Michael Pelly, 'Former Chief Justice Diana Bryant takes aim at family law reforms', *The Australian Financial Review* (online), 30 May 2018 <<https://www.afr.com/business/legal/former-chief-justice-diana-bryant-takes-aim-at-family-law-reforms-20180530-h10rc6>>.

<sup>2</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth) 15 [52].

<sup>3</sup> Chief Judge Alstergren, 'State of the Nation' (Speech delivered at the National Family Law Conference 2018, Brisbane, 3 October 2018) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2018/>>.

<sup>4</sup> Attorney-General, Hon Christian Porter MP, 'State of the Nation' (Speech delivered at the National Family Law Conference 2018, Brisbane, 3 October 2018) <<https://www.attorneygeneral.gov.au/Media/Pages/speech-at-the-opening-plenary-session-the-state-of-the-nation-18th-biennial-national-family-law-conference-3-October-2018.aspx>>.

and individuals within the system.<sup>5</sup> The LIV fully supports reforms that will improve the efficiency and accessibility of the family law jurisdiction in the federal court system, and stresses that improving outcomes for children and families should form the paramount consideration of any reform process.

The LIV further contends that any reform must focus on creating a system that can evolve to meet the challenge of continual changes in the social and cultural conceptions of the issues considered relevant to the 'family' in our society, as well as the concurrent and continual evolution of our knowledge base and societal expectations.

Family law is a specialist area of law developed to address family disputes in increasingly complex and fraught circumstances. The unique and specialist nature of family law requires the attention of a specialist federal court, and a Superior Court of Record, which is equipped to deal with the most complex and serious family law matters and adapt to this continually expanding jurisdiction. Australian children and families navigating the family law system are entitled to a nuanced, experienced and specialised response, which gives them the best possible chance of a positive outcome.

Unfortunately, the Government's proposed model is unlikely to deliver the objectives of the structural reforms. The proposal would remove the specialisation that has been developed to aid families in crisis who are dealing with multiple and interrelated issues such as family violence, substance misuse, mental health issues and child abuse. Rather than simplifying the system, the proposal will lead to significant uncertainty and add unnecessary levels of complexity through the insertion of additional complex legislation, and by creating a three-tiered system for families to navigate.

The Report on which the proposal is based contains multiple inaccuracies and unsubstantiated assumptions, and therefore should not form the basis of considered reform.

The flaws within the current system can be ameliorated through the implementation of some fundamental changes that fall short of removing the very specialisation that aids and protects Australian families. The family lawyers represented by the LIV support the harmonisation of regulations, including the Rules of Court, governing the details, operations, and practice and procedures of the family law jurisdiction of the federal court system. Thus, the applicable court forms, practice notes, directions and case management pathways should be made consistent and cross-

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<sup>5</sup> Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper 86 (2018) 4 [1.19] ('*Review of the Family Law System: DP 86*').



referential, thereby creating a much-needed sense of certainty for members of the Australian community in family law matters.

## RECOMMENDATIONS

1. The LIV is in favour of the Government's proposal to include an overarching purpose that is binding on everybody, including judicial officers, parties and practitioners, and recommends such an overarching purpose is adopted.
2. The LIV recommends the development of a single point of entry to the federal courts exercising family law jurisdiction. The LIV recommends the single point of entry consist of specialist case management Registrars to appropriately direct and triage family law matters. Matters should be assessed by the Registrar and sent to the FCoA or the FCC, as may be appropriate for the individual case. In addition, a judicial officer such as an FCC judge should be available to hear any urgent interim matters that require immediate judicial determination.
3. The LIV recommends harmonising the Rules and forms of the FCoA and the FCC to create a clearer and more accessible system for litigants to navigate.
4. The LIV recommends the federal courts exercising family law jurisdiction be immediately allocated urgent additional resources for judicial officers, family report writers, registrars and other court personnel. Appropriate resourcing will enable the courts to commence operating with adequate resources and appropriate judicial and administrative people and processes in place so as to respond to the demand for their services without being hampered in their efforts to do so by lack of funding.
5. The LIV recommends the modernisation of court processes and forms as an essential element to attaining the objective of efficiency.
6. The LIV recommends the adoption of the proposals in the ALRC *Review of the Family Law System*, Discussion Paper no 86 (2018) regarding family dispute resolution.

# COMPLEXITY AND SPECIALISATION

## Nature of family law disputes

The LIV notes that the vast majority of family law matters never see the inside of a courtroom because most separating families are able to resolve post-separation financial and parenting issues with limited or no contact with the family law system.<sup>6</sup> Unfortunately, this means that those families that do come to court are those whose circumstances are indicative of ‘significant complexity’.<sup>7</sup>

The research suggests the small percentage of families that rely on the courts to resolve their family law disputes have ‘highly conflicted or fearful relationships’, which are incontrovertibly linked with family violence, child abuse, mental illness, and substance misuse.<sup>8</sup> Further, the data indicates approximately 10 percent of cases, which involve families in circumstances of high conflict, take up 90 percent of the time of the family law courts.<sup>9</sup> These matters are not considered amenable to family dispute resolution, and so are exempt from the requirement to attempt dispute resolution before coming before a court, therefore by definition, the federal courts mainly hear matters involving complex issues.<sup>10</sup>

Of the federal courts exercising family law jurisdiction, the FCoA hears the most difficult, confronting and complex cases, often involving multiple and interrelated financial, personal and or parenting issues, in circumstances of high levels of conflict.<sup>11</sup> As noted by the Fitzroy Legal Service and Darebin Community Legal Centre, clients:

commonly present with multiple, overlapping and interconnected issues including parenting, family violence, child protection and migration, as well as underlying problems such as homelessness/housing stress, mental health issues, drug use, and involvement in the criminal law system.<sup>12</sup>

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<sup>6</sup> Ibid 5 [1.21].

<sup>7</sup> Rae Kaspiew et al, ‘Evaluation of the 2012 Family Violence Amendments’ (Synthesis Report, Australian Institute of Family Studies, 2015) 16.

<sup>8</sup> Lixia Qu et al, ‘Post-Separation Parenting, Property and Relationship Dynamics after Five Years’ (Attorney-General’s Department (Cth), 2014) 43, 44; Bruce Smyth and Lawrence Moloney, ‘Entrenched Postseparation Parenting Disputes: the Role of Interparental Hatred’ (2017) 55(3) *Family Court Review* 404, 405.

<sup>9</sup> Smyth and Moloney, above n 8, 405.

<sup>10</sup> *Family Law Act 1975* (Cth) sections 60I(9), 60J; Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015) 4 (*Interim Report*).

<sup>11</sup> Family Court of Australia, *Annual Report 2017-2018*, 23; Chief Justice Pascoe, ‘State of the Nation’ (Speech delivered at the National Family Law Conference 2018, Brisbane, 3 October 2018) <<http://www.familycourt.gov.au/wps/wcm/connect/FCoAweb/reports-and-publications/speeches-conference-papers/2018/speech-cj-nflc>>.

<sup>12</sup> Fitzroy Legal Service and Darebin Community Legal Centre, *Submission 7* quoted in *Review of the Family Law System: DP 86*, above n 5, 8 [1.32].

Further, the data indicates that the number of contested cases involving these families with complex issues is increasing each year.<sup>13</sup> The data is supported by the experiences of Judges, who have reported a 'very significant rise in family violence and dysfunction', as well as the presence of mental illness and substance addiction, and concluded that '[A]ll of these factors put children at risk.'<sup>14</sup>

Any suggestion that litigation of these matters can or should be akin to litigation in commercial courts demonstrates a fundamental misunderstanding of the unique nature of family law disputes and the often illogical and erratic behaviour of family law litigants that results from the grief, hurt and anger that many experience during a relationship breakdown.<sup>15</sup> The LIV recognises neurological evidence indicates that in complex disputes, emotions have primacy over cognitions.<sup>16</sup> An indication of the difference between commercial and family litigation is demonstrated by the 33,800 dangerous items found on litigants entering the Family Court in 2017, including knives, a tomahawk and a snake.<sup>17</sup>

In addition to the increasingly complex circumstances of the families coming before the court, the jurisdiction of the Family Court has also become increasingly complex. When the *Family Law Act* was passed in 1975 it was a relatively simple item of legislation, however the recommendations of approximately 50 State and Federal Royal Commissions, Inquiries and Special Commissions of Inquiry have culminated in a much more complex piece of legislation.<sup>18</sup> This is demonstrated through the numerous and scattered provisions a judge must take into account to decide the best interests of a child, or a post separation property division.<sup>19</sup>

Since the Act came into operation, major aspects have been added to the legislation, each of which adds a significant layer of complexity to the day-to-day work of the family law system. The resultant diversity of the jurisdiction requires specialist knowledge of many areas, including:

- constitutional law;
- criminal law;
- child support;
- corporations law;
- family violence;
- superannuation law;

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<sup>13</sup> Family Law Council, *Interim Report*, above n 10, 4.

<sup>14</sup> Family Court of Australia, *Annual Report 2017-2018*, 7.

<sup>15</sup> Wendy Kayler-Thomson, 'From the Chair' (2018) 72(2) *Australian Family Lawyer* 5, 6.

<sup>16</sup> Smyth and Moloney, above n 8, 412.

<sup>17</sup> Family Court of Australia, Submission No 68 to the Australian Law Reform Commission, *Review of the Family Law System by the Australian Law Reform Commission*, 18 May 2018, appendix 4 128-151; Nicola Berkovic, 'Handguns, knives, snake seized at Family Court last year', *The Australian* (Sydney) 26 June 2018.

<sup>18</sup> Chief Justice Pascoe, 'State of the Nation', above n 11.

<sup>19</sup> *Ibid.*

- binding financial agreements;
- de-facto relationships;
- orders and injunctions binding third parties;
- shared parenting reforms;
- taxation;
- trusts;
- international treaties;
- adoption;
- child abduction;
- cutting edge developments in technology, medicine and psychology;
- evidentiary matters and subpoenas;
- trans-national property transactions;
- bankruptcy matters where the trustee is a party to family law property or maintenance proceedings; and
- conflicts of laws.<sup>20</sup>

The above demonstrates that a family law system that was originally designed to deal with issues arising from marriage has ‘morphed’ into something else entirely. As a result of changing attitudes toward family relationships, additions to the jurisdiction such as States transferring jurisdiction over de-facto child and property matters, overlap between the family law and child welfare jurisdictions and the increased awareness and reporting of family violence, this area now encompasses a much larger load than was originally envisaged.

The FCoA is a Superior Court of Record and a specialist federal court which is equipped to deal with the most complex and serious family law matters within this expansive jurisdiction.<sup>21</sup> The Australian families that need the intervention of a court to resolve their family law disputes in complex circumstances require a nuanced, experienced and specialised response.<sup>22</sup> This necessitates a specialised family court, with judges and other personnel who are experts in family law, and a system of case management and procedures specifically designed to provide a just outcome for families and children.

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<sup>20</sup> Family Court of Australia, *Annual Report 2017-2018*, 10 -11; Chief Justice Pascoe, ‘State of the Nation’, above n 11.

<sup>21</sup> Family Court of Australia, *Annual Report 2017-2018*, 50.

<sup>22</sup> Kayler-Thomson, above n 15, 6.

## Specialist issues

### Allocation between the courts

The LIV notes that the family as the natural and fundamental group unit of society is entitled to protection by society and the State.<sup>23</sup> It is this unique status of the ‘family’ within the Australian community which goes some way to explain the passion with which people respond to proposed changes in the family law system.

The LIV notes that the rhetoric surrounding the proposed restructure of the federal courts has largely devolved into an unhelpful comparison and forced competition between the FCC and the FCoA. The LIV wishes to express its strong opposition to this false dichotomy, and its strong support for the Judges exercising family law jurisdiction in the FCC, and in the FCoA.

These courts, rather than being in competition, complement each other. The FCC acts as the ‘workhorse of the system’ hearing the vast majority of family law matters, while the FCoA hears the most complex matters that require knowledge of complex law, psychology, psychiatry, counselling, mediation and negotiation, as well as specialist issues such as family violence and child development.<sup>24</sup> Combined, these courts offer Australian children and families a forum to resolve their often extraordinarily challenging issues.

The arguments the Government has presented for the proposed model are permeated by an assumption that the FCC and the FCoA are essentially dealing with the same issues, at the same level of complexity. Therefore, the federal courts exercising federal jurisdiction have the same workload, and it would make little difference if one of the courts were to cease operation.

The Attorney-General has asserted the Government’s recognition of the difference in the ‘composition and complexity’ of the matters dealt with by the courts.<sup>25</sup> However, the Attorney-General is quoted as having stated that, although the matters before the court are more complex, they are not complex enough to explain the difference in the number of finalisations, which must lead to the conclusion that the FCoA is simply less efficient than the FCC (discussed in detail below).<sup>26</sup>

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<sup>23</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/180 (10 December 1948) article 16(3).

<sup>24</sup> Chief Justice Pascoe, ‘State of the Nation’, above n 11, Chief Judge Alstergren, above n 3.

<sup>25</sup> Attorney-General, Hon Christian Porter MP, ‘State of the Nation’ above n 4.

<sup>26</sup> Nicola Berkovic, ‘Family court merger faces judges’ revolt’ *The Australian* (Sydney) 30 May 2018.

The Attorney-General contends that complexity is assessed solely upon the rudimentary, coarse and ‘frankly unsophisticated’ measure of whether a trial is estimated to take more than four days: under three days and the matter is allocated to the FCC, and over four days it is allocated to the FCoA.<sup>27</sup>

The LIV respectfully disagrees with this assessment. The 2013 *Protocol for the division of work between the Family Court of Australia and the Federal Circuit Court* clearly states that a case should be allocated to the FCoA if any of the following criteria apply:

1. International child abduction;
2. International relocation;
3. Disputes as to whether a case should be heard in Australia;
4. Special medical procedures (of the type such as gender reassignment and sterilisation);
5. Contravention and related applications in parenting cases relating to orders which have been made in FCoA proceedings, which have reached a final stage of hearing or a judicial determination and which have been made within 12 months prior to filing;
6. Serious allegations of sexual abuse of a child warranting transfer to the Magellan list or similar list where applicable, and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court;
7. Complex questions of jurisdiction or law; and
8. If the matter proceeds to a final hearing, it is likely it would take in excess of four days of hearing time.<sup>28</sup>

The LIV notes the estimated time of trial is the last of many considerations in the allocation of cases between the courts.

Further, the Government purports to be proposing the model as the solution to the ‘key issue’ of exacerbated delays caused by a confused system of allocation leading to cases being transferred between the courts.<sup>29</sup> However, the LIV notes the proposal does not deal with the division of work between the courts at all, which represents a lost opportunity to clarify and redefine the domains of the courts.<sup>30</sup>

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<sup>27</sup> Attorney-General, Hon Christian Porter MP, ‘State of the Nation’ above n 4.

<sup>28</sup> *Protocol for the division of work between the Family Court of Australia and the Federal Circuit Court* (12 April 2013) <<http://www.familycourt.gov.au/wps/wcm/connect/FCoAweb/about/policies-and-procedures/protocol-for-division-of-work-FCoA-fcc>> (‘*The 2013 Protocol*’).

<sup>29</sup> Attorney-General, Hon Christian Porter MP, ‘Court Reforms to help families save time and costs in family law disputes’ (Media Release, 30 May 2018) <<https://www.attorneygeneral.gov.au/Media/Pages/Court-Reforms-to-help-families-save-time-and-costs-in-family-law-disputes.aspx>>.

<sup>30</sup> Kayler-Thomson, above n 15, 7.



The LIV considers it is important to correct this misapprehension surrounding the allocation of matters between the courts by outlining the complexity of the jurisdiction and acknowledging the breadth of some of the specialist areas (outlined above) of which Judges of the FCoA are required to have specialist knowledge.

The LIV wishes to emphasise that sustaining the level of specialisation contained in a superior court of family law is required to maintain just and consistent outcomes for Australian families participating in the family law system, and ultimately, for the community as a whole.

## Family violence

The LIV submits that the government's proposal to remove the specialist family law appeals court and to the requirement for Judges to be 'by reason of training, experience and personality... suitable to deal with matters of family law' may put victims of family violence at risk. Family violence is the most commonly raised factual issue in litigated family law proceedings, with nearly half of all litigants reporting physical violence against themselves and/or their child, and 85% reporting emotional abuse.<sup>31</sup> In order to adequately assess those allegations and protect the victims of family violence, the Judges who decide those cases ought to have specialist experience and training in family violence.

In Australia, one in six women, and one in 16 men, experience physical and/or sexual violence, and approximately one in four women, and one in six men experience emotional abuse at the hands of an intimate partner.<sup>32</sup> The community's rapidly evolving understanding of the complexity, nature and scope of family violence is reflected by the ongoing change in the law relating to the intersection between family violence and family law. In 2012 legislative amendments were passed which significantly expanded the definition of family violence in family law matters to encompass non-physical abuse, such as economic abuse, repeated derogatory taunts, social and cultural isolation, causing serious psychological harm, exposing a child to family violence, and serious neglect of a child.<sup>33</sup> Recently, the ALRC has proposed further changes to clarify and broaden the existing definition, including:

- replacing 'repeated derogatory taunts' with 'emotional or psychological abuse', to bring the terminology in line with clinical and practice literature;

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<sup>31</sup> *Review of the Family Law System: DP 86*, above n 5, 132 [6.22].

<sup>32</sup> Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2018) 1.

<sup>33</sup> *Family Law Act 1975* (Cth) section 4AB; Rae Kaspiew et al, 'Responding to Family Violence: A survey of family law practices and experiences' (Australian Institute of Family Studies, 2015) 31-33 [3.1.1].

- adding to the existing example in section 4AB(2)(g) ‘unreasonably denying the family member the financial autonomy that he or she would otherwise have had’, the words ‘including requiring the family member to transfer or hand over control of assets, or forcing the family member to sign a document such as a loan or guarantee’ to better reflect research regarding financial abuse;
- adding to the existing example in section 4AB(2)(h) ‘unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support’, the words ‘including unreasonably withholding information about financial and other resources’, to better reflect the research on the association between concealment of financial and property resources and a pattern of financial and other abuse; and
- adding to the existing example in section 4AB(2)(i) ‘preventing the family member from making or keeping connections with his or her family, friends and culture’, the terms ‘community or religion’ to better recognise the importance of community connections.<sup>34</sup>

Properly understanding the complexities of family violence and implementing the rapidly changing law in relation to it requires the expertise of Judges who have practised extensively in family law and undergone specialist training in family violence, such as that which is required to become an Accredited Family Law Specialist. Without that specialisation and training, there is a risk that issues of family violence will not be properly considered or addressed within their socio-legal context. This is particularly so in the family law courts given the significant number of self-represented litigants who appear in this jurisdiction.

The vast majority of legal reform and research bodies (including the LIV)<sup>35</sup> have advocated for increased specialisation in the approach to family violence rather than seeking to simplify or limit the specialist nature of the legal response to family violence.<sup>36</sup> For example, the Standing Committee on Social Policy and Legal Affairs advocated for the extension of the Magellan program (discussed below) to include all parenting matters involving family violence.<sup>37</sup> The Committee also advocated for the expansion of specialised family violence courts, which incorporate specialised judicial officers,

<sup>34</sup> *Review of the Family Law System: DP 86*, above n 5, 188-9 [8.30-8.34].

<sup>35</sup> See Law Institute of Victoria, Submission to the Royal Commission into Family Violence (3 June 2015).

<sup>36</sup> See Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever* (2015) recommendations 103-105; Victorian Royal Commission into Family Violence, *Summary and Recommendations* (2016) recommendation 216; COAG Advisory Panel on Reducing Violence against Women and their Children, *Final Report* (2016) recommendation 1.4.

<sup>37</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 225 [6.142] (*‘A Better Family Law System’*).

prosecutors, lawyers, victim support workers, and community corrections officers, chosen because of their specialised skills or who would receive specialised training in family violence.<sup>38</sup> The Family Law Council also advocated for specific ongoing family violence training for judicial officers, lawyers and court staff.<sup>39</sup> The vast majority of the recommendations support the retention and application of the specialist knowledge and experience of the FCoA to the increasingly prevalent issue of family violence.

The specialist family violence training undergone by judges of the FCoA, and their extensive experience dealing with the issue, enables them to stay informed and responsive, as the understanding of family violence evolves with each new set of data, research or evidence from psychologists and social workers.

The benefit of the specialist expertise of the FCoA Judges (and the Full Court of the FCoA) can already be seen in the precedent case law established by those Judges which has endeavoured to acknowledge the complex nature of family violence and properly reflect its impact upon survivors. The cases of *Kennon v Kennon*<sup>40</sup> and *Britt & Britt*<sup>41</sup> are excellent examples.

In *Kennon v Kennon*, decided in 1997, the Family Court responded to the need to acknowledge the impact of family violence in financial matters by establishing a legal principle that the family law courts could take the financial consequences of family violence into account when determining the property settlement a survivor of family violence ought receive. The *Kennon* test required that a survivor of family violence demonstrate:

- They were subject to a violent course of conduct during the marriage; and
- The conduct had a significant adverse impact upon the party's contribution; or
- The conduct made those contributions significantly more arduous.

If that test were satisfied, the Court could then make a financial adjustment in favour of the family violence survivor in a property settlement proceeding.

Some 20 years later, in *Britt v Britt*, the FCoA acknowledged the evidentiary barriers being imposed upon litigants to prove those matters when seeking a *Kennon*-style adjustment. The Court responded by further developing the law to more accurately reflect the nature of family violence by significantly

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<sup>38</sup> Ibid 122 [4.146].

<sup>39</sup> Family Law Council, *Final Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2016) 140-141 recommendation 12.

<sup>40</sup> *Kennon v Kennon* (1997) FLC 92-757.

<sup>41</sup> *Britt & Britt* [2017] FamCAFC 27 (27 February 2017).

lowering those evidentiary barriers for victims seeking a *Kennon* adjustment.<sup>42</sup> In *Britt*, the wife asserted that her husband had repeatedly committed severe acts of family violence during their 30 year relationship.<sup>43</sup> However, much of her evidence in relation to those acts of family violence had been deemed inadmissible at first instance as a result of a range of matters, including its lack of specificity as to particular incidents during that 30 year relationship. This is a feature common to the evidence of many survivors of family violence, it being difficult for many survivors to recall the times, dates and specific details of every incident of family violence over a long marriage, particular when that family violence has impacted the survivor's mental and/or emotional health. The Full Court responded to this issue by finding that 'evidence that is probative, even slightly probative, is admissible because it could rationally affect the determination of an issue. For it to be inadmissible it must lack any probative value'.<sup>44</sup>

The court confirmed that evidence of family violence will have probative value even where it only:

- provides context to other evidence;
- provides evidence as to the relationship in existence between the parties, which may explain other actions taken by the parties in their financial relationship or their relationship generally; and
- is relevant to the credibility of each party.<sup>45</sup>

Further, the court found that a party expressing a conclusion in an affidavit does not render the evidence inadmissible, and that evidence can be admitted provisionally at the commencement of a trial (with its admissibility to be reconsidered at the conclusion of a trial), rather than being dismissed before the parties undergo cross-examination.<sup>46</sup>

The LIV cautions that any reform which seeks to remove or diminish the specialist knowledge and experience of Judges of the family law courts with respect to family violence risks potentially harmful ramifications for the most vulnerable participants in the family law system.

## The Magellan Program

The FCoA developed the world-first Magellan program to address the needs of children and families in circumstances where there are serious allegations of sexual and/ or physical abuse of children

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<sup>42</sup> Will Stidston and Elizabeth Mathews, 'Adjusting for Violence' (2018) 92(1/2) *Law Institute Journal* 32.

<sup>43</sup> *Ibid* 34.

<sup>44</sup> *Britt & Britt* [2017] FamCAFC 27 (27 February 2017) [31].

<sup>45</sup> *Britt & Britt* [2017] FamCAFC 27 (27 February 2017) [34]-[37]; Stidston and Mathews, above n 42, 35.

<sup>46</sup> Stidston and Mathews, above n 42, 35.

during parenting disputes.<sup>47</sup> ‘Magellan cases’, once identified, undergo special case management, managed by a small team consisting of a judge, a registrar and a family consultant.<sup>48</sup> An Independent Children’s Lawyer is also appointed in every Magellan case.<sup>49</sup> The process and procedures are intensive, collaborative, specialised, highly coordinated, and rely on robust interagency coordination, particularly with state and territory child protection agencies.<sup>50</sup> This distinct case management pathway ensures that these cases are heard and determined within six months of the allegations being raised in litigation before the Court.<sup>51</sup>

An extensive evaluation of the Magellan program’s effectiveness as a mechanism for responding to serious allegations of sexual and/ or physical abuse of children found Magellan cases:

- resolve more quickly;
- have greater involvement of the statutory child protection department;
- have fewer Court events
- are dealt with by fewer different judicial officers; and
- are more likely to settle earlier.<sup>52</sup>

There are calls for the extension of the Magellan program so that it can operate in all regions of Australia, and that it should be extended to the FCC.<sup>53</sup>

The number of Magellan cases coming before the courts is increasing, with 93 Magellan cases commenced and 76 finalised in the 2017-2018 financial year alone.<sup>54</sup> The LIV notes that on 30 June 2018, there were 143 active Magellan cases.<sup>55</sup> In addition, the number of Notices of Child Abuse, Family Violence or Risk of Family Violence filed continues to increase, with 426 filed between 2013-2014, as opposed to 715 in 2017-2018.<sup>56</sup> This reflects a growing awareness of family violence in the community as well as the increasing complexity of the Court’s cases.<sup>57</sup>

The LIV wishes to express its concern that the Magellan program is not mentioned in any of the material provided by the Government regarding its proposal. The LIV further wishes to express its

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<sup>47</sup> Dr Daryl Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan case-management model* (Australian Institute of Family Studies, 2007) 16 - 17.

<sup>48</sup> Family Court of Australia, *2017-2018 Annual Report*, 36.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* 69.

<sup>52</sup> Higgins, above n 47, 12–13, 16.

<sup>53</sup> *A Better Family Law System*, above n 37, 205 [6.96]; Family Law Council, *Interim Report*, above n 10, 24.

<sup>54</sup> Family Court of Australia, *2017-2018 Annual Report*, 36.

<sup>55</sup> *Ibid.* 69.

<sup>56</sup> *Ibid.* 34.

<sup>57</sup> *Ibid.* 34.

concern that the loss of this specialised model, and the specialised training and experience of the FCoA judges, registrars and family consultants involved in the program, would significantly negatively impact on the most vulnerable children in the family law system.

## International matters

The FCoA deals with more complex and specialist matters, such as international cases that involve conflicts of laws, adoption and child abduction, including international child abduction and retention under the 1980 Hague Convention.<sup>58</sup> Hearing a Convention case involves an intricate balancing act to assess the competing priorities of prompt return, the promotion of comity between States and the best interests of children generally (not individually).<sup>59</sup>

The LIV notes that there are no Hague Convention judges within the FCC.

As technological advances lead to a more connected international community, the number of family law matters with international aspects is increasing.<sup>60</sup> In 2017-2018 there were 127 new Hague Convention abduction applications received by the Australian Central Authority relating to 305 children.<sup>61</sup> The increase in the number of complex international matters necessitates the existence of a specialist court to hear them.

## Substance misuse and/ or mental health issues

The FCoA deals with more complex and specialist areas, such as the interrelated issues of mental health and substance misuse.<sup>62</sup> The LIV notes that judges exercising federal family law jurisdiction have reported a sharp increase in the presence of mental health issues and substance addiction in the litigants coming before them.<sup>63</sup> The LIV further notes there have been calls for family law

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<sup>58</sup> *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) (incorporated into Australian law by the *Family Law (Child Abduction Convention) Regulations 1986* (Cth)); Family Court of Australia, *Annual Report 2017-2018*, 10 -11; Chief Justice Pascoe, 'State of the Nation', above n 11.

<sup>59</sup> Danielle Bozin, 'The Hague Child Abduction Convention's Grave Risk of Harm Exception: Traversing the Tightrope and Maintaining Balance between Comity and the Best Interests of the Child' (2016) 35(1) *University of Tasmania Law Review* 24, 41-42.

<sup>60</sup> Dr Parker, 'International family law in the spotlight' (2016) 159 *Victorian Bar News* 48.

<sup>61</sup> Attorney-General's Department, 'Hague convention application statistics (2017-2018)' <<https://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Documents/Hague-Convention-application-stats-2013-18.pdf>>.

<sup>62</sup> Family Court of Australia, *Annual Report 2017-2018*, 10 -11.

<sup>63</sup> Chief Justice Pascoe, 'State of the Nation', above n 11.

professionals, including the judiciary, to have at least a basic understanding of these specialist areas.<sup>64</sup>

Members have reported examples of the added complexity that mental health issues may bring to a matter, and the types of circumstances the judiciary are facing in the family law jurisdiction, an example of which is outlined below:

A parenting matter came before a Judge with two self-represented litigants, a child representative and a worker for the Department of Health and Human Services. The primary carer of the child had had a psychotic episode and now claimed to be fine. However, the primary carer had not filed any documents, so evidence was dealt with without preparation during the proceedings.

The court then had to find a list of psychiatrists who will do reports for legal aid rates, which is apparently a small pool.

Proceedings are incredibly stressful for anyone, and are especially so for those suffering from mental health issues. In this case, the primary carer simply walked out of the court when the proceedings became too overwhelming. This necessitated that everything was repeated once they had regained their composure and re-entered the court room.

Unsurprisingly, this caused substantial delay.

## Special medical procedures/ Welfare jurisdiction

The FCoA deals with more complex matters, including cases at the forefront of developments in medicine, psychology and technology, such as special medical procedures under the welfare jurisdiction in section 67ZC of the *Family Law Act 1975*.<sup>65</sup> Under this specialist jurisdiction the court determines the administration of medical treatment for children as it directly concerns the parental rights and the custody and guardianship of infants.<sup>66</sup> Under this jurisdiction, the court is asked to authorise special medical procedures when the entirety of the circumstances surrounding the particular treatment requires court authorisation.<sup>67</sup>

The welfare power has been interpreted to give the court jurisdiction in relation to a range of matters, including:

<sup>64</sup> *Review of the Family Law System: DP 86*, above n 5, 244 [10.28].

<sup>65</sup> Chief Justice Pascoe, 'State of the Nation', above n 11.

<sup>66</sup> *Family Law Act 1975* (Cth) section 67ZC(2).

<sup>67</sup> *Re Kelvin* [2017] FamCAFC 258, [138].



- sterilisation of children with disability;<sup>68</sup>
- procedures on intersex children;<sup>69</sup>
- authorisation of administration of an experimental drug on a child;<sup>70</sup>
- authorisation of other, non-therapeutic, medical procedures, such as bone marrow donation;<sup>71</sup> and
- authorisation of administration of an experimental drug on a child.<sup>72</sup>

A notable recent example of the complexity of such cases is *Re Kelvin*,<sup>73</sup> regarding the treatment of a child with gender dysphoria, where the Full Court determined that authorisation was no longer required for stage two treatment where there is no dispute as to the procedure or the child's competence to make medical decisions.

*Re Kelvin* concerned an application for the administration of stage two medical treatment for gender dysphoria on a child, with the support of the child's parents, psychologist, psychiatrist and endocrinologist. To decide such a case, the court is required to have specialist knowledge of gender dysphoria; the distress experienced by a child due to incongruence between gender identity and the sex assigned at birth.<sup>74</sup> Stage two treatment is considered to have 'irreversible physiological effects', and may cause long term infertility.<sup>75</sup> Kelvin exhibited all the diagnostic criteria for gender dysphoria, as well as the resultant 'anxiety, depression, self-harm and attempted suicide'.<sup>76</sup> The Full Court was asked to decide:

1. Whether to confirm its decision in *Re Jamie* that stage two treatment for a child requires the court's authorisation pursuant to s 67ZC of the *Family Law Act 1975* unless the child was *Gillick* competent to give informed consent?
2. Where the child consents to the stage two treatment, the treating medical practitioners agree that the child is *Gillick* competent and the parents do not object, is it mandatory to apply to the Court for a determination that the child is *Gillick* competent?

The Full Court considered it appropriate to depart from *Re Jamie* to enable the law to 'effectively reflect the current state of medical knowledge'.<sup>77</sup> The Full Court therefore exercised its jurisdiction to

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<sup>68</sup> *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

<sup>69</sup> *Re Carla* [2016] FamCA 7.

<sup>70</sup> *Re Baby A* (2008) [2008] FamCA 417.

<sup>71</sup> *In the Marriage of GWW and CMW* [1997] FamCA 2; cf *Re Inaya (Special Medical Procedure)* (2007) FamCA [2007] 658.

<sup>72</sup> *Re Baby A* (2008) [2008] FamCA 417.

<sup>73</sup> *Re Kelvin* [2017] FamCAFC 58.

<sup>74</sup> *Ibid* [7].

<sup>75</sup> *Ibid* [14] – [15].

<sup>76</sup> *Ibid* [19].

<sup>77</sup> *Ibid* [152], [159].

reflect the evolution in our understanding of the condition and concluded 'the treatment can no longer be considered a medical procedure for which consent lies outside the bounds of parental authority and requires the imprimatur of the Court.'<sup>78</sup>

As the nature of the treatment no longer justifies court authorisation, the court found there is also no longer a basis for the court to determine *Gillick* competence.<sup>79</sup>

Rather than seeking to limit or broaden the legal approach to this kind of issue, the ALRC has recently advocated for a move toward even greater specialisation.<sup>80</sup>

## Complex financial matters

The FCoA deals with the more complex financial cases involving multiple parties, valuation of complex interests in trust or corporate structures, including minority interests, multiple expert witnesses, complex questions of law and/ or jurisdictional issues or complex issues concerning superannuation.<sup>81</sup> Complex financial issues form the majority of the FCoA's caseload, making up 50% of all the issues sought on applications for final orders.<sup>82</sup>

A notable recent example of the complexity of the financial cases heard by the FCoA is *Tomaras & Tomaras*,<sup>83</sup> where the Full Court was asked to decide whether section 90AE(1)-(2) of the *Family Law Act 1975* (Cth) confers power to make an order substituting one party to a marriage for the other party in relation to a taxation debt.

The parties were married in 1992 and separated in 2009. During the marriage, the Commissioner of Taxation issued assessments against the wife with respect to income tax and Medicare levies and obtained default judgment against her in November 2009.<sup>84</sup> In December 2013, the wife commenced proceedings in the Federal Circuit Court, seeking orders for alteration of property interests under section 79 of the *Family Law Act 1975* (Cth), specifically for the husband to be substituted as the debtor solely liable for the debt to the Commissioner.<sup>85</sup>

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<sup>78</sup> Ibid [164].

<sup>79</sup> Ibid [182] - [184].

<sup>80</sup> *Review of the Family Law System: DP 86*, above n 5, 234 [9.103].

<sup>81</sup> Family Court of Australia, *Annual Report 2017-2018*, 10 -11.

<sup>82</sup> Ibid 20.

<sup>83</sup> *Tomaras & Tomaras and Anor and Commissioner of Taxation* [2017] FamCAFC 216.

<sup>84</sup> Ibid [3] - [4].

<sup>85</sup> Ibid [6] - [7].

Section 90AE gives the Court the power to make an order under section 79 binding third parties, including an order directed to a creditor of one party to the marriage to substitute the other party for that party in relation to the debt.<sup>86</sup> With the Commissioner intervening, the Full Court was asked to decide whether the presumption against the Crown being bound, outlined in *Bropho*<sup>87</sup> has, in all the circumstances, been rebutted, and if it has, the extent to which it was the legislative intent that section 90AE(1) should bind the Crown and/or those covered by the prima facie immunity of the Crown?<sup>88</sup>

The Full Court decided the presumption does not apply because the provision does not impose an obligation or restraint on the Crown, and instead the proper construction of the provision confers a benefit on the Crown, since:

- the provision increases the prospects of recovery, because instead of an impecunious taxpayer being responsible for a tax liability, his or her more wealthy spouse may be made solely responsible;
- the provision provides a remedy for recovery that otherwise would have been unavailable, because instead of one spouse being responsible for a tax liability, both spouses may be made liable;
- an order could not be made if it was foreseeable that the order would result in the debt not being paid (section 90AE(3)(b)); and
- the Court is permitted to make such an order as it considers just for the payment of the reasonable expenses of the creditor incurred as a necessary result of the order (section 90AJ(2)).<sup>89</sup>

Special leave to appeal to the High Court of Australia was granted on 23 March 2018.<sup>90</sup>

## Understanding of child development and attachment

The LIV notes that judicial officers hear complex matters involving an assessment of the best interests of the child, which necessitates an understanding of child development and attachment, as well as the effect of conflict on children.

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<sup>86</sup> *Family Law Act 1975* (Cth) section 90AE(1)(b).

<sup>87</sup> *Bropho v State of Western Australia* (1990) 171 CLR 1.

<sup>88</sup> *Tomaras & Tomaras and Anor and Commissioner of Taxation* [2017] FamCAFC 216 [13] - [15].

<sup>89</sup> *Ibid* [16] - [17].

<sup>90</sup> Family Court of Australia, *Annual Report 2017-2018*, 56-57.

For example, family violence can have a substantial and unique impact on a child's physical, psychological and emotional wellbeing, and uninformed or inappropriate decisions can result in children being exposed to further harm.<sup>91</sup> Understanding and consideration of potential issues such as how a child can be coached or coerced into misrepresenting experiences involving their family members is critical to appropriate decision making in relation to children.<sup>92</sup>

The LIV acknowledges the vital work of Independent Children's Lawyers to ensure children's participation in family law proceedings, which often requires significant time and effort.

The LIV notes that the ALRC Review seeks to understand how children's voices can be better heard, rather than seeking to limit or restrict the circumstances in which they can have input into the family law matters that have such a profound effect on them.

## Adoption and the validity of marriages and divorces

The LIV notes the FCoA has exclusive jurisdiction in relation to the validity of marriages and divorces, and adoption.<sup>93</sup>

## Self-represented litigants

The LIV notes there has been an exponential rise in the number of self-represented litigants in the FCoA. In the 2017-2018 year, 24 percent of matters had at least one unrepresented litigant at trial, and 8 percent of trials occurred with no representative present at all.<sup>94</sup> In 2017–18, 46 per cent of appellants were unrepresented, compared to 2013–14 where the figure was 38 per cent.<sup>95</sup>

Unrepresented litigants are a measure of complexity of the FCoA caseload, because they require significant assistance in navigating the system and require a considerable expenditure of court resources to assist them adhere to the Family Law Rules and procedures, and to understand the proceedings.<sup>96</sup> The large number of unrepresented litigants not only significantly increases the time a trial takes to run, but also increases delays in the courts overall, contributing to the overburdening of Judges. Further, issues of current or potential risk and harm being caused to children who are the subject of proceedings and/or in the care of litigants is a matter of grave

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<sup>91</sup> *A Better Family Law System*, above n 37, 264 -66 [8.15], [8.18].

<sup>92</sup> *Ibid* 264 -66.

<sup>93</sup> *The 2013 Protocol*, above n 28.

<sup>94</sup> Family Court of Australia, *Annual Report 2017-2018*, 33.

<sup>95</sup> *Ibid* 46.

<sup>96</sup> *Ibid* 32.

concern and careful consideration by all participants within the family law arena, but particularly the judicial officers required to make decisions impacting on those children with a parent who may be at their most vulnerable as a self-represented litigant – and whose behaviour and reactions may have ramifications on those children.<sup>97</sup>

*Masters v Cheyne*<sup>98</sup> provides an illustration of the significant judicial time that must be devoted to accommodating self-represented litigants in family law matters.<sup>99</sup>

The matter involved a sum of approximately \$31,200. Both parties were self-represented, with the mother preparing her own materials that resulted in an improperly drafted Notice of Appeal. The Notice purported to contain 15 grounds, but actually contained over 90 separate challengers stretching over 22 pages and 104 footnotes.<sup>100</sup> The Notice was characterised by the court as obscuring rather than illuminating the mother's grounds and arguments.<sup>101</sup> Justice Aldridge was forced to identify, synthesise and summarise the grounds of appeal before the court was able to give them proper consideration.<sup>102</sup>

Issues surrounding the provision of incomplete or poor quality evidence and procedural fairness pervade matters involving self-represented litigants.

The Honourable Professor Nahum Mushin AM, a retired judge of the FCoA, has noted that the unreasonable hurdles faced by unrepresented litigants in family law proceedings are exacerbated in matters involving family violence.<sup>103</sup> This is also true of other specialist issues, such as allegations of mistreatment or abuse of children, mental health and substance misuse.

The LIV submits the exponential increase in the number of self-represented litigants necessitates the presence of judicial officers with specialist family law knowledge and experience.

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<sup>97</sup> Chief Justice Pascoe, 'State of the Nation', above n 11.

<sup>98</sup> *Masters v Cheyne* [2016] FamCAFC 255.

<sup>99</sup> Olivia Rundle, 'Recent cases' (2017) 7 *Family Law Review* 74, 89.

<sup>100</sup> *Masters v Cheyne* [2016] FamCAFC 255 [4].

<sup>101</sup> *Ibid* [5].

<sup>102</sup> *Ibid* [6].

<sup>103</sup> Hon. Professor Nahum Mushin AM quoted in *A Better Family Law System*, above n 37, 127 [4.159].

## Judicial expertise

The LIV wishes to express its members' concern to ensure the professionals working in the family law system, including within the judiciary, possess the necessary level of specialist skill, knowledge and abilities, to provide Australian families with just outcomes in their family law disputes.

The LIV commends the stated objective of the Government's proposal, to 'ensure the expertise of suitably qualified and experienced professionals supports those families in need'.<sup>104</sup>

Under the current legislation, there are different requirements for the appointment of FCoA, FCC and FC judges. To be eligible for appointment to the FC, the FCC and the FCoA, a person must have been enrolled as a legal practitioner of the High Court or a Supreme Court of a state or territory for at least five years.<sup>105</sup> There are additional stated criteria for appointment to the FCoA, requiring the person is a suitable person to deal with matters of family law, by reason of *training, experience and personality*.<sup>106</sup>

This additional criterion acknowledges the skills, abilities, knowledge, expertise and experience of the professionals working within a system are necessary for the system to operate effectively and accessibly.<sup>107</sup> The LIV notes that the Government has seen fit to endorse the additional criterion by replicating it in section 11 of the *FCFCA Bill* in relation to the appointment of Judges in Division 1. Furthermore, the proposal extends a requirement of some form of specialisation to the judges of Division 2 of the FCFCA by creating an additional requirement that the person has the 'appropriate knowledge, skills and experience' to deal with the kinds of matters that may come before the FCFCA Division 2.<sup>108</sup> The LIV notes that this criterion does not apply to current Judges of the FCC, whose appointment will be preserved and transitioned to Division 2, and will only apply to future appointments to Division 2.<sup>109</sup>

The LIV notes that the Government proposes to confer on Division 2 'much the same family law jurisdiction' as that conferred on Division 1, 'such that the jurisdiction of both divisions will be largely become the same'.<sup>110</sup> Given the unique nature of family law disputes, and the specialist issues the

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<sup>104</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth) 2 [5].

<sup>105</sup> *Federal Court of Australia Act 1976* (Cth) section 6(2); *Federal Circuit Court of Australia Act 1999* (Cth) schedule 1, part 1(2); *Family Law Act 1975* section 22(2).

<sup>106</sup> *Family Law Act 1975* section 22(2)(b).

<sup>107</sup> *A Better Family Law System*, above n 37, 256 [8.1].

<sup>108</sup> Federal Circuit and Family Court of Australia Bill 2018 (Cth) section 79(2)(b); Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) section 186.

<sup>109</sup> Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) schedule 10, part 3, item 14(2).

<sup>110</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth) [10].

FCCA Judges are required to grapple with, the LIV submits the proposal be altered so that only FCC Judges who fit the additional criterion hear family law matters. The LIV notes that in light of the Attorney-General's assertion that the FCC 'boasts the greatest concentration of specialist family law judges in Australia' with '41 specialist family judges each with an average of 25 years in family law', extending the additional criterion to the existing Judges of the FCC would not create too onerous a burden on the Court.<sup>111</sup>

The LIV submits that it is essential that judicial officers exercising family law jurisdiction possess the requisite expert knowledge, experience and aptitude to hear such cases, and that these characteristics form part of the criterion for appointment.<sup>112</sup> The LIV considers the continuing dramatic increase in the FCC's family law workload, from originally hearing 20 per cent, to presently hearing 80 per cent, of all family law matters, combined with the unique nature of family law, requires a level of specialisation in the subject.<sup>113</sup>

The LIV wishes to express its family law practitioner members' concern regarding what they perceive to be the wide range of FCC Judges' experience and knowledge of family law, and the resultant lack of consistency in approach and outcome in family law matters. Members have reported considerable difficulty in advising clients on the possible outcomes of different courses of action, in light of the lack of consistency and fluctuations in process and outcomes.

Further, the LIV is concerned about the impact of Judges who have no previous experience in family law routinely hearing family law cases, on the ability of the law to respond to the constantly evolving knowledge around specialist issues such as family violence, and the changing needs and expectations of the Australian community.

The LIV contends Australian families participating in the family law system are entitled to have their matter heard by a Judge with appropriate training, experience and personality to determine family law matters, whether their matter is heard in the FCCA, FCC or Division 1 or 2 of FCFCFA.

The LIV further notes members have reported perplexity at the appointment of Judges with non-family law backgrounds to hear family law matters in the FCC, when specialist family law Judges

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<sup>111</sup> Attorney-General, Hon Christian Porter MP, 'State of the Nation', above n 4.

<sup>112</sup> *Review of the Family Law System: DP 86*, above n 5, 238 [10.4], 253 [10.62]; *A Better Family Law System*, above n 37, 264 [8.13].

<sup>113</sup> Attorney-General, Hon Christian Porter MP, 'State of the Nation', above n 4.



could be appointed. Members have noted the solicitors and barristers practising in the area of family law generally do so exclusively, as it is recognised as a specialised area.

The LIV wishes to stress its strong support for the Judges of the FCC without a background practicing in family law who find themselves hearing family law cases, and to emphasise that the LIV in no way impugns their ability to fulfil their role to the highest standard, but rather suggests that it would be more efficient for Judges to be appointed with relevant practice experience. Alternatively, Judges without the requisite experience in this complex and specialist area of law could be offered mandatory and ongoing training, in both family law and the attendant specialist issues such as family violence.<sup>114</sup> The LIV is cognisant the principle of judicial independence means judicial officers cannot be compelled to undertake training once appointed, and so reiterates its calls for expertise in family law to form part of the criterion for appointment.<sup>115</sup>

The LIV notes the consistent calls for further specialisation within the legal community, which is mirrored in the general community's expectations following a heightened awareness of issues such as the prevalence of family violence.<sup>116</sup> The LIV submits that any model that reduces this specialisation would not only lead to greater inefficiency in the application of this complex and specialist area of law, but would also run contrary to the expectations of the community.

## Specialist appellate court

The LIV wishes to express its members' strong opposition to the proposed removal of specialisation from the family law appellate jurisdiction. The LIV submits that a just and proper outcome for Australian families participating in the family law system is only possible if appeals are conducted by Judges with an appropriate family law background and experience who possess a 'thorough, in-depth and expert knowledge of family law'.<sup>117</sup>

The LIV notes the Government's proposal would limit the appellate jurisdiction of Division 1 of the FCFCA to determining appeals from a judgment of a court of summary jurisdiction of a State or Territory exercising jurisdiction under the *Family Law Act 1975* (Cth), the *Child Support (Assessment) Act 1989* or the *Child Support (Registration and Collection) Act 1988*, excluding

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<sup>114</sup> *A Better Family Law System*, above n 37, 266 [8.20].

<sup>115</sup> *Review of the Family Law System: DP 86*, above n 5, 252-3 [10.60]; *A Better Family Law System*, above n 37, 285 [8.78].

<sup>116</sup> *Review of the Family Law System: DP 86*, above n 5, 238 [10.4]; Kayler-Thomson, above n 15, 7; *A Better Family Law System*, above n 37, 286 [8.82] recommendation 27.

<sup>117</sup> Chief Justice Pascoe, 'State of the Nation', above n 11.

decisions Magistrates in Western Australia.<sup>118</sup> The LIV further notes the proposal would confer an identical jurisdiction on Division 2 of the FCFCA.<sup>119</sup>

This appellate jurisdiction of Divisions 1 and 2 is to be exercised by the Court constituted by a single Judge, which the Government notes reflects current practice in the FCoA.<sup>120</sup> However, the LIV notes the requirement in the *Family Law Act 1975* (Cth) that appeals from the FCC, and the Magistrates Court of Western Australia to the FCoA must be heard by a Full Court unless the Chief Justice decides that it is appropriate for a single Judge to hear the decision.<sup>121</sup> Therefore, the current approach is set by the *Family Law Act 1975* and does not indicate any inappropriate use of court resources.

The LIV considers a bench of three Judges deciding appeals allows for more considered and better jurisprudence. As noted above, family law is an incredibly complex area of law, that is expected to respond to community expectations by quickly evolving to make sure the law is in line with community understanding of different issues at a much faster pace than other areas of law. As noted by the Honourable Justice O’Ryan of the FCoA, robust debate amongst three expert Judges promotes responsive and strong jurisprudence, and its removal may result in ‘a downgrading, a depressing of the standard of jurisprudence required of an intermediate appeal court.’<sup>122</sup>

Further, the LIV notes that other intermediate appellate Courts (such as the Courts of Appeal of the various states) routinely have three judges sitting on appeals. The LIV sees no reason matters affecting children and families throughout Australia deserve less considered attention.

The Government contends that having most appeals heard by a single judge will ‘free up considerable judicial resources’ to aid in reducing delays in family law appeal matters and in first instance matters.<sup>123</sup> The LIV queries the assessment of the efficiency gains made by the Government, in light of the fact that 24 percent of appeals from the FCC or Magistrates court in Western Australia were heard by a single judge in 2017-2018.<sup>124</sup> The LIV further notes that any efficiency gains will not be felt in Victoria, as the only current member of the Appeal Division of the Family Court from Victoria is Deputy Chief Justice Alstergren.

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<sup>118</sup> Federal Circuit and Family Court of Australia Bill 2018 (Cth) section 25.

<sup>119</sup> Ibid section 102.

<sup>120</sup> Federal Circuit and Family Court of Australia Bill 2018 (Cth) sections 27(1) and 106; Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth) 29 [83].

<sup>121</sup> *Family Law Act 1975* section 94AAA(3).

<sup>122</sup> Nicola Berkovic, ‘Three judge appeals ‘make system robust’, *The Australian* (Sydney) 5 June 2018.

<sup>123</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth) 26 [61] and 29 [82]; Attorney-General, Hon Christian Porter MP, ‘State of the Nation’, above n 4.

<sup>124</sup> Federal Court of Australia, *Annual Report 2017-2018*, 45

## Family Law Division of the Federal Court

The proposed model will dramatically change the family law appeals landscape, by removing most of the appellate jurisdiction of the FCoA and conferring the jurisdiction on the FC, which will be exercised by the newly created Family Law Appeal Division.<sup>125</sup>

The Family Law Appeal Division will have the power to exercise appellate jurisdiction in family law and child support matters, to determine appeals from judgments of the FCFC, a Family Court of a State, or the Supreme Court of a state or territory, exercising original or appellate jurisdiction under:

- *Family Law Act 1975*; or
- the *Child Support (Assessment) Act 1989*; or
- the *Child Support (Registration and Collection) Act 11 1988* (other than section 72Q of that Act);
- regulations under an one of the above Acts; or
- in relation to a matter in a family law or child support 15 proceeding—any other law.

Division 1 will remain a superior court of record, and therefore appeals will be heard by the Full Court of the Family Law Appeal Division, whereas appeals from Division 2 will ordinarily be heard by a single Judge of the Appeal Division, unless a Judge considers it appropriate for the appellate jurisdiction to be exercised by a Full Court.<sup>126</sup> The LIV notes that the conferral of appellate jurisdiction on Division 2, to determine appeals from a judgment of a court of summary jurisdiction of a State or Territory exercising jurisdiction, means the proposed model could see circumstances where three layers of appeal may each be heard by a single judge.

The Government initially asserted at least some of the existing FCoA appeal judges would shift to the new family law appeal division of the Federal Court Appeal Division.<sup>127</sup> The Attorney-General noted that not all the appeal judges were expected to be needed by the court, and the rest would form part of Division 1 of the proposed court, where they would hear first instance cases and appeals from state magistrates.<sup>128</sup> However, the LIV notes that contrary to this assertion, the *FCFCA (CATP) Bill 2018* appears to contemplate that all the current appellate judges of the Family Court will become trial judges in Division 1 of the proposed court, with no transitional arrangements made for them to

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<sup>125</sup> Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) schedule 1, part 1, items 192 and 227.

<sup>126</sup> Ibid schedule 1, part 1, item 235.

<sup>127</sup> Nicola Berkovic, 'Family Court merger faces court revolt', *The Australian* (online) 30 May 2018.

<sup>128</sup> Ibid.

be appointed to the new Family Law Appeal Division of the Federal Court.<sup>129</sup> This makes more sense of the Government's contention that the proposed model will enable the existing judicial resources of the Family Court to be refocussed to finalise more first instance family law matters and to clear the backlog of family law matters.<sup>130</sup>

The LIV notes the Attorney-General has now confirmed that the Government has no plans to ensure FC Judges appointed to the new Family Law Division have specific family law experience.<sup>131</sup> The LIV is concerned appeals from family law specialist Judges of Division 1 and non-specialist Judges of Division 2 of the FCFCA, will be determined by Judges of the FC who are not appointed based on a criterion that they possess the requisite expert knowledge, experience and aptitude to hear complex and specialist family law matters.

Members have expressed particular concern over what they term the 'nightmare scenario' where self-represented litigants will initially appear before a trial Judge who has not had any family law experience and then have the matter appealed before a single Judge who also has no family law experience. Therefore, Australian families participating in the family law system in these circumstances will at no stage have the benefit of family law expertly applied. The LIV is concerned about barriers to access to justice in family law matters, including the exponential increase in the number of self-represented litigants, which necessitates someone with specialist family law knowledge and experience hearing a case. The LIV contends that not only does this scenario not serve children and families who are seeking to resolve their family law issues, it does not serve the public interest.

The LIV queries whether diverting family law appeals to be heard by non-specialist judges in the Federal Court, who will require time and resources, particularly training, to familiarise themselves with this specialist and complex area of law, is more efficient than moving judges who already have this specialist knowledge and experience to the new division. The LIV notes the small group of 11 Judges who currently comprise the Appeal Division of the Family Court, possess an invaluable wealth of specialist experience and knowledge that allowed them to publish 380 appeal judgments in 2017-2018, a year where 390 appeals were filed.<sup>132</sup> The LIV considers Judges already possessing

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<sup>129</sup> Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) schedule 10, part 1, items 2(3), 2(5) and 3(5); Explanatory Memorandum, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) 365 [1985] notes that item 3(5) applies to those Judges appointed to the Appeal Division.

<sup>130</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth) 16 [61].

<sup>131</sup> Nicola Berkovic, 'Don't axe Family Court: ex-Chief Justice Diana Bryant', *The Australian* (online), 31 May 2018.

<sup>132</sup> Chief Justice Pascoe, 'State of the Nation', above n 11.

the necessary knowledge, experience and aptitude, are much more likely to deliver efficient appeal decisions in some of the most difficult cases heard within the civil jurisdiction.

The LIV notes early drafts of the *Family Law Act 1975* outlined a process where appeals were heard by the Federal Court, however the Act as it was originally drafted dealt with issues associated with marriage, and since then it has come to deal with many more issues (as outlined above) that have brought further complexity to the jurisdiction, such that they cannot now be compared.

### Leave to appeal from certain decisions

The LIV wishes to express its members' concern at the proposal's circumscription of the ability of Australian families to appeal interlocutory decisions that either are not determinative of a litigant's final rights or do not relate to a child's welfare.<sup>133</sup> The Government contends there 'will be significantly fewer appeals' as a result of the reforms and unnecessary appeals will not be filed, which will allow court resources to be better allocated.<sup>134</sup>

The LIV submits that, rather than leading to greater efficiency, the proposed model will result in greater uncertainty for Australian families navigating the family law system, greater uncertainty for the legal practitioners advising their clients (and thus greater costs) and an increase in appeals to the High Court.

### Appeals to the High Court

The LIV notes the right of litigants to bring an appeal to the High Court by special leave from judgments of Division 1, as the continuation of the FCoA, is removed by the Bills.<sup>135</sup> Instead of appealing directly from the equivalent of the FCoA, litigants must first appeal to the Family Law Appeal Division of the Federal Court.<sup>136</sup> The LIV is concerned this adds another layer to an already overly complex structure, by inserting a new litigation layer to be undertaken before litigants are able to reach the final arbiter. The LIV considers this model further restricts access to justice for children and families struggling through an already arduous process.

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<sup>133</sup> Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) schedule 1, part 1, items 227(4) and (5), 228.

<sup>134</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth) 29 [82]; Explanatory Memorandum, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) [10].

<sup>135</sup> *Family Law Act 1975* (Cth) section 96; Federal Circuit and Family Court of Australia Bill 2018 (Cth) section 37.

<sup>136</sup> Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) schedule 1, part 1, items 227.

The LIV further notes, that matters heard by Federal Court Judges without a family law background are more likely to be appealed to the High Court, causing further cost and delays for the litigants, but also significantly increasing the financial burden on the community.

The LIV queries the purported efficiencies of introducing a new level of appeals, and restricting access to apply for special leave to the High Court. The LIV notes that in 2017-2018, there were only 13 applications for special leave to appeal to the High Court from judgments of the FCoA, with only one appeal being granted leave.<sup>137</sup>

The LIV further notes that appeals from a judgment of Division 2, as the purported continuation of the FCC, will still not be able to be brought directly to the High Court.<sup>138</sup> Although this does not represent a change in the rights of litigants at the moment, there are indications that Division 1 will eventually be disbanded (see below), leaving Division 2 as the only avenue through which litigants with family law matters will be permitted to have their matter heard, and therefore litigants access to directly seek leave to appeal to the High Court will be restricted.

## Abolition of the family court

The LIV notes the Government's assertion that the FCFC's Division 1 would be a 'continuation of the Family Court', and therefore the proposal 'does not abolish any existing Court'.<sup>139</sup> The Government has described the proposed structural change as a 'cautionary approach' comprised of the 'amalgamation of the two courts that handle family law' that will 'continue the existence and status of both the Family Court and the Federal Circuit Court'.<sup>140</sup>

The LIV considers it is appropriate and necessary to address the Government's policy, as stated in *The Australian*, to cease to appoint any specialist judges into Division 1 of the proposed court.<sup>141</sup> Over time, this policy will ensure 'there will no longer be a Division 1'.<sup>142</sup>

The LIV notes that under this policy, the FCoA would cease to exist in 21 years, upon the Honourable Justice Jenny Hogan reaching the age of retirement, assuming her Honour does not elect to leave the court sooner.<sup>143</sup> Therefore, although the proposal does not directly abolish the FCoA, the LIV

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<sup>137</sup> Family Court of Australia (2018), *Annual Report 2017-2018*, 47.

<sup>138</sup> *Federal Circuit Court of Australia Act 1999* section 20; Explanatory Memorandum, Federal circuit and Family Court of Australia Bill 2018 (Cth) 80 [502]-[503].

<sup>139</sup> Explanatory Memorandum, Federal circuit and Family Court of Australia Bill 2018 (Cth) 2 [6]; Attorney-General, Hon Christian Porter MP, 'State of the Nation', above n 4.

<sup>140</sup> Attorney-General, Hon Christian Porter MP, 'State of the Nation', above n 4.

<sup>141</sup> Attorney-General Hon Christian Porter MP quoted in Berkovic, 'Don't axe Family Court', above n 131.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

contends it is a device to prepare for the long-term annihilation of not just the FCoA, but specialist decision making in family law matters.

The LIV is concerned that Australian children and families will be denied the benefits of just outcomes that arise from having their family law trials and appeals heard by a superior level of family judges with specialist knowledge, experience and aptitude in this complex area of law.<sup>144</sup>

## Uncertainty

The LIV submits that the uncertainty caused by the proposed restructure will significantly increase the cost to litigants and the community, and limit access of Australian children and families to fair and just outcomes.

Some members have expressed their concern that a lack of specialisation in the courts and decision makers will actually lead to more appeals, and instead of leading to greater efficiency, will inevitably cost the community much more money than is necessary. The Honourable Justice Murphy of the FCoA has noted the increasing number of appeals from interim proceedings, and concluded that the ‘inordinate pressure’ judges from the FCC are under is ‘creating appeals that would otherwise not occur’.<sup>145</sup> Justice Murphy goes on to make the important point that ‘the need to maximise the number of cases heard and the speed at which they are heard should never take the place of proper process’.<sup>146</sup>

Other members argue the proposed model will lead to more settlements, because family law practitioners will advise their clients to settle, rather than have the matter heard by a non-specialist family law judge, whose application of family law, and decisions, would be much more unpredictable. Practitioners rely on consistent decision-making to advise their clients regarding settlement. These settlements will not necessarily result in the most just outcome for children and families, but rather will be a result of practitioners who fear that the outcome may be much worse if the case were to be tried in circumstances where the complex and specialist area of family law is inexpertly applied.

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<sup>144</sup> Chief Justice Pascoe, ‘State of the Nation’, above n 11; Berkovic, ‘Don’t axe Family Court’, above n 131.

<sup>145</sup> *Matenson & Matenson* [2018] FamCAFC 133 (20 July 2018) [74]-[75].

<sup>146</sup> *Ibid.*



Members have reported recent instances of unpredictable decision making and questionable process employed by some judicial officers in the FCC who do not have a background practicing in family law:

A member has reported that in a recent parenting matter the judge ordered costs against one party.

The practitioner noted that the facts of the case did not warrant a costs order, and that the unpredictable nature of parenting matters means they are ordinarily not amenable to such orders.

A member has reported an instance where a judge commented in open court that if the parents really cared about their children, then they would not have separated.

A member has reported a recent financial matter, where a judge enquired of Counsel how an application to set aside final property orders under section 79A of the *Family Law Act 1975* could succeed, given the principles enunciated in *Rice v Asplund* (1978) 6 FamLR 570.

The practitioner noted the decision in *Rice v Asplund* related to parenting issues and is of no relevance to a financial matter.

A member has reported a recent instance where a judge pronounced final orders for a 65/45 split of the matrimonial asset pool, which equates to distributing 110 percent of a pool.

The parties were forced to agree to alternate orders because they could not afford the cost of an appeal despite the obvious error in the decision.

A member has noted a recent parenting matter with an Independent Children's Lawyer and two parents on Government benefits with no other income, all parties asked the Court to order a Court funded family report.

The judge refused to provide a court funded report and told the parties that if they cared about their children they would find the money to fund a private report.

The judge adjourned the matter for 6 months and refused to list it for trial, and said that if the parties returned in 6 months without the private family report the judge would adjourn the matter for another 6 months.

A member has reported a recent property distribution matter.

The matter related to a 51-year marriage with an agreed \$5 million property pool, with the family home valued at \$2 million, and the balance in term deposits. The parties were still living under same roof and the husband was in ill health.

The husband sought a 50/50 property distribution and the wife sought a 60/40 split by way of final orders, with the percentage division as the only dispute. The practitioner noted that on either scenario, the husband would have received a minimum of \$2 million as a final property settlement.

The husband sought an interim distribution of \$250,000 to enable him to move out of the family home. The husband was told by the judge in open court that his application was "cheeky" and the application was dismissed without hearing from the other side.

A member has reported a recent parenting matter where the mother had unilaterally moved with a 6-month-old infant from Melbourne to Mildura.

The Judge responded to the father's application for a recovery order by stating that if the father was concerned about his relationship with the 6-month-old then he wouldn't have left the marriage. The Judge refused to make any interim decision, and listed the matter for trial five months later.

A member has reported recent interim orders in a parenting matter, which outlined a toddler was to live with each parent for a 24-hour period with changeover at McDonalds every day.

The LIV contends that these examples demonstrate a lack of understanding of the jurisdiction, with each instance causing significant additional costs, time and delay, as well as the distress that accompanies unresolved family law disputes, for the children and families traversing the family law system.

The LIV notes that under the new model, a discretionary decision from one appeal Judge in the FCFCA may go on to be heard by another discretionary decision of one appeal judge in the new Family Law Appeal Division of the FC. This increase in individual judicial discretionary decision making will inevitably lead to a lack of consistency and severely limit certainty for those participating in the family law system.

In the meantime, practitioners are in agreement that costs will rise considerably for litigants during the restructure, because of the uncertainty regarding the application of family law by non-specialist judges and the lack of clear guidance on what the new rules and procedures will entail. A lack of certainty will pervade the sector.

## A complex model

The Government has asserted that the proposed model represents a ‘simplification of the Court structure’.<sup>147</sup> The Attorney-General has described the proposed structural reform as ‘essentially uncomplicated’ in nature, which is purportedly demonstrated by the mere addition of 20 new provisions and 18 substantially changed provisions to the current legislative framework.<sup>148</sup> The LIV notes that the FCFCA Bill and FCFCA (CATP) Bill roll out the new model over 573 pages, and consider that such a major change to the federal courts structure should not be a simple undertaking, but a considered approach aimed at the betterment of a flawed system.

The LIV respectively wishes to tender its strong disagreement with the Government’s claim to simplicity. Rather than simplifying the system, the model tends to add unnecessary levels of complexity through the insertion of yet another court, the Family Law Appeal Division of the Federal Court, creating a three-tiered system for families to navigate.<sup>149</sup>

This model will be further complicated by the Victorian responses to community calls for further specialisation, such as the Shepparton Specialist Family Violence Court that emerged from recommendation 60 of the Royal Commission into Family Violence. Additionally, if the *Family Law Amendment (Parenting Management Hearings) Bill 2017* passes it will establish a Parenting Management Hearings Panel, which will add yet another tier for separating couples to navigate.<sup>150</sup>

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<sup>147</sup> Attorney-General, Hon Christian Porter MP, ‘State of the Nation’, above n 4.

<sup>148</sup> Ibid.

<sup>149</sup> Kayler-Thomson, above n 15, 7.

<sup>150</sup> Ibid.

# EFFICIENCY OF THE FEDERAL COURTS

## The PWC Report

The LIV considers the PricewaterhouseCoopers *Review of efficiency of the operation of the federal courts: Final report* (the Report),<sup>151</sup> as the articulated basis for the proposed merger, should be analysed alongside the Bills.

The LIV notes the Government has indicated the reforms are based on ‘many reviews and reports over the last decade’, and yet despite this assertion, has solely referenced the Report’s data analysis in support of the proposals.<sup>152</sup>

The LIV notes that this Report was undertaken in six weeks, with limited input from external parties and contains a number of inaccuracies as a result. As is acknowledged in the Report, the time constraints of the Review have prevented all possible opportunities from being explored and the potential implications of each opportunity being fully assessed. These constraints have prevented the development of detailed solutions.

The LIV does not consider changes to the court system should be based on this Report alone. The Report itself states that the dataset has not been tested and that the two courts use different metrics, making the data difficult to assess. In this context, the data cannot be used as the basis for measuring the efficiency of each court. The Report claims that, where definitive data points have been unavailable, assumptions tested with court stakeholders have been relied upon. However further information about these assumptions and the stakeholders consulted has not been provided, and cannot be examined.

## Finalisation

The Report states the FCC receives over 85% of family law applications and there are approximately 114 final order matters finalised per FCoA judge per annum, but about 338 matters finalised per FCC judge per annum.<sup>153</sup> This suggests that there are 452 final order matters finalised between two judges of the two Courts in any one year, 144 of which are finalised by the FCoA.

The LIV considers that these figures actually substantiate the proposition that the FCoA is more efficient than the FCC as 114 of the final orders matters constitutes approximately 25% of the total final order matters despite receiving less than 15% of the family law filings. The FCoA should not be

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<sup>151</sup> PwC, *Review of efficiency of the operation of the federal courts: Final report* (April 2018).

<sup>152</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth) 2, [2].

<sup>153</sup> PwC, *Review of efficiency of the operation of the federal courts: Final report* (April 2018) 3, 4, 40.

criticised for disposing of fewer matters when it receives fewer filings and is seen to be highly efficient in disposing of the matters it does receive.

This efficiency was demonstrated in the 2017-2018 financial year, where the FCoA received 2,427 first instance filings, and finalised 2,534 first instance matters, which means the FCoA cleared 107 more cases than it received.<sup>154</sup> Therefore, the FCoA is operating in excess of a 100% clearance rate, while the FCC has also seen a 104.5 clearance rate.<sup>155</sup>

In addition, there are final orders matters in the FCoA which are concluded by a Registrar (and therefore, never seen by a FCoA judge) at one of the early dispute resolution events in the FCoA (being a Case Assessment Conference or Conciliation Conference). These were not included in the Report's consideration of the efficiency of the FCoA.

## Timeliness

The Report states that in the FCC, the length of a trial is 57% shorter than in the FCoA.<sup>156</sup> However, the Report lists the average time to finalise matters in the FCC as 11.4 months and the average time to finalise matters in the FCoA as 12.4, only one month longer in the FCoA.<sup>157</sup> The LIV notes the median time to trial in the FCC has since increased to 15.2 months.<sup>158</sup>

The Report further notes that if the matter goes to trial, the respective times are 20.3 months in the FCC and 26.1 months in the FCoA.<sup>159</sup> Given the much lengthier trials in the FCoA, and the fact that they frequently deal with more complex issues, one might have expected a larger "gap" in the finalisation time. The LIV therefore considers that the use of these figures to evidence greater efficiency of the FCC is an inaccurate representation of the efficiency of the respective courts, given the marginal difference in average time to finalise matters and complexity of the issues dealt with by the FCoA.

The LIV considers that the greater complexity and increased length of final hearings in the FCoA explains the lower numbers of matters disposed of in the FCoA as compared with the FCC.

The LIV notes the Report confirms the inference of greater efficiency in the FCoA. For example, the Report indicates that in the FCoA a greater proportion (44%) of matters are finalised within six months compared with the FCC (35%).<sup>160</sup>

The LIV considers the Report's assertion that each FCC judge disposes of 338 final orders applications in each year should to be treated with caution. The Report states that on average FCC judges sit approximately 150 days, while FCoA judges sit 129 days, each year.<sup>161</sup> Therefore, the Report asserts that each FCC judge determines 2.25 matters on a final basis per day. If accurate,

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<sup>154</sup> Chief Justice Pascoe, 'State of the Nation', above n 11.

<sup>155</sup> Chief Judge Alstergren, above n 3, Slide 14.

<sup>156</sup> PwC, *Review of efficiency of the operation of the federal courts: Final report* (April 2018) 35.

<sup>157</sup> *Ibid* 34.

<sup>158</sup> Federal Circuit Court, *Annual Report 2017-2018*, 50.

<sup>159</sup> PwC, *Review of efficiency of the operation of the federal courts: Final report* (April 2018) 35.

<sup>160</sup> *Ibid* 31.

<sup>161</sup> *Ibid* 6.

this data suggests a lack of proper judicial attention being given to such matters, owing to overwhelming workloads and time pressures

The LIV submits these numbers must include matters finalised by consent.

The issue of the impractical lists faced by the FCC is highlighted by the Honourable Justice Murphy (sitting as the Full Court) in *Matenson & Matenson*.<sup>162</sup> Justice Murphy notes ‘the extraordinary size of the lists before judges of the Federal Circuit Court’, explaining that it is not ‘uncommon for in excess of 30 matters to be listed’ and concludes:

[B]y reason of simple arithmetic the average time that can be allotted to each matter as a consequence surely gives pause for thought as to whether proper process can be invoked and the requirement for individual justice met where interim decisions affecting children’s lives are involved.<sup>163</sup>

Although *Matenson* deals with an appeal from an interim, and not a final decision, the failure by an FCC judge to give proper consideration and reasons led to a successful appeal in that matter. The LIV considers that the use of this statistic in either case represents an inaccurate portrayal of the efficiency of the respective Courts.

The LIV contends that, to the extent that the report (if accurate) indicates earlier finalisation dates in the FCC, this conclusion overlooks the reality of why many matters settle or conclude in the FCC.

LIV members have reported that it is common for a matter to be carefully prepared for trial in the FCC, at great time and expense, only for the parties turn up to final hearing with their lawyers to be informed by the judge ‘[S]orry, I do not have time to hear you today, as other matters are listed. You can either go and sort it out yourselves or receive another trial date in about nine months.’

Members have reported that in this context many litigants reach agreement in order to avoid the cost of returning to a second hearing, with all relevant evidence requiring to be updated and reflective of present-day values and the concomitant cost of uncertainty and non-optimal living arrangements for children required to continue living with parents subject to the stress of litigation and delayed resolution. However, if the litigants are less pragmatic, or the matter is one which is effectively impossible to settle (such as a relocation application), members report the time for the FCC to dispose of such matters on a final basis as at least six to nine months longer than is reported. Members are also alive to the possibility of the litigation process itself being used as a weapon in the argument between parties with attempts to delay the resolution process occasionally falling into sync with the delays in the court system to create an insurmountable barrier to access to justice to vulnerable litigants.

A member has reported a parenting matter listed in the FCC, which illustrates the kinds of significant delays experienced by families in crisis:

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<sup>162</sup> *Matenson & Matenson* [2018] FamCAFC 133 (20 July 2018).

<sup>163</sup> *Ibid* [71].

The father had not seen the children in approximately 8 months. The mother contends the father is an abusive alcoholic, and refuses to facilitate time between the children and father. The father denies the accusation and contends the mother is an alienating parent with psychological issues.

There was no room to settle in the matter, as the mother categorically refused to contemplate anything other than her having sole parental responsibility, and for the father to only have time with the children in accordance with her wishes.

A family report highlighted this is a family in crisis, in need of urgent attention if the father's relationship with the children was ever to be restored and recommended a change of living arrangements.

A three-day trial was listed with the FCC, both parties were represented by Counsel and instructing solicitors. At the hearing, the parties discovered that the Judge had four trials listed before her that day, one listed with priority. The Judge was clearly not pleased with the situation and apologised for the necessity of adjourning the matter.

The parties were 'pretty shattered'. The thrown away costs of just that day in court exceeded \$10,000.

## Pre-trial process

The Report's summary of 'the family law application process' inaccurately identifies a substantial difference in the application process for the FCoA and the FCC.<sup>164</sup>

## Case management

The Report asserts there are substantive differences in case management, because matters in the FCoA are not allocated to a judge until they are set for trial. However, the FCoA statistics are reflective of an efficient system that provides mandated opportunities for parties to resolve matters without judicial intervention and before a (less costly) Registrar.

The Report asserts that in the FCoA, cases are handled at first by a registrar and must undergo a series of dispute resolution mechanisms before being considered for trial, which results in parties not coming before a Judge until trial, with trial judges having no role in pre-trial activities. However, most matters in the FCoA have at least one interim application, which is listed before a Judge in the same way as an FCC Judge would hear it. The difference is, because it has been allocated a specific hearing slot, it is more likely to be heard. As previously mentioned, an FCC Judge regularly has 30 matters listed, and the individual issues in each case are unable to be addressed, requiring a further appearance before the Court.

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<sup>164</sup> PwC, *Review of efficiency of the operation of the federal courts: Final report* (April 2018) 17.

The Report also assumes that matters are allocated to an FCC Judge's docket from the day of filing which is not always the case. For example, in Queensland at the moment docketing has been abandoned in favour of FCoA like model.

Further, the Report's diagram infers that after a Case Assessment Conference ('CAC'), the matter must proceed to another procedural hearing before a Registrar both before and after the parties attend a Child Responsive Program. In practice, all matters are listed to a CAC, which addresses all financial and parenting issues, including any outstanding document exchange issues and from a CAC, matters are often listed for interim hearing before a Judge without being referred to a procedural hearing before a Registrar.

## Discovery and Exchange of Documents in the FCC and FCoA

The Report erroneously suggests that discovery and exchange of documents occur in proceedings in the FCoA, but not in the FCC, and draws the conclusion that this leads to great expense and delay.<sup>165</sup>

The LIV notes that the obligation to make full and frank disclosure in family law matters applies equally to matters which are before the FCoA and FCC. Rule 24.03 of the *Federal Circuit Court Rules 2001* outlines the obligation on a party to make *a full and frank disclosure* of their financial circumstances.

In addition, under section 45 of the *Federal Circuit Court of Australia Act 1999*, in the FCC a Judge can allow interrogatories and discovery by declaring that it is appropriate, in the interests of the administration of justice, to do so. Members have informed the LIV that such orders are routinely and frequently made in the FCC.

## Conciliation Conference

The report correctly notes the Conciliation Conference occurs as part of the proceedings in the FCoA, but incorrectly omits this stage as part of the proceedings in the FCC. The LIV notes that a Conciliation Conference, or a private mediation, is also required in FCC proceedings.<sup>166</sup> Further, the Report omits the compulsory family dispute resolution that is required before a matter is filed in the FCC in family law children's matters.<sup>167</sup>

## Compliance check and a trial management hearing

The diagram infers that in the FCoA, there is a compliance check and a trial management hearing before a judge prior trial. In practice these rules are not applied and each registry has its own process. In Melbourne, matters are listed to a single pre-trial callover at which time trial directions are made, before proceeding to trial (potentially with a compliance check before trial). Similar

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<sup>165</sup> Ibid 65, 74.

<sup>166</sup> Federal Circuit Court of Australia, *Annual Report 2017-2018*, 45.

<sup>167</sup> Ibid.



processes occur in the FCC although they are not specified in the rules. The processes are practically similar in each court.

## Specialisation

The Report asserts that the ‘vast’ variation in productivity in the two Courts cannot be explained by mere differences in complexity in matters, noting that more complex matters are dealt with by the FCoA.<sup>168</sup> However, immediately prior to this, the Report acknowledges that there is insufficient data for the authors to substantiate the variation in complexity in the matters between the two Courts. Given that the Report acknowledges that the variation in complexity cannot be accurately measured, the Report’s view that this complexity is an insufficient explanation for differences in productivity lacks the sufficient substantiation. The assertion that both courts hear matters of similar complexity is patently incorrect (see above)

The LIV notes it is often not possible nor appropriate to categorise a matter as non-complex or complex when it is filed, as the level of complexity may become apparent over time and/or may vary during the proceedings as a result of changing circumstances of the parties and the subsequent assertion that in practice both the courts hear matters of similar complex is an inaccurate reflection of the realities of the complexity dealt with by both courts. While the LIV considers that it is true that the level of complexity is not always apparent at the time of filing, the same issue will arise in allocating cases between Division 1 and Division 2 of the proposed court structure.

The differing levels of complexity in matters dealt with by each court respectively is reflected elsewhere in the Report where it confirms that the FCoA deals with 51% of financial matters as compared to 35% in the FCC. Additionally, the FCoA deals with only 32% of parenting matters as opposed to 52% in the FCC. Property matters tend to require more court time and be more complex than parenting matters.

## Rates of transfer of matters between the Courts

The Report states that the FCC takes an average 11.1 months to transfer cases to the FCoA, compared to an average of 4.6 months for the FCoA to transfer matters to the FCC.<sup>169</sup>

The data suggests that the FCoA is identifying matters that are appropriate for transfer at an earlier stage, and that the FCC is only transferring matters once they are ready for trial (noting the average time to trial at the FCC is reported as 15.2 months).<sup>170</sup>

Rather than a reflection of inefficiency in the FCC, this is indicative of under resourcing. Ideally a transfer to the FCoA would follow proper consideration of the issues and the appropriateness of the matter being transferred at an early stage. However, members report that where a matter reaches

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<sup>168</sup> PwC, *Review of efficiency of the operation of the federal courts: Final report* (April 2018) 47.

<sup>169</sup> Ibid 37.

<sup>170</sup> Ibid 34.

trial in the FCC, insufficient resources to hear it result in it being transferred at the last minute to the FCoA.

Furthermore, the assertion that final order cases in the FCoA are more likely to be transferred out of the Court (20% of matters transferred to the FCC compared to 4% transferred to the FCoA) should not be a criticism of the FCoA.<sup>171</sup> If a matter is less complicated or has become less complicated as a consequence of an interim hearing, Conciliation Conference, privately convened mediation or lawyer efforts, and can be resolved in the FCC, it is appropriate that it be transferred.

## Average attendance rates of litigants in the FCC and FCoA

The LIV questions the Report's assertion that there are more Court attendances in the FCoA than in the FCC. The Report states the average attendance rate in the FCC is 4.2 while in the FCoA it is 6.1, with parties required to attend on average 45% more in the FCoA than the FCC, with the attendant costs implications.<sup>172</sup>

Members report that it is very common for there to be multiple Court attendances in the FCC, particularly if the parties have to obtain a section 11F report and return later in the same, or the following week. Although the Report seems to imply pre-trial case management practices, including engagement with ADR are indicative of efficiency, members have reported that the initial dispute resolution events in the FCoA (Case Assessment Conference and Conciliation Conference) are almost invariably the reason why more matters settle in the FCoA in the first six months. In addition, any disparity in the number of court attendances may be the result of the FCoA hearing more complex cases requiring more intensive management.

The LIV notes there is no comparison of the kind of court attendances provided in the Report. For example, the cost of the court holding a CAC before a Registrar as opposed to an appearance before a Judge is not considered. Ultimately, the LIV considers that it is important in complex matters that there is appropriate case management and that opportunities are given to parties to settle matters. This should be considered in analysing average attendance rates.

Further, the Report states that for matters that proceed to trial, it requires almost half as many attendances to finalise that matter in the FCC than the FCoA.<sup>173</sup> FCoA litigants, on average, must attend court 12.4 times if they proceed to trial, representing a potentially significant cost to litigants, which compares to an average of 6.9 times in the FCC. The LIV submits the disparity is due to the greater complexity of matters heard by the FCoA, which require many more determinations. This statistic is also an average, rather than a mean. It is possible that extraordinary cases have affected this figure.

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<sup>171</sup> Ibid 31.

<sup>172</sup> Ibid 32 - 33.

<sup>173</sup> Ibid 33.

## Cost and expenditure

### Cost of Proceedings

The LIV submits the assumptions made in the Report as to costs of family law proceedings are inaccurate. The report estimates party/party to be approximately \$110,000 per matter in the FCoA (including court fees but excluding appeals) and closer to \$30,000 in the FCC. Family law practitioners have informed the LIV that the Report's estimate is not reflective of the true cost of having a matter disposed of on a final basis in the FCC. Instead, the estimate appears to reflect the scales of costs allowed in the FCC in terms of obtaining orders for costs against another litigant, and does not reflect what is charged by private practitioners, although the LIV notes it is unclear where the party/party cost statistics are drawn from.

The LIV has received reports from members practicing in family law that suggest the cost differentials outlined in the Report are very different to the actual experience in practice.

A member has reported their experience of private mediation in the FCoA for pools over \$100,000.

The practitioner had two matters settle at conciliation conferences in the FCoA, both small asset pools, for a 10th of what it would have cost the client to prepare affidavit material, appear on first return date in the FCC and participate in private mediation.

As the practitioner noted, '[I]n those cases FCC certainly wasn't the cheaper option.'

### Court expenditure

The Report states that there is a significant difference in terms of court expenditure per finalisation between the two courts. The Report states that it costs approximately \$17,000 per finalised matter in the FCoA and approximately \$5500 in the FCC.

As discussed above, cases in the FCoA are more complex and may require more appearances and greater consideration than cases heard by the FCC. Although this may lead to slightly higher costs, moving these cases to the FCC will not reduce costs because the complexity of the cases and the greater time and attention they require will not change. The only expenditure that may change is the cost of appointing and providing the non-contributory pension to more specialist judges.

The Report states travel costs equate to \$55,000 per annum per appeal Judge.<sup>174</sup> The differences in the travel costs of the judges from the FCC and the FCoA is partly due to an insufficient number of appellate Judges being appointed in each jurisdiction, requiring Judges to travel from interstate to comprise a Full Court.

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<sup>174</sup> Ibid 65, 74.

In comparing the travel expenses of the courts, the Report states the FCoA travel expenses total \$1.4m, whereas the FCC travel expenses total \$2.3m of the FCC. The LIV notes the report does not distinguish between the travel expenses of FCoA Appeal Judges and FCoA Judges more generally, nor between FCC Judges who go on circuit and those who do not. The Report also fails to note that the FCoA Judges are required to travel to major capital cities, during peak times, while FCC Judges circuit to regional towns.

The LIV would like to express its members support for appeal judges of the Family Court sitting in different states, as this helps to create national cohesion of the case law of the Family Court.

## Appeals

The LIV wishes to express its members' concern regarding contentions in the Report about the appeals process.

The Report states that only 13% of FCoA appeals are finalised by a single judge.<sup>175</sup> The LIV notes it is a requirement of the *Family Law Act 1975* for appeals from the FCC and Magistrates Court of Western Australia, to be heard by a Full Court unless the Chief Justice decides that it is appropriate for a single Judge to hear the decision.<sup>176</sup> Therefore, the use of three appeal judges instead of one, is not a failure to be efficient, but rather, a legal requirement.

The LIV also considers the assertion that more matters may be able to be determined if more appeal judges heard more first instance matters problematic, because Judges of the Family Court's Appeal Division already hear first instance matters.<sup>177</sup>

The LIV also notes that even if such a benefit could be obtained, it will not be beneficial to Victoria because currently none of the Victorian Family Court Judges are members of the Appeal Division, with the exception of Deputy Chief Justice Alstergren.

Finally, the LIV wishes to highlight the Report's acknowledgement that the FCoA operated under budget, while the FCC exceeded budget.<sup>178</sup> This pattern was repeated for the 2017-2018 financial year.<sup>179</sup> Working within budget confirms the efficiency of the current operation of the FCoA and disqualifies this key basis for the proposed changes. In fact, the whole federal court system has an operating surplus of \$2.760 million.<sup>180</sup>

## Ex tempore judgments

The LIV urges the Government to reconsider the suggestion in the Report that ex tempore judgments are to be preferred and should occur more often, in order to avoid or minimise costs and delays.<sup>181</sup>

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<sup>175</sup> Ibid.

<sup>176</sup> *Family Law Act 1975* section 94AAA(3).

<sup>177</sup> PwC, *Review of efficiency of the operation of the federal courts: Final report* (April 2018) 92 - 93.

<sup>178</sup> Ibid 22.

<sup>179</sup> Federal Court of Australia, *Annual Report 2017-2018*, 3-4.

<sup>180</sup> Ibid 18.

<sup>181</sup> PwC, *Review of efficiency of the operation of the federal courts: Final report* (April 2018) 87-90.

The Report appears to applaud the FCC's tendency to provide more ex tempore judgements than the FCoA.<sup>182</sup>

The LIV notes ex tempore judgments are appropriate in some less complex matters, or matters that have resolved by consent in circumstances where they provide no opportunity to the Judge to reflect upon the facts, evidence and relevant case law. The LIV acknowledges the benefits of ex tempore judgments, which include clients knowing the result more quickly. However, members have reported that such quick turnover often results in a loss of appropriate careful consideration of the matter, at the cost of good decision making.

In particular, the more complex matters heard in the FCoA often require greater consideration of the law and facts, which may partially explain the higher rate of ex tempore judgements in the FCC. However, the higher number of FCC ex tempore judgements may be indicative of insufficient time to deal with the huge caseload discussed above, and may result in subsequent compromise in the manner in which judgements are delivered.

The Report itself acknowledges the potential pitfalls of pursuing ex tempore judgments too vigorously, including a restraint on proper deliberation and an increase in appeals, as well as higher costs, and longer delays.<sup>183</sup>

The LIV is concerned a greater emphasis on ex tempore judgements may negatively impact upon the capacity of the Australian public to access justice and decision-making in relation to a highly personal area of their lives and the lives of their children. The further delays the Report contemplates, operate to place the lives of individuals and families on hold.

## Cases pending

The Report notes that the number of matters pending in both courts continues to rise, with the number of pending cases older than 12 months having grown by 38% in the FCC, compared to 5% in the FCoA.

The Report's analysis of the higher number of pending cases and time to trial in both courts is a reflection of the chronic underfunding of the courts, which means cases are not addressed efficiently. The underfunding of the FCC appears to be particularly problematic considering the exponential growth in the number of pending cases.

The FCoA has been more efficient in maintaining the percentage of cases which are older than 12 months at a relatively stable level, despite an 8% increase in filings over the past 5 years and a decrease in the overall number of judges available to hear those matters.<sup>184</sup>

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<sup>182</sup> Ibid 31.

<sup>183</sup> Ibid 90.

<sup>184</sup> Family Court of Australia, *Annual Report 2017-2018*, 28.

The LIV notes there are currently 3,118 first instance final orders matter and 220 appeals pending in the FCoA, and the FCC has experienced a ‘considerable increase’ in pending cases.<sup>185</sup> Deputy Chief Justice Alstergren has asserted that ‘both courts could continue to operate - with no listings whatsoever - for the next 12 months and still not clear the backlog of pending cases’.<sup>186</sup>

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<sup>185</sup> Chief Justice Pascoe, ‘State of the Nation’, above n 11.

<sup>186</sup> Chief Judge Alstergren, above n 3.

# COMMUNITY EXPECTATIONS: JUSTICE

The LIV considers the Report's conclusion that the FCC is more efficient than the FCoA is not supported by the available evidence nor does it accord with members' experience.

The LIV agrees with the assertion in the Report that further implications of potential changes to the court system need to be tested before implementation. The LIV considers the inaccuracies contained in the Report undermine the conclusions the Report reaches.

The LIV agrees with the statement of the Honourable Justice Thackray, Chief Judge of the Family Court of Western Australia, 'we should be wary of law reform being driven by statistics produced by firms of accountants in the guise of measuring or quantifying the productivity of the courts'.<sup>187</sup>

The LIV acknowledges that it is difficult to look behind and beyond the finalisation statistics to see the outcomes actually experienced by Australian children and families participating in the current family law system.

As noted above, the PwC report does not reflect the actual process undertaken in the FCC and FCoA, nor does it reflect the difference between the data and the reality of the experience of the participants in Australia's family law system.

If the object of ensuring justice for Australian children and families is to be achieved, it needs to be kept in mind that justice is 'more a matter of quality than quantity, and the desired judicial product is not a decision, but a just decision according to law'.<sup>188</sup>

The LIV submits that a model that limits specialisation while prioritising finalisation statistics risks creating system where litigants are not given the benefits of proper and fair process, measured consideration of their dispute and a just outcome resulting from the correct application of the law. The LIV notes that those who are most vulnerable to the potential flaws in this system, are children and adults experiencing family violence.

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<sup>187</sup> Chief Judge Thackray, 'The Rule of Law and the Independence of the Judiciary: Values Lost or Conveniently Forgotten?' (Speech delivered at the David Malcolm Memorial Lecture, University of Notre Dame, Fremantle, 27 September 2018) 17 <[https://www.familycourt.wa.gov.au/\\_files/Publications\\_Reports/David\\_Malcolm\\_memorial\\_Lecture\\_2018.pdf](https://www.familycourt.wa.gov.au/_files/Publications_Reports/David_Malcolm_memorial_Lecture_2018.pdf)>

<sup>188</sup> Chief Justice Murray Gleeson, quoted in Chief Judge Thackray, above n 187, 17.

## ALTERNATIVE MODEL

The LIV commends the objective of the proposed structural reforms, to protect the people that use the federal family court system, to ensure justice is delivered and provide just outcomes.<sup>189</sup> The LIV also supports measures that increase efficiency and resolve the current ‘confusion, delay and unnecessary cost’ such people face.<sup>190</sup> However, the LIV cautions that the current proposal tends to prioritise efficiency over ensuring access to real protection to children and families by ensuring access to just outcomes in family law disputes. The LIV does not consider justice and efficiency to be dichotomous, but rather as two mutually inclusive imperatives.

The LIV does not envisage that it is possible to create a system from which every litigant will emerge satisfied, but rather suggests that this opportunity be taken to create a system whereby each litigant will have access to fair outcomes based on the expert application of the complex and specialist area of family law. There is no point in creating a system that decreases cost and delay by removing access to just outcomes in family law disputes.

The LIV submits that the proposed model, which abolishes the specialist Family Court, is unnecessary, and will result in significant adverse outcomes for the most vulnerable children and families in the family law jurisdiction. The flaws within the current system can be ameliorated through the implementation of some fundamental changes.

As outlined above, the efficiencies that form the purported basis of the proposed restructure are not based on an accurate modelling of the current system and do not reflect the experiences of children, families and practitioners in the family law jurisdiction. Therefore, the proposed model will not achieve the objective of ensuring *justice* is delivered *effectively* and *efficiently*.

The LIV submits the implementation of uniform rules and forms, practices and procedures, as well as a uniform approach to case management, will achieve the objective of efficiency while simultaneously not threatening the specialisation and expertise that ensure just outcome for Australian children and families.

These simpler and less intrusive reforms also require the federal family law jurisdiction to be adequately funded to ensure the ongoing excellent work undertaken by both courts and their

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<sup>189</sup> Federal Circuit and Family Court of Australia Bill 2018 (Cth) section 5(a) and (b).

<sup>190</sup> Attorney-General, Hon Christian Porter MP, ‘State of the Nation’, above n 4.



administrative support are able to operate at optimal levels, rather than the stressed and reactive situation currently being experienced in the Victorian courts.

## An overarching purpose

The LIV wishes to express its members' strong support for an overarching purpose that is binding on everybody, judicial officers, parties and practitioners.<sup>191</sup>

## Single point of entry

The LIV recommends the development of a single point of entry for the federal courts hearing family law matters. The LIV contends a single point of entry to the federal family law courts for Australian families will modernise and improve case management and reduce pressure on court resources.<sup>192</sup>

The LIV notes this recommendation reflects the recommendations made by the House of Representatives Standing Committee on Social Policy and Legal Affairs' report, *A Better Family Law System to Support and Protect Those Affected by Family Violence*.<sup>193</sup>

The LIV recommends the single point of entry consist of specialist case management Registrars to appropriately direct and triage family law matters. Matters should be assessed by the Registrar and sent to the FCoA or the FCC, as may be appropriate for the individual case. In addition, a judicial officer such as an FCC judge should be available to hear any urgent interim matters that require immediate judicial determination.

The LIV notes there is a similar process already undertaken in relation to divorce proceedings, where the FCC registry acts as a single point of entry. Pursuant to the Family Court of Australia Practice Direction No 6 of 2003, all divorce applications are filed in the FCC. All divorce applications have a court hearing before a Registrar of the FCC, and depending on the circumstances, the applicant may or may not be required to attend.

The LIV notes the Government's proposal claims to provide 'the single point of entry into the family law jurisdiction of the federal court system', however in reality, it merely provides a framework with

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<sup>191</sup> Federal Circuit and Family Court of Australia Bill 2018 (Cth) sections 157 and 158.

<sup>192</sup> Chief Justice Pascoe, 'State of the Nation', above n 11.

<sup>193</sup> *A Better Family Law System*, above n 37, 154 [4.254]; Chief Justice Pascoe, 'State of the Nation', above n 11.

the aim of ensuring common approaches to case management.<sup>194</sup> The Government is in effect relying on the dual commission of the Chief Judge of Division 2 and the Chief Justice of Division 1 to design new Court Rules that will then devise a single point of entry.<sup>195</sup> The LIV acknowledges the Government's clear intention that a common case management approach be adopted at some point in the future, but notes that the structure merely creates two separate divisions and does not resolve the issue of disparate case management practices.

## Harmonisation of rules, forms and procedures

The LIV considers the divergence between the Rules, forms and procedures of the FCC and FCoA is regrettable and has resulted in unnecessary confusion for families navigating the system.

The LIV further notes that, currently in the FCC each Judge has the discretion to conduct and manage cases as they see fit, which leads to opaque and inconsistent processes within the court, creating significant uncertainty. This has resulted in disparate processes between different Judges, for example:

- on a first return date, one Judge may hear interim arguments while another judge may consider the day a 'mention' and only proceed to give further case management directions; and
- call overs may be conducted in the morning by one judge, and another may call matters with litigants waiting outside for up to 8 hours in some instances.<sup>196</sup>

This uncertainty creates confusion amongst court users and practitioners who find it difficult to advise clients when they are also unsure of what will transpire once a proceeding is filed.

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<sup>194</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth) 3 [8]; Federal Circuit and Family Court of Australia Bill 2018 (Cth) section 5(a) and (b).

<sup>195</sup> Attorney-General, Hon Christian Porter MP, 'State of the Nation', above n 4.

<sup>196</sup> Law Council of Australia, Submission No 43 to Australian Law Reform Commission, *Review of the Family Law System*, 7 May 2018, 43-4 [152] ('Submission No 43').

Members have reported instances that demonstrate the disparate and inconsistent processes within the FCC, when the Judges do not have a background practicing family law:

A member has reported a troubling account of a parenting matter involving a family where the father was homeless and his litigation guardian had to withdraw at the last minute.

Although the court had already established the need for a litigation guardian, the Judge ordered that the hearing go ahead with the father as a self-represented litigant.

The Judge then proceeded to ask the Independent Children's Lawyer (ICL) for their opinion on how to deal with the property aspects of the case. After the ICL responded that they could not answer as how the property is dealt with as it is outside of their role, the Judge responded 'well surely you have an opinion on the matter...'.<sup>197</sup>

The LIV recommends harmonising the Rules and forms of the FCoA and the FCC to create a clearer and more accessible system for litigants to navigate. The LIV notes this recommendation reflects Proposal 3-2 of the ALRC Review of the Family Law System and recommendation 5 of the House of Representatives Standing Committee on Social Policy and Legal Affairs report *A Better Family Law System to Support and Protect Those Affected by Family Violence*.<sup>197</sup> The LIV submits uniform rules and forms will be particularly advantageous for the increasing numbers of self-represented litigants attempting to navigate the system alone. The LIV submits this would increase certainty and therefore, increase efficiency.

The LIV recommends consideration be given to a legislative change requiring the FCC to adopt the *Family Law Rules 2004* and forms of the FCoA when conducting family law matters. Similarly, the FCC could then adopt the *Federal Court Rules 2011* and forms of the FC in non-family law matters. The LIV considers issues arising from differences in the procedures of the two courts may be overcome by slightly altering the wording in some rules. For example, the rules relating to case assessment conferences could be altered to read 'in the event there is a case assessment conference ...'.<sup>198</sup>

The LIV notes the Government's proposed model merely provides a *framework* to facilitate cooperation between the two divisions with the *aim* of ensuring common rules of court and forms, and does not create them.<sup>198</sup> In fact, the proposal specifically provides for the continuity of the Rules

<sup>197</sup> *Review of the Family Law System: DP 86*, above n 5, 40; *A Better Family Law System*, above n 37, 154 [4.254].

<sup>198</sup> Federal Circuit and Family Court of Australia Bill 2018 (Cth) section 5(c).

of Court currently in force, stressing that the amendments alter who has the power to make the rules, and not what they contain.<sup>199</sup>

The only requirement in the Government's proposal is that the Chief Judge and Chief Justice must work cooperatively with the aim of ensuring common rules of court and forms.<sup>200</sup> The LIV notes that this is already occurring. The FCC and FCoA are working cooperatively to harmonise the rules of court, with working groups being organised, and a scope of work and budget being prepared.<sup>201</sup>

Further, the Government anticipates creating the new Court Rules will take time and effort and occur throughout 2019.<sup>202</sup> This indicates that the profession will not have access to the Rules, which are solely responsible for achieving the objects of the restructure, in order to assess the necessity of the restructure. In addition, the community will be left in a period of uncertainty during which the new court will exist, but there will be no rules to match.

The Attorney-General envisages a 'once in a generation opportunity' to re-design the rules using the 'collective wisdom' of practitioners and stressing the importance of consultation 'I am sure that the new Chief Justice and Deputy Chief Justice will seize the opportunity to have maximum input from the people at the practical legal coal face as to what works and what doesn't'.<sup>203</sup>

The LIV respectively cautions that, instead of fostering an environment of consultation, the Government's proposal limits the input of Judges in the family law jurisdiction. Currently under section 123 of the *Family Law Act 1975* a majority of Judges is required in order to make rules governing the practice and procedure of any court exercising jurisdiction under the Act. Under the proposals, the Chief Justice and Chief Judge alone are required to make the Rules of Court for their respective divisions.<sup>204</sup> This not only does not create a uniform set of rules, forms and procedures, it entirely relies on the Government's 'clear intention that there would be a single Chief Justice holding a dual commission' to both Divisions.<sup>205</sup> Therefore, the Government's proposal does nothing more than set the scene for a possible change to the rules, forms and procedures of the federal courts exercising family law jurisdiction.

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<sup>199</sup> Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) schedule 1, part 2, item 264; Explanatory Memorandum, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) 85 [532].

<sup>200</sup> Federal Circuit and Family Court of Australia Bill 2018 (Cth) sections 55 and 183.

<sup>201</sup> Chief Justice Pascoe, 'State of the Nation', above n 11.

<sup>202</sup> Attorney-General, Hon Christian Porter MP, 'State of the Nation', above n 4.

<sup>203</sup> Ibid.

<sup>204</sup> Federal Circuit and Family Court of Australia Bill 2018 (Cth) sections 56 and 184.

<sup>205</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) 183 [1011]; Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) schedule 2, items 469 and 476.

Further, the LIV considers that the proposal removes the considerable benefits of judges from different registries crafting rules that take in different perspectives formed in diverse environments. The LIV notes that not all of the registries are facing similar problems, and that having more than one judges' perspective to help form the rules ensures the rules will not be so narrow as to be inappropriate for one or more parts of the country.

The LIV notes that its recommendation has the advantage of actually achieving the objectives of the reforms, and in the alternative, suggests that the Courts be allowed to continue the project of harmonising the rules, forms and procedures on which they have already embarked.

## Resourcing

The LIV notes the courts are overburdened, and this has resulted in long delays in accessing the courts and in the resolution of disputes. The LIV is concerned that the overwhelming lists and time pressures placed on decision makers exercising family law jurisdiction can also lead to a dubious application of proper process, compromised decision making and unjust outcomes for Australian children and families.<sup>206</sup>

The LIV notes the issue of extraordinary and impractical lists in the FCC, where it is not 'uncommon for in excess of 30 matters to be listed' before a single judge in a single day (discussed above).<sup>207</sup>

The LIV notes that the FCoA has always been under-resourced, and the under-resourcing has been exacerbated by rapid rises in population. In 1976 there were 24 Family Court Judges to service the needs of a population of 10,825,479, which equates to 1 judge per 451,061.625 Australians, whereas in 2018 there are 33 Family Court Judges to service the needs of a population of 24,899,100, which equates to 1 judge per 754, 518.182.<sup>208</sup> These statistics are even more stark when the vast increase in the jurisdiction of the court (discussed above) is taken into account.

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<sup>206</sup> *Matenson & Matenson* [2018] FamCAFC 133 (20 July 2018) [71]; *A Better Family Law System*, above n 37, 288 [8.89].

<sup>207</sup> *Matenson & Matenson* [2018] FamCAFC 133 (20 July 2018).

<sup>208</sup> Family Court of Australia, 'Former Judges of the Family Court'

<<http://www.familycourt.gov.au/wps/wcm/connect/FCoAweb/about/judges-senior-staff/former-judges/>>; Australian Bureau of Statistics, 'Table 81 Population, sex and country of birth, states and territories, 1971 census (usual residence)'

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012006?OpenDocument>>; Australian Bureau of Statistics, *Australian Demographic Statistics, March quarter 2018* <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/3101.0>>; Family Court of Australia, *Annual Report 2017-2018*, 63-64.

A member has reported a recent experience before a Judge in the FCC, whose part heard matter was interrupted by two other matters:

The part heard matter did not commence until 11:00am and was interrupted again for some consent minutes before lunch. Additionally, the practitioner noted the Judge had started their sitting day at 9:30am to accommodate a mention, which quickly turned into a contested interim hearing.

Therefore, the Judge was obliged to read the materials for three matters, and even though they were overworked, they still had less than four hours to spend on the substantive case list.

The chopping between the cases takes time as there is a callover, and everyone has to state what they want.

The litigants in the part heard matter had the expense of their representatives sitting around awaiting their matter to be called on and the case took longer to hear as it was constantly interrupted.

The LIV submits the above issue will become even more marked in light of the expected further significant increases in the migration workload of the FCC, due to the increasing numbers of reviews by the Independent Assessment Authority of the 'asylum legacy caseload'.<sup>209</sup> The LIV notes a total of 5,314 new cases were filed in the year 2017-2018, with the court only managing to dispose of 3,786.<sup>210</sup> Migration already represents the largest jurisdiction in the FCC's general federal law defended hearing list and the FCC has acknowledged it is 'placing pressure on judicial resources'.<sup>211</sup>

Further, the LIV notes this has had a 'knock-on' effect in the FC workload, with an increase in migration appellate filings of over 30 percent in the 2017-2018 year, which has led to almost 80 percent of all appellate proceedings filed in the FC involving migration decisions.<sup>212</sup>

The LIV submits the burden on the FCC and the FC due to the increasing migration caseload, on top of the already impractical workload, makes any suggestion that the FCC and FC will have the capacity to deal with the more complex and specialised work of the FCoA, without any additional allocation of resources, even less credible.<sup>213</sup>

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<sup>209</sup> Federal Circuit Court of Australia, *Annual Report 2017-2018*, 66.

<sup>210</sup> *Ibid* 8.

<sup>211</sup> *Ibid* 66.

<sup>212</sup> Federal Court of Australia, *Annual Report 2017-2018*, 32; Federal Circuit Court of Australia, *Annual Report 2017-2018*, 69.

<sup>213</sup> Kayler-Thomson, above n 15, 7.

Therefore, the LIV recommends the federal courts exercising family law jurisdiction be immediately allocated additional resources for judicial officers, family report writers, registrars and other court personnel.<sup>214</sup>

## Modernisation

The LIV recommends the modernisation of court processes and forms as an essential element to attaining the object of efficiency.

The LIV supports the LCA's recommendation to develop an electronic interface for the transmission and or input of client data.<sup>215</sup> This online interface would replace multiple forms, and instead transmit client data and evidence directly to the court and parties, with the possibility of generating a form from the information if it is later required.<sup>216</sup> The LIV further notes that some people do not have access to or knowledge of the technology to use electronic interfaces, and therefore suggests paper forms remain available to assist people in this position.<sup>217</sup>

## Family Dispute Resolution

The LIV notes the Government's proposal has missed out on some readily available opportunities for improving the efficiency of the family law system. The LIV notes the introduction of strong legislative support of family dispute resolution in parenting matters, resulted in a reduction of 25% in the number of parenting filings.<sup>218</sup>

The LIV supports the ALRC's proposal to overhaul Parts II, III, IIIA and IIIB to enhance the availability and use of appropriate FDR in parenting, property and financial matters.<sup>219</sup>

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<sup>214</sup> *A Better Family Law System*, above n 37, 288 [8.91].

<sup>215</sup> *Submission No 43*, above n 199, 43 [152].

<sup>216</sup> *Ibid.*

<sup>217</sup> *Review of the Family Law System: DP 86*, above n 5, [3.31].

<sup>218</sup> *Ibid* [5.1]-[5.2].

<sup>219</sup> *Ibid.*

# CONCLUSION

The LIV fully supports the objectives of the proposed restructure. Unfortunately, the proposal as it stands is unlikely to deliver on these expectations and is likely to instead have extensive and unintended adverse consequences for the families and children who participate in the family law system.