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**SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL
AFFAIRS COMMITTEE INTO THE FEDERAL CIRCUIT COURT
AND FAMILY COURT OF AUSTRALIA BILL 2019 AND THE
FEDERAL CIRCUIT COURT AND FAMILY COURT OF AUSTRALIA
(CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL
PROVISIONS) BILL 2019**

Submitted by:	Victorian Women Lawyers Association Inc (VWL)
Submitted:	Online
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About us

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 600 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community.

Since 1996, VWL has advocated for the equal representation of women and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in the law and in the legal system, to achieve justice and equality for all women.

Details of our publications and submissions are available at www.vwl.asn.au under the 'Publications' tab.

Overview of submission and response

VWL welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee in relation to the Federal Circuit and Family Court of Australia Bill 2019 (**Bill**) and the Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019. Many of VWL's members are legal professionals who practice in family law.

Family law is an important and multifaceted area of law which touches the lives of many Australians. It often deals with emotionally, socially, culturally and legally complex issues, which must be appropriately managed by practitioners and courts to ensure the safety and wellbeing of individuals – particularly those who are most vulnerable such as women, children and those from culturally and linguistically diverse backgrounds.

If the Bill is passed in its current form:

- the Full Court of the Family Court of Australia (**Family Court**) would be abolished;
- the Family Court would become Division 1 of the Federal Circuit and Family Court of Australia (**FCFCA**) (**FCFCA (Division 1)**);
- the current Federal Circuit Court of Australia would become Division 2 of the FCFCA (**FCFCA (Division 2)**);
- the number of specialist family law judges would be reduced; and
- a single person could hold the position as both the Chief Justice of the FCFCA (Division 1) and Chief Judge of the FCFCA (Division 2).



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VWL does not support the Bill. In particular, VWL is concerned that:

- the Bill prioritises the efficiency of hearing and resolving family law matters over and above the safety and wellbeing of families and children;
- the Bill seeks to reduce the operating costs of hearing family law matters at the expense of ensuring the appropriateness of judicial outcomes;
- the proposed merger of the Family Court and the Federal Circuit Court lacks sufficient justification weighed against the interests of parties to family law proceedings, and goes against the recommendations of family law specialists.

Efficiency prioritised over the safety of Australian families

A primary justification for the merger of the Family Court and the Federal Circuit Court is to increase the efficiency of family law matters being heard by federal courts and to reduce the financial costs associated with managing their jurisdictions. VWL acknowledges that both of these goals are important, but is concerned that the Bill prioritises these objectives over the safety and wellbeing of Australian families.

VWL understands that the number of family law matters that require court hearings is significant and that the federal law jurisdiction currently faces delays in the hearing and resolution of family law matters.

In support of its proposal to abolish the Family Court, the Federal Government has relied on a commissioned report titled 'Review of the efficiency of the operation of the federal courts' by Price Waterhouse Cooper (**PwC report**). The PwC report estimates that after the restructure of the Family Court and the Federal Circuit Court proposed by the Bill, an extra 8,305 matters could be resolved each year including an extra 3,410 matters as a result of having a 'single court entity' with one point of entry. The recommendations in the PwC report are based on a key assumption – that 'in practice, both the courts hear matters of similar complexity'.¹

This is not the case.

As described in the Practitioner's Guide to Family Law (5th Edition) prepared by The Law Society of New South Wales (New South Wales Young Lawyers Family Law Committee):

The Family Court deals with the most complex and intractable parenting disputes requiring substantial court time. These cases often involve allegations of physical or sexual abuse of children; family violence; mental health issues and substance abuse. Other areas of family law affecting children dealt with by the Family Court include domestic and international relocation; international child abduction and the Hague Convention; and medical procedures requiring

¹ PwC Report, page 3.



court authorisation. The Family Court will also deal with those cases involving complex questions of jurisdiction or law.²

Moreover, the characteristics of family law litigants differ significantly to those of parties to commercial disputes. Many of these individuals have experienced traumatic family breakdowns and suffer from acute grief, financial or psychological distress, varying forms of abuse and social or cultural exclusion, all while trying to maintain employment and care for children. Managing individuals who find themselves in these circumstances through the court system requires appropriately designed court rules and procedures. Case management in the family law jurisdiction therefore requires a level of nuance and adaptivity that may not be available in generalist jurisdictions.

The Bill contains a number of provisions which purport to reduce financial inefficiencies in the court's structure, including by:

- reducing the number of Family Court judges hearing appeals from the Federal Circuit Court from three to one;
- providing no guarantee as to the future minimum number of judges in the Family Court;
- providing no guarantee as to the expertise in the appointment of judges; and
- enabling a single person to hold the position as both the Chief Justice of the FCFC (Division 1) and Chief Judge of the FCFC (Division 2).

VWL is concerned that reducing the multiplicity and experience of judicial voices will have an adverse effect on judicial outcomes. Family law issues do not occur in a vacuum. They arise from a variety of circumstances and communities.

As identified by the Queensland Law Society:

Overwhelmingly, it is the experience of our members that a lack of expertise in family law can result in erroneous decisions and poorer outcomes for families. In our view, there is a significant risk that the quality and propriety of family law decisions will be compromised where determinations are made by judicial officers without family law expertise. These decisions are also more likely to be appealed, increasing the demand on court services.³

In particular, a lack of judicial experience in the area of family law could result in increased risks for particularly vulnerable groups such as women and children, including victims of family violence, people with disabilities and those who identify as transgender or gender diverse.

² Practitioner's Guide to Family Law (5th Edition), page 10; available at: <https://www.lawsociety.com.au/sites/default/files/2018-05/The%20Practitioner%27s%20Guide%20to%20Family%20Law%205th%20Edition-ilovepdf-compressed.pdf>. See also Protocol for the division of work between the Family Court of Australia and the Federal Circuit Court published by the Chief Justice of the Family Court and the Chief Judge of the Federal Circuit Court in 2013 which provides guidance to practitioners identifying which court is most appropriate to commence family law matters in, available here:

<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/protocol-for-division-of-work-fcoa-fcc>.

³ Queensland Law Society, Submission to the Legal and Constitutional Affairs Committee Inquiry into the family law courts (28 September 2018), page 2.



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With regard to the proposal to enable the appointment of a single Chief Justice, the core reason behind this change is to free up 'considerable judicial resources to help reduce delays in family law appeal matters.' Given the often unique and sensitive issues drawn out by family law matters, VWL submits that it is essential to have a wider selection of judges developing family law jurisprudence, to reflect the heterogeneous families coming before the court, and foster a more progressive court system generally. VWL supports funding from the Australian Government which focuses on providing regular and consistent training for all professionals in this jurisdiction, including for family law judicial officers.

VWL echoes the sentiments of the Law Institute of Victoria 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.⁴

Bill lacks sufficient justification

The restructure proposed by the Bill is significant and will have broad and far reaching impacts on litigants, their families and the legal profession. Despite some limited independent research supporting the restructure by PWC, there has been overwhelming opposition to the Bill by family law experts and stakeholders, including a vast number of submissions from law societies and legal professionals calling for the Bill to be rejected. The Law Council of Australia has also identified a number of limitations and flaws in the PWC report.⁵

Concluding remarks

VWL does not support the Bill, and echoes the concerns raised by numerous other groups who strongly oppose the dissolution of the Family Court and the watering down of the specialist nature of the family law jurisdiction. VWL considers that the changes proposed by the Bill amount to significant changes that are sought to be made by the Federal Government absent of an appropriate justification. VWL is concerned that these changes would seriously undermine effectiveness of the family law jurisdiction, putting the safety and wellbeing of Australian families at risk, including the most vulnerable members of society including Aboriginal and Torres Strait Islander families, while not necessarily resulting in any marked increases to efficiency.

⁴ Law Institute of Victoria, Submission to the Legal and Constitutional Affairs Committee Inquiry into the family law courts (23 November 2018), page 7; available at: https://www.liv.asn.au/getattachment/Staying-Informed/Submissions/submissions/November-2018/Submission-to-the-inquiry-into-the-family-law-court/20181106_SUB_FederalCourtRestructure.pdf.aspx

⁵ Law Council of Australia, Submission to the Legal and Constitutional Affairs Committee Inquiry into the family law courts (23 November 2018), pages 34 to 44; available at: <https://www.lawcouncil.asn.au/docs/614e0879-cff9-e811-93fc-005056be13b5/3553%20-%20FC%20and%20FCA%20Bill%202018%20Bill%20Consequential%20Amendments%20and%20Transitional%20Provisions%20Bill%202018.pdf>



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Instead, VWL considers that increasing efficiency would be more effectively achieved by improved case management within the current system and holistic structural reform within the Family Court. VWL supports the recommendations contained within the Small Claims, Large Battles report produced by Women's Legal Service Victoria.

Efficiency and reduced delays can be promoted by implementing the recommendations contained within that report including:

- Streamlining court processes for small claims (recommendations 1-3)
- Improving financial disclosure in property matters (recommendation 4)
- Simplifying the superannuation splitting system (recommendations 5-8)
- Dealing with joint debts in the court system more effectively (recommendation 9)
- Responding to family violence in property matters (recommendations 10-12).

VWL calls on the Federal Government to consider adding resources to a system that is already overworked and underfunded, including regular and consistent training for professionals, not seeking to reduce much needed funding to families and communities who are most at risk. VWL also calls for wider consultation with family law specialists and experts before any steps to radically change the current system are made.

Annexure A

Small Claims, Large Battles Research Report, 2018, Women's Legal Service Victoria

Victoria Muravchenkov

VWL, Co-Chair Law Reform Committee

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