Attorney-General's Department

Questions on Notice – Senate Legal and Constitutional Affairs Legislation Committee, public hearing, Brisbane, 13 December 2018

Inquiry into the Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018

Question on notice no. 1

Senator HANSON: Under the new act, you're going to give the discretion to the judges to actually impose a fine on the lawyers who are prolonging the case, or if they believe they are. How is that going to be enforced? Do the defendants or whoever make an acknowledgment to the judge themselves? How do they go about this?
Dr Smrdel: How they would go about it would be a matter for the judge of the court. The provisions were picked up from the Federal Court of Australia Act. That requires parties to act consistently with the overarching purpose, which puts the obligation on lawyers as well. We queried the Federal Court as to how they went about it, and they actually said that, in their estimation, the provision itself has such a deterrence effect that they've never had to actually exercise that power of exercising personal costs against lawyers.
Senator HANSON: I understand that it's in the bill that they can actually make this determination. Does it state in the bill how a person can actually make the allegations? What are the guidelines for the person doing it? If you've got a person who's there defending themselves or the litigant, can they put in a written submission and say to the judge, 'Listen, I think he's ripping me off; I want you to make the determination'? How do they go about it? What happens? Does the judge just say, 'Listen, I see your solicitor's been hanging around here for quite a while; he's actually continued those questions and I think he's maybe cheating you out of money, so I'm going to make an order against him'? If you've got it in the bill, how is it going to work?
Mr Anderson: It's a very broad discretionary power. The provisions say 'without limiting the exercise of discretion', so it's really left to a particular judge who has a concern. The normal process would be that, if a judge is going to consider making such an order, they'd at least advise the lawyer that they were proposing to make such an order. They would be required to give the lawyer the opportunity to be heard as to whether such an order should be made, so it would be a process not unlike the making of any order. There'd be consideration in open court of whether that order should be made.
Senator PATRICK: Could it be an application in that case from a party to the judge? So, if I was one of the parties and I thought the other side were deliberately slowing things down, could I make an application in the case?
Senator HANSON: That's what I want to know: how do you go about it?
Mr Anderson: There's nothing in the bill that sets out a process for that—
Senator HANSON: It needs to be looked at.
Mr Anderson: it just says it's a power that's proposed to be given to the court.
Senator PATRICK: Would that be in the court rules?
CHAIR: It's in the act.
Senator HANSON: What is happening with a lot of people is that sometimes either the litigant or the defendant or whatever are actually dragged through the court system to wear them down so they have no more finances left to actually fight the case. This is what

happens; it depends on how much money you have. In New South Wales—it's not to do with this; it's about property—the law states that you cannot extend it to cost any more than the property. So they're guided by that. They can't keep going and going until there's no more money left. They're reined in. Can that be actually determined here in this bill so that these cases cannot be dragged on by lawyers and solicitors until the families have lost their homes and lost everything.

Mr Anderson: The intention of the provision is that if a judge forms a view that a legal representative is not acting in the best interest of their parties and is acting in a manner that's inconsistent with the overarching purpose of family law, that can be raised with the practitioner and, ultimately, they can be sanctioned by having this order made. The best analogy is actually the existing Federal Court practice, which we believe hasn't actually been used, but we can take on notice to come back with how the Federal Court currently deals with that in its rules.

Senator HANSON: Or the New South Wales court. It can probably be put in the bill to protect people out there who are losing their homes and losing everything to try and get justice in our court system.

Answer

In devising structural reform of the family court system, the Government has recognised the priority of ensuring against excessive and unnecessary legal costs. As well as the essential efficiencies in timelines that can be achieved under the FCFC Bills and which themselves will translate into lower legal costs, the proposed reforms adopt a mechanism to prevent excessive legal costs that has proved successful in the Federal Court of Australia.

Since 2010, provisions[1] in the *Federal Court of Australia Act 1976* have been operating which impose on the Federal Court, its litigants and their lawyers a mutual obligation to facilitate the just resolution of disputes that are before the Court according to law and as quickly, inexpensively and efficiently as possible[2]. More specifically, the provisions make it clear that this obligation includes resolution of any particular dispute at a cost that is proportionate to the importance and complexity of what is in dispute and is not limited to any particular proceedings but extends also to the efficient and timely disposal of the Federal Court's overall caseload[3]. Failure to act in a way that is consistent with these obligations can result in an adverse costs order (including that a lawyer bear costs personally) or, in an extreme situation, dismissal of the proceeding wholly or in part or striking out of a defence[4]. In appropriate circumstances, it may result in a proceedings being stayed[5] or leave to appeal being refused[6].

These provisions have proved effective in strengthening the control that the Federal Court has in case managing proceedings and has had an effect on litigants and their lawyers in being more considered and careful in the commencement and conduct of litigation in the Federal Court. The latter has been supplemented and reinforced by rules and practice notes clarifying that:

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[1] Sections 37M, 37N and 37P

[2] Subsections 37M(1) and (3) and 37N(1), (2) and (4)

[3] Subsection 37M(2)

[4] Subsection 37P(6)

[5] *Mijac investments Pty Ltd v Graham* [2010] FCA 869 and *Apotex Pty Ltd v Les Laboratories Servier (No 6)* [2012] FCA 745

[6] *Ecap Finance Pty Ltd v Ottoway Engineering Pty Ltd (No 2)* [2017] FCA 237

- parties and their lawyers are expected to co-operate with the Court and each other in identifying the real issues in dispute early in the course of each proceeding
- dealing with those issues efficiently
- eliminating unnecessary "process-driven" costs
- considering alternative dispute resolution options not only as a means of to resolve the whole dispute but as a means of limiting or resolving issues by agreement and interlocutory disputes.

The Federal Court has also made rules[7] permitting a party to apply to the Federal Court if he or she believes that additional costs have been incurred in a proceeding because of misconduct by a party's lawyer[8]. In addition, the Federal Court will order that costs be paid personally by a lawyer on its own initiative wherever it believe this to be in the interests of justice[9] although this power must only be exercised with care and on notice to and with an opportunity of response by the lawyer[10].

The need for active case management of civil matters has also been recognised in changes in court practices and procedures adopted since 2010 in all States and Territories with legislation mirroring in the main the provisions of the *Federal Court of Australia Act 1976*.

In an article discussing delay reduction in courts, the Chief Justice of the Federal Court at the time that the above provisions were introduced, Michael Black AC QC, said:

> "Any legislative indication of policy must stand as a powerful indication of the will of the Parliament about the values sought to be achieved by the way in which cases are managed in the courts and the balances that have to be struck … Legislation imposing positive duties upon litigants and practitioners will help to change attitudes and, within constitutionally permissible limits, will confirm that judges do have the power they need to require parties to cooperate to bring about the just resolution of disputes as quickly, inexpensively and efficiently as possible.[11]"

An important part of the present reforms is a strengthening of the ability to case manage and control costs in proceedings in the FCFC to ensure against excessive legal costs being unfairly borne by parties in family law proceedings. Without the passage of the Bills, there will be no additional powers for the courts to assist in keeping legal costs down.

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[7] Rule 40.07 *Federal Court Rules 2011*
[8] *Menzies v Paccar Financial Pty Ltd* [2011] FCA 1161
[9] *Dahler v Australian Capital Territory (No 2)* [2014] FCA 1154
[10] *Mitra Lawyers v Barnden* [2014] FCA 918

[11] *The role of the judge in attacking endemic delays: Some lessons from Fast Track* (2009) 19 Journal of Judicial Administration 88, 92- 3)

Question on notice no. 2

Senator PATRICK: I just wanted to draw your attention to the Law Council's submission. They've gone to great detail to spell out these delays in appointments for judicial officers. Perhaps on notice you could respond to those delays and explain what why it is that we're not getting those appointments. There might be very good reasons. They set it out. Justice Berman took 14 months. Justice Cole took a year. Justice Heffernan took a year. Some of these numbers are awful. I'm just trying to get an explanation as to why it is that we're not getting judges appointed in a timely fashion.
Mr Anderson: We'll take it on notice.

Answer

The Government undertakes to make appointments in a timely fashion, noting the careful consideration that must be given to ensure that appointments to the federal judiciary align with the high standard that Australians expect and deserve. There may be, however, a number of reasons for gaps between the retirement of a particular judge and the appointment of another judge.

In some cases judges may resign ahead of their Constitutional retirement age, and the notice provided may be insufficient for appropriate consultation and Government consideration of a judicial appointment prior to that retirement date. In other instances, after consultation with bodies such as the Law Council of Australia, a particular barrister is considered the most suitable long term appointment but that individual may because of their commitments to clients not be able to start in the position for several months. This is largely out of the control of the executive of the day and often the fact that the most suitable appointment represents a delayed start compared to another candidate is a compromise considered appropriate in the long term interest of the Court and its users. A retirement enables the Government and the courts to assess workload pressures on a national basis and for new appointments to be made that respond to changing needs across all jurisdictions. For example, as the tables below demonstrate, the number of judges in the Federal Circuit Court has tended to increase over time, while numbers of Family Court judges has fluctuated up and down.

On a number of occasions the government of the day has responded to a judge retiring in one court Registry by appointing a new judge to a different Registry of that court. On a number of occasions the government of the day has responded to a Judge retiring in one court by appointing a new judge to a different court. In rarer cases current judges have passed away unexpectedly.

There is not a fixed number of judges in each Registry of the federal courts (excluding the High Court), and it is not strictly required that a retiring judge must be replaced. On that basis, what may appear to be a failure to ‘replace’ a judge may be a reallocation of judicial resources.

Family Court of Australia	
Year	**Number of judges appointed**
2017-18 Annual Report - as at 30 June 2018	38 judges (includes 5 judges of FCWA)
2016-17 Annual Report – as at 30 June 2017	37 judges (includes 5 judges of FCWA)
2015-16 Annual Report – as at 30 June 2016	40 judges (includes 5 judges of FCWA)
2014-15 Annual Report – as at 30 June 2015	38 judges (includes 5 judges of FCWA)
2013-14 Annual Report – as at 30 June 2014	38 judges (includes 5 judges of FCWA)
2012-13 Annual Report – as at 30 June 2013	36 judges (includes 6 judges of FCWA)
2011-12 Annual Report – as at 30 June 2012	35 judges (includes 5 judges of FCWA)
2010-11 Annual Report – as at 30 June 2011	36 judges (includes 5 judges of FCWA)
2009-10 Annual Report – as at 30 June 2010	35 judges (includes 5 judges of FCWA)
2008-09 Annual Report – as at 30 June 2009	39 judges (includes 5 judges of FCWA)
2007-08 Annual Report – as at 30 June 2008	39 judges (includes 5 judges of FCWA)
2006-07 Annual Report – as at 30 June 2007	40 judges (includes 4 judges of FCWA)

Federal Circuit Court of Australia	
Year	**Number of judges appointed**
2017-18 Annual Report - as at 30 June 2018	69 judges[12]
2016-17 Annual Report – as at 30 June 2017	64 judges[13]
2015-16 Annual Report – as at 30 June 2016	65 judges
2014-15 Annual Report – as at 30 June 2015	61 judges
2013-14 Annual Report – as at 30 June 2014	65 judges[14]
2012-13 Annual Report – as at 30 June 2013	64 judges[15]
2011-12 Annual Report – as at 30 June 2012	63 federal magistrates
2010-11 Annual Report – as at 30 June 2011	62 federal magistrates
2009-10 Annual Report – as at 30 June 2010	61 federal magistrates
2008-09 Annual Report – as at 30 June 2009	62 federal magistrates
2007-08 Annual Report – as at 30 June 2008	53 federal magistrates
2006-07 Annual Report – as at 30 June 2007	49 federal magistrates

[12] Chief Judge Pascoe resigned to take up commission as the Chief Justice of the Family Court, Judge Baumann resigned to take up commission as a Justice of the Family Court.

[13] Includes Judge Myers who was on secondment as the Commissioner of the Australian Law Reform Commission inquiry into the incarceration rate of Indigenous Australians.

[14] Judge Foster resigned to take up commission as a Justice of the Family Court.

[15] Judge Walters resigned to take up appointment in the Family Court of Western Australia.

Question on notice no. 3

Senator PATRICK: I understand that. If I take that on face value, that means you have got no pool to draw from in order to populate the family law appeal division of the Federal Court.
Mr Anderson: Unless you take, say, seven of the 10 and appoint three. That's a matter for the government.
Senator PATRICK: Yes, but you'd appreciate that, in terms of us deciding whether to vote for or against this legislation, we might want the whole plan put before us, not part of the plan. Is it likely that those details will be made available to us before this legislation gets debated in the Senate?
Mr Anderson: We can only seek advice from the Attorney as to what he can come forward with.
Senator PATRICK: Is the department working on a plan at the moment for if the legislation were to pass? Presumably, you guys have a plan that you would execute once the legislation is passed. Of course, this was supposed to be passed by 1 January this year, so one presumes you have a plan.
Mr Anderson: We are happy to take it on notice and see what we can tell you about the plans for the appeal division.

Answer

There are a number of ways in which the proposed Family Law Appeal Division (FLAD) of the Federal Court can be constituted with judicial officers who possess specific and significant family law expertise. This could involve appointments from the existing judicial officers of the Appeal Division of the Family Court of Australia or suitable appointments from the legal profession to the new FLAD. Ultimately this is a matter for the Government to consider in close consultation with the Chief Justice of the Federal Court, the proposed FCFC and other stakeholders.

Given those consultations are essentially employment processes, they have traditionally and necessarily involved approaches to individuals, many of whom are presently in private legal practice. These are processes involving important career decisions for individuals in and outside the judiciary. They have always been conducted with a conventional group of stakeholders on a confidential and private basis and have not been the subject of public proposals put before the Parliament at large.

With this in mind, the Attorney-General has informed the Department that, to the extent that is appropriate, he may be able to discuss with the Senator personally a range of options for these appointments that are presently being considered.

Question on notice no. 4

CHAIR: And you'll make up the difference with—okay, it would be better for a mathematician to work on that. Professor Parkinson made some recommendations. Ignoring recommendation 2, could you give me a brief comment, on notice, on Professor Parkinson's recommendations. Some of them are fairly technical; some of them relate to nomenclature; and some seem to highlight deficiencies, where the Chief Justice and Chief Judge would be consulting himself. Could I get either your comments on or explanations of those on notice. Now between you all you've confused me. There are 61 Circuit Court judges—

Answer

Professor Parkinson's recommendation 1 is that the legislation should specify a minimum number of judges to be appointed at all times to the FCFC (Division 1) of the proposed court.

There is currently no prescribed number of judges that are required to be appointed to the Family Court of Australia (or to the Federal Circuit Court of Australia). Subsection 21(3) of the Family Law Act 1975 allows a maximum number of Senior Judges and other Judges to be prescribed. The Family Law (Judges) Regulations, which sunsetted on 1 October 2017, provided that the maximum number of judges to be appointed to the Family Court was 54.

The Bill does not currently specify a minimum number of judges to be appointed to the FCFC (Division 1) or the FCFC (Division 2). This is to allow the Government of the day flexibility to determine how many judges are required to deal with the workload (and future workload) of the FCFC, which recent experience has shown can and does change considerably in relatively short periods of time.

Professor Parkinson's recommendation 3 is that the Consequential Amendments Bill provide that, to be appointed, members of the Family Law Appeal Division should have at least five years' experience as a judge hearing cases under the Family Law Act or otherwise be suitable for appointment by reason of their training and experience in family law, to determine appeals in such matters.

The Consequential Bill provides the following new criteria for a person to be appointed to be a judge of the Federal Court:

'the person has appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Court.'

The intention of this provision is to ensure that those persons appointed as judges of the Federal Court who are assigned to the Family Law Appeal Division, or who exercise the Federal Court's jurisdiction in the Family Law Appeal Division, have the appropriate expertise in family law. The provision will apply broadly to all new judges appointed to the Federal Court, further ensuring that the judges of the Federal Court continue to have the appropriate expertise to deal with matters before the Court.

Professor Parkinson's recommendation 4 is that the reference to senior judges in s.9(2) of the Court Bill be deleted.

There are currently no Senior Judges of the Family Court. The reference to Senior Judges has been retained in the FCFC Bill as the removal of this term did not appear to the Government

as pivotal to the efficiencies sought to be achieved and so was not part of current considerations for structural reform to the Court.

Professor Parkinson's recommendation 5 is that the Bill be amended so that where one person holds both the office of Chief Justice and Chief Judge, he or she will be known as the Chief Justice of the Federal Circuit and Family Court of Australia. The same should apply to the Deputy Chief. Alternatively, this nomenclature should be left to regulation or custom.

It is the department's preference that the nomenclature for a person who holds both the office of Chief Justice and Chief Judge be left to custom. This preference also applies to a person who holds both the office of Deputy Chief Justice and Deputy Chief Judge. This is because the FCFC (Division 1) and the FCFC (Division 2) are still two courts and exercise jurisdiction as separate courts, and the offices of Chief Justice and Chief Judge remain separate offices.

Professor Parkinson's recommendation 6 is that unless the Government intends that the offices of Chief Justice and Chief Judge be held by separate persons, s.55 and 183, and any other sections which presuppose two different office-holders should be deleted.

Clauses 55 and 183 of the FCFC Bill aim to ensure the efficient resolution of family law and child support proceedings in the FCFC. They do this by providing that the Chief Justice of the FCFC (Division 1) and the Chief Judge of the FCFC (Division 2) must work cooperatively with the aim of ensuring common rules of court and forms and practice and procedures across the FCFC. Clauses 55 and 183 should also be read with clauses 20 and 97.

The department recognises that the operation of these provisions may be perceived as awkward where the same person occupies the offices of the Chief Justice and the Chief Judge, but the provisions are not defective and they are absolutely necessary should the positions ever be held by separate people at a future time.

A possible option could be to amend the reference to working cooperatively so that, for example, clause 55 provides that for the purposes of ensuring the efficient resolution of family law or child support proceedings the Chief Justice must aim to ensure common rules of court and forms and common practices and procedures across both Divisions of the FCFC and that the requirement to work cooperatively with the Chief Judge applies only when the Chief Justice is not also the Chief Judge.

Professor Parkinson's recommendation 7 is that the power to make Rules of Court should either be vested in the Chief Justice and Chief Judge, with support from a majority of the other judges in each Division, or in a majority of judges (see ss.123 and 124 of the Family Law Act).

As outlined in the Explanatory Memorandum to the Bill, providing that Rules of Court can be made by the Chief Justice and Chief Judge is intended to enable consistency between the Rules of Court that apply in the FCFC (Division 1) and FCFC (Division 2).

While the department recognises that, theoretically, this consistency could be achieved without changing the rule-making power, the unavoidable fact remains that in the history of the present arrangement the critical goal of a consistent set of Rules of Court has never been able to be achieved. This is because the Family Court and the Federal Circuit Court have their own separate rule making powers (see section 123 of the *Family Law Act 1975* and section 81 of the *Federal Circuit Court of Australia Act 1999*). The Rules of Court for the Family Court are made by a majority of Family Court judges and do not apply to the Federal Circuit Court.

The Rules of Court for the Federal Circuit Court are made by a majority of Federal Circuit Court judges and do not apply to the Family Court. Consequently, for the Rules of Court to be the same across both the Family Court and the Federal Circuit Court, a majority of judges in each respective court would need to agree to such Rules of Court.

Vesting the power to make Rules of Court in the Chief Justice and Chief Judge, with support from a majority of the other judges in each respective Division is in effect a duplication of the structure that has prevented a consolidated set of Rules of Court to date.

The Government considers that every historical indication is that a necessary precursor to achieving the goal of consistent Rules of Court between the Family Court and the Federal Circuit Court or, as part of the proposed structural reforms, between FCFC (Division 1) and FCFC (Division 2) is a change to the rule-making power. The Government proposes to make one Chief Justice ultimately responsible for facilitating the introduction of common rules across both Divisions of the FCFC. The Government's view is that while this process should involve appropriate consultation between Heads of Jurisdiction and their judicial personnel, expecting that a process statutorily requiring two majorities between two different Courts (or two different Divisions of a merged Court) to agree will, as present requirements have done for the past decade, result in no progress being made in realising this critical goal.

The Bills contemplate the Chief Justice/Chief Judge establishing Committees to advise on Rules of Court (see clauses 61 and 215), which is the same arrangement as currently contained in section 124 of the Family Law Act, and the Chief Justice/Chief Judge being responsible for ensuring the effective, orderly and expeditious discharge of the business of each respective court.

Professor Parkinson's recommendation 8 is that the Bill should provide that all matters commence in the FCFC (Division 2) unless (a) the parties agree that the case should be heard in the FCFC (Division 1) and a judge of the FCFC (Division 2) (in chambers) agrees to the transfer; or (b) the Division 2 judge orders the transfer, after giving the parties an opportunity to be heard.

Under the FCFC Bill, the FCFC (Division 1) and the FCFC (Division 2) will remain two separate courts. Matters filed in either Division will be case managed to ensure a single point of entry for all family law and child support matters.

Question on notice no. 5

CHAIR: Is it possible for the 15 non-family law Federal Circuit Court judges to find themselves in a family court matter?
Dr Smrdel: Listing of cases is a responsibility for the court.
CHAIR: We've heard that that's a junior clerk at the reception desk. This morning we heard it was a computer that actually decided those things. I'm not sure the computer would be able to work out which judge was exclusively a general law judge.
Dr Smrdel: We'll need to take that on notice. We'll follow up with the court to see if they have any information about that.
CHAIR: This begs the question about judges in single court registries—Townsville was one mentioned to us, and I think Adelaide was mentioned to us as being a single court registry—and how, if they don't happen to have experience in Family Court matters, you can't go to another judge. You're stuck with that one. I must confess that although I come from Townsville, I don't know who the judge is and what his experience is, so I'm not referring to him except that Townsville was mentioned as a single court judge. I think Rockhampton and Cairns were also mentioned. So if the judges appointed to those do not have any family law experience then that makes it difficult to get justice in family law matters in those registries. Could you agree with that?
Dr Smrdel: We'll need to take that on notice in terms of the actual expertise of the sitting judges in those registries.

Answer

Of the 68 current judges of the Federal Circuit Court, 41 are experienced family law specialists; 15 have expertise in family law and general federal law and conduct trials in both family and general federal law; and 12 judges have expertise in general federal law only.[16] Generally those judges that have expertise only in general federal law do not hear family law matters. All judges who sit as the sole resident judge in a registry of the Court have extensive family law experience. Judge Wills, Judge Middleton and Judge Demack who sit in Cairns, Townsville and Rockhampton respectively are family law specialists.

[16] Figures as at 1 November 2018.

Question on notice no. 6

CHAIR: Finally—and I say 'Merry Christmas' with this—can you get one of your staff who you don't like to go through the transcript of the evidence that we've sat through for the last four or five days and identify statements of fact made to us by witnesses that are not accurate? Now I don't ask you to do this with opinions, simply statements of fact. As I say, I may have misunderstood this, but I understood evidence given to us about the appellate court—I forget which witness it was—was that all appeals would go in the first instance to single judges of the appellate jurisdiction, whereas you're saying that doesn't apply to division 1 appeals. As I say, I might have got that wrong, but if you could get someone who might have been listening and who might have made notes to do this as a question on notice. Do this as best you can. We won't be checking. But I think there have been, from what you've told us, some misunderstandings by those that have given us evidence of the fact of the matter—not of opinions, but of the fact of the matter—and it perhaps would be useful to us, and indeed to the people who did that, if we could just clarify where there are wrong facts—not opinions, facts.

Answer

Several misconceptions were raised by witnesses during their appearances before the Committee as to the content and effect of the FCFC Bills. These have been broadly captured and addressed below.

A) The legislation abolishes the Family Court of Australia.

The legislation does not abolish the Family Court of Australia. Clause 8 of the FCFC Bill provides that the Family Court is continued in existence as the FCFC (Division 1).

B) The legislation will not allow any further appointments to the FCFC (Division 1).

The legislation does not prevent the Government or a future Government from making further appointments to the FCFC (Division 1). Clause 11 of the FCFC Bill specifically provides for the appointment of Judges to the FCFC (Division 1).

C) All appeals from the FCFC (Division 1) will be heard by a single judge of the Family Law Appeal Division of the Federal Court of Australia.

Appeals from decisions of Judges of the FCFC (Division 1) are to be heard by the Full Court of the Family Law Appeal Division of the Federal Court of Australia. Existing subsection 25(1) of the *Federal Court of Australia Act 1976* provides that the appellate jurisdiction of the Federal Court, subject to section 25 and the provisions of any other Act, be exercised by a Full Court. The Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 does not change the operation of this subsection in relation to appeals from decisions of Judges of the FCFC (Division 1), meaning that those decisions will be heard by a Full Court.

D) The Family Court of Australia will lose its status as a superior court of record.

Subclause 9(1) of the FCFC Bill provides that the FCFC (Division 1) will continue as a superior court of record, and a court of law and equity.

E) FCFC (Division 2) judges do not possess the necessary experience to deal with the complexities inherent in family law matters.

The Federal Circuit Court of Australia conducts approximately 89 per cent of all family law cases, including a great number of highly complex parenting and property matters. Many of these matters exceed 4 days in trial duration and include issues of sexual abuse and allegations of unacceptable risk, alienation, surrogacy, complex questions of jurisdiction, complex property issues including bankruptcy, third party creditors, trusts and inter-familial loans, inheritances and taxation issues.

Further, the existing Federal Circuit Court has the highest number of specialist family law judges – 41 with an average of 25 years' experience in family law, as well as an additional 15 highly experienced judges who sit in the family law jurisdiction.

Question on notice no. 7

Mr Anderson: Chair, if I can just come back to something raised by Senator Patrick on the question of consultation on the bills. We'll actually take that on notice as well just in terms of consultation before the bills were—
Senator PATRICK: I'm interested in that, if you could indicate the bodies to whom consultation was sought and the nature of that consultation.
Mr Anderson: On notice, Senator.

Answer

The department consulted with officers of the federal courts in the development of the FCFC Bills. Exposure drafts of the legislation package were provided on an embargoed basis to select members of the Law Council of Australia and the Australian Bar Association for comment. The department also consulted with the Western Australian Department of Justice on the aspects of the reforms affecting Western Australia.

The current and former Attorney-Generals also consulted exhaustively over more than 12 months with the heads of each jurisdiction – the Federal Court, the Family Court and the Federal Circuit – in accordance with the endorsed process required by the *Guide to Judicial Conduct* (Third Edition).[17]

[17] 'Communication with the other branches of government on behalf of the judiciary is the responsibility of the head of jurisdiction or of the Chief Justice'. *Guide to Judicial Conduct (Third Edition)* (2017) pg 6; Australian Institute of Judicial Administration (https://aija.org.au/wp-content/uploads/2017/12/GUIDE-TO-JUDICIAL-CONDUCT-3rd-Edition.pdf)