LAW INSTITUTE VICTORIA

Federal Circuit Court and Family Court of Australia Bill 2019 and Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019

To: **Senate Legal and Constitutional Affairs Legislation Committee**
Date: **Friday, 15 May 2020**

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INTRODUCTION

The Law Institute of Victoria ('**LIV**') welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee ('**Senate Committee**') inquiry into the provisions of the *Federal Circuit and Family Court of Australia Bill 2019* and the *Federal Circuit* and *Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019* ('**FCFCA Bill 2019**').

The LIV is the peak membership body for the Victorian legal profession, representing approximately 19,000 lawyers, students and people working in the law in Victoria, interstate and overseas. Its members are legal professionals from all practice areas, and work in the courts, academia, policy, state and federal government, community legal centres and private practice. 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.

The LIV's membership includes expert lawyers who specialise in assisting vulnerable families and children, who seek access to the justice system and early resolution of their family law dispute which often involves a highly stressful environment and complex factual circumstances to be resolved by the family law jurisdiction. As a constituent body of the Law Council of Australia ('**LCA**'), the LIV has contributed to and supports the LCA submission to the Senate Committee for the above inquiry. The LCA submission represents several 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 had input from members of the LIV's Family Law Section, which is comprised of over 2,000 members working and studying in the legal sector in Victoria.

The LIV welcomes any further opportunity to provide feedback and be consulted on any proposed changes to the family law jurisdiction.

LIST OF ABBREVIATIONS

Term	Abbreviation
Australian Law Reform Commission	ALRC
Australian Law Reform Commission Review of the Family Law System Discussion Paper – October 2018	ALRC Discussion Paper
Australian Law Reform Commission Review of the Family Law System	ALRC Final Report
Federal Circuit and Family Court of Australia Bill 2018	FCFCA Bill 2018
Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018	FCFCA (CATP) Bill 2018
Federal Circuit and Family Court of Australia Bill 2019	FCFCA Bill 2019
Federal Circuit Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019	FCFCA (CATP) Bill 2019
Federal Circuit Court of Australia	FCC
Federal Circuit and Family Court of Australia	FCFC
Family Court of Australia	FCoA
Federal Court of Australia	FC
Law Council of Australia	LCA
Law Institute Victoria	LIV
'Review of efficiency of the operation of the federal courts', Final Report, April 2018 by PwC, and subsequently released in redacted form by the Federal Government	PwC Report

EXECUTIVE SUMMARY

The LIV supports 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 reiterates the position stated in LIV's 2018 submission (copy attached) on the FCFCA Bill 2018, which supported the key objectives of the proposed structural reforms. In the LIV's view, achieving those objectives was and is essential to resolve "confusion, delay and unnecessary cost"[1], in order for parties to achieve just resolution of their family law disputes[2].

The LIV agrees with the aims stated in the Explanatory Memorandum of the FCFCA Bill 2019[3] and fully supports reforms that improve efficiency for family law litigants. The LIV emphasises that improving outcomes for children and families should be the paramount consideration of any reform process, and is essential to enhancing the continued development of the Australian family law system.

The LIV agrees that:

1. the government, family law courts and legal sector must work to improve outcomes for families and children in the family law system;

2. the family law system must deliver justice by which a timely, efficient and cost-effective resolution of disputes protects the most vulnerable parties, including victims and survivors of family violence; and

3. the Harmonisation of Rules Project undertaken by the FCoA and FCC to harmonise rules and forms, and unification of procedures, will reduce costs and encourage timely resolution of disputes which might not otherwise have an opportunity to be resolved by just means.

The LIV recommends that:

1. the family law jurisdiction be properly resourced with urgent additional resources for judicial officers, family report writers, registrars and court personnel. A properly resourced family law court system should adequately respond to the increasing demand for which the administration of justice can be delivered in a timely manner;

[1] Law Institute of Victoria: '*Submission to the Legal and Constitutional Affairs Legislation Committee: Inquiry into the family law courts*', 23 November 2019
[2] Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2019 (Cth) [2]
[3] Above n 2, [6]

2. the development of a single point of entry to the federal courts exercising the family law jurisdiction by the unification and consolidation of a single set of rules, forms, procedures and case management already under consideration by the Harmonisation of Rules project of the family law courts without the need for statutory reform; and

3. reform focuses on continually evolving and modifying the family law jurisdiction by taking into account current developments in social and cultural family issues in order to address societal expectations, for example, by adequately educating court personnel on family violence awareness to safeguard victims and survivors, and to properly consider the safety risks vulnerable parties may face throughout their family law matter.

The LIV cautions that the proposed changes in the FCFCA Bill 2019 should not undermine the specialist family law jurisdiction of the FCoA which adopts unique case management protocols to enhance the administration of justice in the family law jurisdiction.

Family law reform - fundamental issues to be addressed

Abolition of the Family Court

In the Explanatory Memorandum for the FCFCA Bill 2019 the Government repeated its 2018 assertion that Division 1 of the FCC and FCoA will be a "continuation of the Family Court"[4]. The Commonwealth Attorney-General has previously stated that "the reform will not abolish the Family Court. Division 1 of the FCFC will be a continuation of the Family Court, whilst Division 2 of the FCFC will be a continuation of the Federal Circuit Court"[5]. However, the Attorney-General has also stated that the Government will continue to appoint appropriately skilled judges by ensuring that the FCFCA Bill 2019 requires appropriate expertise in family law before Judges are appointed to Division 2. However, the FCFCA Bill 2019 does not contain any specific provisions requiring the appointment of appropriately skilled family law judges for Division 2 of the FCFC; only judges who in the Government's view are competent to hear such cases, including those cases which fall within the broad general federal law jurisdiction of the FCC. In the LIV's view, the FCFCA Bill 2019 does not explicitly establish a Family Law Division in Division 2 of the FCFC.

Further, the LIV is concerned that future appointees to Division 1 of the FCFC may lack the necessary expertise and specialisation normally expected of family law judges. In the LIV's view, a lack of specialist judicial appointments to the newly created Division 1 of the FCFC may contribute to the demise of the FCoA. If this outcome eventuated, it would adversely affect Australian families and children by limiting the ability for parties to a family law dispute to have their case heard and determined by an expert family law Judge who has exclusively adjudicated complex family law matters.

With this in mind, the LIV supports the LCA's opposition to the proposed judicial appointment mechanism and transition of FCoA Judges into the newly established FCFC:

> "*(a) … leaving to the Executive, by Regulation, the power to change the minimum number of Division 1 judges in any new FCFC is entirely inappropriate, and that any minimum number should be enshrined in statute and subject to amendment by the Parliament, and not by the Executive. It is a matter for law making by the Parliament, not unilateral decision making from time to time by the Executive by Regulation:*

[4] 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>.
[5] Ibid.

(b) Whilst the FCFC Bills contain a provision regarding the experience and skills required of new judges appointed to Division 2 of the FCFC, that provision remains flawed;

(c) The effective abolition of a specialist family law court in Australia is against the international and local trend to establish specialist courts to deal, in particular, with aspects of law that have direct impact on individuals within the community, including children; …"

The FCoA is well recognised as a superior court of record and considered by many to be a specialist federal court which is equipped to deal with the most complex and serious family law matters within its broad jurisdiction[6]. The nature of family law matters in the FCoA jurisdiction demands a specialised bench, with judges and court personnel who have relevant expertise in family law to deal with difficult and complex family law disputes which often involve serious allegations of sexual and family violence and/or multifaceted property and financial matters. In many instances, family law litigation is extremely complex and requires jurisprudence to evolve at a fast pace to meet community expectations[7].

The FCoA jurisdiction includes a system of strong case management procedures specifically designed to provide a just outcome for families and children[8].The LIV reiterates the feedback it provided in its 2018 submission that families should be entitled to a nuanced, experienced and specialised methodology in their family law matters in order to provide them the best possible opportunity to achieve a positive outcome in difficult circumstances[9]. A properly resourced family law court system which includes a specialist judicial bench and strong case management principles will adequately respond to the increasing demand for timely and efficient resolution of family law matters.

Appellate jurisdiction

The LIV notes the FCFCA Bill 2019 does not seek to remove the appellate jurisdiction from the FCFC. The Commonwealth Attorney-General recognised that "instead, it is appropriate that family law appeals will continue to be heard by Division 1 of the FCFC"[10]. The retention of family law appeals in Division 1 of the FCFC is a positive shift from the preceding 2018 Bills.

[6] 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>
[7] Above n 1, 30.
[8] Submission by the Honourable William Alstergren, 'Review of the Family Law System by the Australian Law Reform Commission' 19 November 2019, 17 – 18, 26.
[9] Above no 1, 7
[10] Attorney-General's Department (Cth), 'Family Court and Federal Circuit court Plenary - Opening Address' (Speech, 7 August 2019) <https://www.attorneygeneral.gov.au/media/speeches/family-court-and-federal-circuit-court-plenary-opening-address-7-august-2019>.

The LIV welcomes this progress as it somewhat retains a significant level of judicial expertise in family law matters heard by Division 1 of the FCFC.

The LIV strongly opposed the abolition of the FCoA Appeal Division in the LIV's 2018 submission[11]. Despite the FCFCA Bill 2019 abandoning the previous proposal to abolish the FCoA appellate jurisdiction, the LIV remains concerned the newly proposed appellate jurisdiction solely resides in a single Judge in Division 1 of the FCFC. In the LIV's view a single Judge who also has an appellate role may detract from or diminish the role of the Appeal Division of the FCFC. The Attorney-General has stated that the single-judge appeals in Division 1 of the FCFC will reduce appeal rates[12]. The LIV is concerned this reasoning reduces the complex role of appeal judges to a purely quantitative consideration. The LIV submits that a bench of three judges hearing appeals would enable a "more considered and better jurisprudence"[13]. In the LIV's view, limiting the appellate jurisdiction of the proposed Division 1 and Division 2[14] of the FCFC is likely to adversely impact the significant amount of specialised jurisprudence developed by the FCoA Appellate Division.

With this in mind, the LIV supports the LCA's 2018 submission that the then-proposed merger of the FCC and FCoA would be "destructive of the specialised knowledge that FCoA judges of the Appeal Division have at the appellate level and the guidance they therefore give to judges at the trial level"[15]. In the LIV's view, the removal of the three-judge appeals bench will significantly reduce the judicial guidance available for single judges at the trial level. In 2018 The Honourable Diana Bryant AO QC drew on the 2008 Semple Report which did not recommend that appeals be moved from the FCoA, or that the appeal division be modified whatsoever[16]. The LIV notes Her Honour observed that the Semple Report initially recommended many of the reforms the Government is now pursuing[17]. In the LIV's view, complex family law matters require a nuanced approach in determining each individual case on its merits. The nature of this work precludes appeals from being viewed in purely numerical terms or on a quantitative analysis. As noted by former Justice of the FCoA Stephen O'Ryan QC, 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"[18].

[11] Above n 1, 29-30
[12] Above n 4.
[13] Above n 4.
[14] Federal Circuit Court and Family Court of Australia Bill 2019 (Cth) cls 26, 28(1), 28(3).
[15] Law Council of Australia 2018, 'Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018: Senate Legal and Constitutional Affairs Committee', 52.
[16] Ibid
[17] Diana Bryant, 'Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018: Senate Legal and Constitutional Affairs Committee',
[18] Nicola Berkovic, 'Three Judge Appeals 'Make System Robust', *The Australian* (Sydney, 5 June 2018)

The proposed restructuring of the FCoA appellate division appears to have little evidential basis or qualitative analysis to support the proposed restructure. The LIV strongly supports the LCA's position that "the proposed changes to the default position are also destructive of the specialised knowledge that FCoA judges of the existing Appeal Division …". In the LIV's view, the inevitable result is likely to disadvantage litigants in Division 1 of the FCFC by the lack of jurisprudence available to guide appeal Judges in determining complex issues on appeal. The LIV does not support the FCFCA Bill 2019 amendments to the appeals process[19].

Leave to appeal from certain decisions

The LIV remains concerned the FCFCA Bill 2019 limits the ability of litigants to appeal particular decisions[20]. As was the case with the FCFCA Bill 2018, the current proposed model of Division 1 and Division 2 of the FCFC is, in the LIV's view, likely to result in greater expense and uncertainty for Australian families navigating the family law system[21].

The LIV notes this is a result which contradicts the stated objectives in the Explanatory Memorandum of the FCFCA Bill 2019.

Appeals to the High Court

The LIV notes that the FCFCA Bill 2019 contains provisions restricting appeals to the High Court of Australia.

The LIV reiterates the concerns outlined in the LIV's 2018 submission on the FCFCA Bill 2018 which, in the LIV's view, have not been addressed or adequately resolved in the FCFCA Bill 2019[22]. As a result of an additional hurdle and the introduction of further litigation before appellants can reach a final determination, access to justice is limited and unnecessarily adds complexity to the appeals process.

Family violence

The LIV's 2018 submission stated that the government's proposal to remove the requirement for Judges to be "by reason of training, experience and personality…suitable to deal with matters of family law may put victim survivors of family violence at risk."[23]. To some degree the FCFCA Bill 2019 addresses the previous concerns raised by requiring a minimum of experience in family violence as a consideration for judicial appointment[24] to the FCFC. The LIV welcomes the introduction of proposed sections 11(2)(b) and 111(2)(b) contained in the

[19] Federal Circuit Court and Family Court of Australia Bill 2019 (Cth) cls 26, 28(1), 28(3), 32(1).
[20] Above n 19, cls, 26(2), 28(3).
[21] Above n 15, 33.
[22] Above n 15, 33.
[23] Above n 1, 15.
[24] Above n 12 s 111(3).

2019 Bill, because the Bill precludes judicial appointments where the prospective judge is not experienced in dealing with matters involving family violence.

Family violence has been recognised as "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"[25]. It is an all but too familiar experience for a family lawyer to receive initial instructions from their client and hear allegations of family violence being perpetrated by one, or both, parties in the family law dispute (including subtle forms of family violence). In the LIV's view, without adequate specialist family violence training for judicial officers and court personnel, parties remain exposed to an unacceptable risk if concerns about family violence are not being fully considered or addressed by the Court. Adequately addressing instances of family violence by imposing necessary conditions in Court Orders protects the best interests of the child and reduces the risk of family violence within families' socio-legal environment[26]. This is especially so where self-represented litigants appearing in family law matters expose victims and survivors to a higher than normal safety risk.

The LIV welcomes the introduction of proposed sections 11(2)(b) and 111(2)(b). The legislative effect would preclude judicial appointments where the person being considered is insufficiently experienced to adjudicate matters involving family violence. In its 2018 submission the LIV recommended a specialist level of family violence competency be implemented as a prerequisite for judicial appointment. In the LIV's view a specialist level of family violence competency in the adjudicator is likely to facilitate fairer outcomes for parties and protect the child(ren)'s best interests[27]. The LIV urges the proposed sections include as a pre-requisite for judicial appointment a sufficient level of family violence competency. Proposed new section 111(3) contained in the FCFCA Bill 2019 merely requires a judge to be 'suitable' to handle matters involving family violence by virtue of their knowledge, skills, experience and aptitude. Additionally, rather than requiring a specialist level of competency, proposed new section 111(2)(b) merely requires 'a suitable person to deal with kinds of matters that may be expected' to come before a judge, which may require consideration of 'matters involving family violence'[28].

The LIV notes this falls short of the LIV's recommendation of a requirement for specialist family violence competency. In discussing the proposed amalgamation of the courts, the Attorney-General stated that the FCFCA Bill 2019 will 'codify' the requirement for judicial appointees to

[25] Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper 86 (2018) 4 [1.19].
[26] Above n 1, 16
[27] *Family Law Act of Australia 1975* (Cth), s 60CA
[28] Above n 19, s 111(3)

handle family violence cases[29]. In the LIV's view, proposed sections 11 and 111 merely require a vague target of family violence competency and do not codify family violence competency, at an appropriate level of expertise, as a necessary pre-requisite for judicial appointment. There is no legislative guidance offered about when a person may be unsuitable to preside over complex family law matters. The LIV remains concerned the proposed sections do not require a sufficient level of family violence expertise, especially in view of the increasing workload of judges which demands a level of family violence specialisation[30].

Finality of decisions

The LIV is concerned that proposed section 138 in the FCFCA Bill 2019 states that a judgment or decision made in Division 2 of the FCFC is valid and binding until set aside, even if it is given or made in excess of the Court's jurisdiction.

The provision does not specify whether a decision is not binding if the decision is stayed on appeal. This creates uncertainty for both lawyers and litigants, as the practical operation of proposed section 138 is unclear.

Specialisation in the family law jurisdiction

Judicial expertise

The LIV's 2018 submission recommended that "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"[31]. Some LIV members remain concerned the merger of the FCC and FCoA may lead to a loss of judicial expertise in the family law jurisdiction. The LIV is concerned that an element of training is no longer a specific legislative consideration for a judicial appointment to the FCFC. The *Family Law Act 1975* (Cth) refers to the 'training' of judicial officers, whereas a prerequisite to consider training of a judge prior to appointment is not included in the FCFCA Bill 2019 currently being considered by the Senate Committee.[32] Some LIV members believe that a specialist standard of competency should be compulsory in a complex jurisdiction.

Further, the LIV is concerned that merging of the two family law federal courts from the FCC and FCoA to a newly created FCFC obscures the original intention of the FCoA when that Court was established. The LIV agrees with the predominant consensus amongst the legal

[29] Attorney-General's Department (Cth), 'Court reforms to deliver better outcomes for families' (Media Release, 5 December 2019) <https://www.attorneygeneral.gov.au/media/media-releases/court-reforms-deliver-better-outcomes-families-5-december-2019>.
[30] Above n 1, 28.
[31] Above n 1, 27.
[32] Above n 27, s 22(2)(b).

profession that the FCoA is a superior specialist Court. In 2018 the former Chief Judge of the FCoA, the Honourable Elizabeth Evatt AC, observed that the proposed merger of the courts "is inconsistent with the original aims of the Family Court, which was established as a specialist Court"[33]. The proposed merger appears to depart from the original legislative intent of the *Family Law Act 1975* (Cth), that is, to create a separate specialist superior court dealing exclusively with family law matter[34]. Some LIV members hold the view that a newly created FCFC would weaken the family law jurisdiction by diminishing the judicial expertise of the FCoA and its appellate jurisdiction, and eliminate current case management practices with which family law solicitors are familiar and which are uncommon in other jurisdictions.

Uncertainty

The LIV remains concerned that a lack of specialist family law judges in Division 2 of the FCFC will lead to an increase in appeals, and as a consequence, result in higher costs and uncertainty for parties in family law litigation. As a result, lawyers will find it difficult to advise their clients on the likely outcomes of their cases, potentially causing families to agree to less than fair settlements.

The LIV is concerned that the quality of decision-making for parties in family law matters may decline, and may significantly impact on the health and wellbeing of families and children.

Rules of court and judicial consultation

The LIV is particularly concerned the FCFCA Bill 2019 confers sole rule-making power to create the Rules of Court ("**court rules**") on the Chief Justice for Division 1[35] and the Chief Judge for Division 2[36] for a period of 2 years.

Proposed section 77 introduces a requirement for the Chief Justice to be satisfied that there has been proper consultation with the other judges of the FCFC before creating court rules. However this proposed section does not invalidate the rules of the Court as a result of a lack of consultation, nor does it affect their enforceability. This in effect renders the legislative obligation to consult redundant, should it be disregarded in the making of court rules. The LIV is concerned that vesting sole rule-making power in the head of jurisdiction for each Division of the FCFC (who may also be the same person[37]) has the potential to inhibit effective case management of each Division of the FCFC. The LIV is also concerned about the impact this

[33] Elizabeth Evatt 2018, 'Submission to the Joint Select Committee on Australia's Family Law System, 1.
[34] Nicholson, CJ Alastair; Harrison, Margaret --- "Family Law and the Family Court of Australia: Experiences of the First 25 Years" [2000] Me bULawRw 30; (2000) 24(3) Melbourne University Law Review 756. Retrieved from <http://www.austlii.edu.au/au/journals/MelbULawRw/2000/30.html#fn26 >
[35] Above n 19, s 76
[36] Above n 19, s 217
[37] Above n 19, s 29

may have on the relationship the Court currently has with key stakeholders, including the legal profession.

The LIV commends the work of the FCoA Rules Committee completed as part of the Rules Harmonisation Project ("**the Project**"), which harmonises rules and court forms in order to create a unification of procedures between the FCC & FCoA. In the LIV's view, the work completed in issuing Joint Practice Directions better assists users of the family law courts system. The Project demonstrates effective ongoing consultation with the family law judiciary, the legal profession and key stakeholders, which encourages broader compliance with the court rules created as a result of the consultation. In the LIV's view, the Project may create a single point of entry for family law matters without any need for legislative amendment to the *Family Law Act 1975* (Cth).

The LIV recommends that the current method of making rules of Court not be changed.

The PwC Report

As noted in the LIV's 2018 submission on the FCFC Bill 2018, the Government's proposed merger of the FCC and FCoA appeared to solely depend upon the findings of the PwC Report. In the LIV's view, the PwC Report is flawed, given that significant weight is placed on the efficiency of the family law courts in purely quantifiable statistical outcomes of both courts.

There is little or no appreciation demonstrated in the PwC Report for the complexities of family law litigation, or the difficulties faced by all parties and judicial officers throughout the process of a family law matter. The Honourable Diana Bryant AO, QC stated as such in 2018 when Her Honour observed that the PwC report "focuses only on the quantitative element. That may be acceptable for a report designed for that purpose, but it is not a sound basis for major policy decisions which require a much more holistic consideration of the delivery of justice"[38]. In the LIV's view, holistic law reform requires comprehensive consultation with external stakeholders in the broader family law system. The LIV was not consulted by PwC even though LIV members collectively represent a significant number of parties involved in family law litigation in Victoria. LIV members are uniquely positioned to understand the issues and impact the proposed merger may have on family law litigation. Additionally, the LIV is not aware of any other stakeholder consultations with the legal profession, Legal Aid, community legal centres, or family violence specialists to assist in the preparation of the PwC Report. In the LIV's view, the Government's proposed model aims to solve the key issue of exacerbated delays in family law litigation without adequate consultation with key stakeholders in the family law jurisdiction.

[38] Diana Bryant 2018, 'Submission to the Joint Select Committee on Australia's Family Law System, 6

The LIV notes the PwC Report does not adequately assess the division of work[39] between the FCC and FCoA which, in the LIV's view, represents a lost opportunity to clarify and strengthen the role of the FCoA as a specialist superior court. The LIV considers the findings of the PwC Report inadequate because of a failure by PwC to thoroughly investigate the life cycle of a complex family law matter (where over 85% of matters reported involve allegations of family violence[40]). Further, there was no review or assessment by PwC of the operations and delay caused by the general law jurisdiction of the FCC. Recently, Chief Justice William Alstergren remarked that in 2018-19, "pressure on the FCC also comes from migration matters, which have gone up dramatically. In one year, the FCC has about 10,000 listings pending, resolving about 3200. A further 58,000 are with the Administrative Appeals Tribunal and 30,000 with the Minister for Immigration"[41].

In the LIV's view, the proposal to merge the two federal family law courts relies too heavily on the findings of the PwC Report. This is especially so where, in the LIV's view the PwC Report erroneously assesses the efficiency and productivity of the FCC and FCoA on a purely numerical and statistical analysis, without sufficient consideration of the unique features of the family law jurisdiction outlined in the LIV's 2018 submission and mentioned above. The FCoA has evolved over time and implemented case management protocols to assist vulnerable parties involved in complex family law litigation. The LIV considers the PwC Report's conclusions that the FCC is more efficient than the FCoA in dealing with family law matters are inaccurate. In the LIV's view, without proper consideration or consultation, implementation of the FCFCA Bill 2019 will significantly impact the most vulnerable participants in the family law system. The LIV does not support the FCFCA Bill 2019 because the LIV considers that the PwC Report which underpins the Bill does not accurately assess the operation and roles of the two federal family law courts.

The Magellan Program

The LIV is concerned that the Magellan program is not mentioned in the FCFCA Bill 2019. The LIV reiterates from its 2018 submission that "the loss of this specialised model, and the specialised training and experience of FCoA judges, Registrars, family law consultants who are involved in the program, would significantly negatively impact the most vulnerable children in the family law system"[42]. The LIV notes that the inclusion of the Magellan program would

[39] *Protocol for the division of work between the Family Court of Australian 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>
[40] Rae Kaspiew: 'Evaluation of the 2012 Family Violence Amendments: A Synthesis Report', Australian Institute of Family Studies (AIFS) 2015 p 16
[41] Carolyn Ford: 'Family law: Judges and practitioners to be more accountable', Law Institute Journal 1 December 2019, Retrieved from <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/December-2019/Family-law--Judges-and-practitioners-to-be-more-ac >
[42] Above n 1, 20

increase a focus on family violence competency for court personnel as a result of the program's mechanism for responding to serious allegations of physical and sexual abuse of children. The benefits of the Magellan Program were outlined in the LIV's 2018 submission on the preceding FCFCA Bill 2018[43].

The LIV recommends the distinct case management pathway implemented in the Magellan Program be adopted and replicated as far as possible in both federal family law courts. This includes intense case management practices by incorporating court Registrars, Judges, family report writers and consultants working together in a family law matter to provide a specialised delivery of case management services to effectively deal with contentious issues and implement a highly coordinated and robust inter-agency approach. In the LIV's view, the case management procedures adopted ensure court resources are efficiently utilised to achieve the safest outcome for all parties involved. With this in mind, the LIV endorses the LCA's view that:

> "The FCoA has a long history of adapting to changes in the nature of the disputes before it, and in developing innovative responses. This has included the Less Adversarial Trial, the family violence guidelines, the Magellan List and the practice standards for family report writers. The FCoA has also developed, trialled and implemented new case management strategies over its history to deal with the challenges of increased workloads and complexities of cases. Differential case management that triaged cases and applies resources according to the complexity of cases have been developments. This comes in large part, the LCA suggests, from the family law experience and depth of knowledge of litigant behaviour, of its specialist family judges."

The Magellan List demonstrates how court resources can be utilised to effectively manage and efficiently resolve complex issues in family law litigation.

Hague Convention matters

The LIV notes with concern that there continues to be no Hague Convention judges within the FCC. The LIV reiterates concerns expressed in its 2018 submission that the complex nature and increasing incidence of international family law matters require appropriately qualified judges who are adequately skilled to adjudicate and determine cross-jurisdictional Hague Convention matters[44].

[43]Above n 1, 19
[44] Above n 1, 20.

CONCLUSION

The LIV fully supports the objectives outlined in the FCFCA Bill 2019 Explanatory Memorandum[45]. In the LIV's view, the proposed family law courts merger set out in the FCFCA Bill 2019 and FCFCA (CATP) Bill 2019 is not likely to achieve those objectives. The LIV anticipates that families and children will be the victims of a failure to foresee the unintended and adverse consequences of implementing the proposed merger of the family law courts without full consideration of current best practice models implemented by the FCoA.

In consideration of the magnitude of the proposed amendments and in light of current circumstances, the LIV recommends the Senate Committee provide ample time for public hearings to take place and that the Committee arrange hearings in all States in order to properly understand the case management nuances adopted in each jurisdiction.

The LIV would welcome an opportunity to expand upon these submissions and appear before the Senate Committee during public hearings.

[45] Above n 2