

The Senate

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Legal and Constitutional Affairs  
Legislation Committee

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Courts Administration Legislation  
Amendment Bill 2015

February 2016

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# **Recommendation**

## **Recommendation 1**

**2.23 The committee recommends that the bill be passed.**





# Chapter 1

## Introduction

### Referral

1.1 On 2 December 2015 Senator the Hon Nigel Scullion, Minister for Indigenous Affairs and Leader of The Nationals in the Senate, introduced the Courts Administration Legislation Amendment Bill 2015 (the bill) into the Senate.<sup>1</sup>

1.2 On 3 December 2015, pursuant to a report of the Senate Standing Committee for Selection of Bills, the Senate referred the bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 2 February 2016.<sup>2</sup>

### Conduct of the inquiry

1.3 In accordance with usual practice the committee wrote to a number of persons and organisations, inviting submissions to the inquiry by 7 January 2016. Details of the inquiry were also made available through the committee's website at [http://www.aph.gov.au/senate\\_legalcon](http://www.aph.gov.au/senate_legalcon).

1.4 The committee received four submissions in response to this inquiry. The submissions are listed at Appendix 1 to this report and are available on the committee's webpage. The committee would like to thank all those who submitted to the inquiry.

### Background to the bill

1.5 The bill would merge the corporate services functions of the Federal Court of Australia (Federal Court) with those of the Family Court of Australia (Family Court) and the Federal Circuit Court of Australia (Federal Circuit Court), and bring the courts together as a single administrative entity.<sup>3</sup> The performance, funding and operation of the federal courts has been considered in several recent reports and reviews in the context of a smaller more rational government.<sup>4</sup>

1.6 The 2012 Skehill *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio* considered that there would be merit in shared administrative arrangements between the federal courts.<sup>5</sup> More recently, amalgamation of the courts was recommended by the 2014 National Commission of Audit Report, *Towards Responsible Government*, and a 2014 KPMG review into the

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1 *Journals of the Senate*, No. 133, 2 December 2015, p. 3585.

2 *Journals of the Senate*, No. 134, 3 December 2015, p. 3624.

3 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 75.

4 Explanatory Memorandum, p. 7.

5 Explanatory Memorandum, p. 7.

performance and funding of the federal courts.<sup>6</sup> Further, independent analysis conducted by Ernst & Young in 2015 identified potential savings and efficiencies to be gained from a merger model.<sup>7</sup>

1.7 The need for efficiencies to be generated by the amalgamation of the courts has increased with the significant budgetary pressures and ongoing deficits being faced by the family courts in particular.<sup>8</sup> According to the 2013–14 Annual Reports of the Federal Court, Family Court and Federal Circuit Court, the combined projected deficit of the courts was estimated to be \$44.2 million over the forward estimates. This would result in the family courts being unable to maintain current service levels.<sup>9</sup>

1.8 The amalgamation of the courts' corporate services function was central to the package of measures announced by the government as part of its 2015–16 Budget measure *Streamlining and Improving the Sustainability of Courts*.<sup>10</sup>

1.9 The Attorney-General's Department (department) advised the committee that the bill and overall design of the reforms had been developed at all stages in formal and informal consultation with the heads of jurisdiction and senior officers of the Federal Court, Family Court and Federal Circuit Court, including the Chief Executive Officers (CEO).<sup>11</sup> The Attorney-General has also consulted directly with the heads of jurisdiction of the three courts.<sup>12</sup>

### **Purpose of the bill**

1.10 The bill seeks to merge the Federal Court, the Family Court and Federal Circuit Court into a single administrative entity and make legislative provision for the courts to share corporate services. The entity would also include the National Native Title Tribunal which is currently within the Federal Court entity.<sup>13</sup>

1.11 The bill is directed to the organisation and administration of the courts, while maintaining the judicial and functional independence of the courts in accordance with the Constitution, and seeks to promote their effective management.<sup>14</sup>

1.12 The financial impact of merging the courts' corporate functions is expected to deliver efficiencies to the courts of \$9.4 million over the six financial years to 2020–21 and result in ongoing annual efficiencies of \$5.4 million from this time.<sup>15</sup>

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6 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 76.

7 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 76.

8 Explanatory Memorandum, p. 7.

9 Explanatory Memorandum, p. 7.

10 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 75.

11 Attorney-General's Department, *Submission 3*, p. 9.

12 Attorney-General's Department, *Submission 3*, p. 10.

13 Explanatory Memorandum, p. 2.

14 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 76.

15 Explanatory Memorandum, p. 3.

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The government has undertaken that the savings gained would be reinvested to support the core functions of the courts, placing the courts on a sustainable funding footing into the future and better placed to deliver services to litigants.<sup>16</sup> By reducing the administrative burden on each court, the bill would generate efficiencies and reduce unnecessary duplication.<sup>17</sup>

1.13 As the bill solely deals with the administration of the courts, it would have no impact on the judicial and functional independence of each court and would not affect the substantive rights of court users.<sup>18</sup> Each court would maintain its separate and distinct judiciary and there would be no changes to the courts' respective jurisdictions. This would ensure little change to the front end services of the courts. Heads of jurisdiction would continue to have full control over the management of their courts' judicial business.<sup>19</sup>

### **Key provisions of the bill**

1.14 The bill would amend the following Commonwealth Acts:

- *Federal Court of Australia Act 1976* (Federal Court Act);
- *Family Law Act 1975*;
- *Federal Circuit Court of Australia Act 1999*; and
- *Native Title Act 1993*.<sup>20</sup>

1.15 Schedules 1 to 3 of the bill would establish the courts as a single administrative entity under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), and a single statutory agency under the *Public Service Act 1999* (Public Service Act) from 1 July 2016.<sup>21</sup> The Federal Court CEO would hold the role of accountable authority under the PGPA Act and agency head under the Public Service Act.<sup>22</sup>

1.16 Proposed new subsection 18A(1B) of the Federal Court Act would set out what is within corporate services:

- communications;
- finance;
- human resources;
- information technology;

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16 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 75.

17 Explanatory Memorandum, p. 2.

18 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 75.

19 Attorney-General's Department, *Submission 3*, p. 5.

20 Explanatory Memorandum, p. 2.

21 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 77.

22 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 77.

- library services;
- procurement and contract management;
- property;
- risk oversight and management;
- statistics; and
- any other matter prescribed by a determination under subsection (5).<sup>23</sup>

1.17 New subsection 18A(5) would provide for the Attorney-General to determine other matters to be within the scope of corporate services by legislative instrument.<sup>24</sup>

1.18 The shared corporate services would be managed by the Federal Court CEO and Principal Registrar appointed under the Federal Court Act.<sup>25</sup>

1.19 The bill's governance structure is designed to preserve the autonomy of the heads of jurisdiction (the existing Chief Justices and Chief Judge) of the three courts in relation to their own courts.<sup>26</sup> Heads of jurisdiction would retain responsibility for managing the administrative affairs of their respective courts, excluding corporate services.<sup>27</sup> Each court would retain its own budget allocation.<sup>28</sup>

1.20 Heads of jurisdiction would be supported in the management of administrative affairs by a CEO appointed by the Governor-General on their nomination.<sup>29</sup> The Family Court Chief Justice and Federal Circuit Court Chief Judge would no longer be required to share a CEO, with the bill replacing the present position of joint CEO. This would ensure each head of jurisdiction had a dedicated CEO to assist in managing the administrative affairs of their respective court.<sup>30</sup>

1.21 The Federal Court CEO would have four key roles within the entity:

- assisting the Federal Court Chief Justice with the management of the administrative affairs of the Federal Court and holding the role of most senior registrar in the Federal Court;
- continuing to assist the National Native Title Tribunal President with the management of the administrative affairs of the Tribunal;

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23 Schedule 1, 18A(1B)

24 Attorney-General's Department, *Submission 3*, p. 8.

25 Law Council of Australia, *Submission 4*, p. 2.

26 Law Council of Australia, *Submission 4*, p. 2.

27 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 77.

28 Attorney-General's Department, *Submission 3*, p. 6.

29 Explanatory Memorandum, p. 8.

30 Attorney-General's Department, *Submission 3*, p. 6.

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- assuming ultimate responsibility for the management of the courts' joint corporate services and delivering the projected efficiencies from corporate services; and
  - taking overall responsibility for the courts entity as the administrative head for the purposes of the PGPA Act and Public Service Act.<sup>31</sup>

1.22 The bill contains provisions to ensure the Federal Court CEO makes relevant delegations to the Family Court CEO and Federal Circuit Court CEO in relation to the administrative affairs of their respective courts.<sup>32</sup> The Federal Court CEO would be under a general statutory duty to ensure the other two CEOs had the necessary functions and powers to fulfil their roles.<sup>33</sup>

1.23 Schedule 4 of the bill would amend the Native Title Act 1993 to update references to position titles and reflect the amalgamation.<sup>34</sup>

1.24 The bill would make consequential and other amendments to a number of Acts to update and change relevant titles and references. The bill provides for transitional arrangements to ensure the courts can continue their administrative and corporate services functions without disruption at the date of the merger, 1 July 2016.<sup>35</sup> The bill would also provide a rule making power in the form of a legislative instrument to respond to further areas where clarity in transitional arrangements was required.<sup>36</sup>

### **Human rights implications**

1.25 According to the explanatory memorandum, the bill is compatible with human rights. As the amendments primarily relate to the courts' administrative and corporate operations, the bill does not alter the substantive powers of the judiciary or the rights of parties to have a matter heard by the courts. The bill therefore maintains and promotes the right to a fair trial or hearing.<sup>37</sup>

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31 Attorney-General's Department, *Submission 3*, pp 6–7.

32 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 77.

33 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 77.

34 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 78.

35 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 78.

36 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 78.

37 Explanatory Memorandum, p. 6.



# Chapter 2

## Key issues

2.1 Submissions received by the committee supported the bill's objective to improve the financial sustainability of the federal courts. However, some submitters expressed concern about the following matters:

- the lack of constraints on the exercise of power by the Federal Court CEO;
- the immediate lack of funding for the federal courts; and
- employment terms and conditions.

### Corporate services and the Federal Court CEO

2.2 The Family Court of Australia's submission raised concern over the Federal Court CEO's proposed role in relation to corporate services.<sup>1</sup> The Family Court argued that the bill would make the CEO of the Federal Court entirely responsible for corporate services and, in that capacity, the CEO would not be answerable to any head of jurisdiction, including the Federal Court.<sup>2</sup>

2.3 The Family Court stated in particular that information technology plays a vital role in the operations of the court in relation to its services to the public.<sup>3</sup> The submission stated that information technology includes:

..the Court's case management system (Casetrack) and the Commonwealth Law Courts Portal, which is an e-filing and information facility vital to the operation of the Court and to the litigants. The Portal includes listings of when cases are to be heard and when steps are to be taken, recording of time spent in Court, recording of applications and affidavits that have been filed. Casetrack also provides the data which forms the basis for statistical analysis of all the filings and the kind of matters being dealt with, including whether they are parenting or property proceedings and whether family violence allegations form part of applications. The latter is particularly important because much research is done around family violence and its prevalence in matters filed.<sup>4</sup>

2.4 The Family Court regarded it as very important that it retain 'some control' over its information technology system, and was concerned that the bill did not allow that to occur.<sup>5</sup>

2.5 The Family Court further raised concern over the exercise of power by the CEO. The submission noted that the CEO of the Federal Court would be given the

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1 Family Court of Australia, *Submission 2*, p. [1].

2 Family Court of Australia, *Submission 2*, pp [1–2].

3 Family Court of Australia, *Submission 2*, p. [2].

4 Family Court of Australia, *Submission 2*, p. [2].

5 Family Court of Australia, *Submission 2*, p. [2].

power to do 'all things necessary or convenient' for the purpose of providing corporate services.<sup>6</sup> According to the Family Court, there would be no constraints on the exercise of that power other than to consult with the heads of jurisdictions of the three courts and the two other CEOs, and a failure to consult would not affect the validity of a decision.<sup>7</sup>

2.6 The submission stated that the only genuine constraint on the exercise of power was in relation to decisions which had the effect of imposing an expenditure obligation on any of the courts in regard to administrative affairs of the court.<sup>8</sup> The Family Court was concerned that there was otherwise no constraint on decision making, and no criteria for how decisions would be made.

2.7 It further stated:

Nor is there any provision for governance arrangements between the heads of jurisdiction, the Chief Executive Officers of the Family Court and the Federal Circuit Court and the Chief Executive Officer [of the Federal Court] as to how a particular policy may be conceived, proposed and implemented. No board-like structure, where the relevant heads of jurisdiction can discuss policy or other matters which might affect the exercise of the Chief Executive Officer's powers, is provided for in the Bill.<sup>9</sup>

2.8 The submission argued that it was an unusual form of corporate management to have the CEO of one court responsible for corporate services of the other two courts with no accountability, requirement for transparency or an overseeing body to set policy.<sup>10</sup> While there were overarching general obligations under the PGPA Act, the Family Court was concerned that 'they are not supported by any specific provisions in the bill which would give assistance as to how those general obligations are met'.<sup>11</sup>

2.9 The Family Court suggested that the bill be amended to require that two of the three heads of jurisdiction must agree on any decision that would affect the operating processes of the courts, and that any expenditure over \$500,000 must be communicated to the heads of jurisdiction in writing with reasons for the decision reached.<sup>12</sup> The submission suggested that the heads of jurisdiction of the three courts meet at least once per year with their respective CEOs to set policy for the coming 12 months. Further, any dispute between heads of jurisdiction about policy which

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6 Family Court of Australia, *Submission 2*, p. [2].

7 Family Court of Australia, *Submission 2*, p. [2].

8 Family Court of Australia, *Submission 2*, pp [2–3].

9 Family Court of Australia, *Submission 2*, p. [3].

10 Family Court of Australia, *Submission 2*, p. [3].

11 Family Court of Australia, *Submission 2*, p. [4].

12 Family Court of Australia, *Submission 2*, p. [4].



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could not be resolved should be adjudicated by the Attorney-General in consultation with the three heads of jurisdiction.<sup>13</sup>

2.10 The department advised that it was expected that the Family Court CEO and Federal Circuit Court CEO would work closely with the Federal Court CEO to ensure that the delivery of corporate services was tailored to each court's needs, and in relation to matters that affected the administrative entity as a whole.<sup>14</sup> The department pointed out that mechanisms existed in the bill to ensure consultation between the Federal Court CEO, the heads of jurisdiction and the other CEOs for decisions relating to corporate services.<sup>15</sup> The department stated that details relating to corporate services and consultation requirements would be set out in a memorandum of understanding (MOU) between the three courts.<sup>16</sup>

2.11 The department further outlined that although the courts would be within a single administrative entity, the bill would provide clarity and control for each court in relation to its budget allocation. Each court would have its own budget outcome statement, and appropriations acts would set an allocation for each outcome within the entity.<sup>17</sup> The bill contained provisions that would prevent the Federal Court CEO from spending funds on outcomes to which they were not assigned.<sup>18</sup> The Federal Court CEO would also be prevented from imposing an expenditure obligation on the courts when exercising corporate services powers and functions without the consent of the relevant head of jurisdiction or, where agreement could not be reached, the Attorney-General.<sup>19</sup> The department highlighted that these provisions were inserted following consultation with heads of jurisdiction and would provide certainty to the courts in relation to their budgets.<sup>20</sup>

### **Funding the courts**

2.12 The Law Council of Australia (Law Council) welcomed the reinvestment of the proposed savings generated by the bill in the courts, as consistent with the objective of sustainable long term funding of the federal courts.<sup>21</sup>

2.13 The Law Council remained concerned, however, about the immediate lack of judicial resources in the Family Court and Federal Circuit Court and the delay before the savings accrued from the passage of the bill would come into effect. The Law Council highlighted that judges in these courts were under significant pressures due to

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13 Family Court of Australia, *Submission 2*, p. [5].

14 Attorney-General's Department, *Submission 3*, p. 7.

15 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 77.

16 Attorney-General's Department, *Submission 3*, p. 7.

17 Attorney-General's Department, *Submission 3*, p. 9.

18 Attorney-General's Department, *Submission 3*, p. 9.

19 Attorney-General's Department, *Submission 3*, p. 9.

20 Attorney-General's Department, *Submission 3*, p. 9.

21 Law Council of Australia, *Submission 4*, p. 3.

increasing workloads, the stressful nature of high-conflict proceedings and the failure to fill judicial vacancies as they occurred.<sup>22</sup>

2.14 The Law Council was of the view that the Federal Circuit Court should be a particular focus of the reinvestment from the bill. The Council argued that in order to discharge the workload the Federal Circuit Court already had, and the additional and increasing workload arising from the courts' expanding jurisdiction, including family law, industrial law and migration matters, the increased funding for the Federal Circuit Court and the appointment of additional judges in each jurisdiction was critical.<sup>23</sup>

2.15 The Law Council believed that the provision in the bill of a separate CEO to support the Chief Judge of the Federal Circuit Court in the administration of that court, and safeguarding its discrete budget appropriation, were both necessary and appropriate measures if the court was to meet its objectives.<sup>24</sup>

2.16 The Community and Public Sector Union (CPSU) highlighted that the bill was focused on restructuring the courts to reduce costs rather than addressing the bigger challenge of the funding crisis facing the courts. The submission stated that the Federal Circuit Court and Family Court had been struggling with inadequate funding for some time and while the courts received \$22.5 million in additional funding over four years in the 2015–16 Budget, they were still facing a blowout in expenses of \$75 million by 2017–18.<sup>25</sup>

2.17 The CPSU argued that rather than focusing on restructuring the courts, the government needed to address chronic funding shortfalls and provide proper levels of resourcing to the courts.<sup>26</sup>

### **Employment terms and conditions**

2.18 The CPSU raised a further concern, that the merger may result in amalgamated corporate services staff facing relocation or redundancy.<sup>27</sup> The CPSU also suggested an amendment to the bill that would ensure all staff were employed under the Federal Court Enterprise Agreement, to ensure that staff in the merged structure were employed under one set of terms and conditions.<sup>28</sup>

2.19 The department in its submission highlighted that the bill contained transitional provisions which would preserve the courts' existing enterprise agreements until a new agreement came into operation for the single administrative entity.<sup>29</sup>

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22 Law Council of Australia, *Submission 4*, p. 3.

23 Law Council of Australia, *Submission 4*, p. 5.

24 Law Council of Australia, *Submission 4*, p. 4.

25 Community and Public Sector Union, *Submission 1*, p. 2.

26 Community and Public Sector Union, *Submission 1*, p. 2.

27 Community and Public Sector Union, *Submission 1*, p. 2.

28 Community and Public Sector Union, *Submission 1*, p. 2.

29 Attorney-General's Department, *Submission 3*, p. 9.

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## **Committee view**

2.20 The committee welcomes the merger of the courts into a single administrative entity. While submitters offered various proposals with a view to improving the legislation, all acknowledged the need to place the courts on a sustainable funding footing over the long term. With savings arising from the efficiencies to be reinvested back into the courts, the bill would leave the courts far better placed to deliver services to litigants.

2.21 The committee has considered the concerns raised by submitters, including those relating to transparency and accountability between the courts under the new arrangements. The committee notes that details relating to corporate services matters and effective consultation between the three courts are to be set out in an MOU, which would provide for the appropriate management of corporate services. The committee encourages the three courts to continue working expeditiously toward an MOU which will meet the needs and circumstances of all.

2.22 To ensure that the new arrangements are working effectively and that the sustainability of the courts' workloads and financial situations is improving, the committee would welcome a review of the legislation by the Attorney-General's Department one year after its implementation, in consultation with the three courts. Such a review would allow the department to advise the government if any refinement of the bill or the arrangements was required.

### **Recommendation 1**

**2.23 The committee recommends that the bill be passed.**

**Senator the Hon Ian Macdonald  
Chair**



# Appendix 1

## Public submissions

- 1 Community and Public Sector Union (CPSU)
- 2 Family Court of Australia
- 3 Attorney-General's Department
- 4 Law Council of Australia

