

Chapter 1

Introduction

1.1 On 23 August 2018, the Senate referred the Federal Circuit and Family Court of Australia Bill 2018 (FCFC bill) and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Consequential Amendments bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 15 April 2018.¹

1.2 On 27 November 2018, the House of Representatives passed the bills with a number of amendments, which will be outlined below.

Conduct of this inquiry

Details of the inquiry were advertised on the committee's website, and the committee directly invited a range of organisations to make a written submission. The committee called for submissions to be received by 23 November 2018. The committee accepted 115 submissions. Some submissions provided personal accounts of individual experiences of the family court system, which were published with the submitters' names withheld. A number of submissions were also accepted by the committee on a confidential basis. All submissions, as well as answers to questions on notice, tabled documents, and additional information are listed at appendix 1 of this report and are available in full on the committee's website.

1.3 The committee held five public hearings, as follows:

- Perth on 10 December 2018;
- Adelaide on 11 December 2018;
- Sydney on 12 December 2018;
- Brisbane on 13 December 2018; and
- Townsville on 14 December 2018.

1.4 The witnesses who gave evidence at these hearings are listed at appendix 2.

1.5 The committee thanks all submitters and witnesses for their involvement in this inquiry.

Structure of this report

1.6 This report consists of three chapters:

- This chapter provides a brief overview of the bills as well as the administrative details of the inquiry.
- Chapter 2 outlines the need to reform the federal courts and sets out past reviews which have informed the bills' formation.

1 *Journals of the Senate (Proof)*, No. 79, 7 December 2017, pp. 2512–2514.

- Chapter 3 discusses the key issues raised in evidence to the inquiry, and provides the committee's views and recommendations.

Purpose of the bills

1.7 The FCFC bill and the Consequential Amendments bill were introduced into the House of Representatives by the Minister for Revenue and Financial Services, Minister for Women and Minister Assisting the Prime Minister for the Public Service, the Hon. Kelly O'Dwyer MP, on 23 August 2018.² The Minister stated that the bills' reforms would ensure that family law disputes are 'resolved as quickly, inexpensively and efficiently as possible in the best interests of Australian families, especially children'.³

1.8 The Minister explained that there had been a number of reviews of the family law system which had recommended urgent change. She particularly noted the review by PricewaterhouseCoopers Australia (PwC), 'Review of efficiency of the operation of the federal courts', and stated that it highlighted that 'the current court structures and overlapping family law jurisdiction is causing confusion, delays, and significant differences in access to justice for Australian families'.⁴

1.9 The FCFC bill would establish the Federal Circuit and Family Court of Australia (FCFC), which would comprise of two divisions. The FCFC (Division 1) would be a continuation of the Family Court, while the FCFC (Division 2), would be a continuation of the Federal Circuit Court. The Explanatory Memorandum to the FCFC bill outlines the rationale for this change:

- to create a consistent pathway for Australian families in having their family law disputes dealt with in the federal courts
- to improve the efficiency of the federal court system, and
- to ensure outcomes for Australian families are resolved in the most timely, informed and cost effective manner possible.⁵

1.10 The Explanatory Memorandum to the FCFC bill explains how the intentions of the bill would be achieved:

The FCFC would provide, in effect, the single point of entry into the family law jurisdiction of the federal court system. To achieve optimal efficiency in the handling of matters, the Bill would provide for matters to be transferred between FCFC (Division 1) and FCFC (Division 2) with the approval of the Chief Justice/Chief Judge of the receiving Division. With consistent internal approaches to case management, practices and procedures, it is anticipated that the FCFC would significantly improve efficiency in the family law jurisdiction of the federal court system,

2 Parliamentary Debates, 23 August 2018, pp. 8251–8255.

3 Parliamentary Debates, 23 August 2018, p. 8251.

4 Parliamentary Debates, 23 August 2018, p. 8252.

5 Explanatory Memorandum to Federal Circuit and Family Court of Australia Bill 2018 (FCFC bill), pp. 2–3.

providing additional resources that can be directed to reducing the growing backlog of pending cases in the system and reducing the average time it takes to resolve family law matters.⁶

1.11 The Consequential Amendments bill would make 'consequential amendments and provides transitional provisions necessary to support the [FCFC bill].'⁷

1.12 On 27 November 2018, the bills were passed by the House of Representatives with a number of amendments. In broad terms, these amendments relate to:

- The commencement date of the provisions, from 1 January 2019 to be:
...by Proclamation or if the provisions do not commence within the period of six months beginning on the day the Act receives Royal Assent, they commence on the day after the end of that period.⁸
- Clarifying whether certain court fees apply to particular proceedings.

The current family court system

1.13 Neither the Commonwealth nor the states and territories have exclusive jurisdiction over family law matters. The Australian Constitution gives the Commonwealth the power to make laws with respect to 'marriage' and 'divorce and matrimonial cases; and in relation thereto, parental rights and the custody and guardianship of infants'.⁹ Additionally, states (with the exception of Western Australia) have referred their state powers to the Commonwealth. This has had the effect of the federal parliament having jurisdiction over marriage, divorce, parenting and family property upon separation, while the state and territory governments have retained jurisdiction over adoption, child welfare and same-sex couples.¹⁰

1.14 Currently, two federal courts deal with matters under the *Family Law Act 1975* (Family Law Act)—the Family Court of Australia (Family Court) and the Federal Circuit Court of Australia (Federal Circuit Court). Additionally, Western Australia has established a state family court—the Family

6 Explanatory Memorandum to FCFC bill, p. 3.

7 Explanatory Memorandum to Consequential Amendments Bill, p. 2.

8 Explanatory Memorandum of both bills, p. 2.

9 Subsections 51(xxi) and (xxii) of the Constitution.

10 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Parliamentary inquiry into a better family law system to support and protect those affected by family violence: Recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence*, December 2017, p. 24.

Court of Western Australia (FCWA)—which exercises both federal and state jurisdiction.¹¹

Family Court of Australia

1.15 The Family Court was established in 1976 as a specialist court. It commenced operations on 5 January 1976 with the passage of the Family Law Act. The Family Court comprises of a Chief Justice, Deputy Chief Justice, Appeals Division judges and other judges. The Family Court's 2017–18 Annual Report lists 38 judicial appointments to the Court (including the Chief Justice and Deputy Chief Justice), including the five judicial appointments to the FCWA.¹² Between 2006 and 2018, the number of judicial appointments has fluctuated between 35 and 40 positions.¹³

1.16 The Family Court maintains registries in all states and territories except Western Australia (see below). Judges and Registrars are located in the following registries: Adelaide, Brisbane, Canberra, Hobart, Melbourne, Newcastle, Parramatta, Sydney and Townsville.¹⁴

1.17 On 10 December 2018, Chief Justice William Alstergren was appointed Chief Justice of the Family Court. Chief Justice Alstergren was appointed Chief Judge of the Federal Circuit Court in October 2017. Therefore, from 10 December 2018, he will hold both positions simultaneously.¹⁵ The Chief Justice is responsible for 'ensuring the effective, orderly and expeditious discharge of the business of the Court (s 21B, Family Law Act) and for managing its administrative affairs (s 38A)'.¹⁶

1.18 The Family Court's stated objective is:

[To] determine the most complex family law disputes including in specialised areas of family law through effective judicial and non-judicial processes, while respecting the needs of separating families.¹⁷

1.19 The Family Court deals with complex matters in relation to:

Parenting cases, including those that involve a child welfare agency and/or allegations of sexual abuse or serious physical abuse of a child (Magellan

11 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Parliamentary inquiry into a better family law system to support and protect those affected by family violence: Recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence*, December 2017, pp. 21–22.

12 Family Court of Australia, *Annual Report 2017–18*, pp. 62–65.

13 Attorney-General's Department, answers to questions on notice, 13 December 2018 (received 18 January 2019), p. 3.

14 Family Court of Australia, *Annual Report 2017–18*, p. 12.

15 Attorney-General for Australia, the Hon Christian Porter MP, 'Appointments of Chief Justice and Deputy Chief Justice of the Family Court of Australia', media release, 27 September 2018.

16 Family Court of Australia, *Annual Report 2017–18*, p. 62. Refer to sections 21B and 38A of the *Family Law Act 1975*.

17 Family Court of Australia, *Annual Report 2017–18*, p. 10.

cases), family violence and/or mental health issues with other complexities, multiple parties, complex cases where orders sought having the effect of preventing a parent from communicating with or spending time with a child, multiple expert witnesses, complex questions of law and/or special jurisdictional issues, international child abduction under the Hague Convention, special medical procedures and international relocation, and

Financial cases, including those that involve multiple parties, valuation of complex interests in trusts or corporate structures, including minority interests, multiple expert witnesses, complex questions of law and/or jurisdictional issues (including accrued jurisdiction) or complex issues concerning superannuation such as complex valuations of defined benefit superannuation schemes.¹⁸

1.20 The Family Court also has original jurisdiction under certain Commonwealth Acts, including the *Marriage Act 1961* (Marriage Act), the *Child Support (Registration and Collection) Act 1988*, the *Child Support (Assessment) Act 1989* and the *Bankruptcy Act 1966*.¹⁹

Appeal Division of the Family Court

1.21 The Family Court has an Appeal Division, which deals with appeals from decisions of both federal and state courts.²⁰ Appeals of a decision of the Family Court are heard by a bench of the Full Court of the Family Court, which is made up of three or more judges of the Court, the majority of whom must be members of the Appeal Division.²¹ As of 30 June 2018, there were 11 judges assigned to the Appeal Division of the Family Court.²²

1.22 Similarly, appeals from the Federal Circuit Court and the FCWA, exercising jurisdiction under the Family Law Act, are heard by a Full Court of the Family Court, unless the Chief Justice considers it appropriate for a single judge of the Family Court to exercise jurisdiction.²³

Federal Circuit Court of Australia

1.23 Formally known as the Federal Magistrates Court of Australia, the Federal Circuit Court was established in 1999 by the passage of the *Federal Magistrates Act 1999*. It commenced operations on 23 June 2000 and was initially established to address a backlog of matters in the Federal Court of Australia

18 Family Court of Australia, *About the Court*, 3 May 2016, www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/ (accessed 30 November 2018) (emphasis in original).

19 Family Court of Australia, *Annual Report 2017–18*, p. 10.

20 Family Court of Australia, *Annual Report 2017–18*, p. 42.

21 Family Court of Australia, *Annual Report 2017–18*, p. 42.

22 Family Court of Australia, *Annual Report 2017–18*, p. 42.

23 Federal Circuit Court of Australia, *Annual Report 2017–18*, p. 67.

and the Family Court, as well as to assist in dealing with simpler matters in an efficient manner.²⁴

1.24 The Federal Circuit Court comprises two divisions—a Fair Work division, and a general division for other matters including family law. When it was first established, it shared its general federal law jurisdiction with the Federal Court in respect of consumer protection under the *Trade Practices Act 1974*, bankruptcy, judicial review of administrative decisions, appeals from the Administrative Appeals Tribunal (AAT) and unlawful discrimination.²⁵ With respect to its family law jurisdiction, the Federal Circuit Court initially only considered property disputes with a maximum value of \$300,000 and parenting orders regarding residence with the consent of the parties.²⁶

1.25 The jurisdiction of the Federal Circuit Court has significantly increased over time, in respect of both general federal law and family law.²⁷ The Federal Circuit Court explains that it 'now exercises an almost identical concurrent jurisdiction with the [Family Court] with the exception of adoption, nullity and validity of marriage'.²⁸ Its jurisdiction in relation to family law includes:

- applications for divorce
- applications concerning spousal and de facto maintenance
- property disputes
- all parenting orders including those providing for where a child lives, who a child spends time and communicates with, maintenance or specific issues
- enforcement of orders made by either the Federal Circuit Court or the Family Court
- location and recovery orders as well as warrants for the apprehension or detention of a child, and
- determination of parentage and recovery of child bearing expenses.²⁹

1.26 According to the Federal Circuit Court's website, approximately 90 per cent of the court's work is in relation to family law, and the court dealt with almost

24 Federal Circuit Court of Australia, *About the Federal Circuit Court*, 1 July 2016, www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/about-fcc (accessed 30 November 2018).

25 Federal Circuit Court of Australia, *Submission 104*, p. 4.

26 Federal Circuit Court of Australia, *Submission 104*, p. 5.

27 Federal Circuit Court of Australia, *Submission 104*, p. 5.

28 Federal Circuit Court of Australia, *Submission 104*, p. 5.

29 Federal Circuit Court of Australia, *Jurisdiction of the Federal Circuit Court of Australia*, 3 May 2016, www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/jurisdictions/ (accessed 3 December 2018).

80 per cent of family law matters filed in all of the federal courts, excluding family law matters in Western Australia.³⁰

1.27 In 2017–18, the Federal Circuit Court had 69 judges appointed, a substantial increase from 49 federal magistrates in 2006–07.³¹ The Federal Circuit Court has 30 locations across Australia.³²

Family Court of Western Australia

1.28 The Family Law Act allows federal family law jurisdiction to be vested in State family courts, by agreement between a state government and the Australian Government.³³ As noted above, Western Australia is the only state to have entered into such an agreement. As such, the FCWA, established in 1976, is the only state family court in Australia. Its jurisdiction covers federal legislation (for example, the Family Law Act) in addition to state legislation (for example, the *Family Court Act 1997* (WA)). The judges of the FCWA hold equivalent federal commissions, and therefore if the FCFC bill passes, these judges would be appointed to Division 1 of the FCFC.³⁴

1.29 Unlike other states, the Western Australian Parliament has not referred its power to the Commonwealth in relation to parenting disputes concerning ex-nuptial children or issues relating to the division of property of parties to a de facto relationship (subject to the exception of superannuation of de facto partners in Western Australia).³⁵ These proceedings are instituted in the FCWA pursuant to state legislation, which mirrors federal law.³⁶

1.30 Consequently, the appeals pathway differs depending on whether the matter was heard in a state or federal jurisdiction:

- Federal jurisdiction—appeals are determined by the Full Court of the Family Court.
- State jurisdiction—appeals are determined by the Full Court of the Court of Appeal of the Supreme Court of Western Australia (subject to one exception relating to interim/interlocutory decisions of Family Law Magistrates, where the appeals are determined by a single judge of the FCWA).

30 Federal Circuit Court of Australia, About the Federal Circuit Court, 1 July 2016, www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/about-fcc (accessed 30 November 2018).

31 Attorney-General's Department, answers to questions on notice, 13 December 2018 (received 18 January 2019), p. 5.

32 Federal Circuit Court of Australia, *Annual Report 2017–18*, p. 2.

33 Mr Des Sempé, *Future Governance Options for Federal Family Law Courts in Australia: Striking the right balance*, August 2008, p. 17.

34 Family Court of Western Australian, *Submission 57*, p. 4.

35 Family Court of Western Australian, *Submission 57*, p. 4.

36 Family Court of Western Australian, *Submission 57*, p. 4.

1.31 The Hon. Chief Justice Stephen Thackray, Chief Judge of the FCWA, elaborated on the Family Court system in Western Australia:

We already have the unified family law system in WA, because all family law cases in Western Australia are filed in Perth in the Family Court of Western Australia. We then divide up the work between our five judges and 10 specialist family law magistrates, depending upon the complexity of the matter. Although our family law magistrates are appointed formally as magistrates of our [Western Australian (WA)] state Magistrates Court, the law provides that they are in fact subject to the direction of the person who holds my office. So the Chief Judge of the Family Court of Western Australia directs the work of the family law magistrates. So although as a matter of law they are two courts, in reality they are one.

Our court has the great advantage of being able to exercise both state and federal jurisdiction, so we are able to deal with the whole range of family law matters, whether they are federal or state. So we deal with standard parenting-property settlement matters for both married couples and de facto couples. We deal with adoptions. We deal with surrogacy matters. We occasionally make restraining orders. Most importantly, we can deal with the care and protection jurisdiction, which in other states is generally exclusively dealt with by a Children's Court.

In WA we are unique in that we have only one file in each matter, we have one set of rules, the forms are all the same, there's a single point of entry, and cases move seamlessly between the magistrates and the judges throughout the course of a matter, depending upon the complexity and convenience. Although not strictly relevant, I'm very pleased to say that, as at today, in this court there is no judgement of any judge or magistrate that is outstanding for longer than the prescribed period.³⁷

Key provisions of the FCFC bill

1.32 The FCFC bill largely replicates the provisions contained in the Family Law Act, with some exceptions designed to ensure simplicity and efficiency. Only key components of the bills that substantially differ to the current operation or practice of the Family Court or Federal Circuit Court will be outlined below.

One court comprising of two Divisions

1.33 As stated above, the FCFC bill proposes to establish the FCFC, which would comprise of two Divisions—Division 1 would be a continuation of the Family Court, while Division 2 would be a continuation of the Federal Circuit Court. As noted in the Explanatory Memorandum, the aim of the bill is to provide a 'single point of entry into the family law jurisdiction of the federal court system'.³⁸

1.34 The objects of the bills are:

37 The Hon. Justice Stephen Thackray, *Proof Committee Hansard*, 10 December 2018, pp. 1-2.

38 Explanatory Memorandum to FCFC bill, p. 4.

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- (a) to ensure that justice is delivered by federal courts effectively and efficiently; and
 - (b) to provide for just outcomes, in particular, in family law or child support proceedings; and
 - (c) to provide a framework to facilitate cooperation between the Federal Circuit and Family Court of Australia (Division 1) and the Federal Circuit and Family Court of Australia (Division 2) with the aim of ensuring:
 - (i) common rules of court and forms; and
 - (ii) common practices and procedures; and
 - (iii) common approaches to case management.³⁹

1.35 Division 1 would be considered a superior court of record and a court of law and equity, and Division 2 would be a court of record and a court of law and equity.⁴⁰

Jurisdiction

1.36 The original jurisdiction of Division 1 of the FCFC aligns with the jurisdiction of the Family Court (proposed clause 24), as does the original jurisdiction of Division 2 align with the jurisdiction of Federal Circuit Court (proposed clause 100). Additionally, the FCFC bill provides for both Divisions to hear appeals from State and Territory courts of summary jurisdiction, in relation to federal family law or child support matters (proposed clauses 25 and 102 of the FCFC bill and Schedule 1, item 72 of the Consequential Amendments bill). The Attorney-General's Department (the Department) explains the rationale for these provisions:

Providing both Divisions of the FCFC with the same jurisdiction for family law and child support matters means that common approaches to case management for those matters can be more easily implemented consistently across the FCFC...⁴¹

1.37 The Consequential Amendments bill would make changes to the appellant jurisdiction of the Family Court and Federal Circuit Court, which will be discussed below.

Transfer of proceedings

1.38 The FCFC bill would allow for the transfer of matters between the two Divisions, either on initiative of the Division in which the proceeding initiated, or on the application of a party to the proceeding (proposed clauses 34 and 117). The transfer of proceeding from Division 1 to Division 2, would require the approval of a Chief Judge (proposed subclause 34(5)), while the transfer of proceedings from Division 2 to Division 1, would require the approval of the Chief Justice (proposed subclause 117(5)). The Department explained that the approval of the receiving Chief

39 Clause 5 of the FCFC Bill.

40 Explanatory Memorandum to FCFC bill, p. 4.

41 Attorney-General's Department, *Submission 56*, p. 17.

Justice or Chief Judge, is to 'ensure that only matters that need to be transferred will be so transferred'.⁴²

1.39 In contrast, the transfer of non-family law proceedings in Division 2 to the Federal Court would take effect on the date the order is 'confirmed' by the Federal Court (proposed clause 120).

One Chief Executive Officer

1.40 The administrative affairs of Division 1 and Division 2 of the FCFC will be managed by a single Chief Executive Officer, pursuant to clauses 62 and 216 of the FCFC bill.

Appointment of Judges

1.41 The FCFC bill provides for the appointment of a Chief Justice, a Deputy Chief Justice, senior judges and other judges to Division 1; and a Chief Judge, Deputy Chief Judge, senior judges and other judges to Division 2.

1.42 Proposed subsection 20(1) allows for a Chief Justice of Division 1 to hold a dual appointment as the Chief Judge of Division 2. Similarly, proposed subsection 20(2) allows for a Chief Deputy Justice of Division 1 to hold a dual appointment as the Deputy Chief Judge of Division 2. Moreover, the Explanatory Memorandum states that it is the intention of Government:

...that the FCFC would operate under the leadership of one Chief Justice, supported by one Deputy Chief Justice, with each holding a dual commission to both Division 1 and Division 2.⁴³

A common approach

1.43 The FCFC bill seeks to ensure efficiency through a common set of rules, practices and procedures, as well as a common approach to case management, with respect to the two Divisions of the FCFC. For example, clause 51 of the FCFC bill provides that the Chief Justice of Division 1, to work cooperatively with the Chief Judge of Division 2 and that:

For the purposes of ensuring the efficient resolution of family law or child support proceedings, the Chief Justice must work cooperatively with the Chief Judge with the aim of ensuring common approaches to case management.⁴⁴

1.44 Clause 55 similarly provides that the Chief Justice work cooperatively with the Chief Judge with the aim of ensuring common rules of court and forms, and common practices and procedures. The Explanatory Memorandum states that this is 'intended to strengthen the goal of ensuring the efficient resolution of family law and child support proceedings'.⁴⁵

42 Attorney-General's Department, *Submission 56*, p. 22.

43 Explanatory Memorandum to FCFC bill, p. 3.

44 Clause 51 of the FCFC bill.

45 Explanatory Memorandum to FCFC bill, p. 44.

1.45 Proposed clauses 56 and 184 of the FCFC bill provide the Chief Justice of Division 1 and the Chief Judge of Division 2 with the power to make rules. As outlined above, currently, the Chief Justice of the Family Court and the Chief Judge of the Federal Circuit Court, is the same individual—Chief Justice and Chief Judge Alstergren—who holds a dual appointment. Consequently, the rule-making powers of Divisions 1 and 2 of the FCFC would be vested in the one individual.

Parties to comply with overarching purpose

1.46 Clause 49 of the FCFC bill would require parties to act consistently with the overarching purpose of the Act and would require a party's lawyer to assist the party to comply with their duty to act consistently with the overarching purpose.

1.47 Subclause 49(3) of the FCFC bill would allow a Judge of the FCFC (Division 1), to require a lawyer to give a party an estimate of the likely duration of the proceedings and the likely costs the party will have to pay in connection with the proceedings. The Explanatory Memorandum notes that this may assist the party 'to prioritise the issues in dispute, or to re-consider the resources they wish to allocate to the litigation'.⁴⁶

1.48 Subclause 49(4) of the bill would require a Judge to take into account, when awarding costs, any failure of a party to act consistently with the overarching purpose. Additionally, subclauses 49(5) and 49(6) would provide a Judge of the FCFC (Division 1) the discretion to order that a party's lawyer bears the costs personally. Where such an order is made because of the failure to comply with the duty imposed by subclause 49(2), the lawyer is prevented from recovering the costs from the lawyer's client.⁴⁷ The rationale is explained in the Explanatory Memorandum:

The intention of clause 49 is to support a cultural change in the conduct of litigation so that the Court and the parties are focussed on resolving disputes as quickly and cheaply as possible. Parties who act consistently with this duty will be able to avoid cost orders being made against them and, overall, their litigation costs should be reduced.⁴⁸

1.49 Clause 158 of the FCFC bill contains identical provisions with respect to the FCFC (Division 2).

Key provisions of the Consequential Amendments bill

1.50 The Consequential Amendments bill would make 'consequential amendments and provides transitional provisions necessary to support the [FCFC bill]'.⁴⁹ The substantive change relates to the establishment of a new appellate jurisdiction, as discussed below.

46 Explanatory Memorandum to FCFC bill, p. 41.

47 Subclause 49(6) of the FCFC bill.

48 Explanatory Memorandum to FCFC bill, p. 42.

49 Explanatory Memorandum to Consequential Amendments bill, p. 2.

New appellate jurisdiction

1.51 Of particular significance, the Consequential Amendments bill would establish a new Division within the Federal Court of Australia (Federal Court)—the Family Law Appeal Division.

1.52 Currently, appeals from the Family Court are heard in the Full Court of the Family Court. Pursuant to items 227 and 228 of the Consequential Amendments bill, the appellate jurisdiction of the Family Court would largely be removed. In its place, a new division of the Federal Court would be established—the Family Law Appeal Division.

1.53 Appeals from Division 1 of the FCFC would be heard by a Full Court of the Family Law Appeal Division of the Federal Court.⁵⁰ While appeals from Division 2 of the FCFC would be heard by a single judge of the Family Law Appeal Division of the Federal Court, unless a judge considers it appropriate for the appeal to be heard by a Full Court.⁵¹

1.54 The Explanatory Memorandum outlines the rationale for this proposed change:

The conferral of appellate jurisdiction for family law and child support matters is central to the structural reform of the courts. By investing the Federal Court with appellate jurisdiction, and removing most of the appellate jurisdiction of the Family Court, judicial resources of the FCFC (Division 1) will be able to be redirected to hear more first instance family law matters. It is appropriate for appellate jurisdiction to be conferred on the Federal Court as it is a superior court with experienced Judges. Further, the inclusion of the list provisions and a specialised Division – the Family Law Appeal Division – will allow Judges with more experience in dealing with family law matters to be allocated specific family law appeal matters.⁵²

1.55 The effect of the Consequential Amendments bill in Western Australia is that appeals from a Western Australian Family Law Magistrate would be heard by a single judge of the FCWA, rather than by a bench of three judges of the Full Court of the Family Court, as is currently the case.⁵³

1.56 Schedules 6 and 9 of the Consequential Amendments bill would make amendments to the Rules of Court 'to ensure that the FCFC and the Family Law Division of the Federal Court are able to operate appropriately'.⁵⁴ The Department explains how the rules will transition:

50 Attorney-General's Department, *Submission 56*, p. 17. Refer also to section 25 of the *Federal Court of Australia Act 1976*.

51 Schedule 1, Part 1, item 229 of the Consequential Amendments bill.

52 Explanatory Memorandum to Consequential Amendments bill, p. 73.

53 Family Court of Western Australian, *Submission 57*, p. 5.

54 Attorney-General's Department, *Submission 56*, p. 21.

Initially, upon commencement of the reforms, the Federal Court and the two Divisions of the FCFC would largely maintain their existing Rules of Court. ... Over the course of 2019, the Federal Court and the FCFC would undertake a comprehensive review of their respective Rules of Court, to consolidate and update those rules with a view to greater harmonisation of procedures.⁵⁵

Summary of schedules

1.57 The table below provides a brief overview of the schedules contained in the Consequential Amendments bill:

Table 1: Overview of Schedules in the Consequential Amendments bill⁵⁶

Schedules	Overview
Schedule 1	Schedule 1 makes significant amendments to the Family Law Act 1975 to remove provisions relating to the establishment and operation of the Family Court. These provisions have been replicated with necessary changes in the FCFC bill. It also amends that Act to provide for the relevant changes to definitions, jurisdiction and to accommodate the changes to appeal pathways arising from the establishment of the Family Law Appeal Division of the Federal Court. Schedule 1 further makes significant amendments to the Federal Court of Australia Act 1976 to provide for the establishment of the Family Law Appeal Division of the Federal Court. It also imposes a new qualification for judges appointed to the Federal Court.
Schedule 2	Schedule 2 amends other Commonwealth legislation, as necessary, to reflect the continuation of the Family Court as the FCFC (Division 1) and the Federal Circuit Court as the FCFC (Division 2) respectively, and to accommodate the changes to family law appeal arrangements with the establishment of the Family Law Appeal Division of the Federal Court.
Schedule 3	Schedule 3 amends delegated Commonwealth legislation, as necessary, to reflect the continuation of the Family Court as the FCFC (Division 1) and the Federal Circuit Court as the FCFC (Division 2), respectively. It also provides for harmonisation of family law court fees across the FCFC (Division 1) and FCFC (Division 2), and accommodates the changes to appeal arrangements with the establishment of the Family Law Appeal Division of the Federal Court.

⁵⁵ Attorney-General's Department, *Submission 56*, p. 21.

⁵⁶ The overview of each of the schedules is copied from the Attorney-General's Department, *Submission 56*, pp. 23–24.

Schedules	Overview
Schedule 4	Schedule 4 provides for the repeal of the Federal Circuit Court of Australia Act 1999 and related savings and transitional arrangements. The provisions of the Federal Circuit Court Act are replicated with necessary changes in the FCFC bill.
Schedule 5	Schedule 5 provides for consequential amendments to legislation potentially affected by other bills before the Parliament at the time of the introduction of the FCFC bills. The commencement of these amendments is contingent on the passage of the relevant amending legislation.
Schedule 6	Schedule 6 amends the Federal Court Rules for the purpose of ensuring they are appropriate in application to the Family Law Appeal Division of the Federal Court and to reflect changes to arrangements for transfers between the Federal Court and FCFC. The Federal Court Rules provide for the practice and procedure to be followed in the Federal Court and in Registries of the Court. They may extend to all matters incidental to any practice or procedure necessary or convenient to be prescribed for the conduct of any business of the Court.
Schedule 7	Schedule 7 modifies the standard Rules of Court (the Family Law Rules 2004), made under the Family Law Act 1975 as in force immediately before 1 January 2019, for application to the FCFC (Division 1) on and from 1 January 2019. These modified rules will be known as the Federal Circuit and Family Court of Australia (Division 1) Rules 2018, and would be taken to be Rules of Court covered by Chapter 3 of the Federal Circuit and Family Court of Australia Act 2018.
Schedule 8	Schedule 8 modifies the Rules of Court, made under the Federal Circuit Court of Australia Act 1999 as in force immediately before 1 January 2019, for application to the FCFC (Division 2) on and from 1 January 2019. These modified rules will be known as the Federal Circuit and Family Court of Australia (Division 2) Rules 2018, and would be taken to be Rules of Court covered by Chapter 4 of the Federal Circuit and Family Court of Australia Act 2018.
Schedule 9	Schedule 9 amends the standard Rules of Court (the Family Law Rules 2004), made under the Family Law Act 1975 for application to other courts exercising jurisdiction under that Act. The amendments take account of changes in the structure of the federal family law courts and their enabling legislation.

Schedules	Overview
Schedule 10	Schedule 10 provides transitional arrangements to preserve and transition the offices, appointments, and roles of those in the Family Court and the Federal Circuit Court (including Judges, office holders, and other personnel of the two courts) to the FCFC Divisions 1 and 2 respectively. Schedule 10 also provides transitional arrangements for appeals on foot in the Family Court prior to 1 January 2019 or appeals eligible to be filed as at that time, as a result of the creation of the Family Law Appeal Division of the Federal Court.

Scrutiny of Bills Committee

1.58 The Senate's Standing Committee for the Scrutiny of Bills (Scrutiny Committee) raised two issues relating to the FCFC bill which both relate to the broad delegation of administrative powers, as discussed below.⁵⁷

Complaints

1.59 Clause 32 of the FCFC bill outlines the process the Chief Justice may follow if a complaint is made about another Judge of the FCFC (Division 1). Subclause 32(2) provides that the Chief Justice may authorise, in writing, 'a person or a body' to assist the Chief Justice in the handling of the complaint. Clause 113 mirrors clause 32 and applies with respect to complaint handling processes that a Chief Judge may follow where a complaint is made about a Judge of the FCFC (Division 2).

1.60 The Scrutiny Committee raised concerns that subclauses 32(2) and 113(2) delegates administrative powers 'to a relatively large class of persons, with little or no specificity as to their qualifications or attributes'.⁵⁸ The Explanatory Memorandum to the FCFC bill explains that the subclauses would give the Chief Justice 'a high degree of flexibility to deal with complaints as appropriate, including through managing complaints on a case by case basis'.⁵⁹

1.61 The Scrutiny Committee noted that the Explanatory Memorandum does not contain information about the range of persons or bodies that is envisaged the Chief Justice or Chief Judge might authorise to handle complaints.

1.62 While the Explanatory Memorandum recognised 'flexibility' as the reason why the subclauses provides broad delegation of administrative powers with no

57 Standing Committee for the Scrutiny of Bills (Scrutiny Committee), *Scrutiny Digest 10 of 2018*, 12 September 2018.

58 Standing Committee for the Scrutiny of Bills (Scrutiny Committee), *Scrutiny Digest 10 of 2018*, 12 September 2018, p. 5.

59 Explanatory Memorandum to FCFC bill, p. 32. See also pp. 74–75 which states that the subclause 113(2) 'is necessary to ensure a sufficient degree of flexibility for the Chief Judge in complaints handling processes, which may involve a wide variety of circumstances.'

specificity as to the qualifications or attributes delegates must possess, the Scrutiny Committee did not consider this to be a sufficient justification.⁶⁰

1.63 In response to the concerns raised by the Scrutiny Committee, the Attorney-General, the Hon. Christian Porter MP, provided the following advice in relation to the intended operation of the subclauses:

...I anticipate that the persons authorised to handle complaints would continue to be limited to the Deputy Principal Registrars and the Deputy Chief Justice of the FCFC (Division 1), and would also likely include the Deputy Chief Judge of the FCFC (Division 2). However, and as outlined in the Explanatory Memorandum to the main Bill, having a broad delegation power will allow flexibility in the complaint handling process, which may involve a wide variety of circumstances.⁶¹

1.64 The Scrutiny Committee concluded by reiterating its concerns with the subclauses and drawing its concerns to the attention of the senators; noted that it would be appropriate for the FCFC bill to be amended to require the Chief Justice and Chief Judge to be satisfied that person's authorised to handle complaints possess appropriate expertise; and requested that the Explanatory Memorandum be updated to include the advice provided by the Attorney-General.⁶² The committee notes that the revised Explanatory Memorandum contains this updated information.⁶³

Assisting the Sheriff, Deputy Sheriff, Marshall or Deputy Marshall

1.65 Clauses 72, 234 and 235 of the FCFC bill would allow the Sheriff, Deputy Sheriff, Marshall, or Deputy Marshall to authorise persons to assist them in exercising powers or performing functions in Divisions 1 and 2 of the FCFC. Similarly, proposed sections 18PB and 18PE of Schedule 1 of the Consequential Amendments bill allows the Sheriff, Deputy Sheriff, Marshall or Deputy Marshall to authorise persons to assist them in exercising powers or performing functions in the Federal Court of Australia. Apart from noting that these provisions are substantially similar to the current provisions contained in the *Federal Court of Australia Act 1976*, the Explanatory Memorandum provides no further rationale for these powers.

1.66 The Scrutiny Committee raised the same concerns, related to the broad delegation of administrative powers without any legislative guidance as to who may be authorised to assist.⁶⁴

1.67 In response to these concerns, the Attorney-General stated:

Those persons currently authorised to provide such assistance within the Family Court, the Federal Circuit Court and the Federal Court are State and

60 Scrutiny Committee, *Scrutiny Digest 10 of 2018*, 12 September 2018, p. 3.

61 Attorney-General's response to the Scrutiny Committee's comments, 4 October 2018, p. 2. See, Ministerial responses relating to *Scrutiny Digest 12 of 2018*.

62 Scrutiny Committee, *Scrutiny Digest 12 of 2018*, 17 October 2018, p. 86.

63 Revised Explanatory Memorandum to FCFC bill, pp. 32 and 74.

64 Scrutiny Committee, *Scrutiny Digest 10 of 2018*, 12 September 2018, p. 3.

Territory Sheriff's officers. These officers execute the Courts' orders in relation to civil enforcement matters. As such, they execute civil enforcement warrants to seize and sell property or take vacant possession of property in strict accordance with the order issued by the respective Court. State and Territory Sheriff's officers perform the same duties in relation to enforcement orders issued by State and Territory Courts, are trained in accordance with State and Territory requirements and are generally uniformed and carry photo identity cards. Where violence is anticipated, authorised officers seek assistance of local police and do not arrest people in connection with this type of process.

It is essential that there is provision for such authorisation. State and Territory Sheriff's officers assist the federal courts, which do not have personnel with the necessary training and powers to undertake such duties. In the FCFC and the Federal Court, the persons authorised under the provisions would continue to be limited to State and Territory Sheriff's officers.⁶⁵

1.68 The Scrutiny Committee reiterated its concerns that while it may be necessary to authorise State and Territory Sheriff's officers to assist officers of the federal court, it remains unclear why it is necessary or appropriate to authorise 'any person' to provide assistance.⁶⁶ Furthermore, the Scrutiny Committee noted that while it may be intended that the authorisation be made to State and Territory Sheriff's officers, the bill does not appear to restrict the authorisation to such persons or to require that the person authorised to assist officers of the federal court possess appropriate expertise.⁶⁷ The Scrutiny Committee commented that is of particular concern given 'that persons authorised to assist officers of the federal courts may participate in the exercise of relatively significant coercive powers, including powers of arrest, search and entry'.⁶⁸

1.69 The Scrutiny Committee outlined that it considered it appropriate for the bills to be amended to require the Sheriff, Deputy Sheriff, Marshall, or Deputy Marshall of the FCFC and the Federal Court 'to be satisfied that persons authorised to assist those officers in the performance of their functions possess appropriate expertise'.⁶⁹ The Scrutiny Committee also requested that key information provided by the Attorney-General be included in the Explanatory Memorandum and otherwise drew its scrutiny concerns to the attention of senators.⁷⁰

65 Attorney-General's response to the Scrutiny Committee's comments, 4 October 2018, p. 2. See Ministerial responses relating to *Scrutiny Digest 12 of 2018*.

66 Scrutiny Committee, *Scrutiny Digest 12 of 2018*, 17 October 2018, p. 88.

67 Scrutiny Committee, *Scrutiny Digest 12 of 2018*, 17 October 2018, pp. 88–89.

68 Scrutiny Committee, *Scrutiny Digest 12 of 2018*, 17 October 2018, p. 89.

69 Scrutiny Committee, *Scrutiny Digest 12 of 2018*, 17 October 2018, p. 89.

70 Scrutiny Committee, *Scrutiny Digest 12 of 2018*, 17 October 2018, p. 89.

Parliamentary Joint Committee on Human Rights

1.70 The Parliamentary Joint Committee on Human Rights stated that the bills do not raise human rights concerns.⁷¹

Financial impact

1.71 The Explanatory Memorandum states that \$4 million was allocated in the 2018–19 Budget to assist with the implementation of the structural reform of the federal courts.⁷² Additionally the Explanatory Memorandum noted that:

Locating the Federal Circuit Court and the Family Court in the FCFC is expected to deliver efficiencies to the courts of \$3.0 million over the forward estimates. These efficiencies will be reinvested in the courts to further enhance their capacity to provide services.⁷³

71 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report 9 of 2018*, 11 September 2018, p. 22.

72 Explanatory Memorandum to FCFC bill, p. 5.

73 Explanatory Memorandum to FCFC bill, p. 5.