

The Senate

Legal and Constitutional Affairs
Legislation Committee

Federal Circuit and Family Court of Australia
Bill 2018 [Provisions]

Federal Circuit and Family Court of Australia
(Consequential Amendments and Transitional
Provisions) Bill 2018 [Provisions]

February 2019

© Commonwealth of Australia 2019

ISBN 978-1-76010-908-0

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website: <http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Members of the committee

Members

Senator the Hon Ian Macdonald (LNP, QLD) (Chair)

Senator Louise Pratt (ALP, WA) (Deputy Chair)

Senator Jim Molan AO, DSC (LP, NSW)

Senator Nick McKim (AG, TAS)

Senator Jane Hume (LP, VIC)

Senator Murray Watt (ALP, QLD)

Substituted Members

Senator Rachel Siewert (AG, WA) to replace Senator Nick McKim 10.12.2018

Participating Members

Senator Rex Patrick (CA, SA)

Senator Pauline Hanson (PHON, QLD)

Senator Claire Moore (ALP, QLD)

Senator Tim Storer (IND, SA)

Secretariat

Dr Sean Turner, Acting Committee Secretary

Ms Pothida Youhorn, Principal Research Officer

Ms Ophelia Tynan, Estimates Officer

Ms Brooke Gay, Administrative Officer

Suite S1.61

Telephone: (02) 6277 3560

Parliament House

Fax: (02) 6277 5794

CANBERRA ACT 2600

Email: legcon.sen@aph.gov.au

Table of contents

Recommendations	vii
Chapter 1.....	1
Introduction	1
Conduct of this inquiry.....	1
Structure of this report.....	1
Purpose of the bills	2
The current family court system.....	3
Family Court of Australia.....	4
Federal Circuit Court of Australia	5
Family Court of Western Australia	7
Key provisions of the FCFC bill	8
Key provisions of the Consequential Amendments bill.....	11
Scrutiny of Bills Committee.....	15
Financial impact	18
Chapter 2.....	19
Reviews into the Federal Court system.....	19
The need for reform.....	19
Semple review	20
PricewaterhouseCoopers report.....	22
Australian Law Reform Commission review	25
Chapter 3.....	27
Key Issues	27
Achieving the bill's stated purpose.....	27
Appellate jurisdiction in the Federal Court of Australia	35
Judicial expertise	39

Potential impact on vulnerable groups	46
Application of the bill to the Western Australian jurisdiction	48
Other issues	52
Committee view and recommendations	53
Labor Senators' Interim Dissenting Report.....	57
Additional Comments by Senator Rex Patrick.....	59
Appendix 1 Submissions, additional information, answers to questions on notice and tabled documents.....	61
Appendix 2 Public hearings	65

Recommendations

Recommendation 1

3.112 The committee recommends—in addition to the allocated funding as detailed in the Explanatory Memorandum—that the proposed new divisions of the Federal Circuit and Family Court of Australia be provided with additional resources for Registrars to assist with the backlog of cases.

Recommendation 2

3.114 The committee recommends that an appellate division of the Federal Court of Australia not be created and instead the existing appellate jurisdiction of the Family Court of Australia be retained into the Federal Circuit and Family Court of Australia (Division 1).

Recommendation 3

3.117 The committee recommends that the qualifications of judges in Division 2, as per proposed paragraph 79(2)(b), be amended to ensure that they have the appropriate skills, knowledge, experience and personality.

Recommendation 4

3.119 The committee recommends that the Australian Government pursue the immediate appointment of suitable candidates to vacant judiciary positions in the family courts and consider whether there is a need to appoint additional judges.

Recommendation 5

3.122 Subject to the adoption of the above recommendations, the committee recommends that the bills be passed.

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.

-
- (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	<p>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.</p> <p>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.</p>
Schedule 2	<p>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.</p>
Schedule 3	<p>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.</p>

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.

Chapter 2

Reviews into the Federal Court system

2.1 This chapter considers the underlying need for reform of the Family Court system, and summarises recent reviews that have, in one way or another, highlighted this need.

The need for reform

2.2 It has been estimated that approximately 70 per cent of family law disputes are resolved without involving the federal court system.¹ Therefore, the family law jurisdiction is far larger than the disputes that go to court. Part of the much broader family law community includes State and Territory bodies such as legal aid services, community support services, family violence services, and State and Territory Police and Courts; mediators and arbitrators; and counsellors and psychologists. While acknowledging that the federal courts are only one component of a much larger family law system, the committee is required to inquire into the bills before it, which are limited in their scope to the proposed restructure of the federal courts.

2.3 Submitters and witnesses broadly agreed that the family law system is fundamentally broken and requires reform. One witness referred to the family law system being 'in a state of crisis and [that] reform is desperately needed to fix the system'.² Submitters were therefore generally supportive of restructuring the courts in some form to improve outcomes for people using the courts.

2.4 In part, the need for reform has become more pressing not simply because of the volume of work before the courts, but also the growing complexity of cases within the family law system. The former Chief Justice of the Family Court, the Hon. Diana Bryant AO QC, submitted that significant societal, cultural and institutional change had occurred during her appointments in the federal courts which had resulted in more complexity in Family Court cases.³ She noted that these factors, including gender role changes, family violence, sexual abuse, mental health, substance abuse and globalisation, had contributed to cases becoming more difficult and complex, thus occupying more of the courts' time.⁴

2.5 Former Judge of the Family Court, the Hon. Rodney Burr AM agreed with this perspective, arguing that the range and complexity of matters being heard by the

1 Attorney-General's Department, *Submission 56*, p. 3.

2 Mr Arthur Moses SC, President, Law Council of Australia, *Proof Committee Hansard*, 12 December 2018, p. 27.

3 The Hon. Diana Bryant AO, QC, *Submission 71*, pp. 2–3.

4 The Hon. Diana Bryant AO, QC, *Submission 71*, pp. 2–3.

court, partly caused by the increased jurisdiction of the courts, have caused a backlog of cases, in addition to unmanageable workloads for the remaining sitting judges.⁵

2.6 The need to reform the federal courts has been discussed for some years and has been the subject of a number of reviews. In a media release, the Attorney-General, the Hon. Christian Porter MP, outlined that, in developing the bills, the government had taken into account the following reviews:

- the 2008 Semple Review, *Future Governance Operations for the Federal Family Law Courts in Australia: Striking the Right Balance*;
- a 2014 KPMG Review, *Review of the Performance and Funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia*;
- a 2015 EY Report, *High Level Financial Analysis of Court Reform Initiatives*;
- the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs Report, *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*; and
- a 2018 PricewaterhouseCoopers [PwC] Report, *Review of the efficiency of the operation of the federal courts*.⁶

2.7 On 17 August 2017, the then Attorney-General, Senator the Hon. George Brandis QC, asked the Australian Law Reform Commission (ALRC) to review the family law system. The ALRC is due to release its final report in March 2019.⁷

2.8 During the inquiry, the committee heard evidence concerning the Semple review, the PwC report and the ALRC review. These three reviews will be discussed below.

Semple review

2.9 The terms of reference of the Semple review included providing advice on changes to improve case management processes, the structure of the courts, and the judicial structure, with a view to ensuring efficient, effective and integrated service delivery across the family law jurisdiction.⁸ The Semple review was also tasked with considering the potential impact these changes may have on other administrative or judicial structures.⁹ In considering its terms of reference, the Semple review was required have regard to the:

5 The Hon. Rodney Burr AM, private capacity, *Committee Hansard*, 11 December 2018, p. 23.

6 The Hon. Christian Porter, MP, Attorney-General, 'Legislation for family courts reform to be introduced', *Media release*, 17 August 2018.

7 www.alrc.gov.au/inquiries/family-law-system

8 Mr Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the right balance*, August 2008, p. 4.

9 Mr Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the right balance*, August 2008, p. 4.

...continuing difficulties in the administration of the delivery of family law services by the Family Court and Federal Magistrates Court, including continuing confusion among litigants over the appropriate court to handle their matters.¹⁰

2.10 In summary, the Semple review recommended a single family court with two separate judicial divisions—a Superior and Appellate Division comprising of existing Family Court Justices, and a General Division, comprising of existing Federal Magistrates handling family law work.¹¹ The review also proposed a single administrative and corporate service structure for the federal family law system.¹² In relation to other areas of law under the former Federal Magistrates Court, the Semple review recommended that a second division of the Federal Court be established, which would deal with the migration and general federal law work.

2.11 A number of submitters and witnesses expressed their support for the model proposed by the Semple review rather than the model proposed by the FCFC bill. Former Judge of the Family Court, the Hon. Rodney Burr AM, commented that having one court with family law jurisdiction was logical but that the model proposed by the bills have things 'upside down', further noting that:

It is only good sense and logic to have one court doing similar work in the same jurisdiction rather than two, but the mooted proposal has it exactly upside down. As was urged at the time when the extraordinary decision was taken to establish a second court in the jurisdiction, the Family Court of Australia should do all of the work with two tiers of judges.¹³

2.12 The Law Council of Australia also expressed its support for the Semple model:

The Family Law Section in the Law Council and, in fact, the entire legal profession around the country supported the Semple model when it was put forward 10 years ago. Certainly we don't see any reason to modify that view. ...

The Semple model has and always has had great attraction. Before the Federal Magistrates Court was created we said we should give the Family Court a secondary rung of judges, of magistrates, within that entity. It's the most efficient way to manage the work and it means we maintain the specialty and continue to move with the times as society changes. It is the best outcome.¹⁴

10 Mr Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the right balance*, August 2008, p. 4.

11 Mr Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the right balance*, August 2008, p. 8.

12 Mr Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the right balance*, August 2008, p. 7.

13 The Hon Rodney Burr AM, *Proof Committee Hansard*, 11 December 2018, p. 24.

14 Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Proof Committee Hansard*, 12 December 2018, p. 33.

2.13 However, the Attorney-General's Department (the Department) explained a key difference is that the Semple model was not agreed to by the heads of jurisdiction, whereas the model as proposed by the bills before the committee has been agreed to between the three relevant heads of jurisdiction.¹⁵ Additionally, the Department explained that the Semple model recommended the abolition of a court, whereas the current model does not abolish any court:

The current model isn't going one way or another way; it's just bringing them together. It's the Family Court and the Federal Circuit Court brought together administratively, but there are still two separate courts, renamed as division 1 and division 2. The Semple model would have abolished the Federal Circuit Court. It's not a continuation of the Federal Circuit Court. It would have looked at abolishing the Federal Magistrates Court at the time and it would have needed each of the judges to have a new commission to the new court, the Family Court, and resign their commission as Federal Magistrates Court judges at the time. I think the Attorney has characterised that as a radical change, whereas what's proposed now is the least radical change that can be done, because it isn't actually abolishing courts at all, whereas the Semple model did seek to abolish the Federal Magistrates Court.¹⁶

PricewaterhouseCoopers report

2.14 Submitters and witnesses raised concerns relating to PwC's review of the efficiency of the Federal Court. PwC noted that the review was conducted over six weeks between March and April 2018 and did not consider opportunities for broader reform.¹⁷ PwC explained the scope and method of the review:

In understanding the current state of the courts, we were asked to identify potential areas of variation across the Family Court of Australia and the Federal Circuit Court of Australia, arising as a result of different rules and approaches of the courts. The operational review was intended to present a perspective on the efficiency of the courts to assist the Attorney-General's Department to make informed decisions about how to improve our court operations. Our work very much focused on the mechanics of the system and operational data of the courts. Given the focus on operational data, we reviewed the publicly available report on government services data and annual reports of both the Family Court and the Federal Circuit Court, as well as supplementary information related to workload, measures of timeliness and associated levels of expenditure. We also consulted with

15 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 58.

16 Dr Albin Smrdel, Assistant Secretary, Family Law Branch, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 59.

17 Ms Zac Hatzantonis, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard*, 11 December 2018, p. 47.

senior members of the court system to validate our understanding of the current state data and to test possible efficiency opportunities.¹⁸

2.15 At the hearing, PwC outlined the key findings of the review:

In terms of what we saw, our key findings included that, over the past five years, the number of final court applications made to the courts to resolve family disputes has remained static, but the time and cost of resolution have not. The workload of the courts is driven by final order applications—around 20,500 each year. The Federal Circuit Court receives over 85 per cent of these applications. Different operational practices of the courts are leading to variation in efficiency levels. There are key differences in the way matters are handled between the courts. This includes the initial case management and allocation of those cases, practices of judges, and scheduling and listing of appeals. There is a significant difference in cost of finalisation of matters between the two courts, with the Family Court near to \$17,000 versus the Federal Circuit Court at approximately \$5,500. For litigants, it costs approximately \$110,000 in the Family Court versus approximately \$30,000 in the Federal Circuit Court. A number of opportunities that have the potential to significantly improve the efficiency of the family law system are summarised on page 8 of our report. These could significantly reduce the backlog of the family law courts and drive more efficient and cost-effective resolution of matters for litigants.¹⁹

2.16 Submitters expressed concern that the bill was developed on what they considered to be flawed findings contained within PwC's report. For example, the Law Institute of Victoria (LIV) submitted that the evidentiary basis for the reforms was flawed, particularly noting the PwC Report's 'multiple inaccuracies and unsubstantiated assumptions' and therefore argued that PwC report should not form the basis of the reform.²⁰

2.17 Witnesses were particularly concerned that the PwC review did not adequately account for the different levels of complexity between the cases heard in the Family Court and the Federal Circuit Court. For example, Mr Burr stated:

All I would say is that I would be acutely annoyed if I were still a judge of the Family Court of Australia and I were given one stat for a disposal after doing a two-week Magellan sex abuse trial and having to wade through all of the documentation from the state department, all of the family reports that were available and all the evidence that was given by experts, analyse it, make my findings of fact, apply the law and deliver a judgment. I would get one stat for that. If I were in my older role of doing one-day custody

18 Ms Zac Hatzantonis, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard*, 11 December 2018, p. 47.

19 Ms Zac Hatzantonis, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard*, 11 December 2018, p. 47.

20 Law Institute of Victoria, *Submission 60*, p. 7.

trials, I would do those ex temp judgments. They were easy. You would just knock them out in an hour off the cuff, and I'd get one stat for that as well.²¹

2.18 In relation to ex-tempore judgements (that is, judgements made immediately after a trial ends), Mr Gregory Howe from the Law Society of South Australia referred to the suggestion as a 'naïve proposition', further stating that:

One of the flawed things in the PwC report, for example, it that says that things would be a lot better if judges were told to deliver more ex tempore judgments. You just tell them to deliver more ex tempore judgments, and that way they won't be reserving, and that way they'll be able to get on with more cases. All judges could deliver ex tempore judgments, but they wouldn't be very good, potentially. The suggestion is that you can all of a sudden mandate judges to deliver X number of ex tempore judgments—the ones on the spot at the end of a trial. If senators aren't aware, what normally happens at the end of a trial is a judge reserves his or her judgment, goes away, thinks about it carefully, analyses the evidence, looks at all the exhibits, reflects on the demeanour of the witnesses, and then delivers a considered judgment sometime later—hopefully within two or three months, but sometimes longer. However, a judge can deliver an ex tempore judgment which is right at the end of the case. The judge can hear the last bit of evidence and say, 'This is my decision and this is why.' What the PwC report says is that one of the efficiencies in the system is to tell judges to deliver more ex tempore judgments, and that will free up a lot more judicial time. Frankly, that's the most naive proposition that you could make.²²

2.19 On the issue of complexity, PwC noted that there was not a consistent measure of complexity and that it was often not possible or appropriate to categorise a matter as complex or not complex during the initial filing stage because the level of complexity may only become apparent over time.²³ Further, PwC explained that they were informed that both courts hear matters of similar complexity.²⁴ As explained by PwC:

We're not arguing that there is no complexity. We acknowledge that there is complexity in cases that are heard within the Family Court. What we are saying is that complexity alone is not the single driver of efficiency within the two courts.²⁵

21 The Hon. Rodney Burr AM, private capacity, *Proof Committee Hansard*, p. 24.

22 Mr Gregory Howe, Member, Family Law Committee, Law Society of South Australia, *Proof Committee Hansard*, p. 14.

23 Ms Zac Hatzantonis, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard*, 11 December 2018, p. 50.

24 Ms Zac Hatzantonis, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard*, 11 December 2018, p. 50.

25 Mr Richard Gwilym, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard*, 11 December 2018, p. 51.

2.20 PwC elaborated that because of the limited data on complexity, they were quite conservative on their modelling in relation to productivity gains.²⁶

2.21 Despite submitters and witnesses concerns that the reforms were developed based on a flawed report, the Department noted the PwC's report was only one of five reviews that informed the development of the reforms proposed by the bill.²⁷

Australian Law Reform Commission review

2.22 On 9 May 2017, the Australian Government announced its intention to direct the ALRC to conduct a comprehensive review into the family law system, with a view to making necessary reforms to ensure the system meets the contemporary needs of families and effectively addresses family violence and child abuse.²⁸ The ALRC has released a Discussion Paper and is due to provide its final report to the Attorney-General by 31 March 2019.

2.23 In announcing the reforms proposed by the bill, the Attorney-General made clear that the bill would focus on improving the administration of the courts dealing with family law matters and that any ALRC recommendation relating to court processes would be more easily implemented in a new simplified court structure.²⁹

2.24 On 23 October 2018, the President of the ALRC, the Hon. Justice Sarah Derrington, confirmed that the ALRC's review would not consider the amalgamation of the courts:

Our terms of reference do not direct us to look at the structure of the court system. Our terms of reference, rather, direct us to look at questions around improving the whole of the system, looking at a child-centred approach, looking at ways we might make less adversarial reforms to the system as a whole. The discussion paper that we have recently released details a number of key themes that have come out of the submissions that we are looking at. We think that any suite of recommendations that we come up with will stand on their own regardless of whether the proposed court restructure does or does not go ahead.³⁰

2.25 However, a number of inquiry participants remained concerned that the ALRC review would impact directly on the work of the court and therefore argued that consideration of the bills occur after the ALRC review was finalised. For example, Mrs Gabrielle Canny, Director of the Family Law Working Group, Legal Services Commission of South Australia explained:

26 Mr Richard Gwilym, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard*, 11 December 2018, p. 51.

27 Attorney-General's Department, *Submission 56*, p. 11.

28 Australian Law Reform Commission, *Review of the family law system*, 27 September 2017, www.alrc.gov.au/inquiries/family-law-system/terms-reference (accessed 3 December 2018).

29 The Hon. Christian Porter, MP, Attorney-General, 'Legislation for family courts reform to be introduced', *Media release*, 17 August 2018.

30 Legal and Constitutional Affairs Legislation Committee, *Estimates, Proof Committee Hansard*, 23 October 2018, p. 59.

In that inquiry, the structure of the courts was deliberately omitted because it was a blue-sky thinking. It said, 'Ignore what we've got. Think about it differently.' But if you're going to try to introduce change you've got to take into account what that change will try to fit into, which is the court system we have at the moment and what this bill is going to try to assist to improve.³¹

2.26 Mr Arthur Moses SC, President of the Australia Law Council stated:

I think having waited 40 years for this moment it would be a tragedy for Australian families and the community if the opportunity it presents were to be lost through undue haste and inadequate consideration of alternative proposals. The review that's being undertaken is in the context where the government has committed to fundamental change to the structure and operation of the courts operating within the family law system, and the discussion paper issued in October raises a number of proposals and issues relating to the operation of the court. So I think we need to get the building blocks right for the legislative structure before we change the court because a lot of what the Law Reform Commission is looking at is going to impact directly upon the work whatever court is in place is going to need to do.³²

2.27 However, other witnesses, such as Ms Bryant, expressed some concern that the ALRC review would likely take considerable time before the review is finalised the recommendations implemented.³³

2.28 Mr Warwick Soden, Chief Executive Officer of the Federal Court and Acting Chief Executive Officer of the Family Court considered there was merit in taking action to improve the system prior to the release of the ALRC review:

I think the move to have one point of entry, one single system, should be done as soon as possible for the benefits that will flow from that. It will be some time before any changes are made as a result of the ALRC, so we should do as much as we can as soon as we can to improve the system. That's my personal view.³⁴

2.29 The committee's view on the limited relevance of the ALRC's review to the bills before the committee is set out in chapter 3.

31 Mrs Gabrielle Canny, Director of the Family Law Working Group, Legal Services Commission of South Australia, *Proof Committee Hansard*, 11 December 2018, p. 18.

32 Mr Arthur Moses SC, President, Law Council of Australia, *Proof Committee Hansard*, 12 December 2018, p.33.

33 The Hon. Diana Bryant AO, QC, private capacity, *Proof Committee Hansard*, 12 December 2018, p. 22.

34 Mr Warwick Soden, Chief Executive Officer of the Federal Court of Australia and Acting Chief Executive Officer of the Family Court of Australia, *Proof Committee Hansard*, 12 December 2018, p. 13.

Chapter 3

Key Issues

3.1 This chapter summaries the key issues raised in evidence regarding the proposed reforms, including:

- whether the bills would achieve their stated purpose;
- issues relating to the appellate jurisdiction of the Federal Court of Australia;
- the potential loss of judicial expertise, specialised services and institutional knowledge;
- the potential impact on vulnerable groups;
- the application of the bill to the Western Australian jurisdiction; and
- other issues, including the adequacy of funding for courts, and the timely appointment of judges.

3.2 The chapter also outlines the committee's views and recommendations.

Achieving the bill's stated purpose

3.3 The primary purpose of the Federal Circuit and Family Court of Australia Bill 2018 (FCFC bill) is to 'improve outcomes for children and families in the family law jurisdiction of the federal court system by increasing efficiencies and reducing delays'.¹ Intrinsic to achieving this purpose is the amalgamation of the Family Court of Australia (Family Court) and the Federal Circuit Court of Australia (Federal Circuit Court) into a unified administrative structure to be known as the Federal Circuit and Family Court of Australia (FCFC). As the Explanatory Memorandum explains, the unified administrative structure will create a single entry point into the FCFC, as well as create common rules and court forms, common practices and procedures, and common approaches to case management:

The bringing together of the courts is intended to provide Australian families with a quicker dispute resolution mechanism, as well as greater certainty and consistency. This intention will be achieved by improved shared case management practices so that information will be readily available about what to expect and when, thereby standardising the experience of litigants, and providing an early sense of the likely cost implications of lodging a family law application in the FCFC. The FCFC would become the single point of entry into the family law jurisdiction of the federal court system for all Australian family law matters.²

3.4 Submitters and witnesses were generally supportive of having a single point of entry and the harmonisation of rules and practices within the federal courts.

1 Explanatory Memorandum to Federal Circuit and Family Court of Australia Bill 2018 (FCFC bill), p. 2.

2 Explanatory Memorandum to FCFC bill, p. 6.

However, some submitters argued that these amendments could be made without legislative reform. For example, when asked whether a number of the reforms in the bill would assist with improving the federal courts, Mr Gregory Howe, Member of the Family Law Committee of the Law Society of South Australia, stated:

Some parts, yes, but they don't require the most significant change to the family law structure in 40 years, because all these changes that we support—harmonisation of rules, a single point of entry, common forms and precedents, better use of registrars—none of that requires wholesale change...³

3.5 The specific concerns raised in relation to the single entry point and the harmonisation of court rules will be discussed below.

Single entry point

3.6 Submitters generally agreed that a single entry point would be beneficial to the family court system. However, a number of submitters argued that the bill would not achieve its stated purpose of simplifying and reforming the court system. The Law Institute of Victoria (LIV) contended that 'a single point of entry to the federal family law courts for Australian families will modernise and improve case management and reduce pressure on court resources'.⁴ However, the LIV submitted that the reforms would not achieve their stated purpose of improving efficiency in the federal courts and argued that the bill would instead add complexity to the family law system:

Unfortunately, the Government's proposed model is unlikely to deliver the objectives of the structural reforms. The proposal would remove the specialisation that has been developed to aid families in crisis who are dealing with multiple and interrelated issues such as family violence, substance misuse, mental health issues and child abuse. Rather than simplifying the system, the proposal will lead to significant uncertainty and add unnecessary levels of complexity through the insertion of additional complex legislation, and by creating a three-tiered system for families to navigate.⁵

3.7 Similarly, the Queensland Law Society (QLS) submitted that the FCFC bill would not create a single court, but instead would perpetuate a model that would further complicate the courts system. The QLS explained:

In effect, there is no true amalgamation of the courts. It is therefore unclear how the issues around the complexity of the system will be properly resolved through the proposal. While we acknowledge the intention for a common case management approach to be adopted across both divisions,

3 Mr Gregory Howe, Member of the Family Law Committee of the Law Society of South Australia, *Proof Committee Hansard*, 11 December 2018, p. 9.

4 Law Institute of Victoria, *Submission 60*, p. 52. See also, Ms Kate Greenwood, Law Reform Officer, Aboriginal and Torres Strait Islander Legal Service Queensland, *Proof Committee Hansard*, 13 December 2018, p. 34; Law Society of New South Wales, *Submission 49*, p. 3.

5 Law Institute of Victoria, *Submission 60*, p. 7.

the structure does not appear to assist in reducing complication for those engaged in the system to a substantial extent.⁶

3.8 Additionally, the Law Society of New South Wales (Law Society of NSW) argued that the proposed bills would not contain improvements, but rather that 'merging the two Courts as proposed will simply change the structure around the problems they face'.⁷

3.9 Rather than the single entry point as proposed under the bill, the Law Council of Australia (Law Council) expressed their support for the model put forward by the New South Wales Bar Association, as depicted in diagram 1.

3.10 As explained by the Law Council, the model would have a single entry point.⁸ Additionally, the model would make better use of Registrars and judges' time. Registrars, the Law Council explained, would be used at the front end and along the court pathway, while judges' time would be preserved for dealing with interlocutory hearings and final trials.⁹

3.11 However, in its submission, the Attorney-General's Department (the Department) explained that, unlike other models, the legislation had been developed in consultation with the heads of jurisdiction of the federal courts.¹⁰ Furthermore, the reforms proposed by the bills 'take the least radical path to change, while ensuring that the current barriers to improvement in the family law system are addressed'.¹¹ At the hearing, the Department reiterated that a key difference between the model proposed by the bill and other proposed models was that 'the model that's before the parliament now has been agreed between the three relevant heads of jurisdiction'.¹²

3.12 While not supporting the model put forward by the bills, and instead preferring the model as proposed by the Semple review, former Judge of the Family Court, the Hon. Rodney Burr AM, outlined other possible benefits of amalgamating the Family Court and Federal Circuit Court:

If you had the two courts working in the same building, together, in the same court and in the same structure, and eating in the same lunchroom, which they don't do, you would get all of those benefits that would flow. One court would also provide an incentive for promotion. There have been a number of the Federal Circuit Court judges who have been promoted to

6 Queensland Law Society, *Submission 5*, p. 2.

7 Law Society of New South Wales, *Submission 49*, p. 1.

8 Law Council of Australia, *Submission 52*, pp. 28–30.

9 Law Council of Australia, *Submission 52*, pp. 28–30.

10 Attorney-General's Department, *Submission 56*, p. 4.

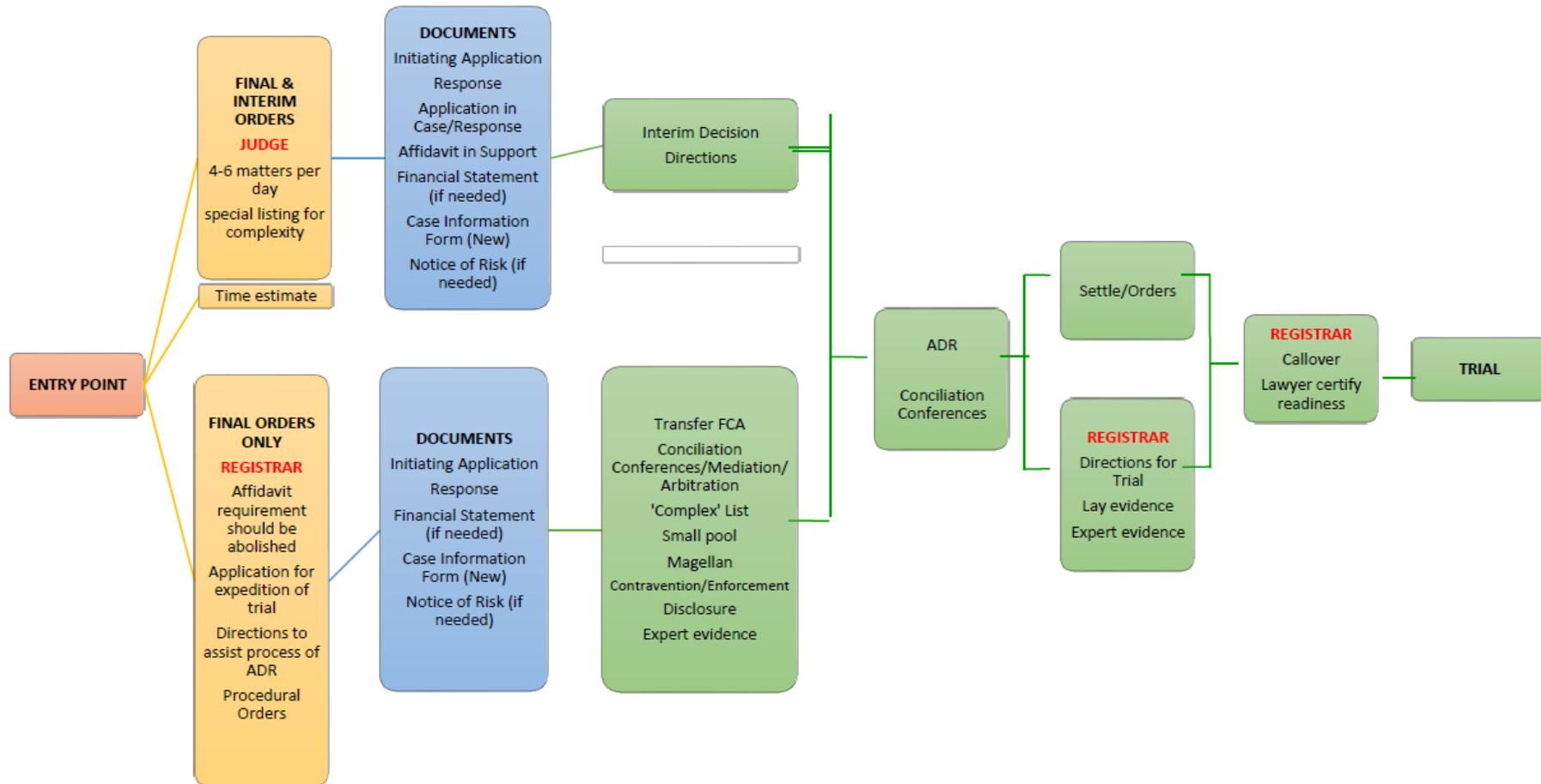
11 Attorney-General's Department, *Submission 56*, p. 4.

12 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 58.

the Family Court. There would be a greater opportunity to demonstrate your worth, to your brother and sister judges, in that one environment.¹³

13 The Hon. Rodney Burr AM, private capacity, *Proof Committee Hansard*, 11 December 2018, p. 25.

Diagram 1: Proposed single entry point and case management system¹⁴



14 Law Council of Australia, *Submission 52*, p. 29.

Common management and practices

3.13 Many submitters were supportive of the aim of the FCFC bill to create a more streamlined and simplified court system. The Aboriginal and Torres Strait Islander Legal Service Queensland (ATSILS Queensland) submitted that the bill's proposal to merge the practices and procedures of the Family Court and Federal Circuit Court would be beneficial to clients in avoiding confusion when moving cases between the courts.¹⁵ The Law Society of NSW also expressed support for the bill's proposed common leadership by registrars of both divisions and common management and more consistent case management.¹⁶

3.14 However, a number of submitters and witnesses noted that legislation is not required for the courts to agree on the same set of rules, forms, case management practices and directions. Former Judge of the Family Court, the Hon. Peter Rose, stated:

My suggestion is that you don't need legislation. Legislation doesn't have the purpose of changing procedure. That's a matter for each court. I would have thought that it was a matter of common sense that where one is dealing with the same jurisdiction, albeit different types of matters, of course you should have the same rules. Rules are traditionally made by the court, not by legislation. The reason is obvious—if there's a need to change the rule, does that mean you have to go back to parliament to get the legislation amended?¹⁷

3.15 However, the importance of having legislation to enable the development of common rules and practices was explained by Ms Louise Anderson, National Director of the Federal Court of Australia (Federal Court):

...I would think that given that over the last 10 years there's been very strong support for harmonised rules and case management, no court, notwithstanding very highly capable people endeavouring to put that in place, has yet achieved it. To that extent, the bill provides clarity as to parliament's intention, which would assist from an administrative perspective.¹⁸

3.16 The former Chief Justice of the Family Court, the Hon. Diana Bryant, similarly expressed the view that while legislation may not be necessary, it would have the effect of the unified rules and practices being easier to achieve:

15 Ms Kate Greenwood, Law Reform Officer, Aboriginal and Torres Strait Islander Legal Service Queensland, *Proof Committee Hansard*, 13 December 2018, p. 32.

16 Law Society of New South Wales, *Submission 49*, p. 3.

17 The Hon. Peter Rose, private capacity, *Proof Committee Hansard*, 12 December 2018, p. 15.

18 Ms Louise Anderson, National Director, Court and Tribunal Services, Federal Court of Australia, *Proof Committee Hansard*, 12 December 2018, p. 3.

I probably come at it with my head of jurisdiction hat on and from my experience. It's just easier probably when you have legislation. You don't need it, but it probably makes life easier.¹⁹

Court rules to be decided by the Chief Justice

3.17 Proposed clauses 56 and 184 of the FCFC bill provide that the Chief Justice of Division 1 and the Chief Judge of Division 2 would have the power to unilaterally set rules for the proposed FCFC.

3.18 A number of submitters expressed concerns with the proposed sections. The Law Council submitted that it was highly unusual for a Superior Court in Australia to be placed with sole rule-making powers.²⁰ The Law Council explained that currently Superior Courts vest rule-making powers in either all of the judges of the court with a majority required to support changes to court rules, or in a 'rule committee' made up of judges and sometimes external stakeholders.²¹ The Law Council argued that rule-making should be a shared responsibility to ensure judges work collaboratively:

The LCA is concerned that the vesting of sole rule-making power in the head of jurisdiction for each Division of the FCFC (who may also be the same person) has the potential to risk a breakdown in the relationship between judges of each Division and the effective management of each Division and to risk that the input of other stakeholders in matters of importance to practice and procedure are not taken into account.²²

3.19 Other submitters argued that a broader group of stakeholders should be consulted in regards to rules of the FCFC. For example, ATSILS Queensland stated that the rules should reflect the diversity in the courts, including courts servicing those living in regional or remote areas. They argued that judges from regional centres should be included in making rules to ensure that the views of those living outside metropolitan areas are adequately represented.²³

3.20 The Law Society of NSW noted that it was difficult for observers to effectively examine whether the reforms would be effective given that the rules were not yet published, and requested that the proposed rules be published to enable sufficient scrutiny of the bills.²⁴

3.21 The Law Council recommended that the existing provisions contained in the *Family Law Act 1975* (Family Law Act) and the *Federal Circuit Court of Australia Act 1999* be retained in the FCFC Bill and applied to Divisions 1 and 2 of the FCFC,

19 The Hon. Diana Bryant, private capacity, *Proof Committee Hansard*, 12 December 2018, p. 22.

20 Law Council of Australia, *Submission 52*, p. 62.

21 Law Council of Australia, *Submission 52*, p. 62.

22 Law Council of Australia, *Submission 52*, p. 62.

23 Ms Kate Greenwood, Law Reform Officer, Aboriginal and Torres Strait Islander Legal Service Queensland, *Proof Committee Hansard*, 13 December 2018, pp. 32–33.

24 Law Society of New South Wales, *Submission 49*, p. 1.

in order to ensure that judges of different backgrounds and experience have input into the creation of the rules and efficiently manage the court's work.²⁵

3.22 Professor Patrick Parkinson AM recommended that the bill be amended to ensure that the rule making powers of the court be either 'vested in the Chief Justice and Chief Judge, with support from a majority of other judges in each Division, or in a majority of judges'.²⁶ At the hearing, Professor Parkinson explained that a rule-making power 'with support from a majority of other judges' would provide the Chief Justice and Chief Judge with effectively, a veto power, while the alternative would not provide a power of veto.²⁷

3.23 The Department advised that the FCFC bill's proposal was consistent with the Chief Justice's responsibility to ensure the 'effective, orderly and expeditious discharge of the business of the Federal Circuit and Family Court of Australia'.²⁸

3.24 Regarding the concerns of the Chief Justice and Chief Judge's capacity to unilaterally set court rules, the Department provided the following response:

None of this is intended to be a criticism of any existing court, but it is worth noting that these issues about the lack of consistency of rules and lack of common rules have been around for 20 years, and the existing mechanisms enabling the rules to be changed don't seem to be particularly successful at addressing that issue. So I think one would really have to say: how is the chief justice going to address this? He has said he's going to [make the rules] in consultation. It's weighing up: do you enable a chief justice if necessary to cut through and make decisions, or do you really almost empower the majority of the other judges to hold the chief justice to ransom? I think it's a weighing-up exercise.²⁹

3.25 In answers to questions on notice, the Department elaborated that Professor Parkinson's recommendation to vest the rules in the Chief Justice and Chief Judge with support from a majority of the judges in each Division of the FCFC would be 'a duplication of the structure that has prevented a consolidated set of Rules of Court to date'.³⁰

3.26 Despite Chief Justice Alstergen's proposed power to unilaterally set court rules, the Department noted that the Chief Justice's intention to convene an advisory committee, which would be permitted under the bills:

25 Law Council of Australia, *Submission 52*, p. 62.

26 Professor Patrick Parkinson AM, Dean of Law, University of Queensland, *Submission 53*, p. 8.

27 Professor Patrick Parkinson AM, *Proof Committee Hansard*, 13 December 2018, pp. 14–15.

28 Dr Albin Smrdel, Assistant Secretary, Legal System Branch, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 49.

29 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 49.

30 Attorney-General's Department, answers to questions taken on notice, 13 December 2018 (received 18 January 2019), p. 9.

So the rules aspect—giving the chief justice power for the rules—I guess is just an addition to that. We note that the chief justice has indicated that he will constitute committees, but the [FCFC bill] also provides for advisory committees. The chief justice can convene advisory committees comprising other judges or other experts to be part of an advisory committee for the formation of the rules.³¹

3.27 Ms Bryant also expressed qualified support for the proposal, subject to the power being transitional:

I don't have any great concern, at least in a transitional sense, about giving the chief justice the power to make rules. As you said earlier, any competent leader would have a process, which, I heard this morning, is what unsurprisingly Chief Judge Alstergren wants to do. You obviously have a committee but what it does is it gives the chief justices, if they can't reach agreement on certain things, the capacity to make the decision on areas of dispute. I probably wouldn't make it long term. I'd probably have it as transitional so that when the harmonisation is complete, you have a more traditional rule-making power.³²

Appellate jurisdiction in the Federal Court of Australia

3.28 As outlined in chapter one, the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Consequential Amendments bill) provides for the creation of the proposed Family Law Appeal Division within the Federal Court, which would hold jurisdiction over the majority of appellate functions for family law decisions.³³ The new Family Law Appeal Division would hear appeals from Division 1 and Division 2 of the proposed FCFC. Division 1 appeals would be heard by a Full Court of the Family Law Appeal Division, comprising of three judges. Division 2 appeals would generally be heard by a single judge of the Family Law Appeal Division unless a Judge considered it appropriate for the appellate jurisdiction to be exercised by a Full Court.³⁴ General federal law appeals from Division 2 would be directed to the Federal Court, which replicates current practice.

3.29 Proposed Division 1 of the FCFC would be restricted in its appeal jurisdiction to ensure that judges only hear appeals from state and territory courts of summary jurisdiction exercising federal family law jurisdiction, excluding decisions of Family Law Magistrates and non-Family Law Magistrates in the Family Court of Western Australia (FCWA).³⁵ The Explanatory Memorandum states that this would have the effect of the workload of the FCFC (Division 1) judges being reduced as the majority

31 Dr Albin Smrdel, Assistant Secretary, Legal System Branch, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 49.

32 The Hon. Diana Bryant, private capacity, *Proof Committee Hansard*, 12 December 2018, p. 20.

33 FCFC bill, subcl 27(1); Consequential Amendments bill, Schedule 1, Part 1, items 227 and 228.

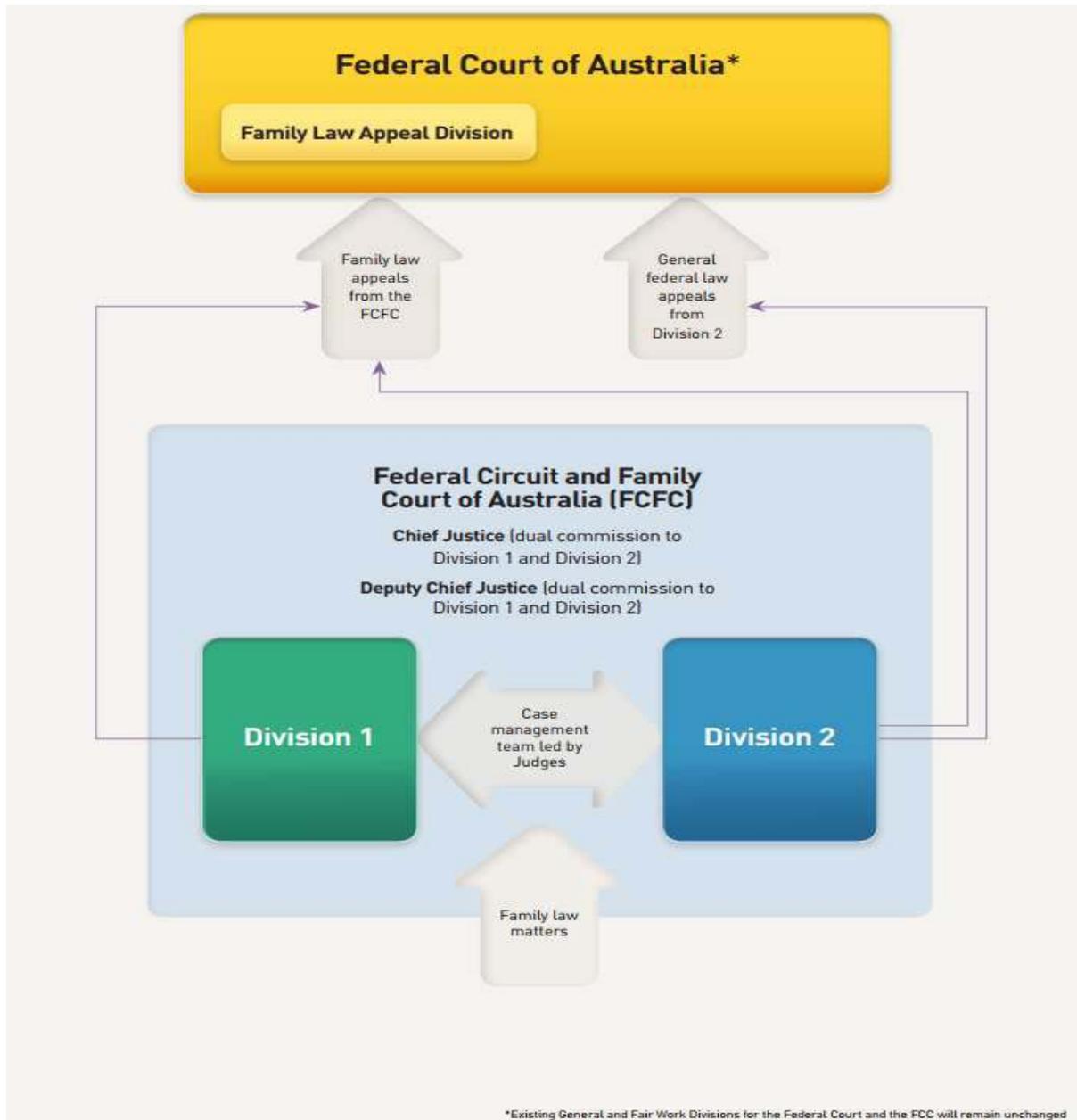
34 Consequential Amendments bill, Schedule 1, Part 1, item 229.

35 Explanatory Memorandum to FCFC bill, p. 16.

of its appeals would be directed to the Family Law Appeals Division of the Federal Court.

3.30 Diagram 2 depicts the proposed appeals structure:

Diagram 2: Proposed Federal Courts Structure³⁶



3.31 Concerns were raised by a number of submitters regarding the Consequential Amendments bill's proposal to move the appellate jurisdiction from the Family Court

to the proposed Family Law Division within Federal Court in relation to family law matters.³⁷

3.32 The Law Council did not support what it described as the abolition of the Appeal Division of the Family Court.³⁸ It stated that the current members of the Appeals Division held extensive experience and expertise in family law, which had contributed to the development of a body of jurisprudence.³⁹ The Law Council argued that the High Court of Australia (the High Court) has explicitly recognised the guidance as a specialised intermediate court, which was described by the High Court as more experienced than that of other courts of appeal.⁴⁰ It was noted that knowledge may be subsequently lost as a result of the shift of the appeals jurisdiction to the Federal Court.

3.33 The Law Society of NSW raised concerns regarding whether the Federal Court was an appropriate venue to which to refer family law appeals. The Law Society of NSW submitted that the bills were not clear regarding how this model will practically work, and could potentially risk losing the expertise and experience of the current appeals division of the Family Court.⁴¹ It stated:

The Federal Court does not have an appeals division - there are currently four sittings of approximately one month duration each calendar year in that court, and the judges are drawn from the trial division. Given the number of family law appeals, some for urgent parenting matters, it is unlikely the current federal court structure can accommodate the volume of family law appeals.⁴²

3.34 The Law Society of NSW further noted that appeals in the Federal Court relate to errors of law rather than errors of fact or evidence, which involves a significantly different and laborious process which may be ill-suited to members of the Federal Court judiciary.⁴³

3.35 Ms Zoe Rathus of Griffith University recommended that the bill be amended to provide for shared commissions to enable judicial officers to sit on the Family Law Appeal Division in the Federal Court of Australia and the FCFC concurrently.⁴⁴

37 Ms Deborah Awyzio, Chair, Domestic and Family Violence Committee, Queensland Law Society, *Proof Committee Hansard*, 13 December 2018, p. 7; Ms Angela Lynch, Chief Executive Officer, Women's Legal Services Australia, *Proof Committee Hansard*, 13 December 2018, p. 36.

38 Law Council of Australia, *Submission 52*, p. 51.

39 Law Council of Australia, *Submission 52*, p. 51.

40 Law Council of Australia, *Submission 52*, p. 52.

41 Law Society of New South Wales, *Submission 49*, p. 4.

42 Law Society of New South Wales, *Submission 49*, p. 4.

43 Law Society of New South Wales, *Submission 49*, p. 5.

44 Ms Zoe Rathus, Griffith University, *Proof Committee Hansard*, 13 December 2018, p. 21.

3.36 In response, the Department noted the intention of the amendments was to refocus the proposed FCFC judicial officers' workload away from appellate work and towards hearing and finalising more first instances family law cases. This, they argued, would address the backlog of family law cases currently before the courts.⁴⁵

Single-judge appeals in the Family Law Appeal Division

3.37 As detailed above, the bills provide that appeals from Division 2 of the FCFC to the Family Law Appeal Division would be heard by a single judge unless it was deemed appropriate to exercise the jurisdiction by a Full Court.⁴⁶

3.38 The Department explained that currently appeals from the Federal Circuit Court to the Family Court can be heard by a single judge, but that the majority of such appeals conducted by the Family Court were conducted by a Full Court of three judges.⁴⁷ The Department stated that the proposal to change the law to automatically apply single judge appeals unless otherwise decided would free up judges' workload to hear and decide cases:

Having more appeals heard by a single judge of the Federal Court would free up additional judicial resources to help reduce delays in family law appeal matters. As part of the 2018 PwC Report, it was estimated that better management of appeals could result in up to 1,500 additional family law matters being finalised every year. That means 1,500 more families afforded the opportunity to move on with their lives more quickly than they are currently able.⁴⁸

3.39 The Department also noted that the work of the courts would be monitored to ensure that the reforms were operating as anticipated.⁴⁹

3.40 Professor Parkinson was supportive of the proposal, noting that it was similar to the practice of the former Federal Magistrates' Court before it became the Federal Circuit Court:

The change to have three member benches in all appeals against final orders from a Circuit Court judge arose because it was considered that the status of the Circuit Court as equivalent to a District Court in NSW, warranted ordinarily having a three member appellate bench of superior court judges to hear the appeal. That is, the elevation of the magistrates to become judges required an increase in the number of judges providing appellate scrutiny for each decision.⁵⁰

45 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 47.

46 Consequential Amendments bill, Schedule 1, Part 1, item 229.

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

48 Attorney-General's Department, *Submission 56*, pp. 17–18.

49 Attorney-General's Department, *Submission 56*, p. 18.

50 Professor Patrick Parkinson AM, *Submission 53*, pp. 4–5.

3.41 Professor Parkinson also stated that the Australian Government had attempted to prioritise the need for greater efficiency to reduce delays, rather than the status of Federal Circuit Court judges. He agreed with this approach, while also noting that there would be methods of ensuring a larger appellate bench would be available to consider matters concerning significant issues of law or practice which would affect more than the particular matter at hand.⁵¹

3.42 Some submitters expressed concern regarding the proposed model for single-judge appeals. The LIV submitted that a bench of three judges deciding appeals was a preferable model rather than one judge.⁵² The LIV stated that a number of intermediate appellate Courts in other jurisdictions routinely had three judges hearing appeals.⁵³ It further asserted that additional judges sitting on appeals assisted in creating robust decisions:

The LIV considers a bench of three Judges deciding appeals allows for more considered and better jurisprudence. As noted above, family law is an incredibly complex area of law, that is expected to respond to community expectations by quickly evolving to make sure the law is in line with community understanding of different issues at a much faster pace than other areas of law. As noted by the Hon. Justice O’Ryan of the FCoA, 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.’⁵⁴

3.43 Responding to these concerns, the Department observed that the capacity to hold single-judge appeals was possible under the current framework for the Federal Circuit Court, which enables the exercise of jurisdiction by a single judge if considered appropriate rather than a three-judge Full Court.⁵⁵

3.44 The Department also emphasised that appeals from Division 1 would still be heard by a Full Court consisting of three judges.⁵⁶

Judicial expertise

3.45 One of the key objectives of the bills is to deliver structural reforms that would ‘ensure the expertise of suitably qualified and experienced professionals supports those families in need’.⁵⁷

3.46 Judges of the three federal courts are currently subject to different qualifying requirements. In order to be eligible for appointment as a judge of the Federal Court

51 Professor Patrick Parkinson AM, *Submission 53*, p. 5.

52 Law Institute of Victoria, *Submission 60*, p. 30.

53 Law Institute of Victoria, *Submission 60*, p. 30.

54 Law Institute of Victoria, *Submission 60*, p. 30.

55 Mr Ryan Perry, Principal Legal Officer, *Proof Committee Hansard*, 13 December 2018, p. 57.

56 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General’s Department, *Proof Committee Hansard*, 13 December 2018, p. 52.

57 Explanatory Memorandum to FCFC bill, p. 2.

and the Federal Circuit Court, candidates are required to be enrolled as legal practitioners of the High Court or a Supreme Court of a state or territory for at least five years.⁵⁸ Candidates for the Family Court are subject to the same requirements in addition to the criterion under section 22(2)(b) of the Family Law Act which requires that 'by reason of *training, experience and personality*, the person is a suitable person to deal with matters of family law'.⁵⁹

3.47 The proposed FCFC bill provides that judges appointed to Division 1 remain subject to the same qualifications stated in the Family Law Act. Clause 11(2)(b) of the FCFC bill states that a person is not to be appointed as a judge of Division 1 unless:

[B]y reason of training, experience and personality, the person is a suitable person to deal with matters of family law.⁶⁰

3.48 The Explanatory Memorandum to the FCFC bill states that these requirements are included in the bill to ensure that a person appointed as a FCFC judge:

...not only has the necessary duration of experience as outlined in paragraph 11(2)(a), but also has the appropriate type of training, experience and personality to be appointed as a Judge of the FCFC (Division 1).⁶¹

3.49 Judges appointed to Division 2 of the proposed FCFC are subject to different qualifications than judges in Division 1. The FCFC bill provides that a person is not to be appointed as a Division 2 judge unless:

[T]he person has appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Federal Circuit and Family Court of Australia (Division 2).⁶²

3.50 The Explanatory Memorandum provided an explanation regarding the requirements for Division 2 judges:

[The provision] is to ensure that not only does a person need to have the necessary duration of experience as outlined in paragraph 79(2)(a), but also the appropriate types of knowledge, skills and experience.⁶³

3.51 The LIV submitted that the additional criterion relating specifically to family law was critically important in ensuring that judges were able to effectively manage family law cases:

This additional criterion acknowledges the skills, abilities, knowledge, expertise and experience of the professionals working within a system are necessary for the system to operate effectively and accessibly.⁶⁴

58 *Federal Court of Australia Act 1976*, s. 6(2); *Federal Circuit Court of Australia Act 1999*, Schedule 1, Part 1(2).

59 Emphasis added.

60 FCFC Bill 2018, subcl. 11(2)(b).

61 Explanatory Memorandum to FCFC bill, p. 23.

62 FCFC Bill 2018, subcl. 79(2)(b).

63 Explanatory Memorandum to FCFC bill, p. 57.

3.52 The LIV expressed concern that judges of the FCFC would consequently be subject to differing qualifications while dealing with the same jurisdiction. It noted that the Explanatory Memorandum states that Division 2 will hold largely the same family law jurisdiction as Division 1, which would result in judges not subject to Division 1 qualifications presiding over family law matters.⁶⁵ The LIV further stated that incoming Federal Circuit Court judges would not be subject to the qualifications as those being newly appointed to the FCFC, as they will be appointed to Division 2.⁶⁶

3.53 The LIV recommended that the FCFC bill be amended to ensure that only Federal Circuit Court judges who fit the additional criteria in Division 1 would be able to hear family law matters.⁶⁷ It submitted that the increasing family law workload in the current Federal Circuit Court demonstrated the need to ensure that judges were appropriately qualified and suited to manage family law proceedings.⁶⁸ The LIV further argued that there was considerable risk in allowing judges with no family law experience to routinely hear family law cases, which may also result in greater inefficiency and fail to meet community standards.⁶⁹

3.54 Ms Bryant stated in her submission that it was unclear what kind of 'knowledge' and 'skills' would be required, although noted that guidance had been provided by the Discussion Paper released by the Australian Law Reform Commission (ALRC).⁷⁰ Ms Bryant explained that the ALRC had also proposed that all future appointees to federal law courts exercising family law jurisdiction be considered on matters such as 'knowledge, experience and aptitude' regarding family violence.⁷¹ She also observed that a number of inquiries at federal and state levels, including the Royal Commission into Institutional Responses to Child Sexual Abuse, had promoted judicial expertise in matters relating to family law.⁷²

3.55 Mr Burr submitted that unless judges of the new FCFC were appropriately trained to manage family law cases, there may be inadequate experience and knowledge amongst the judiciary to ensure adequate specialisation in family law.⁷³ When queried about whether Division 2 judges overseeing family law cases would require additional support to become specialists, Mr Burr stated:

64 Law Institute of Victoria, *Submission 60*, p. 27.

65 Law Institute of Victoria, *Submission 60*, p. 27.

66 Law Institute of Victoria, *Submission 60*, p. 27.

67 Law Institute of Victoria, *Submission 60*, pp. 27–28.

68 Law Institute of Victoria, *Submission 60*, p. 28.

69 Law Institute of Victoria, *Submission 60*, pp. 28–29.

70 The Hon. Diana Bryant AO, QC, *Submission 71*, p. 11.

71 The Hon. Diana Bryant AO, QC, *Submission 71*, p. 11.

72 The Hon. Diana Bryant AO, QC, *Submission 71*, p. 11.

73 The Hon. Rodney Burr AM, private capacity, *Proof Committee Hansard*, 11 December 2018, pp. 25–26 and 28.

You would have no choice, Senator, because the government's given them the appointment and ... they're in there. Some of them struggle for a while. Many come up to speed very quickly. We're talking about some quality people, but it's pretty hard on them to do it in an under-resourced court and not be familiar with the jurisdiction. It's important not to ignore that, if you're an expert family lawyer, you're not just a lawyer; you really need to be a serious people person. You're dealing with distressed people every day of your life.⁷⁴

3.56 The LIV raised concerns regarding the potential for the loss of Family Court judicial expertise and specialisation in areas such as:

- Matters relating to international law, including Hague Convention cases regarding international child abduction;
- The interrelationship between mental health and substance abuse;
- Special medical procedures and the welfare jurisdiction under section 67ZC of the Act; and
- Childhood development and attachment.⁷⁵

3.57 The LIV stated that the lack of specialisation in family law in the Federal Court may result in negative outcomes for court users:

The LIV submits that a just and proper outcome for Australian families participating in the family law system is only possible if appeals are conducted by Judges with an appropriate family law background and experience who possess a 'thorough, indepth and expert knowledge of family law'.⁷⁶

3.58 The QLS similarly submitted that the lack of specialisation could have negative effects on court users and the quality of jurisprudence:

Overwhelmingly, it is the experience of our members that a lack of expertise in family law can result in erroneous decisions and poorer outcomes for families. In our view, there is a significant risk that the quality and propriety of family law decisions will be compromised where determinations are made by judicial officers without family law expertise. These decisions are also more likely to be appealed, increasing the demand on court services.⁷⁷

3.59 The Law Council detailed a number of negative consequences that could occur without adequate judicial experience in family law, including:

- (a) lack of consistency in judicial approach to practice, procedure, the application of well-established legal principles and the limits or range of the

74 The Hon. Rodney Burr AM, private capacity, *Proof Committee Hansard*, 11 December 2018, p. 29.

75 Law Institute of Victoria, *Submission 60*, pp. 20–25.

76 Law Institute of Victoria, *Submission 60*, p. 29.

77 Queensland Law Society, *Submission 5*, p. 2.

exercise of judicial discretion – which makes it difficult for lawyers to advise litigants about likely outcome. This means that some litigants are minded to agree to less than fair settlements or arrangements for children that might not prioritise their best interests and safety, rather than risk an adverse judgment. Other litigants who should settle their cases, are minded to 'take their chance' and run their case in the hope of achieving an outcome better than they might be otherwise be entitled to;

(b) the making of orders that may not appropriately manage risks to women and children;

(c) increased costs to litigants due to the inconsistency and unpredictability of case management practices;

(d) a less than comprehensive identification of legal issues, particularly when either or both parties are unrepresented, leading to unfair outcomes; and

(e) lack of social science knowledge about issues such as the appropriate post-separation parenting arrangements for children at different ages and stages of development, leading to orders being made that are not in the best interests of children.⁷⁸

3.60 The Department stated in evidence that the bills would not remove specialisation in family law from the proposed FCFC. Representatives of the Department explained that the criteria proposed for appointees would ensure that judges are suitably qualified for the positions they would hold in the court, reinforcing specialisation in family law particularly in relation to Division 1. It was further noted that the bills introduce qualification criteria for judges for Division 2, which currently do not exist for Federal Circuit Court judges.⁷⁹

3.61 Mr Cameron Gifford of the Department noted that the bill did not detract from the specialisation of judicial officers, but instead enabled the courts to effectively target judges' specialisation in certain areas:

The specialisation argument really goes towards the competence of the judge to be able look after the cases that are before them. This particular bill does nothing to take away from the specialisation or the experience of the judges that are currently within both the FCC and the Family Court. If anything, it actually provides greater flexibility for the Chief Justice to be able to allocate the judges appropriate to the cases that are in front of them. One of the additional provisions of the bill was also for specialist lists, to make sure that there is expertise being applied to the right types of cases, with the right judge attached to them.⁸⁰

78 Law Council of Australia, *Submission 52*, p. 47.

79 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 47.

80 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 53.

Qualification of 'personality'

3.62 As described above, the bill proposes that Division 1 judges be subject to the qualification that the person has the requisite 'personality' to manage family law proceedings. However, Division 2 judges are not subject to the qualification for the appropriate personality.

3.63 Ms Bryant recommended that 'personality' should be added to the qualifications for judges dealing with family law matters.⁸¹

3.64 This was similarly supported by Mr Burr.⁸² However, Mr Burr observed that this requirement may not be needed for Division 2 judges that specialise in other subject areas and hear matters not requiring family law.⁸³

3.65 The Department advised that the qualification in the Family Law Act for judges to have an appropriate personality for family law could be implemented in the proposed bills, as there was no policy reason for it to be omitted.⁸⁴

Future appointments to Division 1

3.66 A number of submitters expressed concern that potentially no further judges would be appointed to the new FCFC, which could result in the end of the specialist nature of the Family Court. The Law Council stated in its submission that the lack of future judicial appointments to Division 1 represented the 'effective abolition of a specialist family court in Australia'.⁸⁵

3.67 This view was shared by Mr Burr, who submitted that the bills would effectively provide for the 'end of the Family Court of Australia'.⁸⁶ Mr Burr stated that, without amending the constitutional requirement providing for judges to retire at the age of 70, no further judges originating from the Family Court would remain after the final judges retired unless future judges were appointed.

3.68 The Department responded to concerns that the Family Court was effectively being abolished by explaining that this was not the intended outcome of the bills. The Department, stated that judges from the Family Court would continue on the FCFC for a long period, ensuring that the expertise of the former court remained:

It's important to note, though, that the bills don't abolish the Family Court. The existing appointees to the Family Court are appointed until age 70, unless they retire or resign sooner than that. In fact, the person who will run

81 The Hon. Diana Bryant AO, QC, *Committee Hansard*, 12 December 2018, pp. 21 and 28.

82 The Hon. Rodney Burr AM, *Proof Committee Hansard*, 11 December 2018, p. 25.

83 The Hon. Rodney Burr AM, *Proof Committee Hansard*, 11 December 2018, p. 29.

84 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 48.

85 Law Council of Australia, *Submission 52*, p. 44. Also see: Law Society of New South Wales, *Submission 49*, p. 2.

86 The Hon. Rodney Burr AM, private capacity, *Proof Committee Hansard*, 11 December 2018, p. 25.

the longest will run until 2039. There's a body of appointees who will continue, and there's no prohibition on fresh appointments to [D]ivision 1.⁸⁷

3.69 The Department also stated that nothing in the bills prevented further judicial appointments to Division 1, and that governments may elect to appoint more judges to Division 1.⁸⁸

Qualifications of judges appointed to the Family Law Appeal Division of the Federal Court of Australia

3.70 The Consequential Amendments bill provides that judges appointed to the Family Law Appeal Division of the Federal Court possess 'appropriate knowledge, skills and experience to deal with the kind of matters that may come before the Court'.⁸⁹

3.71 The Explanatory Memorandum stated that the clause had been drafted to ensure that judges appointed to the Family Law Appeal Division would be appropriately qualified to manage a range of matters that may come before it:

[T]he structure of the subsection is amended to add an additional requirement that a person must have the appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Court. This is to ensure that not only does a person need to have the necessary duration of experience as outlined in new paragraph (a), but also the appropriate type of knowledge, skill and experience to be appointed as a Judge of the Federal Court. The inclusion of this additional requirement reflects the current practice for appointing Judges.⁹⁰

3.72 Concerns were raised by submitters in relation to the qualifications of judges appointed to the proposed Family Law Appeal Division.⁹¹ The Law Council submitted that the proposed amendment to section 6(2) of the *Federal Court Act 1976* does not explicitly require experience or personality suited to family law matters.⁹²

3.73 While agreeing that specialist knowledge and skills were required by the judges of the proposed Appeal Division of the Federal Court, Professor Parkinson argued that it could be beneficial for judges with limited family law experience to bring new perspectives to decision-making, in addition to also training a broader range

87 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 47.

88 *Proof Committee Hansard*, 13 December 2018, pp. 50–51.

89 Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (the Consequential Amendments bill), cl. 186 (proposed subsection 6(2)).

90 Explanatory Memorandum to Consequential Amendments bill, pp. 60–61.

91 Ms Deborah Awyzio, Chair, Domestic and Family Violence Committee, Queensland Law Society, *Proof Committee Hansard*, 13 December 2018, p. 7.

92 Law Council of Australia, *Submission 52*, p. 53.

of judges.⁹³ This was supported by Ms Rathus who suggested the implementation of dual commissions to enable judges to hear matters in different jurisdictions.⁹⁴

3.74 Further, the Law Council argued that the bills are silent on whether the existing judges of the Appeal Division of the Family Court would be assigned to the Family Law Appeal Division.⁹⁵

3.75 In response, the Department explained to the committee that the provision regarding judges' qualifications for the Appeal Division had been carefully worded to ensure that the Government appointed candidates suitably qualified to hear family law matters in an appellate division.⁹⁶

Potential impact on vulnerable groups

3.76 The case management framework for the Family Court includes a number of programs designed to address vulnerable groups. This includes the Magellan program and cases involving family violence, which were noted by submitters to the inquiry as potentially facing an uncertain future under the bills' proposals.

The Magellan program

3.77 The Magellan case management program was introduced to capture the most complex and serious cases (often including cases involving allegations of sexual abuse or physical abuse of children), and required oversight by a highly experienced and expert judge.⁹⁷ The Magellan program is not currently required by statute, and is instead a program of the Family Court.⁹⁸

3.78 The Magellan program was noted as an important resource used by the current Family Court which may be lost as a result of the passage of the bills. The LIV noted that Magellan cases undergo special case management by a small team of experts and ensure that cases are dealt with in an intensive and time-efficient manner, requiring that all cases be heard and determined within six months of the allegations being heard before the Court. The LIV further argued that the Magellan program had been evaluated and found to be highly effective in resolving cases quickly and efficiently.⁹⁹

3.79 The LIV expressed concern in its submission that the future of the Magellan program is unclear in light of the proposed establishment of the FCFC. The LIV noted that the material provided by the Government in relation to the establishment of the

93 Professor Patrick Parkinson AM, *Submission 53*, p. 5.

94 Ms Zoe Rathus, Griffith University, *Proof Committee Hansard*, 13 December 2018, p. 21.

95 Ms Zoe Rathus, Griffith University, *Proof Committee Hansard*, 13 December 2018, pp. 20–21.

96 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 48.

97 The Hon. Rodney Burr AM, private capacity, *Proof Committee Hansard*, 11 December 2018, p. 23.

98 Ms Louise Dorian, Family Law Section Committee, Law Institute of Victoria, *Proof Committee Hansard*, 11 December 2018, p. 43.

99 Law Institute of Victoria, *Submission 60*, p. 18.

FCFC does not contain any reference to the Magellan program.¹⁰⁰ The LIV further highlighted its concern that the Magellan program would not continue in the new FCFC:

The LIV further wishes to express its concern that the loss of this specialised model, and the specialised training and experience of the [Family Court] judges, registrars and family consultants involved in the program, would significantly negatively impact on the most vulnerable children in the family law system.¹⁰¹

3.80 The Magellan program is a case management system developed by the Family Court. As such, the Family Law Act does not mention the Magellan program. Similarly, neither the FCFC bill nor the Consequential Amendments bill refer specifically to the program. The committee notes that there is nothing in the bills which would prevent the continued operation of the Magellan program within the FCFC.

Family violence

3.81 The Explanatory Memorandum of the FCFC bill states the proposed legislation seeks to 'better protect victims of family violence'.¹⁰² The bill states that it will achieve this by:

[E]nhancing the ability of the FCFC to manage family violence matters and applications with allegations of sexual abuse by creating the case management framework for urgent and high risk cases to be prioritised, and for each case to be allocated to the judge and division with the appropriate expertise and capacity to hear the matter. The case management framework will ensure that a matter will come to the immediate attention of the court and the most suitable case management pathway can be determined to achieve a safe outcome when family violence or allegations of sexual abuse have been identified. There will be a range of court-based options available to both divisions for the effective case management of these types of matters.¹⁰³

3.82 Some submitters put the view to the committee that the bills did not sufficiently provide for measures to address family violence. Ms Rathus stated that family violence was only referred to in the Explanatory Memorandum of the FCFC bill and not in the text of the bills. She argued that the bill needed to explicitly state the words 'family violence' in order to ensure that the case management system would adequately assist court users experiencing family violence.¹⁰⁴

3.83 This perspective was similarly expressed by Ms Angela Lynch of Women's Legal Services Australia, who submitted that any reforms to the family court system

100 Law Institute of Victoria, *Submission 60*, p. 19.

101 Law Institute of Victoria, *Submission 60*, pp. 19–20.

102 Explanatory Memorandum to FCFC bill, p. 10.

103 Explanatory Memorandum to FCFC bill, p. 11.

104 Ms Zoe Rathus, Griffith University, *Proof Committee Hansard*, 13 December 2018, p. 21.

required a 'philosophical basis that places domestic violence, risk and safety at the centre of all practice and decision-making'.¹⁰⁵ Ms Lynch stated that the bills had not adequately addressed family violence concerns by not consulting with family violence experts and focussing on economic efficiencies.¹⁰⁶

3.84 Ms Lynch further articulated her concern that the perceived loss of specialisation in the family court system would significantly impact outcomes for court users:

I think that the lack of or loss of specialisation over time will have a serious deleterious effect. That is because family law litigation is like no other because it isn't about making commercial decisions. In some ways, people aren't making even rational decisions. It's highly emotional litigation that's involved, and the reality is it's also a highly dangerous time for women and children leaving domestic violence. So, you want practitioners, judges and professionals in that court to be as expert as possible in relation to issues of safety and risk because the impacts of decision-making are so great for our clients.¹⁰⁷

3.85 In response to these concerns, the Department explained that the Australian Government was limited in its capacity to address family violence due to the intersection with state and territory-run family violence and child protection programs.¹⁰⁸ Despite these limitations, the Department also noted that the Australian Government would provide \$162.2 million in 2018–19 to fund a range of family law services, in addition to providing over \$800 million from 1 July 2019.¹⁰⁹

3.86 The Department also advised that the Government had invested in mandatory training for judicial officers of the Federal Circuit Court on family violence over the past 12 months.¹¹⁰

Application of the bill to the Western Australian jurisdiction

3.87 The FCWA is comprised of judges who hold state and federal commissions as judges of both the FCWA and the Family Court of Australia, state magistrates who are specialists in family law, and Registrars who are able to exercise delegated powers.¹¹¹ As Western Australia has elected not to refer power to the Commonwealth to legislate in relation to ex-nuptial children or financial matters between parties in a de facto

105 *Proof Committee Hansard*, 13 December 2018, p. 34.

106 Ms Angela Lynch, Chief Executive Officer, Women's Legal Services Australia, *Proof Committee Hansard*, 13 December 2018, p. 34.

107 Ms Angela Lynch, Chief Executive Officer, Women's Legal Services Australia, *Proof Committee Hansard*, 13 December 2018, p. 35.

108 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 47.

109 Attorney-General's Department, *Submission 56*, pp. 7–9.

110 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, pp. 48–50.

111 Family Court of Western Australia, *Submission 57*, p. 2.

relationship (subject to one exception), the pathway for appeals from the FCWA is dependent on whether the case has been heard in the state or federal jurisdiction.

3.88 The FCWA provided an explanation of the appeals process in its submission:

Appeals in matters coming under federal law are determined by the Full Court of the Family Court of Australia, whereas appeals in matters in state jurisdiction 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).

Appeals from a judge of the FCWA exercising federal jurisdiction are currently heard by a bench of three judges of the Full Court of the Family Court of Australia. This mirrors the appeal provisions relating to decisions of judges of the Family Court of Australia who will be appointed to Division 1 of the proposed merged court. The current judges of FCWA will also be appointed to Division 1, as they currently hold equivalent federal commissions.

Appeals from a specialist Family Law Magistrate exercising federal jurisdiction are currently heard by a bench of three judges of the Full Court of the Family Court of Australia unless the Chief Justice of the Family Court of Australia determines it is appropriate for the appeal to be heard by a single Judge. This mirrors the appeal provisions relating to decisions of judges of the Federal Circuit Court, who will be appointed to Division 2 of the proposed merged court.

Appeals from judges of the FCWA and from specialist Family Law Magistrates exercising state jurisdiction are heard by a bench of three judges of the Court of Appeal of the Supreme Court of Western Australia, save in the case of interim/interlocutory decisions of Family Law Magistrates which are dealt with by a single judge of the FCWA. This is recognition of the fact that the powers and expertise of the Family Law Magistrates are such that appeals from their decisions should be considered by the highest court in the state judicial hierarchy.¹¹²

3.89 The FCFC bill provides that appeals from Family Law Magistrates would be heard by the FCWA. Appeals from the FCWA would be heard in the new Family Law Appeal Division of the Federal Court.¹¹³

3.90 Concerns were raised by Western Australian submitters in relation to how the bills would apply to the Western Australian jurisdiction and the FCWA. In particular, submitters and witnesses expressed concern in relation to the proposed appeals pathway in relation to decisions made by the FCWA in the exercise of its federal family law jurisdiction.

3.91 The FCWA's submission to the inquiry noted that, according to the bills' proposal, appeals would be treated differently depending on the type of judicial officer who had originally decided the case in the Western Australian jurisdiction. It

112 Family Court of Western Australia, *Submission 57*, pp. 4–5.

113 Explanatory Memorandum to FCFC bill, p. 16.

submitted that appeals from Family Law Magistrates would be heard by a single judge of the FCWA similarly to how a decision made by a regional magistrate with no family law experience would be appealed. This was argued not to be reflective of Family Law Magistrates' skill and expertise, which was stated to equate with that of a family law judge of the FCWA.¹¹⁴ The FCWA noted that an equivalent decision made in another state by a judge assigned to Division 2 of the proposed FCFC would be heard by an appellate judge in the Family Law Appeal Division of the Federal Court.¹¹⁵

3.92 The FCWA submitted that the appeal pathway for Family Law Magistrates should remain tied to the pathway for appeals from Division 2 judges. It stated:

Acceptance of this submission will ensure that litigants in Western Australia are treated in the same way as litigants in other states. It will also ensure that proper recognition continues to be given to the fact that WA Family Law Magistrates have a far wider jurisdiction than non-specialist magistrates and collectively have much greater relevant experience.¹¹⁶

3.93 These concerns were shared by the Attorney-General of Western Australia, the Hon. John Quigley MLA, who submitted to the inquiry that the FCFC bill reverses longstanding legislative arrangements between the Western Australian and Commonwealth jurisdictions in relation to family law appeals. This was argued to not recognise the uniqueness of the work of Family Law Magistrates which conduct essentially the same work of the Federal Circuit Court.¹¹⁷ The effect of this provision was detailed:

First, the work to be done in future by the specialist Family Law Magistrates will be of the same nature as that undertaken by the judges of Division 2 of the proposed merged Commonwealth court.

Second, the trial work undertaken by WA Family Law Magistrates largely involves the exercise of judicial discretion in resolving parenting disputes and issues relating to the division of property.

It is not appropriate or desirable for appeals from a discretionary decision of one judicial officer to be reviewed on appeal by only one other judicial officer, even in a court at a higher level in the judicial hierarchy.¹¹⁸

3.94 Western Australian lawyers groups were similarly supportive of the recommendations of the FCWA and the Attorney-General of Western Australia to retain the appeals pathway currently used.¹¹⁹

114 Family Court of Western Australia, *Submission 57*, pp. 2–5.

115 Family Court of Western Australia, *Submission 57*, p. 5.

116 Family Court of Western Australia, *Submission 57*, p. 6.

117 The Hon. John Quigley MLA, Attorney-General of Western Australia, *Submission 51*, p. 3.

118 The Hon. John Quigley MLA, Attorney-General of Western Australia *Submission 51*, p. 3.

3.95 In addition, Chief Judge Stephen Thackray of the FCWA noted in the hearing that the proposed reform of the appeals pathway would have a consequential result of appeals from Family Law Magistrates being dealt with by way of a *hearing de novo*. Chief Judge Thackray explained the impact of the proposal:

[I]t is a completely new hearing. It is not a rehearing; it is the hearing of the whole matter all over again. Hence, if we have a magistrate who deals with a three- or four-day case, which is not uncommon, and a party doesn't like the outcome, they can appeal. They are not required to show any error on the part of the magistrate. They have what we call a second bite of the cherry. They can introduce new evidence, and so the family, having been through a trial and having had an outcome, and without any error being demonstrated on the part of the magistrate, can have another trial. That would be horrendous for our case management system; it would in fact destroy it. It's only because we got rid of the appeals de novo a long time ago that we've been able to give our magistrates significant trials to do.¹²⁰

3.96 He further illustrated the potential consequences of an increase in *hearings de novo*:

Last year we conducted or started 373 trials in our court; 233 of them were done by magistrates, so only 140 trials were done by the judges. If, in those 233 families, everyone had another opportunity to have another crack, if you'll excuse the expression, we would have to think very seriously about allowing magistrates to hear trials. If we had to make that decision, then our delays, which are already unacceptable, would become impossible.¹²¹

3.97 The Chief Judge further noted that, if the bills were to be passed, an increase in allocation of resources to manage the additional caseload would be essential.¹²²

3.98 The Department stated that the bills do not propose to change the number of judges required for appeals originating from judges of the FCWA, in other words to continue three-judge benches for appeals.¹²³

119 Ms Sarah Bright, Principal Legal Officer, Women's Legal Service of Western Australia, *Proof Committee Hansard*, 10 December 2018, p. 1; Mr William Sloan, President, Family Law Practitioners' Association of Western Australia, *Proof Committee Hansard*, 10 December 2018, pp. 30–31; Mr Greg McIntyre SC, Senior Vice President, Law Society of Western Australia, *Proof Committee Hansard*, 10 December 2018, p. 32.

120 The Hon. Justice Stephen Thackray, Chief Judge, Family Court of Western Australia, *Proof Committee Hansard*, 10 December 2018, p. 4.

121 The Hon. Justice Stephen Thackray, Chief Judge, Family Court of Western Australia, *Proof Committee Hansard*, 10 December 2018, p. 5.

122 The Hon. Justice Stephen Thackray, Chief Judge, Family Court of Western Australia, *Proof Committee Hansard*, 10 December 2018, p. 10.

123 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 52.

Other issues

Adequate resourcing for the courts

3.99 Submitters and witnesses raised the 'dire need for more resources for the system' and argued that a one-third increase in efficiency could not be achieved without additional funding.¹²⁴ A number of witnesses, such as the Australian Bar Association, noted that it was not possible to separate the issue of chronic underfunding of the system with the reforms proposed by the bills:

You've packaged it with some other things and you've said, 'This is the solution to all of the problems that we have.' We've said we agree that there are problems and we agree that is part of the solution, but we cannot—understanding what this committee must deal with—divorce it from the resource issues which we, every single day, see affecting the real people whose family law cases we're trying to help resolve.¹²⁵

Timely appointments of judicial officers

3.100 Connected to the issue of pressures faced by the family law system, is the timely appointment of judges. Witnesses noted that both Family Court and Federal Circuit Court judges are under enormous pressure and the delayed replacement of judges compounds the pressures to the family law system.¹²⁶

3.101 As an example of the delay sometimes experienced in replacing judges, Mr Howe outlined that the Mr Burr retired in May 2012 and was not replaced by Justice David Berman until July 2013, 14 months later.¹²⁷ Mr Howe further noted that Justice Christine Dawe retired in March 2017 but has not yet been replaced.¹²⁸

3.102 The Law Council explained the effect to litigants when the replacement of judicial officers has been delayed:

The Federal Circuit Court judges are already struggling with their immense workload of both family law and migration cases. If those judges take on more complex work, requiring more judicial time, it will inevitably lead to a blowout in lists and increased delays for family law litigants.¹²⁹

3.103 The Law Society of NSW supported the views expressed by the Law Council and argued for a system with sufficient flexibility to fill vacancies within the judiciary:

124 Law Society of NSW, *Submission 49*, p. 1.

125 Ms Suzanne Christie SC, Australian Bar Association, *Proof Committee Hansard*, 12 December 2018, p. 50.

126 Mr Gregory Howe, Member, Family Law Committee, Law Society of South Australia, *Proof Committee Hansard*, 11 December 2018, p. 8.

127 Mr Gregory Howe, Member, Family Law Committee, Law Society of South Australia, *Proof Committee Hansard*, 11 December 2018, p. 8.

128 Mr Gregory Howe, Member, Family Law Committee, Law Society of South Australia, *Proof Committee Hansard*, 11 December 2018, p. 8.

129 Law Council of Australia, *Submission 52*, p. 11.

The system needs to allow flexibility to fill leave vacancies. The system is currently under such pressure that when a Judge is sick for an extended period or takes leave, then another Judge has to take up their docket as well. This generates further delay.¹³⁰

3.104 At the hearing, the Department noted that the Family Court currently have two positions vacant.¹³¹ In answers to questions on notice the Department explained the why some judicial appointments may take some time to implement:

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

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

There is not a fixed number of judges in each Registry of the federal courts (excluding the High Court), and it is not strictly required that a retiring judge must be replaced. On that basis, what may appear to be a failure to 'replace' a judge may be a reallocation of judicial resources.¹³²

Committee view and recommendations

3.105 The committee commends the Australian Government for its proposal to reform the family court system. It notes that this is the first major reform of the family court system since the inception of the Family Law Act in 1975. The reforms also have been introduced at a time when the family court system is under significant pressure due to case backlogs causing further inefficiencies and delays. The committee therefore supports the bill's attempt to address the issues facing the courts and, ultimately, the users of the court system.

130 Law Society of NSW, *Submission 49*, p. 6.

131 Dr Albin Smrdel, Assistant Secretary, Legal System Branch, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 55.

132 Attorney-General's Department, answers to questions on notice, 13 December 2018 (received 18 January 2019), p. 9.

3.106 It is clear from evidence provided to the committee that all stakeholders agree that the family law system is broken and does not adequately serve court users. To this extent, all witnesses and submitters were in agreement.

Australian Law Reform Commission Review

3.107 The committee notes that a number of submitters and witnesses who provided evidence to the inquiry were of the view that consideration of the proposed bills should be deferred until after the ALRC has provided its report on the family law system in Australia.

3.108 The committee considers that there are two problems with this view. Firstly, the President of the ALRC informed the committee that the courts system is not being examined in the Review. Secondly, if this recommendation were accepted, any major reform recommended by the ALRC would require a substantial amount of time to consult relevant stakeholders, draft legislation, conduct further consultations and be introduced. Consequently, any meaningful change would be delayed for many years.

3.109 Further delays in fixing the family law system would extend and compound the difficulties to the users of the family law system. The committee is of the view that the reforms are critically needed to assist in restructuring a court system under significant pressure. Litigants cannot afford to wait years for the system to change.

Resourcing for courts

3.110 A major theme of the inquiry related to ensuring that adequate resourcing was available to the proposed FCFC to enable it to function efficiently. Many submitters noted that sufficient funding for the courts was critical to ensure that the FCFC bill's objective of reforming the courts to provide adequate family law services to families was achieved.

3.111 The committee notes that funding of legal aid and community legal centres is not within the terms of reference of this inquiry. However, the committee acknowledges the importance of ensuring that the proposed court model is adequately funded to prevent inefficiencies and delays in a new system.

Recommendation 1

3.112 The committee recommends—in addition to the allocated funding as detailed in the Explanatory Memorandum—that the proposed new divisions of the Federal Circuit and Family Court of Australia be provided with additional resources for Registrars to assist with the backlog of cases.

Potential loss of specialisation

3.113 A key concern related to the potential loss of specialisation within the family court. Central to this concern was the proposal for the current Appeal Division of the Family Court to be moved to a newly formed Family Court Appeal Division of the Federal Court. The committee shares the concerns of submitters and witnesses that this reform as proposed by the bills would have the effect of appeals no longer being heard by judges with extensive experience and expertise in family law.

Recommendation 2

3.114 The committee recommends that an appellate division of the Federal Court of Australia not be created and instead the existing appellate jurisdiction of the Family Court of Australia be retained into the Federal Circuit and Family Court of Australia (Division 1).

Appointments to the Federal Circuit and Family Court of Australia judiciary

3.115 The importance of an effective and expert judiciary in the proposed FCFC was highlighted in evidence to the committee. Many submitters expressed concerns regarding the composition of the future FCFC, particularly in relation to appointees having the required experience, expertise and personality to suit their positions as family law judges.

3.116 The committee accepts that it is critically important for those presiding in family law cases to be qualified for the position, with respect not only to their extensive experience and knowledge in the subject matter, but also to their personal suitability to manage difficult and complex cases as is common in family law.

Recommendation 3

3.117 The committee recommends that the qualifications of judges in Division 2, as per proposed paragraph 79(2)(b), be amended to ensure that they have the appropriate skills, knowledge, experience and personality.

Timely appointment of Judges

3.118 Evidence during the inquiry suggested that in some cases, there may not have been a timely replacement of retiring judges in the Family Court or Federal Circuit Court. While the committee notes the evidence provided by the Department, and accepts that in some cases there may be valid reasons why the appointment of a judge may be delayed, the committee is nevertheless concerned that to delay the replacement of judges would inevitably increase delays for family law litigants. The committee also notes the evidence provided by the Department that there are currently two vacancies to the Family Court.

Recommendation 4

3.119 The committee recommends that the Australian Government pursue the immediate appointment of suitable candidates to vacant judiciary positions in the family courts and consider whether there is a need to appoint additional judges.

Unintended consequence concerning the Western Australian jurisdiction

3.120 The committee notes the concerns expressed by the Chief Judge and practitioners of the Western Australian family law jurisdiction. In particular, the committee is concerned that the Consequential Amendments bill may have the unintended consequence of appeals from Family Law Magistrates of the FCWA, being treated differently to appeals from Judges from proposed Division 2 of the

FCFC. Moreover, the committee is concerned that the proposed appeals pathway from Family Law Magistrates may be dealt with by way of a *hearing de novo*.

3.121 The committee is of the view that the further consideration be given to whether there may be unintended consequences concerning the appeals pathway for the Western Australian jurisdiction and for these possible unintended consequences to be remedied.

Recommendation 5

3.122 Subject to the adoption of the above recommendations, the committee recommends that the bills be passed.

Senator the Hon Ian Macdonald

Chair

Labor Senators' Interim Dissenting Report

3.1 For more than forty years the family court system has been endeavouring to repair broken families. The complexity of the challenges facing families has increased substantially over that time. There is no doubt that the family law system is struggling to meet the increasing demand for its services.

3.2 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) propose to radically change the structure of the courts that deal with family law.

3.3 The majority report refers to evidence from many well respected stakeholders including the Law Council, Law Society of New South Wales, Law Institute of Victoria, Queensland Law Society, Women's Legal Services Australia, Family Court of Western Australia, Attorney-General of Western Australia and other Western Australian lawyers groups, all of whom are critical of the reforms proposed in the FCFC bill and the Consequential Amendments bill.

3.4 The process that Government Senators on this Committee have pursued in their determination to push these bills through the Committee process has been irresponsible.

3.5 On 23 August 2018 the Senate referred the provisions of the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018, Federal Circuit and Family Court of Australia Bill 2018 to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 15 April 2019.

3.6 Government Senators changed the date for this Committee to report from the original reporting date of 15th April 2019 to 26th November 2018, with submissions on the more than 1000 pages that comprised the Bills and Explanatory Memorandum due in September, just one month after referral to this Committee. Sensibly, and extraordinarily, the Senate voted to extend the deadline for submissions to 23rd November.

3.7 Government Senators on this Committee refused to adhere to the reporting date set by the Senate, leaving just three days after submissions were due to have hearings and produce this report. The Senate then voted again to instruct the Committee that it could not hold hearings for this inquiry until after submissions were due, forcing the Committee to hold hearings in December.

3.8 The Australian Law Reform Commission (ALRC) is currently undertaking a landmark inquiry into the family law system. The Commission is due to report on 15th April 2019. As the majority report notes, a number of stakeholders, including the President of the Law Council, Mr Arthur Moses SC, argued that consideration of the bills should occur after the ALRC review.

3.9 Reform should be undertaken with great care. It should be well considered and it should not be rushed. It is wrong that this report is tabled now, and again shows the disdain with which this government is treating key stakeholders in the family law system.

3.10 Labor Senators dissent from the majority report tabled.

3.11 A full dissenting report from Labor Senators will be tabled as soon as possible.

Recommendation 1

3.12 Labor Senators recommend that the Bills not be passed.

Senator Louise Pratt

Deputy Chair

Additional Comments by Senator Rex Patrick

The work of the Committee

I thank the Committee and secretariat for its time and effort in relation to these bills. It is noted that Committee members and participating members held five contiguous days of hearings in Perth, Adelaide, Sydney, Brisbane and Townsville.

A Bad Starting Point

I have never observed or sat on an inquiry where there has been such an overwhelming view amongst the majority of submitters and witnesses that the proposed legislation will not achieve the legislation's stated objectives.

Key issues raised:

- (a) The dangers of relying so heavily on a statistically focused report ('Review of efficiency of the operation of the federal courts' Final Report April 2018' by PwC) in the consideration of the operation of courts that deal with extremely complex personal issues.
- (b) The lack of proper consultation with both judicial officers and the broader legal profession. Wide-ranging consultation should have occurred prior to the Bills introduction into Parliament, not after the fact.
- (c) Perhaps most importantly, the de-specialisation of the family law courts system that would result from the legislation.
- (d) The 'breaking' of things not broken – the Western Australian appeals arrangements.

It is acknowledged that the bill had good intentions in seeking a common entry point and common rules between a new lower tier court and superior court, although legislative changes were not really needed for either and the idea of handing sole rule making power to the Chief Justices in perpetuity is fundamentally flawed.

A Committee Working at its Best

Almost all of the concerns raised by the profession have been addressed by the Committee in this report, at least to some degree.

Centre Alliance awaits the tabling of amendments, anticipating that it will take into consideration the views of the Committee.

Resourcing

The Family Court system is severely under resourced, and while I appreciate that the Government is seeking to find efficiencies, it seems to be ignoring a basic reality that more resources are needed as part of the solution mix.

It is disgraceful that the Government is seeing to lay blame on hard-working judicial officers of the Family Court for the backlog, when the Government has refused to allocate the necessary resources to fix the system. It's not, as the Chair suggested during the hearing, a case of the Government needing to find the money.

Billions have been wasted by Government in IT and Defence projects (to just scratch the surface) and Ministers/Cabinet having no appetite to stand up to the unjustifiable demands of star ranked Defence officers in their quest to spend taxpayer's money on bespoke equipment procurements that ultimately end up blowing out by billions of dollars and delivering capabilities late that fall short of the off-the-shelf capabilities originally rejected by them. Significant resources (but insignificant by Defence's opulent standards) need to be directed at fixing the Family Law system.

Recommendation 1

The Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 should not be passed in their current form.

Recommendation 2

A significant increase in resourcing is required as part of any Family Court reform.

Senator Rex Patrick

Centre Alliance

Appendix 1

Submissions, additional information, answers to questions on notice and tabled documents

Submissions

1. Non-Custodial Parents Party (Equal Parenting)
2. Name Withheld
3. Name Withheld
4. Name Withheld
5. Queensland Law Society
6. Western Sydney's Best Ever Book Club
7. Mr Bill Patterson
8. Mr Paul Bates
9. Name Withheld
10. Confidential
11. Name Withheld
12. Name Withheld
13. Ms Sarah Muller
14. Mr Don Nesbitt
15. Pete of Leichardt
16. Mr Nick Jones
17. Mr Alan Morgan
18. Women's Legal Services Australia
19. Mr Kevin MacNamara
20. Mr Peter Lawrence
21. Name Withheld
22. Mr Andrew Bickley
23. Mr Brian Johnstone
24. Safe Steps Family Violence Response Centre
25. Australian Women Against Violence Alliance
26. Domestic Violence Victoria
27. Ms Leigh Bridge
28. Mr Jim Stevenson
29. Name Withheld
30. Mr Des Hansen
31. Mr Rob MacInnes
32. Mr Gary Drummond
33. Mr Paul Wilkinson

34. Mr Andrew Jenkins
35. Ms Samantha Joblin
36. Mr Dan Wakefield
37. Mr Alan McDiarmid
38. The Betoota Lore Society
39. Relationships Australia
40. Family Law Practitioners Association QLD (FLPA)
41. Domestic Violence NSW
42. CASA Forum – Victorian Centres Against Sexual Assault
43. Professor Belinda Fehlberg
44. Victorian Family Law Bar Association
45. Aboriginal & Torres Strait Islander Legal Service (QLD)
46. Mr Alan Jamieson
47. Top End Women's Legal Service Inc.
48. Mr Stuart Gilroy
49. The Law Society of New South Wales
50. Mr Andy Turnbull
51. Attorney-General of Western Australia, The Hon. John Quigley, MLA
52. Law Council of Australia
53. Prof. Patrick Parkinson
54. Rape & Domestic Violence Services Australia
55. Women's Domestic Violence Court Advocacy Service NSW (WDVCAS NSW)
56. Attorney-General's Department
57. Family Court of Western Australia
58. National Family Violence Prevention Legal Services
59. Australian Bar Association
60. Law Institute of Victoria
61. Name Withheld
62. Community and Public Sector Union
63. Community Legal Centres NSW
64. No to Violence
65. Gold Coast District Law Association
66. Australian Association of Social Workers
67. Ms Jessica Coles-Black
68. New South Wales Bar Association
69. The Centre for Excellence in Child and Family Welfare
70. Shoalcoast Community Legal Centre
71. the Hon Diana Bryant
72. Ms Carolyn Reid
73. Family Law Matters

-
74. Family Law Practitioners' Association of Western Australia (Inc.)
 75. Ms Charlotte McKay
 76. Australian Institute of Family Studies
 77. Mr Eric Partland
 78. Ms Alex Williams
 79. Name Withheld
 80. Ms Jacqueline Campbell
 81. Name Withheld
 82. Name Withheld
 83. Name Withheld
 84. Ms Miranda Kaye, Dr Tracey Booth and Dr Jane Wangmann
 85. Name Withheld
 86. Name Withheld
 87. Name Withheld
 88. Name Withheld
 89. Name Withheld
 90. Name Withheld
 91. Name Withheld
 92. Name Withheld
 93. Name Withheld
 94. Name Withheld
 95. Name Withheld
 96. Name Withheld
 97. 43 Grandfathers
 98. Ms Lisa Trinne
 99. National Legal Aid
 100. Confidential
 101. Mr Chris Bowrey
 102. Mr Paul Sansom SC
 103. The Hon. Peter I Rose AM QC
 104. Federal Circuit Court of Australia
 105. Family Court of Australia
 106. Mr Cliff J. Wong
 107. Confidential
 108. Name Withheld
 109. Family Court Survival Services (Mr Leo Powell)
 110. Name Withheld
 111. Name Withheld
 112. Name Withheld
 113. Confidential

114. Mr Simon Jenkins

115. Dads of Mosman

Additional Information

1. Additional information provided by the Australian Brotherhood of Fathers, received 13 December 2018.
2. Correspondence from the Honourable Justice EW Alstergren dated 11 December 2018.
3. Correspondence from the Honourable James Allsop dated 7 December 2018.
4. Rape and Domestic Violence Services Australia - correction to the Hansard transcript.
5. Additional information provided by the Gold Coast District Law Association, received 13 December 2018.
6. Correspondence from the Honourable Justice Thackray, received 7 December 2018.

Answers to questions on notice

1. PwC - answers to questions taken on notice at the public hearing in Adelaide on 11 December 2018 (received 11 January 2019).
2. Family Court of Australia - answer to question taken on notice at the public hearing on 12 December 2018, (received 21 January 2019).
3. Attorney-General's Department - answers to questions taken on notice from the public hearing on 13 December 2018 (received 18 January 2019).
4. Aboriginal & Torres Strait Islander Legal Service (QLD) Ltd - answer to question taken on notice at the public hearing on 13 December 2018 (received 23 January 2019).

Tabled documents

1. Document tabled by Mr Greg McIntyre SC, Law Society of Western Australia at the public hearing in Perth, 10 December 2018 - 'summary of consistent views of law associations'.
2. Document tabled by Mr William Sloan, Family Law Practitioners' Association of Western Australia (Inc) at the public hearing in Perth, 10 December 2018.

Appendix 2

Public hearings

Perth WA, 10 December 2018

Members in attendance: Senators Hanson, Macdonald, Patrick, Pratt, Siewert, Watt.
BACK, Mr Michael, Principal Legal Officer, Aboriginal Family Law Service
BRIGHT, Ms Sarah, Principal Legal Officer, Women's Legal Service of Western Australia
CAO, Ms Linda, Senior Family Lawyer, Aboriginal Family Law Service
FERGUSON, Mr Bradley, Lawyer, Aboriginal Family Law Service
MARTIN, Ms Corina, Chief Executive Officer, Aboriginal Family Law Service
McINTYRE, Mr Greg, SC, Senior Vice President, Law Society of Western Australia
SLOAN, Mr William, President, Family Law Practitioners' Association of Western Australia
THACKRAY, The Honourable Justice Stephen, Chief Judge, Family Court of Western Australia
WILKINSON, Ms Paula, Ordinary Council Member, Law Society of Western Australia

Adelaide SA, 11 December 2018

Members in attendance: Senators Hanson, Hume, Macdonald, Patrick, Pratt, Storer.
AXLEBY, Ms Cheryl, Chief Executive Officer, Aboriginal Legal Rights Movement
BURR, the Hon. Rodney, Private capacity
CANNY, Mrs Gabrielle, Canny, Director, Family Law Working Group, National Legal Aid, Legal Services Commission of South Australia
DICKSON, Ms Meredith, Chair, Family Law Committee, South Australian Bar Association
DORIAN, Ms Louise, Family Law Section Committee, Law Council of Victoria
GWILYM, Mr Richard, Partner, PricewaterhouseCoopers Australia
HATZANTONIS, Ms Zac, Partner, PricewaterhouseCoopers Australia
HOWE, Mr Gregory, Member, Family Law Committee, Law Society of South Australia
KARI, Ms Penelope, Private capacity
RUSSELL, Mr Graham, Convener, Family Law Working Group, National Legal Aid, Legal Services Commission of South Australia
VALENTINE, Ms Lynn, Senior Solicitor, Aboriginal Legal Rights Movement

Sydney NSW, 12 December 2018

Members in attendance: Senators Hanson, Macdonald, Patrick, Watt.

ANDERSON, Ms Louise, National Director, Court and Tribunal Services, Federal Court of Australia

BRASCH, Dr Jacoba, QC, Australian Bar Association

BRYANT, the Hon. Diana, Private capacity

CHRISTIE, Ms Suzanne, SC, Australian Bar Association

DOOLAN, Mr Paul, Chair, Family Law Section, Law Council of Australia

KAYLER-THOMSON, Ms Wendy, Immediate Past Chair, Family Law Section, Law Council of Australia

KEARNEY, Mr Michael, SC, Chair, Family Law Committee, New South Wales Bar Association

MATHIESON, Mr John, Deputy Principle Registrar, Federal Court of Australia

McHUGH, Mr Michael, SC, Junior Vice President, New South Wales Bar Association

McINTYRE, Ms Kajhal, Legal Researcher and Project Worker, Rape & Domestic Violence Services Australia

MOSES, Mr Arthur, SC, President-elect, Law Council of Australia

ROSE, the Hon. Peter, Private capacity

SODEN, Mr Warwick, Chief Executive Officer, Federal Court of Australia; Acting Chief Executive Officer, Family Court of Australia

WILLIS, Ms Karen, Executive Officer, Rape & Domestic Violence Services Australia

WILSON, Ms Virginia, Deputy Principle Registrar, Federal Court of Australia

Brisbane QLD, 13 December 2018

Members in attendance: Senators Hanson, Macdonald, Patrick, Watt.

ANDERSON, Mr Iain, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department

AWYZIO, Ms Deborah, Chair, Domestic and Family Violence Committee, Queensland Law Society

BASTIAN-JORDAN, Ms Sarah, Solicitor, Women's Legal Services Australia

DUNN, Mr Matt, General Manager, Policy, Public Affairs and Government, Queensland Law Society

ERIKSON, Mr Leith, Founder, Australian Brotherhood of Fathers

EVANS, Mr Dean, Vice-President, Gold Coast District Law Association

GIFFORD, Mr Cameron, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department

GREENWOOD, Ms Kate, Law Reform Officer, Aboriginal and Torres Strait Islander Legal Service, Queensland

KNIGHT, Ms Jo-Anne, Court Coordinator, Domestic Violence Prevention Centre Gold Coast Inc

LYNCH, Ms Angela, Chief Executive Officer, Women's Legal Services Australia

PARKINSON, Professor Patrick, Private capacity

PERRY, Mr Ryan, Principal Legal Officer, Legal System Branch, Attorney-General's Department

RATHUS, Ms Zoe, AM, Senior Lecturer in Law, Griffith Law School

SAINT, Ms Ashleigh, Assistant Secretary, Family Law Branch, Attorney-General's Department

SMRDEL, Dr Albin, Assistant Secretary, Legal System Branch, Attorney-General's Department

SUMMERS, Ms Megan, Woman's Advocate, Domestic Violence Prevention Centre Gold Coast Inc

TAYLOR, Mr Ken, President, Queensland Law Society

WILLIAMS, Mr Barry, National President/Spokesperson, Lone Fathers Association of Australia Inc

Townsville QLD, 14 December 2018

Members in attendance: Senators Hanson, Macdonald, Moore, Patrick.

BOWREY, Mr Chris, Private capacity

FELLOWS, Mr Michael, Private capacity

O'BRIEN, Ms Sharell, Supervising Solicitor, North Queensland Women's Legal Service

SANSOM, Mr Paul, SC, Private capacity

