Law Council
OF AUSTRALIA

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

## Senate Legal and Constitutional Affairs Legislation Committee

**2 April 2020**


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# Table of Contents

**About the Law Council of Australia** ..... **3**
**Acknowledgement** ..... **4**
**Acronyms and abbreviations** ..... **4**
**Executive Summary** ..... **5**
**The fundamental issues that family law reform must address** ..... **7**
**The PwC Report** ..... **11**
Measures of assessing the value of courts and judicial officers ..... 12
What were PwC engaged to do? ..... 15
Limitations and flaws in the PwC Report ..... 15
**The importance of specialisation in the family law jurisdiction** ..... **25**
Judicial specialisation in family law ..... 26
Specialist family courts ..... 31
**The importance of the development of the jurisprudence by specialist judges in the Full Court of the Family Court of Australia** ..... **31**
**Reshaping and improving a world leading family law system** ..... **38**
Transfers of cases between Division 1 and Division 2 of the FCFC ..... 40
Rule-making power ..... 42
Divisions of the FCC ..... 44
Corporations Act powers ..... 45
**Submission** ..... **45**
**Attachment A – Rule Making Powers of Courts** ..... **46**

# About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

# Acknowledgement

The Law Council is grateful to its Family Law Section as the primary drafters of this submission. The Law Council also acknowledges input received from the Queensland Law Society, the Law Society of New South Wales, the Law Institute of Victoria, the Bar Association of Queensland and the South Australian Bar Association.

# Acronyms and abbreviations

In this submission the following terms are utilised:

| Acronym | Meaning |
|---|---|
| **ALRC** | Australian Law Reform Commission |
| **ALRC Review** | Australian Law Reform Commission Review of the Family Law System |
| **ALRC Discussion Paper** | Australian Law Reform Commission Review of the Family Law System Discussion Paper – October 2018 |
| **ALRC Final Report** | Australian Law Reform Commission Final Report, Family Law for the Future: An Inquiry into the Family Law System, April 2019 |
| **Bills** | Federal Circuit Court and Family Court of Australia Bill 2019 and the Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 |
| **2018 Bills** | Federal Circuit Court and Family Court of Australia Bill 2018 and the Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 |
| **CATP Bill** | Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 |
| **FCoA** | Family Court of Australia |
| **FCC** | Federal Circuit Court of Australia |
| **FCFC Bill** | Federal Circuit Court and Family Court of Australia Bill 2019 |
| **FCFC** | Federal Circuit and Family Court of Australia |
| **FLA** | *Family Law Act 1975* (Cth) |
| **FLS** | Family Law Section of the Law Council of Australia |
| **KPMG Report** | *Review of the performance and funding of the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia, 5 March 2014* by KPMG, and subsequently released in redacted form by the Federal Government |
| **LCA** | Law Council of Australia |
| **LIV** | Law Institute of Victoria |
| **LSSA** | Law Society of South Australia |
| **NSWBA** | New South Wales Bar Association |
| **NSWLS** | The Law Society of New South Wales |
| **PwC Report** | 'Review of efficiency of the operation of the federal courts', Final Report, April 2018 by PwC, and subsequently released in redacted form by the Federal Government |
| **QLS** | Queensland Law Society |
| **Semple Report** | 'Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance', by Des Semple, 2008. |

# Executive Summary

1. The Law Council of Australia welcomes the opportunity to provide submissions to the Senate Legal and Constitutional Affairs Legislation Committee's (**Senate Committee**) inquiry into the Federal Circuit Court and Family Court of Australia Bill 2019 and the Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019.

2. They represent amended and updated versions of the Bills that were placed before the last Parliament and which were the subject of report by the Senate Legal and Constitutional Affairs Committee on 14 February 2019.

3. The LCA agrees that:

   (a) there are significant shortcomings in the dual family law courts structure (of the FCoA and FCC) and the management of the family law system;

   (b) government, the courts and the legal sector must work to improve outcomes for families and children following the breakdown of relationships;

   (c) it was timely for the Government to have commissioned the ALRC to undertake a far-reaching review of the Australian family law system which resulted in the release of the ALRC Final Report;

   (d) where parties cannot resolve matters themselves following relationship breakdown, the Australian family law system must deliver them justice in the form of multiple avenues by which a timely, efficient and cost-effective resolution of disputes can occur and which provides protection for the vulnerable and for victims of family violence. However, there will always be a need for a properly resourced and functioning court system to provide both a context within which disputes can be resolved and a just means by which those not otherwise able to be resolved can be determined; and

   (e) the move that is presently being undertaken by the FCoA and FCC through the Harmonisation of Rules Project to a single point of entry, harmonisation of rules and forms, and unification of procedures, will assist users of the family law courts system and the practitioners who operate within it and lead to reduced costs and greater certainty of outcomes. This is a matter which has been raised previously by LCA. The rule making power presently exists to the Courts to implement this reform and is already underway. There is no legislation required to enable this to occur.

4. The LCA does not agree that:

   (a) the court structural changes as proposed by the Bills (as was the case with the 2018 iteration of the Bills), will produce efficiencies, reduction in delays and deliverables for the community;

   (b) the Bills will reduce complexity or legal costs in the family law system;

   (c) the PwC Report makes a business case or policy foundation supportive of the changes proposed by the Bills. Further, that the primary economic case for the reforms put forward by the PwC Report, namely that it would result in an ability for the courts to dispose of an additional 8,000 cases per year (even were that disposals outcome accepted to be accurate), can no longer be seen to have any relevance as a basis for the proposed merger given that:

(i) the Bills have (in accordance with the recommendations made on 14 February 2019 by the Senate Committee) abandoned the transfer of appeals to the Full Court of the Federal Court of Australia. The PwC report estimated that by increasing the use of Appeal Division judges on first instances matters (and vice versa), increasing the rate of appeals matters managed as a single judge and by implementing a system of managed listing of appeals and scheduling, a combined efficiency gain of an additional 1,495 finalised cases per year could be achieved.[1]

(ii) the move to a single point of entry is already under consideration by the Harmonisation of Rules project of the family law courts without the need for statutory reform. The PwC Report stated that the establishment of a single point for filing, assessing and allocating first instance family law matters could result in a potential disposal of an extra 670 cases per year;[2] and

(iii) the consolidation of a single set of rules, forms, procedures and case management is already under consideration by the Harmonisation of Rules project of the family law courts without the need for statutory reform. Regarding case management, the PwC Report stated that implementing structured initial case management with appropriate judicial authority, and coordinating and standardising case listing, could result in an additional 3,170 matters being finalised per year.[3]

(d) governments have provided proper funding and resourcing to the existing family law courts system, associated services and/or Legal Aid Commissions.

5. The LCA recommends that:

(a) the Bills not be passed by the Parliament;

(b) the move to a single point of entry, harmonisation of rules and forms, and unification of procedures in the family law system should continue to be implemented with the benefit of consultation with the legal profession as that is a matter that has near universal acceptance (and can be implemented by reference to the rules of Court with no legislative amendments required);

(c) the Government engage with the ALRC Final Report and liaise with stakeholders as to which of the 60 recommendations are proposed to be implemented; and

(d) having regard to the ALRC Final Report and its recommendations, the stated aims of the Bills can be better and more effectively achieved by proper funding of the existing court system, timely appointment of judicial officers, improved case management, more intensive use of Registrars, proper funding of Legal Aid, and the structural reforms to the family law courts system put forward in the Semple Report and by the NSWBA.

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[1] PricewaterhouseCoopers, *Review of Efficiency of the Operation of the Federal Courts* (Final Report, April 2018) 2 <https://www.ag.gov.au/LegalSystem/Courts/Documents/pwc-report.pdf> ('*PwC Report*') 8, 55. The Law Council notes that the efficiency opportunities are additive to either a single point of entry (efficiency opportunity 1) or a consolidated first instance jurisdiction (efficiency opportunity 2) and that all efficiency opportunities, including case management efficiency opportunities, may have some overlap and specific consideration of how they interrelate would be required to access the potential efficiency gain.

[2] Ibid.

[3] Ibid.

# The fundamental issues that family law reform must address

6. When examining the Bills, and having in mid-2019 provided to the Attorney-General's Department the comments of its FLS on the 60 Recommendations made in the ALRC Final Report, the LCA has considered:

   (a) what problems the Bills are designed to address;

   (b) how the Bills propose to address such problems;

   (c) the ability for the Bills to achieve those goals, and the likely cost, both in financial and justice terms; and

   (d) whether other or better solutions exist.

7. There are Objects of the Bills and statements made within the accompanying Explanatory Memoranda to the Bills, that LCA supports as essential to the maintenance and continued development of the Australian family law system.

8. The Explanatory Memorandum for the FCFC Bill (at paragraph 6) provides that the structural reform proposed would:

   (a) improve the efficiency of the existing split family law system – the LCA agrees with that aim and notes that the FLS has long advocated against a dual court system;

   (b) provide appropriate protection for vulnerable persons – the LCA agrees with that aim and notes it is the subject of consideration and recommendation by the ALRC Final Report; and

   (c) ensure the expertise of suitably qualified and experienced professionals to support those families in need - the LCA agrees with that aim and notes it is the subject of consideration and recommendation by the ALRC (see Recommendation 51 of the ALRC Final Report).[4]

9. It is the mechanism by which those goals and aims are to be achieved where views differ.

10. In November 2019, the (then) President of the LCA, Arthur Moses SC, delivered a speech to the Newcastle Law Society entitled, 'Why "Radical" is Not a Dirty Word in Family Law Reform'.[5] It outlines the proposals made by the LCA for structural family law reform, and makes the case for that reform and its benefits to the Australian community. A copy of the paper is annexed to and forms part of these submissions.

11. The LCA notes the following submission from the NSWLS in relation to the 2018 version of the Bills:

> *The Family Court of Australia should be a priority and choice as to where public money is spent.*

[4] Explanatory Memorandum, Federal Circuit Court and Family Court of Australia Bill 2019 and the Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 (Cth) 2 [6].
[5] Arthur Moses, 'Why "Radical" is Not a Dirty Word in Family Law Reform' (Speech, Newcastle Law Society, 1 November 2019).

> *Family law impacts a broad range of Australians, not just court users. The social, economic and emotional costs of having a system that is chronically under-funded and under-resourced are immense.*
>
> *Many other nations look to Australia as a 'gold' standard for the provision of specialised family law services. Countries such as Hong Kong, Singapore, Japan and Fiji have turned to Australia to emulate many of our family law systems. We must not dissolve what we have, so hastily and without proper consultation.*

12. The LCA notes the following submission received 6 March 2020 from the Queensland Law Society:

> *In summary, QLS does not support the Federal Circuit and Family Court of Australian Bill 2019 and Federal Circuit or the Family Court of Australia (Consequential Amendment and Transitional Provisions) bill 2019. In our view, the proposed reforms are significantly flawed and the Bills will not achieve their intended objective.*

13. The LCA notes the following submission in 2018 from the LIV in relation to the 2018 version of the Bills:

> *The LIV fully supports the objectives of the proposed restructure. Unfortunately, the proposal as it stands is unlikely to deliver on these expectations and is likely to instead have extensive and unintended adverse consequences for the families and children who participate in the family law system.*

14. In 1999, the then Shadow Attorney-General, Robert McClelland, used the debate in the House of Representatives on the Federal Magistrates (Consequential Amendments) Bill 1999, to state:

> *The magistracy will neither achieve what the government wants — that is, providing greater access to justice — nor remove these horrific delays that exist, particularly in the Family Court…*
>
> *it is fanciful to suggest that it will have any realistic effect at all on the court lists.*[6]

15. The LCA notes the following March 2020 submission of the Queensland Bar Association:

> *Section 284 of the 2019 Bill proposes a wholesale review of the operation of the Act five years after its enactment. While a review of the legislation might suggest a commitment to ensuring the ongoing success of the proposed model, it is entirely unclear how long the court will take to implement these changes and therefore how long the new model will be effectively operating prior to such a review, thereby casting into doubt any statistics upon which such a review may be based.*
>
> *The Association is concerned with the substantial investment and delay caused by the numerous reviews of the family law system which have been undertaken in the previous five years. Furthermore, the Association*

[6] Commonwealth, *Parliamentary Debates,* House of Representatives, 18 October 1999, 11,786-7 (Robert McClelland).

*is concerned that this proposed structural reform does not appear to be based upon the substantive recommendations advanced by the Australian Law Reform Commission despite the significant cost associated with that review. It is difficult to contemplate the purpose of such a review, if the review process is time and resource intensive, the recommendations of existing substantial reviews have not been adopted and the model may not be sufficiently operative for a review to give an accurate reflection of the model.*

*These concerns are exacerbated by the limitations identified in the report by PricewaterhouseCoopers upon which current criticisms of efficiency are based, and its ultimate conclusion that "the actual scope for efficiency will vary from estimates presented in this report". These limitations are likely to be present in any future review unless those limitations and assumptions are overcome.*

16. The Government has now acknowledged that which appears otherwise universally accepted for a substantial time, namely that the dual family law courts system is and has been a failure.[7]

17. Criticisms of the decision to create dual courts, its structural inefficiencies and the manner in which it operates has meant less resources for the FCoA, are not new. In an article 20 years ago entitled *Family Law and the Family Court of Australia: Experiences of the First 25 Years*, then Chief Justice Nicholson of the FCoA and Margaret Harrison observed:

> *The Family Court has, on a number of occasions, pointed out the unacceptable complexities in its structure to various governments and parliamentary inquiries. Specifically, it has sought the appointment of specialist 'Chapter III' federal magistrates within the Court itself, and the establishment of something akin to a small claims tribunal to allow the summary disposition of minor disputes. Instead, the Government decided to establish the [*then*] Federal Magistrates Service as a separate entity under Chapter III, notwithstanding that scarce funds would be diverted from the Family Court into the administrative establishment and other costs of the Federal Magistrates Service.*[8]

18. The LCA notes the following submission received 6 March 2020 from the Queensland Law Society:

> *QLS supports the Law Council of Australia's view that the existence of two separate courts, with different rules, procedures and processes produces unnecessary complexity. QLS has consistently advocated for the creation of a single, specialist court for determining family law matters with one set of rules, procedures and processes. In our view, this would better facilitate timely and cost-effective resolution of disputes.*
>
> *However, the amalgamation of the Family Court and the Federal Circuit Court, as proposed in the Bills, does not achieve this. The structure*

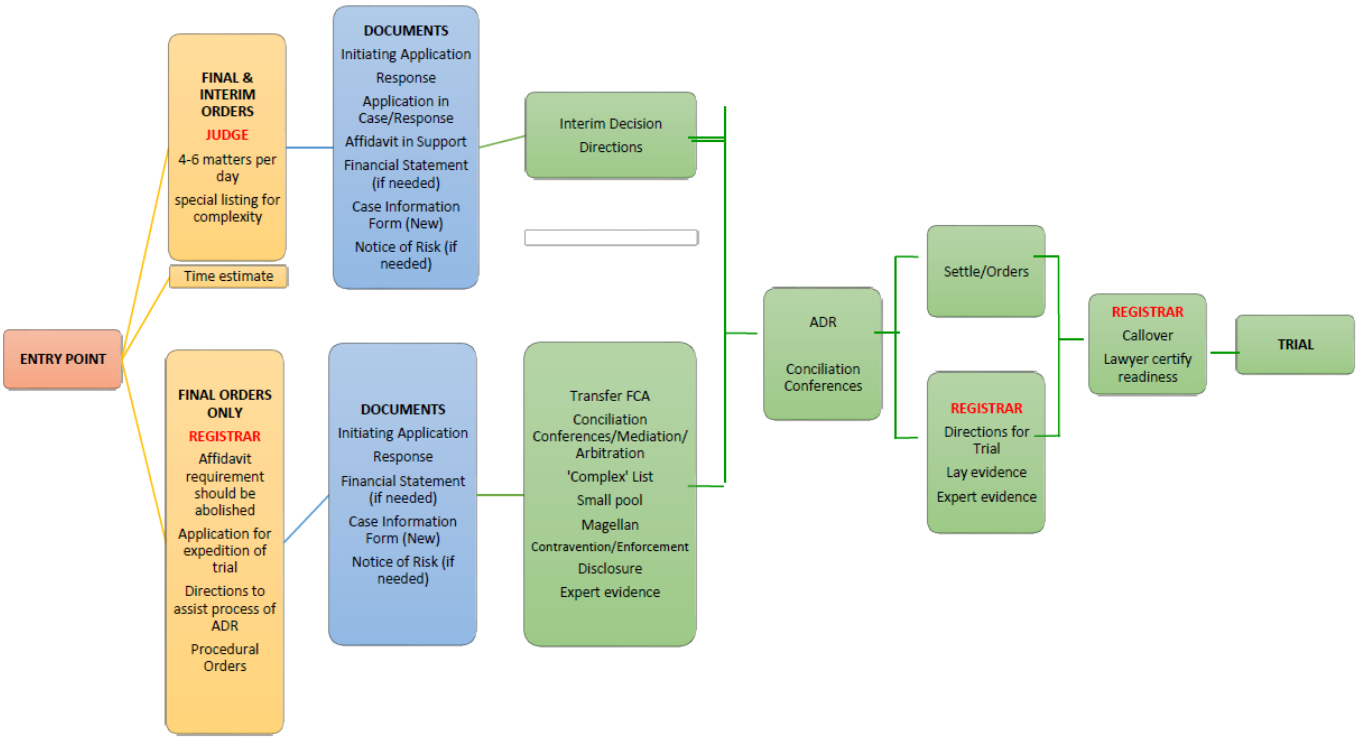
[7] Christian Porter, Attorney-General, 'The State of the Nation' (Speech, 18th Biennial National Family Law Conference, 3 October 2018).
[8] Alastair Nicholson CJ and Margaret Harrison, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24(3) *Melbourne University Law Review* 756.

*proposed in the Bills continues to separate the Courts into two divisions, Division 1 and Division 2.*

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

19. The docket system that has been operational in the FCC since its inception was developed for a vastly different court, with lesser workload and more limited jurisdiction. Its 'judge heavy' case management system whereby each case is docketed to a judge throughout its time in the family law system does not now (if it ever did) make efficient and proper use of judicial hearing time, which is an incredibly valuable resource and which should not be unduly utilised in dealing with matters of a procedural, basic interlocutory or administrative nature and which could be better undertaken, and at less cost, by experienced court registrars.

20. The LCA notes that its FLS has previously prepared and provided to the FCC the draft model as set out below as to how it envisaged that case management could more efficiently be undertaken in the FCC through better use of Registrars and changes to the documents that needed to be filed when proceedings were commenced. The structural diagram below highlights a management system for use of Registrars at the front end and along the court pathway at critical points, with Judge time preserved for dealing with interlocutory hearings and final trials.



21. The LCA notes that this or a similar case management model could be applied to that court model put forward by the NSWBA in its July 2018 Discussion paper.[9] It involves a single entry point, with a decision to be made upon filing as to whether the matter was in the superior or trial division of the FCoA.

22. The LCA notes the comments made in 2018 by the LIV (in relation to the 2018 Bills) in respect of the single point of entry:

> *The LIV notes this recommendation reflects the recommendations made by the 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.[10]
>
> *The LIV recommends the single point of entry consist of specialist case management Registrars to appropriately direct and triage family law matters. Matters should be assessed by the Registrar and sent to the FCoA or the FCC, as may be appropriate for the individual case. In addition, a judicial officer such as an FCC judge should be available to hear any urgent interim matters that require immediate judicial determination.*

# The PwC Report

23. The Government continues to place significant reliance for its proposed reforms upon the findings of the PwC Report. The LCA is concerned about many aspects of the PwC Report, and therefore the Government's reliance upon it:

    (a) The efficiency, or alleged efficiency, of a court is one, but should not be the only, measure of the performance of a court. It is inappropriate to measure the effectiveness of individual judicial officers simply by reference to statistics about the number of 'finalisations' they achieve (or other simplistic and mathematical measures of 'productivity').

    (b) The 'Order for Services Agreement' between PwC and the Attorney General's Department dated 7 March 2018[11] has not been made public and it is unclear from the PwC Report if the entirety of the terms of reference have been adequately disclosed within that Report. In addition, there are significant redactions to the publicly released version of the PwC Report making it difficult for the community to scrutinise the findings and recommendations made by PwC.

    (c) The PwC Report was completed in just 6 weeks and with no consultation outside of the Attorney General's Department and with 'senior family law court stakeholders'.[12] As the LCA understands it, PwC did not consult or meet with a broad cross section of judicial officers of either the Federal Court, the FCoA or the FCC. There was no consultation between PwC and external stakeholders in the broader family law system, including the legal profession, legal aid,

[9] New South Wales bar Association, *A Matter of Public Importance: Time for a Family Court of Australia 2.0* (Discussion Paper, July 2018).
[10] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 154 [4.254]; Chief Justice Pascoe, 'The State of the Nation' (Speech, 18th Biennial National Family Law Conference 2018, 3 October 2018).
[11] PwC Report, 2.
[12] Ibid 14.

community legal centres or family violence specialists. This can be contrasted with, for instance, the consultation engaged in by KPMG in the preparation of their report and the level of consultation that usually occurs between the Attorney General's Department and stakeholders within the broader family law system for other family law reforms (including reforms of significantly less community impact than that proposed by the Government in these two bills). The LCA suggests that the findings of the PwC report should be treated cautiously.

(d) The LCA considers that many of the key assumptions relied up by PwC in formulating their suggested 'efficiency opportunities' are flawed, and that the dramatic suggested improvements in court performance are unrealistic and not sufficiently robust as to warrant reliance upon for such a significant reform to the Australian justice system. Further and as stated earlier in this submission at paragraph 4, even if those case disposal estimates of an extra 8,000 per year to date are accurate, many of these forecast efficiencies have been 'lost' by the acceptance in the 2019 Bills that the move of appeals to the Full Court of the Federal Court should be abandoned, and the other estimated case disposal savings are already going to be achieved by the work of the Harmonisation of Rules Committee which is proceeding without the need for statutory amendment.

(e) Whilst the PwC Report is titled 'Review of efficiency of the operation of the federal courts', there is no review or assessment by PwC of the operations of the Federal Court and just one page is devoted to the general law jurisdiction of the FCC. The lack of proper investigation and review of the latter is, in the view of the LCA, extraordinary given the well-known significant backlog of work in the FCC's general federal law jurisdiction, particularly in migration work which makes up over 50 per cent of that work.[13] To the extent that PwC provides any analysis of the general federal law jurisdiction of the FCC, it highlights that whilst that work comprises about 10 per cent of the FCC's work, it accounts for about '20 of judicial effort'.[14] The LCA notes that there is no analysis by PwC of how that work might impact on the family law jurisdiction or how its proposed family law efficiency measures might ultimately be diverted to the general federal law jurisdiction.

The LCA notes that the KPMG Report cautioned that:

> *…the sheer volume of Family Law matters determined by the FCC can lead to some clouding of the underlying clearance rate for specific causes of action across the FCC. Given Family Law applications consistently comprise over 92 per cent of the FCC's workload, it is possible for overall clearance rates to mask challenges associated with finalising matters within the court's General Federal Law jurisdiction.*[15]

## Measures of assessing the value of courts and judicial officers

24. Most of the analysis by PwC focuses on assessing the *'productivity'* of judicial officers (and comparisons of productivity between judicial officers in the FCoA and

[13] Federal Circuit Court of Australia, *Annual Report 2018-19* (September 2019) 27.
[14] PwC Report, 98.
[15] KPMG, *Review of the Performance and Funding of the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia* (Report, 5 March 2014) 51 ('*KPMG Report*').

FCC) and the relative *'efficiencies'* of each court, their processes and their judicial officers and other staff.

25. The LCA contends that the value of a court or of a judicial officer ought not and cannot simply be assessed according to statistical data. As the Hon. Murray Gleeson, Chief Justice of the High Court of Australia (as he then was) remarked in his State of the Judicature address to the 35th Australian Legal Convention:

> *Nobody has yet devised a satisfactory indicator of judicial productivity, probably because the concept of productivity of judges is no more amenable to measurement than the productivity of parliamentarians. It is possible to measure some aspects of the performance of a judge or a court; and this may have utility. Justice, however, is more a matter of quality than quantity, and the desired judicial product is not a decision, but a just decision according to law.*[16]

26. The LCA is concerned that inappropriate reliance has been placed on the findings of PwC as to the efficiency and productivity of each court and its judicial officers, to the exclusion of consideration of the other essential aspects of a properly functioning court, including the quality and fairness of its procedures and outcomes.

27. The tension between assessing courts on the basis of organisational management and accounting or mathematical parameters (so called 'KPI's') or instead on the basis of more well-rounded criteria which also take into account the quality, impartiality, accessibility and fairness of courts, is not a new issue in Australia.

28. The Hon Justice James Spigelman AC, Chief Justice of New South Wales (as he then was), in his address to the Family Court of Australia 25th Anniversary Conference in 2001 remarked:

> *Performance indicators for the courts focus on disposition of cases. Cases are a measure of output. They are not a measure of outcome. The outcome of a judicial decision making process can be variously stated. The administration of justice in accordance with the law is one. Another is the attainment of a fair result arrived at by fair procedures. Such 'outcomes' are not measurable. They can only be judged.*[17]

29. And again, in 2002, his Honour remarked:

> *In many areas of public decision making, including the administration of justice, there is simply no escaping qualitative judgments. Not everything that counts can be counted.*[18]

30. The LCA is concerned by an increasing recent trend in public discourse and commentary to assess the worth of a judicial officer or a court simply by reference to statistics. The PwC Report (and the Government's apparent acceptance of the findings therein), and relatively recent criticism of the delivery of judgments by Judges of the Federal Court of Australia are examples. As recently stated by Judge

[16] Murray Gleeson AC, *The State of the Judicature Address* (Speech, 35th Australian Legal Convention, 25 March 2007) 14.
[17] James Spigelman AC, 'The 'New Public Management' and the Courts' (Speech, Family Court of Australia 25th Anniversary Conference, 27 July 2001).
[18] James Spigelman QC, 'The Maintenance of Institutional Values' (Speech, Colloquium, Research Library Futures: Strategies for Action, State Library of New South Wales, 17 May 2002).

Judith Kelly, the President of the Judicial Conference of Australia, in response to criticisms of the productivity of judges of the Federal Court of Australia:

> *How is one to measure the "productivity" of a judge?*
>
> *Productivity has been defined as "the effectiveness of productive effort... as measure in terms of the rate of output".*
>
> *How does one define the output of a judge? Surely not in such crude terms as words written per day as was suggested in a recent article in The Australian Financial Review. Judges are supposed to deliver justice.*
>
> *How does one measure how much justice has been delivered, let alone compare it with the amount of justice delivered by other judges within a comparable time to ascertain and compare the "rate of delivery of justice"? What ingredients go into the delivery of justice?*
>
> *Courts, civil and criminal, are mostly concerned with parties in dispute. One might ask how quickly, how cheaply and appropriately disputes have been resolved and to what degree the judge contributed to the speed, cheapness and appropriateness of the resolution.*
>
> *Did skilful case management by the judge contribute to an appropriate settlement without the need for trial? If the matter went to trial, was the case efficiently managed? Were the participants treated respectfully? How does one measure these things?*
>
> *Judges are charged with delivering justice according to law. Did the judge get it right? Did the case go on appeal? If so, was the appeal successful? Some cases involve well-settled law; in others the law may be evolving or unsettled. How do we factor this into a measure of "productivity"?*
>
> *Judges must make decisions. Has the judge made her decisions in a timely fashion? What is meant by "timely"?*
>
> *How does one compare the timeliness of a decision in a straightforward contract case, delivered ex tempore on the afternoon of the trial, with a lengthy intellectual property case involving months of evidence, thousands of documents, and complex legal factual issues, in which judgment may be reserved for months?*
>
> *How does one take into account the amount of judgment writing time allocated to the judge or the amount and variety of other work in the judge's list?*
>
> *Judges must give reasons for their decisions. How does one judge the productivity of reasons? A productivity measure of words per day rewards the prolix: concise reasons take longer to write.*
>
> *Reasons must explain the result; sentences must be justified in language those affected can understand. How do we measure this?*
>
> *We are all equal before the law, but some crimes are more serious than others, and the amount in dispute in civil cases can range from very little to billions of dollars. Has the magistrate who deals with 15 individuals for*

*minor assaults in the time it takes a judge and jury to dispose of one murder case, delivered 15 times more "justice" than the judge?*

*Judges also perform extrajudicial functions, on committees, law reform commissions and the like, which make a significant contribution to the administration of justice. How does one place a value of such work when attempting to measure productivity?*

*Above all, a judge must be fair - a quality that is easy to recognise but impossible to measure.*[19]

## What were PwC engaged to do?

31. The preamble *Disclaimer* to the PwC Report refers to an 'Order for Services agreement' between it and the Attorney-General's Department. It is not clear if the 7 terms of reference outlined by PwC in relation to the Project scope represent all of the questions asked of it by the Attorney-General's Department.

32. There are significant redactions to the publicly released version of the PwC Report. Whilst the LCA agrees that redactions to ensure that information which would identify individual judicial officers are appropriate, the redactions appear to go beyond that purpose and include, for instance, some of the limitations or risks to its assessment of productivity opportunities.

33. It is unclear if PwC was asked by the Government to propose a preferred structure of the federal courts. To the extent that PwC do refer to a different structure of the federal family courts, they refer to a restructure different to that now proposed by the Government:

> *Where the removal of first instance jurisdiction from either the FCoA or FCC reduces the scale of the remaining court (e.g. FCoA reduced to just an appeals function for family law matters, or FCC reduced to just first instance GFL matters), consideration will be required to the strategy for the residual court functions. This may include abolition of the relevant court and absorption of its residual functions into another court entity, or retention of the court at a reduced scale (recognising that there may be a loss of certain scale efficiencies).*[20]

34. Since there was no contemporaneous or subsequent consultation between PwC or the Government and external family law stakeholders, it is not known the extent to which PwC were asked to consider the relative efficiencies and ramifications of those other options for restructuring, or the basis upon which the Government preferred one model over any other.

## Limitations and flaws in the PwC Report

35. The PwC Report itself contains a number of disclaimers about the limitations of PwC's consultations and data and thus the limitations of the assumptions that they have drawn from that data, including:

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[19] Judith Kelly 'Making Judgment on Output Takes No Account of Reason and Offers Little to Delivery of Justice', *The Australian* (online, 9 November 2018) <https://www.theaustralian.com.au/business/legal-affairs/making-judgment-on-output-takes-no-account-of-reason-and-offers-little-to-delivery-of-justic/news-story/7161c6711b915a35daf354bc62516a84>.

[20] PwC Report, 82.

> *Given time constraints of this Review, not all possible opportunities have been explored nor have the potential implications of each opportunity been fully assessed. Furthermore, detailed solutions have not been developed.*[21]
>
> *…*
>
> *It is also worth noting that specific processes and practices may vary at an individual level due to the circumstances and complexity of a case; the preferences and practices of different judiciary; the capability and capacity within each court; and, the behaviour of litigants and their legal representation. The scope of this review considers averages across the courts, meaning that these nuances have not been factored in. PwC has not looked at the detailed processes associated with case management, nor have we undertaken a capability assessment, or sampled cases, which would inform a detailed analysis of potential opportunities.*[22]

36. The LCA suggests that it is remarkable, given the number of limitations and disclaimers made by PwC, that the Government has chosen to so heavily rely on the findings of PwC as justification for its proposed restructure.

37. Further, given the caveats posed by PwC about the time restraints they operated under, it is surprising that the Government did not (following the non-passage of the 2018 iteration of the Bills) give to PwC a further opportunity to explore '*all possible opportunities*' and fully assess '*the potential implications of each opportunity*'.

38. However, in addition to the limitations that PwC itself identified, the LCA and the legal profession (particularly those who regularly practise in the FCoA and FCC (family law jurisdiction)) have identified other key flaws in the PwC Report which significantly undermine the alleged efficiency gains that can be achieved by a restructure of the kind proposed by the Government. The LCA notes that consultation with external stakeholders in the family law system and more broadly within the family law courts would likely have led to less errors being made about key aspects of the current operation of the courts, and thus a more reliable analysis.

39. As remarked by the (the then) Hon Justice Stephen Thackray, Chief Judge of the Family Court of Western Australia in his delivery of the David Malcolm Memorial Lecture in September 2018:

> *…consultation about change is always desirable. Indeed, it is essential if we are to avoid decisions about change being based on incomplete, inaccurate, or misunderstood information. For example, that firm of accountants could have consulted with experienced trial and appellate judges in both courts in the Eastern States about what their raw data actually meant. And they could have consulted with those of us in the West, who already have a fully unified system, to help explain how the stark differences in the data relating to judicial officers working at different levels bears no relationship to efficiency.*[23]

40. A number of key errors in the interpretation and factual basis of the PwC Report are identified by the legal profession:

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[21] Ibid 14.
[22] PwC Report, 53.
[23] Stephen Thackray, 'The Rule of Law and the Independence of the Judiciary: Values Lost or Conveniently Forgotten?' (Speech, The David Malcolm Memorial Lecture, 27 September 2018).

(a) The failure to take into account the listing and case management practices in FCC regional circuits, and the impact those practices have on the statistical performance of the FCC as a whole.

(i) The absence of reference to the circuit work of the FCC in the PwC Report is quite stark, both in terms of the failure to identify the impact that the different case management practices on circuits would have on the efficiencies of the FCC as a whole, as well as the failure to identify the impact on regional, rural and remote litigants of the proposed changes.

(ii) It is the experience of FLS members working in regional and rural Australia that the number of cases listed on duty days of a circuit can range between 25 to 70 (or more), depending on the region. Chronic over-listing for both interim hearings and trials is common, and FLS members report an increasing tendency for cases to settle in regional circuits for less than fair outcomes to one party because of the limited judicial time available to hear and determine cases.

(iii) The failure to take into account the differences in practices between registries and circuits is likely, in the opinion of the LCA, to have skewed some of the FCC statistical data relied upon PwC. For instance, the average number of court events per case in the FCC is likely to be understated because of the low number of court events for many circuit cases.

(b) An incorrect interpretation or appreciation for the operation of the Protocol between the FCoA and the FCC regarding the allocation of work and transfers, including the management of cases that are transferred.

(i) The Protocol for the Division of Family Work between the FCoA and FCC (as published by the Chief Justice and Chief Judge) sets out 8 separate criteria to identify those cases that should usually be heard by the FCoA (in addition to those matters which must be filed in that Court where the FCC does not have jurisdiction).[24] Those criteria can be summarised as:

- International child abduction cases, including Hague Convention cases;
- International child relocation cases;
- International forum disputes;
- Special medical procedure cases;
- Contravention applications related to orders previously made in the FCoA;
- Serious allegations of child sexual abuse, serious allegations of other abuse of a child or serious controlling family violence;

[24] See Family Court of Australia, 'Protocol for the Division of Work Between the Family Court and the Federal Circuit Court' (Web page, 12 April 2013) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/corporate-information/protocol-for-division-of-work-fcoa-fcc>.

- Cases involving complex questions of jurisdiction or law; or [emphasis added]

- If the case at trial would take in excess of four days' hearing time.

(ii) Despite having identified the terms of that Protocol, PwC insist that 'it has been difficult for PwC to substantiate the extent of variation in complexity of cases between the two courts'. PwC also indicate that they have 'been informed that, in practice, both the courts hear matters of similar complexity'.

(iii) The LCA notes the contrary comments in 2018 by the (then) CEO and Principal Registrar of the FCoA, Mr Warwick Soden:

> *the cases the Family Court deals with are in the 'more complex' category. In other words, it's fair to say the Family Court and the Federal Circuit Court deal with complex cases but the Family Court deals with the very complex cases.*[25]

(iv) The LCA notes the experience of family lawyers is that the overall level of complexity of cases before both Courts has increased in the last decade or so. The FCC is clearly dealing with a caseload that is more complex than it faced when the Federal Magistrates Court was first established. But the caseload of the FCoA has also increased in complexity over that time, and there remains a significant disparity in the overall complexity of work done by the FCoA and FCC.

(v) The experience of most family lawyers is that the identification of what types of cases fall within the classes of cases identified in the Protocol is relatively clear. Nevertheless, the LCA notes that there are cases that need to be transferred between the two Courts. The LCA notes that the number of transferred cases is relatively low (about 5.7 per cent of the applications for final orders in 2016/17).[26] Most of those transfers, in the experience of family lawyers, occur in circumstances where the complexity of the case has changed during the life of the case, for instance, by new allegations of child sexual abuse being made, a child abduction occurring or third parties being joined to the case, or by parts of the case being resolved.

(vi) The relatively higher percentage of FCoA cases that are transferred to the FCC also reflects a practice in some registries of family lawyers filing cases in the FCoA to enable their clients to take advantage of the more cost effective case management practices of the FCoA which assist parties to settle cases in the early stages of a case (in particular, the availability of Registrar-led Case Assessment Conferences and Conciliation Conferences). Where those cases are unable to be resolved, they are transferred to the FCC for trial.

(vii) The LCA rejects the assertion made by PwC that upon the transfer of a case, litigants must 're-start' their case or 'begin again in the court to

[25] Commonwealth, *Parliamentary Debates,* Senate, 23 October 2018 (Warwick Soden).
[26] PwC Report, 37; 1,181 transfers of a total number of filings of 20,550.

which they've been transferred'.[27] That is simply not the way that transferred cases are managed in either court. There is cooperation between both courts to ensure that cases that are transferred are accommodated within the listing processes of the new court at a stage commensurate with the stage they reached in the other court. So, for instance, cases transferred from the FCC to the FCoA after the preliminary case management hearing and alternative dispute event, do not 'start again' with a Case Assessment Conference (the first court event in the FCoA). They would typically be transferred into the pool of cases awaiting trial or be listed before the court for directions to deal with the new complexities that have arisen.

(viii) The LCA agrees that some cases of inappropriate levels of complexity remain in each court. The FCC does hear some cases with sufficient complexity to warrant them being transferred to the FCoA, and the FCoA does hear some cases that are not as complex as most of its work. But the LCA suggests that these anomalies occur mainly due to the chronic lack of resources facing each court and differences in length of delays to hearings between both courts in some registries. In some cases, litigants choose not to press the case for transfer because they would face longer delays in the other court.

(ix) The proposed restructure of the family law courts into two Divisions will still require transfers, particularly given the reality that some cases become more or less complex over time, and because of differences in the jurisdiction in both courts.

(c) A fundamental misunderstanding of the differences in complexity of work usually undertaken by the FCoA compared to the FCC, and the demands that work places on the FCoA and its judges.

(i) The PwC Report suggests that an additional 2,080 to 4,080 cases could be heard each year by avoiding transfers of all cases between the courts and by 'lifting the average utilisation or productivity of FCoA resources towards the outcomes achieved by FCC resources'.[28] Those resources are, primarily, judges. That assessment is founded in the incorrect assumption by PwC that the complexity of cases heard in each court is the same.

(d) An incorrect description of the usual case management and listing practices of the FCoA, the permanent registries of the FCC and FCC circuits.

(i) The PwC Report refers to a 'family law application process'[29] that bears only passing resemblance to the common experience of most litigants in either the FCoA and FCC. The process relied on by PwC as the measure by which it assesses the efficiencies of each court overstates the number of procedural hearings held in the FCoA and understates the number of hearings before a judicial officer in the FCC. For example, the PwC Report treats the initial Case Assessment Conference and Procedural Hearing before a registrar in the FCoA as two separate court events, when in fact, in most cases they occur simultaneously. The PwC

[27] Ibid.
[28] Ibid 81.
[29] Ibid 17.

Report suggests that at the first duty list hearing in the FCC a judge is able to manage a range of different possible hearing types, including hearing and determining interim applications and giving directions for trial. Given the significant over-listing of duty lists in the FCC in most registries and circuits, judges have limited time available to hear interim applications and further court hearings are required to resolve interim disputes.

(ii) The PwC Report also incorrectly states that the same 'family law application process' applies to all cases before each court. It is the experience of FLS members that the case management and listing practices of judges, and particularly FCC judges, varies greatly, even between judges sitting in the same registry. So, for instance, some FCC judges will not hear interim applications on the first return date, while others will. Because case management in the early stages of FCoA cases are largely managed by registrars and according to a fairly standard approach within registries, there is more certainty for litigants and their lawyers about the likely progress of a case and hence legal cost savings for clients.

(iii) Importantly, the PwC Report does not include the external ADR that is commonly ordered in the FCC in financial cases, as opposed to the in-house Conciliation Conferences that are offered by the FCoA. Whilst not a cost to the FCC, external mediation is still a cost to litigants and part of the case management processes of the court.

(e) The failure to properly account for different processes by the courts in the making of consent orders (other than by the use of the Application of Consent Order process in the FCoA), and the extent to which the number of 'finalisations' of FCC Judges are likely to be over-stated by the making of consent orders which in the FCoA would ordinarily be made by Registrars.

(i) The early stages of case management in the FCoA are heard before registrars who preside over Case Assessment Conferences, Directions Hearings and Conciliation Conferences. As noted in the PwC Report, a greater proportion of cases settle within the first 6 months in the FCoA than the FCC.[30] When cases settle in the early stages of FCoA proceedings, it is likely that the final consent order will be made by a Registrar, rather than by a judge.

(ii) As virtually all case management in the FCC is done by a judge, if a case settles in the FCC (whether at a court event or at external mediation) the final consent order will be made by a judge.

(iii) The LCA notes the further comments made in 2018 by the LIV in respect of the 2018 Bills:

*The LIV considers the Report's assertion that each FCC judge disposes of 338 final orders applications in each year should be treated with caution. The Report states that on average FCC judges sit approximately 150 days, while FCoA judges sit 129 days, each year. Therefore, the Report asserts that each FCC judge determines 2.25 matters on a final basis per day. If accurate, this data suggests a lack of*

[30] Ibid 31.

*proper judicial attention being given to such matters, owing to overwhelming workloads and time pressures.*

*The LIV submits these numbers must include matters finalised by consent.*

(f) The exclusion of external ADR events ordered by the FCC from the statistics regarding the number and cost of court events in that court compared to the FCoA.

(g) The failure to properly take into account the impact of interim applications and hearings on litigants and the courts, particularly in circumstances where PwC identifies that there are a greater number of interim applications filed in the courts than applications for final orders,[31] the latter of which is used as the main determiner of PwC's assessment of various criteria of court and judge performance.

(i) It is well understood amongst family lawyers that delays in the family law court system lead to more disputes between litigants and a greater number of interim applications being filed. The number of interim applications being filed has caused a 'bottleneck' in the court system, with it being common for litigants to wait many months for an interim hearing on urgent issues. Over-listing of interim hearings also means that cases are often not dealt with on the first return date of interim applications and cases then being adjourned to later dates. During those delays, it is not uncommon for further disputes to arise.

(ii) Interim hearings take up judicial time that could otherwise be spent hearing and determining cases at final trial. Given that most cases do not proceed to trial, the LCA is concerned that insufficient attention has been placed by PwC on the potential for backlog in the courts to be cleared by a focus on improving the case management of interim applications, particularly in the FCC.

(h) The failure to take into account the impact that long delays to interim hearings and trials, backlogs, untimely [or no] replacement of retired judicial officers, ill health of judicial officers, the relative lack of relevant experience of some judicial officers appointed to undertake family law work, the use of the docket system in the FCC and complexities in the application of some provisions of the FLA, have on litigants, lawyers and judicial officers.

(i) It is the experience of FLS members that litigants involved in family law proceedings are settling cases for less than fair outcomes. Vulnerable litigants, particularly victims of family violence, are at special disadvantage.

(i) The failure to take into account the differences in the numbers of judicial officers in each registry, including those registries with no FCoA appeals judge, and thus the differences in impact between registries of the proposed restructure.

(i) The PwC Report assesses all registries of the FCoA and FCC to be the same, and applies 'efficiency opportunities' to the court system as a

[31] Ibid 28.

whole. This ignores the reality of the differences in resources available in each registry and the work performed by it.

(j) A misinterpretation of the different Rules and practices in each court, including the impact those Rules and practices have on settlement opportunities and on costs for litigants.

(i) The PwC Report contains an analysis of the 'key differences in the Court Rules' between the FCoA and FCC, as well as an estimate of party/party costs to litigants in each Court. The LCA does not agree with the PwC analysis, which appears not to have been informed about the practical implications of many Rules and procedures in the FCC which increase costs for litigants. At a meeting with the case management judges of the FCC in 2017, the FLS informed the FCC that in many cases the costs of litigating in the FCC were higher than in the FCoA as a result of those Rules and procedures.

(ii) For example, the Rules of the FCC provided (until the commencement of the 'small property pool' pilot known as PPP500) that an affidavit must be filed at the same time as every Application for Final Orders, even where no interim orders are sought. No such requirement applies in the FCoA. The limited Rules in the FCC concerning disclosure in financial cases has long been a source of complaint by family lawyers as it does not assist in the timely settlement of financial cases (where identifying the asset pool is the first step) and tends to lead to more, rather than less, arguments about what ought to be disclosed. The duty of disclosure in the FCoA Rules, while on its face being suggestive of increased costs, is more helpful in settling cases and is directive towards settlement.

(iii) The analysis by PwC of the Rules regarding expert witnesses misses the main point of difference entirely, which is that the FCoA requires the parties to appoint single experts unless the court orders otherwise (with a consequent reduction in the costs of obtaining expert evidence), while the FCC Rules do not contain such a requirement.

(iv) The analysis by PwC of the estimate of costs incurred in each court is wrong. The estimates are based on an incorrect description of the usual case management pathway in each court and are calculated by reference to the scale of costs contained in each Courts' Rules, rather than any analysis of market rates. The scales of costs in each Court are used as one measure of the quantum of costs that might be ordered to be paid by one party to the other, and not lawyer/client costs. The FLS has argued for some time that neither scale of costs appropriately compensates a litigant when the courts order costs in their favour.

(v) The two scales are based on different methodologies – the FCC scale based on 'stage of matter' lump sums, and the FCoA scale based on individual tasks performed by lawyers, such as writing letters and appearing in Court. The FCC scale was created at a time when the FCC handled less complex family law work and is an outdated measure of costs incurred in the court. The PwC Report takes the items in the FCoA scale at the highest rate for each individual task, such as a Senior Counsel and Junior Counsel appearing at every court event, even procedural hearings. Senior and Junior Counsel are only briefed in cases where the litigant can afford such fees, and the LCA suggests

both would be briefed in less than 10 per cent of cases heard in the FCoA. There are, in any event, not sufficient numbers of Senior Counsel practising at the family law bar for one to be briefed in every single hearing in the FCoA.

(k) A fundamental misunderstanding of the nature of judicial decision making, including the appropriate use of ex tempore judgments and single judge appeals, in a discretionary system of law.

(vi) Ex tempore judgments are most commonly delivered in cases which are undefended or where the number of facts or legal questions in issue are relatively modest. It is not surprising that there are more ex tempore judgments delivered in the FCC, where the less complex cases are heard. The number of ex tempore judgments delivered may however also be symptomatic of the pressures on FCC Judges due to their significant workloads and the over-listing practices in registries and on circuits. The experience of FLS members, particularly those in regional areas, is that where circuit judges do not have sufficient time available to hear all cases listed for trial, settlements or compromises are reached as a matter of pragmatism rather than justice and equity on as many of the issues in dispute as possible in order to avoid a lengthy adjournment. Judges then typically have more time to hear and determine disputes over limited issues, which are well suited to ex tempore judgments. Given the complexity of the cases in the FCoA, the LCA considers that there are limited opportunities to increase the number of ex tempore judgments in that Court (or by Division 1 of a FCFC).

(l) A failure to take proper regard of the efficiency of the FCoA in maintaining an annual clearance rate in excess of 100 per cent, despite the challenges of limited judicial resources and complexity of cases before it. As noted by Judges of the FCoA in their published response to criticisms made of them by the Attorney-General:

> *The Family Court's 100% clearance rate during that period has occurred despite the failure by government to appoint judges to replace retiring judges and, when they have done so, only after an inordinate delay.*
>
> *The Family Court's 100% clearance rate has also occurred against a background of increasing difficulty and complexity in the cases. For example:*
>
> - *In 2012, 334 Notices of Child Abuse or Family Violence were filed; in 2017 the number was 653;*
> - *In 2010, 28% of trials had one self-represented litigant and, in another 7% of trials both parties were self-represented – a total of 35%; in 2017, 41% of trials involved self-represented litigants and, significantly, in 15% both parties were self-represented;*
> - *In 2012, 10.3% of trials were concerned with abuse and/or family violence; in 2017 it was 23.8%.*

> Thus, the Family Court's clearance rate has been maintained despite diminishing resources and cases of greater difficulty and complexity.[32]

41. The LCA notes the following submission in 2018 from LIV regarding the 2018 Bills:

> *The LIV commends the objective of the proposed structural reforms, to protect the people that use the federal family court system, to ensure justice is delivered and provide just outcomes.[33] The LIV also supports measures that increase efficiency and resolve the current 'confusion, delay and unnecessary cost' such people face.[34] However, the LIV cautions that the current proposal tends to prioritise efficiency over ensuring access to real protection to children and families by ensuring access to just outcomes in family law disputes. The LIV does not consider justice and efficiency to be dichotomous, but rather as two mutually inclusive imperatives.*
>
> *The LIV does not envisage that is possible to create a system from which every litigant will emerge satisfied, but rather suggests that this opportunity be taken to create a system whereby each litigant will have access to fair outcomes based on the expert application of the complex and specialist area of family law. There is no point in creating a system that decreases cost and delay by removing access to just outcomes in family law disputes.*
>
> *The LIV submits that the proposed model, which abolishes the specialist Family Court, is unnecessary, and will result in significant adverse outcomes for the most vulnerable children and families in the family law jurisdiction. The flaws within the current system can be ameliorated through the implementation of some fundamental changes.*
>
> *As outlined above, the efficiencies that form the purported basis of the proposed restructure are not based on an accurate modelling of the current system and do not reflect the experiences of children, families and practitioners in the family law jurisdiction. Therefore, the proposed model will not achieve the objective of ensuring justice is delivered effectively and efficiently.*
>
> *The LIV submits the implementation of uniform rules and forms, practices and procedures, as well as a uniform approach to case management, will achieve the objective of efficiency while simultaneously not threatening the specialisation and expertise that ensure just outcome for Australian children and families.*
>
> *These simpler and less intrusive reforms also require the federal family law jurisdiction to be adequately funded to ensure the ongoing excellent work undertaken by both courts and their administrative support are able to operate at optimal levels, rather than the stressed and reactive situation currently being experienced in the Victorian courts.*

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[32] Family Court of Australia, 'Fact Not Fiction' (Fact Sheet, August 2018) <https://theaustralianatnewscorpau.files.wordpress.com/2018/08/family-court.pdf>.
[33] Federal Circuit and Family Court of Australia Bill 2018 (Cth) cls 5(a), (b).
[34] Christian Porter, Attorney-General, 'The State of the Nation' (Speech, 18th Biennial National Family Law Conference, 2018).

42. The LCA considers that chronic underfunding of the family law courts as well as the delays (or in some cases failure) in replacing retiring judges are the root cause of much of the backlog and delays currently experienced by family law litigants. When a judge retires in the FCC their docket of cases or workload, which can be as much as 500-600 cases, must be picked up by existing judges until a replacement is appointed. Delays in appointment inevitably therefore reduce the capacity of the remaining judges to hear cases in a timely way, causing significant backlogs, over-listings of interim and trial dates and increases in the time to both interim hearing and trial.

43. The KPMG Report confirms publicly for the first time what was assumed to be the case, that delays in making appointments to the courts were used as a mechanism of cost saving for government:

> *A number of larger-value savings have been implemented, including…not replacing FCA, FcoA and FCC judicial officers in 2009-10 and 2011 (estimated to deliver savings of $24.9 million…)*[35]

44. The impact of over-listing at FCC interim or duty list hearings was the subject of comment in the appellate decision of *Matenson v Matenson*.[36] Justice Murphy noted that it was not uncommon for more than 30 cases to be listed in a duty list in the FCC and found:

> *[B]y reason of simple arithmetic the average time that can be allotted to each matter as a consequence surely gives pause for thought as to whether proper process can be invoked and the requirement for individual justice met where interim decisions affecting children's lives are involved.*[37]

45. The PwC Report does not consider the long term funding arrangements for the federal courts, or the impact that changes in workload will have on the capacity of the courts to maintain their suggested efficiency gains if funding does not keep pace with those changes. The LCA suggests that consideration should be given by Government to implementation of the recommendation in the KPMG Report that a formal and regular mechanism be implemented to review the workload of each court and, if appropriate, base funding be adjusted accordingly.[38]

# The importance of specialisation in the family law jurisdiction

46. A number of key aspects of the FCFC Bills raise substantial concerns about the loss of specialisation in the family law judiciary.

47. The 2019 iteration of the FCFC Bills do reflect a material change in position by the Government. Previously, the Government had announced (in the context of the 2018 Bills) that it would not appoint any new judges to the proposed Division 1 of the FCFC, which would in the view of the LCA have resulted in the effective abolition of a specialist family law court in Australia (although in the LCA submissions in respect of the 2018 Bills it was acknowledged that future governments may adopt a different

[35] KPMG Report, xi.
[36] [2018] FamCAFC 133.
[37] Ibid 71.
[38] KPMG Report, 80.

policy approach). The 2019 Bills, as the Explanatory Memorandum states at paragraph 68, now provides that:

> *The Bill also includes a specific provision providing that a minimum number of FCFC (Division 1) judges can be specified in regulation. The Government's intention is to make a Regulation that would prescribe 25 as the minimum number of judges to hold office in the FCFC (Division 1).*[39]

48. In respect of those matters:

    (a) Noting the LCA overall opposition to the proposed move of the FCoA Judges into the FCCA, the LCA is of the view that leaving to the Executive, by Regulation, the power to change the minimum number of Division 1 judges in any new FCFC is entirely inappropriate, and that any minimum number should be enshrined in statute and subject to amendment by the Parliament, and not by the Executive. It is a matter for law making by the Parliament, not unilateral decision making from time to time by the Executive by Regulation:

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

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

    (d) Specialisation of both judges and courts in the family law jurisdiction has two important benefits to the community:

        (vii) The quality of decision making is enhanced*; and*

        (viii) The practice and procedure of a specialist family court can focus on the needs of separating families and adapt to changes in experience of families over time.

49. As noted in 2018 by the LIV:

> *Australian children and families navigating the family law system are entitled to a nuanced, experienced and specialised response, which gives them the best possible chance of a positive outcome.*

## Judicial specialisation in family law

50. In an address in 2018 to the National Family Law Conference, the Hon Robert French AC, former Chief Justice of the High Court of Australia, reflected on the benefits of judicial specialisation:

> *Market forces have driven the profession to increasing levels of specialisation in all areas of practice. Judicial specialisation is not quite so acute but is reflected in the internal arrangements of generalist courts*

[39] Explanatory Memorandum, Federal Circuit Court and Family Court of Australia Bill 2019 and the Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 (Cth) 19 [68].

> *such as the Federal Court with its national practice groups and State courts with their specific subject matter lists. There are a number of specialist courts in the States created to exercise jurisdiction in narrowly defined areas. Drug Courts and Liquor Licensing Courts are particular examples. The Family Court can be characterised as a specialist court by reference to the subject matter of its jurisdiction. Nevertheless, its jurisdiction potentially covers a wide range of questions.*
>
> *Legal professional and judicial specialisation can offer efficiencies. People familiar with a particular area of law and practice are more likely to be able to advise and to adjudicate in such areas economically and expeditiously.*
>
> *As a general observation, there are areas in which specialist judges are particularly beneficial and other areas where specialisation may be useful but is not a requirement. At the primary level, in the exercise of a trial court's original jurisdiction, common sense would suggest that judges burdened with the responsibility for a high volume of decision-making in difficult areas of judicial discretion should have a thorough familiarity with the law they are administering and the practice of the court. They will also have or acquire the important lived experience over time of hearing and deciding cases in which the facts are contested, the parties not always well represented, if represented at all, and in which a high level of interpersonal skills and communication skills is require to manage emotionally fraught and stressed people.*[40]

51. The existing provisions of the Family Law Act require that:

> *A person shall not be appointed as a Judge [of the FCoA] unless…by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.*[41]

52. There is no equivalent provision in the current *Federal Circuit Court Act 1999* (Cth) (**Federal Circuit Court Act***)* regarding the appointment of judges to the FCC. The LCA acknowledges that a significant number of judges of the FCC were experienced family lawyers before their appointment to the bench and reflect those qualities already.

53. The House of Representatives Report into family violence and the family law system expressed concern that not all judges exercising family law jurisdiction in the FCC had prior family law experience:

> *Although the most serious cases of child sexual or physical abuse or family violence are reserved for the Family Court, the presence of child abuse or family violence is not always identified early in a case. This is compounded by data that indicates the vast majority of family law matters are heard in the Federal Circuit Court. It is therefore particularly concerning that judges appointed to the Federal Circuit Court may not have expertise in family law or identifying the presence of family violence or child abuse, prior to presiding over such cases.*

[40] Robert French AC, 'Specialists, Generalists and Legal Intersections in Family Law' (Speech, 18th Biennial National Family Law Conference, 4 October 2018).
[41] *Family Law Act 1975* (Cth) s 22(b).

> *The Committee notes that judicial officers cannot be compelled to attend or participate in training once appointed. It is therefore critical that judges with family law and family violence expertise are appointed to the federal family courts, and for current and up-to-date training to be made available to judicial officers. Given the high family law caseload in the Federal Circuit Court, it is fundamental that the professional experience of the judicial appointees to the Federal Circuit Court possess sufficient expertise to reflect that caseload.*[42]

54. To understand the value of specialised family law judicial officers, it is important to first understand the characteristics of litigants in the family law courts. Reflecting on the work of family lawyers, FLS Chair Wendy Kayler-Thomson said in her State of the Nation address to the National Family Law Conference in 2018:

> *….most of the work we do does not involve a court. In cases that we are able to resolve without bothering a court, we are generally dealing with separated families, who, whilst experiencing the trauma of a family breakdown, have the capacity, with our assistance, to resolve their dispute. But for those clients that need the intervention of a court, or who find themselves responding to a court application by their former partner, there are many characteristics to their behaviour in a court setting that require a nuanced, specialised and experienced response. There has been much said, including in the ALRC's Discussion Paper, about the complex problems involved in many family law cases before the courts. This includes family violence, sexual abuse of children, drug and alcohol addiction and mental health problems. They are complexities which are relatively easy to label and for the community to understand may involve disputes which require a skilled and experienced judge to determine. But there is a deeper layer of complexity that is well known to us. People who experience family breakdown, and particularly those who end up in Court, often demonstrate a range of personal behaviours that is unlike the behaviour of people or corporations involved in commercial disputes.*
>
> *Many are grieving the loss of a relationship or experiencing the cycle of psychological responses to the breakdown of that relationship – hurt, anger, frustration, acceptance. It is an understatement to say that our clients are not at their best. Even the most accomplished and intelligent of our clients, behave in a compromised manner that often defies commercial logic or is not in the best interests of their children. Many of them are overwhelmed by the process of separation and the litigation – many are trying to maintain their employment, care for children, grieve the loss of a relationship and some are clinging to a hope that the relationship can be rescued. Some are recovering from an abusive relationship in circumstances where the tool of abuse has become the litigation itself. One of the most fascinating pieces of research in the family law field in Australia in recent years has been Professor Bruce Smyth's research on the role of hatred in parental conflict. Some of our clients truly hate each other with a passion that they once reserved for the love that they felt for each other.*

[42] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support And Protect Those Affected by Family Violence* (Report, December 2017) [8.77]-[8.78].

> *There is the nub of why many of us do this work. Assisting people like this to reach a resolution of their dispute or to achieve an outcome in court is what keeps us engaged. Family lawyers are not just skilled lawyers, we are skilled at managing the vagaries of the personal behaviours that our client's present. It is those 'people management skills' that means we are able to settle more cases than we run. If it were not for those skills of family lawyers, the family law court system would have ground to halt a long time ago.*
>
> *Judges who are experienced family lawyers understand all this. Their understanding of the management of family law cases and family law litigants isn't just about what they have learnt in the relatively sanitised environment of a court room. Their years of experience in doing what we do informs their work as a judge. Quite simply, it makes them better judges.*[43]

55. The QLS made the following comments in 2018 about the potential impact on litigants of having their case heard by a judge without family law experience:

> *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.*

56. Other impacts on cases and litigants where the judicial officer has no or limited family experience include:

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

[43] Wendy Kayler-Thomson, 'The State of the Nation' (Speech, 18th Biennial National Family Law Conference, 3 October 2018).

development, leading to orders being made that are not in the best interests of children.

57. The ALRC proposed in its 2018 Discussion Paper that 'all future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person's knowledge, experience and aptitude in relation to family violence'.[44] The ALRC posed in its Discussion Paper a further question about what other changes should be made to the criteria for appointment of judges exercising family law jurisdiction.[45]

58. Recommendation 51 of the ALRC Final Report was that:

> *Relevant statutes should be amended to require that future appointments of all federal judicial officers exercising family law jurisdiction include consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.*[46]

59. The proposed subsection 11(2)(b) of the FCFC Bill in relation to the qualifications for appointment of judicial officers to Division 1 of the FCFC differs from the current provisions of section 22 of the Family Law Act, but reflects Recommendation 51 of the ALRC Final Report.

60. Subsection 79(2)(b) of the 2018 FCBC Bill related to the appointment of judges to Division 2 of the FCFC and provided that *'a person is not to be appointed as a Judge* [of Division 2] *unless the person has appropriate knowledge, skills and experience with the kinds of matters that may come before* [Division 2 of the FCFC]'.

61. Section 111 of the 2019 FCFC Bill now provides in respect of appointments to the proposed Division 2 of the FCFC that:

> *(2) A person is not to be appointed as a Judge unless:*
>
> *(a) the person has been enrolled as a legal practitioner (however described) of the High Court, or a Supreme Court of a State or Territory, for at least 5 years; and*
>
> *(b) by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with the kinds of matters that may be expected to come before the person as a Judge of the Federal Circuit and Family Court of Australia (Division 2).*
>
> *(3) To avoid doubt, for the purposes of paragraph (2)(b), if the kinds of matters that may be expected to come before a person as a Judge of the Federal Circuit and Family Court of Australia (Division 2) are family law matters, the person, by reason of their knowledge, skills, experience and aptitude, is a suitable person to deal with those matters, including matters involving family violence.*

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[44] Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper 86, 2018) 251, Proposal 10-8.
[45] Ibid 245, Question 10-4.
[46] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 22.

62. Other provisions of the 2019 FCFC Bill confirm that Division 2 of the FCFC will have a broad general federal law jurisdiction including migration, industrial relations, bankruptcy and intellectual property. The Bill does not create a Family Law Division of the FCFC Division 2.

63. The LCA notes that in their February 2020 submission, the Law Society of New South Wales has expressed the view that appointees (whether to Division 1 or 2) of any new FCFC should have 7, rather than 5, years of experience.

## Specialist family courts

64. A court system that appropriately responds to the needs of separated families is more than just experienced judges. The case management practices, the Rules and procedures of the Court and the other professional staff of the court all contribute to an effective court system.

65. It is well accepted that the complexity of issues involved in many family law cases has increased significantly in recent years. As noted in 2018 by the LIV:

> *The research suggests the small percentages of families that rely on the courts to resolve their family law disputes have "highly conflicted or fearful relationships", which are incontrovertibly linked with family violence, child abuse, mental illness, and substance misuse. Further, the data indicates approximately 10 percent of cases, which involve families in circumstances of high conflict, take up 90 percent of the time of the family law courts.*

66. A specialist family law court, appropriately resourced, is best placed to meet the challenge presented by the complex nature of family law litigation. The FCoA has a long history of adapting to changes in the nature of the disputes before it, and in developing innovative responses. This has included the Less Adversarial Trial, the family violence guidelines, the Magellan List and the practice standards for family report writers. The FCoA has also developed, trialled and implemented new case management strategies over its history to deal with the challenges of increasing workloads and complexities of cases. Differential case management that triaged cases and applied resources according to the complexity of cases have been developed. This comes in large part, the LCA suggests, from the family law experience and depth of knowledge of litigant behaviour, of its specialist family judges.

67. In contrast, the FCC has changed little of its case management practices over the last 15 years. The legal profession has raised concerns that the FCC's adherence to many of its procedures and management, in particular the docket system and some of its Rules (developed early in the history of that court), are not adequately meeting the needs of litigants in its family law jurisdictions.

# The importance of the development of the jurisprudence by specialist judges in the Full Court of the Family Court of Australia

68. The proposed abolition of the Appeal Division of the FCoA was opposed by the LCA in its submissions in respect of the 2018 version of the Bills. Whilst the 2019 iteration of the FCFC Bills rightly abandons the move of appellate jurisdiction to the Federal Court of Australia (as recommended by the 14 February 2019 Senate

Committee Report), it now proposes at sections 26 and 32 that each Judge in the proposed Division 1 of the FCFC will have an appellate judge role and disbands the Appeal Division of the FCoA.

69. Section 21A of the FLA establishes the Appeal Division of the FCoA. Subsection 93A(1) of the FLA prescribes the appellate jurisdiction of the FCoA in the following terms:

> *(1) The Family Court has jurisdiction with respect to matters arising under this Act or under any other law made by the Parliament in respect of which:*
>
> *(a) appeals referred to in section 94 are instituted; or*
>
> *(aa) appeals referred to in subsection 94AAA(1) or (1A) are instituted; or*
>
> *(b) appeals referred to in section 96 are instituted.*

70. Section 4 of the FLA defines the 'Full Court', such as to statutorily require the FCoA to have appeals from single judges of its own court heard by a bench of 3 judges:

> *Full Court means:*
>
> *(a) 3 or more Judges of the Family Court sitting together, where a majority of those Judges are members of the Appeal Division; or*
>
> *(b) in relation to particular proceedings:*
>
> *(i) 3 or more Judges of the Family Court sitting together, where, at the commencement of the hearing of the proceedings, a majority of those Judges were members of the Appeal Division; or*
>
> *(ii) 2 Judges of the Family Court sitting together, where those Judges are permitted, by subsection 28(4), to complete the hearing and determination, or the determination, of those proceedings.*

71. Section 94 of the FLA provides that:

> *(1) Subject to sections 94AAA and 94AA, an appeal lies to a Full Court of the Family Court from:*
>
> *(a) a decree of the Family Court, constituted otherwise than as a Full Court, exercising original or appellate jurisdiction:*
>
> *(i) under this Act; or*
>
> *(ii) under any other law; or*
>
> *(b) a decree of:*

*(i) a Family Court of a State; or*

*(ii) a Supreme Court of a State or Territory constituted by a single Judge;*

*exercising original or appellate jurisdiction under this Act or in proceedings continued in accordance with any of the provisions of section 9.*

72. Section 94AAA of the FLA establishes a statutory default position that appeals from the FCC to the FCoA be heard by a bench of 3 judges, unless the Chief Justice considers it appropriate in a particular case for the appellate jurisdiction to be exercised by a single judge:

*(1) An appeal lies to the Family Court from:*

*(a) a decree of the Federal Circuit Court of Australia exercising original jurisdiction under this Act; or*

*(b) a decree or decision of a Judge of the Federal Circuit Court of Australia exercising original jurisdiction under this Act rejecting an application that he or she disqualify himself or herself from further hearing a matter.*

*(1A) An appeal lies to the Family Court from:*

*(a) a decree of the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia exercising original jurisdiction under this Act; or*

*(b) a decree or decision of a Family Law Magistrate of Western Australia exercising in the Magistrates Court of Western Australia original jurisdiction under this Act rejecting an application that he or she disqualify himself or herself from further hearing a matter.*

*Note: This subsection applies to appeals from the making, variation and revocation of court security orders under the Court Security Act 2013 as described in section 94AB.*

*(2) Subsections (1) and (1A) have effect subject to section 94AA.*

*(3) The jurisdiction of the Family Court in relation to an appeal under subsection (1) or (1A) is to be exercised by a Full Court unless the Chief Justice considers that it is appropriate for the jurisdiction of the Family Court in relation to the appeal to be exercised by a single Judge.*

73. Given that section 94AAA of the FLA establishes the default position for appeals from the FCC to a bench of 3 judges and section 94 requires a Full Court to sit where the appeal arises from a single judge of the FCoA, the earlier criticisms in some quarters of the practices of the Full Court of FCoA (in having 3 judges comprise the Full Court) and then seeking to make comparisons with how matters are heard by the Full Court of the Federal Court where different statutory

requirements are applied under the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**), has been difficult to understand.

74. Were there some problem with the practice of the Full Court of the Family Court, then surely the Parliament would many years earlier have identified the same and proposed a simple amendment to section 94AAA of the FLA to change the default provision for appeals from a judge in the family law division of the FCC.

75. The Appeal Division of the Family Court presently contains 10 members with vast family law experience. For over 40 years they have developed a substantial body of jurisprudence. The LCA notes the following 2018 submission from the LIV:

> *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 [former Justice of the FCoA] Stephen O'Ryan QC, robust debate amongst three expert Judges promotes responsive and strong jurisprudence, and its removal may result in 'a downgrading, a depressing of the standard of jurisprudence required of an intermediate appeal court.'*[47]

76. There are three major effects of the appeal division changes proposed by the Bills:

    (a) abolition of the Appeal Division of the FCoA

    (b) limiting the appellate jurisdiction of the proposed Division 1 and 2;[48] and

    (c) the reversal of the default position for the number of judges required to hear appeals from the FCC, from three to one.

77. Appeals from Division 1 judges of the FCFC would be heard by a Full Court, whereas appeals from Division 2 judges would be heard by a single judge of Division 1 unless it is determined appropriate the matter be dealt with by a Full Court.[49]

78. The FCFC Bill creates a change to the default position that applies in respect of appeals from family law final orders of the FCC (what would be Division 2 of the FCFC) by the proposed paragraph 32(1)(a). Given the importance of family law decision making to Australian families and their children, it is the view of the LCA that this change is contrary to community interests and should not be implemented, and appeals should as a presumptive position go before a Full Court of three judges.

79. The proposed changes to the default position are also destructive of the specialised knowledge that FCoA judges of the existing Appeal Division have at the appellate level and the guidance they therefore give to the judges at trial level both of the FCoA and the FCC. The importance of the guidance provided by the Full Court of the FCoA as a specialised intermediate court of appeal has been explicitly recognised by the High Court of Australia.

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[47] Nicola Berkovic, 'Three Judge Appeals 'Make System Robust', *The Australian* (Sydney, 5 June 2018).
[48] Federal Circuit Court and Family Court of Australia Bill 2019 (Cth) cls 26, 28(1), 28(3).
[49] Ibid cl 32(1).

80. In *Slazenger & Ors v Hunt & Ors; Lederer & Anor v Hunt & Ors,*[50] Justice Heydon when delivering Reasons for the refusal of an application for special leave to appeal stated:

> *... so far as the Full Court [of the Family Court of Australia] is not faced with earlier decisions of its own, its opinions would be valuable. Family law is a specialised field in which the experience of the Family Court is much greater than that of this Court, particularly so far as consideration of the constitutionality of the impugned provisions would be assisted by considering their potential practical operation.*

81. The LCA acknowledges the position as conveyed 10 March 2020 of the Queensland Bar Association in respect of the appeal division of the FCoA:

> *Whilst the Association supports the appellate jurisdiction remaining with the Family Court rather than as a division of the Federal Court of Australia, the Association does not support the model proposed by the 2019 Bill.*
>
> *In particular, the Association opposes the elimination of a dedicated appeal division. It would result in the loss of valuable precedent and the expertise of appeal judges in family law crucial to the proper administration of justice.*
>
> *It is important to understand that the conduct of appeals in the Federal Court of Australia is quite different for good reason. That court deals with multiple legislation and diverse areas of law. The judges of the Federal Court are assigned to practice areas reflecting their expertise and consequently when appeal benches are set, that expertise is a consideration.*
>
> *The 2019 Bill would have the effect that appeals from a Division 2 judge would be heard by a single judge of Division 1. Generally, it is appropriate for appeals to be heard by a bench of three judges. The current position where the Chief Justice, on the advice of experienced appellate judges, will decide that an appeal be heard by one appellate judge is the preferable position.*
>
> *This is so for a number of reasons.*
>
> *First, appeal decisions of a bench of three judges results in the development of authoritative jurisprudence, rather than a series of single judge decisions. Relatedly, the proposed structure of the appellate jurisdiction has the very real potential for the development of regional jurisprudence and divisions in the jurisprudence of appellate cases. There remain, arguably justifiable, criticisms of divergent existing Full Court authorities, which are only likely to increase if appellate jurisprudence is created by single judges. It has the scope and potential to seriously diminish, and undermine, the development of jurisprudence of family law principles, as well as the application of principles from other jurisdictions in family law cases, particularly in those concerning property division.*

[50] [2006] HCATrans 473.

*Second, a material distinction ought to be drawn between the Federal Court of Australia (**FCA**) and the proposed FCFCA. Unlike the FCA, Divisions 1 and 2 of the proposed FCFCA model have a complete concurrence of jurisdiction. Where Division 1 judges would only have original jurisdiction to hear and determine matters transferred to it by Division 2, it is inappropriate for a single judge of Division 1 to hear and determine an appeal from a decision of a Division 2 judge. This model has the potential for an appeal to be tantamount to a substitution of one single judge's decision for another, a course the authorities are clear is improper.*

*The Association is unable to comment on any proposed changes to the right to appeal with leave in circumstances where the relevant sections make reference to subordinate legislation which has not been tabled and is not available for comment.*

82. The LCA further notes the submissions of 27 February 2020 from the South Australian Bar Association:

> *2.1. SABA supports the retention of a permanent specialist Court of Appeal ("the Appeal Court"). SABA adopts this position for the following reasons:*
>
> *2.1.1. To promote consistency in the development, interpretation and application of Family Law Jurisprudence around the country;*
>
> *2.1.2. To maintain the intellectual rigour of the jurisdiction and to encourage advocates of the highest calibre to practise in the jurisdiction;*
>
> *2.1.3. To ensure that litigants continue to receive access to justice by the timely and thorough administration of appeals;*
>
> *2.1.4. To ensure that judges of Division 1 do not lose valuable sitting time to hear matters in the first instance particularly given the well documented delays, which litigants experience when prosecuting applications to final hearing. If Judges of Division 1 are required to undertake as part of their judicial duties appellate work (together with interlocutory work and trials) then it is SABA's opinion that there will need to be more appointments of division 1 judges to cope with the additional workload.*

83. The amendments generally to the appeals process cannot be supported given:

(a) the benefits of the specialist intermediate court of appeal as recognised by the High Court, and which the LCA acknowledges the 2019 iteration of the Bills now retains (albeit no longer comprised of a dedicated division of appellate judges);

(b) the proposed grant of appellate responsibility to all judges from Division 1 of the FCFC;

(c) the absence of any sound business case for savings that would result from the proposed changes; and

(d) the lack of merit in changing the default position in respect of appeals from division 2 judges (currently FCC family law judges) to be dealt with by a single judge of appeal rather than a bench of 3 judges.

84. Pursuant to proposed subclause 28(3) of the FCFA Bill, leave to appeal would also be required from a 'prescribed judgment' of a Judge of Division 1. Under the FLA as it presently stands, leave to appeal is not required in respect of interlocutory parenting orders. It is unclear what 'prescribed judgment' refers to in this context, noting that the definition that had been proposed in the 2018 Bills has not been replicated in the current reforms.

85. The LCA further notes the submissions received 27 February 2020 from the South Australian Bar Association:

> *3.1. Proposed subsection 26(2) proves that certain kinds of appeal to FCFCA Division 1 are prohibited. The subsection proposes that an appeal must not be brought from a judgment referred to in subsection (1) if the judgements is:*
>
> *3.1.1. A determination of an application:*
>
> *3.1.1.1. For leave or special leave to institute proceedings in the Federal Circuit and Family Court of Australia (Division 1); or*
>
> *3.1.1.2. For an extension of time within which to institute proceedings in the Federal Circuit and Family Court of Australia (Division 1); or*
>
> *3.1.1.3. For leave to amend the grounds of an application or appeal to the Federal Circuit and Family Court of Australia (Division 1); or*
>
> *3.1.2. A decision to do, or not to do, any of the following:*
>
> *3.1.2.1. Join or remove a party;*
>
> *3.1.2.2. Adjourn or expedite a hearing;*
>
> *3.1.2.3. Vacate a hearing date.*
>
> *3.2. SABA does not support the proposed limitation on rights to appeal as proposed for the following reasons:*
>
> *3.2.1. It would summarily limit a litigant's access to justice and to be heard;*
>
> *3.2.2. Applications of the type identified in proposed paragraph 26(2) often involve complex questions of fact and law and are finely balanced. If the applications are denied by a judge at first instance, the terms of proposed paragraph 26(2) would deny a litigant access to an alternate remedy; and*
>
> *3.2.3. Applications for an extension of time within which to bring property proceedings are not*

> *uncommon. Victims of family violence often delay filing applications for all manner of reasons including the fear of doing so, homelessness, mental health and other social disadvantages. There is also a lack of education in the public arena regarding time limits especially for de facto couples. In SABA's view, these litigants ought to have the opportunity to access all avenues to justice.*

86. One other matter of importance must be noted. The Terms of Reference given to the ALRC included consideration of whether, and if so what, reforms to the family law system are necessary or desirable in relation to inter alia 'mechanisms for reviewing and appealing decisions'. In October 2018, the ALRC published its 313-page Discussion Paper containing over 130 proposals and 30 questions for consideration. It included a chapter devoted to 'Reshaping the Adjudication Landscape'. That chapter alone contained 12 proposals and 4 questions. None of them (nor anywhere else in the body of the Discussion Paper) proposed or raised the prospect of a change to the existing appeals process or the need for reform in this area. None of the 60 Recommendations in the ALRC Final Report were for any changes to the existing appellate court structure, the decisions that require leave to appeal, the default position that applies to the number of judges hearing an appeal from the FCC (what would be Division 2 of the FCFC) or the disbanding of the appeal division.

# Reshaping and improving a world leading family law system

87. Since the passage of the FLA in the mid-1970s, Australia has been at the forefront of developments in this field.

88. From the establishment of a specialist family law court, to no fault divorce, to Independent Children's Lawyers, to the Magellan List, to the emphasis on counselling and mediation, Australia has led the way. Just how far advanced the Australian system can be considered, is apparent even now from the recent movement in England, Scotland and Wales, to finally adopt a less stringent approach to the grounds for divorce[51] and as to the absence in many other common law jurisdictions of recognition of the financial rights of parties to a de facto relationship (or recognition at all of same sex relationships, whether de facto or married) that breaks down.

89. The specialist knowledge in the area of family violence, and the growing understanding about its many natures and forms, informs the need for a specialised court. These were also the subject of Recommendations in the ALRC Final Report:

> *Recommendation 51*
>
> *Relevant statutes should be amended to require that future appointments of all federal judicial officers exercising family law jurisdiction include consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.*

[51] See *Owen v Owen* [2018] UKSC 41 <https://www.supremecourt.uk/cases/uksc-2017-0077.html>.

*Recommendation 52*

*The Law Council of Australia should work with state and territory regulatory bodies for legal practitioners to develop consistent requirements for legal practitioners undertaking family law work to complete annually at least one unit of continuing professional development relating to family violence.*[52]

90. The FCoA is a superior court of record. The FCFC Bill maintains the superior court status of Division 1. The FCC (and Division 2 of the FCFC) is not a superior court. Even before the establishment of the FCoA, most family law proceedings were heard by superior courts as 'matrimonial causes' were typically heard in State Supreme Courts, which are superior courts. One clear danger wrought by the provision by Regulation rather than statute of the minimum number of Division 1 judges in the FCFC, is that unilateral decision making by the Executive (without the checks and balances of the upper House of Parliament in the form of the Senate) is that the Australian community may ultimately be left without the benefit of a superior court of record to hear and determine family law proceedings. This is likely to create a number of difficulties, some of which are unpredictable because we have never before been faced with the absence of a superior court of record in the family law jurisdiction. Decisions of superior courts have special status compared to those of inferior courts, which may lead to difficulties if a Division 2 judge is required to interpret any new laws introduced by Parliament and in doing so exceeds jurisdiction (a decision of an inferior court which exceeds its jurisdiction is a nullity, whilst a decision of a superior court is valid until set aside).

91. On a practical level, orders of superior courts also tend to have special status or recognition overseas. Litigants in family law proceedings sometimes need to register FcoA orders in overseas countries in order to aid enforcement of those orders in relation to assets held outside of Australia or where children reside overseas. The absence of a superior court in the family law jurisdiction may hamper the ability of Australians to enforce obligations in orders made under the FLA.

92. The NSWBA issued a Discussion Paper in mid-2018 that contained a proposal, based in large part on the Semple Report, for the creation of a single family law court where the family law responsibilities of the FCC were merged into the FCoA and became a secondary level of that court.

93. The LCA continues to support that position, and proposes that a single specialist court be known as the 'Family Law Court of Australia'

94. The LCA notes that any court system, whether it be in family law (as it exists now or in the future) and in any other jurisdiction, can only properly serve a community if it is properly funded and resourced. Without that backing from government, it is impossible for its goals to be achieved.

95. The LCA is concerned that successive governments have failed to fund the courts as they should and as the community deserves, and that cuts to Legal Aid have contributed to the growth in unrepresented litigants before the courts and have further slowed the system.

[52] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019) 22.

96. It is a rhetorical question but it should not be – would we be having this debate about the family law courts structure had there not been a chronic underfunding of the system and a failure to make timely appointments of judicial officers when retirements occurred?

97. The LCA is of the view that any final consideration of the Bills should stand over until the government responds to the ALRC Final Report. If the Inquiry into the Australian Family Law System by the Joint Select Committee is to continue (noting that in March 2020 the LCA has called for its termination), then the community should also have the benefit of its Report.

98. But at this stage, the LCA cannot support the structural reform proposed by the Bills, and urges government to give consideration to the model put forward by the NSWBA.

## Transfers of cases between Division 1 and Division 2 of the FCFC

99. Pursuant to clause 50 of the FCFC Bill, there will be a single point of entry (Division 2).

100. The proposed section 51 of the FCFC Bill, provides that proceedings can be transferred by the Chief Justice from Division 2 to Division 1, and pursuant to the proposed section 52, proceedings can be transferred by the Chief Justice from Division 1 to Division 2.

101. The LCA notes the following matters raised February 2020 by the NSW Law Society;

> *As stated in our 2018 submission, we support the provision of a single entry point to the family law jurisdiction, which will make the filing process simpler for parties and their representatives.*
>
> *However, a corollary to a single entry point is the need to transfer matters between Divisions and we have concerns as to how these transfers may operate. Although a single entry point in Division 2 of the FCFCA will streamline the filing process, it may result in increased numbers of transfers overall.*
>
> *All matters are filed in Division 2 and the question as to whether a matter is transferred to Division 1, or back again, is a matter for the Chief Justice's discretion, to be exercised upon application or of his/her own motion. Sections 51 and 52 provide that the discretion may be exercised on the basis of:*
>
> - *the powers of the Court as set out in Rules;*
> - *relative resource constraints on each Division; or*
> - *practical considerations relating to keeping associated proceedings in the same Division.*
>
> *The jurisdiction of each Division is indicated by section 8 which provides that Division 1 will consist of the former FCA and Division 2 will consist of the former FCCA. This suggests that matters which, after filing, are immediately transferred to Division 1 pursuant to the Rules are likely to include those that would currently be heard in the FCA pursuant to the*

*Protocol for the division of work between the Family Court and the Federal Circuit Court:*[53]

1. *International child abduction.*

2. *International relocation*

3. *Disputes as to whether a case should be heard in Australia.*

4. *Special medical procedures (of the type such as gender reassignment and sterilisation).*

5. *Contravention and related applications in parenting cases relating to orders which have been made in FCoA proceedings; which have reached a final stage of hearing or a judicial determination and which have been made within 12 months prior to filing.*

6. *Serious allegations of sexual abuse of a child warranting transfer to the Magellan list or similar list where applicable, and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court.*

7. *Complex questions of jurisdiction or law.*

8. *If the matter proceeds to a final hearing, it is likely it would take in excess of four days of hearing time.*

*In 2018-2019 the FCoA filed 19,588 matters. Although a few of these would have been transferred to the FCCA,*[54] *the figure broadly indicates the number of matters that qualified to be heard in the FCA under the Protocol. If the factors set out in the Protocol are embodied in the Rules (or in a new Protocol), a similar number of matters could be expected to be transferred to Division 1.*

*'Relative resource constraints' is another basis on which, pursuant to sections 51 and 52, a matter may be transferred between Divisions. As a general principle, the Law Society supports measures that assist in reducing case backlogs in either Division and in enabling the Court to respond to fluctuating caseloads. However, in our view, consideration should be given in each matter to the potentially disruptive effect of transfers on effective case management. Noting our comments in previous submissions that family law litigation can have a traumatic effect on the parties, consideration should also be given to the risk of multiple transfers heightening that effect.*

[53] See Family Court of Australia, 'Protocol for the Division of Work Between the Family Court and the Federal Circuit Court' (Web page, 12 April 2013) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/corporate-information/protocol-for-division-of-work-fcoa-fcc>.

[54] The number of matters transferred from the Family Court to the Federal Circuit Court is not publicly available.

*We recommend that, in the Rules or elsewhere, the exercise of the Chief Justice's discretion to transfer a matter should require balancing all of these considerations.*

## Rule-making power

102. The LCA has substantial concerns about the proposed sections 76 and 217 of the FCFC Bill, which give sole rule-making power to the Chief Justice for Division 1 and to the Chief Judge for Division 2 for a period of 2 years, however the Bill does not contain a legislative sunset provision in that regard, just a notation of intention. As a result of the proposed section 21, the Chief Justice and the Chief Judge can be the same person.

103. Vesting a head of jurisdiction of a Superior court with sole rule-making power marks a significant departure from the arrangements in place for every other Superior Court in Australia, and which currently exist for the Family Court of Australia and Federal Circuit Court of Australia. In all Superior Courts in Australia (the High Court of Australia, the Federal Court, the Family Court of Australia, the Supreme Courts of each state and territory and the District Courts where they exist in each state and territory), rule-making power is vested in either, all of the judges of that court with the majority of judges required to support any change to the rules, or in some jurisdictions, rule-making power is vested in a rule committee made up of a number of judges and in some instances external stakeholders. Extracts of the relevant legislative provisions for each Superior Court in Australia are included in this submission at **Attachment A**.

104. 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) even for 2 years, 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

105. LCA notes that the Law Society New South Wales has in its February 2020 submission expressed no objection to the Head of Jurisdiction for each of Division 1 and 2 having sole rule making power for 2 years and they regard it as a 'workable approach'.

106. It is essential that the community have faith in the judicial system, and a system whereby a committee of judges or a majority of judges have rule making power, is an important measure and one recognised by the State Governments throughout the Commonwealth of Australia. As remarked by the Honourable Sir Gerard Brennan, AC KBE, Chief Justice of Australia (as he then was):

> *Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors, but the governed*.[55]

107. The LCA notes the position of the Queensland Bar Association:

> *The BAQ is concerned by the current conglomeration of power vested in the respective Chiefs of jurisdiction. Pursuant to sections 76 and 217,*

[55] Sir Gerard Brennan AC KBE, 'Judicial Independence' (Speech, Australian Judicial Conference, 2 November 1996).

*the Chief Justice and Chief Judge may make Rules of Court. While a Note to each of those provisions indicates an intention to amend that provision after two years, there is no sunset clause in the Bill.*

*Notably, the position of Chief Judge and Chief Justice may be held by the same person.*

*In circumstances where legislative amendments to the family law system have been historically slow, this ought to be addressed.*

108. The LCA is of the view that the existing provisions of the FLA and the Federal Circuit Court Act which provide for the majority of judges to make the Rules of each court, should be replicated in the FCFC Bill in relation to both Division 1 and Division 2 of the FCFC. The input of a broad range of judicial officers who sit in different registries and who have different skills and experience in particular types of work undertaken by the courts, is likely to enable the courts to develop Rules which allow them to more efficiently manage its caseload and to adequately address the differences in practices around the country.

109. The LCA notes the following submissions by the QLS:

*Currently, sections 123 and 124 of the Family Law Act 1975 state that the Rules of the Court are created and amended by the Rules Advisory Committee, comprised of judges of the Family Court of Australia.*

*We believe there is substantial benefit to the Rules of the Court being shaped by a committee of judges who sit in various registries across Australia. This ensures Rules of the Court operate in a fair and effective manner, taking into account the differences in practice and litigant demographic across Australia, including in rural and regional areas. We do not support section 56 of the Bill, which proposes that the Chief Justice alone make Rules of Court.*

110. The LCA commends the Rules Committee of the Family Court of Australia process, noting that the committee regularly engages on a formal basis with representatives of the legal profession and other court stakeholders in each registry and nationally when considering both minor and major adaptations to its Rules. The LCA considers that this has led to benefits both for the Court and for the users of the court. In this regard the LCA notes the provisions of the Supreme Court Act (NSW) and District Court Act (NSW), which include representatives of the profession as formal members of Rules committees. The LCA considers that this is worth further consideration in the context of the family law jurisdiction - given that both the FCoA and FCC plan a significant rewrite of their respective Rules, regardless of whether these Bills are passed.

111. The LCA notes the comment of the NSWLS in February 2020 about the absence as yet of the Harmonized Court Rules, namely that:

*At this stage, the Law Society can only provide its preliminary views as to the impact of the 2019 Bill and whether the Bill delivers an effective family law system. A more detailed assessment may be possible when draft Rules of the Family and Federal Circuit Court of Australia (FCFCA) and indications as to resourcing arrangements are available.*

112. The problem arising from the manner of drafting of the FCFC Bills and the absence of provision of the harmonised Rule provisions has been noted in March 2019 by the Queensland Bar Association:

> *The Association notes the repeated reference in the 2019 Bill and the Transitional provisions to powers arising from the Rules of Court. The proposed Rules of Court have not yet been made public for consideration. Further, concern must also be expressed that, where there is the possibility for the Chiefs' of the two courts to be the same person, the proposal effectively vests the rules making power in a single person. However, until the Rules, and subordinate legislation, have been made public, the Association is unable to make further comment.*

## Divisions of the FCC

113. The LCA notes that the proposed section 104 of the FCFC Bill replicates the provisions of the existing Federal Circuit Court Act in dividing the organisation and conduct of the business of Division 2 of the FCFC into two divisions:

    (a) The General Division; and

    (b) The Fair Work Division.

114. The LCA suggests that the opportunity exists for the General Division to be divided and for a family law division of Division 2 to be created. In circumstances where the family law jurisdiction of the FCC represents 90% of all filings in that Court, it is somewhat surprising that family law does not comprise its own separate division of the existing FCC or the proposed Division 2. The LCA notes that in the context of the demands placed on the resources of the court in relation to the general federal jurisdiction of the FCC, and in particular the migration work backlog, the failure to take the opportunity to create a specialised family law division within Division 2 represents tacit acknowledgement that any efficiency gains to be achieved by the restructure may not solely be applied to the family law jurisdiction.

115. The LCA notes the following comments of the NSWLS received February 2020:

> *…. under the 2019 Bill the new FCFCA would retain the former FCCA's general federal law jurisdiction.*
>
> *The general federal law jurisdiction spans a range of areas including administrative law, bankruptcy, consumer law, fair industrial law and intellectual property. As family law applications constitute 90% of the FCC's workload, and the general federal law jurisdiction only 10%,[56] the majority of court resources are allocated to the family law jurisdiction.*
>
> *The Law Society considers that the general federal jurisdiction should sit outside the FCFCA, either in a new specialist court or in the Federal Court. This would achieve the 2019 Bill's objective of creating a single specialist family court while giving proper judicial attention and resourcing to general federal matters.*

[56] Federal Circuit Court of Australia, *Annual Report 2018-2019* (2019) 27.

## Corporations Act powers

116. The consequential amendment provisions in relation to the *Corporations Act 2001* (Cth) contained in the CATP Bill replicate the provisions of the existing provisions which confer Corporations Law powers on the FCoA. Where in the existing provisions of the Corporations Act reference is made to the FCoA, that is proposed to become Division 1, and where reference is made to the FCC, the proposed provision refers to Division 2. Most of the provisions relating to Corporations Law powers of the FCoA (or Division 1 of the FCFC) relate to powers which would otherwise only be exercised by a superior court. That is, there is no intention in the consequential amendments to the *Corporations Act* to expand the jurisdiction of the inferior Division 2 of the FCFC.

117. The LCA does not advocate any change to this position but notes that in the event that the Division 1 of the FCFC is slowly phased out by change to Regulation as to the minimum number of Judges, the availability of Division 1 judges with the necessary jurisdiction to exercise such powers, will be reduced and over time potentially eliminated.

# Submission

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

# Attachment A – Rule Making Powers of Courts

**COMMONWEALTH**

**High Court of Australia**

***Judiciary Act 1903* (Cth)**

**S 86 Rules of Court**

(1) The Justices of the High Court or a majority of them may make Rules of Court necessary or convenient to be made for carrying into effect the provisions of this Act or so much of the provisions of any other Act as confers jurisdiction on the High Court or relates to the practice or procedure of the High Court, and in particular for the following matters.

***High Court of Australia Act 1979* (Cth)**

**S 48 Rules of Court**

The power of the Justices or of a majority of them to make Rules of Court under section 86 of the Judiciary Act 1903 extends to making any Rules of Court required or permitted by this Act to be made or necessary or convenient to be made for carrying into effect the provisions of this Act.

**Federal Court of Australia**

***Federal Court of Australia Act 1976* (Cth)**

**S 59 Rules of Court**

(1) The Judges of the Court or a majority of them may make Rules of Court, not inconsistent with this Act, making provision for or in relation to the practice and procedure to be followed in the Court (including the practice and procedure to be followed in Registries of the Court) and for or in relation to all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Court.

**Family Court of Australia**

***Family Law Act 1975* (Cth)**

**S 123 Rules of Court**

(1) The Judges, or a majority of them, may make Rules of Court not inconsistent with this Act, providing for or in relation to the practice and procedure to be followed in the Family Court

**Federal Circuit Court of Australia**

***Federal Circuit Court of Australia Act 1999* (Cth)**

**S 81 Rules of Court**

(1) The Judges, or a majority of them, may make Rules of Court.

## AUSTRALIAN CAPITAL TERRITORY

**Supreme Court of the Australian Capital Territory**

***Australian Capital Territory Supreme Court Act 1933* (ACT)**

**S 28 Rules of Court**

(1) The Judges appointed under subsection (1) of section 7 or any two of those Judges may make Rules of Court, not inconsistent with this or any other Act, with regulations under this or any other Act or with any Ordinance:
   (a) for regulating and prescribing:
      (i) the practice and procedure, including the method of pleading, to be followed in the Supreme Court and in the offices of the Court; and
      (ii) all matters and things incidental to or relating to any such practice and procedure or necessary or convenient to be prescribed for the conduct of any business of the Court;
   (b) for prescribing any matter or thing that is, by any law of the Commonwealth or of the Territory that makes provision for the incorporation of, and otherwise in relation to, companies, required or permitted to be prescribed by regulation under that law;
   (c) for prescribing the qualifications for the admission of persons to practise as barristers and solicitors of the Supreme Court; and
   (d) for prescribing any matter or thing that is, by this Act or by any Ordinance or enactment, required or permitted to be prescribed by Rules of Court.
(2) In particular the Rules of Court may provide: (…)

## NEW SOUTH WALES

**Supreme Court of New South Wales**

***Supreme Court Act 1970* (NSW)**

**S 123 Rule Committee**

(1) Rules may be made under this Act by a Rule Committee consisting of:
   (a) the Chief Justice,
   (b) the President of the Court of Appeal or a Judge of Appeal appointed on the nomination of the President of the Court of Appeal,
   (c) one other appointed Judge of Appeal,
   (d) four other appointed judges, and
   (e) an appointed barrister and an appointed solicitor.

**District Court of New South Wales**

***District Court Act 1973* (NSW)**

**S 18A Establishment of the Rule Committee**

There shall be a District Court Rule Committee.

**S 18B Composition of the Rule Committee**

(1) The Rule Committee shall be composed of no fewer than 9 and no more than 10 members.

(2) Of the members of the Rule Committee:
  (a) one shall be the Chief Judge,
  (b) six shall be Judges other than the Chief Judge,
  (c) one shall be a barrister, and
  (d) one shall be a solicitor.

**NORTHERN TERRITORY**

**Supreme Court of the Northern Territory**

***Supreme Court Act***

**S 71 Rules of Court**

Except as provided by this Act or by any other law in force in the Territory, the practice and procedure of the Court shall be as provided by the Rules.

**S 86 Rules of Court**

(1) The Judges who are not acting or additional Judges, or a majority of those Judges, may make Rules of Court.

**QUEENSLAND**

**Supreme Court of Queensland and the District Court of Queensland**

***Supreme Court of Queensland Act 1991*** **(QLD)**

**S 85 Rule-making power**

(1) The Governor in Council may make rules of court under this Act for—
  (a) the practices and procedures of the Supreme Court, the District Court or the Magistrates Courts or their registries or another matter mentioned in *schedule 1.*
(2) A rule may only be made with the consent of the rules committee.

**S 89 Rules Committee**

(1) The Chief Justice is to establish a Rules Committee consisting of the following members—
  (a) the Chief Justice, or a Supreme Court judge nominated by the Chief Justice;
  (b) the President or a judge of appeal nominated by the President;
  (c) 2 Supreme Court judges nominated by the Chief Justice;

(d) the Chief Judge or a District Court judge nominated by the Chief Judge;
(e) a District Court judge nominated by the Chief Judge;
(f) the Chief Magistrate or a magistrate nominated by the Chief Magistrate;
(g) a magistrate nominated by the Chief Magistrate.

**SOUTH AUSTRALIA**

**Supreme Court of South Australia**

***Supreme Court Act 1935* (SA)**

**S 72 Rules of Court**

(1) Rules of court may be made under this Act by any three or more judges of the Supreme Court for any of the following purposes:
(…)

**District Court of South Australia**

***District Court Act 1991* (SA)**

**S 51 Rules of Court**

(1) Rules of the Court may be made by the Chief Judge and any two or more other Judges.

**TASMANIA**

**Supreme Court of Tasmania**

***Supreme Court Civil Procedure Act 1932* (Tas)**

**S 197 Power of judges to make Rules of Court**

(1) Subject to the provisions of section 203, the judges of the Supreme Court, or a majority of them, may make Rules of Court, not inconsistent with this Act for carrying this Act into effect, and in particular for the following matters in addition to those for which Rules of Court are authorized to be made by any other provision in this Act:

**VICTORIA**

**Supreme Court of Victoria**

***Supreme Court Act 1986* (Vic)**

**S 26 Manner of making Rules**

If by this or any other Act it is provided, expressly or by implication, that the Court or the Judges of the Court may make Rules, the power may be exercised by a majority of the

Judges (not including any reserve Judge, Associate Judge or reserve Associate Judge) present at a meeting held for that purpose.

**County Court of Victoria**

***County Court Act 1958* (Vic)**

**S 78 Power to make rules of practice**

(1) A majority of the judges (other than reserve judges or associate judges or reserve associate judges) for the time being may make rules for all or any of the following purposes— (…)

**WESTERN AUSTRALIA**

**Supreme Court of Western Australia**

***Supreme Court Act 1935* (WA)**

**S 168 Rules of court, making**

Whenever by this or any other Act it is provided expressly or in effect that the Supreme Court or the judges of the Court may make rules, such power may be exercised at any time and from time to time, and may be exercised by a majority of the judges at a meeting for that purpose, and shall be deemed to include the power to alter, annul, or add rules, and to prescribe, alter, annul, or add forms.

**District Court of Western Australia**

***District Court of Western Australia Act 1969* (WA)**

**S 88 Rules of court, making, content**

(1) The District Court judges, for the time being, or a majority of them, may make rules, not inconsistent with this Act —
(for purposes…)

**Family Court of Western Australia**

***Family Court Act 1997* (WA)**

**S 244 Rules**

(1) The judges, or a majority of them, may make rules not inconsistent with this Act or regulations made under this Act providing for or in relation to —
(a) the practice and procedure to be followed in the Court or in the Magistrates Court exercising jurisdiction under this Act; and

(b) all matters and things necessary or convenient to be prescribed for the conduct of any business in the Court or in the Magistrates Court exercising jurisdiction under this Act; and
(c) all matters and things incidental to the things specified in this section.

**Children's Court Of Western Australia**

***Children's Court of Western Australia Act 1988* (WA)**

**S 38 Rules of court**

The judge, or if there is more than one judge a majority of the judges, may make rules for regulating and prescribing the practice and procedure to be followed in the Court and for regulating and prescribing all matters or things incidental or relating to such practice and procedure or necessary or convenient to be prescribed for the conduct of any business of the Court.

**Why "radical" is not a dirty word in family law reform**

Speech to the Newcastle Law Society 2019 Annual Dinner

20-30 mins

Good evening ladies and gentlemen, colleagues and friends.

I acknowledge the traditional custodians of the land and sea of Newcastle, the AWABAKAL and WORIMI peoples, and pay my respects to elders past, present and emerging. I extend those respects to First Nations Australians with us today.

It is an honour to be here with you this evening. The profession in Newcastle has a proud 178 year history, and has built a sterling reputation for serving the local community and championing access to justice for the region.

I commend you on the important work you do, and thank President Gary Fox and the Newcastle Law Society for the kind invitation to join your Annual Members' Dinner.

When I first received Gary's invitation to speak this evening, Gary was kind enough to let me speak on any topic of my choosing. The jury is still out on whether this was a wise decision on Gary's part!

I have been called a great many things by many people in my time – including many Attorneys-General.

"Radical" has not been one of them.

So when the Commonwealth Attorney-General first called the family law reform policy advanced by the Law Council, the Family Law Section and our Constituent Bodies "radical", I confess this took me somewhat by surprise.

"Radical" is an odd word to use in a law reform discussion because the word itself adds very little that is useful. It says nothing about whether a

policy or law is good, bad or otherwise.

The Attorney has continued to use the word "radical" to seek to dismiss the position advanced by the legal profession.

There are two things I do not understand about this proposition.

First, what is so radical about what the profession is proposing?

And second, even if it is radical, why does that mean it is necessarily bad?

Why is "radical" a dirty word in family law reform?

I appreciate that Newcastle's legal profession has a diverse range of practices. But the reason I have chosen to speak with you tonight about family law reform is that we are on the eve of the Federal Government reintroducing the fundamentally flawed merger bill in the November sittings of the Parliament which will see the abolition of the specialist Family Court. The Government's stubborn and wrong headed approach to family law will see it advocate again for a bad law to be passed by Parliament – a law which it failed to pass in the last Parliament. This approach is not only irrational, but is extremely disrespectful to the views of the significant stakeholders in the family violence services sector. These dedicated professionals who understand this area better than any member of the Government have made it clear that this policy will hurt children and families. As lawyers and members of our community, we all have a stake in this, regardless of where and what we practice.

More Australians will have contact with the family law system than perhaps any other part of our justice system.

As Justice Abella of the Canadian Supreme Court once observed:

> *No area of law matters to more people than family law. Not many people do corporate takeovers, most do not commit crimes, but absolutely everyone has a family.*[1]

[1] Justice Abella, "The Challenge of Change', (1998) Speech to the 8th National Family Law Conference, Hobart Tasmania, 5 October 1998, 1-2.

It is no secret that Australia's family law system is not serving the best interests of children or families as well as it could or should.

There has been understandable frustration in the community with the speed and cost of justice the system delivers.

Frustration that is shared by the profession.

Few are more intimately acquainted with the challenges and pressures facing the system than the practitioners in this room who face the daily struggle of working to support clients in a system that has been neglected, chronically under-resourced and under-funded.

For too long Newcastle's families and family law practitioners have been forced to endure the cramped and overcrowded conditions of the Commonwealth courts building in Bolton Street.

The working conditions are unsafe for judges and lawyers. Jurisdictional gaps between Commonwealth jurisdiction and state child protection, and poor information sharing, pose risks to the safety of children and victims of family violence.

Those risks were well illustrated by the decision of Judge Betts on 12 February this year in the case of Munson & Munson[2]. The case involved an application by a father for interim parenting orders in relation to five children. The mother opposed this application and sought interim orders that the father spend only supervised time with the children through a professional supervision service. She also sought specific orders in relation to the father undertaking a comprehensive mental health assessment and sought an order that he enrol in a "Facing Up" course, being a course designed for perpetrators of family violence. Like many others, this was a case involving allegations of family violence that demanded immediate attention. But Judge Betts was unable to list the matter for hearing until the end of August. He said:

> *I do not consider 28 August 2019 to be an entirely appropriate date*

[2] Munson & Munson [2019] FCCA 670 (20 February 2019).

> *for the further hearing of this interim application. The regrettable reality is that these children require more attention than this court can give them at this time given the sheer state of the listings at this time, a matter which should by now be a matter of public record. The fact is that, on the latest numbers I have, my docket consists of 563 cases, each of which has its own significance, each of which has its own urgency.*[3]

Unfortunately, this is just one of the many cases where delay, cost and confusion continue to let down vulnerable families and children and sap public confidence in our courts and our justice system more broadly.

On behalf of the profession, the Law Council in lockstep with its Family Law Section have consistently argued that reform of the system is urgently needed for six reasons.

**First**, the experiment of sharing jurisdiction between and running family law matters in two separate federal courts – with separate rules and procedures – has failed. It has failed because of an incomprehensive and inconsistent internal case management approach, despite existing laws and rule making powers to create a common approach, or a single point of entry.

**Second**, the system has been systematically underfunded by successive Governments of both political persuasions for decades - not only the courts but also critical counselling and assessment services.

**Third**, the system has been adversely affected by a chronic lack and mismanagement of resources in both the Family Court and Federal Circuit Court. This has included a failure to promptly replace retiring judicial officers, or to appoint sufficient judges to deal with an expanding jurisdiction that now includes de facto relationships.

**Fourth**, underfunding legal assistance has meant a significant number of parties cannot afford legal representation in family law matters and appear

[3] Ibid, [10].

by necessity unrepresented in court.

**Fifth,** these factors have all contributed to the creation of crippling judicial workloads. The status quo is setting our judges up to fail, especially in the FCC, where some judges have more than 500 cases in their docket at any one time. This workload of the judges is unsafe for the judicial officers, and necessarily impacts upon the quality of justice which can be consistently administered by those judicial officers.

**And last**, despite best efforts, the challenges faced by judicial officers struggling to meet these caseloads adversely affect the quality of outcomes delivered for parents and children. Particularly in the FCC where judges are not required to meet the same statutory requirement of specialisation as judges of the Family Court under section 22(2)(b) of the *Family Law Act.*

This situation is unacceptable, unfair and unsustainable.

Newcastle has lived each of these factors in its own registries.

Newcastle has seen some of the largest increases in the number of final order applications in the Federal Circuit Court - 16 percent between 2012-13 to 2016-17[4].

With the government's failure to make timely appointments of new judges, this has led to a blowout of waiting times for trial of up to 19 months.

It has produced judicial workloads of nearly double the national average and increases in delays of finalisations.[5]

Yet successive governments have failed to do what is needed to improve the system: provide adequate funding, sufficient resourcing and a coherent structure to stop children and victims of family violence from falling

[4] PwC, *Review of efficiency of the operations of the federal courts – Final Report* (April 2018) 100.
[5] "Hunter domestic violence victims, children, at risk because of 'reckless ' judge shortage", Newcastle Herald, 30 June 2017, https://www.illawarramercury.com.au/story/4762659/reckless-judge-shortage-puts-domestic-violence-victims-at-risk.

through the cracks.

This paints a pretty compelling picture of the case for change.

And against this backdrop, the Law Council's advocacy hardly seems radical. So what exactly are we proposing? And why has the Attorney taken issue with it?

Our position, what we stand for, can be summed up in two words.

Specialisation matters.

The Law Council agrees there is a dire need to resource and reform the family law system.

We do not accept, though, that the way the Government has sought to go about this would deliver meaningful reform.

Last year, the Attorney-General announced in May a proposal to merge the specialist Family Court into the generalist Federal Circuit Court.

There was no consultation with the community or the profession over the proposal – only with three heads of jurisdiction.

The proposal was introduced to Parliament with a start date of 1 January 2019.

And the reaction from the family violence services sector, from the legal profession and from the Parliament was stark.

In the face of significant stakeholder concern, a Senate committee inquired into the Bill over a matter of some months and the 1 January start date was pushed back. The Committee proposed significant amendment to the bill.

In April, the government broke trust with parliament by inexplicably withholding the landmark Australian Law Reform Commission report from senators who were being pressured to vote on the merger in the last days of the 45th Parliament.

Ultimately, the bill was not brought on for a vote because the proposal

lacked the support of the Senate cross-bench needed to get it across the line, with or without amendment.

After the May election, the Attorney-General declared his "highest priority" in the new parliament would be structural reform of the family law courts.

Instead of taking the opportunity presented by the ALRC's once in a generation review of the system to look to holistic reform, the Attorney has committed to reintroducing the flawed merger proposal to the Parliament before Christmas.

The Law Council vehemently opposed the merger last year, and we will continue to oppose it because we do not support bad policy that will hurt children and families.

With or without further amendment, we remain concerned that the merger will result in the loss of a stand-alone, dedicated Family Court as we know it, to the detriment of those in need of specialist family law assistance.

Further, we do not accept the purported efficiencies it has been claimed the merger will produce. Rather, we are concerned it will further increase cost, time and stress for families.

The six-week desktop review by PWC presented as the original business case for the merger was ultimately discredited and disregarded by the Senate Committee inquiring into the merger bill. It is unclear how the Government can continue to claim these efficiencies would be realised if the merger were reintroduced, as these efficiencies were premised on the mooted changes to the Family Court's appellate jurisdiction, which were rightly rejected by the Committee.

The merger fails to alleviate the fundamental problems plaguing the system, including the risk of victims of family violence falling through the cracks.

This was all but conceded by the Former Liberal senator Ian MacDonald, who chaired the inquiry into the merger bill, when he told ABC radio in

July the proposal was only a “short term fix”.

We dispute it is even that.

Abolishing a stand-alone specialist family court, whether directly or by abeyance, is no fix.

Refusing to inject desperately needed funds and resources into a crippled system unless the Parliament votes for the Government’s plan is certainly no fix.

We are not alone in holding these concerns – they are shared by stakeholders and family violence support providers including Women’s Legal Services Australia, Rape and Domestic Violence NSW and Community Legal Centres.

But we accept it is unhelpful to simply shoot holes in well-intentioned proposals without providing any alternative.

So what has the Law Council proposed?

On behalf of the profession, the Law Council and Family Law Section have advanced essentially three propositions.

**First**, we have urged the Government to retain and properly resource a specialist, stand-alone family court. Greater resourcing, funding and investment in the system is critical and would make a tangible difference to the quality of justice clients experience.

As the federal budget heads back into black, investing in this critical social justice infrastructure must be a priority.

**Second**, we have encouraged the Government to carefully consider alternative holistic structural reform of the system, such as recommended by the Semple Report, and now the Australian Law Reform Commission, to bolster – not undermine – a specialist, accessible family law system.

**Third**, we have said the Government must consult with stakeholders and carefully consider recommendations of the Australian Law Reform

Commission's recent landmark report on the family law system.

To suggest any one of these propositions is "radical" is a fake argument.

There should be nothing radical about the concept that critical social justice infrastructure – let alone a Chapter III Court – should not be irrevocably altered without informed consultation and discussion with those who use the court, work in the court, or whose lives are irreversibly shaped by its decisions.

The structure recommended by the Semple Report is a structure already in place in the Attorney's home state of Western Australia. A structure for which the Attorney himself was responsible for, for four years in his role as Attorney General of Western Australia from 2008 to 2012.

There is a direct nexus between resourcing, judicial appointments and case disposition times.

**So is it "radical" to call for a specialist family law court to be maintained?**

At the outset it's important to be clear about what we mean by a specialist family court. The establishment of a standalone specialist court was radical in and of itself.

For more than forty years, the Family Court of Australia has been a premier legal institution, a specialist superior court admired by other family law jurisdictions around the world for its innovative management of the most complex and difficult family law matters.

In the lead up to the introduction of the Family Law Bill 1974, the National Council of Women of Australia and some 620 affiliated groups strongly advocated for "specialised Family Courts" comprised of "specialist judges of superior status, working in one unified court alongside judicial officers at a lower level "specially appointed and trained" for the work".[6]

[6]Justice Stephen Thackray, 'The Rule of Law and the Independence of the Judiciary: Values Lost or Conveniently Lost or Conveniently Forgotten? The David Malcolm Memorial Lecture' (Speech to the University of Notre Dame, School of Law, 27 September 2-18), 136.

The Family Court was established as a "specialist multi-disciplinary court, incorporating the creation of an in-house counselling section staffed by psychologists and social workers with child welfare expertise, and the requirement to place the interests of children at the forefront of parenting disputes. This was followed by the establishment of mediation as a fundamental part of the system, and provision for less adversarial trial proceedings in child-related proceedings."[7]

The Attorney-General has sought to downplay claims that the merger would 'abolish' a specialist court or undermine specialisation.

This is an abrupt about face from the Government's position last year, when the Attorney-General said clearly no further judges would be appointed to Division 1 of the merged court – ie the current Family Court. It would therefore be abolished by attrition as remaining judges retired.

Former Chief Justice of the Family Court John Pascoe reiterated the vital importance of maintaining specialisation in family court matters, explaining:

> *"There is a clear need for a superior court in family law to deal with matters such as complicated financial cases that involve complex trust and corporate structures; allegations of extreme child abuse; international cases that involve conflicts of laws, adoption and abduction; and those that are on the cutting edge of developments in technology, medicine and psychology. These require the attention and precedent-setting decisions of a superior court."*[8]

The Government has subsequently backtracked from this and in recent discussions with stakeholders has mooted including a fixed number of judicial officers in Division 1 by regulation.

This is inherently problematic because to include in regulation a minimum number of judges is to place the continued existence of a specialist Chapter

[7] ALRC Report, [1.12] https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf
[8] Chief Justice of the Family Court of Australia, the Honourable Chief Justice John Pascoe, 'State of the Nation' (Speech delivered at 18th National Family Law Conference, Brisbane, 3 October 2019), 2.

III Court in the sole hands of the Executive.

But to suggest this guarantees specialisation is to fundamentally misunderstand the issue and why specialisation is important.

**Why does specialisation matter?**

One reason specialisation matters is to keep victims of family violence safe.

In 2010, the ALRC and NSW Law Reform commission advised that "the specialisation of key individuals and institutions is crucial to improving the interaction' of the different legal frameworks governing family violence in Australia".[9]

As many as 70 percent of family law matters in the Commonwealth courts involve an allegation of family violence.

The alarming prevalence of family violence in the system makes specialisation all the more important to promote safe engagement for victims with the Courts and our justice system, from the time a matter is filed, through appropriate triage, active case management and expedited resolution.

A specialist stand-alone family court is important to ensure specialist knowledge and training for judicial officers, registrars and court staff to equip them to identify and manage risk, and protect children and victims in need of the courts' assistance. To identify and respond appropriately when family violence presents and to engage effectively, safely and respectfully with victims of family violence.

Specialised court infrastructure is also important to support children and families, for example when giving evidence or appearing in matters involving the alleged abuser.

Moving away from a stand-alone specialist court with co-located legal and non-legal support services goes against the advice of expert reports and

[9] Quoted in ALRC Report, [4.83].

research, including the ALRC review. The 2016 Report by the Victorian Royal Commission into family violence explained that specialist family violence services mattered because "there is no single pathway into the family violence system". Justice services operate on the front line in responding to violence, alongside police and support services and when elements of the system are fragmented, it makes it much harder and more complex for victims to access the help, resources and pathways they need to stay safe, seek protection and uphold their rights and obligations.

A specialist family court is much more than the sum of a number in some legislative instrument.

It is important to be clear about what we mean by a specialist Family Court and why the Law council believes the merger would see it dismantled.

In this we need your help to continue to communicate and explain to the public, to politicians and to others why this is so important.

It is a part of a holistic, specialist ecosystem of interrelated and co-located support services and resources. This is particularly important with respect to family violence and responding to children at risk.

A specialist court is about more than just its judges – it is the support services, resources and processes. The Family Court has excelled at the provision and application of specialist conciliation and assessment services. Registrars and family consultants, when properly resourced and deployed, are an integral part of case management. They provide an invaluable service in the early identification, narrowing and resolution of issues.

The proposed merger will see these specialist services and resources diluted or worse lost. Together with the skills of specialist judges, these services and resources do not sit readily in a generalist court and ought not to have compete with the needs of litigants in a generalist court for resourcing and judge time.

In addition, the merger will continue to undermine specialisation because

of the significant differences in the requirements for the qualification and experience of judges appointed to its two divisions – both of which would handle family law matters, albeit of different complexity.

Specialist family court judges are essential to the proper administration of justice.

The Family Court deals with most difficult and complex family law matters that come before our courts, with direct, life-altering and irreversible consequences for the children and families concerned.

One of the most admired features of the Family Court is the fact only those who "by reason of training, experience and personality" are suited to deal with family law cases ought to be appointed as judges as required by section 22(2)(b) of the *Family Law Act 1975 (Cth)*.

This same requirement does not apply to Federal Circuit Court judges who hear family law matters.

Nor would this requirement apply to judges in 'Division 2' of a merged court.

In evidence to a Senate committee, the Council of Single Mothers and their Children said "many of the most disconcerting stories we hear occur in the Federal Circuit Courts where issues of family violence are disregarded in comments from the Bench[10].

The lack of specialisation, coupled with time and resources, has the potential to impact negatively on the quality of outcomes experienced by family law litigants in the Federal Circuit Court. It also places an unfair burden on FCC judges called to make difficult decisions on these matters under significant pressures.

Importantly, the merger will also effectively remove the specialist appeal division of the Family Court.

[10] Council of Single Mothers and their Children, Submission 6 to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Family Law Amendment (Family Violence and Cross-examination of parties) Bill 2018* (2018), 2.

The Attorney-General has now suggested the appellate function would be retained within the merged court, rather than transplanted into the Federal Court as it suggested last year.

The problem is the appellate function currently performed by the specialist skills of the Family Court's appeal bench would devolve to all Division 1 judges, undermining the retention of specialist appellate jurisdiction in a different way.

Former Chief Justice Pascoe has also acknowledged the "*critical importance of a thorough, in-depth and expert knowledge of family law"* to ensure just and proper conclusions are reached in appellate matters. He said:

> *"It is important that single-judges dealing with appeals in Family Law have appropriate family law background and experience, and that larger panels include judges with relevant Family Law experience. The High Court has noted on several occasions that hearing an appeal of a discretionary decision is no easy task and this certainly accords with my experience."*[11]

Currently, the default position is that family law matters appealed from the FCC are heard by appeal bench of the Family Court consisting of three members whereas appeals in respect of the Court's general work are heard by a single judge only.

Under the merger proposal, appeals in family law matters will heard by a single judge only. This single judge may be any current Family Court judge, rather than a member of the current appeal bench.

This is inconsistent with the treatment of parenting and financial issues before any other Court, including the Supreme and District Courts and the Federal Court, and does not promote the best justice outcomes.

If a system is struggling to realise its key purpose or deliver a key service, the policy answer is not to compromise or do away with that service. The

[11] Op. Cit.

answer should be to better resource and support its service delivery.

A specialist court must not be destroyed, whether by stealth or abeyance, based on a mirage that this will fix problems which in reality require more resources and holistic reform.

It is, therefore, very difficult to conceive of what is so radical about proposing to retain a specialist court.

But even if what we were proposing was radical, what's so wrong with that?

In 2017, then Attorney-General Brandis said the government was open to change to improve the system, "if need be, radical change".

Reform of the courts must be part of a holistic approach to the family law system and a whole-of-system response to do what is in the interests of Australian families and children.

Senator Brandis commissioned the Australian Law Reform Commission to undertake the first root and branch review of the Family Law Act 1975 in more than 40 years. That comprehensive report was handed down in April this year and highlighted the fragmented nature of the current system.

The ALRC's first recommendation was that the government consider fundamental changes to the identity and structure of the courts to deal with both family law as well as with family violence and child protection issues, which have traditionally been the province of the states.

The government is yet to respond to that recommendation or to any of the 59 other recommendations by the ALRC.

As a rule, family violence and child abuse issues are dealt with by the states and territories and financial and parenting issues arising on family breakdown fall to the Commonwealth.

This results in delay, additional cost and too often in an inconsistent response to families and children in crisis. There is a real risk of children

and victims of family violence falling through what the commission called the "jurisdictional gap".

The ALRC recommended establishing family courts in each state and territory to provide a comprehensive response to these difficulties.

The Attorney said this too was "radical". He described it as "largely impractical" and a "radical Gordian knot approach",[12] and has dismissed it without further consultation.

Regrettably, the word "radical" appears to have become code for "the too-hard basket".

There is a response available that would address both the issues identified by the ALRC and those confronting the family law system.

The government should lead consultation over necessary structural reform by seeking to assume responsibility from the states and territories for all aspects of the welfare of children and in addressing family violence.

The answer is not to be found in reviving the flawed merger.

When the Coalition party room met for the first time in the 46th parliament, the Prime Minister reminded his government that serving the Australian people means ensuring "that we focus on fixing the problems that need to be fixed".

There is now a real opportunity to have an informed and proper discussion and consideration of *all* options available to fix this most important of systems.

The recently announced parliamentary inquiry into Australia's family law system has the potential to drive an informed, holistic parliamentary response to the challenges facing our family law system now and into the future.

But to achieve this, the inquiry must ensure a full, complete and open-

[12] https://www.attorneygeneral.gov.au/Media/Pages/family-court-and-federal-circuit-court-plenary-opening-address-7th-august-2019.aspx

minded review of the family law system, involving all impacted by the system.

This inquiry must not be compromised by the government pressing ill-conceived changes in the face of the inquiry and it must not be derailed by any preconceived views or pre-determined outcomes, particularly in relation to family violence.

What Australia needs is a comprehensive blueprint to protect families and children into the future. Not the regurgitation of a flawed stopgap that is fundamentally unfit for purpose and will hurt Australians who have already suffered enough.

The Law Council has called for the inquiry to be conducted in a respectful, safe and inclusive manner, informed by expert advice and empirical evidence.

And we are committed to holding the inquiry to account for the need to undertake a full examination of all aspects of the family law system.

To do otherwise would be an opportunity lost and relegate the inquiry to yet another expensive, cynical political ploy.

In the meantime, this inquiry should not stop the government from addressing immediately the pressing need for proper resourcing and funding of those parts of the system in crisis.

This means sufficient funding for family violence support services, proper legal assistance funding for those in need and adequate funding to ensure Australian children and families are not waiting for three or more years for justice.

Our Parliament must do what is right. Not what is politically expedient or looks like a short term fix.

We have an obligation as a community to ensure any change to the family law system has the best interests of children at heart, and promotes meaningful sustainable outcomes to secure justice.

And to speak out in defence of the Rule of Law and the administration of justice – even and especially when it is unpopular – or dare I say, radical – to do so.

We make no apologies for carefully scrutinising and putting to proof any proposed reform to the family law system.

The Law Council has worked and will continue to work tirelessly in close collaboration and cooperation with the Family Law Section to advocate for meaningful reform in this space in the interests of justice, children and families.

I commend the FLS for its fierce advocacy in defence of the administration of justice, under the leadership of a section executive led by Chair Mr Paul Doolan and Deputy Chair Michael Kearney SC.

But we also need your help to continue to explain and to prosecute these concerns and the case for holistic change. To inform public debate with your own professional experiences and lend your expertise to help drive long-term solutions.

Martin Luther King Jr famously said "When you are right, you cannot be too radical".

The Law Council does not profess to have all the answers. And as the Prime Minister has conceded, in family law there is no perfect solution.

What we do know is that any change to Australia's family law system directly impacts on the lives of children and families already at their most vulnerable.

That does not mean we should not change it. We *must* change it because we know the current system is letting down those most in need.

But we must commit to change to better the law, not short term fixes or change for change's sake.

And if radical change will produce the best outcomes for vulnerable Australians, and secure a safe, specialist and accessible system for all, then

radical change is what we must pursue.

Australian children and families deserve nothing less.

Thank you.