



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: DHnh/FLC

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The Law Council of Australia
Attn: Mr. Jonathan Smithers
Chief Executive Officer
GPO Box 1989
Canberra ACT 2601

By email: Jonathan.Smithers@lawcouncil.asn.au

Dear Mr. Smithers,

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

Thank you for the opportunity to contribute to a submission regarding the above Bill. We agree with the comments of the Attorney General, the Honourable Christian Porter MP, that *“the current system is letting Australian families down”*. We do not agree, however, that the proposed amalgamation is going to provide the improvements that the Government suggests. We are concerned that merging the two Courts as proposed will simply change the structure around the problems they face.

In our view, the Government must not overlook the dire need for more resources for the system. To indicate a potential one-third increase in efficiency in the proposed merged court without additional funding is puzzling and troubling. Any cost savings generated by the new court must be reinvested back into the system. The system is chronically understaffed and in urgent need of the appointment of additional Judges, Registrars and Family Consultants.

It is also very difficult to see how the changes will succeed in saving time and money without being able to examine the Rules of the proposed Court. We would ask that the proposed Rules be published as soon as possible to allow a proper examination of the proposal.

Separately, the ALRC review into the Family Law System has not been assisted by the timing of the Federal Government's announcement of the proposed court merger. The Government's focus should be on getting the best out of the ALRC's Review, considering the findings and recommendations, and then implementing constructive reforms. One of the matters that could then be considered is the structure of the Courts that deal with Family Law matters. That is a part of the matrix. But to try and attempt structural reform in the absence of a considered, system-wide reform blueprint, risks wasting significant resources without delivering better outcomes.

Concerns with the justification for the reforms

PwC report on the efficiency of the operation of the federal courts

In her second reading speech introducing the Bill, Minister O'Dwyer stated, "As the PwC report highlights, the current court structures and overlapping family law jurisdiction is causing confusion, delays, and significant differences in access to justice for Australian families."¹

While we note that the identified issues can present a significant barrier to access to justice, we are concerned that the PwC report does not in fact constitute a sufficient case for the merger of the family courts as proposed. For instance, we note that the PwC report does not specifically address the quality of justice delivered.

As an example, the PwC report incorrectly presumes that the work undertaken by the Family Court and Federal Circuit Court are predominantly the same. This is not correct, as work the type of matters and work performed is different, meaning the conclusions made in that report are not based on accurate information.

Concerns with the proposed model contained in the Bills and whether the model is likely to be an effective reform

The Bill is effectively abolishing the Family Court of Australia

Given the statements of the Attorney General that the proposed Division 1 would not have new Justices appointed, the proposal effectively abolishes the Family Court of Australia. Although there are acknowledged problems with the current family law courts structure, in our view the specialisation of the family court system should be strengthened, so that it better understands and responds to family violence and issues specific to Aboriginal and Torres Strait Islander people, CALD people, people with disability and LGBTI people.

Access to the family law system for Indigenous families

The pilot Indigenous list at the Sydney registry of the Federal Circuit Court has been a significant initiative in creating a pathway into the family law system for Indigenous families. The Indigenous list has provided many Indigenous families a pathway out of the care and protection system. Many, if not all, of these families, would likely otherwise not have had access to the family law system. The intensive, therapeutic approach that the Indigenous list model adopts supports indigenous families to take proactive, protective steps to avoid the damaging effects of child removal, while keeping children safe, and within family and culture.

In addition to the Sydney registry, there are a number of registries across Australia where an Indigenous list has been implemented, or will be. These include Adelaide and Melbourne.

In the Law Society's view, the Indigenous list has proven its success and should no longer be considered a pilot. Indigenous lists should be expanded and rolled out to registries across the country.

¹ Available here:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/9a883748-1cb6-426d-8d31-5a723e72abdf/0005%22;src1=sm1>

The Law Society's strong submission is that Indigenous lists must be preserved in any proposed amalgamation, including preserving the expertise and capacity of the courts to carry out this work effectively. Losing the innovation that the Indigenous list represents would be a significantly retrograde step.

Benefits of the proposed model

Common leadership of both divisions promoting uniformity, harmony and saving costs

Having Registrars hold appointments in Divisions 1 and 2 (as well as the Federal Court) should lead to more consistent practices and efficiencies. This is encouraged as it will provide more certainty to court users as to what processes and procedures should be followed. Furthermore, section 66 and section 67 clearly set out the delegation of powers to Registrars.

Common management and more consistent case management

We support a single point of entry for all family law matters. The current system of having multiple courts to commence proceedings is inefficient. It is also confusing for self-represented parties, particularly given that approximately 90% of family law matters are dealt with by the Federal Circuit Court, not the Family Court. A single point of entry will increase efficiencies and eliminate any issues created by parties filing in the wrong court.

We also support the requirement for Division 1 and Division 2 to work cooperatively with common rules and forms, and common practices and procedures, to ensure the efficient resolution of family law or child support proceedings (section 55).

Allowing for personal costs orders for failure to comply with the duty to facilitate the just resolution of disputes in a quick, inexpensive and efficient manner (section 49) is a positive proposal. Whilst the majority of court users and their legal representatives do the right thing, there are the few that use proceedings for their own gain, often using financial and power imbalances to drag matters out to hurt the other party.

We welcome the increased scope for use of video and audio links (sections 168 to 172) as it will lead to efficiencies and better access for parties in regional and remote areas. Furthermore, in circumstances where there are safety issues and concerns, the use of technology can reduce the impact on parties by allowing them to participate in a way that allows for their emotional and physical safety to be paramount.

Disadvantages of the proposed model

This is still a dual system

The different rules and processes between the two courts are not effectively resolved by the Bill. It appears from the consequential amendments and transitional provisions that each division will continue to operate under separate rules. While the Bill enables the Chief Justice to enact rules, forms and processes, this should ideally take place simultaneously with proper consultation with the profession and all other stakeholders.

“Family Law footballs” will continue:

If the intent is to create a single point of entry and a single set of rules, the retention of two separate divisions appears contrary to that intent. Assuming Division 1 will retain “Family Court” matters (Magellan, international issues, matters more than four days final hearing), the issue of transfers will continue, and it is as yet unclear how matters will be allocated to the different Divisions, so as to alleviate unnecessary transfers.

The Bill still provides for transfers between the courts in certain circumstances, including where it is in the interests of the administration of justice (see sections 34 and 117). As such, there is an implicit understanding that matters will still need to be transferred.

Having a single point of entry for both courts will hopefully assist in having fewer transfers between the courts. The difficulty in saying that transfers between courts are part of the problem and are causing delays is that it is not always evident at the start of a matter whether it is complex or likely to require more than four days of hearing. For example:

1. A party may file for parenting orders only, and only later seek property orders, or the respondent seeks property and parenting orders;
2. A filing party may be unaware of substance abuse or mental health issues or criminal behaviour of the other party and this only becomes evident once the other party raises these issues or when subpoenas are issued and inspected;
3. A lack of financial disclosure, or the existence of complex family trust structures for property matters may only come to light later in the proceedings.

Another criticism of the transfer process appears to be based on a greater number of transfers from the Federal Circuit Court to the Family Court. However, anecdotal evidence suggests that this is usually because practitioners have utilised the different rules between the courts and filed in the Family Court to avoid filing an affidavit (usually in simple property matters) to save their client’s time and money.

The Creation of the Family Law Appeals Division in the Federal Court

We do not support the move of the appeal bench to the Federal Court.

The Bill is unclear as to how this will work in practice and there are real concerns that the extensive knowledge and experience of the current appeal judges will be lost.

There is no specificity in the amendments to the Act as to how the appeals division is to be constituted. This is especially concerning when the Explanatory Memorandum to the Bill at [60] states that appeal judges from the Family Court will be hearing matters at first instance. These judges have the requisite skills, experience and knowledge to hear family law appeals and should be continuing in that role.

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

Appeals in the Federal Court are appeals against errors of law. The vast majority of family law appeals are about evidence and the weight of the evidence to be considered. This involves a labour intensive inquiry to be made by the appeal judges, including reading transcripts and viewing exhibits.

With the creation of a new Court, with Division 1 effectively being a superior court of record and Division 2 being a court of record, there is concern as to how the proposed Court will consider, give weight and apply previous decisions of the Federal Circuit Court and the Family Court.

Judges appointed to Division 1 are to be a suitable person to deal with matters of family law by reason of training, experience and personality. Judges appointed to Division 2 are to have appropriate knowledge, skills and experience to deal with the kinds of matters that may come before Division 2. In our view, this is insufficient to ensure that family law appeals will be heard by appropriately experienced judges.

The profession should be consulted as to how the appeal division is to be constituted, and it should include the current members of the Full Court of the Family Court.

Implications for the Federal Circuit Court of Australia's general federal law jurisdictions

We note that parties in industrial matters before the Federal Circuit Court already experience significant delays in having their cases mediated and determined at a final hearing. Indeed, there is judicial comment in the matter of *Australian Building and Construction Commissioner v Gava* [2018] FCA 191 at [13] that the Federal Court has an ability to hear and determine industrial cases more expeditiously than the Federal Circuit Court "having regard to the current state of the lists in the Federal Circuit Court".

The Law Society submits that these delays in industrial law matters being heard are a function of the Federal Circuit Court prioritising family law and migration matters over industrial matters, as the latter only comprise 1.4% of the matters filed before the Federal Circuit Court. Under the Bill the number of family law matters in the merged court will dwarf the number of industrial matters to an even greater extent. We are concerned, therefore, that existing delays for industrial and other general federal law matters will be exacerbated. The Bill, in its current form, has no provisions that would allay these concerns.

Elements of a more robust reform, pending the outcome of the ALRC Review

A single court system – A Family Court of Australia

We support a single court system with a single point of entry, and a single set of (simplified) rules and common court forms. Any single court system should not sacrifice an experienced appeal division.

A more sustainable model would see an increase in case management by Registrars in the early stages of matters, reserving judicial resources for substantive interim hearings, complex interlocutory applications and final hearings.

Consider piloting an "Online Divorce" System

Divorce applications are predominantly straight forward in Australia due to the "no fault" system of divorce. There are limited grounds for challenging an application for divorce,

making them largely uncontroversial. Yet we see parties and solicitors appear before Registrars for divorce applications listed daily at the courts.

Moving from a paper-based process to a fully integrated online system would speed up and simplify divorces, freeing up the resources of Registrars for other matters.

Using alternative penalties to cost orders – getting tough on the dilatory conduct of parties in family law property matters

Parties should be penalised when obstructionist tactics are used, and when cases which lack merit are progressed. Parties should be penalised at the time of the offending behavior and courts should work with other government agencies to ensure penalties are enforced.

Penalties should include both financial and non-financial forms. In some circumstances, non-financial penalties (such as restricting overseas travel) could be a more effective deterrent. Whilst the penalties may seem extreme, the issue is arming the courts with a variety of measures which will prevent these types of behaviours that have become endemic in the family law system.

The actions taken by the Child Support Agency in penalising non-paying parents appear to be having an impact on addressing arrears payable by wealthy parties.

Provisions for replacing Judges and other Court staff during periods of absence

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

We accept that there are constitutional restrictions in relation to the appointment and tenure of Judges, but the Government must consider alternatives for covering temporary absences, perhaps through the use of suitably qualified and experienced Registrars.

Families need access to the Courts all year round and the Court needs to be operating at full capacity as often as possible.

Other related matters

Not all cases can or should be dealt with quickly

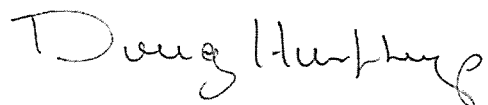
Whilst we agree that there is an urgent need to address overall delays in the current system, there must be recognition and a pathway for cases that cannot be resolved quickly. Often cases involving allegations of sexual assault and family violence require more information to be obtained, inter agency involvement in the proceedings, reports being prepared and at times periods of supervision to be trialled prior to any final orders being considered. It is important that these cases are not rushed at the expense of decisions made in the best interest of the child(ren).

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

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.

Yours sincerely,

A handwritten signature in black ink that reads "Doug Humphreys". The signature is written in a cursive, flowing style.

Doug Humphreys OAM
President