



NEW SOUTH WALES
BAR ASSOCIATION

A MATTER OF PUBLIC IMPORTANCE: TIME FOR A FAMILY COURT OF AUSTRALIA 2.0

Discussion Paper

July 2018

The Discussion Paper

The New South Wales Bar Association has released this discussion paper to encourage a national conversation and fresh ideas on a matter of public importance.

This discussion paper outlines:

- A proposal for a Family Court of Australia 2.0
- The evidential basis for a specialist family court in Australia
- Key questions and considerations

The New South Wales Bar Association

The New South Wales Bar Association is a voluntary professional association comprised of more than 2,300 barristers with their principal place of practice in NSW. Currently, 185 of our members reportedly practice in the area of family law and guardianship. The Association also includes amongst its members judges, academics, and retired practitioners and judges. The Association is committed to promoting the public good in relation to legal matters and the administration of justice. The Association believes there is a pressing need for a national discussion about the future of family law in Australia that transcends state borders, registries and professions.

The Association invites you to be part of a reasoned, considered discussion about alternatives for the future of the Family Court of Australia.

Contents

- A. A proposal for a national discussion: Time for a Family Court of Australia 2.0
- B. Comparative Structural Diagrams
- C. The evidential basis for a Family Court of Australia 2.0

A PROPOSAL FOR A NATIONAL DISCUSSION: TIME FOR A FAMILY COURT OF AUSTRALIA 2.0

Part A

Time for a Family Court of Australia 2.0

Australia's family law system contributes immeasurable social and economic value to our society. For more than forty years, the Family Court of Australia (the Family Court) has been one of Australia's premier legal institutions: 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".¹ The Attorney-General of the Commonwealth will introduce legislation in Spring to amalgamate the Family Court into a new entity called the Federal Circuit and Family Court of Australia (FCFCA).² Essentially, the Attorney-General is proposing to merge the Family Court into a division of a generalised lower level court, the Federal Circuit Court (FCC), and create a new Family Law Appeal Division in the Federal Court of Australia (FCA). There is an opportunity for a national discussion to consider whether an alternate federal court restructure might be possible to realise the cost and time efficiencies proposed by the Attorney-General while retaining a single court entity as a specialised and properly resourced Family Court of Australia 2.0.

The Issue

Stakeholders, including the Family Law Bar of NSW, are concerned that the Attorney-General's proposed restructure will in effect abolish a specialist superior court of record and produce a significant diminution in the quality of the family law justice system. The Women's Legal Service Queensland has stated publicly that this restructure represents a "move to a generalist court model and away from family law specialisation".³ Once in the FCFCA, all family court matters will have to compete for judicial resources and court time with other matters of federal jurisdiction, including a growing migration caseload. There is a risk the restructure will impose further significant pressures and more complex and lengthy cases on already over-burdened FCC Judges.

There is force in the view that if faced with a family law matter that cannot be resolved outside of the court, Australians should be able to access specialist services and a specialist Family Court to hear and determine the matter. Unless there are overwhelming countervailing factors, Australians should not be forced to put their families' futures into the hands of a general purpose court already juggling increased migration caseloads if there is another way forward.

Family law is factually and legally complex, emotionally-charged and produces life-altering consequences for families and children. It is the area of law by which most people will come into contact with the justice system.⁴ The Family Court currently hears "the most complex and difficult

¹ Federal Court of Australia, *Corporate Plan 2017-18* (2017) 18

<http://www.fedcourt.gov.au/__data/assets/pdf_file/0006/45366/Corporate-Plan-2017-18.pdf>.

² Attorney-General for Australia, 'Court Reforms to help families save time and costs in family law disputes' (Media release, 30 May 2018) <<http://www.attorneygeneral.gov.au/Media/Pages/Court-Reforms-to-help-families-save-time-and-costs-in-family-law-disputes.aspx>>.

³ Women's Legal Service Queensland, (Media Release, 28 June 2018).

⁴ Justice Abella, 'The Challenge of Change', (1998) Speech to the 8th National Family Law Conference, Hobart Tasmania, 25 October 1998, 2-3.

family law matters”, including “matters involving allegations of family violence and/or child abuse; questions of international family law (relating to the Hague 1980 Child Abduction Convention and/or 1996 Child Protection Convention); applications related to special medical procedures (such as stage two treatment for gender dysphoria in children); and complex property matters including those involving accrued jurisdiction and third parties”.⁵

Judges working in this area not only require specialist technical knowledge, legal reasoning, fact finding and analytical skills, they also require highly effective communication and interpersonal skills and experience in social dynamics. Judges perform this important work in a difficult, high-pressure environment that carries the risk of physical danger to themselves and their families, as well as the gravity of knowing that their decisions, especially regarding children, could in some instances provoke extreme responses resulting in violence to a child or a party, or in some tragic cases death.

One of the Family Court’s most admired features is the fact that only those who “by reason of training, experience and personality”⁶ are suited to deal with family law cases are appointed as its Judges. By contrast, FCC Judges need not satisfy that same requirement.⁷ Last year, the House of Representatives Standing Committee on Social Policy and Legal Affairs recommended an increase in the specialisation of Judges undertaking family law work.⁸

In recent years, Australia’s family law system has been adversely affected by a chronic and sustained lack of resources in both the FCC and the Family Court, resulting from an absence of commitment by successive Governments to the proper funding of the system. The Family Court can be a gold star institution once again but this would require reform in two key areas:

1. structural improvement to unify the family law system by creating a single family court; and
2. a proper funding and resource commitment from government.

The FCC was established in 1999 as a lower level federal court to provide a simpler and accessible alternative to litigation in the FCA and the Family Court and “to relieve the workload of those courts”.⁹ The experiment of sharing jurisdiction between two federal courts and running family law matters in separate courts with separate rules and procedures has failed.

The Attorney-General is right to say that “fundamental structural reform is an absolute necessary condition to further improvements” to the family law system.¹⁰ We agree that there should be “a

⁵ Federal Court of Australia, *Corporate Plan 2017-18* (2017) 18
<http://www.fedcourt.gov.au/__data/assets/pdf_file/0006/45366/Corporate-Plan-2017-18.pdf>.

⁶ *Family Law Act 1975* (Cth) section 22(2)(b).

⁷ Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (House of Representatives, 2017) [8.21], citing Professor Patrick Parkinson AM, Private Capacity, *Committee Hansard*, Canberra, 17 October 2017, 1.

⁸ See *ibid*, [8.76] – [8.84] and recommendations 27-29.

⁹ Commonwealth, *Attorney-General’s Portfolio 2018-19 Portfolio Budget Statement* (2018), 136.

¹⁰ The Hon Christian Porter MP, *Transcript ABC TV – Insiders*, 10 June 2018, page 4
<<https://www.attorneygeneral.gov.au/Media/Pages/ABC-TV-Insiders-10-June-2018.aspx>>.

single entry point, a single set of rules, processes, procedures, [to] ensure that families can move through the entire gambit of the system far simpler and cheaper...”.¹¹

However, we respectfully suggest that further consideration be given to the question of whether the model of restructuring proposed by the Attorney-General is the only way forward. If it is possible to attain the efficiency goals the Attorney-General is seeking and maintain the specialist jurisdiction of the Family Court then that possibility should be investigated and compared to the reform package that has been put forward.

¹¹ Ibid.

Re-imagining a Family Court of Australia 2.0

Family law is too important to our society to fail. In this discussion paper we suggest thought be given to a structural reform of the federal courts as the basis for the consolidation and streamlining of Australia's federal court jurisdiction and to achieve meaningful reform in family law. We suggest that consideration be given to an alternate model whereby:

- the FCC cease to operate as a separate, third federal court;
- the FCC's current family law jurisdiction and workload, which reportedly represents 90% of the FCC's work, be transferred into a new lower level division to be created in the Family Court;
- the FCC's remaining 10% work be transferred to a lower level division to be created in the FCA;
- the FCC's resources be divided and allocated between the new divisions of the Family Court and the FCA in a 90:10 ratio consistent with the proportion of work undertaken; and
- the Family Court retain its appellate jurisdiction.

There should be a national discussion to consider whether reducing three federal courts - the Family Court, FCC and FCA – into two federal courts (a specialist Family Court 2.0 and the FCA, each with a lower level division to resolve less complex disputes) will streamline resourcing, reduce costs and provide greater consistency, as well as opportunities for specialisation, career development and progression of judges. Structural diagrams are enclosed on the following pages.

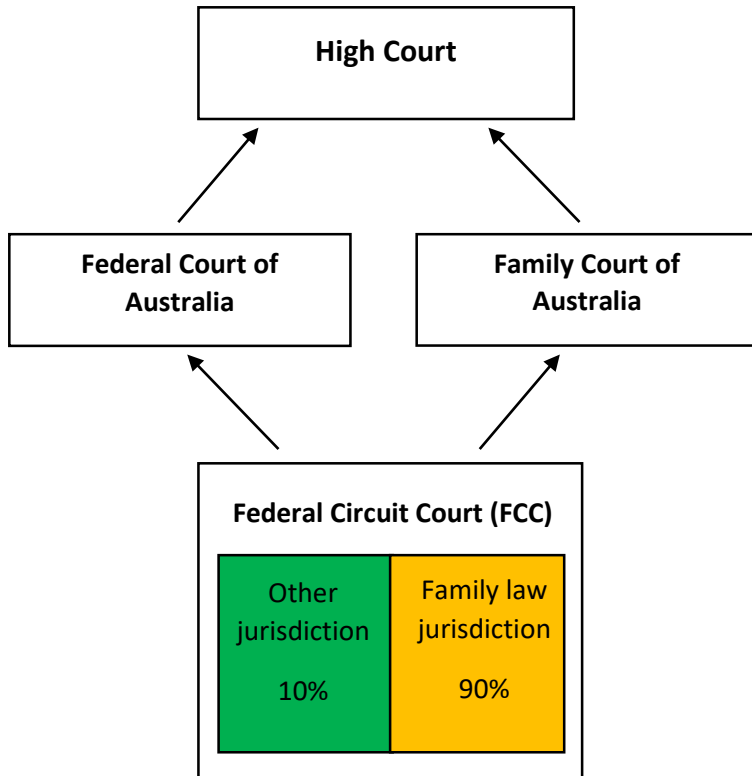
Most importantly, this proposal consolidates and strengthens a single, specialised Family Court 2.0 with one point of entry, unified court rules and procedures across divisions and inherent appellate jurisdiction. This discussion will consider whether maintaining a specialist, properly resourced, stand-alone family court would be more beneficial to the administration of justice than the restructure currently proposed, to quickly and affordably resolve the most complex of family law cases that cannot otherwise be determined and coordinate referral to ADR where appropriate. To date, there has been a lack of consultation with the legal profession about the Government's proposed structural reforms.

This discussion paper is intended to encourage open and frank dialogue between the Government, the Courts and the profession; to test the model put forward by the Attorney-General; and suggest an alternative model which we feel is worthy of investigation.

COMPARATIVE STRUCTURAL DIAGRAMS

Part B

**Diagram A:
Current Federal Courts Structure**



**Diagram B:
Alternate Federal Courts Structure Proposed in
Discussion Paper**

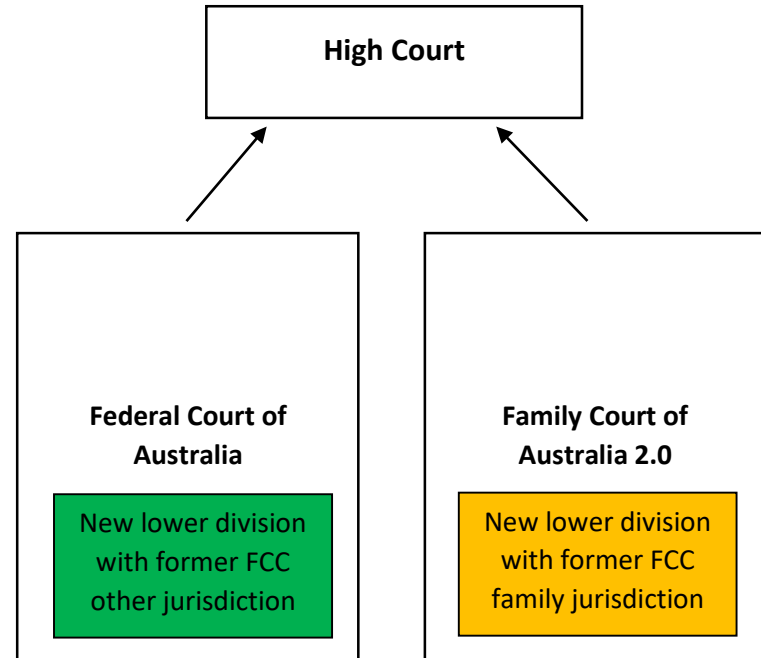


Diagram C: Family Court of Australia 2.0 proposed in Discussion Paper

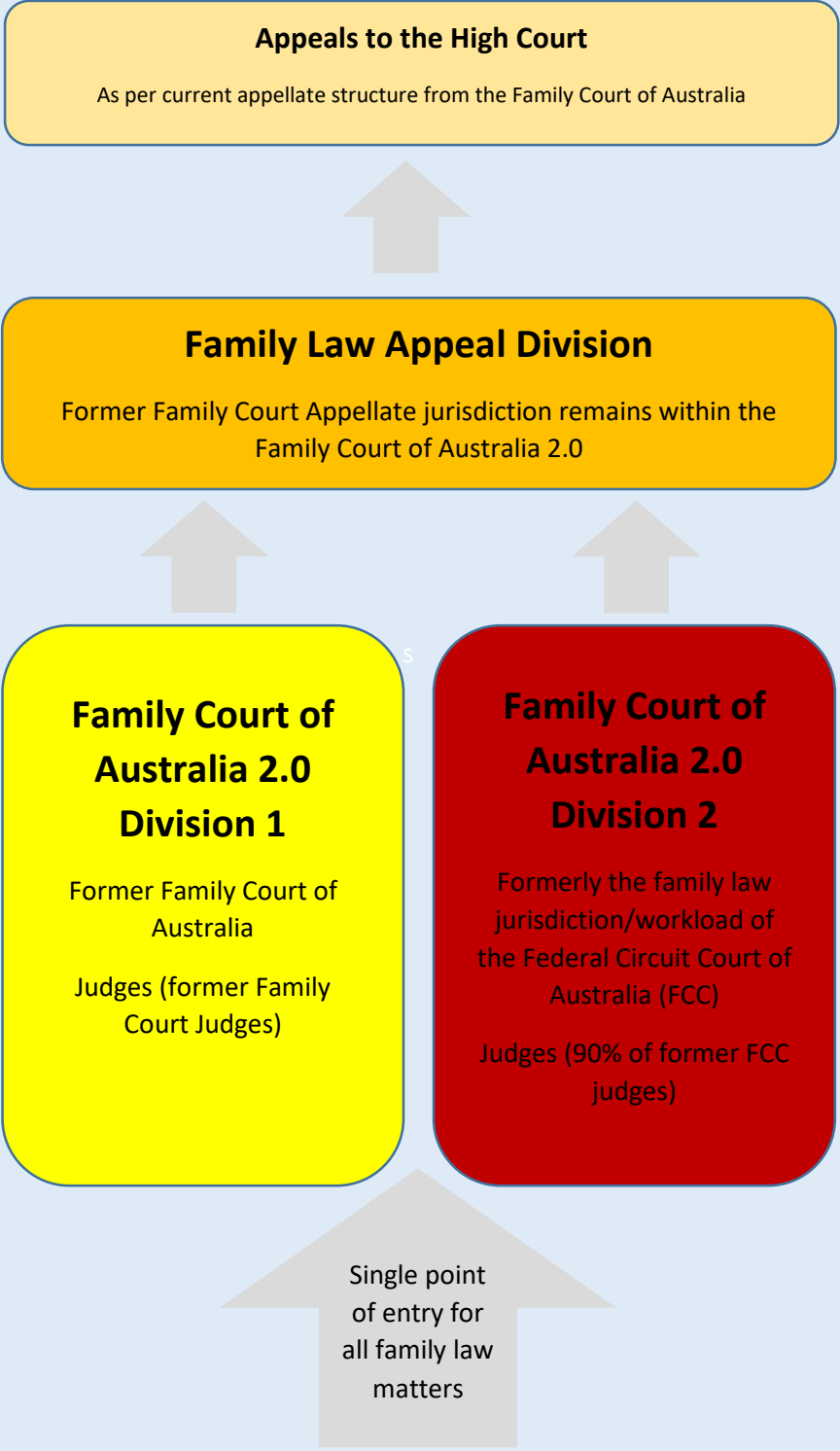
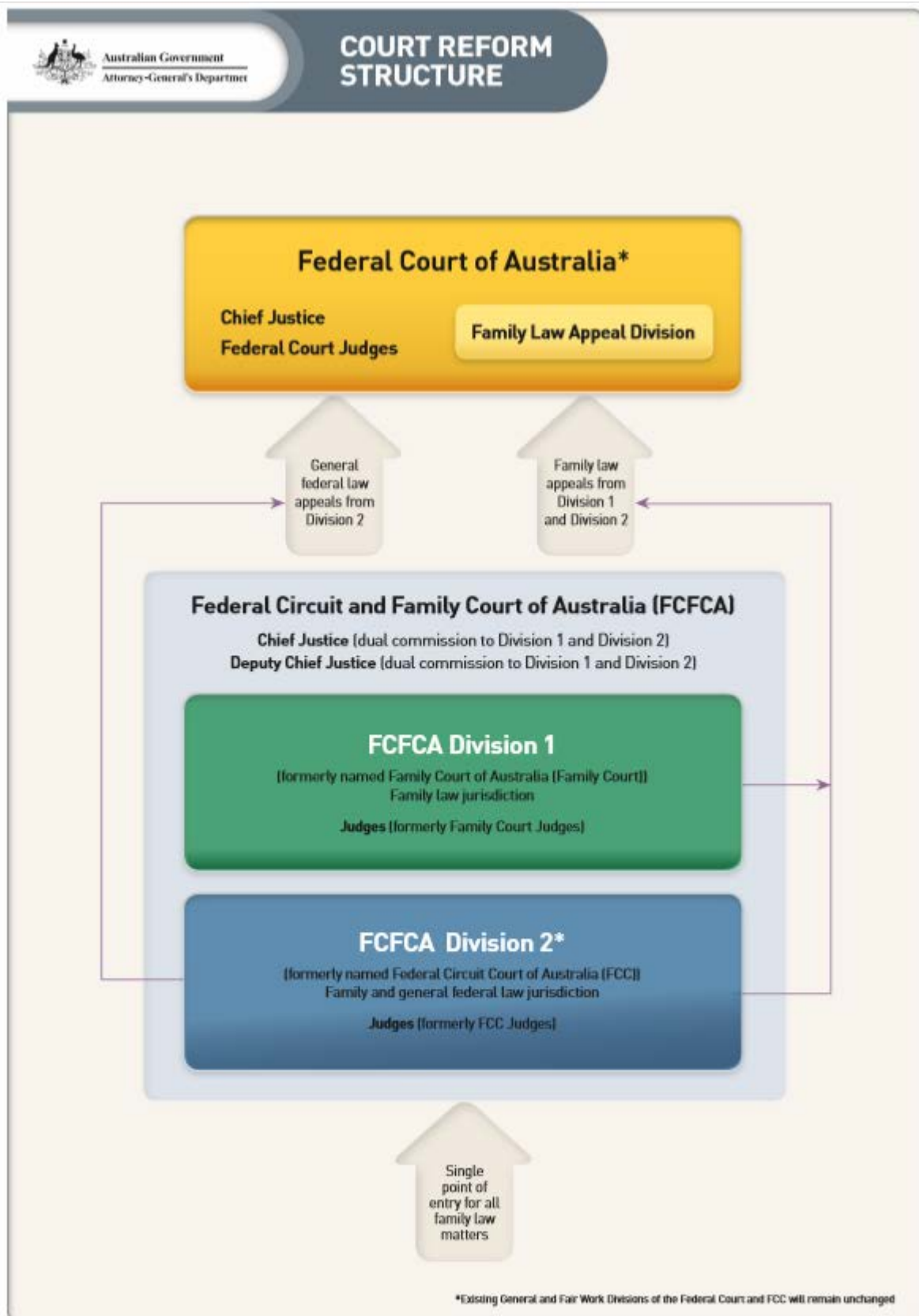


Diagram D: Attorney-General's Proposed FCFCA structure



EVIDENTIAL BASIS FOR A FAMILY COURT OF AUSTRALIA 2.0

Part C

The Family Court of Australia 2.0

There should be a national discussion to consider whether fundamental structural reform should involve the consolidation of all federal jurisdiction work relating to family law into one stand-alone Family Court where cases can be managed under one set of court rules and procedures, supported by one set of services and referred to tailored avenues of alternative dispute resolution where appropriate.

Further, this discussion should consider the benefits in cost and to the community of the Family Court being supported, properly resourced and strengthened as a separate entity.

There is a risk that amalgamating the Family Court into the new FCFCA where cases will be heard alongside other matters of federal jurisdiction including migration and industrial relations will not alleviate time or cost pressures. Rather, it will result in an increase in the pressures and delays already affecting the family law system.

The FCC has acknowledged that the increasing number of migration and refugee division referrals to the FCC is comprising “a significant component of the workload”¹⁰ and contributing to delays and increases in the length of family law cases resolved. Chief Executive Officer and Principal Registrar of the FCC, Dr Fenwick, confirmed in May at Senate Estimates that “roughly one-third of the total pending case load” in the FCC is “migration work”.¹¹ Relevantly, the transcript provides as follows:¹²

Senator MOLAN: In the figures that you collect, are you able to see the impact that the increasing number of migration and refugee division referrals to the Federal Circuit Court is having on family law matters?

Dr Fenwick: It's a significant component of the workload and it has to be disposed, as with any other case load. As I say, there are slightly different case management approaches in different cities. A significant amount—I think around 50 per cent—of the migration work is handled in Sydney. There is a group of judges who are federal law specialists in other cities. Many judges handle a mixed docket of family and federal law and their diet is balanced according to their capacity to schedule matters, but matters are filed and docketed or given a date only according to the capacity of the schedule to accept dates. So, when there's more work, the dates will obviously—

Senator MOLAN: Go out.

Dr Fenwick: Go out, yes.

...

¹⁰ Evidence to Senate Legal and Constitutional Affairs Legislation Committee - Estimates, Parliament of Australia, Canberra, 24 May 2018, 80 (Dr Stewart Fenwick, Chief Executive Officer and Principal Registrar).

¹¹ Ibid, 81

¹² Ibid, 80-81.

CHAIR: But, Dr Fenwick, surely if there is an increase in the number of migration appeals from the AAT to the Federal Court—

Dr Fenwick: To the Federal Circuit Court.

CHAIR: that then means that the time available to the Federal Circuit Court judges to deal with what they should be dealing with must be of necessity limited.

Dr Fenwick: That's right.

CHAIR: That means the Family Court things have to blow out. In spite of your statistics, it's a matter of common sense.

Dr Fenwick: That's correct. There's no priority in this given to any particular case load, but they are filed and docketed as they come in according to the availability of the calendar and—

CHAIR: But it just means the more AAT appeals in migration there are to the court the less time the court's going to be used for what used to be its core business.

Dr Fenwick: It's the mainstay of the court—88 per cent of all family law workers are in the Federal Circuit Court. We have a current case load of 17,500 cases in family law, and 6,000-odd cases, roughly one-third of the total pending case load, is just migration work. So it's significant.

As a result, the migration caseload is contributing to delays experienced in family law.

The FCC's website stated in 2016 that "Approximately 90% of the court's workload is in the area of family law".¹³

It should be considered whether this workload, and the FCC's current family law jurisdiction, should be shifted into a separate division within a stand-alone Family Court of Australia 2.0 to create a single entry point for family law disputes, consolidate a single specialised entity, consolidate judicial specialist and corporate knowledge, and sever the nexus between waiting times in family law cases and those in migration.

The remaining 10% of the FCC's casework could be incorporated into a new division within the FCA. Court and judicial resources currently allocated to family and other cases in the FCC could be divided between the Family Court of Australia 2.0 and the FCA according to a 90:10 ratio. If these ratios are no longer current, resources could nevertheless still be proportionately divided between the FCA and the Family Court of Australia 2.0 according to the workload ratio.

¹³ FCC, 'About the Federal Circuit Court' <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/about-fcc>> .

Thus, this conversation should consider the underlying policy question of whether changes to Australia’s legal landscape, including the growth of alternative methods of dispute resolution, and the change in other pressures including the migration case load, mean that the purpose for which the FCC was created as a stand-alone institution is still relevant.

Difficulties in sharing family law jurisdiction between Courts

The FCC was established in 1999 by the *Federal Circuit Court of Australia Act 1999* (formerly the Federal Magistrates Act). The FCC’s website explains that:¹⁴

The establishment of the Federal Circuit Court marked a change in direction in the administration of justice at the federal level in Australia. Australia had not previously had a lower level federal court...

The Court was established to provide a simple and accessible alternative to litigation in the Federal Court of Australia (Federal Court) and the Family Court of Australia (Family Court) and to relieve the workload of those courts.

As the Attorney-General has outlined,¹⁵ difficulties have emerged in two different federal courts sharing family law jurisdiction. There should be discussion to consider whether the FCC’s work would now be more suitably performed under the auspices of the Family Court in the case of family law matters, or the FCA in other matters, as compared with a third separate entity as proposed by the Attorney-General.

As the FCA, Family Court and FCC are now managed as one “entity” or “administrative body with a single appropriation” for budgetary purposes,¹⁶ the structural reform contemplated by this discussion paper is not expected to create significant complications from the perspective of reallocating funding. However, the financial benefits and ramifications would form an important discussion piece.

Resourcing issues

The Attorney-General has disagreed that the delays currently experienced in family law are the result of a resourcing issue. Prima facie this appears inconsistent with the FCA’s advice that:¹⁷

There are many factors that affect the time to get to trial, such as the complexity of the issues, *matters pending in other courts*, and *the availability of judicial resources*. (emphasis added)

¹⁴ Ibid.

¹⁵ See, eg, The Hon Christian Porter MP, *Transcript ABC TV – Insiders*, 10 June 2018, page 4 <<https://www.attorneygeneral.gov.au/Media/Pages/ABC-TV-Insiders-10-June-2018.aspx>>.

¹⁶ See Commonwealth, *Attorney-General’s Portfolio 2018-19 Portfolio Budget Statement* (2018), 135 [1.1].

¹⁷ *Question Number and Title: AE18-014 - Family Court of Australia trends*, Senate Standing Committee On Legal and Constitutional Affairs, Additional Estimates 2017-18 (February 2018).

Further, this statement does not appear to be consistent with the following statement in the *Federal Court of Australia Corporate Plan 2017-18* that:¹⁸

There is a growing community awareness and focus on matters involving family violence and allegations of child abuse that impact on strategy for the Family Court of Australia and the FCC. Cases involving mental illness and substance abuse have also increased, as have cases relating to international family law (including Hague Convention abduction matters and the 1996 Protection Convention), as well as medical procedures for which court approval is required. These are complex matters that present strategic challenges for each court.

Mr Moraitis PSM, Secretary of the Attorney-General's Department, told Senate Estimates in February 2018 that "It's clear that, if we had more resources, we would deploy more judges in the daytime, and in the evenings if it suits people to have evening sessions,"¹⁹ and added that "In an ideal world, I'd love to see more funding for the courts..."²⁰

There should be a national discussion to consider whether pressures in the Family Court could be improved by greater resourcing commitments from Government to the family law courts and legal aid.

The Attorney-General stated that the national median time to trial has increased from 10.8 months to 15.2 months in the FCC (an increase of 40.7%), and from 11.5 months to 17 months in the Family Court (47.8%),²¹ from 2012-13 to 2016-17.²²

The FCA confirmed in Senate Estimates that there has been a 2.73 percent increase in the operating appropriation provided to the FCA, FCC and Family Court together from 2013-14 to 2017-18.²³

From 30 June 2013 to 19 January 2018, only two additional judicial officers were added to each of the FCC and the Family Court of Australia,²⁴ bringing the total to 66 FCC Judges and 33 Family Court judges, representing a total increase of 4.2%.

¹⁸ Federal Court of Australia, *Corporate Plan 2017-2018* (2017) 4

<http://www.fedcourt.gov.au/__data/assets/pdf_file/0006/45366/Corporate-Plan-2017-18.pdf>.

¹⁹ Evidence to Senate Legal and Constitutional Affairs Legislation Committee – Additional Estimates, Parliament of Australia, Canberra, 27 February 2018, 80 (Mr Chris Moraitis, Secretary – Attorney-General's Department Executive).

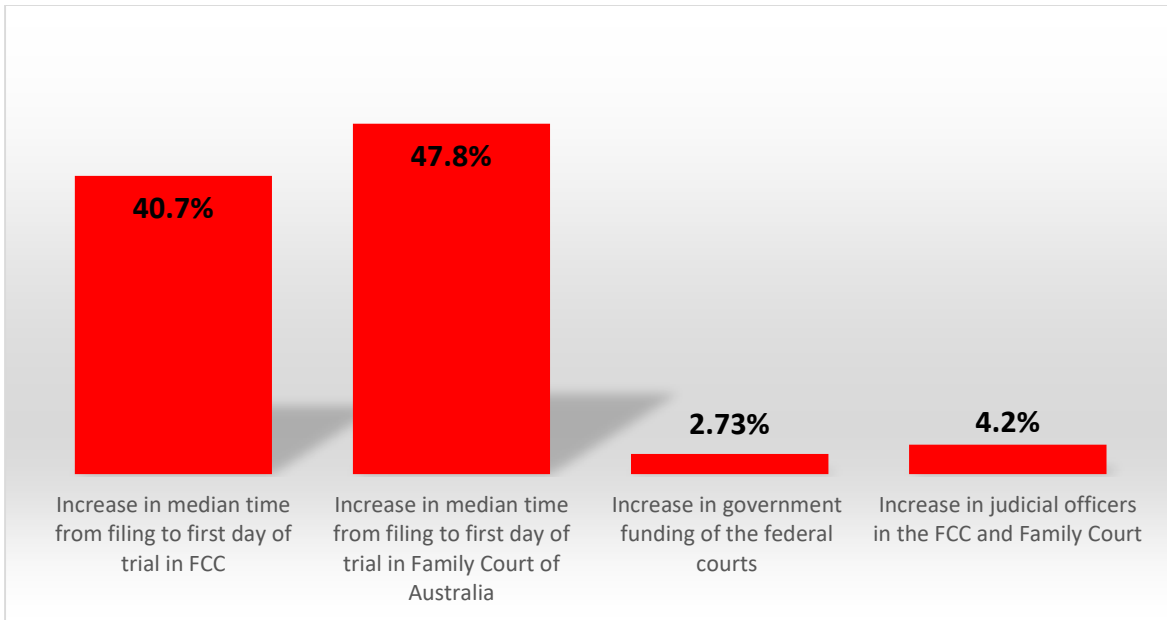
²⁰ Ibid.

²¹ Attorney-General for Australia, 'Court Reforms to help families save time and costs in family law disputes' (Media release, 30 May 2018) <<https://www.attorneygeneral.gov.au/Media/Pages/Court-Reforms-to-help-families-save-time-and-costs-in-family-law-disputes.aspx>>.

²² *Question Number and Title: AE18-014 - Family Court of Australia trends*, Senate Standing Committee On Legal and Constitutional Affairs, Additional Estimates 2017-18 (February 2018).

²³ Federal Court of Australia, *Question on Notice AE18-018 - Family Court of Australia trends*, Senate Standing Committee On Legal and Constitutional Affairs, Attorney-General's Portfolio, Additional Estimates 2017-18 (February 2018).

²⁴ Federal Court of Australia, *Question on Notice AE18-015 – Number of Family Court of Australia and family law circuit court judges employed*, Senate Standing Committee On Legal and Constitutional Affairs, Attorney-General's Portfolio, Additional Estimates 2017-18 (February 2018).



The Attorney-General has not disclosed the basis for the proposed savings to be realised by the Turnbull Government’s restructure proposal. However, there is no reason to believe that similar improvements in time and cost could not be realised by amalgamating the FCC into the Family Court and FCA.

The Attorney-General has relied upon statistics of the median time in months from filing to first day of trial to support the proposed restructure.²⁵ However, this provides a skewed picture of the percentage of family law matters that actually proceed to trial.

It was confirmed at Senate Estimates that “many matters resolve prior to trial”, ie before the first day of a defended hearing,²⁶ while only 25% of final orders applications commenced trial.²⁷

Statistics showing the median time in months from filing to finalisation of final orders applications are substantially lower.

For example, the following table was provided at Senate Estimates, setting out the “median time from filing to finalisation and the median time from filing to first day of trial for final orders applications in the Family Court of Australia”:²⁸

²⁵ See, eg, Attorney-General for Australia, ‘Court Reforms to help families save time and costs in family law disputes’ (Media release, 30 May 2018) <<https://www.attorneygeneral.gov.au/Media/Pages/Court-Reforms-to-help-families-save-time-and-costs-in-family-law-disputes.aspx>>.

²⁶ *Question Number and Title: AE18-014 - Family Court of Australia trends*, Senate Standing Committee On Legal and Constitutional Affairs, Additional Estimates 2017-18 (February 2018).

²⁷ *Ibid*, citing the Court’s 2016-17 Annual Report.

²⁸ *Question Number and Title: AE18-014 - Family Court of Australia trends*, Senate Standing Committee On Legal and Constitutional Affairs, Additional Estimates 2017-18 (February 2018).

| | Median time in months from filing to finalisation | Median time in months from filing to first day of trial |
|-------------|---|---|
| 2012/13 | 8.0 | 11.5 |
| 2013/14 | 8.0 | 12.1 |
| 2014/15 | 7.4 | 11.6 |
| 2015/16 | 7.5 | 14.7 |
| 2016/17 | 7.4 | 17.0 |
| 2017/18 YTD | 8.6 | 17.8 |

Notes: The median time to finalisation is lower because many matters resolve prior to trial (in 2016-17 25% of final orders applications commenced trial (refer to the Court’s 2016-17 Annual Report)).

The first day of trial refers to the first day of a defended hearing. There are many factors that affect the time to get to trial, such as the complexity of the issues, matters pending in other courts, and the availability of judicial resources.

Finalisation refers to all types of finalisation, including settled by consent, discontinued, and dismissed.

It is misleading to rely solely on factors such as caseload dispatch or productivity to compare the Courts, or compare the family law system with other court systems. This is because such factors are influenced by other factors that remain fundamentally outside of the Courts’ control, including government funding, the factual and legal complexity of cases, recruitment and retention rates of Judges.

Therefore, there should be a discussion to evaluate whether the Australian community stand to realise greater benefits by the preservation of a stand-alone, specialist family court, as compared with an amalgamated FCFCA.