



**Law Council**  
OF AUSTRALIA

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

**Senate Legal and Constitutional Affairs Committee**

**23 November 2018**

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## 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 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

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

## Acknowledgement

The Law Council of Australia (**LCA**) acknowledges that this submission has been prepared by the Executive of the Family Law Section (**FLS**).

The FLS is the largest of the Law Council of Australia's specialist Sections. Since its inception in 1985, the FLS has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2600 it is committed to furthering the interests and objectives of family law for the benefit of the community.

The current members of the FLS Executive are:

- Wendy Kayler-Thomson (Chair)
- Paul Doolan (Deputy Chair)
- Michael Kearney SC (Treasurer)
- Dr Jacoba Brasch QC
- Sarah Bastian-Jordan
- Di Simpson
- Minal Vohra SC
- Kate Mooney
- Greg Howe
- Jaquie Palavra
- Nicola Watts

Immediate Past Chair, Geoffrey Sinclair, was not involved in the preparation of this submission.

### **Law Council Constituent Bodies**

The Law Council is grateful to those Constituent bodies for their assistance with the preparation of this submission, including:

- The Law Society of New South Wales;
- The Law Institute of Victoria;
- The Queensland Law Society; and
- The Law Society of South Australia.

## 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
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 2018
FCoA	Family Court of Australia
FCC	Federal Circuit Court of Australia
FCFC Bill	Federal Circuit Court and Family Court of Australia Bill 2018
FCFC	Federal Circuit and Family Court of Australia
FLA	<i>Family Law Act 1975</i> (Cth)
FLS	Family Law Section of the Law Council of Australia
KPMG Report	<i>Review of the performance and funding of the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia</i> , 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
Seemple Report	"Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance", by Des Seemple, 2008.

## Executive Summary

1. The Law Council of Australia welcomes the opportunity to provide submissions to the Legal and Constitutional Affairs Legislation Committee inquiry into the 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.
2. 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 is timely for the Government to have commissioned the ALRC to undertake a far-reaching review of the Australian family law system;
  - (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 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. There is no legislation required to enable this to occur.
3. The LCA does not agree that:
  - (a) the court structural changes as proposed by 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, and does not understand why government chose not to give either to the Family Law Council or to the ALRC a commission to examine structural change; and
  - (d) governments have provided proper funding and resourcing to the existing family law courts system, associated services and/or Legal Aid Commissions.
4. The LCA recommends that:
  - (a) the Bills and their proposed structural reform to the federal courts system should not be implemented at this point in time;

- (b) the Government should defer further consideration of the Bills until after receipt and proper time has been given for consideration of the final ALRC Report due 31 March 2019;
- (c) the move to a single point of entry, harmonisation of rules and forms, and unification of procedures in the family law system should be implemented without further delay by the relevant Heads of Jurisdiction as they are matters in respect of which there appears little controversy as to their merits and have near universal acceptance (and can be implemented by reference to the rules of Court with no legislative amendments required); and
- (d) upon receipt of the ALRC Report and its proposals, recommendations and critiques, consideration should be given to whether 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/or the structural reforms to the family law courts system put forward in the Semple Report and by the NSWBA.

## Context

5. The LCA notes the position of the LIV which provides context for the proposed reforms and the family law system more generally:

*Family law is a specialist area of law developed to address family disputes in increasingly complex and fraught circumstances. The unique and specialist nature of family law requires the attention of a specialist federal court, and a Superior Court of Record, which is equipped to deal with the most complex and serious family law matters and adapt to this continually expanding jurisdiction. 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.*

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

*The Report on which the proposal is based exhibits multiple inaccuracies and unsubstantiated assumptions, and therefore should not form the basis of considered reform.*

*The flaws within the current system can be ameliorated through the implementation of some fundamental changes that fall short of removing the very specialisation that aids and protects Australian families. The family lawyers represented by the LIV support the harmonisation of regulations, including the Rules of Court, governing the details, operations, and practice and procedures of the family law jurisdiction of the federal court system. Thus, the applicable court forms, practice notes, directions and case management pathways should be made consistent and cross-referential, thereby creating a much-needed sense of certainty for members of the Australian community in family law matters.*

6. The LCA also notes the position of the NSWLS in relation to the proposed reforms:

*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.*

7. The LCA also notes the position of LSSA:

*The loss of specialisation of judicial officers in this jurisdiction, particularly with respect to complex issues around the intersection of family violence, child protection and family law is a serious cause for concern and may have a serious impact on some of the most vulnerable litigants in this area.*

*The recommendation by the Law Council that the government should defer further consideration of the Bills until after receipt and proper consideration of the final ALRC Report on the Family Law System is provided on 31 March 2019, is strongly supported by the Society.*

8. On 9 August 2018, the FLS sent a notice to its more than 2,500 members, comprising family law practitioners and allied professionals in the family law system. It stated the position of the FLS:

*The New South Wales Bar Association has released a Discussion Paper regarding the restructure of the federal courts - ['A Matter of Public Importance: Time for a Family Court of Australia 2.0'](#).*

*The NSW Bar raises another federal courts model for discussion, reducing the number of courts from three to two. The Discussion Paper suggests the creation of a specialist family court (the Family Court of Australia 2.0), with two divisions comprised of the existing Family Court and the family law jurisdiction of the Federal Circuit Court, and the retention of the Family Court's appellate jurisdiction. The general law jurisdiction of the Federal Circuit Court would be transferred to a new, second division of the Federal Court. That model largely replicates the recommendations of the independent expert, Des Semple, who reviewed the structure of the federal courts in 2008, in the report Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance.*

*The Family Law Section supported the model proposed by Mr Semple, and supports the model the NSW Bar raises for discussion. It has clear advantages - a single court that specialises in family law, a single set of forms and rules and unified case management principles. This would ensure the consistent and efficient administration of justice.*

*Each state and territory law society and bar association, and each of the independent family law practitioner associations have been asked to provide their feedback on the NSW Bar's Discussion Paper. The Family Law Section also invites comments and feedback from our members via [mail@familylawsection.org.au](mailto:mail@familylawsection.org.au).*

### **Response from the Attorney-General**

*Last Friday The Australian newspaper published an article by the Commonwealth Attorney-General, the Hon Mr Christian Porter MP, entitled 'Structural reform, not more judges, needed'. In rejecting the proposal raised by the NSW Bar, the Attorney-General made a number of statements critical of the performance of judges of the Family Court of Australia. Those judges, of course, have few options to publicly reply.*

*The Attorney-General places great weight on the 'output' or 'finalisations' in each court. In plain language, that means the number of final orders that are made by the courts each year, including the great majority of which are made by consent or without contest.*

*According to the Federal Circuit Court's annual report, the number of applications for final orders in family law cases finalised in the 2016/17 financial year was 17,239, an increase of 860 on the previous year. But 17,786 cases remained pending at the end of that period, an increase on the previous year. The Attorney-General suggests that the Federal Circuit Court now has a 'clearance rate' of 104%, but provides no evidence for that figure. If it is correct (that more cases are being finalised compared to those filed), the family law profession can take a great deal of credit for the work it does to encourage and broker settlements.*

*The Family Court, which does more complex work, finalised 2,742 cases in the 2016/17 financial year, a reduction of 237 on the previous year – but the number of those cases which were finalised by way of judgment being delivered at a trial increased. There were 3,180 pending cases in the Family Court at the end of that period, roughly the same as the previous year.*

*The Attorney-General suggests that the Family Court, and in particular its judges, are entirely responsible for the reduction in its 'finalisations'. He fails entirely to acknowledge the significant impact that the government's unacceptably long delays in appointing judges upon (or in anticipation of) retirements has had and continues to have on the capacity of the Family Court to meet the demands of its complex caseload. As noted by then Chief Justice Diana Bryant in the Family Court's 2017 Annual Report 'Delay in making appointments affects the capacity of the Court to get through its workload and leads to longer waiting times for hearings, directly adversely affecting litigants.'*

*Nor does the Attorney-General acknowledge that a lack of government resourcing for other aspects of the courts' functions, like family consultants, registrars and registry staff has an adverse impact on the courts' capacity to deal with cases.*

*And there is also no mention by the Attorney-General of the critical underfunding of legal aid for family law cases by government, and the extra strain that increasing numbers of unrepresented litigants places on judges and the court system.*

## ***Our clients and the family law system***

*Litigants in the family law court system are more than just statistics.*

*The work of judges is more complex and nuanced than ‘finalisations’ and ‘outputs’. What we know, at the coalface of family law, is that the court system is in crisis and that the single most important driver of that crisis is lack of government resourcing.*

*It is worth drawing attention to the suggestion by many in the family law sector that settlement rates are impacted by court delays, and that some litigants are accepting poor outcomes rather than incur the costs – both emotional and financial – of continuing litigation. So, raw statistics of increased ‘finalisations’ may not be a positive reflection on the health of the court system, but rather an indication of user fatigue and disaffection.*

*The Attorney-General suggest that both Courts are ‘dealing with the same body of family law matters’. That is simply incorrect. The Family Court deals with the most complex of family law cases, both in parenting and financial cases, as well as exercising special jurisdiction in matters such as medical procedures for children. Those cases require intense case management, often require multiple interlocutory applications, are more difficult to resolve by agreement, require more hearing days of trial and require more complex judicial analysis and decision making.*

*The Attorney-General argues that in his analysis of the performance of both Courts, the efficiency of the Federal Circuit Court would not be adversely affected by its judges taking on more of this complex work in the proposed new Court, and that as a result, no extra judicial resources are required.*

*As a matter of pure logic, that cannot be accurate.*

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

*The Attorney-General states that Australian families ‘rightly expect matters to be resolved more quickly’. What he does not say, is that litigants also expect and have the right for the process to be fair, and for the adjudicator to be an expert in the subject matter of their dispute. In family law, that means judges with not just an expert understanding of family law and how it ought be applied, but an understanding of the dynamics of family breakdown and the range of social issues that are experienced by our clients.*

*The Attorney-General’s suggestion that sending family law appeals to ‘the superior Federal Court’ where they will be heard by ‘Australia’s most skilled judges’ is unacceptably derisive of the enormous contribution and skill of the judges of the appeal division of the Family Court.*

## ***Next steps***

*The government seeks to impose the most significant structural change to our federal court system in decades.*

*In contrast to the consultative and transparent review process undertaken by the Semple review 10 years ago, the government's current approach bears the hallmarks of a lack of consultation with the key stakeholders in the family law system and a lack of transparency in revealing the basis for the government's claims of increased efficiencies.*

*The family law courts system and the public it serves, deserve far better.*

## Interaction with the ALRC Review

9. When providing the Terms of Reference to the ALRC Review, the (then) Attorney-General of Australia, Senator the Hon George Brandis QC, had regard to numerous factors including:
  - (a) the fact that, despite profound social changes and changes to the needs of families in Australia over the past 40 years, there has not been a comprehensive review of the FLA since its 1976 commencement;
  - (b) the pressures (including, in particular, financial pressures) on courts exercising family law jurisdiction; and
  - (c) the benefits of the engagement of appropriately skilled professionals in the family law system.
10. The terms of reference given to the ALRC for inquiry and report, included consideration of whether, and if so what, reforms to the family law system are necessary or desirable, in relation to matters including:
  - (a) rules of procedure, and rules of evidence, that would best support high quality decision-making in family law disputes;
  - (b) mechanisms for reviewing and appealing decisions; and
  - (c) the underlying substantive rules and general legal principles in relation to parenting and property.
11. The absence of connectivity between the Bills and the ALRC Review, due for completion on 31 March 2019, represents in the view of the LCA a failure of public policy and a lost opportunity for the Australian community's future. Common sense would suggest that one (the ALRC Review) should be the 'building block' for the other (legislative change). There is in the opinion of the LCA something genuinely amiss about commissioning a report to design a legal system but not the court structure in which it will operate – but simultaneously and entirely separately designing a court structure without knowing the nature of the legal system it is expected to deliver justice for. The potential for the wastage of taxpayer funds and failure to deliver the promised efficiencies, is with respect enormous. Having waited 40 years for this moment (as the Attorney-General noted when commissioning this landmark ALRC Review) it would be a tragedy for Australian families and the community if the opportunity it presents were to be lost through undue haste, inadequate consideration of alternate proposals, insufficient funding of existing resources, and decisions made without a sound policy and financial foundation.
12. The House of Representatives' Social Policy and Legal Affairs Committee report into family violence and the family law system recommended:

*In light of overwhelming evidence received highlighting the complexity of navigating multiple jurisdictions, and multiple courts within the same jurisdiction, the Committee considers that the system of the two federal courts with concurrent jurisdiction should be simplified. While the Committee did not receive sufficient evidence to support a specific recommendation at this stage, this matter is worthy of further investigation. The ALRC, as part of its current review, might consider the benefits of combining the federal family courts into one court. This single court might provide more opportunity for appropriate triaging and case management upon filing, which could be more responsive to the needs of families who are affected by family violence.<sup>1</sup>*

13. A number of provisions within the ALRC Discussion Paper go to matters of a structural nature and or overlap with matters the subject of the Bills.
14. The Explanatory Memorandum to the FCFC Bill highlights the legislative objective to provide a court framework enabling a more stringent, early assessment of the relative complexity of matters requiring determination, and to facilitate the ability of any new court to take a consistent internal case management approach to ensure the more efficient handling of family law matters.<sup>2</sup>
15. The FCFC is to be established as two courts under a single, overarching, unified administrative structure, acting as a single point of entry into the family law jurisdiction of the federal court system and comprising two divisions. A key reason for the reforms, noted in the Explanatory Memorandum is to provide a streamlined court system that would enable Australian families to spend significantly less time in the court to resolve their family law disputes.<sup>3</sup>
16. Chapter 6 of the ALRC Discussion Paper is entitled, tellingly, 'Reshaping the Adjudication Landscape'. It contains 12 proposals and poses 3 additional questions for further consideration.
17. At paragraph 6.9, the ALRC Discussion Paper proposed the family courts consider establishing a registrar and family consultant team-based triage process to direct matters to appropriate alternative dispute resolution processes and specialist pathways within the court as needed, and to case manage matters until resolution. The proposal arises from a series of submissions from stakeholders about delays in the system, and concerns that better case management practices should focus upon effective triage being conducted by experienced registrars with judicial time being utilised for hearing and determining disputed issues.
18. In the context of the stated aims of the Bills, those intersecting and cross-over proposals and questions of the ALRC in this chapter are set out below:

## 6. RESHAPING THE ADJUDICATION LANDSCAPE

### Proposal 6–1

The family courts should establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.

<sup>1</sup> House of Representatives' Social Policy and Legal Affairs Committee report *A better family law system to support and protect those affected by family violence*, December 2017, paragraph 3.85.

<sup>2</sup> Federal Circuit and Family Court of Australia Bill 2018, Explanatory Memorandum, [9].

<sup>3</sup> *Ibid*, 19, 26 and 86.

<b>Proposal 6–2</b>	The triage process should involve a team-based approach combining the expertise of the court’s registrars and family consultants to ensure initial and ongoing risk and needs assessment and case management of the matter, continuing, if required, until final decision.
<b>Proposal 6–3</b>	Specialist court pathways should include: <ul style="list-style-type: none"> <li>• a simplified small property claims process;</li> <li>• a specialist family violence list; and</li> <li>• the Indigenous List.</li> </ul>
<b>Proposal 6–4</b>	The <i>Family Law Act 1975</i> (Cth) should provide for a simplified court process for matters involving smaller property pools. The provisions should allow for: <ul style="list-style-type: none"> <li>• the court to have discretion, subject to the requirements of procedural fairness, not to apply formal rules of evidence and procedure in a given case;</li> <li>• the proceedings to be conducted without legal technicality; and</li> <li>• the simplified court procedure to be applied by the court on its own motion or on application by a party.</li> </ul>
<b>Proposal 6–5</b>	In considering whether the simplified court procedure should be applied in a particular matter, the court should have regard to: <ul style="list-style-type: none"> <li>• the relative financial circumstances of the parties;</li> <li>• the parties’ relative levels of knowledge of their financial circumstances;</li> <li>• whether either party is in need of urgent access to financial resources to meet the day to day needs of themselves and their children;</li> <li>• the size and complexity of the asset pool; and</li> <li>• whether there are reasonable grounds to believe there is history of family violence involving the parties, or risk of family violence.</li> </ul> <p>The court should give weight to each of these factors as it sees fit.</p>
<b>Proposal 6–6</b>	The family courts should consider developing case management protocols to support implementation of the simplified process for matters with smaller property pools, including provision for: <ul style="list-style-type: none"> <li>• case management by court registrars to establish, monitor and enforce timelines for procedural steps, including disclosure;</li> <li>• conducting a conciliation conference once the asset pool has been identified; and</li> <li>• establishing a standard timetable for processing claims with expected timeframes for case management of events (mentions, conciliation conferences and trial).</li> </ul>
<b>Proposal 6–7</b>	The family courts should consider establishing a specialist list for the hearing of high risk family violence matters in each registry. The list should have the following features: <ul style="list-style-type: none"> <li>• a lead judge with oversight of the list;</li> <li>• a registrar with responsibility for triaging matters into the list and ongoing case management;</li> <li>• family consultants to prepare short and long reports on families whose matters are heard in the list; and</li> <li>• a cap on the number of matters listed in each daily hearing list.</li> </ul> <p>All of the professionals in these roles should have specialist family violence knowledge and experience.</p>

<b>Question 6–1</b>	What criteria should be used to establish eligibility for the family violence list?
<b>Question 6–3</b>	What changes to the design of the Parenting Management Hearings process are needed to strengthen its capacity to apply a problem-solving approach in children’s matters? Are other changes needed to this model?
<b>Question 6–4</b>	What other ways of developing a less adversarial decision making process for children’s matters should be considered?

19. The PwC Report at parts 3 and 4 of the ‘Summary of family law opportunities’ address similar issues to the ALRC Discussion Paper in Chapter 6, namely Initial Case Management and Managed Case Listing practice. The PwC Report makes recommendations on these crucial topics that are also the subject of coverage by Proposals 6-1, 6-2, 6-3, 6-4, 6-5, 6-6 and 6-7 of the ALRC Discussion Paper.

20. The LCA is concerned that proper consideration cannot be given to the question of how the objects of the Bills can best be achieved, before the ALRC Final Report is completed and considered. Indeed, the PwC Report noted that it was but ‘*one step among many of the Government’s initiatives to review the family law system, including the concurrent Australian Law Reform Commission’s comprehensive review of the family law system*’.<sup>4</sup> [emphasis added]

21. Indeed, it is difficult to understand why the government did not give to the ALRC, or for that matter the Family Law Council, terms of reference that encompassed structural reform to the courts themselves.

22. The LCA notes the following submission from the QLS:

*The structural reforms have been proposed outside the current family law review being conducted by the Australian Law Reform Commission (ALRC). We maintain that any significant changes to the court system must be considered in a holistic manner as part of the ALRC’s review and following proper consultation with relevant stakeholders.*

*There appears to be no justification for the proposed Bills to be progressed without the benefit of thorough consideration by the ALRC, particularly given the matters covered by the Bills clearly fall within the scope of the ALRC’s Terms of Reference.*

23. The LCA is further concerned that some of the questions posed in the ALRC Discussion Paper, were they to be the subject of implementation, may have substantial implications for the work load of the family law courts. Questions 6-1 and 6-2 go to the proposed establishment of a family violence list, and whether family law courts should embark upon early fact-finding processes about family violence. Proposal 3-11 and 3-19 of the ALRC Discussion Paper go to amendments to the property division and spouse maintenance sections of the Family Law Act to include family violence as a statutory factor for consideration by the courts. In the submissions lodged by the LCA to the ALRC in response to the Discussion Paper, the LCA has noted its concern about a potential flood gates risk, and how it may impact upon case load, length of trials, number of witnesses, judicial work load and funding and resources of the courts. Questions of structural reform therefore of the court system, should only in the view of the LCA be undertaken with a full understanding of the legislative environment in which those courts may be asked to operate. The

<sup>4</sup> PriceWaterhouseCoopers ‘Review of efficiency of the operation of the federal courts’, (April 2018), 3.

comments by LCA in respect of Proposal 3-11 of the ALRC Discussion Paper are excerpted below for ease of reference.

<b>3. SIMPLER AND CLEARER LEGISLATION</b>	
<b>Proposal 3–11</b>	<p>The provisions for property division in the <i>Family Law Act 1975</i> (Cth) should be amended to provide that courts must:</p> <ul style="list-style-type: none"> <li>• in determining the contributions of the parties, take into account the effect of family violence on a party’s contributions; and</li> <li>• in determining the future needs of the parties, take into account the effect of any family violence on the future needs of a party.</li> </ul>
<b>Response:</b>	<p>The LCA recognises the powerful goals that may be achieved, in both a preventative and compensatory sense, from a legislative recognition of the past and future effects of family violence in the context of financial matters under the Family Law Act. Whether the proposal is ultimately supported, will however be dependent on the text of any proposed statutory amendments, both as to the Family Law Act and as to the evidentiary rules that should apply.</p>
<b>Comment:</b>	<p>The LCA response to the Issues Paper addressed the arguments for and against this proposal and potential issues with a codification of <i>Kennon</i> (see paragraphs [217] to [218] on pages 56 to 61), and noted that it also drew extensively on the FLS / LCA submissions to the Parliamentary Inquiry into a Better Family Law System to Support those Affected by Family Violence.</p> <p>The LCA recognises the potential importance of change in this area and the preventative purpose which statutory inclusion of family violence may achieve. For example, there may over time be behavioural changes if parties are aware that they may have substantial and adverse financial consequences for them under the Family Law Act, leaving aside the existing criminal law ramifications of such actions.</p> <p>The LCA remains concerned however by the absence in the Discussion Paper of an attempt to grapple with the evidentiary challenges in family violence cases; to recognise that there are many other forms of behaviour (e.g. drug and alcohol abuse) that can have devastating consequences as well; and the floodgates risk for litigation.</p> <p>Whilst some of these are already highlighted in the Issues Paper submission by the LCA, a number of problematic issues need to be addressed as part of any drafting exercise to achieve a statutory amendment:</p> <ol style="list-style-type: none"> <li>a. Will the existing definition of 'family violence' in the Family Law Act apply to financial matters?</li> <li>b. Will one incident of 'family violence' suffice or will a course of conduct be required?</li> <li>c. What is the intent of the amendment in respect of the contributions factor? Is it intended to be punitive/compensatory in nature and will a link to making contributions more arduous be required? In respect of the future needs factors, is it intended to be relevant only if there is a causal link to a diminution of income earning capacity or having an effect for example on health?</li> <li>d. Is there a risk of a 'double dip' if it is included both as a factor affecting contributions weighting and a factor going to future needs, if it arises from the same factual incident or incidents? The LCA considers that the effect</li> </ol>



of family violence, if it is to be included and is not already covered by (in the married persons context) section 75(2)(o), is more readily identifiable as a factor relevant to the future needs of a party rather than as a factor in the assessment of contributions.

- e. If it is included simply as a factor for consideration, it must in the vast majority of cases then be reflected by the percentage awarded to a party of the 'property' available for division. It will not usually be a specific percentage as the case law eschews any approach that breaks down the overall percentage into component parts, rather it is (generally, but not always) a holistic exercise in arriving at the overall outcome (for example, a court may assess contributions to be equal and then award 12% for future needs, but will not generally say that the 12% is made up of 3% for income disparity; 5% for care of children and 4% for family violence, or break them up into specific dollar amounts although this can be done). This will normally therefore mean no correlation is available for example between what an award in a civil case for an assault may have been and the award given because of family violence in arriving at an alteration of property interests. As it is embodied in a percentage, it may also mean that family violence in a case involving wealthy parties with larger property pools, has a greater effect than more serious family violence in a case involving a smaller property pool (e.g. 3% adjustment for family violence in a pool of \$10million for couple A is greater than 10% for more serious and sustained episodes of family violence for couple B who have a pool of only \$500,000). This raises social justice and comparative justice issues and goes back to the question of the intent of the legislative reform i.e. is to be punitive or compensatory or preventative or giving recognition to the contributions made?
- f. Will it be mandatory to disclose family violence in financial cases, even if a party does not want to pursue a finding or seek a contributions weighting or future needs adjustment on that issue?
- g. Will it be necessary to give particulars of the incidents or actions that amount to family violence, to enable a respondent to address them?
- h. Evidence at trials is generally filed simultaneously by way of exchange. If there are not pleadings that identify the issues, will the rules need to be amended to require a party raising such matters to file evidence first, with the other party then responding, or otherwise permitting a case in reply?
- i. Will the usual rules of evidence in the *Evidence Act 1995* (Cth) (**Evidence Act**) apply to family violence cases?
- j. Will a party still be entitled to bring a common law claim for damages in respect of for example an assault (either separately in a civil court or in the FCA or FCCA under accrued jurisdiction) as well as seeking findings about the same incidents and contributions weightings/ future needs adjustments under the Family Law Act? How would the state laws and commonwealth laws interact?
- k. What effect, from the point of view of case load, length of trials, number of witnesses, and judicial workload and funding and resources of the courts, would an amendment of this nature have?

## The fundamental issues that family law reform must address

24. When examining the Bills, and being cognisant of the concurrent ALRC Review 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 achieve those goals, and the likely cost, both in financial and justice terms; and
  - (d) whether other or better solutions exist.
25. 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.
26. The Explanatory Memorandum for the FCFC Bill (at paragraph 5) 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 ongoing consideration by the ALRC (see for example Part 8 of the ALRC Discussion Paper at pages 181-210); 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 ongoing consideration by the ALRC (see for example Part 10 of the ALRC Discussion Paper at pages 237 -266).
27. It is the mechanism by which those goals and aims are to be achieved where views differ and where the LCA expresses its ongoing concern about the inappropriateness of forging ahead with structural reform to the family law courts – the largest changes since the establishment of the FCoA more than 40 years ago – and where the *concurrent* ALRC Review (to use the expression from the PwC Report) is some 4 months from delivery.
28. The LCA notes the following submission from the NSWLS:
- 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.*
29. The LCA notes the following submission from the LIV:

*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.*

30. 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.<sup>5</sup>*

31. 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.<sup>6</sup>

32. Criticisms of the decision to create dual courts, its structural inefficiencies and the manner in which it has meant less resources for the FCoA, are not new. In an article 18 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.<sup>7</sup>*

33. The Bills do not resolve that issue. Users of the family law system will (under the Bills) have Division 1 and 2 of the FCFC and a separate appeals court in the Federal Court of Australia. Rules, forms and practice directions (let alone the physical venue) will diverge between the FCFC and the Federal Court of Australia in many cities. The promise of efficiencies and cost savings cannot be readily identified, although mere dollars and statistics are not an adequate means by which the delivery of justice can be weighed. Were the Parenting Management Hearings legislation to pass (see the Family Law Amendment (Parenting Management Hearings) Bill 2017), some litigants would of course have part of their case (parenting) in that tribunal style forum and another part (financial) before a court, and with different appeal or administrative routes in each case. Some may in fact have part of their parenting case before the Parenting Management Hearing and another part before the FCFC.

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<sup>5</sup> Hansard, House of Representatives, 18 October 1999, at 11,786 and 11,787.

<sup>6</sup> Attorney-General, the Hon Christian Porter MP, Speech at the opening plenary session, 'The State of the Nation', 18th Biennial National Family Law Conference, 2018.

<sup>7</sup> (2000) 24(3) *Melbourne University Law Review* 756.

34. One of the difficulties in examining the Bills and weighing the structural reforms it proposes, is that much is also dependent on the rules of court of any new FCFC that will ultimately govern matters of practice and procedure, case management and practice directions. That detail is not yet known.
35. The Bills give to the new Chief Justice alone the rule making power, a substantial departure from the prevailing position in the FCoA (section 123 of the FLA) and the FCCA (section 81 of the Federal Circuit Court Act). Whilst the LCA supports harmonisation of the rules and forms in the family law system, a move to grant to the Chief Justice alone that power is at odds with existing practice and legislative grant of power in the federal family law courts, and counter to the position elsewhere.<sup>8</sup> No reasoning has been advanced by the government that would justify such a radical departure from the usual process for the making of procedural rules.
36. The LCA notes the following submission from LIV:

*The LIV recommends harmonising the Rules and forms of the FCoA and the FCC to create a clearer and more accessible system for litigants to navigate. The LIV notes this recommendation reflects Proposal 3-2 of the ALRC Review of the Family Law System and recommendation 5 of 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.<sup>9</sup> The LIV submits uniform rules and forms will be particularly advantageous for the increasing numbers of self-represented litigants attempting to navigate the system alone. The LIV submits this would increase certainty and therefore, increase efficiency.*

*The LIV recommends consideration be given to a legislative change requiring the FCC to adopt the Family Law Rules 2004 and forms of the FCoA when conducting family law matters. Similarly, the FCC could then adopt the Federal Court Rules 2011 and forms of the FC in non-family law matters. The LIV considers issues arising from differences in the procedures of the two courts may be overcome by slightly altering the wording in some rules. For example, the rules relating to case assessment conferences could be altered to read 'in the event there is a case assessment conference ...'.*

*The LIV notes the Government's proposed model merely provides a framework to facilitate cooperation between the two divisions with the aim of ensuring common rules of court and forms, and does not create them.<sup>10</sup> In fact, the proposal specifically provides for the continuity of the Rules of Court currently in force, stressing that the amendments alter who has the power to make the rules, and not what they contain.<sup>11</sup>*

*The only requirement in the Government's proposal is that the Chief Judge and Chief Justice must work cooperatively with the aim of ensuring common*

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<sup>8</sup> See for example ss123 and 124 of the *Supreme Court Act 1970* (NSW); ss18B and D of the *District Court Act 1973* (NSW); s59 of the *Federal Court of Australia Act 1976* (Cth); s26 of the *Supreme Court Act 1986* (Vic); ss85 and 89 of the *Supreme Court Act 1991* (Qld); s72 of the *Supreme Court Act 1935* (SA); s197 of the *Supreme Court Civil Procedure Act 1932* (Tas); s168 of the *Supreme Court Act 1935* (WA)).

<sup>9</sup> Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper 86 (2018) 40; 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].

<sup>10</sup> *Federal Circuit and Family Court of Australia Bill 2018* section 5(c).

<sup>11</sup> *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* schedule 1, part 2, item 264; Explanatory Memorandum, *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* 85 [532].

*rules of court and forms.<sup>12</sup> The LIV notes that this is already occurring. The FCC and FCoA are working cooperatively to harmonise the rules of court, with working groups being organised, and a scope of work and budget being prepared.<sup>13</sup>*

*Further, the Government anticipates creating the new Court Rules will take time and effort and occur throughout 2019.<sup>14</sup> This indicates that the profession will not have access to the Rules, which are solely responsible for achieving the objects of the restructure, in order to assess the necessity of the restructure. In addition, the community will be left in a period of uncertainty during which the new court will exist, but there will be no rules to match.*

*The Attorney-General envisages a ‘once in a generation opportunity’ to re-design the rules using the ‘collective wisdom’ of practitioners and stressing the importance of consultation ‘I am sure that the new Chief Justice and Deputy Chief Justice will seize the opportunity to have maximum input from the people at the practical legal coal face as to what works and what doesn’t’.<sup>15</sup>*

*The LIV respectively cautions that, instead of fostering an environment of consultation, the Government’s proposal limits the input of Judges in the family law jurisdiction. Currently under section 123 of the Family Law Act 1975 a majority of Judges is required in order to make rules governing the practice and procedure of any court exercising jurisdiction under the Act. Under the proposals, the Chief Justice and Chief Judge alone are required to make the Rules of Court for their respective divisions.<sup>16</sup> This not only does not create a uniform set of rules, forms and procedures, it entirely relies on the Government’s ‘clear intention that there would be a single Chief Justice holding a dual commission’ to both Divisions.<sup>17</sup> Therefore, the Government’s proposal does nothing more than set the scene for a possible change to the rules, forms and procedures of the federal courts exercising family law jurisdiction.*

*Further, the LIV considers that the proposal removes the considerable benefits of judges from different registries crafting rules that take in different perspectives formed in diverse environments. The LIV notes that not all of the registries are facing similar problems, and that having more than one judges’ perspective to help form the rules ensures the rules will not be so narrow as to be inappropriate for one or more parts of the country.*

*The LIV notes that its recommendation has the advantage of actually achieving the objectives of the reforms, and in the alternative, suggests that the Courts be allowed to continue the project of harmonising the rules, forms and procedures on which they have already embarked.*

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<sup>12</sup> *Federal Circuit and Family Court of Australia Bill 2018* sections 55 and 183.

<sup>13</sup> Chief Justice Pascoe, ‘State of the Nation’ (Speech delivered at the National Family Law Conference 2018, Brisbane, 3 October 2018) <<http://www.familycourt.gov.au/wps/wcm/connect/FCoAweb/reports-and-publications/speeches-conference-papers/2018/speech-cj-nflc>>.

<sup>14</sup> Attorney-General, Hon Christian Porter MP, ‘State of the Nation’ (Speech delivered at the National Family Law Conference 2018, Brisbane, 3 October 2018).

<sup>15</sup> Attorney-General, Hon Christian Porter MP, ‘State of the Nation’ (Speech delivered at the National Family Law Conference 2018, Brisbane, 3 October 2018).

<sup>16</sup> *Federal Circuit and Family Court of Australia Bill 2018* sections 56 and 184.

<sup>17</sup> Explanatory Memorandum, *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* 183 [1011]; *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* schedule 2, items 469 and 476.

37. The LCA notes the following submission from the NSWLS:

*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:*

- i. A party may file for parenting orders only, and only later seek property orders, or the respondent seeks property and parenting orders;*
- ii. 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;*
- iii. 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.*

38. The LCA notes the following submission from the QLS:

*QLS supports 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 proposed in the Bills continues to separate the Courts into two divisions, whereby the current Family Court of Australia will become the Federal Circuit and Family Court of Australia (Division 1) and the Federal Circuit Court will become the Federal Circuit and Family Court of Australia (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.*

39. The concept of a single point of entry for users to the federal family law courts is supported by LCA. Again however, the Bills do not achieve this, rather they just give the rule making power to ultimately achieve it and the LCA concern as to the vesting of that power in a single Judge is expressed above.

40. This issue further emphasises the essential interaction of the ALRC report process, as Chapter 6 (pages 126 – 134) of the Discussion Paper focuses on and develops proposals regarding triage, risk assessment and specialist pathways, and the role that ought be played by Registrars rather than Judges, in that process. The response by LCA to those ALRC proposals is extrapolated below, as it is important for the Committee to appreciate the level of detail in these matters and the importance they ultimately have for any system:

<b>6. RESHAPING THE ADJUDICATION LANDSCAPE</b>	
<b>Proposal 6–1</b>	The family courts should establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.
<b>Response:</b>	Agreed as a general proposition but see below for qualifications.
<b>Comment:</b>	<p>The LCA supports the reinstatement of a proper, appropriate and resourced triage system for the assessment of proceedings. The Family Court established and successfully conducted such a system in the late 1990s and early 2000s, involving registrars and family consultants before both changing management practices and reducing resources resulted in the system being unable to function effectively. In conjunction with a case management system planned and implemented after extensive consultation, research and study of comparative case management system, the Family Court then provided an effective system for the proper disposition of proceedings on a timely basis.</p> <p>The LCA is opposed to the use of judicial resources for the primary conduct of such a system. One of the most valuable resources that the system has, and the most costly, is judge time and it ought be allocated to the determination of proceedings that require allocation of this resource. The case management of proceedings ought to otherwise be undertaken by properly qualified and experienced Registrars, supported in parenting proceedings by Family Consultants.</p> <p>The broader system ought to ensure that by the time proceedings are commenced, and absent other good reason, ADR processes have been exhausted. It ought not be the role of the Courts to divert parties to ADR processes where they have already engaged in such process, often at considerable cost and delay, prior to commencing proceedings. The current practice of the Federal Circuit Court in forcing parties to undertake further ADR where they have already participated fully in such processes increases delay, costs and often forces parties to enter into disadvantageous resolutions because of those imposts.</p> <p>The purpose should be proper case management and not simply diversion.</p> <p>If the other reform proposals are implemented (and as current practice demonstrates in many instances) filing proceedings is a last resort after ADR has been exhausted and/or the matter is unsuitable.</p> <p>Any triage process should not add to cost and delay; nor should it soak up scarce judicial resources which would be better applied to determination of cases– any triage to be at Registrar level, where the Registrar can send the matter to the next step or event which is actually appropriate for the specific case.</p>

6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–2</b>	The triage process should involve a team-based approach combining the expertise of the court’s registrars and family consultants to ensure initial and ongoing risk and needs assessment and case management of the matter, continuing, if required, until final decision.
<b>Response:</b>	See above.
<b>Comment:</b>	See comments on Proposal 6-1.

6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–3</b>	<p>Specialist court pathways should include:</p> <ul style="list-style-type: none"> <li>• a simplified small property claims process;</li> <li>• a specialist family violence list; and</li> <li>• the Indigenous List.</li> </ul>
<b>Response:</b>	Agreed in part.
<b>Comment:</b>	<p>The LCA submits that the establishment of ‘specialist court pathways’ ought not be understood as a case management tool or approach as opposed to a means of ensuring that proceedings involving particular issues are allocated appropriate attention and resources within the Court system. Such issues can and ought to be the subject of particular attention in that context.</p> <p>The LCA submits that any case management system ought to seek to identify a matter by the level of resources that the Court will be required to allocate to determine that matter – for example, short or contained matters (which would encompass most small property claims), complex matters (encompassing those requiring the intense allocation of judicial resources to determine the most demanding parenting and financial matters) and the balance or ‘standard’ matters. This approach permits a differential approach to the management of each matter within broad and objectively discernible parameters.</p> <p>Such approach also permits the identification within such a system of matters which raise particular issues requiring more nuanced attention – for example, the Magellan program and the Indigenous List. Further, matters raising issues of family violence which require a particular approach or attention can also be identified.</p> <p>There are a series of difficulties in constructing a case management system or pathways by reference to particular issues such as the three raised for consideration. As commented upon below, ‘small’ in the context of property claims has a meaning that is likely to diverge substantially across the country and from region to region and says nothing about the nature of the issues involved nor the significance of those issues to the parties. Further, the current definition of ‘family violence’ in the Family Law Act is of such breadth that a substantial majority of proceedings could be characterised as raising such a potential issue, whether ultimately relevant to the proceedings or not.</p>



## 6. RESHAPING THE ADJUDICATION LANDSCAPE

### Proposal 6–4

The *Family Law Act 1975* (Cth) should provide for a simplified court process for matters involving smaller property pools. The provisions should allow for:

- the court to have discretion, subject to the requirements of procedural fairness, not to apply formal rules of evidence and procedure in a given case;
- the proceedings to be conducted without legal technicality; and
- the simplified court procedure to be applied by the court on its own motion or on application by a party.

### Response:

See below comments.

### Comment:

The LCA submits that it is difficult to have a common definition of what is to constitute a ‘small’ property pool across the Commonwealth. There are obvious vast differences in property values between various states and regions.

Further, it is in the ‘small’ property cases that the consequences of a determination of the issues will be of far greater and lasting significance for parties and children and their futures than in ‘large’ cases.

It is thus to be recognised that any differing approach to the determination of ‘small’ property cases need to appropriately balance the perceived aim of quicker and cheaper justice with the overriding mandate that a just and equitable outcome be achieved. The adoption of a ‘simplified court procedure’ is likely to be one that provides a second (and lesser) tier of justice to those for whom the financial consequences of a determination are the most significant. The LCA is fundamentally opposed to any notion predicated upon a process that would see the level of justice able to be accessed by a family law litigant being determined by their financial means.

The primary difficulty in determining ‘small’ property matters presently is the absence of available judicial resources to do so on a timely basis. Such matters are dealt with in the same way as every other matter before the Courts. Delay increases costs and uncertainty and, whilst not universally so, the delay is greatest in the more economically disadvantaged regions – such as clients at the Parramatta registry in NSW.

The most appropriate way in which to deal with ‘small’ property matters is to ensure that such matters are appropriately identified early in the case management process; that there are Registrars available to refine and define the issues on a timely basis; and that there is, where necessary, a Judge available to determine the matter on a timely basis.

The LCA notes the following additional comments that have been received from the South Australian Bar Association:

*SABAR would support a process whereby small property pools are expedited for a final hearing taking 1 day or less. It is important for these smaller cases that they be dealt with before the cost of legal fees impacts on the capacity of the parties to resolve the matter and/or one of the parties is so financially disadvantaged that they remain in a precarious financial position pending Trial. Very often the financially disadvantaged party is the wife who has the care of children.*

<b>6. RESHAPING THE ADJUDICATION LANDSCAPE</b>	
<b>Proposal 6–5</b>	<p>In considering whether the simplified court procedure should be applied in a particular matter, the court should have regard to:</p> <ul style="list-style-type: none"> <li>• the relative financial circumstances of the parties;</li> <li>• the parties’ relative levels of knowledge of their financial circumstances;</li> <li>• whether either party is in need of urgent access to financial resources to meet the day to day needs of themselves and their children;</li> <li>• the size and complexity of the asset pool; and</li> <li>• whether there are reasonable grounds to believe there is history of family violence involving the parties, or risk of family violence.</li> </ul> <p>The court should give weight to each of these factors as it sees fit.</p>
<b>Response:</b>	Disagree.
<b>Comment:</b>	<p>LCA refers to the earlier comments made in relation to case management processes.</p> <p>In addition to the matters set out above, there are a series of issues emerging from the identified matters which require consideration:</p> <ul style="list-style-type: none"> <li>• the matters identified rarely remain static during a proceeding – financial circumstances change, needs change, family violence emerges or occurs and the relative levels of knowledge change (both for better or worse and consequent upon changes in or losses of legal representation and advice). One consequence of change relevant here is the change in the suitability of a matter for the application of any varied or differing procedure together with the cost and delay entailed with changes to the procedures applied to the determination;</li> <li>• identification of each matter on an informed and proper basis will, of itself, add a layer of cost and complexity to the management of the case – for the reasons set out above, that a matter at face value may involve a ‘small’ amount of money does not inform nor convey any information as to the issues involved, that which is required to determine those issues and the consequences of such a determination. Further, in order to properly consider the consequences of such a characterisation on their rights and entitlements, a party will need to have the opportunity for and benefit of proper and informed legal advice; and</li> <li>• if family violence is to be a relevant consideration, for the reasons already set out, it is likely to preclude the application of any proposed procedure in many cases if the simple existence of such an allegation within the meaning of section 4AA of the Family Law Act is to be sufficient. If it is not, there are considerable difficulties in determining that family violence which would be sufficient and that which would not and how the occurrence of such violence is to be determined or not – for example, will the existence of an allegation be sufficient?</li> </ul>

6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–6</b>	<p>The family courts should consider developing case management protocols to support implementation of the simplified process for matters with smaller property pools, including provision for:</p> <ul style="list-style-type: none"> <li>• case management by court registrars to establish, monitor and enforce timelines for procedural steps, including disclosure;</li> <li>• conducting a conciliation conference once the asset pool has been identified; and</li> <li>• establishing a standard timetable for processing claims with expected timeframes for case management of events (mentions, conciliation conferences and trial).</li> </ul>
<b>Response:</b>	See above response to Proposal 6-5.
<b>Comment:</b>	<p>The LCA repeats the prior submissions advanced in relation to the proper approach to case management, including the role that Registrar’s should have. Registrars should be used for case management as identified together with the conduct of conciliation conferences, the latter of which continues to occur in the Family Court where resources permit.</p> <p>Small property pool cases do not make those matters necessarily easier to determine as every percentage point and every dollar counts. They need special care and attention not a formulaic approach.</p>

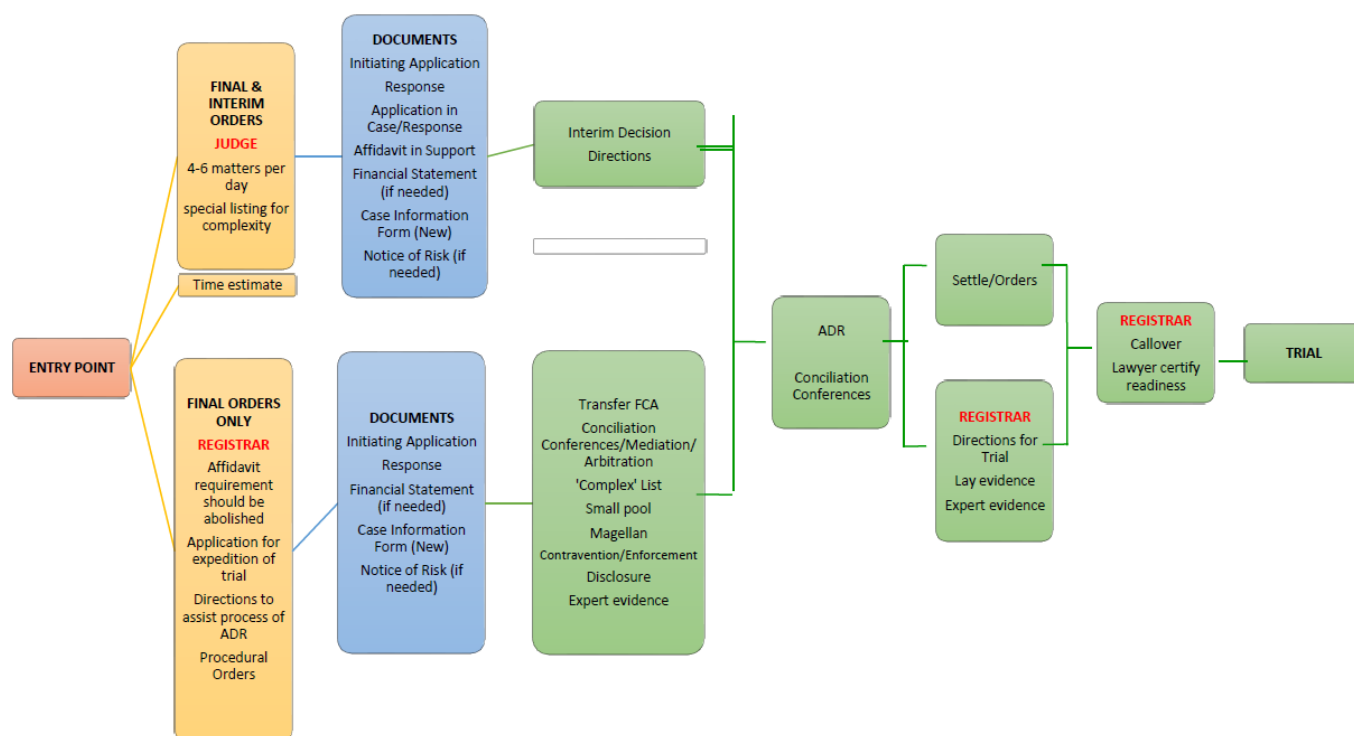
6. RESHAPING THE ADJUDICATION LANDSCAPE	
<b>Proposal 6–7</b>	<p>The family courts should consider establishing a specialist list for the hearing of high risk family violence matters in each registry. The list should have the following features:</p> <ul style="list-style-type: none"> <li>• a lead judge with oversight of the list;</li> <li>• a registrar with responsibility for triaging matters into the list and ongoing case management;</li> <li>• family consultants to prepare short and long reports on families whose matters are heard in the list; and</li> <li>• a cap on the number of matters listed in each daily hearing list.</li> </ul> <p>All of the professionals in these roles should have specialist family violence knowledge and experience.</p>
<b>Response:</b>	If family violence was the only critical issue in family law matters, then this proposal would be agreed to, but it is not.
<b>Comment:</b>	<p>At first blush, this proposal appears positive. However, deeper consideration reveals an idea which is fraught with tensions and difficulties. For example:</p> <ul style="list-style-type: none"> <li>• What is ‘high risk’; from whose perspective (parent and/or child), and at what time?</li> <li>• Will this list include property matters, as well as children’s cases?</li> <li>• Who will decide if the matter ought to be on the list or not – that is, some form of prima facie determination will be required on an interim basis? How is the respondent to such claims to properly participate in this preliminary determination phase?</li> </ul>

- If there is to be some kind of discrete trial, then the alleged victim may be cross-examined twice, being at this preliminary phase and then again at the trial-proper;
- What is the purpose of the separate listing - i.e. does allegation or meeting this criterion mean the case gets quasi-expedition?

As a matter of general practice, by the time what might be termed 'high risk' cases come to the family courts, they normally (or should) have their AVO/DVO in place from the State/Territory court.

There is perhaps an assumption in the Discussion Paper that does require challenging - family violence is a critical issue, but it is not the only issue of complexity in family law disputes. What about cases, and there are a huge number of them in the system, that do not fall within the family violence criteria but throw up similar risk factors for children and spouses due to drugs, alcohol, personality disorders, psychiatric issues or where no party is a responsible parent (for any of many reasons) and the state or territory child protection department will not intervene?

41. 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.
42. 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 Judges time preserved for dealing with interlocutory hearings and final trials.



43. 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. 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.

44. The LCA notes the submission of the LIV 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.<sup>18</sup>*

*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 LIV notes there is a similar process already undertaken in relation to divorce proceedings, where the FCC registry acts as a single point of entry. Pursuant to the Family Court of Australia Practice Direction No 6 of 2003, all divorce applications are filed in the FCC. All divorce applications have a court*

<sup>18</sup> 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, 'State of the Nation' (Speech delivered at the National Family Law Conference 2018, Brisbane, 3 October 2018).

*hearing before a Registrar of the FCC, and depending on the circumstances, the applicant may or may not be required to attend.*

*The LIV notes the Government's proposal claims to provide 'the single point of entry into the family law jurisdiction of the federal court system', however in reality, it merely provides a framework with the aim of ensuring common approaches to case management.<sup>19</sup> The Government is in effect relying on the dual commission of the Chief Judge of Division 2 and the Chief Justice of Division 1 to design new Court Rules that will then devise a single point of entry.<sup>20</sup> The LIV acknowledges the Government's clear intention that a common case management approach be adopted at some point in the future, but notes that the structure merely creates two separate divisions and does not resolve the issue of disparate case management practices.*

## The PwC Report

45. The Government places 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<sup>21</sup> 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"<sup>22</sup>. 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, 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

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<sup>19</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 3 [8]; Federal Circuit and Family Court of Australia Bill 2018 section 5(a) and (b).

<sup>20</sup> Attorney-General, Hon Christian Porter MP, 'State of the Nation' (Speech delivered at the National Family Law Conference 2018, Brisbane, 3 October 2018).

<sup>21</sup> PwC Report, 2.

<sup>22</sup> PwC Report, 14.

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.

- (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 about 50% of that work. 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% of the FCC's work, it accounts for about '20% of judicial effort'<sup>23</sup>. 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.<sup>24</sup>*

The LCA notes the following submission by NSWLS:

*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.*

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

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

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<sup>23</sup> PwC Report, 98.

<sup>24</sup> KPMG Report, 51.

47. 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 35<sup>th</sup> 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.*<sup>25</sup>

48. 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.
49. 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.
50. 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 25<sup>th</sup> 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.*<sup>26</sup>

51. 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.*<sup>27</sup>

52. 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 recent criticism of the delivery of judgments by Judges of the Federal Court of Australia are examples. As recently stated by Judge 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?*

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<sup>25</sup> The Hon. Murray Gleeson, Chief Justice of the High Court of Australia, *The State of the Judicature Address*, Australian Legal Convention, 25 March 2007, 14.

<sup>26</sup> The Hon James Spigelman AC, Chief Justice of New South Wales, The 'New Public Management' and the Courts, address to the Family Court of Australia 25<sup>th</sup> Anniversary Conference, Sydney, 27 July 2001.

<sup>27</sup> The Hon Justice James Spigelman QC, Chief Justice of New South Wales, The Maintenance of Institutional Values, speech delivered at the Colloquium, Research Library Futures: Strategies for Action, State Library of New South Wales, 17 May 2002.



*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.*<sup>28</sup>

## What were PwC engaged to do?

53. 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.
54. There are significant redactions to the publicly released version of the PwC. 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.
55. 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).*

56. 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

57. 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:

*Given time restraints 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.*<sup>29</sup>

and

*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*

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<sup>28</sup> Judge Judith Kelly 'Making judgment on output takes no account of reason and offers little to delivery of justice', *The Australian*, 9 November 2018.

<sup>29</sup> PwC Report, 14.

*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.*<sup>30</sup>

58. 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.
59. 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.
60. As remarked by the Hon Justice Stephen Thackray, Chief Judge of the Family Court of Western Australia in his delivery of the David Malcolm Memorial Lecture earlier this year:

*...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.*<sup>31</sup>

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

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.

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.

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<sup>30</sup> PwC Report, 53.

<sup>31</sup> The Hon. Justice Stephen Thackray, Chief Judge of the Family Court of Western Australia, *The Rule of Law and the Independence of the Judiciary: Values Lost or Conveniently Forgotten?*, The David Malcolm Memorial Lecture, 27 September 2018.

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.

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). 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;
- 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.

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'.

The LCA notes the recent contrary comments by the 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.*<sup>32</sup>

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

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<sup>32</sup> Warwick Soden, Senate Estimates hearing, 23 October 2018.

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.

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% of the applications for final orders in 2016/17)<sup>33</sup> 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.

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 settled, they are transferred to the FCC for trial.

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 which they've been transferred".<sup>34</sup> 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.

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.

The proposed restructure of the family law courts into two Divisions will still require transfers, particularly given the reality that some cases become

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<sup>33</sup> PwC Report, 37; 1,181 transfers of a total number of filings of 20,550.

<sup>34</sup> PwC Report, 37.

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.

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”.<sup>35</sup> 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.

The PwC Report refers to a ‘family law application process’<sup>36</sup> 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 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.

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.

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

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<sup>35</sup> PwC Report, page 81

<sup>36</sup> PwC Report, page 17

Judges are likely to be inflated by the making of consent orders which in the FCoA would ordinarily be made by Registrars.

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.<sup>37</sup> 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.

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.

The LCA notes the further comments by the LIV:

*The LIV considers the Report's assertion that each FCC judge disposes of 338 final orders applications in each year should to 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 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<sup>38</sup>, the latter of which is used as the main determiner of PwC's assessment of various criteria of court and judge performance.

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.

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.

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<sup>37</sup> PwC Report, page 31

<sup>38</sup> PwC Report, 28.

- (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 family law experience of some judicial officers, 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.

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.

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

In Victoria, there is no FCoA appeals division judge (other than the Chief Judge of the FCC). The LCA understands that more applications for final orders are made in the FCoA in Melbourne than in any other registry in Australia and that the FCC registry in Melbourne conducts the greatest number of regional circuits of any FCC registry in Australia. The Government's policy position is that it will not make any further appointments to the trial division of the FCoA, and that appeal division judges will be diverted to trial work. In Victoria, there will be no 'efficiency gains' from such a policy, as there is no appeals judge, other than the Chief Judge. As retirements take place in the FCoA, the FCC, which already has a backlog of family and general law jurisdiction cases, will be required to do more of the work now done by the FCoA, as well as managing its extensive circuit commitments.

In South Australia, the vacancy created in the FCoA by the retirement of the Hon Justice Dawe has not been filled for over 19 months, and there is currently only one FCoA trial judge. There is one appeals judge who is eligible to retire at any time. The vacancy created in the FCC by the resignation of Judge Lindsay in September 2014 has never been filled.

- (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.

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.

For example, the Rules of the FCC provide 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. 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.

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.

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% 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.

*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 least 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 the FCFC).

- (l) A failure to take proper regard of the efficiency of the FCoA in maintaining an annual clearance rate in excess of 100%, 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.<sup>39</sup>

62. The LCA notes the following submission from LIV:

*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.<sup>40</sup> The LIV also supports measures that increase efficiency and resolve the current 'confusion, delay and unnecessary cost' such people face.<sup>41</sup> 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.*

<sup>39</sup> *Fact not Fiction*, response by Family Court of Australia judges to The Australian op ed by the Attorney-General, Hon Christian Porter MP published on 3 August 2018.

<sup>40</sup> *Federal Circuit and Family Court of Australia Bill 2018* section 5(a) and (b).

<sup>41</sup> Attorney-General, Hon Christian Porter MP, 'State of the Nation' (Speech delivered at the National Family Law Conference 2018, Brisbane, 3 October 2018).

*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.*

63. The LCA considers that chronic underfunding of the family 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. The FLS have compiled a summary of the judicial retirements and appointments, including appointments of FcoA judges to the appeal division, and analysed the delays between each. That summary is attached to this Submission. Most of the information about judicial retirements is not publicly available, particularly in relation to retirement of FCC Judges, but the FLS considers that it is reasonably accurate based on the experience of FLS members around the country. That summary demonstrates the extraordinary delay in some cases of making appointments to fill vacancies caused by retirements and appointments to the appeal division of the FcoA. 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.

64. The recently released 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...)<sup>42</sup>*

65. The impact of over-listing at FCC interim or duty list hearings was the subject of recent comment in the appeal case of *Matenson*. 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:

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<sup>42</sup> KPMG Report, xi.

*[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.*<sup>43</sup>

66. 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.<sup>44</sup>

## The importance of specialisation in the family law jurisdiction

67. A number of key aspects of the FCFC Bills and the Government's policy position regarding the future of the FCoA raise substantial concerns about the loss of specialisation in the family law judiciary:

- (a) By virtue of the Government's policy announcement that it will not appoint any new judges to Division 1 of the FCFC, the Bills represent the effective abolition of a specialist family court in Australia, although the LCA acknowledges that future Governments may adopt a different policy approach to the appointment of Division 1 Judges;
- (b) Whilst the FCFC Bills contain a new provision regarding the experience and skills required of new judges appointed to Division 2 of the FCFC, that provision is flawed;
- (c) The effective abolition of a specialist family 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:
  - The quality of decision making is enhanced; *and*
  - 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.

68. As noted 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.*

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<sup>43</sup> *Matenson & Matenson [2018] FamCAFC 133* at 71.

<sup>44</sup> KPMG Report, 80.

## Judicial specialisation in family law

69. In a recent address 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 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.<sup>45</sup>*

70. 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.<sup>46</sup>*

71. There is no equivalent provision in the 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.

72. 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*

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<sup>45</sup> The Hon Robert French AC, *Specialists, Generalists and Legal Intersections in Family Law*, 18th National Family Law Conference, Brisbane, 4 October 2018.

<sup>46</sup> *Family Law Act 1975* (Cth), s 22(b).

*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.*

*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.<sup>47</sup>*

73. 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 this year:

*....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.*

*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*

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<sup>47</sup> House of Representatives, Legal and Social Affairs Committee, A better family law system to support and protect those affected by family violence, December 2017, paragraphs 8.77-8.78.

*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.<sup>48</sup>*

74. The QLS makes the following comments 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.*

75. 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 unpredictability of case management practices;
- (d) a less than comprehensive identification of legal issues, particularly when either or both parties are unrepresented, leading to unfair outcomes; and
- (e) lack of social science knowledge about issues such as the appropriate post-separation parenting arrangements for children at different ages and stages of development, leading to orders being made that are not in the best interests of children.

76. The ALRC proposes in its 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'.<sup>49</sup> The

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<sup>48</sup> Wendy Kayler-Thomson, Chair Family Law Section, State of the Nation address, National Family Law Conference, Brisbane, 3 October 2018.

<sup>49</sup> ALRC Discussion Paper, Proposal 10-8.

ALRC poses a further question about what other changes should be made to the criteria for appointment of judges exercising family law jurisdiction.<sup>50</sup>

77. The proposed section 12(2)(b) of the FCFC Bill in relation to the qualifications for appointment of judicial officers to Division 1 of the FCFC replicates the current provisions of section 22 of the Family Law Act. But in circumstances where the Government has indicated that it will make no further appointments to Division 1, that section may have little practical impact unless there is a change in Government policy.
78. Section 79(2)(b) of the FCBC Bill relates to the appointment of judges to Division 2 of the FCFC and provides 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]*'.
79. Other provisions of the 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. In those circumstances the LCA suggests that it will be almost impossible to identify a suitable candidate for appointment to Division 2 that can meet the criteria of section 79(2)(b). Specialisation of legal practice means that rarely would a lawyer have 'knowledge, skills and experience' of the broad range of jurisdiction to be exercised by that Division. If the inclusion of that section was intended to increase the family law skill of judges in Division 2, it may have the opposite effect.

## Specialist family courts

80. 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.
81. It is well accepted that the complexity of issues involved in many family law cases has increased significantly in recent years. As noted 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.*

82. 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.

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<sup>50</sup> Ibid, Question 10-4.



83. 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.
84. The LCA advocates for a single, specialised court with family law jurisdiction. As noted by the LIV:

*... any reform must focus on creating a system that can evolve to meet the challenge of continual changes in the social and cultural conceptions of the issues considered relevant to the "family" in our society, as well as the concurrent and continual evolution of our knowledge base and societal expectations.*

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

85. The LCA opposes the abolition of the Appeal Division of the FCoA.
86. Section 21A of the FLA establishes the Appeal Division of the FCofA. 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.*
87. 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.*
88. 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.*

89. 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.*

90. 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 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.

91. 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.
92. 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 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.’<sup>51</sup>*

93. There are 3 major effects of the appeal division changes proposed by the Bills:
- (a) abolition of the Appeal Division of the FCoA, and establishment of the Family Law Appeal Division of the Federal Court of Australia;<sup>52</sup>
  - (b) limiting the appellate jurisdiction of the proposed Division 1 and 2, and where it is exercised it will be by a single judge only;<sup>53</sup> and
  - (c) the reversal of the default position for the number of judges on the new Family Law Appeal Division of the FCA required to hear appeals from the FCC, from three to one.
94. At paragraph 61 of the Explanatory Memorandum to the FCFC Bill, it is said that "having appeals heard by a single judge will free up considerable judicial resources to help reduce delays in family law appeal matters". The LCA notes the following comment from the LIV:

*The LIV queries the assessment of the efficiency gains made by the Government, in light of the fact that 24 percent of appeals from the FCC or Magistrates court in Western Australia were heard by a single judge in 2017-2018.<sup>54</sup> The LIV further notes that any efficiency gains will not be felt in Victoria, as the only current member of the Appeal Division of the Family Court from Victoria is [the now] Deputy Chief Justice Alstergren.*

95. Appeals to the new Family Law Appeal Division from Division 1 judges of the FCFC would be heard by a Full Court, whereas appeals from Division 2 judges would be

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<sup>51</sup> Nicola Berkovic, 'Three judge appeals 'make system robust', *The Australian* (Sydney) 5 June 2018.

<sup>52</sup> Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018, clauses 192 and 227 of Schedule 1, Part 1.

<sup>53</sup> Federal Circuit Court and Family Court of Australia Bill 2018, clauses 25, 27(1), 102 and 106.

<sup>54</sup> Federal Court of Australia, *Annual Report 2017-2018*, 45

heard by a single judge of the Appeal Division unless it is determined appropriate the matter be dealt with by a Full Court.<sup>55</sup>

96. The Bills create 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 a proposed amendment to s25(1AA) of the Federal Court Act. 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. That the proposed amendment *might* create a cost saving (which is not clear as costings for any new Family Law Appeal Division have not been addressed) is of itself a plainly insufficient basis for such a marked change in policy.
97. The proposed changes are also destructive of the specialised knowledge that FCoA judges of the Appeal Division have at the appellate level and the guidance they therefore give to the judges at trial level. 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.
98. In *Slazenger & Ors v Hunt & Ors; Lederer & Anor v Hunt & Ors* [2006] HCATrans 473 (1 September 2006), 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."
99. The LCA notes the following submission from the LIV:

*Division 1 will remain a superior court of record, and therefore appeals will be heard by the Full Court of the Family Law Appeal Division, whereas appeals from Division 2 will ordinarily be heard by a single Judge of the Appeal Division, unless a Judge considers it appropriate for the appellate jurisdiction to be exercised by a Full Court.*<sup>56</sup> The LIV notes that the conferral of appellate jurisdiction on Division 2, to determine appeals from a judgment of a court of summary jurisdiction of a State or Territory exercising jurisdiction, means the proposed model could see circumstances where three layers of appeal may each be heard by a single judge.

*The Government initially asserted at least some of the existing FCoA appeal judges would shift to the new family law appeal division of the Federal Court Appeal Division.*<sup>57</sup> The Attorney-General noted that not all the appeal judges were expected to be needed by the court, and the rest would form part of Division 1 of the proposed court, where they would hear first instance cases and appeals from state magistrates.<sup>58</sup> However, the LIV notes that contrary to this assertion, the FCFA (CATP) Bill 2018 appears to contemplate that all the current appellate judges of the Family Court will become trial judges in Division 1 of the proposed court, with no transitional arrangements made for

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<sup>55</sup> Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018, clause 235 of Schedule 1, Part 1.

<sup>56</sup> *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* schedule 1, part 1, item 235.

<sup>57</sup> Nicola Berkovic, 'Family Court merger faces court revolt', *The Australian* (Sydney) 30 May 2018.

<sup>58</sup> Nicola Berkovic, 'Family Court merger faces court revolt', *The Australian* (Sydney) 30 May 2018.

*them to be appointed to the new Family Law Appeal Division of the Federal Court.<sup>59</sup> This makes more sense of the Government's contention that the proposed model will enable the existing judicial resources of the Family Court to be refocussed to finalise more first instance family law matters and to clear the backlog of family law matters.<sup>60</sup>*

100. In October 2018, whilst speaking at the National Family Law Conference, the Hon Chief Justice of the FCoA, John Pascoe, said:<sup>61</sup>

*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.*

*On the issue of appeals, I note the critical importance of a thorough, in-depth and expert knowledge of family law. Without such knowledge, it would be much more difficult to ensure that a just and proper conclusion is reached. 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.*

101. The LCA is concerned that were the Family Law Appeal Division of the Federal Court of Australia established, there is no assurance that the existing judges of the Appeal Division of the FCoA (or any of them) will be assigned to it as they become Division 1 Judges in the FCFC under the CATP Bill.
102. The absence of specialisation for members of the new Family Law Appeal Division is clear, in that they need not have or hold 'qualification, training or experience' in relation to the practice of family law as set out presently in paragraph 22(2)(b) of the FLA. The proposed amendment to s6(2) of the Federal Court Act states in part that any appointee to the new Family Law Appeal Division must instead have 'appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Court'.
103. The constituent members of the proposed Family Law Appeal Division of the Federal Court do not on the Bills as framed automatically include the Chief Justice nor Deputy Chief Justice of the FCFC, although it may well be the future policy intention that they receive dual commissions as between the FCFC and the Federal Court of Australia.

104. The LCA notes the following submission from the NSWLS:

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

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<sup>59</sup> *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* schedule 10, part 1, items 2(3), 2(5) and 3(5); Explanatory Memorandum, *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018* 365 [1985] notes that item 3(5) applies to those Judges appointed to the Appeal Division.

<sup>60</sup> Explanatory Memorandum, *Federal Circuit and Family Court of Australia Bill 2018*.

<sup>61</sup> Chief Justice of the Family Court of Australia, the Honourable Chief Justice John Pascoe AC CVO, 'State of the Nation' (Speech delivered at 18<sup>th</sup> National Family Law Conference, Brisbane, 3 October 2018) as delivered, Cf <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/speeches-conference-papers/2018/speech-cj-nflc>>.

*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.*

105. The LCA also notes the following submission from the LIV:

*The LIV queries whether diverting family law appeals to be heard by non-specialist judges in the Federal Court, who will require time and resources, particularly training, to familiarise themselves with this specialist and complex area of law, is more efficient than moving judges who already have this specialist knowledge and experience to the new division. The LIV notes the small group of 11 Judges who currently comprise the Appeal Division of the Family Court, possess an invaluable wealth of specialist experience and knowledge that allowed them to publish 380 appeal judgments in 2017-2018, a year where 390 appeals were filed.<sup>62</sup> The LIV considers Judges already possessing the necessary knowledge, experience and aptitude, are much more likely to deliver efficient appeal decisions in some of the most difficult cases heard within the civil jurisdiction.*

106. The proposed removal from the FCoA of its appellate jurisdiction and 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;
- (b) the loss of specialist appeal judges from the Full Court to Division 1 of the FCFC;
- (c) the absence of any sound business case for substantial savings; 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.

107. Changes are also proposed, by the CATP Bill, in respect of those matters that require leave to appeal. By virtue of item 228 of Schedule 1, Part 1 to the CATP Bill, an amendment is affected to the Federal Court Act by the insertion of a new section 24A. Amendments are also made to subsections 24(1AA) to (1E) by virtue of item 27 of the Bill. Sub-paragraph (5) provides that an appeal must not be brought from an interlocutory judgement in the absence of leave to appeal. This creates a change in respect of the prevailing situation under the FLA whereby leave to appeal is not

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<sup>62</sup> Chief Justice Pascoe, 'State of the Nation' (Speech delivered at the National Family Law Conference 2018, Brisbane), < [www.familycourt.gov.au/wps/wcm/connect/FCoAweb/reports-and-publications/speeches-conference-papers/2018/speech-cj-nflc](http://www.familycourt.gov.au/wps/wcm/connect/FCoAweb/reports-and-publications/speeches-conference-papers/2018/speech-cj-nflc)>.

required in respect of interlocutory parenting matters. The Explanatory Memorandum does not eliminate why this change, insofar as it relates to child welfare matters, should be the subject of change. In circumstances where interlocutory decisions about parenting matters are often of enormous significance to the overall outcome of a matter, the imposition of a leave to appeal requirement needs to be the subject of better explanation and reasoning before it could be accepted.

108. 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.

## Reshaping and improving a world leading family law system

109. Since the passage of the FLA in the mid-1970s, Australia has been at the forefront of developments in this field.
110. 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 debate just starting in England, Scotland and Wales, as to whether they should adopt a less stringent approach to the grounds for divorce<sup>63</sup> and as to the absence in many other common law jurisdictions of recognition of the financial rights of parties to a de facto relationship that breaks down.
111. 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.
112. The LCA notes the following submission from the LIV on the importance of a specialised court having regard to issues of family violence:

*The increasing incidences of allegations of family violence in family law matters is demonstrated in the research. In Australia, one in six women, and one in 16 men, experience physical and/or sexual violence, and approximately one in four women, and one in six men experience emotional abuse at the hands of an intimate partner.<sup>64</sup> It is unsurprising that family violence is the most commonly raised factual issue in litigated family law proceedings, with nearly half of all litigants reporting physical violence against themselves and/or their child, and 85% reporting emotional abuse.<sup>65</sup> Further, Judges of the FCoA have reported 'a very significant rise in violence and family dysfunction'.<sup>66</sup>*

<sup>63</sup> See *Owen v Owen* [2018] UKSC 41, <<https://www.supremecourt.uk/cases/uksc-2017-0077.html>>.

<sup>64</sup> Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2018) 1.

<sup>65</sup> Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper 86 (2018) 132 [6.22].

<sup>66</sup> Chief Justice Pascoe, 'State of the Nation' (Speech delivered at the National Family Law Conference 2018, Brisbane) <<http://www.familycourt.gov.au/wps/wcm/connect/FCoAweb/reports-and-publications/speeches-conference-papers/2018/speech-cj-nflc>>.

*The ever-evolving understanding of the complexity, nature and scope of family violence is reflected by legislative reforms to expand the definition of family violence. For example, the 2012 family violence reforms expanded the definition to encompass non-physical abuse, such as economic abuse, repeated derogatory taunts, social and cultural isolation, causing serious psychological harm, exposing a child to family violence, and serious neglect of a child.<sup>67</sup>*

*Inquiries and law reform bodies have consistently recommended the extension of the definition of family violence to reflect our evolving understanding of the issue. For example, many bodies have advocated for the definition of family violence to include specific reference to abuse of process and systems in the context of family law proceedings, using electronic or other means to distribute words or images that cause harm or distress and non-consensual surveillance of a family member by electronic or other means.<sup>68</sup> Recently, the ALRC has proposed changes to clarify and broaden the existing definition, including:*

- *replacing ‘repeated derogatory taunts’ with ‘emotional or psychological abuse’, to bring the terminology in line with clinical and practice literature;*
- *adding to the existing example in section 4AB(2)(g) ‘unreasonably denying the family member the financial autonomy that he or she would otherwise have had’, the words ‘including requiring the family member to transfer or hand over control of assets, or forcing the family member to sign a document such as a loan or guarantee’ to better reflect research regarding financial abuse;*
- *adding to the existing example in section 4AB(2)(h) ‘unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support’, the words ‘including unreasonably withholding information about financial and other resources’, to better reflect the research on the association between concealment of financial and property resources and a pattern of financial and other abuse; and*
- *adding to the existing example in section 4AB(2)(i) ‘preventing the family member from making or keeping connections with his or her family, friends and culture’, the terms ‘community or religion’ to better recognise the importance of community connections.<sup>69</sup>*

*Rather than seeking to simplify or limit the specialist nature of the legal response to family violence, the vast majority of legal reform and research bodies (including the LIV)<sup>70</sup> have advocated for increased specialisation in the*

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<sup>67</sup> Family Law Act 1975 (Cth) section 4AB; Rae Kaspiw et al, ‘Responding to Family Violence: A survey of family law practices and experiences’ (Australian Institute of Family Studies, 2015) 31-33 [3.1.1].

<sup>68</sup> 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) 156 [4.262] recommendation 8; Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper 86 (2018) 188-9 [8.30-8.34], 192 proposal 8-3.

<sup>69</sup> Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper 86 (2018) 188-9 [8.30-8.34].

<sup>70</sup> See Law Institute of Victoria, Submission to the Royal Commission into Family Violence (3 June 2015).



*approach to family violence.<sup>71</sup> For example, the Standing Committee on Social Policy and Legal Affairs advocated for the extension of the Magellan program (discussed below) to include all parenting matters involving family violence.<sup>72</sup> The Committee also advocated for the expansion of specialised family violence courts, which incorporate specialised judicial officers, prosecutors, lawyers, victim support workers, and community corrections officers, chosen because of their specialised skills or who would receive specialised training in family violence.<sup>73</sup> The Family Law Council also advocated for specific family violence training for judicial officers, lawyers and court staff.<sup>74</sup> Therefore, the vast majority of the recommendations support the retention and application of the specialist knowledge and experience of the FCoA to the increasingly prevalent issue of family violence.*

*The specialist family violence training undergone by judges of the FCoA, and their extensive experience dealing with the issue, enables them to stay informed and responsive, as the understanding of family violence evolves with each new set of data, research or evidence from psychologists and social workers.*

*The case of Britt & Britt<sup>75</sup> provides an excellent example of the FCoA responding to the Australian communities' evolving understanding of family violence, and its impact on victim survivors, through the steady removal of barriers to the consideration of family violence in the post separation distribution of property.*

*Law makers have been reluctant to take family violence into consideration in property disputes, lest it be perceived as re-introducing the old fault based system for divorce.<sup>76</sup> In the absence of legislative reform, the FCoA developed a principle whereby a history of family violence is a relevant consideration in the post separation distribution of property. Since Kennon v Kennon<sup>77</sup> Australian courts can take the financial consequences of family violence into account when determining whether property settlements are 'appropriate' and 'just and equitable' when considering the past contribution factors outlined in section 79(4) of the Family Law Act 1975 (Cth).*

*The scope for application of the 'Kennon adjustment' is severely limited. In order to satisfy the Kennon test, the party must prove:*

- *They were subject to a violent course of conduct during the marriage; and*

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<sup>71</sup> See Queensland Special Taskforce on Domestic and Family Violence, Not Now, Not Ever (2015) recommendations 103-105; Victorian Royal Commission into Family Violence, *Summary and Recommendations* (2016) recommendation 216; COAG Advisory Panel on Reducing Violence against Women and their Children, *Final Report* (2016) recommendation 1.4.

<sup>72</sup> 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) 225 [6.142].

<sup>73</sup> 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) 122 [4.146].

<sup>74</sup> Family Law Council, *Final Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2016) 140-141 recommendation 12.

<sup>75</sup> *Britt & Britt* [2017] FamCAFC 27 (27 February 2017).

<sup>76</sup> *Eastreal, Young and Carline*, above n 37, 212; *Maine & Maine* [2016] FamCAFC 270, 52.

<sup>77</sup> *Kennon v Kennon* (1997) FLC 92-757.

- *The conduct had a significant adverse impact upon the party's contribution; or*
- *The conduct made those contributions significantly more arduous.*

*Therefore, the victim of family violence has the difficult task of proving the violence occurred, and the causal connection between the family violence and the financial impact.*

*In Britt v Britt the FCoA further developed the law to more accurately reflect our knowledge of the nature of family violence, by significantly lowering the evidentiary barriers to assist victims to obtain financial recompense.<sup>78</sup> The wife in the case asserted the husband had repeatedly committed severe acts of family violence during their 30-year relationship, which had made her contributions significantly more onerous, and therefore she should receive a contribution-based adjustment.<sup>79</sup> The Full Court significantly lowered the evidentiary burden previously placed on victim survivors by declaring 'evidence that is probative, even slightly probative, is admissible because it could rationally affect the determination of an issue. For it to be inadmissible it must lack any probative value'.<sup>80</sup>*

*The court also confirmed that evidence of family violence can be a relevant consideration to:*

- *provide context to other evidence;*
- *provide evidence as to the relationship in existence between the parties, which may explain other actions taken by the parties in their financial relationship or their relationship generally; and*
- *the credibility of each party.<sup>81</sup>*

*Further, the court found a party expressing a conclusion in an affidavit does not render the evidence inadmissible, and evidence can be admitted provisionally at the commencement of a trial.<sup>82</sup>*

*The LIV cautions that any reform which seeks to remove or diminish the specialist knowledge and experience of family violence risks potentially harmful ramifications for the most vulnerable participants in the family law system.*

### *The Magellan Program*

*The FCoA developed the world-first Magellan program to address the needs of children and families in circumstances where there are serious allegations of sexual and/ or physical abuse of children during parenting disputes.<sup>83</sup> 'Magellan cases', once identified, undergo special case management,*

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<sup>78</sup> Will Stidston and Elizabeth Mathews, 'Adjusting for Violence' (2018) 92(1/2) *Law Institute Journal* 32.

<sup>79</sup> *Ibid*, 32, 34.

<sup>80</sup> *Britt & Britt* [2017] FamCAFC 27 (27 February 2017) [31].

<sup>81</sup> *Britt & Britt* [2017] FamCAFC 27 (27 February 2017) [34]-[37]; Will Stidston and Elizabeth Mathews, 'Adjusting for Violence' (2018) 92(1/2) *Law Institute Journal* 32, 35.

<sup>82</sup> Will Stidston and Elizabeth Mathews, 'Adjusting for Violence' (2018) 92(1/2) *Law Institute Journal* 32, 35.

<sup>83</sup> Dr Daryl Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan case-management model* (Australian Institute of Family Studies, 2007) 16 - 17.

*managed by a small team consisting of a judge, a registrar and a family consultant.<sup>84</sup> An Independent Children's Lawyer is also appointed in every Magellan case.<sup>85</sup> The process and procedures are intensive, collaborative, specialised, highly coordinated, and rely on robust interagency coordination, particularly with state and territory child protection agencies.<sup>86</sup> This distinct case management pathway ensures that these cases are heard and determined within six months of the allegations being raised in litigation before the Court.<sup>87</sup>*

*An extensive evaluation of the Magellan program's effectiveness as a mechanism for responding to serious allegations of sexual and/ or physical abuse of children found Magellan cases:*

- *resolve more quickly;*
- *have greater involvement of the statutory child protection department;*
- *have fewer Court events*
- *are dealt with by fewer different judicial officers; and*
- *are more likely to settle earlier.<sup>88</sup>*

*There are calls for the extension of the Magellan program so that it can operate in all regions of Australia, and that it should be extended to the FCC.<sup>89</sup>*

*The number of Magellan cases coming before the courts is increasing, with 93 Magellan cases commenced and 76 finalised in the 2017-2018 financial year alone.<sup>90</sup> The LIV notes that on 30 June 2018, there were 143 active Magellan cases.<sup>91</sup> In addition, the number of Notices of Child Abuse, Family Violence or Risk of Family Violence filed continues to increase, with 426 filed between 2013-2014, as opposed to 715 in 2017-2018.<sup>92</sup> This reflects a growing awareness of family violence in the community as well as the increasing complexity of the Court's cases.<sup>93</sup>*

*The LIV wishes to express its concern that the Magellan program is not mentioned in any of the material provided by the Government regarding its proposal. The LIV further wishes to express its concern that the loss of this specialised model, and the specialised training and experience of the FCoA judges, registrars and family consultants involved in the program, would significantly negatively impact on the most vulnerable children in the family law system.*

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<sup>84</sup> Family Court of Australia, *2017-2018 Annual Report*, 36.

<sup>85</sup> Family Court of Australia, *2017-2018 Annual Report*, 36.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, 69.

<sup>88</sup> Dr Daryl Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan case-management model* (Australian Institute of Family Studies, 2007) 12 – 13. 16.

<sup>89</sup> 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) 205 [6.96]; Family Law Council, *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015) 24.

<sup>90</sup> Family Court of Australia, *2017-2018 Annual Report*, 36.

<sup>91</sup> *Ibid.*, 69.

<sup>92</sup> *Ibid.*, 34.

<sup>93</sup> *Ibid.*, 34.

113. 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. The Government's policy position is that Division 1 of the FCFC will be phased out over time. That will mean that the Australian community will no longer have 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).
114. 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.
115. 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.
116. 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.
117. 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. 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?
118. The LCA is of the view, as set out above, that any final consideration of the Bills should stand over until the ALRC Report is complete and provided to the government and stakeholders for review.
119. But at this stage, the LCA cannot support the structural reform proposed by the Bills, and would urge government to give consideration to the model put forward by the NSWBA. The advantages of that NSWBA model include the retention of the specialised Family Court and its knowledge now and the future of matters including family violence, the absorption of the family law work from the FCC into a secondary division, and the maintenance of the Appeal Division of the FCoA.

## Specific provisions in the FCFC Bill and the CATP Bill

120. Without derogation to the matters otherwise raised in the balance of this submission, the LCA makes the following comments in relation to some of the technical aspects of the drafting of the Bills.

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

121. Pursuant to the proposed section 34 of the FCFC Bill, proceedings can be transferred from Division 1 to Division 2, and pursuant to the proposed section 117, proceedings can be transferred from Division 2 to Division 1.
122. Where a Division 1 judge transfers proceedings to Division 2, that transfer is subject to the "approval" of the Chief Judge of Division 2.<sup>94</sup>
123. Similarly, where a Division 2 judge transfers a proceeding to Division 1, that transfer does not take effect until it is "approved" by the Chief Justice of Division 1.<sup>95</sup>
124. There is no provision in either the proposed section 34 or the proposed section 117 about what is to occur to the proceedings if the Chief Justice or Chief Judge (as the case may be) declines to grant that approval. If that was to occur, on the current drafting of the FCFC Bill, the case would be in limbo.
125. By contrast, in the proposed section 120 of the FCFC Bill in relation to the transfer of non-family law proceedings in Division 2 to the Federal Court, the transfer of proceedings takes effect on the date that the order is "confirmed" by the Federal Court, and with no specific reference to that Court's Chief Justice. This may suggest that the process of transfer of proceedings between the Division 2 of the FCFC and the Federal Court is largely an administrative process, rather than one which requires the exercise of judicial discretion.
126. The LCA considers that litigants would be adversely affected in the family law jurisdiction if decisions made by judges (or registrars) for the appropriate transfer of cases were delayed or were uncertain as a result of the proposed sections 34 and 117.
127. If the difference in language is intended to grant such a discretion to the Chief Justice or Chief Judge (as the case may be) as a result of some perceived concern about cases "bouncing" between Division 1 and Division 2, then the LCA considers that:
- (a) No data has been provided by PwC to quantify the number of cases which have 'bounced' between both courts and the LCA suggests that in recent times, the experience of the FLS and its members is that such numbers are small;
  - (b) The provisions themselves lend weight to the LCA's submission that the proposed restructure of the courts will not change the position that transfers of cases between courts or Divisions will continue to occur. The LCA suggests that, in the main, the transfer of cases between superior and inferior courts is an appropriate mechanism to ensure that the appropriate court or judicial officer deals with particular cases and that it is in the interests of justice for that to occur. Any restriction or limitation on the powers of judges/registrars to transfer proceedings

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<sup>94</sup> Proposed section 34(5) of the FCFC Bill.

<sup>95</sup> Proposed Section 117(5) of the FCFC bill.

to the most appropriate court, or for litigants to seek such transfers in appropriate circumstances, would be inappropriate.

## Rule-making power

128. As outlined earlier in this submission, the LCA has substantial concerns about the proposed section 56 and the proposed section 184 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. As a result of the proposed section 20, the Chief Justice and the Chief Judge can be the same person.

129. 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. **Attached** to this submission are extracts of the relevant legislative provisions for each Superior Court in Australia

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

131. 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.*<sup>96</sup>

132. 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.

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

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<sup>96</sup> The Hon Sir Gerard Brennan, AC KBE, Chief Justice of Australia, *Judicial independence*, the Australian Judicial Conference, Canberra, 2 November 1996.

*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.*

134. 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.

## Divisions of the FCC

135. 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:

- The General Division; and
- The Fair Work Division.

136. 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.

137. In light of the limitations of the new proposed qualifications for appointment as a judge of Division 2 outlined in this Submission, the creation of a family law division of Division 2 would allow for changes to the proposed section 79(2)(b) to provide for the appointment of judges with "training, experience and personality, the person is a suitable person to deal with matters of family law" to be appointed to that division.

## Corporations Act powers

138. 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.

139. 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, the availability of Division 1 judges with the necessary jurisdiction to exercise such powers, will be reduced and over time eliminated.

## Submission

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



## Attachment – Judicial retirements and replacements – FCoA/FCC

### FAMILY COURT JUDGES

#### MELBOURNE REGISTRY

<b>JUDGE LEFT OFFICE OR APPOINTED TO APPEAL DIVISION</b>		<b>NEW JUDGE APPOINTED</b>		<b>DELAY</b>
Sally BROWN	02/06/2010	Kirsty Marion MACMILLAN	14/12/2011	18 months
Nahum MUSHIN	30/11/2011	Jennifer Ann COATE	31/01/2013	14 months
Peter Charles YOUNG	09/05/2013	Sharon Louise JOHNS	29/07/2013	2 months, 20 days
Linda DESSAU	21/06/2013	Christine THORNTON	12/08/2013	1 month, 21 days
Diana BRYANT (CJ)*  Appeal division	12/10/2017	William ALSTERGREN* appeal division	13/10/2017	No delay
Christine THORNTON	December 2018			No replacement announced

SYDNEY REGISTRY

JUDGE LEFT OFFICE OR APPOINTED TO APPEAL DIVISION		NEW JUDGE APPOINTED		DELAY
Mary Jane Murray LAWRIE	09/03/2007	-	-	
John Joseph STEELE	15/01/2008	-	-	
Colleen Ann MOORE	31/07/2009	<i>Ann Margaret AINSLIE-WALLACE *appointed to appeal division</i>	09/07/2010	1 year
-	-	William JOHNSTON	12/07/2010	-
-	-	Ian LOUGHNAN	12/07/2010	-
-	-	Judith RYAN – transferred from Newcastle to Sydney	First half of 2011 (exact date n/a)	
Jennifer Margaret BOLAND	04/02/2011	Judith Anne REES	15/12/2011	11 months, 11 days
John Morris COHEN	04/03/2011	-	-	Not replaced
Stephen Richard O'RYAN	15/03/2011	-	-	Not replaced
Peter Isaac ROSE	01/07/2011	Murray Robert ALDRIDGE	13/12/2012	18 months
<i>Judith RYAN* appointed to</i>	27/09/2012	-	-	Not replaced

<i>appeal division</i>				
Stuart Grant FOWLER	14/11/2013	Robert MCLELLAND	16/06/2015	18 months
<i>Murray Robert ALDRIDGE* appointed to appeal division</i>	12/03/2015	-	-	Not replaced
-	-	<i>John PASCOE (CJ)* appeal division</i>	13/10/2017	
<i>Garry Allan WATTS* appointed to appeal division</i>	21/06/2018			
<i>John PASCOE (CJ)* appeal division</i>	12/2018			
Mark LE POER TRENCH	Retirement ceremony 30/10/2018			

#### NEWCASTLE REGISTRY

<b>JUDGE LEFT OFFICE OR APPOINTED TO APPEAL DIVISION</b>		<b>NEW JUDGE APPOINTED</b>		<b>DELAY</b>
Graham Robert MULLANE	30/09/2008	Stewart Craig AUSTIN	13/07/2009	10 months
-	-	Margaret CLEARY	Appointed 08/07/2010	-
Judith RYAN – transferred from	First half of 2011	-	-	Not replaced

Newcastle to Sydney				
<i>Stewart Craig AUSTIN* appointed to appeal division</i>	21/06/2018	-	-	Not replaced

PARAMATTA REGISTRY

<b>JUDGE LEFT OFFICE OR APPOINTED TO APPEAL DIVISION</b>		<b>NEW JUDGE APPOINTED</b>		<b>DELAY</b>
Lloyd Dengate Stacy WADDY	22/12/2009	-	-	Not replaced
Robyn Sylvia FLOHM	29/04/2010	-	-	Not replaced
Ian Roy COLEMAN	08/05/2013	Garry Frederick FOSTER	08/08/2013	3 months
David John COLLIER	23/07/2013	Hilary HANNAM	13/08/2013	21 days

BRISBANE REGISTRY

<b>JUDGE LEFT OFFICE OR APPOINTED TO APPEAL DIVISION</b>		<b>NEW JUDGE APPOINTED</b>		<b>DELAY</b>
Brian JORDAN	31/12/2009	Colin James FORREST	Appointed 02/02/2011	13 months

Bernard John WARNICK	31/03/2010	-	-	Not replaced
James Patrick O'Hara BARRY	27/06/2011	Michael Patrick KENT	12/07/2011	15 days
<i>Peter John MURPHY* appointed to appeal division</i>	27/09/2012	-	-	Not replaced
Elizabeth Madonna O'REILLY	31/01/2013	Jenny HOGAN	31/01/2013	No delay
Graham Rodney BELL	27/02/2015	Catherine CAREW	Appointed 25/02/2016  Commenced 07/03/2016	1 year
<i>Michael Patrick KENT* appointed to appeal division</i>	10/12/2015	-	-	Not replaced
Michelle MAY	31/07/2017	Michael BAUMANN	Appointed 14/12/2017  Commenced 11/01/2018	5/6 months

TOWNSVILLE REGISTRY

<b>JUDGE LEFT OFFICE OR APPOINTED TO APPEAL DIVISION</b>		<b>NEW JUDGE APPOINTED</b>		<b>DELAY</b>
Alexander Robert MONTEITH	30/11/2011	Peter TREE	14/01/2013	1 year, 1 ½ months



ADELAIDE REGISTRY

JUDGE LEFT OFFICE OR APPOINTED TO APPEAL DIVISION		NEW JUDGE APPOINTED		DELAY
Rodney Keith BURR	25/05/2012	David BERMAN	18/07/2013	14 months
Christine DAWE	03/2017	-	-	Not replaced

CANBERRA REGISTRY

JUDGE RETIRED		NEW JUDGE APPOINTED		DELAY
Mary Madeline FINN	03/07/2016	Shane GILL	16/05/2016	No delay – appointed in anticipation of 2 upcoming retirements
John FAULKS	30/10/2016	-	-	Not replaced

**FEDERAL CIRCUIT COURT JUDGES**

**SOUTH AUSTRALIA**

ADELAIDE

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
		Christine MEAD	13/06/2000	1 year
		Stewart BROWN	05/11/2001	8 – 10 months

		Charlotte KELLY	12/03/2007	8 – 10 months
John MORCOMBE	26/11/2007 (died)	Peter COLE	24/11/2008	1 year
Stuart LINDSAY	19/09/2014	-	-	Not replaced
Denys SIMPSON	06/11/2015	Timothy HEFFERNAN	23/11/2015	1 year

**QLD – BRISBANE, CAIRNS, ROCKHAMPTON, TOWNSVILLE**

BRISBANE

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
		Michael JARRETT	02/02/2004	
		Kevin LAPHORN	29/08/2005	
		Stephen COATES	27/11/2006	
		Leane SPELLEKEN	11/12/2006	
		Paul HOWARD	09/07/2007	
		Susan PURDON-SULLY	15/10/2007	
		Margaret CASSIDY	05/11/2007	
		Anne DEMACK	22/09/2008	
Keith WILSON	28/02/2010	Leanne TURNER	07/07/2010	Over 4 months



Keith SLACK	17/12/2011	-	-	-
Michael BURNETT	31/10/2014	Salvatore VASTA	01/01/2015	2 months
Anne DEMACK – relocated from Brisbane to Rockhampton	07/03/2016	Gregory EGAN	18/12/2017	1 year, 9 months
Michael BAUMANN	10/01/2018	-	-	Not replaced

CAIRNS

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
		Josephine WILLIS	27/01/2009	

TOWNSVILLE

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
John COKER	27/04/2018	Steven MIDDLETON – relocated from Newcastle to Townsville	28/05/2018	1 month – note only 1 judge on bench

ROCKHAMPTON

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
		Anne DEMACK – relocated from Brisbane to Rockhampton	07/03/2016	

**ACT**

CANBERRA

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
		Warwick NEVILLE	02/07/2007	
Graham MOWBRAY	03/10/2008	-	-	Not replaced
		Kate Hughes – relocated from Melbourne to Canberra	05/05/2014	
Jim BREWSTER	15/07/2016	Amanda TONKIN	01/01/2017	4 ½ months

**NORTHERN TERRITORY**

DARWIN

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
Alexandra HARLAND – relocated from Darwin to Melbourne	02/03/2015	Tony YOUNG	31/07/2015	5 months

**TASMANIA – BURNIE\*, HOBART, LAUNCESTON**

HOBART

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
		Barbara BAKER	27/10/2008	
		Terry MCGUIRE	06/10/2008	

LAUNCESTON

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
Stuart ROBERTS	19/06/2015	TERRY MCGUIRE – relocated from Melbourne to Launceston	19/06/2015	No delay

**VICTORIA - DANDENONG, MELBOURNE**

MELBOURNE

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
		Norah HARTNETT	19/06/2000	
		Grant RIETHMULLER	19/07/2004	
		Heather RILEY	03/07/2006	
		John O'SULLIVAN	10/07/2006	

		Phillip BURCHARDT	10/07/2006	
Murray MCINNES	28/01/2008	Evelyn BENDER	15/09/2008	8 months
		Dominica WHELAN	24/05/2010	
		Ron CURTAIN	23/01/2012	
John WALTERS	06/12/2012	Judith SMALL	15/04/2013	4 months
Kate HUGHES – relocated from Melbourne to Canberra	05/05/2014	Joanne STEWART – relocated from Paramatta to Melbourne	05/05/2014	No delay
Michael CONNOLLY	24/01/2015	-	-	Not replaced
Daniel O'DWYER	02/02/2015	Alexandra HARLAND – relocated from Darwin to Melbourne	02/03/2015	No delay
Terry MCGUIRE – relocated from Melbourne to Launceston	19/06/2015	-	-	Not replaced
Frank TURNER	23/06/2015	Joshua WILSON	02/11/2015	5 months
Dominica WHELAN	17/02/2016	Jillian WILLIAMS	29/02/2016	2 weeks
-	-	Alister MCNAB	18/05/2016	
Maurice PHIPPS	09/11/2016	Anthony KELLY	06/02/2017	3 months
-	-	Patrizia MERCURI	25/09/2017	
-	-	William ALSTERGREN (CJ)	13/10/2017	

-	-	Caroline KIRTON	29/01/2018	
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PERTH

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
		Antoni LUCEV	14/08/2006	
		Christopher KENDALL	29/01/2018	

**NSW – NEWCASTLE, PARAMATTA, SYDNEY**

SYDNEY

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
		Rolf DRIVER	31/06/2000	
		Shenaugh BARNES	05/11/2001	
		Syvlia EMMETT	05/07/2004	
		Nick NICHOLLS	23/08/2004	
		Louise HENDERSON	28/11/2005	
		Robert CAMERON	03/10/2006	
		Tom ALTOBELLI	13/11/2006	
		Dale KEMP	04/07/2006	
		Geoffrey MONAHAN	03/11/2008	
Jillian ORCHISTON	09/10/2009	-	-	Not replaced

Matthew SMITH	31/01/2013	Nicholas MANOUSARIDIS	01/07/2013	6 months
-	-	Louise HENDERSON – relocated from Paramatta to Sydney	30/09/2013	
Kenneth RAPHAEL	01/07/2014	Sandy STREET	01/01/2015	6 months
Judith WALKER	03/02/2015	Justin SMITH	21/02/2015	3 weeks
Michael LLOYD-JONES	21/06/2015	Phillip DOWDY	07/12/2015	6 months
-	-	Elizabeth BOYLE	29/02/2016	
Stephen SCARLETT	28/07/2016	Robert HARPER	18/01/2017	Almost 6 months
John PASCOE (CJ)	12/10/2017	Julia BAIRD	20/02/2018	4 months
Robyn SEXTON	26/02/2018	Bruce SMITH	12/06/2018	3 ½ months

NEWCASTLE

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
		Janet TERRY	10/04/2007	
Judith HOUSEGO	31/07/2009	Garry FOSTER	18/04/2011	1 year, 9 months
Garry FOSTER	07/08/2013	-	-	Not replaced
Giles COAKES	30/06/2015	Steven MIDDLETON	09/11/2015	Over 4 months
-	-	Jane COSTIGAN	08/10/2017	
Steven MIDDLETON – relocated from	28/05/2018	Terry BETTS	30/05/2018	No delay

Newcastle to Townsville				
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PARAMATTA

JUDGE LEFT OFFICE	DATE LEFT OFFICE	JUDGE APPOINTED	DATE APPOINTED	DELAY
		David DUNKLEY	13/10/2008	
		Joe HARMAN	07/06/2010	
		Matthew MYERS	23/01/2012	
		Joanne STEWART	02/09/2013	
Louise HENDERSON – relocated from Paramatta to Sydney	30/09/2013	-	-	Not replaced
Joanne STEWART – relocated from Paramatta to Melbourne	05/05/2014	Ian NEWBRUN	04/02/2015	9 months
David HALLIGAN	01/11/2015	Brana OBRADOVIC	30/05/2016	5 months
Warren DONALD	31/03/2017	-	-	Not replaced

## Attachment – Rule Making Powers of Courts

### **COMMONWEALTH**

#### **High Court of Australia**

##### ***Judiciary Act 1903***

##### **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***

##### **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***

##### **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***

##### **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***

#### **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.