20 March 2020

Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: *legcon.sen@aph.gov.au*

Dear Ms Dunstone

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

Thank you on behalf of the Bar Association of Queensland for the invitation to provide input to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Federal Circuit and Family Court of Australia Bill 2019 (the **2019 Bill**).

The Association has previously provided a number of comprehensive submissions in relation to the proposed structural changes to the family law system and we repeat those submissions. The Association remains opposed to the restructure in its entirety, and is concerned that the philosophy behind the 2019 Bill is fundamentally wrong, and will not assist (and does not purport to assist) in the alleviation of any delays inherent in the family law system.

The Association supports the submissions made by the Law Council of Australia in its submission to the Senate Legal and Constitutional Affairs Committee regarding the 2019 Bill.

We have limited our comments to key changes from the 2018 Bills, as identified by the Law Council of Australia.

Appellate jurisdiction

Whilst the Association supports the appellate jurisdiction remaining with the Family Court rather than as a division of the Federal Court of Australia, the Association does not support the model proposed by the 2019 Bill.

In particular, the Association opposes the elimination of a dedicated appeal division. It would result in the loss of valuable precedent and the expertise of appeal judges in family law crucial to the proper administration of justice.

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It is important to understand that the conduct of appeals in the Federal Court of Australia is quite different for good reason. That court deals with multiple legislation and diverse areas of law. The judges of the Federal Court are assigned to practice areas reflecting their expertise and consequently when appeal benches are set, that expertise is a consideration.

The 2019 Bill would have the effect that appeals from a Division 2 judge would be heard by a single judge of Division 1. Generally, it is appropriate for appeals to be heard by a bench of three judges. The current position where the Chief Justice, on the advice of experienced appellate judges, will decide that an appeal be heard by one appellate judge is the preferable position.

This is so for a number of reasons.

First, appeal decisions of a bench of three judges results in the development of authoritative jurisprudence, rather than a series of single judge decisions. Relatedly, the proposed structure of the appellate jurisdiction has the very real potential for the development of regional jurisprudence and divisions in the jurisprudence of appellate cases. There remain, arguably justifiable, criticisms of divergent existing Full Court authorities, which are only likely to increase if appellate jurisprudence is created by single judges. It has the scope and potential to seriously diminish, and undermine, the development of jurisprudence of family law principles, as well as the application of principles from other jurisdictions in family law cases, particularly in those concerning property division.

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

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

Changes to the judiciary

The Association is supportive of the requirement that judicial appointments be suitable persons by reason of their training including in respect of matters of family violence.

The Association is similarly supportive, in theory, of the prescription of a minimum number of judicial officers. However, the number of judges is to be prescribed by regulation (which is not yet available for comment), and it is unclear how the resources will be allocated, thus preventing any real consideration of this important issue.

The Chief Justice and Chief Judge's rule making power

The Association is concerned by the current conglomeration of power vested in the respective Chiefs of jurisdiction. Pursuant to clauses 76 and 217, the Chief Justice and Chief Judge may

make Rules of Court. While a Note to each of those provisions indicates an intention to amend that provision after two years, there is no sunset clause in the 2019 Bill.

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

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

The proposed review of the legislation

Clause 284 of the 2019 Bill proposes a wholesale review of the operation of the Act five years after its enactment. While a review of the legislation might suggest a commitment to ensuring the ongoing success of the proposed model, it is entirely unclear how long the court will take to implement these changes and therefore how long the new model will be effectively operating prior to such a review, thereby casting into doubt any statistics upon which such a review may be based.

The Association is concerned with the substantial investment and delay caused by the numerous reviews of the family law system which have been undertaken in the previous five years. Furthermore, the Association is concerned that this proposed structural reform does not appear to be based upon the substantive recommendations advanced by the Australian Law Reform Commission despite the significant cost associated with that review. It is difficult to contemplate the purpose of such a review, if the review process is time and resource intensive, the recommendations of existing substantial reviews have not been adopted and the model may not be sufficiently operative for a review to give an accurate reflection of the model.

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

Other matters

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

Yours faithfully

Rebecca Treston QC
President