Labor Senators' Final Dissenting Report

1.1 Labor Senators' Final Dissenting Report is to be read in conjunction with Labor Senators' Interim Dissenting Report tabled with the Committee Report on 14 February 2019.

1.2 Labor Senators oppose the *Federal Circuit and Family Court of Australia Bill* 2018 (FCFC bill) and the *Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill* 2018 (Consequential Amendments bill).

Overview

1.3 The FCFC bill and the Consequential Amendments bill were introduced into Parliament on 23 August 2018.

1.4 These bills propose a radical change to the structure and operation of the Federal Circuit Court of Australia (FCC), the Family Court of Australia (Family Court) and the Federal Court of Australia (Federal Court).

1.5 The proposals to be implemented by the bills include:-

- Amalgamating the Family Court and the FCC into a new Federal Circuit and Family Court of Australia (FCFCA) with two divisions;
- the Appeals Division of the Family Court of Australia to be moved into the Federal Court and renamed the Family Law Appeal Division (FLAD);
- the appeals pathway for decisions from the Federal Circuit Court will no longer be heard by three judges;
- a single point of entry to the FCFCA;
- leadership by one Chief Justice and one Deputy Chief Justice who will each hold dual commissions to both divisions of the FCFCA.

1.6 There was overwhelming criticism of the bills from submitters and witnesses to the Committee.

How did we get here?

1.7 There is little doubt that the Family Court is in a state of crisis, with unacceptable backlogs that are causing untold heartache for families.

1.8 While there are many reasons for this, we cannot ignore significant contributing factors: the lack of judicial resourcing, failure to fill judicial vacancies in a timely manner, and gutting Community Legal Centres and Legal Aid. The government cannot ignore its role in this.

1.9 The Attorney-General Christian Porter has himself described the creation of a duplicate court system dealing with Family Court matters as "a failed experiment". He has failed to mention it was in fact a Liberal government, in 1999, who set up the Federal Circuit Court and established the very system he now describes as "a failed experiment".

1.10 It is widely accepted that change needs to be made. But – as the government should have learned from its own past experience – change in the Family Court has to be very carefully considered and thought through.

1.11 The process surrounding these bills has been anything but. It is wrong that this committee should be reporting before the Australian Law Reform Commission's landmark review of the family law system, and it is completely irresponsible for these bills to be put to a vote in the Senate before that time. If that were to occur – in the dying days of Parliament before an election – it could do unforeseen damage to the family law system and the people caught within it.

Lack of consultation

1.12 The evidence before the Committee confirms that there was no proper consultation on these bills before they were introduced to Parliament.

1.13 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group in the Attorney-General's Department, told the Committee that the bills were developed in consultation with the three heads of jurisdiction.

1.14 Labor Senators consider that while consultation with the heads of jurisdiction is important, it is of critical importance that other stakeholders are consulted.

1.15 Many witnesses before the Committee were concerned about the lack of consultation with key stakeholders.

1.16 Mr Gregory Howe from the Family Law Committee of the Law Society of South Australia said:

> We would say that this bill is the product of flawed information, flawed assumptions and inadequate consultation both with the profession and with a number of other interest groups and stakeholders. It appears to have been prepared on very limited and in some cases flawed information and does not have the proper evidentiary basis for a bill of this importance.

1.17 Ms Angela Lynch, Chief Executive Officer of Women's Legal Services Australia said:

> Without consultation, we've just been presented with one model and have been asked to accept that without looking at whether there are other models out there that could also provide efficiency and get the end result. It was never discussed.

1.18 Other witnesses expressed their concern at the lack of consultation, including Ms Sharell O'Brien, Supervising Solicitor from the North Queensland Women's Legal Service, Ms Zoe Rathus AM, Senior Lecturer in Law at Griffith Law School, Mr Arthur Moses SC, President-elect of the Law Council of Australia and Mr Michael McHugh SC, Junior Vice President of the New South Wales Bar Association.

1.19 The Honourable Diana Bryant AO QC, former Chief Justice of the Family Court said in her submission to the Committee:

> The abolition of a specialist superior court and removal of appeals from a specialist intermediate appellate court, well suited to hear them, are significant changes which I submit should be the subject to proper and

> transparent consultation with stakeholders. In addition, there are other options for reform of the courts which have not been discussed or subjected to analysis to see if they would create efficiencies. My submission is that this should occur before significant changes as proposed are implemented.

Australian Law Reform Commission review of the family law system

1.20 The Australian Law Reform Commission (ALRC) was asked to conduct a review into the family law system on 27 September 2017. The ALRC is to report to the Attorney-General by 31 March 2019.

1.21 The review has been described as the first comprehensive review of the family law system since the *Family Law Act* 1975 was introduced.

1.22 The terms of reference to the ALRC are broad and include a consideration of the necessity or desirability of reform to:-

- Family law services, including (but not limited to) dispute resolution services;
- Rules of procedure, and rules of evidence, that would best support high quality decision-making in family disputes;
- Mechanisms for reviewing and appealing decisions;
- Families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness;
- The skills, including but not limited to legal, required of professionals in the family law system; and
- Any other matters related to these Terms of Reference.

1.23 Many witnesses to the Committee expressed their concerns, and in some instances frustration, that these bills had been introduced before the ALRC report had been completed.

1.24 Mr Paul Doolan, Chair of the Family Law Section of the Law Council of Australia told the Committee:

> The ALRC discussion paper looks at specialised lists for courts—family violence lists, Aboriginal and Torres Strait Islander lists, and simple case lists. It also talks about making family violence a factor in financial cases. If that reform were introduced by the parliament, that could have a very considerable effect on the amount of work judges have to do in dealing with that issue. To set up a court without knowing what that court is actually going to be dealing with seems to me to be putting the cart before the horse.

1.25 Ms Angela Lynch, Chief Executive Officer of Women's Legal Services Australia in her evidence said:

> As we stated in our submission, it is in the best interests of victims of domestic violence and their children and the broader community to delay this bill until the ALRC has reported or been asked to specifically report on the court restructure and to broadly consult.

1.26 Ms Kajhal McIntyre, Legal Researcher and Project Worker from Rape and Domestic Violence Services Australia expressed her concerns to the Committee:

> We merely ask that the government undertake due diligence by, at a minimum, suspending the reforms until the conclusion of the ALRC review and ideally referring the issue to the ALRC for proper consideration of how any model of restructure might impact the people impacted by family violence.

1.27 Ms Louise Dorian from the Family Law Section Committee of the Law Council of Victoria said:

> We would have concerns about implementing the bills in their current form, especially in the absence of the review from the ALRC given the comprehensive nature of what is being undertaken.

1.28 Ms Sarah Bright, Principal Legal Officer from Women's Legal Service of Western Australia said in her evidence:

> The ALRC report was a great opportunity to have a whole-of-community and sector consultation about what the court structure should be. It very much, in our view, goes hand-in-hand with the sort of family law system we think we should have now.

1.29 Other witnesses including Ms Deborah Awyzio, Chair of Domestic and Family Violence Committee of the Queensland Law Society, Mr Dean Evans, Vice-President of the Gold Coast District Law Association, Mr Ken Taylor, President of the Queensland Law Society and Ms Zoe Rathus AM, Senior Lecturer in Law at Griffith University, all expressed their concern that the proposals in the bills were being pushed through without the benefit of the report of the ALRC being completed.

Criticism of evidence base for the reforms

1.30 The reforms contained in the FCFC bill and the Consequential Amendments bill relies heavily on a review conducted by PwC into efficiency of the operation of the federal courts.

1.31 There was much criticism by witnesses of the report being used to support the reforms.

1.32 Mr Arthur Moses, SC, President-elect of the Law Council of Australia told the Committee:

> What we've been concerned about as a law council is that the government could have possibly thought that this was a good idea based on a PWC report done by two accountants, as we heard I think in your Adelaide hearings, based on a six-week review. It was a desktop review with no consultation with the profession or the judiciary that is meant to be dealing with these laws that parliament has entrusted the courts with.

1.33 The Law Council of Australia in their submission also said:

> 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.

1.34 Mr Michael Fellows, a senior legal practitioner based in Townsville said:

> Part of the difficulty with the debate about the bill is that the foundation of some of what's proposed is said to be the PWC report. Most of us, as barristers, are troubled by that in the sense that it's really not a proper evidentiary basis for some of the change that's proposed.

1.35 Ms Deborah Awyzio, Chair of the Domestic and Family Violence Committee of the Queensland Law Society said:

> …the society does not agree that the PwC report makes a business case or policy foundation supportive of the changes proposed by the bills.

1.36 Ms Angela Lynch, Chief Executive Officer of the Women's Legal Services Australia pointed out to the Committee:

> The evidentiary basis for the reforms is a PwC report which clearly states in its disclaimer that the report was exclusively prepared for the Attorney-General's Department and for their sole use and benefit in accordance with a service agreement that has not been publicly provided. The PwC disclaimer says: In doing so, we acted exclusively for the Attorney-General's Department and considered no-one else's interests. It is therefore clear in PwC's own words that victims of family violence and their children have been left out in the consideration of the development of these reforms.

1.37 Mr Gregory Howe from the Family Law Committee of the Law Society of South Australia in his evidence to the Committee said:

> What the PwC report says is that one of the efficiencies in the system is to tell judges to deliver more ex tempore judgments, and that will free up a lot more judicial time. Frankly, that's the most naive proposition that you could make.

Criticism of the reforms proposed

1.38 As previously stated in this dissenting report, the reforms proposed in the bills are radical. If implemented, they will forever change the way the family law system operates in Australia.

1.39 There are many aspects of the reforms that came under criticism by witnesses before the Committee. For example:

- The Honourable Diana Bryant AO QC, former Chief Justice of the Family Court commented on the proposal for appeals to be heard by only one judge and the proposal to move the Appeals Division of the Family Court to the Federal Court. She said in her submission:

  > There is also good reason why three- member bench is appropriate for most appeals from final orders in the FCC in a discretionary jurisdiction and why a specialist Appeal Division was created... What is not adequately explained is why the appeals should not continue to be heard in the FCoA. There are thus sound reasons and considerable benefits in appeals being heard by a relatively small number of specialized judges and it is in the interests of litigants and their legal advisors for there to be as consistent an approach as possible.

- The Family Law Practitioners Association of Queensland in their submission questioned the practical benefits of the proposed reform to the structure of the courts. They said:

> In circumstances where the single court structure will retain two Divisions, it remains unclear how the effect of the FCFC Bill will simplify present complexities around the current system. The creation of Divisions of judges means there is no legitimate amalgamation of the courts. FLPA does not oppose the idea of a merger of the courts with streamlined case management and one set of rules. The concern however is that the courts must be properly funded with judges, registrars and other professional staff who are specialists.

- The Aboriginal and Torres Strait Islander Legal Service (Qld) in their submission commented on the proposed reforms being implemented without a broader inquiry of the work undertaken by the court. They said:

> The accounting review brings many useful insights but the work done by the Family Court of Australia is different from the work of the Federal Circuit Court and without a proper understanding of how the complex family matters that arise in this country are to be properly addressed in a specialist Court, the very real danger is that implementing administrative recommendations in isolation from an analysis of the substance of the legal work will worsen the current situation instead of introducing benefits.

- The Law Council of Australia raised this concern about the loss of specialisation that they consider will flow from the reforms in their submission:

> 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.

Resourcing Issues

1.40 It is recognised widely that the family law system is struggling to meet the needs of Australian families. The delays being experienced are unacceptably long.

1.41 It was also recognised by most witnesses that the family law system is under-resourced.

1.42 The Law Council of Australia noted in their submission:

> The LCA does not agree that governments have provided proper funding and resourcing to the existing family law courts system, associated services and/or Legal Aid Commissions.

1.43 Ms Deborah Awyzio, Chair of the Domestic and Family Violence Committee of the Queensland Law Society told the Committee:

> It's definitely the position of the Queensland Law Society that the system is not resourced adequately. I think our concern is that, whatever amendment is made, it has to follow through with the proper resourcing, and the bill, in our submission, is putting the cart before the horse.

1.44 Mr Michael McHugh, SC, Junior Vice President of the New South Wales Bar Association told the Committee:

> The association does not dispute that reform of the family law system is required to address the chronic underfunding and under-resourcing of the courts and legal aid, to address mismanagement of existing resources and to provide a consistent case management approach. We accept that. However, we believe it's critical not to attempt to rush the proposals without a solid and cogent rationale and without the opportunity for proper consideration of both the proposal itself and, importantly, other available alternatives which don't necessarily require legislation.

1.45 Mr Gregory Howe from the Family Law Committee of the Law Society of South Australia said in his evidence to the Committee:

> This bill just rebadges things, in our respectful submission, and it doesn't achieve anything without the proper resourcing of the entire court system and the legal aid system.

1.46 The Honourable Diana Bryant AO, QC, former Chief Justice of the Family Court told the Committee:

> But timely replacement of judges leaving is a really big issue, and I'm sure you've heard that from others. There's been a long delay on many occasions, and that just inevitably causes backlog. It is just so clear that you can overcome that quite easily by making timely appointments, and supports with registrars and family consultants, I think, would assist. Most cases settle but you don't want them sitting in the list for 11 months and then settling at the last minute. You want people working on them—people other than judges—to try and get them to settle earlier.

Importance of retaining a superior specialist court

1.47 The Family Court of Australia has been assisting Australian families put their lives back together after separation for more than forty years.

1.48 Many submitters praised the work of the Family Court and the initiatives they have taken to deal with increasingly complex families.

1.49 The Law Council of Australia in their submission said:

> 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.

1.50 Mr Paul Sansom, SC, a barrister practicing in Sydney, described the evolution of the Family Court of Australia in his submission:

> The Family Court of Australia has become the "Gold standard" internationally as a Court in the area of Family Law. I hear this often when overseas. At home I view it as having had a difficult birth in that it also had to carry much of the responsibility of quite revolutionary legislation (no fault divorce) and rapidly changing community standards. It has done these things well in my view.

1.51 Many submitters and witnesses to the Committee were concerned about the reforms having a detrimental effect on the family law system by reducing specialisation within the court structure.

1.52 Ms Angela Lynch, Chief Executive Officer of the Women's Legal Services Australia in her evidence to the Committee said:

> It is also of interest and concern that, when other jurisdictions such as Queensland and indeed across the world are moving towards and embracing a specialist court approach in responding to domestic violence, the federal system is moving away from a specialist approach. As the evaluation of the Queensland domestic violence specialist court found, specialisation provides a way of managing the complexity of domestic violence in the courts, as well as providing meaningful service to victims and perpetrators. In our view, a lack of skill can also be uneconomic in the long run.

1.53 Safe Steps Family Violence Response Centre in their submission to the Committee expressed their concerns:

> The potential loss in family law specialisation is at odds with the ALRC's emphasis in its Discussion Paper on ensuring that all legal professionals, including judges, possess specialised knowledge in the complex issues that characterise family law disputes adjudicated in the court system: family violence, child abuse, trauma-informed practice, risk, cultural competency, disability awareness and an understanding of the family violence and child protection systems. Safe Steps is concerned that a lack of judicial expertise in these areas will result in decisions that place victim survivors and their children at increased risk.

Continuing development of family law jurisprudence

1.54 One of the reforms proposed in the bills is to change the default position for appeals of decisions from Division 2 of the FCFCA, the existing Federal Circuit Court. Currently appeals from the FCC are heard by a Full Court. If these reforms are implemented appeals from Division 2 of the FCFCA will be heard by a single judge.

1.55 Some submitters expressed concern about the effect this would have on family law jurisprudence.

1.56 The Family Law Council in their submission said:

> 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.

1.57 Dr Jacoba Brasch, QC from the Australian Bar Association told the Committee:

> It is also the ABA's position not only that appeals ought be heard by specialists but that the bill currently places an emphasis on there being only one appeal judge. Our position is there should be three. Occasionally, it will be warranted to have one judge—an application to expedite an appeal or something like that—but three reasonable minds can reasonably differ, just as I've heard here this morning four reasonable minds reasonably differing. That's how you develop. That's how you develop well-thought-out policy, in this case, or jurisprudence in the family law case.

Western Australian courts

1.58 The Committee heard from submitters and witnesses that the proposed reforms will have an impact that will uniquely affect the West Australian family law courts.

1.59 The Honourable Justice Stephen Thackray, Chief Judge, Family Court of Western Australia told the Committee:-

> …the appeals from our specialist family law magistrates, most of whom have practiced in this area exclusively for more than 25 years, would be dealt with in precisely the same way as an appeal from a country magistrate who, with respect, has a very wide jurisdiction and is not known for their expertise in family law matters. We are simply asking to keep a connection that has existed since at least 2006 between our family law magistrates and those who are doing precisely the same work in the eastern states.

1.60 Ms Sarah Bright, Principal Legal Officer of the Women's Legal Service of Western Australia in her evidence to the Committee explained how it might impact the women they represent:-

> But specialist family law magistrates in WA really provide a lot more opportunity for matters to be resolved more quickly than they would be if you had to wait for a Family Court of Western Australia judge to be available. So we see family law magistrates as playing a really pivotal role, and we're concerned about the proposed change to the appeal pathway because of the long-term access-to-justice issues that we consider this might have.

Rules and Case Management

1.61 Many witnesses told the Committee that some of the stated objectives of the bills, a single set of Rules, single point of entry and a common case management approach, could be achieved without legislation.

1.62 The Law Council of Australia in their submission to the Committee said:

> …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)

1.63 Ms Deborah Awyzio, Chair of the Domestic and Family Violence Committee of the Queensland Law Society told the Committee:

> We agree that 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 to be little controversy as to their merits, they have near universal acceptance, and they can be implemented by reference to the rules of court with no legislative amendments required.

Majority report

1.64 The majority report tabled by government Senators was notable in its overwhelmingly critical description of the current bill. In fact, the report was so critical, the recommendation that the bill be passed is surprising. The minority report filed by Senator Rex Patrick is also overwhelmingly negative, and recommends the bill not be passed.

1.65 The government is yet to respond or commit to any of the majority report's recommendations – which effectively gut the government's original bill. The family court system has now been left in a horrible state of limbo.

Conclusion by Labor Senators

1.66 Labor Senators are very concerned about the wide-ranging criticism of the bills, and the reforms they would implement.

1.67 It is clear that lack of consultation before the bills were drafted has resulted in ill-considered reforms that will not meet the needs of Australian families.

1.68 Labor Senators consider that if proper consultation had occurred, the bills would be in a very different form to what has been introduced to Parliament.

1.69 It is of great concern to Labor Senators that the bills will have unintended consequences on the Western Australian courts and are equally concerned other unintended consequences may result from the proposed reforms.

1.70 Labor Senators consider that the Government must take responsibility for the delays being experienced in the family law system. Delays in replacement of judges, inadequate funding for legal aid and a lack of judicial resourcing have all contributed.

1.71 Without appropriate resourcing the family law system will never adequately meet the needs of Australian families.

1.72 Labor Senators agree with many submitters and witnesses that the ALRC report must be considered before any reforms are undertaken.

1.73 Labor Senators note the evidence from key stakeholders that some of the objectives of the reforms could be undertaken without legislative change.

1.74 Labor Senators note that the Attorney-General is yet to reverse his earlier position of not appointing any further judges to Division 1 of the proposed amalgamated courts. Unless he does so, these bills remain an effective abolition of the Family Court over time.

1.75 Reforming the family law system is an important task. It should not be rushed, especially in the short time remaining before an election.

Recommendation 1

1.76 Labor Senators recommend that the bills not be passed.

Senator Louise Pratt

Deputy Chair