



Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

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

Our ref: (NDC - FLC)

By post and by email: legcon.sen@aph.gov.au

Dear Committee Secretary

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

Thank you for the opportunity to provide comments on the Federal Circuit and Family Court of Australia Bill 2018 and Federal Circuit and Family Court of Australia (Consequential Amendment and Transitional Provisions) Bill 2018. The Queensland Law Society appreciates being consulted on this important issue.

This response has been compiled with the assistance of the Family Law Committee and the Domestic and Family Violence Committee who have substantial expertise in this area.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide.

QLS assists legal practitioners to continually improve their services, while monitoring their practices to ensure they meet the high standards set for the profession in Queensland. The QLS assists the public by advising government on improvements to laws affecting Queenslanders, and working to improve their access to the law.

In summary, QLS does not support the Federal Circuit and Family Court of Australian Bill 2018 and Federal Circuit or the Family Court of Australia (Consequential Amendment and Transitional Provisions) Bill 2018. In our view, the proposed reforms are significantly flawed and the Bills will not achieve their intended objective.

FCFCA Bill 2018 and FCFCA (Consequential Amendments and Transitional Provisions) Bill 2018

We provide the following specific comments in relation to the Bills:

Single Specialist Court

QLS supports the Law Council of Australia's view that the existence of two separate courts, with different rules, procedures and processes produces unnecessary complexity. 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.

Specialisation

In time, it appears the proposal will involve a move away from family law specialisation within the court. In effect, this would see a court well-versed in sensitive family law matters abolished in favour of a court which handles multiple areas of law. We submit that this would be to the detriment of families who will not have the benefit of the expertise the Family Court currently provides.

The proper determination of family law matters requires a high level of skill and extensive knowledge of a wide range of issues and areas of substantive law, including property, commercial law, taxation, trusts, family violence, child development, social and psychological issues impacting on litigants and children, post-separation family dynamics, diverse family structures and cultural awareness.

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.

The skill necessary to understand the complex dynamics relating to family violence and properly identify risk is essential to the practice of family law and the proper determination of family law disputes. Decisions made without this skill and expertise can place victims of family violence, including children, at increased risk.

FCFCA Bill 2018 and FCFCA (Consequential Amendments and Transitional Provisions) Bill 2018

Finally, under the proposal, the appellate jurisdiction of the Family Court will be substantially removed and appeals will be heard by a new division of the Federal Court. It is not clear whether the judges who form part of the new Family Law Appeal Division of the Federal Court will be required to have family law expertise. We submit that where this is not required, not only are families more likely to be subject to inferior, unpredictable outcomes, the development of family law jurisprudence would be adversely affected.

Context of proposed reforms

QLS shares the concerns expressed by the Law Council of Australia in relation to the limited and rushed consultation around the proposed structural reforms. 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.

Rules of Court

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 the Rules of Court.

Evidence based policy

The Society maintains that the proposed court amalgamation does not represent evidence-based policy. The Price Waterhouse Cooper report relied on in support of the court merger does not adequately demonstrate an increased capacity to properly hear and determine family law matters, particularly complex matters, without any additional funding.

Further, the comparison of matters heard in the Family Court of Australia and Federal Circuit Court is fundamentally flawed. The enormous range of cases that come before the two Courts for determination has not been adequately accounted for in the analysis provided. It also remains unclear whether, if any, stakeholders were consulted as part of the report process.

While QLS welcomes improvements to efficiency, we question how this will be achieved without the provision of appropriate resourcing. Chronic underfunding has drastically impeded the capacity of the court to hear matters in a timely and effective manner. Current wait times

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are unsustainable and can lead to detrimental outcomes for children and families. In matters involving family violence, these delays potentially expose a person experiencing family violence to greater risk. The Society strongly recommends that family law courts be provided with appropriate resources to allow matters to be heard and determined in a timely manner.

In consideration of the issues outlined above, QLS is unable to support the court reforms as proposed. QLS would welcome the opportunity to be consulted further on any proposed reforms.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy Team on [redacted] or by email to [redacted].

Yours faithfully

Ken Taylor
President