



Submission to the Legal and Constitutional Affairs Legislation Committee Regarding the *Federal Circuit and Family Court of Australia Bills 2019*

National Aboriginal and Torres Strait Islander Legal Services

April 2020

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Executive Summary and Recommendations

The Family Court deals with complex family law matters and family law matters that require a specialised approach. The *Federal Circuit and Family Court of Australia Bill 2019* (Cth) and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019* (Cth) (the **Amended Merger Bills**) would collapse the Family Court into a generalised court, becoming the Federal Circuit and Family Court of Australia.

This merger is being proposed without a sound policy basis behind it, the merger is also against expert advice.

NATSILS believes that any changes should strengthen a system, not weaken it by reducing its specialisation. If the Amended Merger Bills are allowed to pass, we will lose a stand-alone specialist superior family court, a model that has been replicated internationally due to its specialised approach.¹

The issues with the court and the family law system do not arise out of its specialisation or its structure.

The reason why the family law system is not performing as it should is because the courts, legal assistance services like ATSILS and Family Violence Prevention Legal Services and other Aboriginal Community Controlled Organisations do not receive enough public funds to provide the level of care, attention, and service that facilitates an easy access to justice.

The Amended Merger Bills do not address the real reason the family law system is not performing as it should, the lack of resourcing and support the courts and the family system receive from public funds.

Because the Amended Merger Bills do not address the root causes of the issues, NATSILS recommends that these Bills before Parliament should not be allowed to pass or be debated.

¹ New South Wales Bar Association, Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Federal Circuit and Family Court of Australia Bill 2019, 6 April 2020

NATSILS recommends the following:

- The Amended Merger Bills should not be allowed to pass the Parliament or be debated in the Senate as they would lead to the loss of a specialist family court. It is our position that greater resourcing and public money in the family law system will actually make a real difference to the justice that the community rightfully expects to receive from the family law system.
- A specialist, stand-alone and properly resourced Family Court should be maintained in Australia to continue to provide specialist assistance to children, families and survivors of family violence
- The Committee should instead advocate to the Parliament and the Government to work in true partnership with ATSILS and NATSILS to improve Aboriginal and Torres Strait Islander Peoples experience of the family law system by properly resourcing ATSILS and NATSILS to provide culturally safe and appropriately resourced throughcare and support services including the production of cultural reports for matters involving Aboriginal and Torres Strait Islander children.
- The Committee should advocate to the Parliament for a more holistic, structural reform of the family law system with a view to eliminating jurisdictional gaps, improved information sharing, and a greater focus on protecting victim survivors of family violence and children, like those recommendations that have already been made by the numerous inquiries into the family law system that have been initiated in the last few years, including the Australian Law Reform Commission's review of the family law system.²

² For example: the House of Representatives' *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*, the Australian Law Reform Commission's *Family Law Inquiry*, the Victorian Royal Commission into Family Violence, the Commonwealth Parliament's *Joint Select Committee on Australia's Family Law System*, and the House of Representatives Standing Committee on Social Policy and Legal Affairs' *Inquiry Into Surrogacy*

About NATSILS and the ATSILS

NATSILS is the national peak body for Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) in Australia.

NATSILS was established as the peak body for ATSILS in 2007. We have evolved and grown into a highly coordinated body with an expanded sphere of influence to include broader systemic issues of injustice.

We are experts on the delivery of effective and culturally responsive legal assistance services to Aboriginal and Torres Strait Islander peoples. We have a unique insight into legal and justice issues affecting Aboriginal and Torres Strait Islander people.

We bring together over 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and imprisoned people's through-care to Aboriginal and Torres Strait Islander peoples in contact with the legal system.

We proudly represent the following ATSILS around Australia:

- Aboriginal and Torres Strait Islander Legal Service Ltd (**ATSILS Qld**);
- Aboriginal Legal Rights Movement in South Australia (**ALRM**);
- Aboriginal Legal Service (NSW/ACT) Ltd (**ALS NSW/ACT**);
- Aboriginal Legal Service of Western Australia Ltd (**ALSWA**);
- North Australian Aboriginal Justice Agency (**NAAJA**);
- Tasmanian Aboriginal Community Legal Service (**TACLS**); and
- Victorian Aboriginal Legal Service Co-operative Limited (**VALS**).

Background

The Family Court of Australia (**the Family Court**) was established in 1975 by the Commonwealth Parliament with the powers granted to it by Chapter 3 of the Constitution of Australia with the passing of the *Family Law Act 1975* (Cth).

The Family Court of Australia is a stand-alone, specialist family court.

The Family Court deals with complex family law matters and family law matters that require a specialised approach. These might include parenting cases involving child welfare agencies, family violence, child abduction under the Hague Convention or financial cases that involve multiple parties, multiple expert witnesses, complex questions of law, jurisdictional issues or complex issues concerning superannuation.³

The Court maintains registries in all states and territories except Western Australia. Western Australia maintains its own family law courts system.⁴

From its inception, the Family Court of Australia has always tried to promote the settlement of cases through non-litigious means through counselling, dispute resolution, or conferencing while also providing holistic support, counselling and assessment services to the people who access the courts.⁵

With the *Federal Circuit and Family Court of Australia Bill 2019* (Cth) and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019* (Cth) (**the Amended Merger Bills**) the Commonwealth Government is proposing to merge the Family Court of Australia with the Federal Circuit Court of Australia into a single generalised court.

The Federal Circuit Court of Australia was established in 1999 to deal with shorter and simpler federal matters as an alternative to litigation in the Federal Court of Australia. It was the first time a lower level court was established in federal jurisdiction.

The Federal Circuit Court was originally called the Federal Magistrates Court of Australia.⁶

³ Family Court of Australia, *About the Court*, <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/>>

⁴ Family Court of Australia, *About the Court*, <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/>>

⁵ Family Court of Australia, *Indigenous Families and the Courts*, <http://www.familycourt.gov.au/wps/wcm/connect/8fa1449f-1244-4f01-9bda-e43c890f1eef/BRATSI_0313_V4_web.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-8fa1449f-1244-4f01-9bda-e43c890f1eef-ILd0g7L>

⁶ Federal Circuit Court of Australia, *About the Federal Circuit Court*, <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/about-fcc>>

As a low court with federal jurisdiction the Federal Circuit Court hears family matters, admiralty matters, bankruptcy, migration, intellectual property, and a number of other simple general federal matters.

The Federal Circuit Court's family law jurisdiction covers most applications for divorce, simple child support and child maintenance matters, parenting orders, simple divisions of property or payment of maintenance and parentage declarations.⁷

If the Amended Merger Bills pass through the Parliament, we will lose our stand-alone, specialist, superior family court which will be rolled into a generalist court. The current Family Court has been admired around the world because of its specialisation and has been replicated in jurisdictions as diverse as Canada and Singapore.⁸

Any big structural change should strengthen a system, not lessen its specialisation, particularly as the Family Court. Allowing the Amended Merger Bills to pass would also be against expert advice, including that of the former Chief Justice of the Family court, the Honourable Alastair Nicholson who warned that: 'experience in Australia and overseas suggests that where a family court is a division of a generalist court, or where family law cases are simply assigned to judges or magistrates in a generalist court, the quality of performance suffers greatly.'⁹

The issues with the court and the family law system do not arise out of its specialisation or its structure, rather the courts, legal assistance services like ATSILS and Family Violence Prevention Legal Services and other Aboriginal Community Controlled Organisations do not receive enough public funds to provide the level of care, attention, and service that facilitates an easy access to justice.

The Honourable John Pascoe, the former Chief Justice of the Family court has confirmed that 'many of the difficulties apparent with the system, and particularly with the Family Court, can be solved by an injection of funds, and particularly into legal [assistance services].'¹⁰

We oppose the proposal outlined in the Amended Merger Bills and we are in opposition alongside the Law Council of Australia, Women's legal Services Australia, Community Legal Centres Australia, sexual, domestic and family violence service providers and their peak bodies,

⁷ Federal Circuit Court of Australia, *About the Federal Circuit Court*,
<<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/about-fcc>>

⁸ New South Wales Bar Association, Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Federal Circuit and Family Court of Australia Bill 2019, 6 April 2020

⁹ The Hon Chief Justice Alastair Nicholson and Margaret Harrison, '*Family Law and the Family court of Australia: Experiences of the First 25 Years*', 2000, Melbourne University Law Review 756 quoted in New South Wales Bar Association, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Federal Circuit and Family Court of Australia Bill 2019*, 6 April 2020

¹⁰ Family Court of Australia, *Submission by the Honourable John Pascoe AC CVO, Chief Justice of the Family Court of Australia*, 18 May 2018

specialist family law and child protection legal assistance providers, academics, lawyers and other key stakeholders.¹¹

¹¹ Law Council of Australia, *Put Safety First in Family Law, Abandon Flawed Family Court Merger*, 11 November 2019 (Press Release)
<<https://www.lawcouncil.asn.au/media/media-releases/put-safety-first-in-family-law-abandon-flawed-family-court-merger>>

Towards A Better Family Law System For Aboriginal And Torres Strait Islander People

Any significant changes to the family law system that will impact Aboriginal and Torres Strait Islander families must be underpinned by the principles of self-determination and should be designed in collaboration with our communities.

Changes to the family law system must also take a human rights centered approach informed by principles of collaboration across the courts, service providers and other relevant departments and organisations, including greater information and data sharing.

Ultimately, all changes to the family law system must place the safety of people experiencing family violence and the rights of the child at the forefront, particularly a child's right to culture and equal access to justice. Particularly important as almost 70% of matters before the Commonwealth family courts involve allegations of family violence.¹²

A good family law system would also provide sufficient public funds for the preparation of cultural reports to the courts for all cases before them that concern Aboriginal and Torres Strait Islander children, similar to the Cultural Reports that can be requested by judges of *Te Kōti ā-Whānau Aotearoa*/ the Family Court of New Zealand.

These reports would equip judges and decision makers with knowledge about that child's culture and community ties so that better, culturally safe decisions can be made by the courts with respect to a child's welfare. These public funds for cultural reports would be allocated to ATSILS for staff training to develop these reports, including travel to allow the report writers to visit a child's family and communities.

In turn, the *Family Law Act 1975 (Cth)* would be amended to require judges to consider cultural reports and the opinions of cultural advisors when making decisions on family law matters involving Aboriginal and Torres Strait Islander children. This change would significantly increase the cultural safety of courts as well as provide better justice to all Aboriginal and Torres Strait Islander people involved in family disputes.

These changes would require a commitment of more public funding and also the proper resourcing of Aboriginal and Torres Strait Islander community controlled services, including ATSILS and family violence prevention legal services.

¹² Women's Legal Services Australia, *Safety First in Family Law*, 2019, <www.wlsa.org.au/campaigns/safety_first_in_family_law>

Addressing the Root Causes Of The Problems In The Family Law System

Australia's family law system is currently not serving the best interests of Aboriginal and Torres Strait Islander children or families as well as it must. This is not a failure of the courts, but rather a chronic lack of public funding to support the system by successive governments.

Because of this under the current system, programs that work like those promoting cultural healing and cultural safety led by our community-controlled organisations are not prioritised or embedded in all elements of our family law responses.

The family law system is struggling to provide adequate care for people experiencing family violence through holistic, trauma-informed care, culturally safe support services, early intervention and prevention programs, community based healing programs, or counselling.

Finally, legal assistance services, like Aboriginal and Torres Strait Islander Legal Services are not resourced with enough public funding to meet the incredible demand on our services, with the amount of real funding provided to them by governments of all persuasions declining since 2013.

A modern family law system would have a focus on Aboriginal and Torres Strait Islander community-controlled organisations providing family support services that are culturally safe while also properly resourcing current programs and services that work to keep victim survivors of family violence and children safe. Programs like the Aboriginal and Torres Strait Islander List currently operating in the Sydney, Adelaide, Darwin, Alice Springs, and Melbourne registries of the Federal Circuit Court can be expanded and strengthened.

This court list balances the need to protect families from further harm through legal processes by providing access to culturally appropriate services, timely court dates and culturally safe legal services whilst also ensuring orders are made which protect victim survivors and children from family violence.

Furthermore, we are of the view that a good family law system must be trauma-informed and one that always aims to build trust and healing with Aboriginal and Torres Strait Islander communities while always upholding the safety of our children.

A modern family law system must also be well-resourced on every level: essential family support services, additional judicial resources, legal resources, family consultants, Aboriginal Liaison Officers, cultural awareness training, independent children's lawyers and other experts.

The Amended Merger Bills before the Parliament do not do this in any meaningful way. Any radical change, like the one proposed by the Amended Merger Bills should be made only to improve the family law system for the better. The Amended Merger Bills do not tackle the root causes of the dysfunction of the current system and they should not be supported.

Numerous inquiries have recommended that courts increase their specialisation to improve decisions and outcomes for children and families.¹³ A specialist stand-alone family court is critical to ensure specialist knowledge and training for judicial officers, registrars and court staff and ensures the court is able to identify and manage risk, and protect Aboriginal and Torres Strait Islander women and their children.

NATSILS believes that the court's specialisation increases the safety of families, particularly for those disproportionately impacted in the family law and family violence systems, including Aboriginal and Torres Strait Islander people. However, this specialisation has to be backed up with a significant contribution of public funding to the Family Court.

It must be noted here that Family violence is not part of Aboriginal culture. The disadvantage, dispossession and attempted destruction of Aboriginal cultures since colonisation has meant that family violence has proliferated in Aboriginal communities. The trauma of colonisation and oppression is directly linked to the complexity and prevalence of family violence that exists today.

Family violence responses have systematically failed to accommodate for the cultural and social contexts of Aboriginal and Torres Strait Islander people in accessing the family law system.

The Commonwealth's proposal to merge the Courts does not remove the significant barriers in accessing culturally safe and speedy justice for Aboriginal and Torres Strait Islander people.

Further, there is no rationale for the Amended Merger Bills and they lack a sound evidentiary foundation¹⁴. A desktop review by PWC, which was presented as the original business case for the proposal, has been discredited.

The PWC report was commissioned to justify the proposal in the Amended Merger Bills and was done without consulting key stakeholders and it did not examine the key issues like a lack of

¹³ New South Wales Bar Association, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Federal Circuit and Family Court of Australia Bill 2019*, 6 April 2020

¹⁴ New South Wales Bar Association, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Federal Circuit and Family Court of Australia Bill 2019*, 6 April 2020

proper funding or the many other inquiries into the family law system that had already been commissioned.¹⁵

We have a real opportunity to have an informed and proper discussion that centres the experiences, wellbeing and cultural safety of Aboriginal and Torres Strait Islander people in the family law system.

The Commonwealth must consider other options to improve how the family law system protects and cares for people, particularly Aboriginal and Torres Strait Islander people.

Recommendations

- The Amended Merger Bills should not be allowed to pass the Parliament or be debated in the Senate as they would lead to the loss of a specialist family court. It is our position that greater resourcing and public money in the family law system will make a real difference to the justice that the community rightfully expects to receive from the family law system.
- A specialist, stand-alone and properly resourced Family Court should be maintained in Australia to continue to provide specialist assistance to children, families and survivors of family violence
- The Committee should instead advocate to the Parliament and the Government to work in true partnership with ATSILS and NATSILS to improve Aboriginal and Torres Strait Islander peoples experience of the family law system by properly resourcing ATSILS and NATSILS to provide culturally safe and appropriately resourced throughcare and support services including the production of cultural reports for matters involving Aboriginal and Torres Strait Islander children.
- The Committee should advocate to the Parliament for a more holistic, structural reform of the family law system with a view to eliminating jurisdictional gaps, improved information sharing, and a greater focus on protecting women and children from family violence, like those recommendations that have already been made by the numerous inquiries into the family law system that have been initiated in the last few years, including the Australian Law Reform Commission's review of the family law system.¹⁶

¹⁵ New South Wales Bar Association, Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Federal Circuit and Family Court of Australia Bill 2019, 6 April 2020

¹⁶ For example: the House of Representatives' *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*, the Australian Law Reform Commission's *Family Law Inquiry*, the Victorian Royal Commission into Family Violence, the Commonwealth Parliament's *Joint Select Committee on Australia's Family Law System*, and the House of Representatives Standing Committee on Social Policy and Legal Affairs' *Inquiry Into Surrogacy*
