



Australian Government  
Attorney-General's Department

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

**Attorney-General's Department submission to the  
Senate Legal and Constitutional Affairs Legislation  
Committee**

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# 1. Introduction

The Attorney-General's Department welcomes the opportunity to provide the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) with this submission as part of the Committee's inquiry into the Federal Circuit and Family Court of Australia Bill 2018 (the FCFC Bill) and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (the Consequential Amendments Bill) (together 'the legislation').

The Attorney-General's Department has portfolio oversight of the federal courts (including the Federal Court of Australia (Federal Court), Family Court of Australia (Family Court), and Federal Circuit Court of Australia (Federal Circuit Court)) and policy responsibility for the family law system, and has led the development of the legislation in close consultation with the federal courts.

The Attorney-General and his predecessor, the Hon George Brandis QC, also closely consulted with the Heads of Jurisdiction of the federal courts over more than 12 months. Consultation with the Heads of Jurisdiction on legislative proposals is consistent with the process for consultation outlined in the *Guidelines for Communications and Relationships between the Judicial Branch of Government and the Legislative and Executive Branches Adopted by the Council of Chief Justices of Australia and New Zealand on 23 April 2014*.<sup>1</sup> Targeted consultation on the reforms was also undertaken with the Law Council of Australia and Australian Bar Association.

## The issue

Around 70 per cent of family law disputes are resolved amicably without going through the courts. Of the families who require assistance from the federal family law courts, some 89 per cent of matters are resolved in the Federal Circuit Court and 11 per cent in the Family Court. This means that only a small portion of family law disputes are resolved by the Family Court (noting that the Family Court of Western Australia (FCWA) and some state and territory courts also exercise federal family law jurisdiction).

The Family Court and the Federal Circuit Court maintain almost the same jurisdiction in family law, except for some limited application types (such as nullity of marriage<sup>2</sup>). However, each court has different court rules and approaches to case management.

The current system has become increasingly challenged. There is widespread agreement amongst those accessing the family law courts, practitioners, the wider family law sector and the community, that the current federal family court structure does not serve families as it should. The significant overlap between the two courts' family law jurisdiction, while maintaining very different

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<sup>1</sup> See also: *Guide to Judicial Conduct (Third Edition)* (2017) pg 6.

<sup>2</sup> *Family Law Act 1975*, sections 39(1A) and 4(1).

approaches to case management, has created confusion, delay and unnecessary costs for thousands of Australian families. The two-court system is widely described as a failure.

Families are often confused about whether they are to file their family law matter in the Family Court or the Federal Circuit Court because of the courts' overlapping jurisdiction. In circumstances where matters do need to be transferred between the courts, it takes on average 11.1 months for a matter to be transferred from the Federal Circuit Court to the Family Court and 4.6 months for a matter to be transferred from the Family Court to the Federal Circuit Court.<sup>3</sup> This wastes money and up to almost a year of Australian families' time.

Over the past five years, the number of family law matters pending in the Family Court and the Federal Circuit Court has grown from 17,200 to 21,000. Since 2012-13, the age of pending cases has also increased, with approximately 29 per cent of Federal Circuit Court and 42 per cent of Family Court pending final order cases now older than 12 months. The national median time to trial has also increased from 10.8 months to 15.2 months in the Federal Circuit Court, and from 11.5 months to 17 months in the Family Court.<sup>4</sup>

Delays, confusion and increased costs caused to parties by inefficient court processes are not allowing Australian families the access to justice they expect and deserve.

## The reforms

On 23 August 2018, the legislation was introduced into Parliament. Its primary purpose is to improve justice outcomes for Australian families. The legislation brings together the Family Court and the Federal Circuit Court into an overarching, unified administrative structure to be known as the Federal Circuit and Family Court of Australia (FCFC). The legislation also establishes the Family Law Appeal Division in the Federal Court of Australia (the Federal Court) which will hear family law and child support appeals from the FCFC as well as appeals from the FCWA.

Unlike other suggestions for restructuring the courts, such as the New South Wales Bar Association's proposal for a Family Court of Australia 2.0,<sup>5</sup> the legislation has been developed in close consultation with the Heads of Jurisdiction of the federal courts. The reforms acknowledge that Judges of both the Federal Circuit Court and the Family Court are under pressure, and that structural changes are required to facilitate a more cohesive family law court system.

The reforms take the least radical path to change, while ensuring that the current barriers to improvement in the family law system are addressed. They are a necessary step towards a unified, consistent, and clear set of case management, practice and procedures and court rules.

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<sup>3</sup> PwC, *Review of efficiency of the operation of the federal courts*.

<sup>4</sup> PwC, *Review of efficiency of the operation of the federal courts*.

<sup>5</sup> New South Wales Bar Association, Media Release, *Time to Talk About a Family Court of Australia 2.0*, 31 July 2018.

The reforms will ultimately improve the efficiency of the family law system, reduce the backlog of matters before the family law courts, and lead to faster, cheaper and more consistent resolution of disputes.

Key aspects of the reforms are outlined below in Part 4.

### **Overview of submission**

This submission seeks to provide an overview of the reforms, including the context in which the reforms are being undertaken, the key drivers of the reforms and the benefits that are expected to arise as a result of the legislation. Additionally, the submission addresses the relationship that the reforms have with the Australian Law Reform Commission (ALRC) review of the family law system, and provides responses to key issues raised in submissions made to the Committee available at the time of writing.

## 2. Context of the reforms

The Australian Government is committed to delivering a family law system that supports the needs of Australians – both now, and into the future. A central component of this commitment is to ensure that families can resolve their disputes as quickly, easily and cheaply as possible.

Two key elements of the Government’s broad reform agenda are the Australian Law Reform Commission’s comprehensive review of the family law system, discussed below in Part 6, and the structural changes to the family courts.

There are also more than twenty other current streams of reforms to the family law system underway. None of these reforms are dependent upon each other. Pilots undertaken, and learnings generally from the reforms, inform the ongoing consideration of how to ensure the family law system best helps families to resolve their disputes. Details on those other reforms are set out in the following pages.

The structural changes build on measures introduced in the 2015-2016 Budget. In that year, the Government provided additional funding to the federal courts of \$22.5 million over four years, an efficiency dividend relief for judges’ salaries worth \$13 million over four years, and \$30 million in funding for critical maintenance of court buildings. The Government also introduced new administrative arrangements, merging the corporate services of the federal courts and bringing the courts into a single administrative entity, delivering savings of \$9.4 million over six years to 2020-21 and \$5.4 million annually thereafter. These savings are being reinvested into the courts to enhance their capacity to provide services, particularly in family law.

The Government also currently funds a range of programs and services to assist families resolve their disputes, and is progressing some other crucial and urgent reforms to improve outcomes for families. These programs and initiatives are discussed below.

### Legislative reform

The Government’s current legislative reform initiatives are in direct response to the current challenges and pressures facing the family law system, which require immediate attention. These include:

- The *Family Law Amendment (Family Violence and Other Measures) Act 2018* commenced on 1 September 2018. The reforms will improve the capacity of the family law system to provide effective outcomes to families experiencing violence.
- The *Civil Law and Justice Legislation Amendment Act 2018* commenced on 26 October 2018. The Act makes amendments to improve the operation of the *Family Law Act 1975*, and other civil justice legislation. The family law amendments include reforms which clarify the definitions of family counselling, family dispute resolution and Registry manager; establish cost protections for litigation guardians in family law matters; and remove doubts about immunities for Registrars

conducting conferences with parties in family law property matters. The Act also strengthens the response to international child abduction by establishing new criminal offences for unlawful retention of a child overseas, and a defence of fleeing family violence – these provisions will commence on 25 April 2019.

- The Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 passed the House of Representatives on 11 September 2018, and is awaiting debate in the Senate. The reforms would appropriately protect victims of family violence from being directly cross-examined, or having to directly cross-examine their perpetrators in family law proceedings in certain circumstances.
- The Family Law Amendment (Parenting Management Hearings) Bill 2017 is currently before Parliament. In the 2017-18 Budget, the Government provided \$12.7 million over four years to establish and operate a pilot of Parenting Management Hearings – a more flexible and inquisitorial alternative to the court process for resolving parenting disputes. The Bill was introduced into Parliament on 6 December 2017, and would provide the legal framework to support the pilot.

## **Funding initiatives**

The family law services system provides universal access to information, support and mediation services that are designed to improve the well-being of Australian families, particularly separating or separated families with children.

In 2018-19, the Government will provide \$162.2 million to fund eight service types of family law services under the Family Relationship Services Program (FRSP).

The funded services include:

1. Family Relationship Centres
2. Children’s Contact Services
3. Family Dispute Resolution Services
4. Regional Family Dispute Resolution
5. Counselling
6. Parenting Orders /Post Separation Cooperative Parenting Program
7. Supporting Children After Separation Program, and
8. Family Relationship Advice Line, including Telephone and Online Dispute Resolution and a Legal Advice Service.

In November 2017, the Government committed to continue funding the family law services for a further five years, commencing from 1 July 2019. Over \$800 million has been committed to continue funding family law services that directly support families to resolve their disputes outside of court for the next five years.

The Australian Government also funds legal aid commissions and community legal centres through the *National Partnership Agreement on Legal Assistance Services 2015-20* (the NPA) to provide legal assistance services to vulnerable and disadvantaged people. The Government will provide over \$1.3 billion to legal aid commissions and community legal centres through the NPA from 2015-2020 to deliver front line services to disadvantaged Australians. People experiencing, or at risk of, family violence are one of 11 priority client groups under the NPA. Legal assistance service providers, where appropriate, are expected to plan and target their services to those who fall within one or more of these priority client groups. The NPA also details a range of family law priorities towards which family law services should be focussed, including matters involving allegations of family violence.

Since 2015, the Government has invested in three key packages to support families experiencing family violence. The 2015 Women's Safety Package provided \$100 million to a range of services, with the department administering \$15 million for specialist domestic violence units (DVUs) and health justice partnerships (HJPs).

In 2016, a further \$100 million was committed to support implementation of the Third Action Plan of the National Plan to Reduce Violence against Women and their Children 2010-2022, with the department administering \$30 million for family relationship and legal assistance services comprising:

- \$18.5 million for legal aid commissions to integrate duty lawyer and family violence support services in family law court registries through Family Advocacy and Support Services (FASS)
- \$6.2 million for selected Family Relationship Centres to deliver pilots of legally-assisted and/or culturally appropriate family dispute resolution to vulnerable families, particularly Indigenous and culturally and linguistically diverse families
- \$4.92 million to extend funding for the specialist domestic violence units and health justice partnerships established under the Women's Safety Package by an additional year, until 30 June 2019, and
- \$0.3 million to improve the contribution of legal assistance data to the broader evidence base – the department is working with the ABS and the sector to establish this project.

In the 2017-18 Budget, a further \$26.8 million in additional funding was committed specifically for family law services, and \$55.7 million was provided to restore funding for legal assistance services. The family law funding comprised:

- \$12.7 million to pilot Parenting Management Hearings – a less adversarial and multi-disciplinary approach for resolving parenting disputes outside of court



- \$10.7 million in new funding for the family courts to engage additional family consultants to assist in ensuring the courts have access to timely information about safety and other issues relevant to decision-making in family law parenting cases, and
- \$3.4 million to expand the specialist domestic violence units.

Additionally, \$39 million of the \$55.7 million provided to restore legal assistance services was directly targeted towards family law and family violence related services in community legal centres (CLCs) over three years.

On 20 November 2018, the Minister for Women delivered the inaugural Women’s Economic Security Statement and announced a package of measures which included \$98.4 million in new funding for legal and social support services for families engaged in the family law system. The measures include:

- Ongoing funding, initially \$7 million over three years, to support implementation of the Family Violence and Cross-examination of Parties Scheme. Legal Aid Commissions will be funded to provide legal representation to parties to prevent direct cross-examination of victims and perpetrators in family law cases involving family violence
- \$31.8 million each year, in ongoing funding, to continue the existing specialist Domestic Violence Units and Health Justice Partnerships across Australia, and expand these services to include financial advice, counselling and literacy services
- \$50.4 million in new funding for family law property mediation services:
  - \$13 million each year, in ongoing funding, for the 65 Family Relationship Centres (FRCs) across Australia to help families reach agreements about splitting their property after separation (helping these families to avoid going to court), and
  - \$10.3 million for Legal Aid Commissions to run a two year trial of lawyer-assisted mediation in each state and territory. Using a more relaxed means and merit test, the trial will support families with asset pools of up to \$500,000 (excluding debt) to resolve their property disputes with the help of experienced legal aid lawyers, and
- \$5.9 million in new funding for the federal family courts to conduct a two year trial of simpler and faster court processes for resolving family law property cases with an asset pool of up to \$500,000 (excluding debt). Additional court Registrars will be appointed to help separated couples prepare consent orders to be lodged with the court, and a short-form process will be used if the case needs to be decided by a judge, and
- \$3.3 million will be provided to the Australian Taxation Office to develop an electronic information-sharing system to ensure that the family law courts have better visibility of superannuation information in family law property cases. The non-disclosure of information

about assets delays family law property cases; giving the court access to superannuation information held by the ATO is expected to result in faster and fairer family law property settlements.

### 3. Drivers for reform

The structure and operation of the federal family courts have been considered over a number of years. In particular, a number of inquiries and reviews related to the federal courts and the family law system have been undertaken over the past decade and assisted in developing the present reforms, including:

- the 2008 Semple Review entitled *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance*
- a 2014 KPMG Review entitled *Review of the performance and funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia*
- a 2015 Ernst & Young Report entitled *High Level Financial Analysis of Court Reform Initiatives*
- the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs Report entitled *A better family law system to support and protect those affected by family violence: Recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence*, and
- a 2018 PwC Report entitled *Review of efficiency of the operation of the federal courts*.

Each of these reviews involved significant consultation with the Courts through the Heads of Jurisdiction, other family law stakeholders and the community.

While different reports may present different options for change, what is clear from these reports is that the current structure of the family law system is untenable.

#### **PwC Report**

The PwC Report of April 2018 outlined a challenging user-experience in the family court system and, in the Government's view, makes clear that the current state of affairs needs urgent attention and reform.

The PwC report highlights some differences in the rate of matters finalised between the two courts. The department does not consider these a criticism of the Family Court or the Federal Circuit Court, nor are they a criticism of a particular Judge or group of Judges. Rather, the Report identifies the challenges faced by the courts and users of the court system, and outlines opportunities for improvement for the benefit of Australian families.

Subsequent to the PwC report being released, some have mistakenly interpreted the Government's proposed legislative reforms as choosing a 'winner' between the Family Court and Federal Circuit Court. This interpretation is incorrect. The reforms are about improving the performance of both courts for the benefit of Australian families.

Examples of the concerning observations made in the PwC report include the following:

- The median time to trial is 17 months in the Family Court and 15.2 months in the Federal Circuit Court.
- It takes on average 4.6 months for the Family Court to transfer a matter to the Federal Circuit Court and 11.1 months for the Federal Circuit Court to transfer a matter to the Family Court.
- Almost half (approximately 42 per cent) of all Family Court pending final order cases are older than 12 months, compared to 29 per cent in the Federal Circuit Court.
- Party/party costs are estimated to be \$110,000 per matter in the Family Court, and \$30,000 per matter in the Federal Circuit Court.

The PwC Report used final orders to assess the number of matters handled by each court in a year. The use of final orders as a measurement is the most useful and comparable measure of the family law caseload of the courts as those orders require judicial determination and therefore significant court time. A system that has almost half (in the Family Court) and a third (in the Federal Circuit Court) of Australian families waiting more than 12 months for a decision is clearly not working.

There may be some differences in the complexity of cases heard between the Family Court and the Federal Circuit Court. However, PwC found it was difficult, without detailed data, to substantiate the extent of the variation in complexity of cases between the two courts. Despite this lack of data, PwC considered that the variation in productivity between the two courts cannot be accounted for merely by the level of complexity. Currently, the measurement of complexity applied in the initial assessment of a matter is mainly driven by the anticipated length of a future trial. Measuring complexity in this manner is relatively simplistic, and not likely to capture the full spectrum of issues that would make a case complex.

A further challenge for Australian families is that the Family Court and Federal Circuit Court exercise largely concurrent jurisdiction but have different rules and processes for exercising that jurisdiction. These different approaches mean that there is no single point of entry for Australian families into the federal family law courts and there is an inconsistency of experience both for them and their practitioners having to navigate the two courts' different practices and procedures.

The legislation draws on and seeks to implement a number of the opportunities for improvement identified in the PwC Report to ensure better outcomes for Australian families. These include:

- the establishment, in effect, of a single point of entry into the family law jurisdiction of the federal court system
- the consolidation of jurisdiction for first instance family law matters into a single court entity
- improved and consistent case management approaches across the family courts, and
- improved practices and management of family law appeals.

PwC estimated that structural reforms had the potential to enable significantly more matters to be resolved each year. For example, PwC estimates that a common initial case management process and managed case listing could result in up to 3,000 additional family law matters being finalised every year. Even if only a portion of these improvements were achieved as a result of the proposed reforms it would greatly benefit Australian families.

## **2008 Semple Report**

The Government closely considered the 2008 Semple Report. The Government's proposal responds directly to many of the issues raised by the Semple Report, including:

- the desirability of a single family court
- the desirability of establishing a single administration
- the importance of retaining the Federal Circuit Court's existing culture, and
- the need to eliminate unhealthy competition between the courts for resources and filings.

However, the Government considers that the Semple Review did not fully examine the totality of the three federal courts and the impact on general federal law. The Government also considers that the structure proposed by the Semple Report would have been seen as a takeover of the Federal Circuit Court by the Family Court, with a risk that the Federal Circuit Court's existing culture and relative efficiency across all practice areas would not have been retained. In addition, when the Federal Circuit Court was established in 1999 (as the then Federal Magistrates' Court), it handled approximately 20 per cent of all federal family law matters, with the balance handled by the Family Court. Today, these figures have reversed, and the Federal Circuit Court manages the overwhelming majority of family law cases, leading to a high degree of skill in this area amongst its judges.

## **2014 KPMG Review**

In 2014, KPMG was engaged by the department to undertake a review of the performance and funding of the Federal Court, Family Court and Federal Circuit Court to support future strategic decision making. The KPMG report highlighted the unsustainability of the federal courts and underlined the case for reform. Leading up to the 2015-16 Budget, the Family Court and the Federal Circuit Court were operating at substantial losses (projected at \$44 million over the forward estimates). The KPMG report found that there was scope to make savings by implementing a redefined operating model across federal court system. In particular, through enhanced use of technology, a review of judicial support and resourcing models, an increased use of registrars in procedural matters, and streamlining case management practices to adopt a consistent approach across the federal courts.

## **2015 Ernst & Young Report**

In 2015, the department engaged Ernst & Young to analyse the savings and some of the key findings in the KPMG Report about funding and performance of the federal courts. KPMG and Ernst & Young's work

in this area was used to inform the package of court reform measures announced in the 2015-16 Budget, to ensure the courts' future funding sustainability.

Under the *Courts Administration Legislation Amendment Act 2016*, the Federal Court, the Family Court and the Federal Circuit Court were brought together as a single administrative agency under the *Public Service Act 1999*, known as the Federal Court. Following these reforms, the Chief Executive Officer of the Federal Court is the head of the agency, is the accountable authority under the *Public Governance, Performance and Accountability Act 2013* and is responsible for the delivery of shared corporate services on behalf of the three courts. However, the courts retain their separate statutory identities and jurisdiction, and Heads of Jurisdiction remain responsible for the administrative affairs of their respective courts.

The proposed structural reforms build on the 2016 reforms, continuing to bring the courts closer together to create efficiencies across the federal courts to deliver better outcomes for their users.

### **2017 House of Representatives Standing Committee on Social Policy and Legal Affairs Report**

The 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs Report noted the complexity of the current family law system and recommended that consideration be given to how the family courts can improve case management of family law matters involving family violence issues (including through the adoption of a single point of entry). This aspect is also being addressed by the Government's proposed structural reforms by providing specific case management provisions with a view to achieving common case management approaches across both Divisions of the Federal Circuit and Family Court.

## 4. Key aspects of the reforms

The legislation was developed with the following key objectives:

- to create a consistent pathway for those Australian families that require assistance from the federal family courts to resolve their family law disputes
- to ensure family law disputes are resolved in the most timely, informed and cost effective manner possible
- to create a better legislative framework for the courts to implement consistent processes for the early identification of urgent and high risk matters, including in relation to family violence, and
- to retain existing arrangements for general federal law matters.

The approach taken in drafting the legislation is to largely preserve existing provisions governing the Federal Circuit Court and bring across, from the Family Law Act, relevant provisions governing the Family Court. The large majority of provisions in the FCFC Bill are the same as existing provisions. Only a small number of provisions are new or substantively changed from existing ones. These changes are designed to facilitate the creation of a more efficient family law court system, in particular, by targeting areas of potential efficiency identified in the PwC report. **Attachment A** shows the sources of the provisions in the FCFC Bill.

### The establishment of the FCFC

As noted above, the FCFC Bill brings the Federal Circuit Court and the Family Court together into an overarching, unified administrative structure to be known as the Federal Circuit and Family Court of Australia (FCFC).

The legislation does not abolish either the Family Court or the Federal Circuit Court. Both courts would continue in existence as ‘Divisions’ of the FCFC.<sup>6</sup> The FCFC would comprise two divisions. The FCFC (Division 1) would be a continuation of the Family Court – a superior court of record that specialises in the exercise of family law jurisdiction. The FCFC (Division 2) would be a continuation of the Federal Circuit Court – a court of record that exercises both family law and general federal law jurisdiction (including administrative law, bankruptcy, consumer matters, and migration).

The FCFC Bill would preserve the current cohort of judges of the Family Court and the Federal Circuit Court, including their extensive family law and family violence expertise. The department notes that some have perceived the establishment of the FCFC as a dilution of family law expertise. This is not the case. At present, the Federal Circuit Court finalises over 89 per cent of final order

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<sup>6</sup> FCFC Bill, clause 8.

family law matters in the federal court system and 90 per cent of the Federal Circuit Court's caseload consists of family law matters. The legislation would introduce a new appointment requirement for the Federal Court and the FCFC (Division 2) to ensure that future appointees have appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the courts.<sup>7</sup>

The legislation is a sensible way of bringing together the two existing courts dealing with family law as a cohesive unit with all its existing personnel. It is less radical than abolishing one or both of the Family Court and Federal Circuit Court and is consistent with the constitution. The FCFC would retain the existing courts' legal expertise, but through restructure and reformed management, practices and procedures would create a consistent, more efficient family law process for Australian families.

### **No wrong door for family law matters**

The FCFC will provide, in effect, a single point of entry into the family law jurisdiction of the federal court system. The legislation achieves this by:

- giving both Divisions of the FCFC the same family law jurisdiction and applying the same family court fees
- providing for the dual appointment of the Chief Justice of the FCFC (Division 1) and the Chief Judge of the FCFC (Division 2)
- providing for the Chief Justice of the FCFC (Division 1) and the Chief Judge of the FCFC (Division 2) to make Rules of Court for their respective Divisions and requiring that the Chief Justice and Chief Judge work cooperatively (noting the intention for the dual appointment of one person to both offices) to establish common Rules of Court for family law proceedings
- providing specific case management provisions with a view to achieving common case management approaches across both Divisions of the FCFC, and
- providing for the transfer of proceedings between the Divisions of the FCFC.

Adopting a common case management approach would pave the way for achieving, in effect, the much called-for single point of entry to the family law courts for litigants. Consistency in approaches between the Divisions would enhance the efficiency of having an effective single point of entry to the FCFC for litigants. Risks would be able to be more easily identified and managed, and families with complex needs would receive the early support and assistance they need to resolve their disputes.

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<sup>7</sup> Clause 79 FCFC Bill and item 186 Schedule 1 Consequential Bill.



## Jurisdiction of the FCFC and the Federal Court

Under the FCFC Bill, both Divisions of the FCFC would have the same jurisdiction for federal family law and child support matters.<sup>8</sup> Additionally, the FCFC Bill provides for both Divisions to hear appeals from State and Territory courts of summary jurisdiction in relation to federal family law or child support matters.<sup>9</sup> The FCFC Bill also ensures that the Federal Circuit Court's existing general federal law jurisdiction and fair work jurisdiction would be preserved in FCFC (Division 2).<sup>10</sup>

Providing both Divisions of the FCFC with the same jurisdiction for family law and child support matters means that common approaches to case management for those matters can be more easily implemented consistently across the FCFC (further discussion on case management is below).

As part of the reforms, the appellate jurisdiction of the Family Court would largely be removed and placed in a new Family Law Appeal Division to be established in the Federal Court.<sup>11</sup> As noted previously, the FCFC (Division 1) would only retain a limited appellate jurisdiction to hear appeals from State and Territory courts of summary jurisdiction exercising federal family law jurisdiction.<sup>12</sup> As there would be significantly fewer appeals handled by the FCFC (Division 1), these reforms enable the existing judicial resources of that Court to be refocussed to finalise more first instance family law matters and to clear the backlog of pending matters.

The Family Law Appeal Division of the Federal Court would be given appellate jurisdiction in relation to appeals from judgments of the FCFC (Division 1) and FCFC (Division 2) as well as appeals from judgments of the FCWA in relation to federal family law matters.<sup>13</sup> Appeals from the FCFC (Division 1) and FCWA would be heard by a Full Court of the Family Law Appeal Division to be established in the Federal Court, comprised of three Judges.<sup>14</sup> Appeals from the FCFC (Division 2) would ordinarily be heard by a single Judge of the Family Law Appeal Division of the Federal Court unless a Judge considers it appropriate for the appellate jurisdiction to be exercised by a Full Court.<sup>15</sup> Having more appeals heard by a single judge of the Federal Court would free up additional judicial resources to help reduce delays in family law appeal matters. As part of the 2018 PwC Report, it was estimated that better management of appeals could result in up to 1,500 additional

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<sup>8</sup> FCFC Bill, clauses 24, 100.

<sup>9</sup> FCFC Bill, clauses 25, 102; Consequential Amendments Bill, Schedule 1, item 72.

<sup>10</sup> FCFC Bill, clauses 99, 101.

<sup>11</sup> Consequential Amendments Bill, Schedule 1, Part 1, item 227, 228.

<sup>12</sup> FCFC Bill, clause 25. The FCFC (Division 2) will also have limited appellate jurisdiction to hear these appeals – refer to FCFC Bill clause 102; Consequential Amendments Bill, Schedule 1, item 72.

<sup>13</sup> Consequential Amendments Bill, Schedule 1, Part 1, item 227, 228.

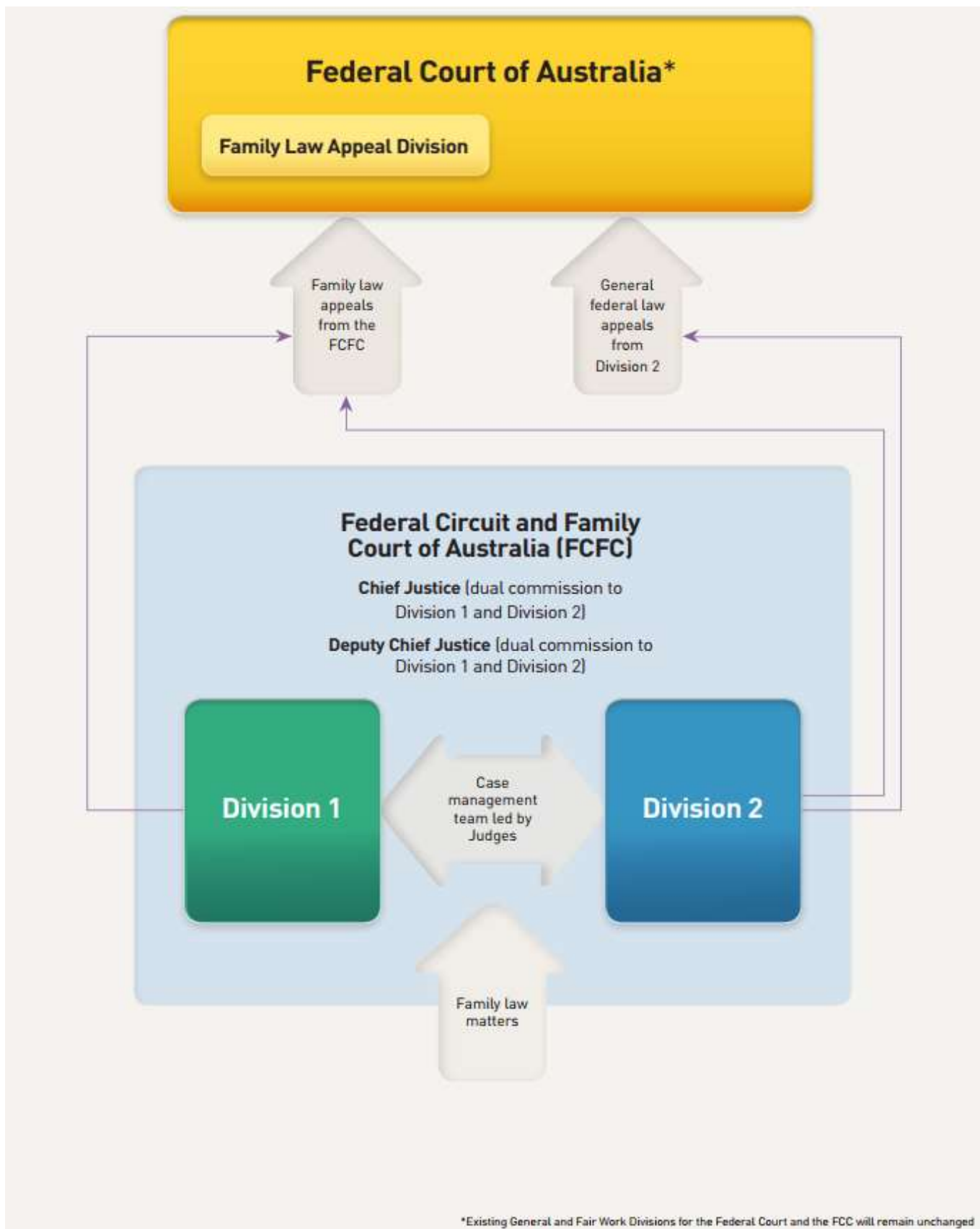
<sup>14</sup> Refer to operation of *Federal Court of Australia Act 1976*, s 25.

<sup>15</sup> Consequential Amendments Bill, Schedule 1, Part 1, item 229. Currently, appeals from the Federal Circuit Court to the Family Court can be heard by a single judge. In 2016-17, however, 75 per cent of appeals from the Federal Circuit Court were heard by a Full Bench of three Family Court judges.

family law matters being finalised every year. That means 1,500 more families afforded the opportunity to move on with their lives more quickly than they are currently able.

The workloads and throughput of the courts would be closely monitored to ensure that the reforms are delivering the anticipated efficiencies.

Figure 1: Proposed Federal Courts Structure



## Leadership of the FCFC

The FCFC Bill facilitates the operation of the FCFC under the leadership of one Chief Justice, supported by one Deputy Chief Justice. As the Divisions of the FCFC are separate courts, the legislation provides for a Chief Justice and Deputy Chief Justice of the FCFC (Division 1) and a Chief Judge and Deputy Chief Judge of the FCFC (Division 2).<sup>16</sup> However, the legislation also provides that the same person can be dually appointed as the Chief Justice and Chief Judge, and the Deputy Chief Justice and Deputy Chief Judge, and in practice it is intended that the Chief Justice and Deputy Chief Justice would each hold a dual commission to both Divisions of the FCFC.<sup>17</sup>

On 27 September 2018, the Attorney-General announced the appointments of the Hon Justice William Alstergren as the new Chief Justice of the Family Court and the Hon Justice Robert McClelland as the new Deputy Chief Justice of the Family Court, to commence upon the retirement of the current Chief Justice of the Family Court, the Hon John Pascoe AC CVO, on 10 December 2018. Justice Alstergren will retain his commission as Chief Judge of the Federal Circuit Court. Subject to passage of the legislation, these appointments will transition into the FCFC structure.

This would mean that Justice Alstergren would transition to be both the Chief Justice of the FCFC (Division 1) and the Chief Judge of the FCFC (Division 2) and Justice McClelland would become the Deputy Chief Justice of the FCFC (Division 1). While the appointment of a Deputy Chief Judge of the FCFC (Division 2) would be a matter for Government, given the Government's clear preference to have a dual appointment for both the Chief Judge and Chief Justice (in Justice Alstergren), it could be anticipated that Justice McClelland would also be dually appointed as Deputy Chief Justice of the FCFC (Division 2).

The single leadership and management of both Courts by a single Chief Justice supported by a single Deputy Chief Justice would allow for redesigning consistent internal approaches to case management, practice and procedures across both Divisions. It is also expected that a common Head of Jurisdiction would ensure the issuing of common Rules of Courts, practice notes and directions.

## Common Rules of Court and case management

One of the drivers of the Government's proposed reforms is to facilitate a new case management approach, in which both Divisions will operate as one cohesive entity, applying consistent case management approaches in family law matters and, in time, applying consistent Rules of Court. The new common case management approach is not contained in the legislation. Rather, the legislation

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<sup>16</sup> FCFC Bill, subclauses 9(2), 10(2). The role of the Deputy Chief Judge of the FCFC (Division 2) will be a newly created role.

<sup>17</sup> Refer to FCFC Bill, clause 20, 97.

provides a leadership structure that will facilitate the development and implementation of this approach. In particular, one of the objects of the FCFC Bill is to provide a framework to facilitate cooperation between both Divisions of the FCFC with the aim of ensuring common Rules of Court and forms, common practices and procedures, and common approaches to case management.<sup>18</sup>

A key advantage in providing for a dually appointed Chief Justice of the FCFC is that it would more effectively achieve a consistent set of court rules and consistent internal approaches to case management across both Divisions of the FCFC. This is because under the FCFC Bill the Chief Justice would have the power to make the Rules of Court for the FCFC (Division 1) and the Chief Judge has the power to make the Rules of Court for the FCFC (Division 2).<sup>19</sup> For the purposes of ensuring the efficient resolution of family law or child support proceedings, the FCFC Bill requires the Chief Justice of the FCFC (Division 1) and the Chief Judge of the FCFC (Division 2) to work cooperatively with the aim of ensuring common Rules of Court.<sup>20</sup> The FCFC Bill also provides that Chief Justice of the FCFC (Division 1) and the Chief Judge of the FCFC (Division 2) may appoint committees consisting of judges and other persons to advise on the making of rules.<sup>21</sup>

Initially, upon commencement of the reforms, the Federal Court and the two Divisions of the FCFC would largely maintain their existing Rules of Court. However, Schedules 6 to 9 of the Consequential Amendments Bill make necessary amendments to those Rules of Court to ensure that the FCFC and the Family Law Appeal Division of the Federal Court are able to operate appropriately. Over the course of 2019, the Federal Court and the FCFC would undertake a comprehensive review of their respective Rules of Court, to consolidate and update those rules with a view to greater harmonisation of procedures. \$4 million has been allocated to support implementation of the proposed reforms as part of the 2018-19 Budget, part of which will fund a comprehensive review of court rules.

While the making of Rules of Court would be a matter for the courts, the Government expects that the rewriting of rules will be the subject of consultation, drawing on the expertise of family law stakeholders.

The FCFC Bill provides for more robust case management across both Divisions of the FCFC. In particular, the overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.<sup>22</sup> These provisions are new provisions and have been modelled on existing provisions in section 37M, 37N and 37P of the *Federal Court of Australia Act 1976*. Parties must act consistently with the overarching purpose and a party's lawyer must assist the party to comply with

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<sup>18</sup> FCFC Bill, clause 5.

<sup>19</sup> FCFC Bill, clause 56, 184.

<sup>20</sup> FCFC Bill, clause 55, 183.

<sup>21</sup> FCFC Bill, clause 61, 215.

<sup>22</sup> FCFC Bill, clause 48, 157.

the duty.<sup>23</sup> Under these provisions, a Judge may order a lawyer to bear costs personally for failure to assist their clients comply with this duty.<sup>24</sup> Further, the FCFC Bill specifically provides that the Chief Justice of the FCFC (Division 1) must work cooperatively with the Chief Justice of the FCFC (Division 2) (and vice versa) with the aim of ensuring common approaches to case management. Again, there is an advantage of having a dually appointed Chief Justice of the FCFC in that it would more effectively ensure the implementation of common case management approaches across both Divisions of the FCFC. This framework would enable the Chief Justice to ensure more stringent, early assessments of the relative complexity of matters requiring determination by the FCFC, including issues relating to family safety, with a view to more effective allocation of cases between the two Divisions.

As noted earlier, it currently takes on average 11.1 months for a matter to be transferred from the Federal Circuit Court to the Family Court and 4.6 months for a matter to be transferred from the Family Court to the Federal Circuit Court. To achieve optimal efficiency in the handling of matters in the FCFC, the FCFC Bill provides for matters to be transferred between FCFC (Division 1) and FCFC (Division 2) with the approval of the Chief Justice or Chief Judge of the receiving Division.<sup>25</sup> The approval of the receiving Chief Justice or Chief Judge is required to ensure that only matters that need to be transferred will be so transferred. The more effective case management of family law matters across the FCFC should result in fewer matters needing to be transferred between the courts.

## **Court officer roles**

The majority of court officer roles across the courts will remain the same. However, under the reforms, the offices of the Chief Executive Officer of the Family Court and the Chief Executive Officer of the Federal Circuit Court would be removed. The Chief Executive Officer (CEO) of the Federal Court would be responsible for the single federal court corporate entity and to assist the Chief Justice of the Federal Court, the Chief Justice of the FCFC (Division 1) and the Chief Judge of the FCFC (Division 2) in the administration of the courts. Consistent with the 2015-16 Budget measures, the single CEO would retain sole responsibility for corporate services.

Additionally, new offices will be created in the Federal Court for a Marshal and such Deputy Marshals as are necessary. The creation of the offices in the Federal Court seeks to ensure the continued safety for families and children and other persons who attend the Federal Court, recognising that family law matters are often highly emotional and can involve potentially unsafe situations for families and children.

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<sup>23</sup> FCFC Bill, clause 49, 158.

<sup>24</sup> FCFC Bill, subclauses 49(6), 158(6).

<sup>25</sup> FCFC Bill, clause 34, 117.

## 5. Overview of consequential amendments and transitional provisions

The Consequential Amendments Bill makes the necessary amendments to other Commonwealth Acts and Regulations affected by the passage of the FCFC Bill. A brief description of each Schedule of the Consequential Amendments Bill is included below.

Schedule 1 makes significant amendments to the *Family Law Act 1975* to remove provisions relating to the establishment and operation of the Family Court. These provisions have been replicated with necessary changes in the FCFC Bill. It also amends that Act to provide for the relevant changes to definitions, jurisdiction and to accommodate the changes to appeal pathways arising from the establishment of the Family Law Appeal Division of the Federal Court.

Schedule 1 further makes significant amendments to the *Federal Court of Australia Act 1976* to provide for the establishment of the Family Law Appeal Division of the Federal Court. It also imposes a new qualification for judges appointed to the Federal Court.

Schedule 2 amends other Commonwealth legislation, as necessary, to reflect the continuation of the Family Court as the FCFC (Division 1) and the Federal Circuit Court as the FCFC (Division 2) respectively, and to accommodate the changes to family law appeal arrangements with the establishment of the Family Law Appeal Division of the Federal Court.

Schedule 3 amends delegated Commonwealth legislation, as necessary, to reflect the continuation of the Family Court as the FCFC (Division 1) and the Federal Circuit Court as the FCFC (Division 2), respectively. It also provides for harmonisation of family law court fees across the FCFC (Division 1) and FCFC (Division 2), and accommodates the changes to appeal arrangements with the establishment of the Family Law Appeal Division of the Federal Court.

Schedule 4 provides for the repeal of the *Federal Circuit Court of Australia Act 1999* and related savings and transitional arrangements. The provisions of the Federal Circuit Court Act are replicated with necessary changes in the FCFC Bill.

Schedule 5 provides for consequential amendments to legislation potentially affected by other Bills before the Parliament at the time of the introduction of the FCFC Bills. The commencement of these amendments is contingent on the passage of the relevant amending legislation.

Schedule 6 amends the Federal Court Rules for the purpose of ensuring they are appropriate in application to the Family Law Appeal Division of the Federal Court and to reflect changes to arrangements for transfers between the Federal Court and FCFC. The Federal Court Rules provide for the practice and procedure to be followed in the Federal Court and in Registries of the Court. They may

extend to all matters incidental to any practice or procedure necessary or convenient to be prescribed for the conduct of any business of the Court.

Schedule 7 modifies the standard Rules of Court (the Family Law Rules 2004), made under the *Family Law Act 1975* as in force immediately before 1 January 2019, for application to the FCFC (Division 1) on and from 1 January 2019. These modified rules will be known as the Federal Circuit and Family Court of Australia (Division 1) Rules 2018, and would be taken to be Rules of Court covered by Chapter 3 of the Federal Circuit and Family Court of Australia Act 2018.

Schedule 8 modifies the Rules of Court, made under the *Federal Circuit Court of Australia Act 1999* as in force immediately before 1 January 2019, for application to the FCFC (Division 2) on and from 1 January 2019. These modified rules will be known as the Federal Circuit and Family Court of Australia (Division 2) Rules 2018, and would be taken to be Rules of Court covered by Chapter 4 of the Federal Circuit and Family Court of Australia Act 2018.

Schedule 9 amends the standard Rules of Court (the Family Law Rules 2004), made under the *Family Law Act 1975* for application to other courts exercising jurisdiction under that Act. The amendments take account of changes in the structure of the federal family law courts and their enabling legislation.

Schedule 10 provides transitional arrangements to preserve and transition the offices, appointments, and roles of those in the Family Court and the Federal Circuit Court (including Judges, office holders, and other personnel of the two courts) to the FCFC Divisions 1 and 2 respectively. Schedule 10 also provides transitional arrangements for appeals on foot in the Family Court prior to 1 January 2019 or appeals eligible to be filed as at that time, as a result of the creation of the Family Law Appeal Division of the Federal Court.



## 6. Relationship with ALRC inquiry

On 27 September 2017, the Government directed the ALRC to review the Australian family law system. The ALRC is due to provide a final report to Government by 31 March 2019.

On 2 October 2018, the ALRC released the Review of the Family Law System Discussion Paper (the Discussion Paper). The Discussion Paper asks 33 questions and makes 124 proposals for change to the family law system.

As the Discussion Paper notes, the ALRC Terms of Reference do not include the structure of the family law courts, and there are no proposals or questions in the ALRC Discussion Paper pertaining to a restructure of the family law courts.<sup>26</sup> However there are questions and proposals in the Discussion Paper that interact with some aspects of the structural reform legislation.

There are four key areas of interaction between the Discussion Paper and the legislation. The first area of interaction is the ALRC's proposal to remove the Family Court provisions from the *Family Law Act 1975* (Cth),<sup>27</sup> and redraft the Rules of Court<sup>28</sup> and forms.<sup>29</sup> In relation to this proposal, the Consequential Amendments Bill provides for the repeal of Parts IV and IVA of the Family Law Act, which establish the Family Court.<sup>30</sup> Further, the Government has provided the courts with \$4 million in funding to assist in implementing the reforms, part of which will support a comprehensive year-long review of court rules and forms. On commencement of the legislation, each federal court (the Federal Court and the two divisions of the FCFC) would largely maintain their existing court rules. Within one year, following close consultation with the judiciary, legal profession and other stakeholders, the FCFC would have consolidated and updated rules to achieve consistency of procedures. Under the FCFC Bill, the Chief Justice of the FCFC (Division 1) and the Chief Judge of the FCFC (Division 2) are to work cooperatively with the aim of ensuring common Rules of Court and forms.<sup>31</sup>

The second key area of interaction is the ALRC's proposal for the family courts to triage family law matters to appropriate alternative dispute resolution and specialist pathways within the courts.<sup>32</sup> The FCFC would be, in effect, a single point of entry to the federal family law courts by utilising case management teams led by judges to direct cases to the most appropriate Division, irrespective of

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<sup>26</sup> Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) 2 [1.6].

<sup>27</sup> *Ibid* 34-35.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid* 40.

<sup>30</sup> Consequential Amendments Bill, Schedule 1, Part 1, clause 38.

<sup>31</sup> FCFC Bill, clause 55, 183.

<sup>32</sup> *Ibid* 126.

the Division in which the application was originally made.<sup>33</sup> The FCFC Bill provides for matters to be transferred between FCFC (Division 1) and FCFC (Division 2) with the approval of the Chief Justice or Chief Judge of the receiving Division.<sup>34</sup>

The third key area of interaction is the ALRC's proposal for the development of specialist court lists, including a simplified small property claims list, specialist family violence list, and an Indigenous List.<sup>35</sup> The FCFC Bill gives powers to the Chief Justice of the FCFC (Division 1) and the Chief Judge of the FCFC (Division 2) to authorise Judges in the FCFC to manage proceedings or classes of proceedings. This would empower the Chief Justice and Chief Judge to develop certain Judges to manage certain lists.<sup>36</sup>

The fourth key area of interaction is the ALRC's proposal to impose additional criteria for the appointment of federal judicial officers exercising family law jurisdiction.<sup>37</sup> The FCFC Bill retains the current requirement in the Family Law Act for appointments of judges to the FCFC (Division 1), which is 'by reason of training, experience and personality, the person is a suitable person to deal with matters of family law'.<sup>38</sup> For appointments of judges to the FCFC (Division 2), the FCFC Bill introduces the requirement that the person have 'appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the FCFC (Division 2)'.<sup>39</sup> Similarly, for appointments of judges to the Federal Court, the Consequential Amendments Bill introduces the requirement that the person have 'appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Court'.<sup>40</sup>

Noting these areas of overlap, the ALRC is not specifically inquiring into, or proposing to make recommendations about, the structure of the federal family law courts. As clearly outlined by the Hon Justice Sarah Derrington, President of the ALRC, at the Senate Legal and Constitutional Affairs Committee hearing for Estimates on 23 October 2018, it is not the intention of the ALRC for its review of the family law system to look at the structure of the courts and it is not intended that any recommendations be made in relation to court structure in the final report.<sup>41</sup>

Any final ALRC recommendations relating to court processes that merit implementation will be more easily and effectively implemented with a new, simplified family law court structure already in place.

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<sup>33</sup> Refer to FCFC Bill, clause 66, 67, 220, 221.

<sup>34</sup> FCFC Bill, clause 34, 117.

<sup>35</sup> Ibid.

<sup>36</sup> FCFC Bill, clause 13, 31, 81, 112.

<sup>37</sup> Ibid 251.

<sup>38</sup> FCFC Bill, clause 11.

<sup>39</sup> FCFC Bill, clause 79.

<sup>40</sup> Consequential Amendments Bill, Schedule 1, Part 1, item 186.

<sup>41</sup> Commonwealth, *Senate Estimates*, Senate Legal and Constitutional Affairs Legislation Committee, 23 October 2018, Ref No. 21131, page 60.

## 7. Conclusion

There are compelling reasons for structural reform of the federal family law courts. What is clear from the past 10 years of reporting and discussion on this issue is that the current system can be significantly improved. It is causing delays and confusion for Australian families.

The current reform proposal addresses the key structural problems identified with the system by bringing the Family Court and the Federal Circuit Court together without abolishing either court. The proposed reforms have been developed in close consultation with the federal courts, including with the Heads of Jurisdiction.

The department is of the firm view that the reforms provide a sensible solution to the key structural issues, and that continued inaction on structural reform will only be to the detriment of Australian families.

The department thanks the Committee for considering this submission. The department will provide any further information to the Committee as required.

**Attachment A**

**Comparison of Federal Circuit and Family Court of Australia Bill 2018  
 with equivalent clauses in *Family Law Act* and *Federal Circuit Court of Australia Act***

**Acronyms**

FCCAA – *Federal Circuit Court of Australia Act 1999*

FLA – *Family Law Act 1975*

FCAA – *Federal Court of Australia Act 1976*

The purpose of this table is to identify the sources of the provisions of the FCFC Bill. The large majority of provisions are the same as existing provisions, with only a small number of provisions being new provisions or substantively changed provisions.

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
<b>Chapter One: Introduction</b>				
1	New	Short title	2-3	
2	New	Commencement		
3	FCCAA s6	Act binds the crown		
4	FCCAA s7	Act extends to external territories		
5	New	Objects clause	4	
6	New	Simplified outline	5-6	
7	FCCAA s5, FLA s4	Definitions – some changes to deal with the FCFC references and changes to CEO positions	7-16	
<b>Chapter Two: Federal Circuit and Family Court of Australia</b>				

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
8	New	Continuation of two previous courts	17-18	
9	FLA s21	Establishment of Division 1		
10	FCCAA s8	Establishment of Division 2		
<b>Chapter Three: Federal Circuit and Family Court of Australia (Division 1)</b>				
11	FLA s22	Judges – maintains requirement for family law suitability, removes references to appeal division	19	
12	FLA s22	Judges – assigned to a particular location – no change	19-20 (1/2 Page)	
13	New	Judges may be authorised to manage particular classes of proceedings – will result in more specialist management of particular classes of proceedings.	20 (1/2 Page)	Similar provision for Division 2 (Clause 81)
14	FLA s22	Judges – style – no substantial changes	20-21 (1/2)	
15	FLA s23	Judges – seniority – removal of reference to appeal division	21 (1/2)	
16	FLA s26	Judges – oath – no substantive change	21-22	

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
17	FCCAA Schedule 1 cl5	Remuneration – the FLA provides that the remuneration of Family Court Judges is currently set by Parliament. In practice, it is set by the Remuneration Tribunal. The Bill makes this explicit by providing that the Remuneration Tribunal would determine remuneration (as is the case for Federal Circuit Court Judges)	23 (1/2 Page)	
18	FLA s22	Judges – resignation – no substantial change	23 (1/2 Page)	
19	FLA s22	Judges – removal – no substantial change		
20	New	Judges – dual appointment as Chief Justice / Deputy to Division 1 and 2 allowed	24 (1/2 Page)	Similar provision for Division 2 (Clause 97)
21	FLA s22	Judges – appointments to other courts – no changes	24 (1/2 Page)	
22	FLA s22	Judges – appointments to a State Family Court – no changes	25	

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
23	FLA s24	Judges – acting arrangements – change to allow the AG to appoint acting Chief Justice (rather than being based on seniority as is currently the case in FLA)	26	
24	FLA s31	Original jurisdiction – no substantive changes to FLA (but draws numerous provisions together)	27	
25	FLA s96	Appellate jurisdiction – retains current jurisdiction only in relation to appeals from state courts of summary jurisdiction – removes all other appeal jurisdiction	28	
26	FLA s33	Jurisdiction for associated matters – no substantive changes	29	
27	FLA s28	Exercise of jurisdiction – removed ability of Family Court to constitute a Full Court. Changed to single judge only (including for appellate jurisdiction)	30	

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
28	FCCAA s14	Determining matters completely and finally – included for consistency with equivalent Division 2 provision		
29	FLA s34	Making of orders – no substantive changes	31	
30	FLA s35	Contempt – redrafted for consistency with Division 2 but no substantive changes		
31	FLA s21B	Arrangement of business – includes obligation on Chief Justice to promote the objects of the Act but otherwise no substantive changes	32-34	
32	FLA s21B	Complaints – no substantive changes		
33	FLA s21B	Protection for Chief Justice/ Deputy – inclusion of ability of Regulations to confer administrative functions and powers on Chief Justice (consistent with Division 2 provision)	34-35	
34	FLA s33B	Transfer to Division 2 – transfer now requires approval of the Chief Judge before a transfer takes effect	36-38	



Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
35	FLA s33B, FCCAA s40	Transfer to Division 2 – rules of court relating to transfer – Chief Justice to consult Chief Judge of Division 2 before making rules relating to transfer		
36	New	Delegation – Chief Justice may delegate to any one or more Judges the power to approve a transfer from Division 2		
37	FLA s95	High Court appeals – changed to not allow appeals directly to the High Court from Division 1 (under FLA, appeals by special leave of the High Court not precluded)	39	
38	FLA s38	Practice and procedure – no substantive changes	40	
39	FCCAA s44	Representation – new provision from FCCAA included for consistency with Division 2	40-41 (1/2 Page)	
40	FCCAA s46	Filing – new provision from FCCAA included for consistency with Division 2	42-44	
41	FCCAA s47	Seal – new provision from FCCAA included for consistency with Division 2		

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
42	FCCAA s48	Stamps – new provision from FCCAA included for consistency with Division 2		
43	FCCAA s49	Writs – new provision from FCCAA included for consistency with Division 2		
44	FCCAA s50, FLA s44	Proceedings initiated by application without need for pleadings – new provision from FCCAA (but still subject to FLA and Rules of Court, so no substantive change)		
45	FCCAA s51	Limits on length of documents - Division 1 or a Judge may give a direction about this for documents required or permitted to be filed – new provision from FCCAA included for consistency with Division 2		
46	FLA s27	Place of sitting – amended to reflect single judge only	45	
47	FLA s27A	Change of venue – no changes	45	

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
47A	FCCAA s57	Formal defects not to invalidate – included for consistency with Division 2	45	
48	FCAA s37M	Overarching purpose of family law practice and procedure provisions – new provision from FCA	46-49	Similar provision for Division 2 (Clause 157)
49	FCAA s37N	Parties to act consistently with overarching purpose – new provision from FCA		Similar provision for Division 2 (Clause 158)
50	FCAA s37P	Court may give directions about practice and procedure during a proceeding – new provision from FCA		
51	New	Chief Justice to seek common approaches to case management with Chief Judge of Division 2		Similar provision for Division 2 (Clause 160)
52	FCCAA s58, FLA s98AA	Oaths and affirmations – no substantive change	50-51	
53	FCCAA s59, FLA s98AB	Swearing of affidavits – no substantive change		
53A	FCCAA s60	Examination of witnesses – included for consistency with Division 2	52	

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
54	FCCAA s75	Reserved judgments – new provision allowing orders or reasons prepared by the Judge who heard the proceeding to be made public by another Judge	53	
55	New	Chief Justice must work cooperatively with Chief Judge with the aim of ensuring common practices and procedures, rules of court and forms	54	Similar provision for Division 2 (Clause 183)
56	FLA s123	Rules of court – amended, including to provide that Rules of Court are made by Chief Justice (instead of a majority of Judges)	55-56	Similar provision for Division 2 (Clause 56)
57	FLA s38A	For clarity, ‘corporate services’ (which do not form part of the administrative affairs of the Court for which the Chief Justice is responsible) is amended to explicitly include ‘records management’, ‘administrative matters relating to judgments’ and ‘court security’.	57-58	

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
58	FLA s38BAA	Arrangements with other courts – no change	58-60	
59	FLA s38BAB	Arrangements with agencies or organisations – no change		
60	FCCAA s92	Arrangements for sharing facilities – new provision inserted for consistency with Division 2	60 (1/2 Page)	
61	New (but see FLA s 124)	Advisory committees – new provision enabling Chief Justice to take advice on rules of court and administrative matters	60-61 (1/2 Page)	
62	FLA s38B	CEO – no changes, although CEO now refers to Federal Court CEO	62	
63	FLA s38D	CEO’s powers – no changes		
64	FLA s36	Registries – amended to provide that Minister can establish Registries (instead of Governor-General) and remove provision that Principal Registry is in Sydney	63 (1 Paragraph)	

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
65	FLA s38N	Registrars – no substantive changes	63 (1 Paragraph)	
66	FCCAA s102	Sets out powers that may (and may not) be exercised by the CEO, Registrars and Deputy Registrars (including transferring proceedings to Division 2 and making orders about procedure) – included for consistency with Division 2	63-66	
67	FLA s37A	Delegation – enables the Chief Justice to make Rules of Court delegating powers to a delegate, and outlines powers that may not be delegated	66-70	
68	FLA s37A(8)	Independence of delegate – provides that a delegate exercising delegated power or power directed to be exercised, exercises that power independently		
69	FLA s37A	Delegation – review – no substantive changes		
70	FLA s37C	Oath of registrars – no substantive changes		
71	FLA s38N	Officers of the Court – no substantive change	71-72	

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
72	FLA s38P	Marshals – no substantive changes		
73	New	Delegation by registry managers – new provision to enable more efficient practices of the Courts	73 (1/2 Page)	
74	FCCAA s116	Procedural information to be given to unrepresented parties – new provision to reflect Division 2 arrangements	74 (1 Paragraph)	
75	FLA s38S	Annual report – no changes	74-75	
76	FLA s38W	Delegation of Chief Justice’s administrative powers – no changes		
77	FLA s38X	Proceedings arising out of administrative matters – no changes		
78	FLA s38Y	Complaint handlers – no changes		
<b>Chapter Four: Federal Circuit and Family Court of Australia (Division 2)</b>				

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
79	FCCAA Schedule 1 cl1	Appointment of judges – amended to include ‘appropriate knowledge skills and experience’ requirement, remove requirement for Chief Judge to occupy role on full time basis (to clarify dual appointment to Division 1)	76	
80	FCCAA Schedule 1 cl1A	Assignment of Judges to division – no changes	76-77 (1 Paragraph)	
81	New	Judges may be authorised to manage particular classes of proceedings – will result in more specialist management of particular classes of proceedings.	77	Similar provision for Division 2 (Clause 13)
82	FCCAA Schedule 1 cl2	Style – amended to add reference to Deputy Chief Judge, and provide style of ‘His Honour’ and ‘Her Honour’ for all serving judges.	77-78	
83	FCCAA Schedule 1 cl3	Judges – Oath – no substantive changes	78-88	
84	FCCAA Schedule 1 cl5	Judges – Remuneration – no change		



Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
85	FCCAA Schedule 1 cl6	Judges – Leave – no change		
86	FCCAA Schedule 1 cl4	Judges – Outside work – no change		
87	FCCAA Schedule 1 cl8	Judges – Other terms and conditions – no change		
88	FCCAA Schedule 1 cl7	Judges – Resignation – no change		
89	FCCAA Schedule 1 cl9	Judges – Removal – no change		
90	FCCAA Schedule 1 cl9A	Certification of retired disabled judges – no change		
91	FCCAA Schedule 1 cl9B	Pensions for retired disabled judges – no change		
92	FCCAA Schedule 1 cl9C	Superannuation for retired disabled judges – no change		
93	FCCAA Schedule 1 cl9D	Death benefits – no change		
94	FCCAA Schedule 1 cl9E	Relationship definitions – no change		

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
95	FCCAA Schedule 1 cl9F	Meaning of eligible child – no change		
96	FCCAA Schedule 1 cl9G	Appropriation – no change		
97	New	Dual appointments – new provision to allow the Division 2 Chief Judge to also hold the office of Division 1 Chief Justice, and for the Division 2 Deputy Chief Judge to hold the appointment of Division 1 Deputy Chief Justice	89	Similar provision for Division 1 (Clause 20)
98	FCCAA Schedule 1 cl10	Acting Chief Judge – amended to include provisions for Deputy Chief Judge	90-91 (1 Page)	
99	FCCAA s10	Original jurisdiction – no substantive change	92	
100	New	Original jurisdiction in family law or child support matters – new provision to provide Division 2 with same jurisdiction as Division 1	92-93	
101	FCCAA s10AA	Commonwealth tenancy disputes – no change	93-94	

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
102	New (but see FLA ss93, 96)	Appellate jurisdiction – confers appellate jurisdiction in relation to family law appeals from state courts of summary jurisdiction. This is the same jurisdiction as Division 1 (see 25 above).	95	
103	FCCAA s18	Jurisdiction in associated matters – no change	96	
104	FCCAA s10A	Exercise of jurisdiction (general and fair work divisions) – no change	97-107	
105	FCCAA s13	Exercise of jurisdiction (open court or in chambers) – no change		
106	FCCAA s11	Court to be constituted by single judge – no substantive change		
107	FCCAA s14	Determination of matters completely and finally – no change		
108	FCCAA s15	Making of orders – no change		
109	FCCAA s16	Declarations – no change		
110	FCCAA s17	Contempt – minor change to remove provision that power is subject to any other Act		

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
111	FCCAA s17A	Summary judgement – no change		
112	FCCAA s12	Arrangement of business – no substantive changes, although Deputy Chief Judge is to assist Chief Judge		
113	FCCAA s12	Complaints – no substantive changes		
114	FCCAA s12	Exercise of powers in general and Fair Work divisions – no substantive changes		
115	FCCAA s12	Assignment of judges to location or registry – no substantive changes		
116	FCCAA s12	Protection of Chief Judge and Deputy Chief Judge – no substantive changes, although extension of provision to Deputy Chief Judge		
117	FCCAA s39	Transfer to Division 1 – transfer now requires approval of the Chief Justice before a transfer takes effect	108-109	Similar provision for Division 1 (Clause 34)

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
118	FCCAA s40	Rules of court relating to transfer – Chief Judge to consult Chief Justice of Division 1 before making rules relating to transfer	109-110	Similar provision for Division 1 (Clause 35)
119	New	Delegation - Chief Judge may delegate to any one or more Judges the power to approve a transfer from Division 1		Similar provision for Division 1 (Clause 37)
120	FCCAA s39	Transfer to Federal Court – no substantive changes, although transfer will now require confirmation of the Federal Court (see item 248, Schedule 1, Consequential Bill)	111-122	
121	FCCAA s40	Rules of Court relating to transfer to Federal Court – no substantive changes		
122	FCCAA s20	Appeals to High Court – no substantive changes		
123	FCCAA s20A	Non-family law dispute resolution – no changes		
124	FCCAA s22	Non-family law dispute resolution – no changes		
125	FCCAA s23	Non-family law dispute resolution – no changes		
126	FCCAA s24	Non-family law dispute resolution – no changes		

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
127	FCCAA s25	Non-family law dispute resolution – no changes		
128	FCCAA s26	Non-family law dispute resolution – no changes		
129	FCCAA s27	Non-family law dispute resolution – no changes		
130	FCCAA s28	Non-family law dispute resolution – no changes		
131	FCCAA s29	Non-family law dispute resolution – no changes		
132	FCCAA s30	Non-family law dispute resolution – no changes		
133	FCCAA s31	Non-family law dispute resolution – no changes		
134	FCCAA s32	Non-family law dispute resolution – no changes		
135	FCCAA s33	Non-family law proceedings – no changes		
136	FCCAA s34	Non-family law proceedings – no changes		
137	FCCAA s35	Non-family law proceedings – no changes		
138	FCCAA s36	Non-family law proceedings – no changes		

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill	
139	FCCAA s37	Non-family law proceedings – no changes			
140	FCCAA s38	Non-family law proceedings – no changes			
141	FCCAA s43	Practice and procedure – added reference to regulation-making power		123	
142	FCCAA s44	Representation – no changes		124-129	
143	FCCAA s45	Interrogatories and discovery – changes to allow use in family law and child support matters			
144	FCCAA s46	Filing – no changes			
145	FCCAA s47	Seal – no changes			
146	FCCAA s48	Stamps – no changes			
147	FCCAA s49	Writs – no changes			
148	FCCAA s50	Proceedings by application – no changes			
149	FCCAA s51	Limits on length of documents – no changes			

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
150	FCCAA s52	Place of sitting – no changes		
151	FCCAA s52	Change of venue – no changes		
152	FCCAA s53	No jury – no changes		
153	FCCAA s54	Decision without oral hearing – no changes		
154	FCCAA s55	Limits on length of argument – no changes		
155	FCCAA s56	Written submissions – no changes		
156	FCCAA s57	Formal defects – no changes		
157	FCAA s37M	Overarching purpose of procedure provisions – new provision from FCA	130-133	Similar provision for Division 1 (Clause 48)
158	FCAA s37N	Parties to act consistently with overarching purpose – new provision from FCA		Similar provision for Division 1 (Clause 49)
159	FCAA s37P	Court may give directions about procedure during a proceeding – new provision from FCA		Similar provision for Division 1 (Clause 50)



Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
160	New	Chief Judge to seek common approaches to case management with Chief Justice of Division 1		Similar provision for Division 1 (Clause 51)
161	FCCAA s58	Oaths and affirmations – no substantive changes	134-151	
162	FCCAA s59	Swearing of affidavits – no substantive changes		
163	FCCAA s60	Examination of witnesses – no changes		
164	FCCAA s62	Time limits on giving testimony – no changes		
165	FCCAA s63	Court may question witnesses – no changes		
166	FCCAA s64	Form of evidence – no changes		
167	FCCAA s65	Offenses by witnesses – no changes		
168	FCCAA s66	Video or audio links – no changes		
169	FCCAA s67	Video or audio links – no changes		
170	FCCAA s68	Video or audio links – no changes		
171	FCCAA s69	Video or audio links – no changes		
172	FCCAA s70	Video or audio links – no changes		

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
173	FCCAA s71	Video or audio links – no changes		
174	FCCAA s72	Video or audio links – no changes		
175	FCCAA s73	New Zealand proceedings – no changes		
176	FCCAA s74	Orders – no changes		
177	FCCAA s75	Reserved judgments – no substantial changes		
178	FCCAA s76	Interest up to judgment – no changes		
179	FCCAA s77	Interest on judgment – no changes		
180	FCCAA s78	Enforcement of judgment – no changes		
181	FCCAA s79	Costs – no changes		
182	FCCAA s80	Security for costs – no changes		
183	New	Chief Judge must work cooperatively with Chief Justice to achieve common practices and procedures, rules of court and forms	152	Similar provision for Division 1 (Clause 55)

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
184	FCCAA s81	Rules of court – amended, including to provide that Rules of Court are made by Chief Judge (instead of a majority of Judges)	153-154	Similar provision for Division 1 (Clause 56)
185	FCCAA s82	Documents – no changes	154-170	
186	FCCAA s83	Service – no changes		
187	FCCAA s84	Evidence – no changes		
188	FCCAA s85	Orders – no changes		
189	FCCAA s86	Costs – no changes		
190	FCCAA s87	General – changes to include new provisions relating to cost estimates and practice and procedure		
191	FCCAA s88	Incidental matters – no changes		
192	FCCAA s88B	Powers not affected for non-family law suppression and non-publication orders – no changes		





Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
211	FCCAA s89	For clarity, 'corporate services' (for which the Chief Justice is not responsible) is amended to explicitly include 'records management', 'administrative matters relating to judgments' and 'court security'	171-172	
212	FCCAA s90	Arrangements with other courts – no changes	172-174	
213	FCCAA s91	Arrangements with agencies or organisations – no changes		
214	FCCAA s92	Arrangements for sharing facilities – no changes		
215	FCCAA s93	Advisory committees – changes to reflect changed rule-making power	174-175 (1/2 Page)	
216	FCCAA s96	CEO – no changes, although the CEO is the Federal Court CEO	176-177	
217	FCCAA s96	Powers of CEO – no changes		
218	FCCAA s98	Registries – no changes		
219	FCCAA s101	Registrars – no changes		



Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
228	FCCAA s109	Marshal – no changes		
229	FCCAA s110	Deputy marshals – no changes		
230	FCCAA s111A	Family consultants – no changes		
231	FCCAA s112	Staff – no changes		
232	FCCAA s100	Commonwealth staff – no changes		
233	New	Delegation by registry managers – new provision to enable more efficient practice of the Courts		187 (1 Paragraph)
234	FCCAA s108	Authorised persons to assist Sheriff or Deputy Sheriffs – no changes	187-192	
235	FCCAA s111	Authorised person to assist Marshal or Deputy Marshals – no changes		
236	FCCAA s113	Actions by or against Sheriff or Marshal – no changes		
237	FCCAA s113A	Arrests – no changes		
238	FCCAA s114	Receivers – no changes		



Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
239	FFCAA s116	Procedural information to be given to unrepresented parties – no changes		
240	FFCAA s117	Annual report – no changes		
241	FFCAA s117A	Delegation of Chief Judge’s administrative powers – no changes		
242	FFCAA s118	Proceedings arising out of administrative affairs – no substantive changes		
243	FFCAA s118A	Protection of complaint handlers – no changes		
<b>Chapter Five: Miscellaneous</b>				
244	FFCAA s93A, FLA s38BA	CEO has function of family consultants – no changes	193-196	
245	FFCAA s93B, FLA s38BB	CEO may delegate powers relating to family consultants – no changes		
246	FFCAA s93C, FLA s38BC	CEO may give directions relating to family services functions – no changes		

Clause	Source	Comment	Pages of the Bill	Similar clause across Divisions of the Bill
247	FFCAA s93D, FLA s38BD	CEO may authorise staff to act as family counsellor or family dispute resolution practitioner – no changes		
248	FFCAA s119	References to judges in other laws – no substantive changes		
249	FFCAA s120	Regulations –changes to include increase in penalty units for offences and authorisations for family counsellors and family dispute resolution practitioners		