LEADERSHIP IN FAMILY LAW

7 April 2020

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

By Email: legcon.sen@aph.gov.au

Dear Committee Secretary,

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

Thank you for the opportunity to respond to the aforementioned bills.

The Family Law Practitioners Association (**FLPA**) is Queensland's leading body representing those who work in family law including solicitors, barristers, social workers, psychologists, members of the judiciary and associated fields. FLPA has almost 1,000 members who are based throughout Queensland, Northern New South Wales and the Northern Territory.

It is noted that the *Federal Circuit and Family Court of Australia Bill* 2019 (FCFCA Bill) seeks to amalgamate the Family Court of Australia and the Federal Circuit Court of Australia to create a single court structure. The FCFCA Bill proposes that Division 1 would be a continuation of the Family Court, while Division 2 would be a continuation of the Federal Circuit Court. The creation of divisions of judges means there will not be an actual amalgamation of the courts.

In circumstances where the new single court structure will retain two divisions, it remains unclear how the FCFCA Bill will simplify complexities in relation the current system.

FLPA supports the idea of a merger of the courts with streamlined case management and one set of rules. Reform of the courts cannot be productive of superior outcomes for users of the courts however when the existing resourcing issue remains unaddressed.

FLPA's primary concern is that the courts (in whatever form they take) must be properly funded with judges, registrars and other professional staff who are specialists in family law.

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FLPA has a number of concerns about the proposed legislation, set out firstly in summary form and thereafter elaborated upon under separate headings.

1. Original jurisdiction - FLPA is opposed to:
    a. The proposed provisions seeking to limit the original jurisdiction of Division 1 (the existing Family Court) in family law and child support matters to those cases which are transferred from Division 2 or conferred by another law of the Commonwealth.
    b. The prohibition on parties being able to institute family law or child support proceedings in Division 1 (other than appellate proceedings).
2. Appellate jurisdiction – FLPA is opposed to:
    a. The absence of a specific Appeals Division within Division 1.
    b. The unnecessary change of an already functional appeal process. It is noted the existing process provides that an appeal be heard by a Full Court unless the Chief Justice determines it to be appropriate for the appeal to be heard by a single judge, while the proposed new arrangement would see the listing of appeals from Division 2 before a single judge of Division 1, unless the Chief Justice determines it to be appropriate that the appeal be heard by a Full Court.
    c. The prohibition of certain kinds of appeals as outlined in proposed section 26(2) and the requirement for leave to appeal from prescribed judgments, which are yet to be defined (proposed section 28).
3. Court Hierarchy – FLPA is opposed to:
    a. The possibility of dual appointments of the Chief Justice of Division 1 and the Chief Judge of Division 2; and the Deputy Chief Justice of Division 1 and the Deputy Chief Judge (Family Law) of Division 2.
    b. The absence of any clarity, definition or appointment processes for a 'Senior Judge' of Division 2 and 'Senior Registrars'.
    c. The present inability to identify what the minimum number of Senior Judges and other Judges for Division 2 will be, noting that the number is to prescribed by regulations.
    d. The complete lack of any requirement for there to be a minimum number of Division 1 Judges.
4. Costs against lawyers provisions – FLPA is opposed to the proposed section 68(5) with respect to Division 1, and the proposed section 191(5) with respect to Division 2.

1. Original jurisdiction

The Bill seeks to limit the original jurisdiction of Division 1 (the existing Family Court) in family law and child support matters, to those cases which are transferred from Division 2 or as conferred by another law of the Commonwealth.

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It is critically important for the operation of the family law system that decisions in family law matters are made by specialist family law judges and FLPA is opposed to any phasing out or reduction of the Family Court, as it is currently known, or Division 2 (whether through a failure to appoint new judges, refer original jurisdiction matters to that Court upon filing, or a failure to confer jurisdiction upon it through other legislation).

Family law is a specialist area of law, and deals with some of the most important issues facing everyday Australians including the arrangements for children and the adjustment of property interests following the breakdown of a relationship. Given current divorce rates, significant numbers of the population may need to, at some point, utilise the family law system.

The Family Court of Australia itself, is a superior court which has been admired by jurisdictions around the world for its innovative management of the most complex and difficult family law matters.[1]

Continued access to a superior court within our family law jurisdiction is required for the determination of complex disputes, for example, special medical procedure matters, Magellan matters and those falling under the Hague Convention on Civil Aspects of Child Abduction.

Transfers

In the past, delays have been caused by the transfer of cases from the Federal Circuit Court to the Family Court. The courts have been working to reduce these delays. Concern is expressed that such delays may be exacerbated if Division 2 is to be the 'gateway' for all applications. Such a gateway will only be effective if it has the resources to promptly allocate cases between Divisions 1 and 2 to prevent a 'bottleneck'.

It is noted that the Chief Justice or his delegates appointed in writing pursuant to proposed section 54 may transfer proceedings between the two courts. It is noted that the Rules of Court may set out the matters which the Chief Justice must have regard to when deciding whether to transfer proceedings (proposed section 53(2)).

As the Rules of Court have not, as yet, been developed, it is unclear as what matters will be taken into account when determining the transfer (other than those maters set out in proposed sections 51(3) and 52(3), which includes whether the resources of the relevant Court are sufficient to hear and determine the proceeding).

Sadly, for parties involved in the family law system, resourcing of both existing courts is a factor to consider when deciding whether to seek a transfer between the courts. It should not be. Both courts need to be adequately resourced so that the decision to seek a transfer is solely based on the issues to be determined and the complexity of the matter being considered.

[1] See Media Release from the New South Wales Bar Association 31 July 2018

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2. Appellate jurisdiction

FLPA strongly opposes the removal of the Appeal Division from the Family Court. The current Appeals Division, with the assistance of the Appeals Registrar and designated appeals staff, works hard to resolve appeals and does so in a timely fashion. Time and experience has resulted in the development of efficient and effective systems and processes in the existing Appeal Division. Change is unnecessary.

According to the Annual Report, in the 2018-2019 financial year 400 appeals were filed in the Family Court of Australia, a 3% increase from those filed in 2017-2018. The Appeal Division of the Family Court delivered 257 judgments. In addition, 53 applications for extension of time and 247 applications in an appeal were filed, bringing the total number of appellate proceedings in the financial year to 667. This workload required 8 judges fulltime, dedicated to the hearing of appeals.

FLPA queries the capacity of Division 1 judges to take on the such workload in addition to the busy trial and interim hearing case load currently undertaken by the trial division judges in the Family Court.

Full Court v Single Judge Appeals

The existing legislation provides that an appeal from either the Family Court or the Federal Circuit Court be heard by a Full Court, unless the Chief Justice determines it to be appropriate for the appeal to be heard by a single judge.

The proposed new arrangement reverses that position (at least insofar as appeals from the Federal Circuit Court/Division 2 are concerned) and will see the listing of appeals from Division 2 before a single judge of Division 1, unless the Chief Justice determines it to be appropriate that the appeal be heard by a Full Court.

The number of appeals from the Federal Circuit Court presently dealt with by the Full Court suggest that only a limited numbers of appeals are of such an uncomplicated nature that they could appropriately be dealt with by a single Judge. While there may be some appeals from Division 2, which are appropriate for hearing by a single Judge, this should not be the starting point.

Appeal courts provide guidance for future cases, by settling authoritative precedents. FLPA is concerned that an increase in single judge appellate level decisions may lead to divergent views being expressed, detracting from the development of consistent jurisprudence.

Prohibition of certain appeals

Appeals perform both private and public functions. The private function being to provide accountability to the individual litigants and the public function being to enable errors to be corrected, which maintains and enhances the confidence of citizens in the justice system. The prohibition of certain kinds of appeals as outlined in proposed section 26(2) is contrary to the private and public functions of appeals. Appeal rights should be protected.

The appeals which are prohibited relate to decisions which go to a party's fundamental rights, (for example, for leave or special leave to institute proceedings in Division 1; for an extension of time within which to institute proceedings in Division 1; for leave to amend the grounds of an application or appeal to the Division 1).

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Proposed subsection 28 sets out that leave to appeal is required for appeals from (presently unspecified) prescribed judgments. FLPA is concerned that the provision seeks to create an additional step which may not otherwise already be required and which will add expense and delay for the parties.

3. Court Hierarchy

Proposed section 129 provides for the possibility of dual appointments of the Chief Justice of Division 1 and the Chief Judge of Division 2; and the Deputy Chief Justice of Division 1 and the Deputy Chief Judge (Family Law) of 2. Dual appointments are opposed by FLPA.

Pursuant to proposed sections 70 & 75, the Chief Justice must work cooperatively with the Chief Judge with the aim of ensuring common approaches to case management and ensuring common rules of court, forms, practices and procedures. Having the same person performing each role defeats the purpose of these sections.

Of particular concern to FLPA is the rule making power and the fact that the Chief Justice/Chief Judge are to be empowered to make Rules of Court. Whilst the Bills note that the power to make Rules is to be amended two years after the section commences to provide for the Rules to be made by the Judges or a majority of them, there are many potential dangers if the rule making power is reposed in one person even for a two year period, and particularly during a transitional and establishment phase.

Whilst it is acknowledged that proposed sections 77 and 218 require that before making the Rules of Court the Chief Justice must be satisfied that there has been appropriate consultation with other Judges, no guidance is provided as to what that means. Notably, ss(2) outlines that if the consultation does not occur, the validity or enforceability of a Rule of Court is not affected.

Decisions made by a single person may be adverse to the rule of law and against the interests of either one or both divisions of the Court and the public which it strives to serve. The proposed process is a significant departure from how court rules are made in all superior courts.

Consideration must instead be given to requiring that judges of both Divisions, through a Rules Committee, consult with each other, confer with the profession (where appropriate) and then, by majority, make the rules. Such an approach ensures that Rules are considered in detail by numerous judicial officers (able to bring differing perspectives and a broader spectrum of experience to the table) prior to their introduction and implementation.

Senior Judges & Registrars

The Bill introduces Senior Judges for Division 2 and Senior Registrars, yet there is no definition of the requirements of such roles nor detail as to what the process for their appointment might be. Clarification is needed.

Judge Numbers

FLPA is troubled that there is no minimum number of Division 1 judges to be prescribed.

As raised above, the continuation of the Family Court or Division 1 is critically important for the operation of the family law system, ensuring that decisions in complex family law matters are made by specialist family law judges.

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FLPA is supportive of there being a minimum number of Judges prescribed for Division 2, though is concerned that there has not yet been any indication of the intended minimum number of Senior Judges and other Judges to be prescribed by regulation.

4. Costs against lawyers provisions

Proposed section 68(5), and proposed section 191(5) enables Division 1 and Division 2 judges to order that a party's lawyer bear costs personally.

Legal practitioners, facing the prospect of such a penalty, would be unable to offer any evidence explaining the steps taken in the conduct of the litigation to support an argument against the making of such an order, without their client first agreeing for that practitioner to disclose information which is otherwise subject to legal professional privilege. Assuming that their client has not waived legal professional privilege, a legal representative is, in essence, gagged and prevented from producing any evidence which reveals the advice given to that client (prior to or during the litigation) in respect of any matter, which would enable submissions to be made against a personal costs order.

While all lawyers must, as officers of the court, be accountable in the fulfilment of their duties, a number of our members have raised concerns about that which is proposed on this subject.

The existing costs provisions (s117 of the *Family Law Act 1975*, rule 19.10 of the *Family Law Rules 2004* and rule 21.07 of the *Federal Circuit Court Rules 2001*) which permit judges to make orders against legal representatives personally are sufficient.

Yours faithfully

James Steel
FLPA President