Chapter 2

Reviews into the Federal Court system

2.1 This chapter considers the underlying need for reform of the Family Court system, and summarises recent reviews that have, in one way or another, highlighted this need.

The need for reform

2.2 It has been estimated that approximately 70 per cent of family law disputes are resolved without involving the federal court system.[1] Therefore, the family law jurisdiction is far larger than the disputes that go to court. Part of the much broader family law community includes State and Territory bodies such as legal aid services, community support services, family violence services, and State and Territory Police and Courts; mediators and arbitrators; and counsellors and psychologists. While acknowledging that the federal courts are only one component of a much larger family law system, the committee is required to inquire into the bills before it, which are limited in their scope to the proposed restructure of the federal courts.

2.3 Submitters and witnesses broadly agreed that the family law system is fundamentally broken and requires reform. One witness referred to the family law system being 'in a state of crisis and [that] reform is desperately needed to fix the system'.[2] Submitters were therefore generally supportive of restructuring the courts in some form to improve outcomes for people using the courts.

2.4 In part, the need for reform has become more pressing not simply because of the volume of work before the courts, but also the growing complexity of cases within the family law system. The former Chief Justice of the Family Court, the Hon. Diana Bryant AO QC, submitted that significant societal, cultural and institutional change had occurred during her appointments in the federal courts which had resulted in more complexity in Family Court cases.[3] She noted that these factors, including gender role changes, family violence, sexual abuse, mental health, substance abuse and globalisation, had contributed to cases becoming more difficult and complex, thus occupying more of the courts' time.[4]

2.5 Former Judge of the Family Court, the Hon. Rodney Burr AM agreed with this perspective, arguing that the range and complexity of matters being heard by the

---

1 Attorney-General's Department, *Submission 56*, p. 3.

2 Mr Arthur Moses SC, President, Law Council of Australia, *Proof Committee Hansard*, 12 December 2018, p. 27.

3 The Hon. Diana Bryant AO, QC, *Submission 71*, pp. 2–3.

4 The Hon. Diana Bryant AO, QC, *Submission 71*, pp. 2–3.

court, partly caused by the increased jurisdiction of the courts, have caused a backlog of cases, in addition to unmanageable workloads for the remaining sitting judges.[5]

2.6 The need to reform the federal courts has been discussed for some years and has been the subject of a number of reviews. In a media release, the Attorney-General, the Hon. Christian Porter MP, outlined that, in developing the bills, the government had taken into account the following reviews:

- the 2008 Semple Review, *Future Governance Operations for the Federal Family Law Courts in Australia: Striking the Right Balance*;
- a 2014 KPMG Review, *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 EY Report, *High Level Financial Analysis of Court Reform Initiatives*;
- the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs Report, *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 PricewaterhouseCoopers [PwC] Report, *Review of the efficiency of the operation of the federal courts*.[6]

2.7 On 17 August 2017, the then Attorney-General, Senator the Hon. George Brandis QC, asked the Australian Law Reform Commission (ALRC) to review the family law system. The ALRC is due to release its final report in March 2019.[7]

2.8 During the inquiry, the committee heard evidence concerning the Semple review, the PwC report and the ALRC review. These three reviews will be discussed below.

Semple review

2.9 The terms of reference of the Semple review included providing advice on changes to improve case management processes, the structure of the courts, and the judicial structure, with a view to ensuring efficient, effective and integrated service delivery across the family law jurisdiction.[8] The Semple review was also tasked with considering the potential impact these changes may have on other administrative or judicial structures.[9] In considering its terms of reference, the Semple review was required have regard to the:

---

5 The Hon. Rodney Burr AM, private capacity, *Committee Hansard*, 11 December 2018, p. 23.

6 The Hon. Christian Porter, MP, Attorney-General, 'Legislation for family courts reform to be introduced', *Media release*, 17 August 2018.

7 www.alrc.gov.au/inquiries/family-law-system

8 Mr Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the right balance*, August 2008, p. 4.

9 Mr Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the right balance*, August 2008, p. 4.

> …continuing difficulties in the administration of the delivery of family law services by the Family Court and Federal Magistrates Court, including continuing confusion among litigants over the appropriate court to handle their matters.[10]

2.10 In summary, the Semple review recommended a single family court with two separate judicial divisions—a Superior and Appellate Division comprising of existing Family Court Justices, and a General Division, comprising of existing Federal Magistrates handling family law work.[11] The review also proposed a single administrative and corporate service structure for the federal family law system.[12] In relation to other areas of law under the former Federal Magistrates Court, the Semple review recommended that a second division of the Federal Court be established, which would deal with the migration and general federal law work.

2.11 A number of submitters and witnesses expressed their support for the model proposed by the Semple review rather than the model proposed by the FCFC bill. Former Judge of the Family Court, the Hon. Rodney Burr AM, commented that having one court with family law jurisdiction was logical but that the model proposed by the bills have things 'upside down', further noting that:

> It is only good sense and logic to have one court doing similar work in the same jurisdiction rather than two, but the mooted proposal has it exactly upside down. As was urged at the time when the extraordinary decision was taken to establish a second court in the jurisdiction, the Family Court of Australia should do all of the work with two tiers of judges.[13]

2.12 The Law Council of Australia also expressed its support for the Semple model:

> The Family Law Section in the Law Council and, in fact, the entire legal profession around the country supported the Semple model when it was put forward 10 years ago. Certainly we don't see any reason to modify that view. …
>
> The Semple model has and always has had great attraction. Before the Federal Magistrates Court was created we said we should give the Family Court a secondary rung of judges, of magistrates, within that entity. It's the most efficient way to manage the work and it means we maintain the specialty and continue to move with the times as society changes. It is the best outcome.[14]

---

10 Mr Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the right balance*, August 2008, p. 4.

11 Mr Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the right balance*, August 2008, p. 8.

12 Mr Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the right balance*, August 2008, p. 7.

13 The Hon Rodney Burr AM, *Proof Committee Hansard*, 11 December 2018, p. 24.

14 Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Proof Committee Hansard*, 12 December 2018, p. 33.

2.13 However, the Attorney-General's Department (the Department) explained a key difference is that the Semple model was not agreed to by the heads of jurisdiction, whereas the model as proposed by the bills before the committee has been agreed to between the three relevant heads of jurisdiction.[15] Additionally, the Department explained that the Semple model recommended the abolition of a court, whereas the current model does not abolish any court:

> The current model isn't going one way or another way; it's just bringing them together. It's the Family Court and the Federal Circuit Court brought together administratively, but there are still two separate courts, renamed as division 1 and division 2. The Semple model would have abolished the Federal Circuit Court. It's not a continuation of the Federal Circuit Court. It would have looked at abolishing the Federal Magistrates Court at the time and it would have needed each of the judges to have a new commission to the new court, the Family Court, and resign their commission as Federal Magistrates Court judges at the time. I think the Attorney has characterised that as a radical change, whereas what's proposed now is the least radical change that can be done, because it isn't actually abolishing courts at all, whereas the Semple model did seek to abolish the Federal Magistrates Court.[16]

PricewaterhouseCoopers report

2.14 Submitters and witnesses raised concerns relating to PwC's review of the efficiency of the Federal Court. PwC noted that the review was conducted over six weeks between March and April 2018 and did not consider opportunities for broader reform.[17] PwC explained the scope and method of the review:

> In understanding the current state of the courts, we were asked to identify potential areas of variation across the Family Court of Australia and the Federal Circuit Court of Australia, arising as a result of different rules and approaches of the courts. The operational review was intended to present a perspective on the efficiency of the courts to assist the Attorney-General's Department to make informed decisions about how to improve our court operations. Our work very much focused on the mechanics of the system and operational data of the courts. Given the focus on operational data, we reviewed the publicly available report on government services data and annual reports of both the Family Court and the Federal Circuit Court, as well as supplementary information related to workload, measures of timeliness and associated levels of expenditure. We also consulted with

15 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard,* 13 December 2018, p. 58.

16 Dr Albin Smrdel, Assistant Secretary, Family Law Branch, Attorney-General's Department, *Proof Committee Hansard,* 13 December 2018, p. 59.

17 Ms Zac Hatzantonis, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard,* 11 December 2018, p. 47.

> senior members of the court system to validate our understanding of the current state data and to test possible efficiency opportunities.[18]

2.15 At the hearing, PwC outlined the key findings of the review:

> In terms of what we saw, our key findings included that, over the past five years, the number of final court applications made to the courts to resolve family disputes has remained static, but the time and cost of resolution have not. The workload of the courts is driven by final order applications—around 20,500 each year. The Federal Circuit Court receives over 85 per cent of these applications. Different operational practices of the courts are leading to variation in efficiency levels. There are key differences in the way matters are handled between the courts. This includes the initial case management and allocation of those cases, practices of judges, and scheduling and listing of appeals. There is a significant difference in cost of finalisation of matters between the two courts, with the Family Court near to $17,000 versus the Federal Circuit Court at approximately $5,500. For litigants, it costs approximately $110,000 in the Family Court versus approximately $30,000 in the Federal Circuit Court. A number of opportunities that have the potential to significantly improve the efficiency of the family law system are summarised on page 8 of our report. These could significantly reduce the backlog of the family law courts and drive more efficient and cost-effective resolution of matters for litigants.[19]

2.16 Submitters expressed concern that the bill was developed on what they considered to be flawed findings contained within PwC's report. For example, the Law Institute of Victoria (LIV) submitted that the evidentiary basis for the reforms was flawed, particularly noting the PwC Report's 'multiple inaccuracies and unsubstantiated assumptions' and therefore argued that PwC report should not form the basis of the reform.[20]

2.17 Witnesses were particularly concerned that the PwC review did not adequately account for the different levels of complexity between the cases heard in the Family Court and the Federal Circuit Court. For example, Mr Burr stated:

> All I would say is that I would be acutely annoyed if I were still a judge of the Family Court of Australia and I were given one stat for a disposal after doing a two-week Magellan sex abuse trial and having to wade through all of the documentation from the state department, all of the family reports that were available and all the evidence that was given by experts, analyse it, make my findings of fact, apply the law and deliver a judgment. I would get one stat for that. If I were in my older role of doing one-day custody

18 Ms Zac Hatzantonis, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard,* 11 December 2018, p. 47.

19 Ms Zac Hatzantonis, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard,* 11 December 2018, p. 47.

20 Law Institute of Victoria, *Submission 60*, p. 7.

> trials, I would do those ex temp judgments. They were easy. You would just knock them out in an hour off the cuff, and I'd get one stat for that as well.[21]

2.18 In relation to ex-tempore judgements (that is, judgements made immediately after a trial ends), Mr Gregory Howe from the Law Society of South Australia referred to the suggestion as a 'naïve proposition', further stating that:

> One of the flawed things in the PwC report, for example, it that says that things would be a lot better if judges were told to deliver more ex tempore judgments. You just tell them to deliver more ex tempore judgments, and that way they won't be reserving, and that way they'll be able to get on with more cases. All judges could deliver ex tempore judgments, but they wouldn't be very good, potentially. The suggestion is that you can all of a sudden mandate judges to deliver X number of ex tempore judgments—the ones on the spot at the end of a trial. If senators aren't aware, what normally happens at the end of a trial is a judge reserves his or her judgment, goes away, thinks about it carefully, analyses the evidence, looks at all the exhibits, reflects on the demeanour of the witnesses, and then delivers a considered judgment sometime later—hopefully within two or three months, but sometimes longer. However, a judge can deliver an ex tempore judgment which is right at the end of the case. The judge can hear the last bit of evidence and say, 'This is my decision and this is why.' What the PwC report says is that one of the efficiencies in the system is to tell judges to deliver more ex tempore judgments, and that will free up a lot more judicial time. Frankly, that's the most naive proposition that you could make.[22]

2.19 On the issue of complexity, PwC noted that there was not a consistent measure of complexity and that it was often not possible or appropriate to categorise a matter as complex or not complex during the initial filing stage because the level of complexity may only become apparent over time.[23] Further, PwC explained that they were informed that both courts hear matters of similar complexity.[24] As explained by PwC:

> We're not arguing that there is no complexity. We acknowledge that there is complexity in cases that are heard within the Family Court. What we are saying is that complexity alone is not the single driver of efficiency within the two courts.[25]

---

21 The Hon. Rodney Burr AM, private capacity, *Proof Committee Hansard*, p. 24.

22 Mr Gregory Howe, Member, Family Law Committee, Law Society of South Australia, *Proof Committee Hansard*, p. 14.

23 Ms Zac Hatzantonis, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard*, 11 December 2018, p. 50.

24 Ms Zac Hatzantonis, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard*, 11 December 2018, p. 50.

25 Mr Richard Gwilym, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard*, 11 December 2018, p. 51.

2.20 PwC elaborated that because of the limited data on complexity, they were quite conservative on their modelling in relation to productivity gains.[26]

2.21 Despite submitters and witnesses concerns that the reforms were developed based on a flawed report, the Department noted the PwC's report was only one of five reviews that informed the development of the reforms proposed by the bill.[27]

Australian Law Reform Commission review

2.22 On 9 May 2017, the Australian Government announced its intention to direct the ALRC to conduct a comprehensive review into the family law system, with a view to making necessary reforms to ensure the system meets the contemporary needs of families and effectively addresses family violence and child abuse.[28] The ALRC has released a Discussion Paper and is due to provide its final report to the Attorney-General by 31 March 2019.

2.23 In announcing the reforms proposed by the bill, the Attorney-General made clear that the bill would focus on improving the administration of the courts dealing with family law matters and that any ALRC recommendation relating to court processes would be more easily implemented in a new simplified court structure.[29]

2.24 On 23 October 2018, the President of the ALRC, the Hon. Justice Sarah Derriginton, confirmed that the ALRC's review would not consider the amalgamation of the courts:

> Our terms of reference do not direct us to look at the structure of the court system. Our terms of reference, rather, direct us to look at questions around improving the whole of the system, looking at a child-centred approach, looking at ways we might make less adversarial reforms to the system as a whole. The discussion paper that we have recently released details a number of key themes that have come out of the submissions that we are looking at. We think that any suite of recommendations that we come up with will stand on their own regardless of whether the proposed court restructure does or does not go ahead.[30]

2.25 However, a number of inquiry participants remained concerned that the ALRC review would impact directly on the work of the court and therefore argued that consideration of the bills occur after the ALRC review was finalised. For example, Mrs Gabrielle Canny, Director of the Family Law Working Group, Legal Services Commission of South Australia explained:

---

26 Mr Richard Gwilym, Partner, PricewaterhouseCoopers Australia, *Proof Committee Hansard*, 11 December 2018, p. 51.

27 Attorney-General's Department, *Submission 56*, p. 11.

28 Australian Law Reform Commission, *Review of the family law system*, 27 September 2017, www.alrc.gov.au/inquiries/family-law-system/terms-reference (accessed 3 December 2018).

29 The Hon. Christian Porter, MP, Attorney-General, 'Legislation for family courts reform to be introduced', *Media release*, 17 August 2018.

30 Legal and Constitutional Affairs Legislation Committee, Estimates, *Proof Committee Hansard*, 23 October 2018, p. 59.

> In that inquiry, the structure of the courts was deliberately omitted because it was a blue-sky thinking. It said, 'Ignore what we've got. Think about it differently.' But if you're going to try to introduce change you've got to take into account what that change will try to fit into, which is the court system we have at the moment and what this bill is going to try to assist to improve.[31]

2.26 Mr Arthur Moses SC, President of the Australia Law Council stated:

> I think having waited 40 years for this moment it would be a tragedy for Australian families and the community if the opportunity it presents were to be lost through undue haste and inadequate consideration of alternative proposals. The review that's being undertaken is in the context where the government has committed to fundamental change to the structure and operation of the courts operating within the family law system, and the discussion paper issued in October raises a number of proposals and issues relating to the operation of the court. So I think we need to get the building blocks right for the legislative structure before we change the court because a lot of what the Law Reform Commission is looking at is going to impact directly upon the work whatever court is in place is going to need to do.[32]

2.27 However, other witnesses, such as Ms Bryant, expressed some concern that the ALRC review would likely take considerable time before the review is finalised the recommendations implemented.[33]

2.28 Mr Warwick Soden, Chief Executive Officer of the Federal Court and Acting Chief Executive Officer of the Family Court considered there was merit in taking action to improve the system prior to the release of the ALRC review:

> I think the move to have one point of entry, one single system, should be done as soon as possible for the benefits that will flow from that. It will be some time before any changes are made as a result of the ALRC, so we should do as much as we can as soon as we can to improve the system. That's my personal view.[34]

2.29 The committee's view on the limited relevance of the ALRC's review to the bills before the committee is set out in chapter 3.

---

31 Mrs Gabrielle Canny, Director of the Family Law Working Group, Legal Services Commission of South Australia, *Proof Committee Hansard*, 11 December 2018, p. 18.

32 Mr Arthur Moses SC, President, Law Council of Australia, *Proof Committee Hansard*, 12 December 2018, p.33.

33 The Hon. Diana Bryant AO, QC, private capacity, *Proof Committee Hansard*, 12 December 2018, p. 22.

34 Mr Warwick Soden, Chief Executive Officer of the Federal Court of Australia and Acting Chief Executive Officer of the Family Court of Australia, *Proof Committee Hansard*, 12 December 2018, p. 13.