Chapter 3

Key Issues

3.1 This chapter summaries the key issues raised in evidence regarding the proposed reforms, including:

- whether the bills would achieve their stated purpose;
- issues relating to the appellate jurisdiction of the Federal Court of Australia;
- the potential loss of judicial expertise, specialised services and institutional knowledge;
- the potential impact on vulnerable groups;
- the application of the bill to the Western Australian jurisdiction; and
- other issues, including the adequacy of funding for courts, and the timely appointment of judges.

3.2 The chapter also outlines the committee's views and recommendations.

Achieving the bill's stated purpose

3.3 The primary purpose of the Federal Circuit and Family Court of Australia Bill 2018 (FCFC bill) is to 'improve outcomes for children and families in the family law jurisdiction of the federal court system by increasing efficiencies and reducing delays'.[1] Intrinsic to achieving this purpose is the amalgamation of the Family Court of Australia (Family Court) and the Federal Circuit Court of Australia (Federal Circuit Court) into a unified administrative structure to be known as the Federal Circuit and Family Court of Australia (FCFC). As the Explanatory Memorandum explains, the unified administrative structure will create a single entry point into the FCFC, as well as create common rules and court forms, common practices and procedures, and common approaches to case management:

> The bringing together of the courts is intended to provide Australian families with a quicker dispute resolution mechanism, as well as greater certainty and consistency. This intention will be achieved by improved shared case management practices so that information will be readily available about what to expect and when, thereby standardising the experience of litigants, and providing an early sense of the likely cost implications of lodging a family law application in the FCFC. The FCFC would become the single point of entry into the family law jurisdiction of the federal court system for all Australian family law matters.[2]

3.4 Submitters and witnesses were generally supportive of having a single point of entry and the harmonisation of rules and practices within the federal courts.

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1 Explanatory Memorandum to Federal Circuit and Family Court of Australia Bill 2018 (FCFC bill), p. 2.

2 Explanatory Memorandum to FCFC bill, p. 6.

However, some submitters argued that these amendments could be made without legislative reform. For example, when asked whether a number of the reforms in the bill would assist with improving the federal courts, Mr Gregory Howe, Member of the Family Law Committee of the Law Society of South Australia, stated:

> Some parts, yes, but they don't require the most significant change to the family law structure in 40 years, because all these changes that we support—harmonisation of rules, a single point of entry, common forms and precedents, better use of registrars—none of that the requires wholesale change…[3]

3.5 The specific concerns raised in relation to the single entry point and the harmonisation of court rules will be discussed below.

Single entry point

3.6 Submitters generally agreed that a single entry point would be beneficial to the family court system. However, a number of submitters argued that the bill would not achieve its stated purpose of simplifying and reforming the court system. The Law Institute of Victoria (LIV) contended that 'a single point of entry to the federal family law courts for Australian families will modernise and improve case management and reduce pressure on court resources'.[4] However, the LIV submitted that the reforms would not achieve their stated purpose of improving efficiency in the federal courts and argued that the bill would instead add complexity to the family law system:

> Unfortunately, the Government's proposed model is unlikely to deliver the objectives of the structural reforms. The proposal would remove the specialisation that has been developed to aid families in crisis who are dealing with multiple and interrelated issues such as family violence, substance misuse, mental health issues and child abuse. Rather than simplifying the system, the proposal will lead to significant uncertainty and add unnecessary levels of complexity through the insertion of additional complex legislation, and by creating a three-tiered system for families to navigate.[5]

3.7 Similarly, the Queensland Law Society (QLS) submitted that the FCFC bill would not create a single court, but instead would perpetuate a model that would further complicate the courts system. The QLS explained:

> In effect, there is no true amalgamation of the courts. It is therefore unclear how the issues around the complexity of the system will be properly resolved through the proposal. While we acknowledge the intention for a common case management approach to be adopted across both divisions,

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3 Mr Gregory Howe, Member of the Family Law Committee of the Law Society of South Australia, *Proof Committee Hansard*, 11 December 2018, p. 9.

4 Law Institute of Victoria, *Submission 60*, p. 52. See also, Ms Kate Greenwood, Law Reform Officer, Aboriginal and Torres Strait Islander Legal Service Queensland, *Proof Committee Hansard*, 13 December 2018, p. 34; Law Society of New South Wales, *Submission 49*, p. 3.

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

> the structure does not appear to assist in reducing complication for those engaged in the system to a substantial extent.[6]

3.8 Additionally, the Law Society of New South Wales (Law Society of NSW) argued that the proposed bills would not contain improvements, but rather that 'merging the two Courts as proposed will simply change the structure around the problems they face'.[7]

3.9 Rather than the single entry point as proposed under the bill, the Law Council of Australia (Law Council) expressed their support for the model put forward by the New South Wales Bar Association, as depicted in diagram 1.

3.10 As explained by the Law Council, the model would have a single entry point.[8] Additionally, the model would make better use of Registrars and judges' time. Registrars, the Law Council explained, would be used at the front end and along the court pathway, while judges' time would be preserved for dealing with interlocutory hearings and final trials.[9]

3.11 However, in its submission, the Attorney-General's Department (the Department) explained that, unlike other models, the legislation had been developed in consultation with the heads of jurisdiction of the federal courts.[10] Furthermore, the reforms proposed by the bills 'take the least radical path to change, while ensuring that the current barriers to improvement in the family law system are addressed'.[11] At the hearing, the Department reiterated that a key difference between the model proposed by the bill and other proposed models was that 'the model that's before the parliament now has been agreed between the three relevant heads of jurisdiction'.[12]

3.12 While not supporting the model put forward by the bills, and instead preferring the model as proposed by the Semple review, former Judge of the Family Court, the Hon. Rodney Burr AM, outlined other possible benefits of amalgamating the Family Court and Federal Circuit Court:

> If you had the two courts working in the same building, together, in the same court and in the same structure, and eating in the same lunchroom, which they don't do, you would get all of those benefits that would flow. One court would also provide an incentive for promotion. There have been a number of the Federal Circuit Court judges who have been promoted to

6 Queensland Law Society, *Submission 5*, p. 2.

7 Law Society of New South Wales, *Submission 49*, p. 1.

8 Law Council of Australia, *Submission 52*, pp. 28–30.

9 Law Council of Australia, *Submission 52*, pp. 28–30.

10 Attorney-General's Department, *Submission 56*, p. 4.

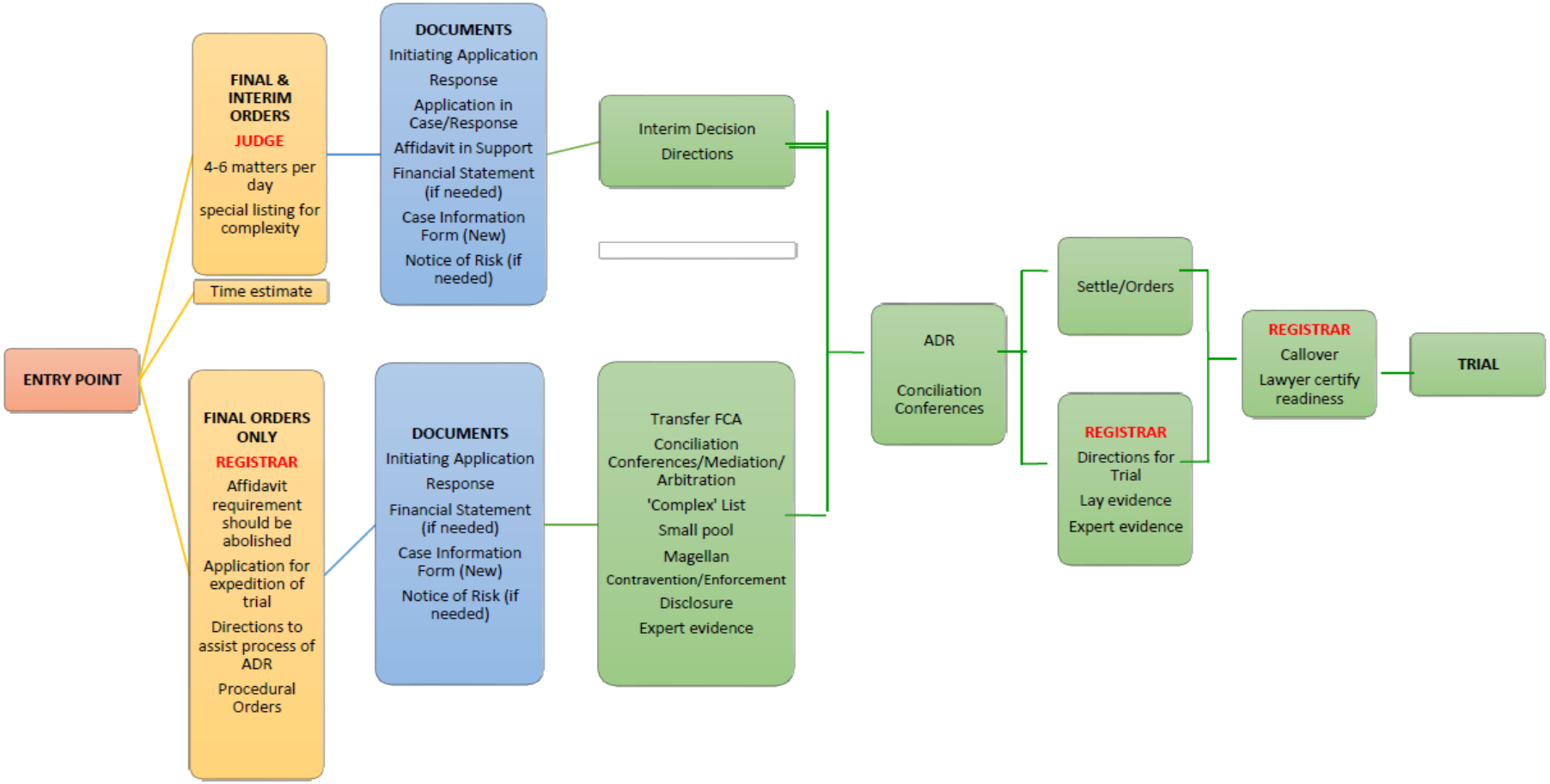
11 Attorney-General's Department, *Submission 56*, p. 4.

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

the Family Court. There would be a greater opportunity to demonstrate your worth, to your brother and sister judges, in that one environment.[13]

13 The Hon. Rodney Burr AM, private capacity, *Proof Committee Hansard*, 11 December 2018, p. 25.

Diagram 1: Proposed single entry point and case management system[14]



14 Law Council of Australia, *Submission 52*, p. 29.

Common management and practices

3.13 Many submitters were supportive of the aim of the FCFC bill to create a more streamlined and simplified court system. The Aboriginal and Torres Strait Islander Legal Service Queensland (ATSILS Queensland) submitted that the bill's proposal to merge the practices and procedures of the Family Court and Federal Circuit Court would be beneficial to clients in avoiding confusion when moving cases between the courts.[15] The Law Society of NSW also expressed support for the bill's proposed common leadership by registrars of both divisions and common management and more consistent case management.[16]

3.14 However, a number of submitters and witnesses noted that legislation is not required for the courts to agree on the same set of rules, forms, case management practices and directions. Former Judge of the Family Court, the Hon. Peter Rose, stated:

> My suggestion is that you don't need legislation. Legislation doesn't have the purpose of changing procedure. That's a matter for each court. I would have thought that it was a matter of common sense that where one is dealing with the same jurisdiction, albeit different types of matters, of course you should have the same rules. Rules are traditionally made by the court, not by legislation. The reason is obvious—if there's a need to change the rule, does that mean you have to go back to parliament to get the legislation amended?[17]

3.15 However, the importance of having legislation to enable the development of common rules and practices was explained by Ms Louise Anderson, National Director of the Federal Court of Australia (Federal Court):

> …I would think that given that over the last 10 years there's been very strong support for harmonised rules and case management, no court, notwithstanding very highly capable people endeavouring to put that in place, has yet achieved it. To that extent, the bill provides clarity as to parliament's intention, which would assist from an administrative perspective.[18]

3.16 The former Chief Justice of the Family Court, the Hon. Diana Bryant, similarly expressed the view that while legislation may not be necessary, it would have the effect of the unified rules and practices being easier to achieve:

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15 Ms Kate Greenwood, Law Reform Officer, Aboriginal and Torres Strait Islander Legal Service Queensland, *Proof Committee Hansard*, 13 December 2018, p. 32.

16 Law Society of New South Wales, *Submission 49*, p. 3.

17 The Hon. Peter Rose, private capacity, *Proof Committee Hansard,* 12 December 2018, p. 15.

18 Ms Louise Anderson, National Director, Court and Tribunal Services, Federal Court of Australia, *Proof Committee Hansard,* 12 December 2018, p. 3.

> I probably come at it with my head of jurisdiction hat on and from my experience. It's just easier probably when you have legislation. You don't need it, but it probably makes life easier.[19]

Court rules to be decided by the Chief Justice

3.17 Proposed clauses 56 and 184 of the FCFC bill provide that the Chief Justice of Division 1 and the Chief Judge of Division 2 would have the power to unilaterally set rules for the proposed FCFC.

3.18 A number of submitters expressed concerns with the proposed sections. The Law Council submitted that it was highly unusual for a Superior Court in Australia to be placed with sole rule-making powers.[20] The Law Council explained that currently Superior Courts vest rule-making powers in either all of the judges of the court with a majority required to support changes to court rules, or in a 'rule committee' made up of judges and sometimes external stakeholders.[21] The Law Council argued that rule-making should be a shared responsibility to ensure judges work collaboratively:

> The LCA is concerned that the vesting of sole rule-making power in the head of jurisdiction for each Division of the FCFC (who may also be the same person) has the potential to risk a breakdown in the relationship between judges of each Division and the effective management of each Division and to risk that the input of other stakeholders in matters of importance to practice and procedure are not taken into account.[22]

3.19 Other submitters argued that a broader group of stakeholders should be consulted in regards to rules of the FCFC. For example, ATSILS Queensland stated that the rules should reflect the diversity in the courts, including courts servicing those living in regional or remote areas. They argued that judges from regional centres should be included in making rules to ensure that the views of those living outside metropolitan areas are adequately represented.[23]

3.20 The Law Society of NSW noted that it was difficult for observers to effectively examine whether the reforms would be effective given that the rules were not yet published, and requested that the proposed rules be published to enable sufficient scrutiny of the bills.[24]

3.21 The Law Council recommended that the existing provisions contained in the *Family Law Act 1975* (Family Law Act) and the *Federal Circuit Court of Australia Act 1999* be retained in the FCFC Bill and applied to Divisions 1 and 2 of the FCFC,

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

20 Law Council of Australia, *Submission 52*, p. 62.

21 Law Council of Australia, *Submission 52*, p. 62.

22 Law Council of Australia, *Submission 52*, p. 62.

23 Ms Kate Greenwood, Law Reform Officer, Aboriginal and Torres Strait Islander Legal Service Queensland, *Proof Committee Hansard*, 13 December 2018, pp. 32–33.

24 Law Society of New South Wales, *Submission 49*, p. 1.

in order to ensure that judges of different backgrounds and experience have input into the creation of the rules and efficiently manage the court's work.[25]

3.22 Professor Patrick Parkinson AM recommended that the bill be amended to ensure that the rule making powers of the court be either 'vested in the Chief Justice and Chief Judge, with support from a majority of other judges in each Division, or in a majority of judges'.[26] At the hearing, Professor Parkinson explained that a rule-making power 'with support from a majority of other judges' would provide the Chief Justice and Chief Judge with effectively, a veto power, while the alternative would not provide a power of veto.[27]

3.23 The Department advised that the FCFC bill's proposal was consistent with the Chief Justice's responsibility to ensure the 'effective, orderly and expeditious discharge of the business of the Federal Circuit and Family Court of Australia'.[28]

3.24 Regarding the concerns of the Chief Justice and Chief Judge's capacity to unilaterally set court rules, the Department provided the following response:

> None of this is intended to be a criticism of any existing court, but it is worth noting that these issues about the lack of consistency of rules and lack of common rules have been around for 20 years, and the existing mechanisms enabling the rules to be changed don't seem to be particularly successful at addressing that issue. So I think one would really have to say: how is the chief justice going to address this? He has said he's going to [make the rules] in consultation. It's weighing up: do you enable a chief justice if necessary to cut through and make decisions, or do you really almost empower the majority of the other judges to hold the chief justice to ransom? I think it's a weighing-up exercise.[29]

3.25 In answers to questions on notice, the Department elaborated that Professor Parkinson's recommendation to vest the rules in the Chief Justice and Chief Judge with support from a majority of the judges in each Division of the FCFC would be 'a duplication of the structure that has prevented a consolidated set of Rules of Court to date'.[30]

3.26 Despite Chief Justice Alstergen's proposed power to unilaterally set court rules, the Department noted that the Chief Justice's intention to convene an advisory committee, which would be permitted under the bills:

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25 Law Council of Australia, *Submission 52*, p. 62.

26 Professor Patrick Parkinson AM, Dean of Law, University of Queensland, *Submission 53*, p. 8.

27 Professor Patrick Parkinson AM, *Proof Committee Hansard*, 13 December 2018, pp. 14–15.

28 Dr Albin Smrdel, Assistant Secretary, Legal System Branch, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 49.

29 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 49.

30 Attorney-General's Department, answers to questions taken on notice, 13 December 2018 (received 18 January 2019), p. 9.

> So the rules aspect—giving the chief justice power for the rules—I guess is just an addition to that. We note that the chief justice has indicated that he will constitute committees, but the [FCFC bill] also provides for advisory committees. The chief justice can convene advisory committees comprising other judges or other experts to be part of an advisory committee for the formation of the rules.[31]

3.27 Ms Bryant also expressed qualified support for the proposal, subject to the power being transitional:

> I don't have any great concern, at least in a transitional sense, about giving the chief justice the power to make rules. As you said earlier, any competent leader would have a process, which, I heard this morning, is what unsurprisingly Chief Judge Alstergren wants to do. You obviously have a committee but what it does is it gives the chief justices, if they can't reach agreement on certain things, the capacity to make the decision on areas of dispute. I probably wouldn't make it long term. I'd probably have it as transitional so that when the harmonisation is complete, you have a more traditional rule-making power.[32]

Appellate jurisdiction in the Federal Court of Australia

3.28 As outlined in chapter one, the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Consequential Amendments bill) provides for the creation of the proposed Family Law Appeal Division within the Federal Court, which would hold jurisdiction over the majority of appellate functions for family law decisions.[33] The new Family Law Appeal Division would hear appeals from Division 1 and Division 2 of the proposed FCFC. Division 1 appeals would be heard by a Full Court of the Family Law Appeal Division, comprising of three judges. Division 2 appeals would generally be heard by a single judge of the Family Law Appeal Division unless a Judge considered it appropriate for the appellate jurisdiction to be exercised by a Full Court.[34] General federal law appeals from Division 2 would be directed to the Federal Court, which replicates current practice.

3.29 Proposed Division 1 of the FCFC would be restricted in its appeal jurisdiction to ensure that judges only hear appeals from state and territory courts of summary jurisdiction exercising federal family law jurisdiction, excluding decisions of Family Law Magistrates and non-Family Law Magistrates in the Family Court of Western Australia (FCWA).[35] The Explanatory Memorandum states that this would have the effect of the workload of the FCFC (Division 1) judges being reduced as the majority

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31 Dr Albin Smrdel, Assistant Secretary, Legal System Branch, Attorney-General's Department, *Proof Committee Hansard,* 13 December 2018, p. 49.

32 The Hon. Diana Bryant, private capacity, *Proof Committee Hansard*, 12 December 2018, p. 20.

33 FCFC bill, subcl 27(1); Consequential Amendments bill, Schedule 1, Part 1, items 227 and 228.

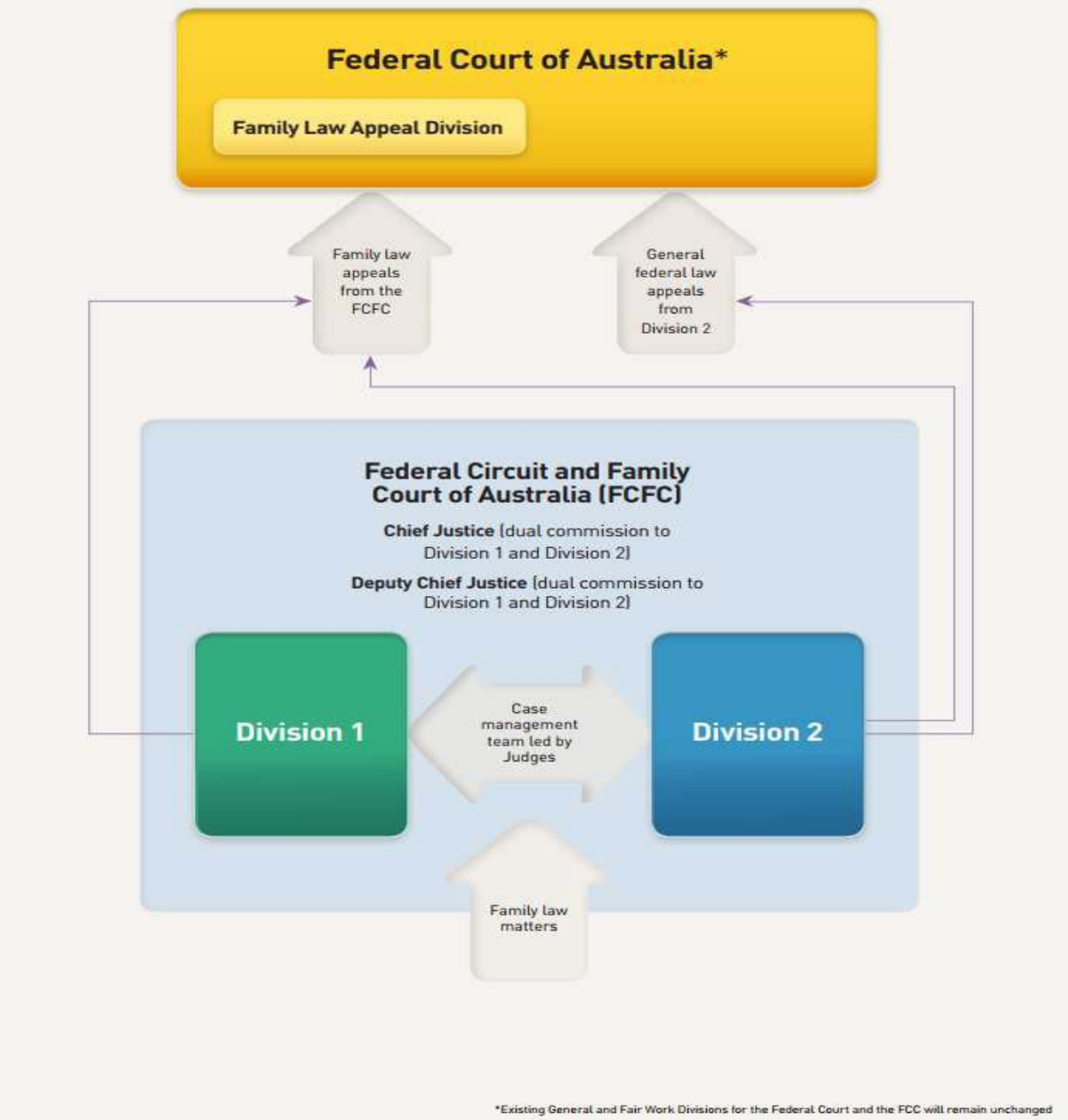
34 Consequential Amendments bill, Schedule 1, Part 1, item 229.

35 Explanatory Memorandum to FCFC bill, p. 16.

of its appeals would be directed to the Family Law Appeals Division of the Federal Court.

3.30 Diagram 2 depicts the proposed appeals structure:

Diagram 2: Proposed Federal Courts Structure[36]



3.31 Concerns were raised by a number of submitters regarding the Consequential Amendments bill's proposal to move the appellate jurisdiction from the Family Court

36 Attorney-General's Department, *Submission 56*, p. 19.

to the proposed Family Law Division within Federal Court in relation to family law matters.[37]

3.32 The Law Council did not support what it described as the abolition of the Appeal Division of the Family Court.[38] It stated that the current members of the Appeals Division held extensive experience and expertise in family law, which had contributed to the development of a body of jurisprudence.[39] The Law Council argued that the High Court of Australia (the High Court) has explicitly recognised the guidance as a specialised intermediate court, which was described by the High Court as more experienced than that of other courts of appeal.[40] It was noted that knowledge may be subsequently lost as a result of the shift of the appeals jurisdiction to the Federal Court.

3.33 The Law Society of NSW raised concerns regarding whether the Federal Court was an appropriate venue to which to refer family law appeals. The Law Society of NSW submitted that the bills were not clear regarding how this model will practically work, and could potentially risk losing the expertise and experience of the current appeals division of the Family Court.[41] It stated:

> The Federal Court does not have an appeals division - there are currently four sittings of approximately one month duration each calendar year in that court, and the judges are drawn from the trial division. Given the number of family law appeals, some for urgent parenting matters, it is unlikely the current federal court structure can accommodate the volume of family law appeals.[42]

3.34 The Law Society of NSW further noted that appeals in the Federal Court relate to errors of law rather than errors of fact or evidence, which involves a significantly different and laborious process which may be ill-suited to members of the Federal Court judiciary.[43]

3.35 Ms Zoe Rathus of Griffith University recommended that the bill be amended to provide for shared commissions to enable judicial officers to sit on the Family Law Appeal Division in the Federal Court of Australia and the FCFC concurrently.[44]

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37 Ms Deborah Awyzio, Chair, Domestic and Family Violence Committee, Queensland Law Society, *Proof Committee Hansard*, 13 December 2018, p. 7; Ms Angela Lynch, Chief Executive Officer, Women's Legal Services Australia, *Proof Committee Hansard*, 13 December 2018, p. 36.

38 Law Council of Australia, *Submission 52*, p. 51.

39 Law Council of Australia, *Submission 52*, p. 51.

40 Law Council of Australia, *Submission 52*, p. 52.

41 Law Society of New South Wales, *Submission 49*, p. 4.

42 Law Society of New South Wales, *Submission 49*, p. 4.

43 Law Society of New South Wales, *Submission 49*, p. 5.

44 Ms Zoe Rathus, Griffith University, *Proof Committee Hansard*, 13 December 2018, p. 21.

3.36 In response, the Department noted the intention of the amendments was to refocus the proposed FCFC judicial officers' workload away from appellate work and towards hearing and finalising more first instances family law cases. This, they argued, would address the backlog of family law cases currently before the courts.[45]

Single-judge appeals in the Family Law Appeal Division

3.37 As detailed above, the bills provide that appeals from Division 2 of the FCFC to the Family Law Appeal Division would be heard by a single judge unless it was deemed appropriate to exercise the jurisdiction by a Full Court.[46]

3.38 The Department explained that currently appeals from the Federal Circuit Court to the Family Court can be heard by a single judge, but that the majority of such appeals conducted by the Family Court were conducted by a Full Court of three judges.[47] The Department stated that the proposal to change the law to automatically apply single judge appeals unless otherwise decided would free up judges' workload to hear and decide cases:

> 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 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.[48]

3.39 The Department also noted that the work of the courts would be monitored to ensure that the reforms were operating as anticipated.[49]

3.40 Professor Parkinson was supportive of the proposal, noting that it was similar to the practice of the former Federal Magistrates' Court before it became the Federal Circuit Court:

> The change to have three member benches in all appeals against final orders from a Circuit Court judge arose because it was considered that the status of the Circuit Court as equivalent to a District Court in NSW, warranted ordinarily having a three member appellate bench of superior court judges to hear the appeal. That is, the elevation of the magistrates to become judges required an increase in the number of judges providing appellate scrutiny for each decision.[50]

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45 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 47.

46 Consequential Amendments bill, Schedule 1, Part 1, item 229.

47 Attorney-General's Department, *Submission 56*, p. 17.

48 Attorney-General's Department, *Submission 56*, pp. 17–18.

49 Attorney-General's Department, *Submission 56*, p. 18.

50 Professor Patrick Parkinson AM, *Submission 53*, pp. 4–5.

3.41 Professor Parkinson also stated that the Australian Government had attempted to prioritise the need for greater efficiency to reduce delays, rather than the status of Federal Circuit Court judges. He agreed with this approach, while also noting that there would be methods of ensuring a larger appellate bench would be available to consider matters concerning significant issues of law or practice which would affect more than the particular matter at hand.[51]

3.42 Some submitters expressed concern regarding the proposed model for single-judge appeals. The LIV submitted that a bench of three judges deciding appeals was a preferable model rather than one judge.[52] The LIV stated that a number of intermediate appellate Courts in other jurisdictions routinely had three judges hearing appeals.[53] It further asserted that additional judges sitting on appeals assisted in creating robust decisions:

> The LIV considers a bench of three Judges deciding appeals allows for more considered and better jurisprudence. As noted above, family law is an incredibly complex area of law, that is expected to respond to community expectations by quickly evolving to make sure the law is in line with community understanding of different issues at a much faster pace than other areas of law. As noted by the Hon. Justice O'Ryan of the FCoA, robust debate amongst three expert Judges promotes responsive and strong jurisprudence, and its removal may result in 'a downgrading, a depressing of the standard of jurisprudence required of an intermediate appeal court.'[54]

3.43 Responding to these concerns, the Department observed that the capacity to hold single-judge appeals was possible under the current framework for the Federal Circuit Court, which enables the exercise of jurisdiction by a single judge if considered appropriate rather than a three-judge Full Court.[55]

3.44 The Department also emphasised that appeals from Division 1 would still be heard by a Full Court consisting of three judges.[56]

Judicial expertise

3.45 One of the key objectives of the bills is to deliver structural reforms that would 'ensure the expertise of suitably qualified and experienced professionals supports those families in need'.[57]

3.46 Judges of the three federal courts are currently subject to different qualifying requirements. In order to be eligible for appointment as a judge of the Federal Court

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51 Professor Patrick Parkinson AM, *Submission 53*, p. 5.

52 Law Institute of Victoria, *Submission 60*, p. 30.

53 Law Institute of Victoria, *Submission 60*, p. 30.

54 Law Institute of Victoria, *Submission 60*, p. 30.

55 Mr Ryan Perry, Principal Legal Officer, *Proof Committee Hansard*, 13 December 2018, p. 57.

56 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 52.

57 Explanatory Memorandum to FCFC bill, p. 2.

and the Federal Circuit Court, candidates are required to be enrolled as legal practitioners of the High Court or a Supreme Court of a state or territory for at least five years.[58] Candidates for the Family Court are subject to the same requirements in addition to the criterion under section 22(2)(b) of the Family Law Act which requires that 'by reason of *training, experience and personality*, the person is a suitable person to deal with matters of family law'.[59]

3.47 The proposed FCFC bill provides that judges appointed to Division 1 remain subject to the same qualifications stated in the Family Law Act. Clause 11(2)(b) of the FCFC bill states that a person is not to be appointed as a judge of Division 1 unless:

> [B]y reason of training, experience and personality, the person is a suitable person to deal with matters of family law.[60]

3.48 The Explanatory Memorandum to the FCFC bill states that these requirement are included in the bill to ensure that a person appointed as a FCFC judge:

> …not only has the necessary duration of experience as outlined in paragraph 11(2)(a), but also has the appropriate type of training, experience and personality to be appointed as a Judge of the FCFC (Division 1).[61]

3.49 Judges appointed to Division 2 of the proposed FCFC are subject to different qualifications than judges in Division 1. The FCFC bill provides that a person is not to be appointed as a Division 2 judge unless:

> [T]he person has appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Federal Circuit and Family Court of Australia (Division 2).[62]

3.50 The Explanatory Memorandum provided an explanation regarding the requirements for Division 2 judges:

> [The provision] is to ensure that not only does a person need to have the necessary duration of experience as outlined in paragraph 79(2)(a), but also the appropriate types of knowledge, skills and experience.[63]

3.51 The LIV submitted that the additional criterion relating specifically to family law was critically important in ensuring that judges were able to effectively manage family law cases:

> This additional criterion acknowledges the skills, abilities, knowledge, expertise and experience of the professionals working within a system are necessary for the system to operate effectively and accessibly.[64]

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58 *Federal Court of Australia Act 1976*, s. 6(2); *Federal Circuit Court of Australia Act 1999*, Schedule 1, Part 1(2).

59 Emphasis added.

60 FCFC Bill 2018, subcl. 11(2)(b).

61 Explanatory Memorandum to FCFC bill, p. 23.

62 FCFC Bill 2018, subcl. 79(2)(b).

63 Explanatory Memorandum to FCFC bill, p. 57.

3.52 The LIV expressed concern that judges of the FCFC would consequently be subject to differing qualifications while dealing with the same jurisdiction. It noted that the Explanatory Memorandum states that Division 2 will hold largely the same family law jurisdiction as Division 1, which would result in judges not subject to Division 1 qualifications presiding over family law matters.[65] The LIV further stated that incoming Federal Circuit Court judges would not be subject to the qualifications as those being newly appointed to the FCFC, as they will be appointed to Division 2.[66]

3.53 The LIV recommended that the FCFC bill be amended to ensure that only Federal Circuit Court judges who fit the additional criteria in Division 1 would be able to hear family law matters.[67] It submitted that the increasing family law workload in the current Federal Circuit Court demonstrated the need to ensure that judges were appropriately qualified and suited to manage family law proceedings.[68] The LIV further argued that there was considerable risk in allowing judges with no family law experience to routinely hear family law cases, which may also result in greater inefficiency and fail to meet community standards.[69]

3.54 Ms Bryant stated in her submission that it was unclear what kind of 'knowledge' and 'skills' would be required, although noted that guidance had been provided by the Discussion Paper released by the Australian Law Reform Commission (ALRC).[70] Ms Bryant explained that the ALRC had also proposed that all future appointees to federal law courts exercising family law jurisdiction be considered on matters such as 'knowledge, experience and aptitude' regarding family violence.[71] She also observed that a number of inquiries at federal and state levels, including the Royal Commission into Institutional Responses to Child Sexual Abuse, had promoted judicial expertise in matters relating to family law.[72]

3.55 Mr Burr submitted that unless judges of the new FCFC were appropriately trained to manage family law cases, there may be inadequate experience and knowledge amongst the judiciary to ensure adequate specialisation in family law.[73] When queried about whether Division 2 judges overseeing family law cases would require additional support to become specialists, Mr Burr stated:

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64 Law Institute of Victoria, *Submission 60*, p. 27.

65 Law Institute of Victoria, *Submission 60*, p. 27.

66 Law Institute of Victoria, *Submission 60*, p. 27.

67 Law Institute of Victoria, *Submission 60*, pp. 27–28.

68 Law Institute of Victoria, *Submission 60*, p. 28.

69 Law Institute of Victoria, *Submission 60*, pp. 28–29.

70 The Hon. Diana Bryant AO, QC, *Submission 71*, p. 11.

71 The Hon. Diana Bryant AO, QC, *Submission 71*, p. 11.

72 The Hon. Diana Bryant AO, QC, *Submission 71*, p. 11.

73 The Hon. Rodney Burr AM, private capacity, *Proof Committee Hansard*, 11 December 2018, pp. 25–26 and 28.

> You would have no choice, Senator, because the government's given them the appointment and … they're in there. Some of them struggle for a while. Many come up to speed very quickly. We're talking about some quality people, but it's pretty hard on them to do it in an under-resourced court and not be familiar with the jurisdiction. It's important not to ignore that, if you're an expert family lawyer, you're not just a lawyer; you really need to be a serious people person. You're dealing with distressed people every day of your life.[74]

3.56 The LIV raised concerns regarding the potential for the loss of Family Court judicial expertise and specialisation in areas such as:

- Matters relating to international law, including Hague Convention cases regarding international child abduction;
- The interrelationship between mental health and substance abuse;
- Special medical procedures and the welfare jurisdiction under section 67ZC of the Act; and
- Childhood development and attachment.[75]

3.57 The LIV stated that the lack of specialisation in family law in the Federal Court may result in negative outcomes for court users:

> The LIV submits that a just and proper outcome for Australian families participating in the family law system is only possible if appeals are conducted by Judges with an appropriate family law background and experience who possess a 'thorough, indepth and expert knowledge of family law'.[76]

3.58 The QLS similarly submitted that the lack of specialisation could have negative effects on court users and the quality of jurisprudence:

> Overwhelmingly, it is the experience of our members that a lack of expertise in family law can result in erroneous decisions and poorer outcomes for families. In our view, there is a significant risk that the quality and propriety of family law decisions will be compromised where determinations are made by judicial officers without family law expertise. These decisions are also more likely to be appealed, increasing the demand on court services.[77]

3.59 The Law Council detailed a number of negative consequences that could occur without adequate judicial experience in family law, including:

> (a) lack of consistency in judicial approach to practice, procedure, the application of well-established legal principles and the limits or range of the

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74 The Hon. Rodney Burr AM, private capacity, *Proof Committee Hansard*, 11 December 2018, p. 29.

75 Law Institute of Victoria, *Submission 60*, pp. 20–25.

76 Law Institute of Victoria, *Submission 60*, p. 29.

77 Queensland Law Society, *Submission 5*, p. 2.

> exercise of judicial discretion – which makes it difficult for lawyers to advise litigants about likely outcome. This means that some litigants are minded to agree to less than fair settlements or arrangements for children that might not prioritise their best interests and safety, rather than risk an adverse judgment. Other litigants who should settle their cases, are minded to 'take their chance' and run their case in the hope of achieving an outcome better than they might be otherwise be entitled to;
>
> (b) the making of orders that may not appropriately manage risks to women and children;
>
> (c) increased costs to litigants due to the inconsistency and unpredictably of case management practices;
>
> (d) a less than comprehensive identification of legal issues, particularly when either or both parties are unrepresented, leading to unfair outcomes; and
>
> (e) lack of social science knowledge about issues such as the appropriate post-separation parenting arrangements for children at different ages and stages of development, leading to orders being made that are not in the best interests of children.[78]

3.60 The Department stated in evidence that the bills would not remove specialisation in family law from the proposed FCFC. Representatives of the Department explained that the criteria proposed for appointees would ensure that judges are suitably qualified for the positions they would hold in the court, reinforcing specialisation in family law particularly in relation to Division 1. It was further noted that the bills introduce qualification criteria for judges for Division 2, which currently do not exist for Federal Circuit Court judges.[79]

3.61 Mr Cameron Gifford of the Department noted that the bill did not detract from the specialisation of judicial officers, but instead enabled the courts to effectively target judges' specialisation in certain areas:

> The specialisation argument really goes towards the competence of the judge to be able look after the cases that are before them. This particular bill does nothing to take away from the specialisation or the experience of the judges that are currently within both the FCC and the Family Court. If anything, it actually provides greater flexibility for the Chief Justice to be able to allocate the judges appropriate to the cases that are in front of them. One of the additional provisions of the bill was also for specialist lists, to make sure that there is expertise being applied to the right types of cases, with the right judge attached to them.[80]

78 Law Council of Australia, *Submission 52*, p. 47.

79 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 47.

80 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 53.

Qualification of 'personality'

3.62 As described above, the bill proposes that Division 1 judges be subject to the qualification that the person has the requisite 'personality' to manage family law proceedings. However, Division 2 judges are not subject to the qualification for the appropriate personality.

3.63 Ms Bryant recommended that 'personality' should be added to the qualifications for judges dealing with family law matters.[81]

3.64 This was similarly supported by Mr Burr.[82] However, Mr Burr observed that this requirement may not be needed for Division 2 judges that specialise in other subject areas and hear matters not requiring family law.[83]

3.65 The Department advised that the qualification in the Family Law Act for judges to have an appropriate personality for family law could be implemented in the proposed bills, as there was no policy reason for it to be omitted.[84]

Future appointments to Division 1

3.66 A number of submitters expressed concern that potentially no further judges would be appointed to the new FCFC, which could result in the end of the specialist nature of the Family Court. The Law Council stated in its submission that the lack of future judicial appointments to Division 1 represented the 'effective abolition of a specialist family court in Australia'.[85]

3.67 This view was shared by Mr Burr, who submitted that the bills would effectively provide for the 'end of the Family Court of Australia'.[86] Mr Burr stated that, without amending the constitutional requirement providing for judges to retire at the age of 70, no further judges originating from the Family Court would remain after the final judges retired unless future judges were appointed.

3.68 The Department responded to concerns that the Family Court was effectively being abolished by explaining that this was not the intended outcome of the bills. The Department, stated that judges from the Family Court would continue on the FCFC for a long period, ensuring that the expertise of the former court remained:

> It's important to note, though, that the bills don't abolish the Family Court. The existing appointees to the Family Court are appointed until age 70, unless they retire or resign sooner than that. In fact, the person who will run

81 The Hon. Diana Bryant AO,QC, *Committee Hansard*, 12 December 2018, pp. 21 and 28.

82 The Hon. Rodney Burr AM, *Proof Committee Hansard*, 11 December 2018, p. 25.

83 The Hon. Rodney Burr AM, *Proof Committee Hansard*, 11 December 2018, p. 29.

84 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 48.

85 Law Council of Australia, *Submission 52*, p. 44. Also see: Law Society of New South Wales, *Submission 49*, p. 2.

86 The Hon. Rodney Burr AM, private capacity, *Proof Committee Hansard*, 11 December 2018, p. 25.

> the longest will run until 2039. There's a body of appointees who will continue, and there's no prohibition on fresh appointments to [D]ivision 1.[87]

3.69 The Department also stated that nothing in the bills prevented further judicial appointments to Division 1, and that governments may elect to appoint more judges to Division 1.[88]

Qualifications of judges appointed to the Family Law Appeal Division of the Federal Court of Australia

3.70 The Consequential Amendments bill provides that judges appointed to the Family Law Appeal Division of the Federal Court possess 'appropriate knowledge, skills and experience to deal with the kind of matters that may come before the Court'.[89]

3.71 The Explanatory Memorandum stated that the clause had been drafted to ensure that judges appointed to the Family Law Appeal Division would be appropriately qualified to manage a range of matters that may come before it:

> [T]he structure of the subsection is amended to add an additional requirement that a person must have the appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Court. This is to ensure that not only does a person need to have the necessary duration of experience as outlined in new paragraph (a), but also the appropriate type of knowledge, skill and experience to be appointed as a Judge of the Federal Court. The inclusion of this additional requirement reflects the current practice for appointing Judges.[90]

3.72 Concerns were raised by submitters in relation to the qualifications of judges appointed to the proposed Family Law Appeal Division.[91] The Law Council submitted that the proposed amendment to section 6(2) of the *Federal Court Act 1976* does not explicitly require experience or personality suited to family law matters.[92]

3.73 While agreeing that specialist knowledge and skills were required by the judges of the proposed Appeal Division of the Federal Court, Professor Parkinson argued that it could be beneficial for judges with limited family law experience to bring new perspectives to decision-making, in addition to also training a broader range

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87 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 47.

88 *Proof Committee Hansard*, 13 December 2018, pp. 50–51.

89 Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (the Consequential Amendments bill), cl. 186 (proposed subsection 6(2)).

90 Explanatory Memorandum to Consequential Amendments bill, pp. 60–61.

91 Ms Deborah Awyzio, Chair, Domestic and Family Violence Committee, Queensland Law Society, *Proof Committee Hansard*, 13 December 2018, p. 7.

92 Law Council of Australia, *Submission 52*, p. 53.

of judges.[93] This was supported by Ms Rathus who suggested the implementation of dual commissions to enable judges to hear matters in different jurisdictions.[94]

3.74 Further, the Law Council argued that the bills are silent on whether the existing judges of the Appeal Division of the Family Court would be assigned to the Family Law Appeal Division.[95]

3.75 In response, the Department explained to the committee that the provision regarding judges' qualifications for the Appeal Division had been carefully worded to ensure that the Government appointed candidates suitably qualified to hear family law matters in an appellate division.[96]

Potential impact on vulnerable groups

3.76 The case management framework for the Family Court includes a number of programs designed to address vulnerable groups. This includes the Magellan program and cases involving family violence, which were noted by submitters to the inquiry as potentially facing an uncertain future under the bills' proposals.

The Magellan program

3.77 The Magellan case management program was introduced to capture the most complex and serious cases (often including cases involving allegations of sexual abuse or physical abuse of children), and required oversight by a highly experienced and expert judge.[97] The Magellan program is not currently required by statute, and is instead a program of the Family Court.[98]

3.78 The Magellan program was noted as an important resource used by the current Family Court which may be lost as a result of the passage of the bills. The LIV noted that Magellan cases undergo special case management by a small team of experts and ensure that cases are dealt with in an intensive and time-efficient manner, requiring that all cases be heard and determined within six months of the allegations being heard before the Court. The LIV further argued that the Magellan program had been evaluated and found to be highly effective in resolving cases quickly and efficiently.[99]

3.79 The LIV expressed concern in its submission that the future of the Magellan program is unclear in light of the proposed establishment of the FCFC. The LIV noted that the material provided by the Government in relation to the establishment of the

93 Professor Patrick Parkinson AM, *Submission 53*, p. 5.

94 Ms Zoe Rathus, Griffith University, *Proof Committee Hansard*, 13 December 2018, p. 21.

95 Ms Zoe Rathus, Griffith University, *Proof Committee Hansard*, 13 December 2018, pp. 20–21.

96 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 48.

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

98 Ms Louise Dorian, Family Law Section Committee, Law Institute of Victoria, *Proof Committee Hansard*, 11 December 2018, p. 43.

99 Law Institute of Victoria, *Submission 60*, p. 18.

FCFC does not contain any reference to the Magellan program.[100] The LIV further highlighted its concern that the Magellan program would not continue in the new FCFC:

> The LIV further wishes to express its concern that the loss of this specialised model, and the specialised training and experience of the [Family Court] judges, registrars and family consultants involved in the program, would significantly negatively impact on the most vulnerable children in the family law system.[101]

3.80 The Magellan program is a case management system developed by the Family Court. As such, the Family Law Act does not mention the Magellan program. Similarly, neither the FCFC bill nor the Consequential Amendments bill refer specifically to the program. The committee notes that there is nothing in the bills which would prevent the continued operation of the Magellan program within the FCFC.

Family violence

3.81 The Explanatory Memorandum of the FCFC bill states the proposed legislation seeks to 'better protect victims of family violence'.[102] The bill states that it will achieve this by:

> [E]nhancing the ability of the FCFC to manage family violence matters and applications with allegations of sexual abuse by creating the case management framework for urgent and high risk cases to be prioritised, and for each case to be allocated to the judge and division with the appropriate expertise and capacity to hear the matter. The case management framework will ensure that a matter will come to the immediate attention of the court and the most suitable case management pathway can be determined to achieve a safe outcome when family violence or allegations of sexual abuse have been identified. There will be a range of court-based options available to both divisions for the effective case management of these types of matters.[103]

3.82 Some submitters put the view to the committee that the bills did not sufficiently provide for measures to address family violence. Ms Rathus stated that family violence was only referred to in the Explanatory Memorandum of the FCFC bill and not in the text of the bills. She argued that the bill needed to explicitly state the words 'family violence' in order to ensure that the case management system would adequately assist court users experiencing family violence.[104]

3.83 This perspective was similarly expressed by Ms Angela Lynch of Women's Legal Services Australia, who submitted that any reforms to the family court system

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100 Law Institute of Victoria, *Submission 60*, p. 19.

101 Law Institute of Victoria, *Submission 60*, pp. 19–20.

102 Explanatory Memorandum to FCFC bill, p. 10.

103 Explanatory Memorandum to FCFC bill, p. 11.

104 Ms Zoe Rathus, Griffith University, *Proof Committee Hansard*, 13 December 2018, p. 21.

required a 'philosophical basis that places domestic violence, risk and safety at the centre of all practice and decision-making'.[105] Ms Lynch stated that the bills had not adequately addressed family violence concerns by not consulting with family violence experts and focussing on economic efficiencies.[106]

3.84 Ms Lynch further articulated her concern that the perceived loss of specialisation in the family court system would significantly impact outcomes for court users:

> I think that the lack of or loss of specialisation over time will have a serious deleterious effect. That is because family law litigation is like no other because it isn't about making commercial decisions. In some ways, people aren't making even rational decisions. It's highly emotional litigation that's involved, and the reality is it's also a highly dangerous time for women and children leaving domestic violence. So, you want practitioners, judges and professionals in that court to be as expert as possible in relation to issues of safety and risk because the impacts of decision-making are so great for our clients.[107]

3.85 In response to these concerns, the Department explained that the Australian Government was limited in its capacity to address family violence due to the intersection with state and territory-run family violence and child protection programs.[108] Despite these limitations, the Department also noted that the Australian Government would provide $162.2 million in 2018–19 to fund a range of family law services, in addition to providing over $800 million from 1 July 2019.[109]

3.86 The Department also advised that the Government had invested in mandatory training for judicial officers of the Federal Circuit Court on family violence over the past 12 months.[110]

Application of the bill to the Western Australian jurisdiction

3.87 The FCWA is comprised of judges who hold state and federal commissions as judges of both the FCWA and the Family Court of Australia, state magistrates who are specialists in family law, and Registrars who are able to exercise delegated powers.[111] As Western Australia has elected not to refer power to the Commonwealth to legislate in relation to ex-nuptial children or financial matters between parties in a de facto

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105 *Proof Committee Hansard*, 13 December 2018, p. 34.

106 Ms Angela Lynch, Chief Executive Officer, Women's Legal Services Australia, *Proof Committee Hansard*, 13 December 2018, p. 34.

107 Ms Angela Lynch, Chief Executive Officer, Women's Legal Services Australia, *Proof Committee Hansard*, 13 December 2018, p. 35.

108 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 47.

109 Attorney-General's Department, *Submission 56*, pp. 7–9.

110 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, pp. 48–50.

111 Family Court of Western Australia, *Submission 57*, p. 2.

relationship (subject to one exception), the pathway for appeals from the FCWA is dependent on whether the case has been heard in the state or federal jurisdiction.

3.88 The FCWA provided an explanation of the appeals process in its submission:

> Appeals in matters coming under federal law are determined by the Full Court of the Family Court of Australia, whereas appeals in matters in state jurisdiction are determined by the Full Court of the Court of Appeal of the Supreme Court of Western Australia (subject to one exception relating to interim/interlocutory decisions of Family Law Magistrates).
>
> Appeals from a judge of the FCWA exercising federal jurisdiction are currently heard by a bench of three judges of the Full Court of the Family Court of Australia. This mirrors the appeal provisions relating to decisions of judges of the Family Court of Australia who will be appointed to Division 1 of the proposed merged court. The current judges of FCWA will also be appointed to Division 1, as they currently hold equivalent federal commissions.
>
> Appeals from a specialist Family Law Magistrate exercising federal jurisdiction are currently heard by a bench of three judges of the Full Court of the Family Court of Australia unless the Chief Justice of the Family Court of Australia determines it is appropriate for the appeal to be heard by a single Judge. This mirrors the appeal provisions relating to decisions of judges of the Federal Circuit Court, who will be appointed to Division 2 of the proposed merged court.
>
> Appeals from judges of the FCWA and from specialist Family Law Magistrates exercising state jurisdiction are heard by a bench of three judges of the Court of Appeal of the Supreme Court of Western Australia, save in the case of interim/interlocutory decisions of Family Law Magistrates which are dealt with by a single judge of the FCWA. This is recognition of the fact that the powers and expertise of the Family Law Magistrates are such that appeals from their decisions should be considered by the highest court in the state judicial hierarchy.[112]

3.89 The FCFC bill provides that appeals from Family Law Magistrates would be heard by the FCWA. Appeals from the FCWA would be heard in the new Family Law Appeal Division of the Federal Court.[113]

3.90 Concerns were raised by Western Australian submitters in relation to how the bills would apply to the Western Australian jurisdiction and the FCWA. In particular, submitters and witnesses expressed concern in relation to the proposed appeals pathway in relation to decisions made by the FCWA in the exercise of its federal family law jurisdiction.

3.91 The FCWA's submission to the inquiry noted that, according to the bills' proposal, appeals would be treated differently depending on the type of judicial officer who had originally decided the case in the Western Australian jurisdiction. It

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112 Family Court of Western Australia, *Submission 57,* pp. 4–5.

113 Explanatory Memorandum to FCFC bill, p. 16.

submitted that appeals from Family Law Magistrates would be heard by a single judge of the FCWA similarly to how a decision made by a regional magistrate with no family law experience would be appealed. This was argued not to be reflective of Family Law Magistrates' skill and expertise, which was stated to equate with that of a family law judge of the FCWA.[114] The FCWA noted that an equivalent decision made in another state by a judge assigned to Division 2 of the proposed FCFC would be heard by an appellate judge in the Family Law Appeal Division of the Federal Court.[115]

3.92 The FCWA submitted that the appeal pathway for Family Law Magistrates should remain tied to the pathway for appeals from Division 2 judges. It stated:

> Acceptance of this submission will ensure that litigants in Western Australia are treated in the same way as litigants in other states. It will also ensure that proper recognition continues to be given to the fact that WA Family Law Magistrates have a far wider jurisdiction than non-specialist magistrates and collectively have much greater relevant experience.[116]

3.93 These concerns were shared by the Attorney-General of Western Australia, the Hon. John Quigley MLA, who submitted to the inquiry that the FCFC bill reverses longstanding legislative arrangements between the Western Australian and Commonwealth jurisdictions in relation to family law appeals. This was argued to not recognise the uniqueness of the work of Family Law Magistrates which conduct essentially the same work of the Federal Circuit Court.[117] The effect of this provision was detailed:

> First, the work to be done in future by the specialist Family Law Magistrates will be of the same nature as that undertaken by the judges of Division 2 of the proposed merged Commonwealth court.
>
> Second, the trial work undertaken by WA Family Law Magistrates largely involves the exercise of judicial discretion in resolving parenting disputes and issues relating to the division of property.
>
> It is not appropriate or desirable for appeals from a discretionary decision of one judicial officer to be reviewed on appeal by only one other judicial officer, even in a court at a higher level in the judicial hierarchy.[118]

3.94 Western Australian lawyers groups were similarly supportive of the recommendations of the FCWA and the Attorney-General of Western Australia to retain the appeals pathway currently used.[119]

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114 Family Court of Western Australia, *Submission 57*, pp. 2–5.

115 Family Court of Western Australia, *Submission 57*, p. 5.

116 Family Court of Western Australia, *Submission 57*, p. 6.

117 The Hon. John Quigley MLA, Attorney-General of Western Australia, *Submission 51*, p. 3.

118 The Hon. John Quigley MLA, Attorney-General of Western Australia *Submission 51*, p. 3.

3.95 In addition, Chief Judge Stephen Thackray of the FCWA noted in the hearing that the proposed reform of the appeals pathway would have a consequential result of appeals from Family Law Magistrates being dealt with by way of a *hearing de novo*. Chief Judge Thackray explained the impact of the proposal:

> [I]t is a completely new hearing. It is not a rehearing; it is the hearing of the whole matter all over again. Hence, if we have a magistrate who deals with a three- or four-day case, which is not uncommon, and a party doesn't like the outcome, they can appeal. They are not required to show any error on the part of the magistrate. They have what we call a second bite of the cherry. They can introduce new evidence, and so the family, having been through a trial and having had an outcome, and without any error being demonstrated on the part of the magistrate, can have another trial. That would be horrendous for our case management system; it would in fact destroy it. It's only because we got rid of the appeals de novo a long time ago that we've been able to give our magistrates significant trials to do.[120]

3.96 He further illustrated the potential consequences of an increase in *hearings de novo*:

> Last year we conducted or started 373 trials in our court; 233 of them were done by magistrates, so only 140 trials were done by the judges. If, in those 233 families, everyone had another opportunity to have another crack, if you'll excuse the expression, we would have to think very seriously about allowing magistrates to hear trials. If we had to make that decision, then our delays, which are already unacceptable, would become impossible.[121]

3.97 The Chief Judge further noted that, if the bills were to be passed, an increase in allocation of resources to manage the additional caseload would be essential.[122]

3.98 The Department stated that the bills do not propose to change the number of judges required for appeals originating from judges of the FCWA, in other words to continue three-judge benches for appeals.[123]

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119 Ms Sarah Bright, Principal Legal Officer, Women's Legal Service of Western Australia, *Proof Committee Hansard*, 10 December 2018, p. 1; Mr William Sloan, President, Family Law Practitioners' Association of Western Australia, *Proof Committee Hansard*, 10 December 2018, pp. 30–31; Mr Greg McIntyre SC, Senior Vice President, Law Society of Western Australia, *Proof Committee Hansard*, 10 December 2018, p. 32.

120 The Hon. Justice Stephen Thackray, Chief Judge, Family Court of Western Australia, *Proof Committee Hansard*, 10 December 2018, p. 4.

121 The Hon. Justice Stephen Thackray, Chief Judge, Family Court of Western Australia, *Proof Committee Hansard*, 10 December 2018, p. 5.

122 The Hon. Justice Stephen Thackray, Chief Judge, Family Court of Western Australia, *Proof Committee Hansard*, 10 December 2018, p. 10.

123 Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Proof Committee Hansard*, 13 December 2018, p. 52.

Other issues

Adequate resourcing for the courts

3.99 Submitters and witnesses raised the 'dire need for more resources for the system' and argued that a one-third increase in efficiency could not be achieved without additional funding.[124] A number of witnesses, such as the Australian Bar Association, noted that it was not possible to separate the issue of chronic underfunding of the system with the reforms proposed by the bills:

> You've packaged it with some other things and you've said, 'This is the solution to all of the problems that we have.' We've said we agree that there are problems and we agree that is part of the solution, but we cannot—understanding what this committee must deal with—divorce it from the resource issues which we, every single day, see affecting the real people whose family law cases we're trying to help resolve.[125]

Timely appointments of judicial officers

3.100 Connected to the issue of pressures faced by the family law system, is the timely appointment of judges. Witnesses noted that both Family Court and Federal Circuit Court judges are under enormous pressure and the delayed replacement of judges compounds the pressures to the family law system.[126]

3.101 As an example of the delay sometimes experienced in replacing judges, Mr Howe outlined that the Mr Burr retired in May 2012 and was not replaced by Justice David Berman until July 2013, 14 months later.[127] Mr Howe further noted that Justice Christine Dawe retired in March 2017 but has not yet been replaced.[128]

3.102 The Law Council explained the effect to litigants when the replacement of judicial officers has been delayed:

> The Federal Circuit Court judges are already struggling with their immense workload of both family law and migration cases. If those judges take on more complex work, requiring more judicial time, it will inevitably lead to a blowout in lists and increased delays for family law litigants.[129]

3.103 The Law Society of NSW supported the views expressed by the Law Council and argued for a system with sufficient flexibility to fill vacancies within the judiciary:

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124 Law Society of NSW, *Submission 49*, p. 1.

125 Ms Suzanne Christie SC, Australian Bar Association, *Proof Committee Hansard*, 12 December 2018, p. 50.

126 Mr Gregory Howe, Member, Family Law Committee, Law Society of South Australia, *Proof Committee Hansard*, 11 December 2018, p. 8.

127 Mr Gregory Howe, Member, Family Law Committee, Law Society of South Australia, *Proof Committee Hansard*, 11 December 2018, p. 8.

128 Mr Gregory Howe, Member, Family Law Committee, Law Society of South Australia, *Proof Committee Hansard*, 11 December 2018, p. 8.

129 Law Council of Australia, *Submission 52*, p. 11.

> The system needs to allow flexibility to fill leave vacancies. The system is currently under such pressure that when a Judge is sick for an extended period or takes leave, then another Judge has to take up their docket as well. This generates further delay.[130]

3.104 At the hearing, the Department noted that the Family Court currently have two positions vacant.[131] In answers to questions on notice the Department explained the why some judicial appointments may take some time to implement:

> In some cases judges may resign ahead of their Constitutional retirement age, and the notice provided may be insufficient for appropriate consultation and Government consideration of a judicial appointment prior to that retirement date. In other instances, after consultation with bodies such as the Law Council of Australia, a particular barrister is considered the most suitable long term appointment but that individual may because of their commitments to clients not be able to start in the position for several months. This is largely out of the control of the executive of the day and often the fact that the most suitable appointment represents a delayed start compared to another candidate is a compromise considered appropriate in the long term interest of the Court and its users. A retirement enables the Government and the courts to assess workload pressures on a national basis and for new appointments to be made that respond to changing needs across all jurisdictions. …
>
> On a number of occasions the government of the day has responded to a judge retiring in one court Registry by appointing a new judge to a different Registry of that court. On a number of occasions the government of the day has responded to a Judge retiring in one court by appointing a new judge to a different court. In rarer cases current judges have passed away unexpectedly.
>
> There is not a fixed number of judges in each Registry of the federal courts (excluding the High Court), and it is not strictly required that a retiring judge must be replaced. On that basis, what may appear to be a failure to 'replace' a judge may be a reallocation of judicial resources.[132]

Committee view and recommendations

3.105 The committee commends the Australian Government for its proposal to reform the family court system. It notes that this is the first major reform of the family court system since the inception of the Family Law Act in 1975. The reforms also have been introduced at a time when the family court system is under significant pressure due to case backlogs causing further inefficiencies and delays. The committee therefore supports the bill's attempt to address the issues facing the courts and, ultimately, the users of the court system.

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130 Law Society of NSW, *Submission 49,* p. 6.

131 Dr Albin Smrdel, Assistant Secretary, Legal System Branch, Attorney-General's Department, *Proof Committee Hansard,* 13 December 2018, p. 55.

132 Attorney-General's Department, answers to questions on notice, 13 December 2018 (received 18 January 2019), p. 9.

3.106 It is clear from evidence provided to the committee that all stakeholders agree that the family law system is broken and does not adequately serve court users. To this extent, all witnesses and submitters were in agreement.

Australian Law Reform Commission Review

3.107 The committee notes that a number of submitters and witnesses who provided evidence to the inquiry were of the view that consideration of the proposed bills should be deferred until after the ALRC has provided its report on the family law system in Australia.

3.108 The committee considers that there are two problems with this view. Firstly, the President of the ALRC informed the committee that the courts system is not being examined in the Review. Secondly, if this recommendation were accepted, any major reform recommended by the ALRC would require a substantial amount of time to consult relevant stakeholders, draft legislation, conduct further consultations and be introduced. Consequently, any meaningful change would be delayed for many years.

3.109 Further delays in fixing the family law system would extend and compound the difficulties to the users of the family law system. The committee is of the view that the reforms are critically needed to assist in restructuring a court system under significant pressure. Litigants cannot afford to wait years for the system to change.

Resourcing for courts

3.110 A major theme of the inquiry related to ensuring that adequate resourcing was available to the proposed FCFC to enable it to function efficiently. Many submitters noted that sufficient funding for the courts was critical to ensure that the FCFC bill's objective of reforming the courts to provide adequate family law services to families was achieved.

3.111 The committee notes that funding of legal aid and community legal centres is not within the terms of reference of this inquiry. However, the committee acknowledges the importance of ensuring that the proposed court model is adequately funded to prevent inefficiencies and delays in a new system.

Recommendation 1

3.112 The committee recommends—in addition to the allocated funding as detailed in the Explanatory Memorandum—that the proposed new divisions of the Federal Circuit and Family Court of Australia be provided with additional resources for Registrars to assist with the backlog of cases.

Potential loss of specialisation

3.113 A key concern related to the potential loss of specialisation within the family court. Central to this concern was the proposal for the current Appeal Division of the Family Court to be moved to a newly formed Family Court Appeal Division of the Federal Court. The committee shares the concerns of submitters and witnesses that this reform as proposed by the bills would have the effect of appeals no longer being heard by judges with extensive experience and expertise in family law.

Recommendation 2

3.114 The committee recommends that an appellate division of the Federal Court of Australia not be created and instead the existing appellate jurisdiction of the Family Court of Australia be retained into the Federal Circuit and Family Court of Australia (Division 1).

Appointments to the Federal Circuit and Family Court of Australia judiciary

3.115 The importance of an effective and expert judiciary in the proposed FCFC was highlighted in evidence to the committee. Many submitters expressed concerns regarding the composition of the future FCFC, particularly in relation to appointees having the required experience, expertise and personality to suit their positions as family law judges.

3.116 The committee accepts that it is critically important for those presiding in family law cases to be qualified for the position, with respect not only to their extensive experience and knowledge in the subject matter, but also to their personal suitability to manage difficult and complex cases as is common in family law.

Recommendation 3

3.117 The committee recommends that the qualifications of judges in Division 2, as per proposed paragraph 79(2)(b), be amended to ensure that they have the appropriate skills, knowledge, experience and personality.

Timely appointment of Judges

3.118 Evidence during the inquiry suggested that in some cases, there may not have been a timely replacement of retiring judges in the Family Court or Federal Circuit Court. While the committee notes the evidence provided by the Department, and accepts that in some cases there may be valid reasons why the appointment of a judge may be delayed, the committee is nevertheless concerned that to delay the replacement of judges would inevitably increase delays for family law litigants. The committee also notes the evidence provided by the Department that there are currently two vacancies to the Family Court.

Recommendation 4

3.119 The committee recommends that the Australian Government pursue the immediate appointment of suitable candidates to vacant judiciary positions in the family courts and consider whether there is a need to appoint additional judges.

Unintended consequence concerning the Western Australian jurisdiction

3.120 The committee notes the concerns expressed by the Chief Judge and practitioners of the Western Australian family law jurisdiction. In particular, the committee is concerned that the Consequential Amendments bill may have the unintended consequence of appeals from Family Law Magistrates of the FCWA, being treated differently to appeals from Judges from proposed Division 2 of the

FCFC. Moreover, the committee is concerned that the proposed appeals pathway from Family Law Magistrates may be dealt with by way of a *hearing de novo*.

3.121 The committee is of the view that the further consideration be given to whether there may be unintended consequences concerning the appeals pathway for the Western Australian jurisdiction and for these possible unintended consequences to be remedied.

Recommendation 5

3.122 Subject to the adoption of the above recommendations, the committee recommends that the bills be passed.

Senator the Hon Ian Macdonald

Chair