Senator the Hon Ian Macdonald
Chair, Senate Legal and Constitutional Affairs Committee
c/o Committee Secretary
PO Box 6100
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

November 2018

Dear Senator Macdonald,

The Australian Bar Association (ABA) is the peak body representing nearly 6000 barristers throughout Australia. Established in 1963, the ABA is committed to serving our members, improving our profession, and promoting the rule of law and the effective administration of justice".

The ABA welcomes an opportunity to comment on the *Federal Circuit and Family Court of Australia Bill* 2018 and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill* 2018 ("the Bills"). However, it would be remiss if we did not observe a number of important overarching concerns we have about the Bills and the process by which they were conceived and drafted, namely:

(a) Structurally, the Bills do little more than give the current two courts the appearance of amalgamation by simply re-badging the current courts with very similar names;

(b) Substantively, the expertise of the judicial officers sitting on the Full Court of the Family Court of Australia will be lost;

(c) Equally, the mooted "Division 1" is, in reality, a mechanism whereby the expertise of Family Court judges and the jurisprudence they develop will also be lost over time, much to the detriment of those who need expert judges to determine their disputes;

(d) The public consultation process has been inadequate. We refer you to our Media Release of 10 September 2018 which corrected the record insofar as it concerned the ABA;

(e) The Bills are said to be founded upon the PwC Report. It is our considered view that the PwC Report is fundamentally flawed as a basis for these proposals for the reasons that appear in the attached substantive submission;

(f) Actual efficiencies are hard to identify in the Bills;

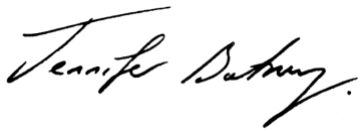
(g) the Bills deal with the constituting of appeal courts in a way inconsistent from the way other federal appeals are presently dealt with, without there being an apparent justification;

(h) The Bills are being rushed without any justification. The ALRC releases its recommendations next year. In all probability, it is highly likely that its recommendations will be futile and pointless if the Bills are made law. Plainly and self-evidently, the ALRC review has had and will have no bearing on these Bills when it should have;

(i) Not a word is said about funding in circumstances where it is apparent to all that a major cause of the "structural issues" of the Courts is a consistent lack of funding of those Courts.

With that overview, the ABA provides the following observations prepared by our Family Law Committee, and approved by the ABA Executive.

Yours sincerely



Jennifer Batrouney QC
President, Australian Bar Association

Re: ***Federal Circuit and Family Court of Australia Bill* 2018** ("the Bill")

***Federal Circuit and Family Court of Australia (Consequential Amendments & Transitional Provisions) Bill* 2018** ("the Consequential Bill")

One Court

1. Public communication about the reforms suggested a plan to amalgamate the Family Court and FCC into one; for example:

> "Having two separate family law courts with different sets of rules, practice management styles, forms, procedures and listing entry points dealing with the same body of family law matters simply does not work. It leads to confusion, delays, additional costs and unequal experiences for many applicants….[1]
>
> "In May I announced that the Government was finalising legislation to establish a new, single Federal Circuit and Family Court of Australia (FCFCA) to be established from 1 January 2019," the Attorney-General said.[2]
>
> Attorney-General, Christian Porter, today announced that a single new Federal Circuit and Family Court of Australia (FCFCA) would be established from 1 January, 2019 through the amalgamation of the existing Federal Circuit Court of Australia and the Family Court of Australia.[3]

2. No doubt, and likely for sound Constitutional reasons, the Bills do not in fact provide for a single court. Clause 8 and the Explanatory Notes make it plain that the Family Court of Australia, whilst abolished, is then re-created in equivalence, but under a different name; the same applies to the FCC.

> **8 Federal Circuit and Family Court of Australia**
>
> (1) The federal court known immediately before 1 January 2019 as the Family Court of Australia is continued in existence as the Federal Circuit and Family Court of Australia (Division 1).
>
> (2) The federal court known immediately before 1 January 2019 as the Federal Circuit Court of Australia is continued in existence as the Federal Circuit and Family Court of Australia (Division 2).

[1] AG Press Release; 23.8.18: www.attorneygeneral.gov.au/Media/Pages/Legislation-to-reform-federal-courts-introduced-into-parliament.aspx

[2] AG Press Release, 17.8.18: www.attorneygeneral.gov.au/Media/Pages/Legislation-for-family-courts-reform-to-be-introduced.aspx

[3] AG Press Release, 30.5.18: www.attorneygeneral.gov.au/Media/Pages/Court-Reforms-to-help-families-save-time-and-costs-in-family-law-disputes.aspx

Note: The Parliament may create federal courts under Chapter III of the Constitution.

3. That the courts have not been "amalgamated" is further apparent by clauses 9 and 10 where Division 1 is a *superior* court of record whilst Division 2 is a court of record.

4. Thus, one might observe that the short title "*The Federal Circuit Court and Family Court of Australia Act* 2018" is misleading as, in fact, two separate courts remain.

5. We do note that at the recent National Family Law Conference in Brisbane, the Hon. The Attorney-General conceded that the Bills do not amalgamate the Courts.

6. This concession raises rather obvious questions – if the courts are not actually amalgamated, then where are the efficiencies? Where are the savings? We cannot accept the opinions in the PwC Report – because in our view they lack an evidentiary and factual basis.[4]

7. It is of great concern that the Bills rest on the PwC Report, and all its flaws. We are fortified in reaching this conclusion by reference to the recent comments made by the Principal Registrar, Mr Warwick Soden that: '*PwC has been informed that, in practice, both the courts hear matters of similar complexity*'.[5] Relying, as it does on the incorrect assumption that both courts undertake work of similar complexity, the conclusions of the PwC report are unsound.

8. The ABA also supports what has been said by the Bar Association of Queensland, and summarised as follows:

   a. The PwC report is much more guarded in its conclusions than the representations in the media would have us believe.

   b. The PwC report is expressed to be significantly curtailed by a lack of independent review or verification of the accuracy or completeness of data and a reliance upon assumptions. The conclusion expressed (page 79) is this (emphasis added): "*Due to these reasons, actual scope for efficiency will vary from the estimates presented in this report (perhaps materially)*."

   c. The report appropriately notes (page 66) a comprehensive analysis of cost and time would need to be undertaken to fully quantify the impacts of any proposed change. Yet that has not occurred.

   d. The report identifies the potential conflict between changes that might be proposed because of this review and changes which might be proposed arising out of the ALRC's report next year (page 69).

[4] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 at [85] per Heydon JA.

[5] PricewaterhouseCoopers, *Review of efficiency of the operation of the federal courts: Final report,* April 2018 3.

e. The report acknowledges that the Family Court deals with more complex matters but declines to accept that the complexity of the work may account for the apparent differences in alleged "*efficiency*" (or implied "*inefficiency*").

f. In circumstances where Family Court Judges are allocated the more complex work which involves longer trials, any statistics based on number of finalisations is comparing apples with oranges. Additionally, it is important to note, that within the definition of "*finalisation*", the figures provided (pages 31 and 40) include:

   i. not only matters in respect of which judgment has been delivered (either after being reserved or delivered ex tempore);

   ii. but also those matters which have settled, been transferred, struck out, dismissed, withdrawn or discontinued (as well as a category of "*other*").

g. The report seems to support as legitimate "*pressure*" on the Federal Circuit Court occasioned by enormous dockets without an appreciation of the impact on the judicial officers, the litigants and the practitioners of the pressure such as stress, inappropriate conduct, settlement by attrition, or failure to hear interim matters.

h. There can be no doubt that there is considerable pressure on the Federal Circuit Court in terms of the number of matters that they are required to deal with.

i. As to "*pressures*" (page 48), Federal Circuit Court Judges have an enormous number of matters allocated to them at any one time (around 350), which creates a pressure on them to finalise matters to clear their own backlog.

j. What becomes apparent is that none of the "*efficiency opportunities*" suggest that the work pressure on Federal Circuit Court Judges will be alleviated (even if the suggestion is that money saved by the implied abolition of the Family Court[6] and giving the Federal Circuit Court all the complex matters will be utilised to employ more Federal Circuit Court Judges).

k. If the workloads of Federal Circuit Court Judges are increased, then it is much more likely that a greater number of parties will wait longer for their matter to be determined.

l. It is pleasing that most reserved Judgments are reportedly delivered within 3 months (page 35). There does not seem to be a significant difference between the delays after 3 months as between the two Courts; suggesting that the more "*efficient*" Court may not necessarily be the best approach.

m. To the extent that the Executive Summary suggests that "*PWC has been informed that, in practice, both the Courts hear matters of similar complexity*", it is silent as

[6] Attorney-General Christian Porter quoted in Australian Financial Review as stating that any new judges would be appointed to Division 2: 17 August 2018 "The bitter struggle to reform the Family Court"; see also 29 May 2018 "Family Court axed in federal courts shake up".

to the source of that information and that is not the experience of our members. Appropriately, PWC observe "*in the absence of detailed data, it has been difficult for PWC to substantiate the extent of variation in complexity of cases between the two Courts*".

n. To the extent that the Executive Summary suggests that "*Different operational practices of the Courts is leading to variation in efficiency levels*", it is not apparent what that expression "*different operational practices*" actually means.

o. It is difficult then to understand any basis for the conclusion that "*It is apparent that the vast variation in productivity between the two Courts cannot be accounted for merely by the level of complexity even accounting for evidenced differences*". There is no data to support that sentence, nor an explanation for which differences have been evidenced and accounted.

p. The report (page 69) identifies that further data capture and analysis is necessary, particularly having a look at case complexity. It does not seem that there has been a comprehensive analysis of legislative, regulatory and policy changes required to action opportunities.

q. The report says (page 69) "*Stakeholders of the Family Law system should be consulted on specific proposed changes to understand where parties will be most affected and if there are particular barriers to change requiring action, action should be incorporated into change management*". That mooted and wide-ranging consultation ought have occurred *before* the Bills were introduced into Parliament, not after the fact.

r. Parts of the report are redacted; why? We do not accept the answer, being it is in the public interest.

9. On those premises, it is hard to accept that the Bills are based on valid and cogent evidence, including empirical evidence.

Common leadership

10. We observe that cls 20 and 97 of the Bill (amongst others) contemplate that the Chief Justice of Division 1 may also be the Chief Judge of Division 2; similarly, the Deputy Chief Justice of Division 1, may also be the Deputy Chief Judge of Division 2.

11. The dual commission provisions therefore have the practical outcome that both courts will be controlled by the same two people.

12. The fact that the Bill provides for dual commissions does not alter the legislative drafting that two separate courts will exist. One might observe that through the device of appointing an individual as Chief Justice of Division 1 and Chief Judge of Division 2 and similarly in respect of the Deputy of both courts, in substance what has been achieved by this draft Bill is maintaining the current structure of courts but giving the

appearance of a single court through the use of the "Division" labelling device and the commonality of leading judicial officers.

13. Yet, whilst the two courts continue, the ABA has great concerns about the capacity of one Chief Justice and one Deputy Chief Justice to manage the different caseloads, structures, practices and procedures of these two separate, and very busy courts.

14. The consultation provisions in, for example, cl 35(3) and 118(3) are also clumsy where a dual commission has been granted, such that the Chief Justice of Division 1 is required to consult with him/herself as the Chief Judge of Division 2. That cannot be the intent of the consultation provisions; rather, it solidifies the control of the divisions in the hands of just two people.

15. Further, this solidification of control of two courts in just two people is less than ideal in circumstances where the Chief/s also handle complaints about their judicial colleagues.

16. We also make comment about abolishing the well-established Rules Committee process, in favour of the rule-making by the Chief, later in this submission.

Appeals

17. The Full Court of the Family Court of Australia is a robust appellate court, which has developed and develops expert jurisprudence because, *inter alia*, its appeal judges are experts in the nuance and subtelty of family law.

18. The Bills effectively abolish the Full Court, and in doing so, that rich mine of appellate expertise will also be lost. The ABA opposes that. The expertise of the Full Court is particularly critical because the Full Court is usually the final arbitor of family law disputes; special leave to the High Court is not often granted.

19. There is also the curiosity of appeals in family matters going to a "permanent" appeal court or division within the Federal Court. Yet, appeals from single judges of the Federal Court do not go to a permanent appeal court but go to a Full Court of the Federal Court constituted on an ad hoc basis. We have not seen any explanation for why that is thought to be sound as a matter of policy.

20. Turning to the Bills, the Appeal provisions are scant in their detail. We advert to the possible constitutional issues associated with abolishing the current appeals division. If the Bills are to be advanced, the following ought be addressed:

    a. The ABA supports cl 186 of the Consequential Bill if it means that there will be a legislative requirement that the judges appointed to the Family Law Appeal Division of the Federal Court of Australia meet the requirements set out in the s22 of the current Act;

    b. In addition, those family law division appeal judges have a commission enabling them to hear first instance trials in Division 1, when their workload allows;

c. Appeals *from* Divisions 1 and 2 ought not be limited to a single Justice of the Family Law Appeal Division of the Federal Court of Australia, but there ought to be three judges with a discretion reposed in the Chief Justice to constitute a bench of a different number if warranted;

d. If the aim of this Bill is to create efficiencies, then the ABA urges that the same form be used to institute appeals, as opposed to the current cl 13, para 36.01(1)(a), Schedule 6 Consequential Bill. See also cl 20, After subrule 36.21(1) Schedule 6.

Abolishing the Family Court of Australia / Division 1 – expertise lost

21. There has been much said about the reforms abolishing the Family Court/Division 1. Although there is nothing in the Bill to indicate this, the current Attorney-General has been reported as saying he will not make any further Division 1 appointments.

22. We join with those ABA Constituent Bodies which have expressed the concern that if no new judges are to be appointed to Division 1, then the development of family law by a cadre of judges of appropriate expertise will suffer. Litigants, the children subject of litigation, and indeed, the wider community ought to be given the confidence that Division 1 will be a robust court where a sufficient number of judicial personnel is retained on an ongoing basis to be able to meet the demands of the community in respect of more demanding and complex matters.

23. The most demanding of family law matters involve issues such as:

a. parenting matters where a judicial officer's decision has the potential to fundamentally change a child's life such as: where a no contact order may be made, ending a child's relationship with a parent; when making a contested[7] gender dysphoria decision; or permitting a child to be relocated overseas and thereby radically and permanently changing the child's parental and wider familial relationships; or,

b. determining whether a child has one parent, two parents, or indeed three parents given the developments in surrogacy and assisted reproductive technology, which is often compounded by the different outcomes which can be reached under the *Family Law Act*, the *Status of Children Act* or equivalent in the State/Territory in which the implantation occurs, and the *Status of Children Act* or equivalent if the child is then born in another State/Territory.

24. It is a misconception, as some persons have suggested, to characterise the most demanding matters as limited to cases involving 'big money' and/or multi-entity property cases, although such matters can raise demanding legal and factual issues.

[7] *Re: Kelvin* [2017] FamCAFC 258.

Division 1

25. The repetition of the current s22 Family Law Act, in proposed cl 11(2)(b) is welcomed, although it is suggested that the words "appropriate knowledge, skills and experience" (the phrase used in cl 79(2)(b)) better reflects current thinking about judicial competencies. We note the issue of judicial competencies in relation to family law is currently before the ALRC. Again, as said above, this is an indication that there are good reasons for these Bills to await the ALRC Report.

26. It is appropriate that appeals from courts of the summary jurisdiction will be heard in Division 1 (cl 25), where there is a concentration of expertise in family law within that Division. We are opposed to the concurrent cl 102 which allows for such appeals to also be heard in Division 2.

27. The ABA does not support appeals from courts of summary jurisdiction being heard by a single judge (cl 27). Rather, the default ought be three judges, with a discretion reposed in the Chief Justice to direct a different number depending on the circumstances of each appeal.

Division 2

28. **Pensions**: whilst it would be preferable that all Division 2 judges acquire entitlement to a pension, we acknowledge and welcome the pension-like provisions for "disabled judges" in Chapter 4, Part 1, Division 3. This may fix one problem that has existed in the Federal Circuit Court of Australia for some time, although the triggers for entitlement being one of "permanent disability or infirmity" as currently structured are potentially problematic especially as in the first instance entitlement is dependent upon the opinion of the relevant Minister. Whilst an adverse finding by a Minister is open to review in the AAT, it is by no means obvious that such a structure is appropriate in dealing with the position of Chapter III judges. A more appropriate structure which secures to those individuals the dignity which is essential to the maintenance to the rule of law should be considered.

29. The ABA does not express an opinion on the appropriateness of the proposed pension levels, but notes with disappointment that the pension only goes to 70 years; cl 91.

30. **Experience**: The ABA is pleased to see a clause like the current s22 of the *Family Law Act*, is included for Division 2 judges (cl 79(2)(b)), albeit with amendment to acknowledge Division 2 judges will not exclusively deal in family law.

31. **Drafting**: Schedule 4 of the Consequential Bill repeals the whole of the FCCA Act, and then other provisions simply replicate much of it in the Bills. This is likely to perpetuate the differences in practice and procedure which presently create inefficiencies. That said, we acknowledge cl 143 no longer repeats the provision from the FCCA Act about disclosure not applying unless a declaration is made. This was at odds with most of the family law forms and family law authority which states that the duty of full and frank disclosure is continuing, without a declaration being made. Rule 14.03 of the Division

2 Rules will instead now require that insofar as family law and child support proceedings are concerned, Chapter 13 of the Division 1 Rules apply.

Drafting

32. Many if not most aspects of the Bills involve the wholesale taking of provisions from the Family Law Act and the Federal Circuit Court of Australia Act ("the FCCA Act") and merely transposing them into the structure of respectively Division 1 and Division 2. As a drafting technique, we consider this is inelegant at best and apt to give the impression that the Act will simply create an amalgam of the two former courts without any attempt to create a truly integrated and more efficient federal family court.

Reform needed, but opportunity missed

33. The ABA shares the Law Council of Australia's long advocated position that Part VII of the Family Law Act (regarding parenting) needs to be simplified. We note that the Bills do not take up that task in any substantive matter. It is notorious that the current Part VII, and its so-called legislative pathway, is unwieldy and unhelpful in focusing on what will actually be in the best interests of children. Further, if judicial officers were not so laden with following the mandatory "*42 easy steps*"[8] to determine a child's parenting arrangements, judicial officers would likely have more time to hear and determine cases and judgement writing would not take so long – this would create greater consistency with cl 5 of the Bill, "*to ensure justice is delivered by federal courts effectively and efficiently*."

34. The ABA is of the view that reform of Part VII is of greater significance, than the re-naming of two current courts with the illusion of amalgamation. The Committee awaits the ALRC report in the hope and expectation that this much-needed reform may follow.

Transfers

35. Where a transfer occurs between Divisions 1 and 2, such a transfer must be "approved" by the receiving Chief; cls 34 and 117. What if such approval is not forthcoming? We also note that a transfer to the Federal Court uses different language; "confirmed" (cl 120). The language is inconsistent.

36. The retention of two courts and the necessary provisions for transfers between those two courts, rather underlines the point we have sought to make that the "efficiencies" mooted for this new structure are not apparent.

[8] Judge G Riethmuller, "*Deciding parenting under Part VIII – 42 Easy steps*", Australian Family Lawyer, Vol 24/3, July 2015

A Single Point of Entry

37. Although much is said about "common approaches" in the Bills, there do not seem to be any substantive provisions which command such an approach. .

38. A mechanism for a single point of entry would be welcomed, even if the courts are in fact separate. This is something which can occur by Rules within the existing structure, and without the changes proposed.

Harmonisation of Rules

39. We understood when the reforms were announced, that the rules were to be harmonised. Despite the many references to achieving "common approaches" and the Objects in cl 5, the *actual* harmonisation of rules is not provided for, or any such mechanisms to ensure the two courts do, in fact, develop a single set of rules.

40. To the contrary cl 35(3), inter alia, suggests different practice and procedure will apply between the two courts, which runs counter to all that has been said about efficiency.

41. Further, various clauses provide that each court will have its own set of rules, which will be anathema to the creation of efficiencies.

42. The Bills require only that the new, differing, Division 1 and Division 2 Rules be applied with the same "*overarching purpose*" in mind (cl 48 and 157), in circumstances where the existing objects provision of the FCC Rules (rule 1.03) and main purpose provision of the Family Law Rules (rule 1.04) are not dissimilar.

43. Given the two courts well-known and long-standing inability to harmonise rules in relation to Family Law, if harmonisation of the rules is to be proposed, there ought be a legislative imperative that this occur.

Abolishing the Rules Committees

44. In most courts around Australia, rules are developed and implemented through a committee process. This is imperative as local practice can be accommodated – for example, what might work well in the Canberra Registry may be unworkable in Cairns. A Rules Committee allows for different voices to have input into the development of rules which cater for a court for the whole of the Commonwealth.

45. Instead, the Bills give all power solely to the Chief Justice and Chief Judge, who, in turn, may be one and the same person. The ABA does not support this.

Re-numbering

46. It looks like the Bills will further add to the currently numerically and alphabetically cumbersome Act.

Definitions

47. "news publisher" and "publish" (cl 6) - will this definition include internet and social media dissemination?

Sharing other court facilities

48. Cll 60 and 214 have the potential to be of great benefit for access to justice issues particularly in regional and remote areas, assuming arrangements can be made with State courts to accommodate this. We note the difficulties for example, in Rockhampton.

Unrepresented parties

49. We are keen to see the guidelines referred to in cll 74 and 239.

Costs

50. The costs provisions, for example cll 49 and 158 are supported and consistent with the ABA's recent submission to the ALRC in its separate family law review. The gist of these clauses is to make clear that costs may attach to a lawyer who, essentially, aids and abets their client to frustrate and delay the efficient determination of the matter.

51. However, it is imperative that the judicial officers also impose such sanctions where parties or their lawyers have not acted in a manner consistent with the overarching purpose of the Act. As the Court of Appeal said in *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302, the imposition of such costs orders is a real motivator for changing the culture of litigation, and in turn the courts use of its limited resources:

> 20 The Court's powers under s 29 of the Act include the power to sanction legal practitioners and parties for a contravention of their obligations as the heading to Part 2.4 indicates.[30] In our view, these powers are intended to make all those involved in the conduct of litigation — parties and practitioners — accountable for the just, efficient, timely and cost effective resolution of disputes. Through them, Parliament has given the courts flexible means of distributing the cost burden upon and across those who fail to comply with their overarching obligations. A sanction which redistributes that burden may have the effect of compensating a party. It may take the form of a costs order against a practitioner, an order that requires the practitioner to share the burden of a costs order made against their client or an order which deprives the practitioner of costs to which

> they would otherwise be entitled. The Act is clearly designed to influence the culture of litigation through the imposition of sanctions on those who do not observe their obligations. Moreover, the power to sanction is not confined to cases of incompetence or improper conduct by a legal practitioner. Where there is a failure by the practitioner, whether solicitor or counsel, to use reasonable endeavours to comply with the overarching obligations, it will be no answer that the practitioner acted upon the explicit and informed instructions of the client. A sanction may be imposed where, contrary to s 13(3)(b), the legal practitioner acts on the instruction of his or her client in breach of the overarching obligations.
>
> 21 Section 28(2) enables a court, in exercising its discretion as to costs, to take into account any contravention of the overarching obligations. In our view, the enactment of s 29 together with s 28(2) imbues the Court with broad disciplinary powers that may be reflected in the costs orders that are made. The Court is given a powerful mechanism to exert greater control over the conduct of parties and their legal representatives, and thus over the process of civil litigation and the use of its own limited resources.

52. As the Court of Appeal also observed, Chief Justice Black said of the comparable Victorian provisions:

> [L]egislation imposing positive duties upon litigants and practitioners, will help to change attitudes and, within constitutionally permissible limits, will confirm that judges do have the power they need to require parties to cooperate to bring about the just resolution of disputes as quickly, inexpensively and efficiently as possible.

53. We commend these observations to the Government. Ultimately the judiciary and the profession must lead the way in changing the culture of litigation for the benefit of litigants and the society they serve.

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