Review of the operation of the *Federal Circuit and Family Court of Australia Act 2021 (Cth)*

Report to the Attorney-General

The Honourable Linda Dessau AC CVO and
Professor Helen Rhoades OAM

28 February 2025

We acknowledge the Traditional Owners of Country throughout Australia and pay our respects to Elders, past and present. We also acknowledge their ongoing connection to land, sea and communities.

Letter of transmittal

Review of the
Federal Circuit and Family Court
of Australia Act 2021

28 February 2025

The Hon Mark Dreyfus KC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

In August 2024, you appointed us to conduct the review of the *Federal Circuit and Family Court of Australia Act 2021* (FCFCOA Act) and provided us with terms of reference.

The review is required by section 284 of the FCFCOA Act and commenced on 2 September 2024. A written report of the review is required to be provided to you on or before 1 March 2025.

We are pleased to now present you with our report.

Yours sincerely

The Hon Linda Dessau AC CVO **Prof Helen Rhoades OAM**

Contents

Glossary

Term	Definition
2018 FCFCOA Bill	Federal Circuit and Family Court of Australia Bill 2018
2018 FCFCOA Bills	2018 FCFCOA Bill and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018
2019 FCFCOA Bill	Federal Circuit and Family Court of Australia Bill 2019
2019 FCFCOA Bills	2019 FCFCOA Bill and 2019 FCFCOA Consequential Amendments Bill
2019 FCFCOA Consequential Amendments Bill	Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019
ALRC	Australian Law Reform Commission
CCE	Court Child Expert – qualified psychologists or social workers who work in the Courts' Court Children's Services as family consultants and family counsellors
Central Practice Direction	The FCFCOA's Central Practice Direction: Family Law Case Management
Courts Consultation	Consultation survey to inform the review, which was open only to judicial officers and personnel of the FCFCOA and the Federal Court.
Division 2 Family Law Rules	Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021
Family Court	Family Court of Australia
Family Law Act	*Family Law Act 1975* (Cth)
Family Law Rules 2021	Federal Circuit and Family Court of Australia (Family Law) Rules 2021
FCFCOA	Federal Circuit and Family Court of Australia
FCFCOA (Division 1)	Federal Circuit and Family Court of Australia (Division 1) – formerly the Family Court of Australia
FCFCOA (Division 2)	Federal Circuit and Family Court of Australia (Division 2) – formerly the Federal Circuit Court of Australia

Term	Definition
FCFCOA Act	*Federal Circuit and Family Court of Australia Act 2021* (Cth)
FCFCOA Consequential Amendments Act	*Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth)
FCWA	Family Court of Western Australia
Federal Circuit Court	Federal Circuit Court of Australia
Federal Circuit Court Act	*Federal Circuit Court of Australia Act 1999* (Cth)
Federal Court	Federal Court of Australia
FMC	Federal Magistrates Court of Australia (was also known as the Federal Magistrates Service, but renamed to the Federal Circuit Court in 2013)
KPMG Review	KPMG, Review of the performance and funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia (5 March 2014)
Public Consultation	Consultation survey to inform the review, which was open to the public
PwC Report	PwC, Review of Efficiency of the Operation of the Federal Courts (April 2018)
Semple Report	Des Semple, Future Governance Options for Federal Family Law Courts in Australia (August 2008)
Senate Committee	Senate Standing Committee on Constitutional and Legal Affairs, which conducted an inquiry into the Family Law Bill 1974
Senate Legislation Committee	Senate Legal and Constitutional Affairs Legislation Committee, which conducted inquiries into the 2018 and 2019 FCFCOA Bills

Chapter 1.
Background to the review

1.1 The *Federal Circuit and Family Court of Australia Act 2021* (Cth) (the FCFCOA Act) came into effect on 1 September 2021, bringing together the Family Court of Australia (the Family Court) and the Federal Circuit Court of Australia (the Federal Circuit Court) under a unified administrative structure known as the Federal Circuit and Family Court of Australia (the FCFCOA).

1.2 Underpinning the restructure of these Courts was a desire to 'help Australian families resolve their disputes faster by improving the efficiency of the existing split family law system'.[1]

1.3 On 30 August 2024, the Commonwealth Attorney-General, the Hon Mark Dreyfus KC MP, announced a review of the FCFCOA Act.[2] The review is required by section 284 of the Act.[3]

1.4 The Attorney-General appointed the Hon Linda Dessau AC CVO and Professor Helen Rhoades OAM to conduct the review.

History of family court reform in Australia

The Family Court of Australia

1.5 The history of modern family court reform in Australia dates from the development of the Family Court of Australia. A creation of the Whitlam Government,[4] the Family Court, and the *Family Law Act 1975* (Cth) (the Family Law Act) it was designed to administer, commenced operation on 5 January 1976.[5]

1.6 The Family Law Act provided an option for the establishment of state family courts, to be funded by the federal government.[6] Western Australia was the only state to take up this option, creating the Family Court of Western Australia (the FCWA). The FCWA opened its doors on 1 June 1976.[7]

1.7 Like the Federal Court of Australia (the Federal Court), which commenced in February 1977,[8] the Family Court was established as a superior court of record under Chapter III of the Commonwealth Constitution. However, unlike the Federal Court, which was vested with a broad range of federal jurisdiction,[9] the Family Court was designed as a specialist court to deal exclusively with family law matters.[10]

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1 Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2019 (Cth) ('2019 FCFCOA Bill') [6].

2 The Hon Mark Dreyfus KC MP, 'Review of the Federal Circuit and Family Court of Australia Act 2021' (Media Release, 30 August 2024).

3 Section 284 requires a review of the operation of the Act to be conducted within 6 months after the third anniversary of the commencement of the FCFCOA Act.

4 The federal government led by Prime Minister Gough Whitlam of the Australian Labor Party (5 December 1972 to 11 November 1975).

5 The Family Court was created by the Family Law Act. The commencement date was set by proclamation: Governor-General of Australia, 'Proclamation' in Commonwealth, *Australian Government Gazette*, No G 35, 9 September 1975, 2.

6 *Family Law Act 1975* (Cth) s 41 ('*Family Law Act*').

7 The FCWA was originally created by the *Family Court Act 1975* (WA) s 6(1), and was subsequently continued by the *Family Court Act 1997* (WA) s 9 (as enacted). Note that state courts of summary jurisdiction also exercise limited jurisdiction in family law matters under the *Family Law Act* ss 39 and 39A.

8 The Federal Court was created by the *Federal Court of Australia Act 1976* (Cth) s 5(1). The date on which the Federal Court commenced was set by proclamation: Governor-General of Australia, 'Proclamation' in *Australian Government Gazette*, No S 3, 18 January 1977, 1.

9 Note that the Federal Court replaced the former Australian Industrial Court and the Federal Court of Bankruptcy, and originally comprised two divisions, the Industrial Division and the General Division: see 'Current Topics' (1977) 51(2) *Australian Law Journal* 55, 56.

10 The bulk of the Family Court's jurisdiction was contained in the Family Law Act, which came into effect on the same day the Family Court commenced operation.

1.8 The structure that had been envisaged for the Family Court was set out in a 1974 report of the Senate Standing Committee on Constitutional and Legal Affairs (the Senate Committee), which had been tasked with examining the Family Law Bill 1974. The Senate Committee's report suggested the new court should incorporate a number of distinctive features that would distinguish it from more traditional courts.[11]

1.9 The first of these focused on judicial specialisation, with the Senate Committee noting that it was 'of the essence of our recommendation' that the Family Court's judicial officers 'be chosen for their experience and understanding of family problems', as well as their legal skills.[12]

1.10 The 1974 report also emphasised the importance of less formal processes for resolving family disputes, and the incorporation of court-based support services. The Senate Committee envisaged the Family Court as a 'one-stop shop' that would provide separating couples with both legal and alternative dispute resolution options, and indicated the judges:

> *… would need to recognise their responsibility in developing a new type of court, acting with a minimum of formality, coordinating the work of ancillary specialists attached to the court, encouraging conciliation and applying, only as a last resort, the judicial powers of the court.*[13]

1.11 A further structural recommendation was that the Court should 'consist of a two tier body of judges, the first tier having the equivalent status of Supreme Court or Federal Judges and the second tier having the status equivalent to the County Court or District Court Judges'.[14] In formulating this recommendation, the Senate Committee imagined 'that senior Judges would hear the more difficult defended matters [like complex custody and property issues][15] and appeals,' while the lower tier of judges 'would hear less complex and more routine matters'.[16]

1.12 The Whitlam Government envisaged the Family Court as a 'helping court' for separating families, one that would 'have regard to their human problems, not just their legal rights'.[17] Reflecting this view, and as recommended by the Senate Committee, an in-house counselling service and informal hearing processes were incorporated into its design.[18] The Family Law Act also provided that a person 'shall not be appointed' as a judge of the Family Court unless:

> *by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.*[19]

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11 Senate Standing Committee on Constitutional and Legal Affairs (Senate Committee), Parliament of Australia, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Parliamentary Paper No 133 of 1974), October 1974) [38]–[41] ('*Report on the Family Law Bill 1974*').

12 Ibid [35].

13 Ibid.

14 Ibid.

15 Ibid.

16 Joint Select Committee on Certain Family Law Issues, Parliament of Australia, *Funding and Administration of the Family Court of Australia* (Report, 28 November 1995) [5.8] ('*Report on Funding and Administration of the Family Court*').

17 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1974, 4322 (Gough Whitlam, Prime Minister, second reading speech to the Family Law Bill 1974). See also *Report on the Family Law Bill 1974* (n 11) 80.

18 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1974 4320–1 (Gough Whitlam, Prime Minister, second reading speech to the Family Law Bill 1974); Audrey Marshall, 'Family Court Counselling Service' [1978] *Law Society Journal* 175.

19 *Family Law Act* s 22(2)(b).

1.13 However, the Senate Committee's proposed two-tiered judicial structure did not eventuate.[20] The Family Court began its work with a limited number of judicial officers, all of whom heard defended cases regardless of the degree of complexity.[21]

1.14 This circumstance no doubt contributed to the hearing delays that have been described as 'perennial issues' for the Family Court.[22] For example, in a 1987 report by the Australian Judicial System Advisory Committee of the Constitutional Commission (the Jackson Committee) on the state of the Australian judicial system,[23] the backlog of cases affecting the Family Court was noted. The report described the Court's workload as falling into two categories – 'those matters of a largely routine kind, many of them uncontested, and those matters involving a smaller number of major contested cases, especially over custody and property'[24] – and recommended a greater use of registrars to do the 'more routine' family law work.[25]

1.15 Amendments to the Family Law Act the following year created the offices of deputy chief justice, judge administrator and judicial registrar,[26] and extended the range of powers that could be delegated to registrars.[27] The amendments permitted the creation of rules of court to delegate to judicial registrars 'all or any of the powers of the court, except the power to make an order in relation to' children, other than interim or consent orders.[28]

1.16 However, the Family Court's workload continued to grow and delays persisted. One source of expansion involved referrals to the Commonwealth in the late 1980s of state powers with respect to the custody and guardianship of *ex nuptial* children.[29] Consequential amendments to the Family Law Act vested the Family Court with power to make orders for all children, not just the children of married parents as had previously been the case,[30] leading to a significant increase in the Family Court's workload in children's matters.[31]

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20 *Report on Funding and Administration of the Family Court* (n 16) [5.8].

21 At the time the Family Court commenced operating, only five judges had been appointed. See John Fogarty, *Establishment of the Family Court* (2001) 60 *Family Matters* 90, 95.

22 See Felicity Bell, 'A Tale of Two Courts' (2020) 29 *Journal of Judicial Administration* 118, 124.

23 Advisory Committee to the Constitutional Commission, Parliament of Australia, *Australian Judicial System* (Parliamentary Paper No 307 of 1987, September 1987).

24 'Developments and Events: the Future of the Family Court of Australia' (1987) 1(3) *Australian Journal of Family Law* 191, 191.

25 Although the Jackson Committee believed the best way to address the problems facing the Family Court was to integrate it into the Federal Court. See Current Topics' (1987) 61(5) *The Australian Law Journal* 207, 209.

26 *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988* (Cth) s 9.

27 Ibid s 17, which inserted sections 26A to 26N into the *Family Law Act*.

28 *Family Law Act* s 26B, as at 5 April 1988. Note that the High Court held that it was permissible for federal judges to delegate judicial functions provided certain conditions were met: *Harris v Caladine* (1991) 172 CLR 84.

29 (in order of commencement) *Commonwealth Powers (Family Law-Children) Act 1986* (Vic), *Commonwealth Powers (Family Law) Act 1986* (SA), *Commonwealth Powers (Family Law — Children) Act 1986* (NSW), *Commonwealth Powers (Family Law) Act 1987* (Tas), *Commonwealth Powers (Family Law—Children) Act 1990* (Qld).

30 See *Family Law Amendment Act 1987* (Cth).

31 The Family Law Council's 1989 Annual Report noted that custody applications in the Family Court had increased by 30% since 1987: Family Law Council, *Annual Report 1988-89* (Report, 1989) 43.

1.17 A potential solution to these issues that was canvassed during the 1990s concerned the possibility of creating a family law magistracy. In 1992, the Joint Select Committee on Certain Family Law Issues (the Joint Committee) commenced an inquiry into the Family Court's administration and funding.[32] The Joint Committee noted that the appointment of seven judicial registrars to the Court since 1989 had allowed judges to 'devote more time to the final resolution of contested matters',[33] but that the Chief Justice of the Family Court had proposed that the 'present three tier judicial structure of the court which consists of Judges, Judicial Registrars and Registrars be replaced by a two tier structure of Judges and Magistrates'.[34]

1.18 The Joint Committee did not favour the establishment of federal magistrates within the Family Court.[35] Instead, it recommended that 'consideration be given to the Family Court of Australia becoming a division of the Federal Court of Australia and that the establishment of a Federal Magistracy be considered at that time'.[36]

1.19 In 1995, then Attorney-General the Hon Michael Lavarch MP referred an inquiry into family law and adversarial litigation to the Australian Law Reform Commission (the ALRC).[37] Following the election of the Howard Government in 1996, the ALRC's terms of reference were altered by the incoming Attorney-General, the Hon Daryl Williams AM QC MP, to specifically exclude consideration of issues relating to 'the possible establishment, structure and jurisdiction of a federal magistracy'.[38] The change reflected the fact that the Attorney-General's Department was already 'considering the policy issues involved in this proposal'.[39]

1.20 The following year the Attorney-General's Department issued a discussion paper on options for the creation of a federal magistracy,[40] and in June 1999 the Attorney-General introduced a bill to Parliament to establish the Federal Magistrates Court of Australia (the FMC).[41]

32 *Report on Funding and Administration of the Family Court* (n 16).
33 Ibid [5.16].
34 Ibid [5.21]. See also Alastair Nicholson, 'Sixteen Years of Family Law: A Retrospective' (2004) 18 *Australian Journal of Family Law* 131, 140.
35 *Report on Funding and Administration of the Family Court* (n 16) [6.22].
36 Ibid [5.80].
37 See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000) 3.
38 Ibid 5.
39 Australian Law Reform Commission, *Rethinking Family Law Proceedings* (Issues Paper No 22, 1997) [18.12].
40 Susan Blashki, 'Access to Justice on the One Hand, Quality of Justice on the Other – Can This be Achieved by a Federal Magistracy?' (Conference Paper, Third National Family Court Conference, 23 October 1998) 11.
41 Federal Magistrates Bill 1999 (Cth). The court was also to be known as the Federal Magistrates Service; see Explanatory Memorandum, Federal Magistrates Bill 1999 (Cth) 1.

The Federal Circuit Court of Australia

1.21 The FMC, later the Federal Circuit Court, was established as an independent court of record under Chapter III of the Constitution in 2000.[42] It commenced operation on 23 June 2000 with 16 federal magistrates.[43]

1.22 The FMC was vested with jurisdiction in relation to both family law and other federal law matters 'of a less complex nature' than were then being dealt with by the Family Court and the Federal Court.[44] This included contested family law property disputes where the property was valued at less than $300,000, and parenting orders providing for the residence of a child where the parties consented to the FMC hearing the matter. It also included applications under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), appeals from the Administrative Appeals Tribunal that were transferred to the FMC by the Federal Court, and certain workplace relations matters.[45]

1.23 The intention was that the FMC would provide a quicker, cheaper option for litigants in these matters and ease the workload of both the Federal Court and the Family Court.[46]

1.24 In introducing the Bill to Parliament, the Attorney-General indicated that the FMC would offer a 'new culture, with an emphasis on user-friendly streamlined procedures' that would be 'especially important for litigants who do not have legal representation'.[47] This capacity was supported by legislative provisions that enabled judge-led case management from filing to decision-making, and regular circuits to regional and rural locations to enhance access to justice for people living outside metropolitan areas.[48]

1.25 Although the FMC was established to deal with less complex family and federal law matters, and to free up the Federal Court and the Family Court to focus on more complex matters, over time it 'experienced an increasing case load and a greater diversity and complexity in the cases coming before it,' as well as expanded jurisdiction.[49]

1.26 In family law matters, the FMC came to have virtually parallel jurisdiction with the Family Court, and to assume the vast bulk of federal family law work.

1.27 These circumstances led to a series of reviews and proposals for structural reform.

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42 Explanatory Memorandum, Federal Magistrates Bill 1999 (Cth) 1. The court was originally established by the *Federal Magistrates Act 1999* (Cth), which was later renamed the *Federal Circuit Court of Australia Act 1999* (Cth) when the court's name was altered in 2013.

43 Federal Magistrates Service, *Report for the period 23 December 1999 to 30 June 2000* (2000) 3.

44 Explanatory Memorandum, Federal Magistrates Bill 1999 (Cth) 1.

45 Ibid 2.

46 Ibid 1.

47 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 1999, 7365 (Daryl Williams, Attorney-General, second reading speech to the Federal Magistrates Bill 1999).

48 KPMG, *Review of the Performance and Funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia* (Report, 5 March 2014) 17 ('*KPMG Review*').

49 Commonwealth, Parliamentary Debates, House of Representatives, 20 September 2012, 11361 (Nicola Roxon, Attorney-General, second reading speech to the Federal Circuit Court of Australia Legislation Amendment Bill 2012).

Reviews and proposals for structural reform

1.28 In 2008, the then Attorney-General, the Hon Robert McClelland MP, requested the Attorney-General's Department and Mr Des Semple to 'advise on structural and governance options to achieve a more integrated and efficient family law court system'.[50]

1.29 The resulting Semple Report noted that the FMC had expanded to 'become the largest federal court'.[51] In particular, its growth had resulted in a substantial shift of family law work from the Family Court to the FMC,[52] with around 79% of family law applications being filed in the FMC at that time.[53]

1.30 The Semple Report noted that despite this workload, the FMC was financially dependent on resources provided by the Federal Court and the Family Court, including the allocation of family consultants, and that 'tension over resources has distracted the Family Court and FMC from their core responsibilities'.[54]

1.31 The Semple Report indicated that the concurrent jurisdiction of the Family Court and the FMC made it 'inevitable' they would need to engage in 'competition for resources as each court endeavours to discharge the functions for which it was created', and that this was counterproductive to delivering timely justice.[55]

1.32 The Semple Report also noted that:

> *Having two independent courts handling largely the same work has created confusion for litigants and legal practitioners who need to choose where to file matters.*[56]

1.33 The review concluded that a redistribution of resources was needed to reflect the change in filings and workloads of the Courts, as well as the 'implementation of a single administration for the delivery of family law services'.[57] It also noted that all submissions to the review, apart from the FMC's own submission, considered the most effective model for delivery of family law services would be to have 'a single family court, with two separate judicial divisions serviced by a single administration'.[58]

1.34 In line with this view, the Semple Report proposed the Family Court be divided into two divisions: the Appeal and Superior Division, which would comprise the existing Family Court judges, and a lower-tier General Division composed of judicial officers from the FMC.[59] It also recommended that a new lower-tier division be created in the Federal Court, and that non–family law federal magistrates be offered commissions to this division. The report concluded:

> *This restructure of the federal courts would ensure there was one specialist family law court and one federal court exercising all federal non-family law civil jurisdiction. Each court would be focussed on its own distinctive jurisdiction.*[60]

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50 Des Semple, *Future Governance Options for Federal Family Law Courts in Australia* (Report, August 2008) [2] ('*Semple Report*').
51 Ibid [47].
52 Ibid [48].
53 Ibid [18].
54 Ibid [49].
55 Ibid 6.
56 Ibid [50].
57 Ibid [145].
58 Ibid [51].
59 Ibid 7.
60 Ibid 8.

1.35 The Semple Report's recommendations were initially accepted by government, but the proposed restructure was ultimately abandoned.[61]

1.36 However, 'as a result of its increased jurisdiction, and role as an intermediate court servicing regional centres as well as capital cities', the FMC was renamed the Federal Circuit Court on 12 April 2013, and federal magistrates became known as judges.[62]

1.37 Five years after the Semple Report, a second review of the performance of the federal courts was conducted by KPMG (the KPMG Review).[63]

1.38 KPMG found that in addition to the growth in family law jurisdiction, which now comprised the bulk of the Court's workload,[64] the Federal Circuit Court had also seen a marked growth in the range and volume of general federal law matters since its inception.[65]

1.39 Like the Semple Report, the KPMG Review noted that much of the jurisdiction exercised by the Federal Circuit Court operated concurrently with the Family Court and the Federal Court.[66] The report concluded that these 'high levels of concurrent jurisdiction' did not 'incentivise the hearing of matters in the lowest appropriate jurisdiction'.[67]

1.40 Despite the concurrent jurisdiction of the Family Court and Federal Circuit Court, disparities in their legislative frameworks (including their respective Acts, regulations and rules) and operational and management practices had seen the development of marked differences in the ways that each Court dealt with family law matters.[68] Most significantly, differences existed between the two Courts in the case management process between filing and trial.[69]

1.41 In 2018, PwC was commissioned by the then government to review these differences and report on opportunities to improve efficiencies in the family law system (resulting in the PwC Report).[70] At this time, the Federal Circuit Court was dealing with 89% of all federal family law matters,[71] and family law represented 90% of its workload.[72]

1.42 The Family Court had also seen a 34% increase in its backlog of pending cases since 2012/13, while the Federal Circuit Court had experienced a 63% increase in its backlog of family law matters over that period.[73]

1.43 The PwC Report suggested that 'addressing the entry point and process for managing first instance matters' offered a significant opportunity to reduce the backlog in the family law courts and 'drive faster and cheaper resolution of matters for litigants'.[74]

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61 A bill to restructure the court in line with the *Semple Report*'s recommendations – the Access to Justice (Family Court Restructure and other Measures) Bill 2010 – was introduced to the House of Representatives on 24 June 2010, but lapsed at dissolution on 19 July 2010. See Commonwealth, Parliamentary Debates, House of Representatives, 24 June 2010, at 6518 (Robert McClelland, Attorney-General, second reading speech to the Access to Justice (Family Court Restructure and Other Measures) Bill 2010).

62 *KPMG Review* (n 48) 19. See also the Hon Nicola Roxon MP, 'Introducing the Federal Circuit Court of Australia' (Media Release, 13 September 2012).

63 *KPMG Review* (n 48).

64 Federal Circuit Court, *Federal Circuit Court of Australia Annual Report 2012-13* (2013) 2. Family law matters accounted for 93% of the Federal Circuit Court's total filings in 2012/13: at 36.

65 *KPMG Review* (n 48) 17.

66 Ibid. The report also noted that, despite this circumstance, the Federal Circuit Court judges did not enjoy the same pension benefits as the Family Court and Federal Court judges: at 19.

67 *KPMG Review* (n 48) 39, 86.

68 Explanatory Memorandum, 2019 FCFCOA Bill 18 [61].

69 PwC, *Review of Efficiency of the Operation of the Federal Courts* (Final Report, April 2018) 5 ('*PwC Report*').

70 *PwC Report* (n 69).

71 Federal Circuit Court, *Annual Report 2017-2018* (2018) 47.

72 Ibid 44.

73 Productivity Commission, *Report on Government Services 2020* (Report, 2020) Table 7A.21.

74 *PwC Report* (n 69) 7.

1.44 Against this background, the idea of merging the family courts, which had been proposed in the Semple Report, was revived.

The FCFCOA restructure proposal

1.45 The Federal Circuit and Family Court of Australia Bill 2018 (2018 FCFCOA Bill) was introduced in Parliament in August 2018, together with the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (together, the 2018 FCFCOA Bills). The Explanatory Memorandum stated that the proposed reforms would increase efficiencies and reduce delays in the federal family courts.[75]

1.46 Criticism was raised of the proposal in the 2018 FCFCOA Bills to remove the appellate function of the Family Court and replace it with a new Family Law Appeal Division of the Federal Court.[76] Concerns were also raised that the reforms would result in the loss of Family Court judicial expertise and specialisation.[77]

1.47 In its February 2019 report on the 2018 FCFCOA Bills, a majority of the Senate Legal and Constitutional Affairs Legislation Committee (the Senate Legislation Committee) recommended the existing appellate jurisdiction of the Family Court be retained in the FCFCOA (Division 1).[78]

1.48 The 2018 FCFCOA Bills lapsed when the Parliament was prorogued ahead of the 2019 federal election.

1.49 The Federal Circuit and Family Court of Australia Bill 2019 (the 2019 FCFCOA Bill) and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 (the 2019 FCFCOA Consequential Amendments Bill) (together, the 2019 FCFCOA Bills) were introduced into the Parliament on 5 December 2019. The most substantive change from the 2018 FCFCOA Bills was the removal of the Federal Court appeals pathway proposal, with the appellate function restored to the FCFCOA (Division 1), being a continuation of the Family Court.

1.50 The recommendation of the Senate Legislation Committee's November 2020 report was that the 2019 FCFCOA Bills be passed, although there were dissenting reports from Senators from the Australian Labor Party and the Australian Greens.[79]

1.51 The 2019 FCFCOA Bills passed both Houses of Parliament on 18 February 2021. The Bills received Royal Assent on 1 March 2021 and commenced on 1 September 2021.

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75 Explanatory Memorandum, 2018 FCFCOA Bill 15 [52].

76 Senate Legal and Constitutional Affairs Legislation Committee (Senate Legislation Committee), *Federal Circuit and Family Court of Australia Bill 2018 [Provisions] and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 [Provisions]* (Report, February 2019) [3.31]–[3.34] ('*Report on the 2018 FCFCOA Bills*').

77 Ibid [3.56]–[3.58]. Open Letter – concerns about proposed family court merger, signed by 155 stakeholders (lawcouncil.au) (originally issued 11 November 2019, signatories updated 16 February 2021). See Senate Legislation Committee, *Federal Circuit and Family Court of Australia Bill 2019 [Provisions] and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 [Provisions]* (Report, November 2020) 38 ('*Report on the 2019 FCFCOA Bills*').

78 *Report on the 2018 FCFCOA Bills* (n 76) [3.114] recommendation 2.

79 *Report on the 2019 FCFCOA Bills* (n 77) 35–41, 43–6.

The Federal Circuit and Family Court of Australia

1.52 On 1 September 2021, through the commencement of the FCFCOA Act, the Family Court and Federal Circuit Court were brought together under a single administrative structure known as the FCFCOA.

1.53 The stated aim of the FCFCOA structural reform was to:

- *create a consistent pathway for families in having their family law disputes dealt with in the federal courts,*
- *improve the efficiency of the federal court system, and*
- *ensure outcomes for Australian families are resolved in the most timely, informed and cost effective manner possible.*[80]

1.54 The Explanatory Memorandum notes that for constitutional reasons, the Family Court and the Federal Circuit Court were not merged. They continue to exist, albeit with changed names.[81]

1.55 The FCFCOA (Division 1) deals only with family law matters, while the FCFCOA (Division 2) deals with both first instance family law and general federal law matters.

1.56 The FCFCOA Act and *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth) (the FCFCOA Consequential Amendments Act) preserved the Federal Circuit Court's general federal law and fair work jurisdiction in FCFCOA (Division 2). For the FCFCOA (Division 2), the FCFCOA Act also:

- maintained two divisions – a general division (which includes family law matters) and a fair work division – as was the case in the Federal Circuit Court,[82] and
- created two Deputy Chief Judge positions – the Deputy Chief Judge (Family Law) and Deputy Chief Judge (General and Fair Work).[83]

1.57 The FCFCOA Act also:

- permits the dual appointment of the Chief Justice of the FCFCOA (Division 1) as the Chief Judge of the FCFCOA (Division 2) and the dual appointment of the Deputy Chief Justice of the FCFCOA (Division 1) as the Deputy Chief Judge (Family Law) of the FCFCOA (Division 2) – discussed in Chapter 2
- provides for the FCFCOA (Division 2) to act as the single point of entry into the Courts for family law matters – discussed in Chapter 3
- removed the Appeal Division structure of the Family Court and allows all judges of the FCFCOA (Division 1) to hear family law appeals – discussed in Chapter 4
- changed the previous default position for appeals from the Federal Circuit Court so that they are heard by a single judge unless the Chief Justice considers it appropriate for an appeal to be heard by a Full Court – also discussed in Chapter 4
- included new criteria for appointment as a judicial officer where the kinds of matters expected to come before the person are family law matters – discussed in Chapter 5
- continues the Family Court as the FCFCOA (Division 1) and the Federal Circuit Court as the FCFCOA (Division 2) – discussed in Chapter 6
- provides that the FCFCOA (Division 1) must comprise a minimum of 25 judges.[84]

80 Explanatory Memorandum, 2019 FCFCOA Bill 3 [8].
81 Ibid 18 [63].
82 *Federal Circuit and Family Court of Australia Act 2021* s 135 ('*FCFCOA Act*').
83 Ibid s 10(2)(b). See also the definitions of Deputy Chief Judge, Deputy Chief Judge (Family Law) and Deputy Chief Judge (General and Fair Work) in s 7 of the *FCFCOA Act*.
84 *FCFCOA Act* s 9(3).

Conduct of the review

1.58 The Terms of Reference for the review asked the reviewers to consider and report on the impact of the structural reforms to the Family Court and the Federal Circuit Court. The complete Terms of Reference is located at Appendix 1.

1.59 As specified in section 284 of the FCFCOA Act, the review was required to commence after 1 September 2024 and be completed on or before 1 March 2025.

1.60 The Terms of Reference provide that:

> *The review should consult as widely as the reviewer considers necessary, including with the Federal Circuit and Family Court of Australia, the Family Court of Western Australia, government funded legal assistance providers, the legal profession more broadly – including peak representative bodies – and the community.*

1.61 The primary method used to consult these stakeholders involved face-to-face meetings. A total of 46 meetings were held with 117 different stakeholders between 5 September and 31 October 2024. Meetings were conducted on the basis that information used in the report of the review would be non-identifying.

1.62 The consultations included meetings with 21 family law judges[85] and six general federal law judges[86] from the FCFCOA Courts, as well as 13 family law registrars and three general federal law registrars, and senior executives from the FCFCOA.[87] The reviewers also met with the heads of jurisdiction and judicial officers from the Federal Court and the FCWA. The meetings with FCFCOA judicial officers were facilitated by the FCFCOA and covered seven different registries of the Courts, including both capital city and regional registries.

1.63 The consultations also included meetings with key organisations in the sector that interact with the Courts, including legal aid commissions, law societies, community legal centres, state bar associations and the Law Council of Australia, as well as with private legal practitioners and specialist legal and support services across Australia.[88]

1.64 A list of the meetings is located at Appendix 2.

1.65 The limited timeframe for the conduct of the review, which included the Christmas vacation period, meant that it was not practical to call for written submissions, which generally take a significant amount of time to prepare, and can require a lengthy process of analysis.[89]

1.66 Accordingly, the consultations were complemented by two online surveys, in which the substantive review questions were identical. The surveys were hosted on the Attorney-General's Department's Consultation Hub at https://consultations.ag.gov.au/.

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85 Including the Chief Justice and the Deputy Chief Justice.

86 Noting that this included the Deputy Chief Judge (General and Fair Work) and judges who have a mixed docket.

87 Some of the FCFCOA senior executives that the reviewers met with are also registrars, but are not included in the count of registrars, as the meetings were in their capacity as members of the senior executive of the Courts.

88 These consultations included meetings with 26 legal practitioners practising primarily in family law and 21 legal practitioners with expertise in areas of general federal law such as migration, bankruptcy, industrial relations and intellectual property.

89 Several written submissions were received by the review secretariat outside the survey platform described in paragraph 1.66. To ensure consistency in methodology, reviewers did not accept these submissions. In one case the submission was formally withdrawn. The authors of all of these submissions nevertheless contributed to the review by way of face-to-face meeting and/or survey response, save in one instance where a submission was received too late.

1.67 One survey was open to the public (the Public Consultation) and one was a closed consultation for only judicial officers and personnel of the FCFCOA Courts and the Federal Court (the Courts Consultation). The survey forms are attached at Appendix 3.

1.68 The Courts Consultation was conducted as a separate, closed consultation to ensure the veracity of respondents' claims describing their role within the Courts, while still allowing anonymous submissions.

1.69 A link to the Courts Consultation was provided to the FCFCOA and the Federal Court so that it could be distributed among judicial officers and personnel.

1.70 The Courts Consultation survey opened on Friday, 22 November 2024 and closed on Tuesday, 10 December. Seventy-three submissions were received.[90]

1.71 In addition to a link to the Public Consultation being available on the website of the Attorney-General's Department, participants were recruited by email, with a link to the survey. These emails were sent to individuals and relevant organisations inviting participation and distribution.

1.72 The Public Consultation survey opened on Monday, 25 November 2024 and closed on Thursday, 12 December. Twenty-three submissions were received.

1.73 The reviewers note the low response rate to the Public Consultation. This could have been caused by a number of factors. Given the largely positive reports by participants during the face-to-face meetings, the low response rate may reflect a lack of continuing apprehension about the restructure of the Courts. It may also be that the timing of the survey, so close to the Christmas vacation, influenced the availability of potential respondents or that, despite appropriate efforts to distribute the survey, not all stakeholders were reached.

1.74 Nevertheless, despite the limited sample size, responses comprised a range of views from a range of relevant stakeholders.

1.75 Both surveys were able to be completed anonymously and most respondents chose to do so. Where quotes are used in this report they are drawn from meetings conducted with people from organisations other than courts where the participant provided consent for their words to be used in a non-identifying way and submissions made as part of the Public Consultation where the author provided appropriate consent. The terms "participants" and "respondents" are used interchangeably throughout the report.

[90] One additional submission was received but not included in this count, or considered in the review, as it did not address any of the survey questions.

Chapter 2.
Dual Appointments

2.1 The Terms of Reference asked the reviewers to consider the impact of the structural reforms to the FCFCOA with respect to dual appointments.

What the legislation provides

2.2 There is nothing in the FCFCOA Act to prevent the Chief Justice of the FCFCOA (Division 1) being appointed to, and holding at the same time, the office of Chief Judge of the FCFCOA (Division 2),[91] or the Deputy Chief Justice of the FCFCOA (Division 1) from being appointed to, and holding at the same time, the office of the Deputy Chief Judge (Family Law) of the FCFCOA (Division 2).[92]

2.3 Where there are separate heads of jurisdiction for each Court, the FCFCOA Act requires them to 'work cooperatively' for the purposes 'of ensuring the efficient resolution of family law or child support proceedings'.[93] This applies to ensuring both 'common approaches to case management',[94] and 'common rules and forms' and 'common practices and procedures'.[95]

2.4 These requirements support the objects of the FCFCOA Act, as set out in section 5(c), which include:

> *to provide a framework to facilitate cooperation between the Federal Circuit and Family Court of Australia (Division 1) and the Federal Circuit and Family Court of Australia (Division 2) with the aim of ensuring:*
>
> *(i) common rules of court and forms; and*
>
> *(ii) common practices and procedures; and*
>
> *(iii) common approaches to case management.*[96]

Background

2.5 The Explanatory Memorandum to the 2019 FCFCOA Bill indicated the then Government's intention that the family law jurisdiction of the FCFCOA Courts 'would operate under the leadership of one Chief Justice, supported by one Deputy Chief Justice, with each holding a dual commission to both Division 1 and Division 2'.[97]

2.6 The Explanatory Memorandum also indicated that having a single head of jurisdiction would support the development of 'a consistent internal case management approach' for the two Courts, resulting in 'the more efficient handling of family law matters',[98] as well as 'the issuing of common rules of courts, practice notes and directions' to guide legal practitioners and litigants and the judicial officers of each Court.[99]

2.7 These aims responded to some of the key concerns raised in the various reviews of the operation of the Family Court and the Federal Circuit Court described in Chapter 1.

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91 *FCFCOA Act* s 21(1). See also s 129(1).
92 Ibid s 21(2). See also s 129(2). Note that the *FCFCOA Act* creates a second Deputy Chief Judge, being the Deputy Chief Judge (General and Fair Work): see s 10(2).
93 *FCFCOA Act* ss 70, 75, 193 and 216.
94 Ibid ss 70 and 193.
95 Ibid ss 75 and 216. Sections 69 and 192 of the *FCFCOA Act* empower the courts to give directions about the practice and procedure to be followed in proceedings before the court.
96 *FCFCOA Act* s 5.
97 Explanatory Memorandum, 2019 FCFCOA Bill [10].
98 Ibid [10].
99 Ibid [10].

2.8 Those reviews revealed that the different operational practices of the two Courts, and particularly their different case management approaches and ways of handling first instance matters, had led to confusion,[100] duplication and inefficiencies,[101] contributing to a significant backlog of cases in both Courts.[102]

Implementation

2.9 The present Chief Justice of the FCFCOA (Division 1), the Hon William Alstergren AO, is also the Chief Judge of the FCFCOA (Division 2).

2.10 Prior to the structural reforms, Chief Justice Alstergren already held dual appointments as the Chief Justice of the Family Court and the Chief Judge of the Federal Circuit Court from 10 December 2018. These appointments were continued by the FCFCOA Consequential Amendments Act.

2.11 From 1 September 2021, the Hon Justice Robert McClelland AO was dually appointed as the Deputy Chief Justice of the FCFCOA (Division 1) and the Deputy Chief Judge (Family Law) of the FCFCOA (Division 2).

2.12 Justice McClelland had been the Deputy Chief Justice of the Family Court immediately before the commencement of the FCFCOA Act. This appointment was also continued by the FCFCOA Consequential Amendments Act, and he was appointed Deputy Chief Judge of the FCFCOA (Division 2) with effect from 1 September 2021.

2.13 As discussed in more detail in Chapter 3, in February 2019, Chief Justice Alstergren established a Joint Rules Harmonisation Working Group of the Family Court and the Federal Circuit Court to oversee the development of harmonised rules and forms for the two Courts. The harmonised Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (the Family Law Rules 2021) and the Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021 (the Division 2 Family Law Rules) were made on 27 August 2021 and came into effect on 1 September to coincide with the commencement of the FCFCOA Courts. These rules provide a single set of forms for family law matters in both the FCFCOA (Division 1) and the FCFCOA (Division 2).

2.14 A common approach to family law case management and the comprehensive Central Practice Direction: Family Law Case Management (the Central Practice Direction) to guide practitioners in the various steps of the case management pathway were also implemented at that time and are discussed in detail in Chapter 3.

[100] *Semple Report* (n 50) [50].
[101] Ibid 5.
[102] See *PwC Report* (n 69) 4.

The review consultations

2.15 Several people during the consultations understood the question of dual appointments as relating to the appointment of judges to the FCFCOA (Division 2) to hear both family law and general federal law matters.[103] A small number of responses described dual appointments in terms of the benefits of registrars being able to hear family law matters in both the FCFCOA (Division 1) and the FCFCOA (Division 2).[104]

2.16 Most participants, however, focused their assessments of this aspect of the Terms of Reference on the appointment of a single head of jurisdiction for both Courts, or the dual appointments of the Chief Justice and Deputy Chief Justice of the FCFCOA (Division 1) as the Chief Judge and Deputy Chief Judge (Family Law) of the FCFCOA (Division 2).

2.17 While several respondents suggested that, for them, the dual appointments had not impacted their day-to-day work,[105] the majority of participants described benefits and/or challenges of having a single leadership team in family law.

2.18 Participants predominantly described experiences of structural or other impacts flowing from this change, although a small number of people attributed certain developments to the personal efforts of Chief Justice Alstergren. Some responses contained a mix of these perspectives, both commenting on the work of the current leadership team and appraising the value of dual appointments more generally.

2.19 The impacts ascribed to Chief Justice Alstergren personally tended to focus on his Honour's commitments to supporting a culture of collegiality, and improving the consistency of family law practice, across the two Courts, including the harmonisation of the Courts' rules and the development of the case management pathway and Central Practice Direction.

2.20 Overall, assessments of the impact of the dual leadership appointments were strongly positive, with participants describing a range of benefits to both the Courts and the legal profession and litigants. These included consistent leadership and practice in family law matters, enhanced unity and collegiality between the Courts, and the removal of the former tensions and competition for resources between the Courts.

2.21 A number of people ascribed responsibility for these positive impacts to a mix of factors, such as the combination of the single head of jurisdiction, the single point of entry and the single set of rules for family law.

2.22 On the other hand, some participants singled out the dual appointments as the critical factor in the FCFCOA reforms, suggesting that the positive transformation of the family law jurisdiction would not have been possible without a single head of jurisdiction.

2.23 There were also participants who saw disadvantages in dual leadership appointments. These responses tended to focus on the potential for a conflict of interests to arise, and the different skill sets required to manage the very different areas of law exercised by the two Courts.

2.24 Participants' experiences of the benefits and challenges flowing from the dual leadership appointments are described below.

[103] This issue is discussed in Chapter 5.
[104] The role of registrars is discussed in Chapter 3.
[105] For example, family law barristers whose work continued to involve hearings in what was formerly the Family Court.

Consistent leadership and family law practice

2.25 Many consultation participants described the ways in which they perceived the management of the Courts and/or the family law jurisdiction had been improved by the dual appointments of the Chief Justice and Deputy Chief Justice.

2.26 A key theme that arose in these responses was acknowledgment of the enhanced consistency of family law practice that had been facilitated by having a single head of jurisdiction for family law.

2.27 Legal practitioners were particularly appreciative of this aspect, noting that a consistent approach to case management of family law cases had been missing in the past.

2.28 Participants also commended the clear communication about practice and procedure from the Chief Justice in the Central Practice Direction. They indicated that this was a welcome change from having to be across different practice notes for each court and suggested that it had improved accessibility to practice and procedure information for self-represented litigants.

2.29 However, as many pointed out, work on these initiatives had commenced before the reforms, and was not, therefore, a function of the FCFCOA Act, which had merely allowed the existing dual appointment of the Chief Justice to continue.

2.30 Other developments that attracted comment included the role of a single head of jurisdiction in developing more consistent approaches to interpretation of the Family Law Act. The reviewers heard that this shift had been supported by the Chief Justice's development of a joint annual conference for the judges of both Courts, as well as a joint judicial education program.[106]

2.31 An associated issue concerned what one practitioner described as the importance of having a single head of jurisdiction being able to set the culture for family law practice 'from the top'. Particular mention was made in this regard of the Chief Justice's messaging to the legal profession about the Courts' practice and procedure expectations in relation to family violence:

> *From our perspective, that's been extremely well led from the Chief. You know, he's very public with the profession on the importance of understanding family violence within the court system.*

2.32 Participants also commended the ability of a single head of jurisdiction to conduct hearings in both Courts, in order to better understand how developments in the law and practice are playing out 'on the ground':

> *I think it's very advantageous having his Honour be able to sit in the lists and see how things are working on the ground. I've had the benefit of appearing before his Honour at a compliance and readiness hearing. So, it's nice to see that he's there and is seeing how the changes are working on the ground.*

2.33 Several respondents suggested that having a single head of jurisdiction had also played a critical role in eradicating the practice of transferring matters 'back and forth' between the Courts, as discussed in Chapter 3.

2.34 More generally, the consultations suggested the dual leadership commissions had produced a common family law culture and contributed to the smooth operation of the two Courts.

[106] Judicial education is discussed in Chapter 5.

Collegiality, cooperation and unity

2.35 A number of participants described positive impacts on judicial wellbeing and the working relationships between judges from the shift to a single head of jurisdiction.

2.36 These descriptions focused on the ways in which the family law judges of the two Courts were working more closely together than in the past.

2.37 While one participant suggested mixed causes for this, including the introduction of the single set of rules, most credited the dual leadership appointments, or Chief Justice Alstergren in particular, with bringing the two Courts together and driving a culture of collegiality between them.

2.38 Participants noted that the present level of collaboration had not been a feature of their work before this time, and indicated a concern that the strong working relationships they currently enjoyed might be disrupted if there were separate heads of jurisdiction in the future.

2.39 Although expressed in different terms, many of the review participants suggested that family law judges across the two Courts are now working as a team, rather than in isolation from one another. Terms such as unity, harmony and cohesion were common.

2.40 Some participants suggested that the increased cooperation between the Courts had also impacted the way in which they were perceived. These reflections proposed that the formerly separate Family Court and Federal Circuit Court are now seen as 'one court'.

2.41 The reviewers also heard reports of greater camaraderie and improved wellbeing associated with these developments. Although it is difficult to discern how much of the latter was a function of the reduced docket sizes for FCFCOA (Division 2) judges since the increased appointment of registrars (discussed in Chapter 3), many reflected that these benefits would not have been possible without the joint leadership of the Courts.

2.42 The consultations revealed that some family law practitioners had also observed the increased harmony between the courts since the restructure, with one summarising:

> *I think that does build that collegiality and that [sense that] they're in it together. I think any division of the work of particularly family law would be counterproductive. I think being under the one umbrella is important.*

Removal of competition for resources

2.43 The consultations also pointed to the impact of dual appointments in removing the previous competition for resources between the Courts.

2.44 As some participants noted, one of the key advantages of having a single head of jurisdiction is the capacity for oversight of the resource needs of both Courts, allowing for the kinds of efficiencies and focused resource allocation discussed above.

2.45 Others pointed to the absence of competition as an important part of the background to the improved relationships between the Courts, noting the benefits of sharing resources such as registrars and Court Child Experts (CCEs) rather than competing for them.

2.46 A number of participants suggested that the re-introduction of separate heads of jurisdiction would risk setting up competition again and undermine the collaboration that had been achieved.

Challenges and disadvantages

2.47 It is important to note that, while most participants described positive impacts of the dual leadership appointments, the reviewers received a small number of responses that did not support the idea of a single head of jurisdiction for the two Courts.

2.48 In the main, these responses suggested there is potential for a conflict of interests in having the same leader for both Courts, particularly where the judges of the two Courts do not share the same terms and conditions.

2.49 There was also a suggestion that dual leadership appointments risked obscuring the substantial differences between the two Courts, and that courts exercising such different areas of law might be better served by separate heads of jurisdiction.

Chapter 3.
Single point of entry for federal family law matters

3.1 The Terms of Reference asked the reviewers to consider the impact of the structural reforms to the FCFCOA with respect to the operation of the FCFCOA (Division 2) as a single point of entry for federal family law matters.

What the legislation provides

3.2 The FCFCOA Act creates a single point of entry for family law and child support matters by vesting original jurisdiction in the FCFCOA (Division 2),[107] and in the FCFCOA (Division 1) only in those matters transferred to it from Division 2.[108]

3.3 Section 50(1) of the Act specifically prohibits a person from instituting family law or child support proceedings (other than appellate proceedings) in the FCFCOA (Division 1). In the event that proceedings are instituted in Division 1 they are, by force of section 50(2), transferred to Division 2.

3.4 Section 149 of the Act provides for the transfer of family law and child support matters from the FCFCOA (Division 2) to the FCFCOA (Division 1). The discretion may be exercised by any Division 2 judge and, in addition, has been delegated to senior judicial registrars and judicial registrars.[109]

3.5 The Chief Justice may also transfer a proceeding from Division 2 to Division 1,[110] or a proceeding from Division 1 to Division 2,[111] and may delegate those transfer powers to any one or more judges.[112]

3.6 The Act prescribes factors for consideration in transferring a matter from one Court to the other. They are in similar terms for both Courts, and include any relevant rules of court,[113] whether proceedings in an associated matter are pending in the other Court, the sufficiency of resources within the other Court and the interests of the administration of justice. [114]

3.7 The single point of entry provisions, like all aspects of the 2021 structural reforms, are set against the backdrop of the objects in section 5 of the Act, being:

> *(a) to ensure that justice is delivered by federal courts effectively and efficiently; and*
>
> *(b) to provide for just outcomes, in particular, in family law or child support proceedings; and*
>
> *(c) to provide a framework to facilitate cooperation between the Federal Circuit and Family Court of Australia (Division 1) and the Federal Circuit and Family Court of Australia (Division 2) with the aim of ensuring:*
>
> *(i) common rules of court and forms; and*
>
> *(ii) common practices and procedures; and*
>
> *(iii) common approaches to case management.*

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[107] *FCFCOA Act* s 132.
[108] Ibid 25.
[109] *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021* (Cth) r 5.01; sch 2 item 29.2A ('*Division 2 Family Law Rules*').
[110] *FCFCOA Act* s 51.
[111] Ibid s 52.
[112] Ibid s 54.
[113] See ibid ss 53 and 151 for the making of Rules of Court in relation to the transfer of proceedings, and ch 9 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) ('*Family Law Rules 2021*')
[114] See *FCFCOA Act* ss 51(3), 52(3) and 149(3).

3.8 The single point of entry is also set against the backdrop of provisions prescribing that, in both Courts, the overarching purpose of civil practice and procedure is to facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible.[115]

3.9 The overarching purpose also includes the following objectives:

> *(a) the just determination of all proceedings before Division 1 and Division 2;*
>
> *(b) the efficient use of the judicial and administrative resources available for the purposes of the Court;*
>
> *(c) the efficient disposal of the Court's overall caseload;*
>
> *(d) the disposal of all proceedings in a timely manner;*
>
> *(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.* [116]

3.10 The Act provides that parties must conduct a proceeding (including negotiations for settlement) in a way that is consistent with the overarching purpose,[117] and that lawyers must take account of that duty and assist their client parties to comply with it.[118]

3.11 Integral to achieving the objects of the Act is the requirement for the Chief Justice and Chief Judge to work cooperatively to achieve a common approach to case management, including in relation to common practices and procedures, rules of court and forms.[119]

Background

Before the reforms

3.12 Before the reforms, the Family Court and the Federal Circuit Court shared original jurisdiction in relation to family law and child support matters (save for adoption and applications for nullity or validity of marriage, in which only the Family Court had original jurisdiction[120]).

3.13 Subject to some specified exceptions, the Family Law Act contained a prohibition against commencing proceedings in the Family Court if 'proceedings in respect of an associated matter' were pending in the Federal Circuit Court.[121]

3.14 Otherwise, a proceeding commenced in the Family Court could, at the Court's discretion, be transferred for hearing in the Federal Circuit Court. Matters to be considered included factors that could be set out in rules of court, whether proceedings were pending in the Federal Circuit Court, whether that Court's resources were sufficient and whether the transfer would be in the interests of the administration of justice.[122]

[115] Ibid ss 67(1) and 190(1).
[116] Ibid ss 67(2) and 190(2)
[117] Ibid ss 68(1) and 191(1).
[118] Ibid ss 68(2) and 191(2).
[119] Ibid ss 75 and 193.
[120] Family Court, *Annual Report 2020-2021* (2021) 7; Federal Circuit Court, *Annual Report 2020-2021* (2021) 9; FCFCOA (Division 1) and FCFCOA (Division 2), *Annual Reports 2021-22* (2022) 71.
[121] See *Family Law Act* s 33A, as at 31 August 2021.
[122] Ibid s 33B, as at 31 August 2021.

3.15 The *Federal Circuit Court of Australia Act 1999* (Cth) (the Federal Circuit Court Act) contained a similar provision for discretionary transfers to the Family Court,[123] as well as matters to be considered and factors that could be included in rules of court about such transfers.[124]

3.16 By 2001, both Courts had made rules in relation to transfers. Immediately before the commencement of the reforms, the Family Court's rules[125] and the Federal Circuit Court's rules[126] provided for similar factors to be considered, including the public interest (or, for the Federal Circuit Court, whether the proceeding involved questions of general importance), aspects of convenience to the parties, specialisation in the other Court and the parties' wishes.

3.17 In addition to the rules of court, in 2010, the Courts published a protocol about the division of work. It listed the applications for final orders that 'ordinarily should be filed and/or heard in the Family Court', including international child abduction, relocation and jurisdiction matters, special medical cases, those with serious allegations of child abuse, certain contraventions and cases likely to be of more than four days' duration or with complex questions of jurisdiction or law.[127]

3.18 The 2018 PwC Report noted that:

> *Despite the Protocol, there is not a consistent measure of complexity and it is often not possible or appropriate to categorise a matter as non-complex or complex when it is filed, as the level of complexity may become apparent over-time and/or may vary during the proceedings as a result of changing circumstances of the parties. As a result, PwC has been informed that, in practice, both the courts hear matters of similar complexity.*[128]

Calls for a single point of entry

3.19 Although there was a question as to whether legislative reform was in fact necessary to achieve it,[129] a single point of entry was called for in various reports and inquiries.

3.20 The 2008 Semple Report noted that feedback from the profession emphasised the need for one administration with a single point of entry and one set of forms.[130]

3.21 As discussed in Chapter 1, the 2018 PwC Report similarly identified a single point of entry for filing first instance family law matters as a potential opportunity to enhance efficiency.[131]

3.22 The proposal was widely supported in submissions to the Senate Legislation Committee on the 2018 and 2019 FCFCOA Bills,[132] including by both Courts.

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123 *Federal Circuit Court of Australia Act 1999* (Cth) s 39, as at 31 August 2021.
124 Ibid s 40.
125 See *Family Law Rules 2004* (Cth) div 11.3.2 r 11.18, as at 31 August 2021.
126 *Federal Circuit Court Rules 2001* (Cth) r 8.02.
127 Federal Magistrates Court of Australia, *Annual Report 2009-2010* (2010) 65. Family Court, *Annual Report 2009-2010* (2010) 26.
128 *PwC Report* (n 69) 3.
129 Evidence to Senate Legislation Committee, Parliament of Australia, 2018 FCFCOA Bills 14 (Warwick Soden).
130 *Semple Report* (n 50) [109].
131 *PwC Report* (n 69) 7.
132 See, eg, Law Council of Australia, Submission No 52 to Senate Legislation Committee, Parliament of Australia, *Inquiry into 2018 FCFCOA Bills* (23 November 2018) 6; National Legal Aid Submission No 99 to Senate Legislation Committee, Parliament of Australia, *Inquiry into 2018 FCFCOA Bills* (6 December 20180) 4; The Law Society of the New South Wales, Submission No 49 to Senate Legislation Committee, Parliament of Australia, *Inquiry into 2018 FCFCOA Bills* (22 November 2018) 3.

3.23 In its submission on the 2019 Bills, the Family Court stated that 'it is accepted that there are systemic defects in two courts having in effect co-terminus jurisdiction'.[133]

3.24 For its part, the Federal Circuit Court suggested that:

> *…the most pressing priority… is the need to develop procedures necessary to support a single point of entry, and a common case management system.*[134]

3.25 They shared the view that, while there were two Courts operating with two sets of rules, different forms and different case management systems, the process was confusing and inefficient.

3.26 There were also widespread concerns about forum shopping on the part of lawyers or parties, sometimes on the basis of a perceived advantage of a hearing before a particular judicial officer, an assessment of relative delays between the Courts or, potentially, with an eye to higher legal fees.[135]

3.27 At the time of the reforms, approximately 87% of all applications for final family law orders were filed in the Federal Circuit Court.[136] Each Court transferred cases to the other, but there were expressed concerns about cases too commonly being sent back and forth between the Courts – like 'family law footballs'.[137]

3.28 The impact on the parties of transfers, particularly late transfers, was a key concern identified in the Explanatory Memorandum to the 2018 FCFCOA Bill.[138]

3.29 By 2018 it was taking the Federal Circuit Court an average of 16.5 months to transfer appropriate matters to the Family Court. Although transfers from the Family Court occurred sooner, on average within 4.6 months,[139] transfers overall were causing too many parties to lose time in the finalisation of their proceedings.

3.30 When introducing the 2019 FCFCOA Bill, the then Attorney-General indicated that:

> *Implementing a single point of entry in this way is a significant and long called for reform to improve the user experience with the family law courts and enhance the unified identity of the Federal Circuit and Family Court. Coupled with the harmonisation of rules and case management approaches, it will reduce confusion and create a much simpler pathway for resolving disputes.*[140]

[133] Family Court, Submission No 105 to Senate Legislation Committee, Parliament of Australia, *Inquiry into 2018 FCFCOA Bills* (14 December 2018) 1.
[134] Federal Circuit Court, Submission No 104 to Senate Legislation Committee, Parliament of Australia, *2018 FCFCOA Bills* (11 December 2018) 3.
[135] For example, see The Law Society of the New South Wales, Submission No 49 to Senate Legislation Committee, Parliament of Australia, 2018 FCFCOA Bills (22 November 2018) 4.
[136] Federal Circuit Court , *Federal Circuit Court Annual Report, 2020/21* (2021) 23.
[137] The Law Society of the New South Wales, Submission No 49 to Senate Legislation Committee, Parliament of Australia, 2018 FCFCOA Bills (22 November 2018) 4.
[138] Explanatory Memorandum, 2018 FCFCOA Bill 76–7.
[139] *PwC Report* (n 69) 37.
[140] Commonwealth, *Parliamentary Debates*, Senate, 5 December 2019, 7055 (Christian Porter, Attorney-General, second reading speech to the Federal Circuit and Family Court of Australia Bill 2019).

Implementation

3.31 On 1 September 2021, when the FCFCOA Act commenced, the Courts announced that:

> *In respect of the Court's* [sic] *family law jurisdiction, for the first time in 21 years, there is a single point of entry, one set of court rules and forms, and a new purpose-built court website. Importantly, there is a new and consistent approach to case management nationally, where the Court's* [sic] *highly skilled Judicial Registrars will triage every case, and assess for risk, soon after they have been filed in the Court.*[141]

3.32 The path to those changes, however, was broader than just the commencement of the FCFCOA Act. Many were initiated by the Courts well before then. And many have been developed and refined since. Some of these initiatives are discussed here.

Harmonised Rules

3.33 As noted in Chapter 2, the Courts had been working on the rules harmonisation process for some time before the FCFCOA Act commenced.

3.34 In February 2019, Chief Justice Alstergren formed a Courts' Joint Rules Harmonisation Working Group, to oversee the development of a common set of rules, forms and case management practices across the family law jurisdiction of the Federal Circuit Court and the Family Court. It comprised judges of both Courts, was chaired by former Federal Court judge, the Honourable Dr Chris Jessup QC, and was assisted by two barristers.[142]

3.35 In the 2019/20 Annual Report of the Federal Circuit Court, Chief Justice Alstergren said:

> *The process of harmonisation to recast the family law system into a system that meets the needs of Australian families in a clear and consistent way is at the forefront of our operations.*[143]

3.36 On 1 September 2021, the Family Law Rules 2004 and the Federal Circuit Court Rules 2001 were superseded by a set of new harmonised rules. Relevant to family law were the Family Law Rules 2021 and the Division 2 Family Law Rules.[144]

Case management

3.37 The Courts were also developing other aspects of practice and procedure before the legislation commenced.

The Central Practice Direction

3.38 Substantial work on a new case management pathway preceded the Chief Justice issuing Joint Practice Direction 1 of 2020 – Core Principles in the Case Management of Family Law Matters, in January 2020.

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[141] FCFCOA, 'The new Federal Circuit and Family Court of Australia officially commences' (Media Release, 1 September 2021).
[142] Federal Circuit Court, *Federal Circuit Court of Australia Annual Report 2018-19* (2019) 4.
[143] Federal Circuit Court, *Annual Report 2019/20* (2020) 5 ('*FCC Annual Report 2019/20*').
[144] FCFCOA, *Legal resources of the new Court: Rules, Practice Directions and forms* (Web Page) <https://www.fcfcoa.gov.au/news-and-media-centre/latest-news/legal-resources>.

3.39 Describing the Practice Direction in the 2019/20 Annual Report of the Federal Circuit Court, as '… an initial step towards reconciling the case management procedures in family law across the two Courts…' the Chief Justice said it included:

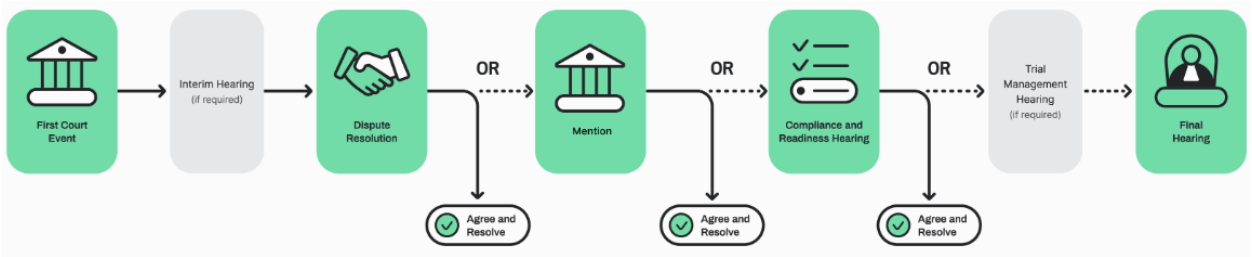
> *… principles in relation to prioritising safety and handling risk, achieving the overarching purpose of the just, safe, efficient and timely resolution of matters and the importance of ADR [alternative dispute resolution]. The core principles also remind parties and practitioners of their responsibilities in relation to identifying and narrowing issues in dispute, being prepared for hearings, and incurring costs only as are fair, reasonable and proportionate to the issues that are genuinely in dispute.*[145]

3.40 Building on that initial practice direction, on 1 September 2021, the day the FCFCOA Act commenced, the Chief Justice introduced a new case management pathway for all family law matters, set out in the Central Practice Direction.

3.41 It specified that its purpose was to establish a 'national case management system'[146] in the FCFCOA (Division 1) and FCFCOA (Division 2), consistent with the Act's overarching purpose, and core principles, which were summarised as follows:

a. *The Courts prioritise the safety of children, vulnerable parties and litigants.*
b. *Parties and their legal representatives must act consistently with the Courts' overarching purpose to resolve disputes according to law and as quickly, inexpensively and efficiently as possible.*
c. *The Courts' resources will be used as efficiently and effectively as possible.*
d. *Consistent case management and risk assessment is prioritised.*
e. *Dispute resolution is encouraged wherever safe.*
f. *Compliance with orders is expected.*
g. *Legal representatives must regularly and clearly inform parties about the costs of proceedings.*
h. *Parties must clearly identify and narrow the issues in dispute.*
i. *Parties and legal representatives must be fully prepared for hearings.*
j. *Judgments will be delivered in a timely way.*[147]

3.42 It then detailed the steps and requirements throughout the case management pathway. The current version of the Central Practice Direction includes the following illustration of the pathway:[148]



[145] *FCC Annual Report 2019/20* (n 143) 5.
[146] FCFCOA, *Central Practice Direction: Family Law Case Management* ('*Central Practice Direction*').
[147] Ibid [3.1].
[148] *Central Practice Direction* (n 146). Diagram used here with permission of the Courts.

The expanded role of registrars

3.43 An expanded role for registrars in the Federal Circuit Court was written into the harmonised rules and case management pathway before the FCFCOA Act commenced.

3.44 Initiated by the Courts, and enabled by significant government funding,[149] the expansion was fundamental to the implementation of the single point of entry and the processes to support it. The role was designed to provide greater assistance to judges in case management work from the point of filing and throughout the case management pathway, to extend the model of family dispute resolution and to assist in specialist lists.

3.45 Senior judicial registrars, judicial registrars and deputy registrars (collectively known as registrars) are sworn to both Courts, and exercise aspects of judicial power formally delegated to them by the judges of both Courts.[150]

3.46 Their work, conducted primarily in the FCFCOA (Division 2), but also in specialist lists and appeals case management in the FCFCOA (Division 1),[151] has become an integral part of the Courts' structure.

3.47 Senior judicial registrars primarily preside over interim hearings and determine interlocutory applications.[152] Amongst a wide range of delegated powers, they also make spousal or child maintenance orders, location, recovery and enforcement orders, grant some injunctions, vary or set aside financial orders and have powers to summarily dismiss proceedings.[153]

3.48 Certain delegated powers can only be exercised by a senior judicial registrar approved by the Chief Justice or the FCFCOA's Chief Executive Officer. The Chief Justice has approved particular senior judicial registrars to exercise some of these powers, including under section 65DAAA of the Family Law Act as to the reconsideration of final parenting orders.[154]

3.49 Judicial registrars preside over directions hearings and initial court events, undertake a triage and assessment role in case management and conduct dispute resolution events.[155]

3.50 Their powers are more procedural in nature but include the capacity to make a wide range of procedural and case management orders, some parenting, financial and spousal maintenance orders, and orders to appoint Independent Children's Lawyers (ICLs) or direct parties to meet with a CCE.

3.51 Judicial registrars also preside over a number of discrete case management lists – including subpoena, enforcement and costs lists – and assist with the Evatt List and the Specialist Indigenous and Magellan Lists.[156] These lists are described below.

3.52 Deputy registrars exercise a more limited range of delegated powers. Amongst other things, they conduct divorce hearings, deal with applications for consent orders, make procedural and case management orders, conduct some dispute resolution events and review applications for urgency.[157]

[149] See further detail under 'Other factors' below.
[150] See '*Family Law Rules 2021*' sch 4 and '*Division 2 Family Law Rules*' sch 2.
[151] Information provided by the FCFCOA. See also FCFCOA (Division 1) and FCFCOA (Division 2), *FCFCOA Annual Reports 2023/24* (2024) 42 ('*FCFCOA Annual Reports 2023/24*').
[152] *FCFCOA Annual Reports 2023/24* (n 151) 42.
[153] Ibid 43.
[154] Information provided by the FCFCOA. See also *Family Law Rules 2021* sch 4 item 3.9.
[155] *FCFCOA Annual Reports 2023/24* (n 151) 43.
[156] Ibid.
[157] Ibid.

Early risk assessment and triage

3.53 The Central Practice Direction set out clearly that it prioritised 'the safety of children, vulnerable parties and litigants'.[158] A number of elements of the Courts' work before the FCFCOA Act underpinned that, as have initiatives introduced since.

3.54 Work on the redesign of the Courts' risk notification processes included a 2019 pilot initiative known as the Lighthouse Project.[159] With the assistance of government funding, the Lighthouse Project introduced a bespoke, confidential, web based risk screening tool that the parties to parenting applications were invited to complete at the point of filing. It enabled the triage of matters to the appropriate list or event, safety planning and service referral.[160]

3.55 To meet the risks identified by the screening process, the Evatt List was established in 2020 as a specialist list for early and proactive management of cases with high-risk features, including serious family violence or abuse of children, serious drug, alcohol or substance misuse and mental health issues.[161]

3.56 Other specialist lists already existed, including the longstanding Magellan List, in which matters involving serious allegations of sexual or physical abuse of children were identified for early transfer and listing in the Family Court, and managed by a team of judges, registrars and CCEs.

3.57 Also in 2020, recognising the need for better information-sharing and collaboration between federal family law and state and territory child protection and family violence systems, the Courts developed a pilot co-location of services.[162]

3.58 This was followed by specific information sharing measures in a National Strategic Framework agreed by federal and state and territory Attorneys-General in November 2021, and the commencement in May 2024 of the *Family Law Amendment (Information-sharing) Act 2023* (Cth).

3.59 To advance the priority of early risk assessment and safety for children and families, the Courts also extended their emphasis on education and training. This commitment was embedded in the FCFCOA Family Violence Plan 2023-2026,[163] which has seen judges, registrars, CCEs and other staff of the Courts undertaking family violence training and education programs delivered by the Safe & Together Institute. These are programs focused on children's safety in the context of family violence, and best practice models, including as to family violence perpetrator identification.

3.60 Education and training, insofar as it relates to the specialisation of judicial officers exercising family law jurisdiction, is discussed further in Chapter 5.

3.61 To oversee this priority area for the Courts, a new senior executive role, Director of Family Violence and Access, Equity and Inclusion, was created in 2023.[164]

[158] See *Central Practice Direction* (n 146) paragraph 3.1(a).
[159] *FCC Annual Report 2019/20* (n 143) 7.
[160] It is also mandatory for parties, upon the filing of any initiating application, response or application for consent orders in parenting matters, to file a Notice of Child Abuse, Family Violence or Risk. See FCFCOA, Notice of Child Abuse, Family Violence or Risk.
[161] *FCC Annual Report 2019/20* (n 143) 8. Federal Circuit Court, *Annual Report 2020-21* (2021) 31.
[162] *FCFCOA Annual Reports 2023/24* (n 151) 32.
[163] FCFCOA, 'Family Violence Plan 2023-2026', *Family Violence Plan* (Web Page) <https://www.fcfcoa.gov.au/sites/default/files/2023-08/family_violence_plan_2023-2026.pdf>.
[164] *FCFCOA Annual Reports 2023/24* (n 151) 44.

Dispute resolution

3.62 Another principle set out in the Central Practice Direction was the expectation of genuine attempts in dispute resolution, when safe, in order to reduce the time, cost and stress of litigation.

3.63 This is facilitated in the Courts by Conciliation Conferences in financial cases and Parenting Dispute Resolution Conferences, conducted by registrars.

3.64 In parenting cases, conferences may be conducted either by a registrar alone or jointly with a CCE. The number of joint conferences doubled from 866 in 2021/22,[165] to 1727 in 2023/24.[166]

3.65 Of a total of 4567 court dispute resolution events conducted in 2023/24, the parties reached agreement in 63% of financial conferences, and in 51% of parenting dispute resolution conferences,[167] thereby concluding their proceedings, without the need for further court events and a final hearing.

Transfers

3.66 The Central Practice Direction also dealt specifically with transfers between the Courts, setting out a detailed framework for deciding the allocation of proceedings in family law.[168]

3.67 It provides that the appropriate Court for a matter to be heard is to be considered as part of the initial triage and assessment process, at the Compliance and Readiness Hearing or at such other time considered appropriate by the court. The determination is at the court's discretion, with regard to the Act, the Family Law Rules 2021 and any submissions of the parties.

3.68 A broad range of factors relevant to the determination are set out, directed to the complexity of the matter, whether it involves questions of general importance to family law jurisprudence, the likely length of the matter, the respective workload of each Court, whether the matter should be included in a specialist list and the impact on litigants if the matter is to be transferred.[169]

3.69 It provides for any matters in which the FCFCOA (Division 1) holds exclusive jurisdiction (for instance, matters arising under section 1337C of the *Corporations Act 2001* (Cth)), to be transferred to Division 1 upon filing, without the need for an application to transfer.

3.70 Importantly, unless otherwise ordered, a matter transferred between the Courts retains the same listing priority as it had in the Court from which it was transferred.[170]

Other factors

3.71 There were two other significant factors preceding and surrounding the 2021 restructure.

3.72 The first was the commitment of substantial government funding in family law.

3.73 In the 2020/21 Federal Budget, increased funding of $35.7 million over four years was announced, for additional resources and judges for the Federal Circuit Court, to assist with the timely resolution of family law (and migration) cases.[171]

[165] FCFCOA (Division 1) and FCFCOA (Division 2), *FCFCOA Annual Reports 2021-22* (2022) 10.
[166] *FCFCOA Annual Reports 2023/24* (n 151) 9.
[167] Ibid.
[168] *Central Practice Direction* (n 146) [4.13]–[4.17].
[169] Ibid [4.16].
[170] Ibid [4.17].
[171] See Commonwealth, *Budget 2020-21: Budget Measures, Budget Paper No 2* (2020) 56.

3.74 In a joint media release, the Family Court and the Federal Circuit Court welcomed the funding and noted that, amongst other things, the additional resources would provide key and ongoing funding for registrars.[172]

3.75 In the 2021/22 Federal Budget,[173] a further $123.8 million over four years was directed to a range of supports for family law system reforms and safety for children and families, including increased resources in South Australia and to support the Family Law Council to advise the Attorney-General on the operation of the Family Law Act and other matters relating to family law.

3.76 On 18 December 2024, in the Mid-Year Economic and Fiscal Outlook, it was announced that the Government will provide $44.5 million over three years from 2025/26 (and $15.2 million per year ongoing) to the FCFCOA, 'to continue providing family law case management services to improve outcomes for vulnerable groups and victims of family and domestic violence.'[174]

3.77 The other influential factor surrounding the Courts' case management work and the implementation of the single point of entry was the COVID pandemic. The disruption created challenges but, at the same time, prompted new and innovative practices, including the use of electronic or remote hearings. These were described by the Courts as innovations that would continue to be used '… to ensure improved safety and access to justice for vulnerable parties and people living in regional areas.'[175]

The review consultations

3.78 The legislated single point of entry has been received with widespread enthusiasm. The reviewers heard that it was a significant improvement on the previous system, with many favourable descriptions amongst consultation responses, to the effect that it is an outstanding success.

3.79 Overall, consultation participants were satisfied that the single point of entry has led to less confusion and competition, more clarity, certainty, efficiency and co-operation, and a greater shared vision and national consistency between the Courts.

3.80 The reviewers also heard that lawyers and those within the Courts are now able to explain the court process more clearly to parties. In this regard, there were also favourable comments about the helpful and informative resources to be found on the Courts' website in relation to case management (as well as more generally in relation to the court processes).

3.81 There was a small number of participants who were critical that, to enable a single point of entry, the FCFCOA (Division 1) – a superior court – has been deprived of original jurisdiction, unless conferred by the FCFCOA (Division 2) – an intermediate court. Such criticism was more philosophical than tangible, save in two respects.

3.82 The first related to an early issue that had arisen as to whether the FCFCOA (Division 1) had jurisdiction to hear and determine the legacy cases pending in the Family Court before the reforms.

[172] FCFCOA, 'The Family Court of Australia and Federal Circuit Court of Australia welcome Government funding announced in the 2020/21 Budget' (Media Release, 8 October 2020).
[173] Commonwealth, *Budget 2021-22: Budget Measures, Budget Paper No 2* (2021) 62–3.
[174] Commonwealth, *Mid-year economic and fiscal outlook 2024/25* (2024) 215.
[175] FCFCOA, *'What has changed with the new Federal Circuit and Family Court of Australia?'* (Media Release, 1 September 2021).

3.83 This issue was resolved in *Nevins & Urwin*,[176] in which the Full Court held that those matters were able to be heard in Division 1, notwithstanding that they had not been transferred from Division 2, as '…the reform legislation does not evince Parliamentary intention to rob Division 1 of original jurisdiction in legacy cases'.[177]

3.84 The other issue related to the effect of the section 50 prohibition against instituting proceedings in the FCFCOA (Division 1). This issue is discussed in Chapter 4.

3.85 Otherwise, in the course of discussing the single point of entry, participants frequently referred to a range of matters, including the caseload of the Courts, case management, the role of registrars, the role of CCEs, early triage, risk assessment and specialist lists, transfers, dispute resolution and remote hearings.

The caseload of the Courts

3.86 Integral to the 2021 reforms was the expectation that the single point of entry would enable greater efficiencies, reducing both the average time to finalisation of matters and the growing backlog of pending cases.

3.87 Although in the course of the consultations there were some references to the time to finalisation and the backlog of cases, the views were mixed, and expressed more as perception, or based on a particular experience, rather than as a detailed overview or tied to any data.

3.88 It is not within the ambit of this review to attempt a granular comparison of the case management steps and their impact on the Courts' caseload before and after the reforms and, in any event, the differences in structures and processes make it hard to compare directly.

3.89 A high-level analysis of the data in the Courts' 2023/24 Annual Reports, however, indicate that the Courts' efforts in reducing delays are showing signs of success. They also indicate that, thus far, the Courts' capacity to reduce the overall time from filing to finalisation is hampered by the particular challenge of a legacy caseload of some of the most difficult cases.

FCFCOA (Division 1)

3.90 In a positive trend since the reforms in September 2021, there has been a 25% decrease in the number of pending cases (5,400 cases) in the FCFCOA (Division 1), and a 40% decrease in the number of applications for final orders aged over 3 years.[178]

3.91 In another positive trend, although the number of transfers from the FCFCOA (Division 2) increased significantly between 2022/23 and 2023/24,[179] FCFCOA (Division 1) judges finalised substantially more applications for final orders at trial in 2023/24.[180] This appears to be a testament to the new case management pathway that enables judges to focus on trial work.

3.92 The median time from filing to the finalisation of applications for final hearing, however, has risen from 16 months in 2020/21, to 29 months in 2023/24.[181] The performance measure for 70-90% of final order applications being finalised within 12 months has not been met. In 2023/24, only 40% of new pathway cases were finalised in that time.[182]

[176] See *Nevins & Urwin* [2022] FedCFamC1A 57.
[177] See *Nevins & Urwin* [2022] FedCFamC1A 57 [53].
[178] *FCFCOA Annual Reports 2023/24* (n 151) 8.
[179] From 578 to 819 applications for final orders, see *FCFCOA Annual Reports 2023/24* (n 151) 60.
[180] A total of 596 compared with 464 in 2020/21, see *FCFCOA Annual Reports 2023/24* (n 151) 61.
[181] *FCFCOA Annual Reports 2023/24* (n 151) 65.
[182] Ibid 73.

3.93 Commentary in the 2023/24 FCFCOA Annual Reports explains that the increase in the median time from filing to finalisation was expected, and reflects two important considerations.

3.94 First, as the FCFCOA (Division 1) now has no new cases filed, and most of the cases transferred from the FCFCOA (Division 2) are only transferred when ready for trial, the increased median time reflects that Division 1 no longer deals with cases resolved early in the litigation pathway.[183]

3.95 Secondly, Division 1 is now focused on finalising the ageing matters, 'which effectively crystallises the delay experienced over previous financial years'.[184] These are the oldest, most difficult and complex cases, the majority of which require a lengthy hearing.

3.96 The 2023/24 FCFCOA Annual Reports note that these challenges were compounded by a vacancy of approximately 10% in FCFCOA (Division 1) judicial positions.[185]

FCFCOA (Division 2)

3.97 As in the FCFCOA (Division 1), in the FCFCOA (Division 2), performance measures around the median time from filing to finalisation of applications for final orders is affected by an emphasis on resolving the oldest and most difficult of the legacy caseload.

3.98 In 2023/24, 60% of FCFCOA (Division 2) cases were finalised within 12 months (against the performance measure of 70-90% of applications).[186]

3.99 Discussion in the 2023/24 Annual Reports emphasises that if only cases that have come through the new case management pathway are considered, then 70% have met the performance measure, so the new pathway is beginning to show improved results.[187]

3.100 Similarly, although the median time from filing to finalisation of FCFCOA (Division 2) cases has not yet significantly improved since 2020/21 (being 9.4 months then, compared with 9 months in 2023/24),[188] the 2023/24 Annual Reports indicate that the median time for cases filed and finalised within the new case management pathway was in fact 6.5 months.[189]

3.101 In the 2023/24 Annual Reports, the Courts summarised the current median times in the FCFCOA (Division 2), noting that:

> *…the results that were anticipated through the introduction of the new case management pathway are beginning to be realised – the Court anticipated that the median and average finalisation timeframes would increase initially whilst the Court focused on resolving the oldest, most difficult cases, which crystallised the delay in those cases. These cases required significant judicial time and court resources; however, the resolution of these matters is of great benefit to the parties and to the ability of the Court, in the future, to resolve matters within a 12-month timeframe as far as is possible.*[190]

3.102 Otherwise, both Courts have continued to exceed performance measures in the delivery of timely judgments, with 90% of FCFCOA (Division 1) judgments, and 96% of FCFCOA (Division 2) judgments, being delivered within three months.[191]

[183] Ibid 65.
[184] *FCFCOA Annual Reports 2023/24* (n 151).
[185] Ibid 60.
[186] Ibid 117.
[187] *FCFCOA Annual Reports 2023/24* (n 151).
[188] Ibid 116.
[189] *FCFCOA Annual Reports 2023/24* (n 151).
[190] Ibid.
[191] Ibid 73 and 118.

Case management

3.103 In consultations, the single point of entry was frequently coupled with references to aspects of case management integral to its implementation.

3.104 The reviewers understand that rules and case management are matters for the Courts. In considering the impact of the single point of entry, however, the role of the harmonised rules, case management pathway, and how the passage of cases from the single point of entry has been operationalised, cannot be ignored.

3.105 Although consultations revealed an overall favourable response to the implementation of the single point of entry – and an appreciation that a new case management system takes time to settle, to be assessed and for refinements to be made – respondents raised aspects of the case management pathway that could be improved. Some, as relevant, are mentioned in other sections below, but there was one cluster of concerns that was consistently repeated.

3.106 The reviewers heard many times that there are too many steps in the case management pathway, and that each step requires preparation and forms, causing duplication of work and the potential of increased costs. A part of this concern was that there are too many forms overall.

3.107 A related view was that the pathway needs greater flexibility to ensure that each court event is productive. In particular, respondents noted that the requirement to conform to the first steps on the pathway can sometimes cause unnecessary delay in reaching a specialist list or obtaining an urgent interim hearing. It was also noted that a court event is sometimes 'wasted,' if the registrar in the list does not have the delegated power to deal with the issue at hand.

3.108 Another recurring concern was that, although electronic filing provides significant advantages and efficiencies – for practitioners and parties, as well as the Courts – there are drawbacks and delays when, for example, a document is refused on a technicality, or a case requires urgent attention but there is no person to person contact for discussion at the point of filing. The reviewers also heard that the educative advantage of practitioners being able to deal with specialist staff over the counter has been diminished.

3.109 In each of these instances, respondents referred to the risk that a party's resources could be depleted before a trial. Particular concern was expressed for clients relying on legal aid, with current funding models not able to keep up with the increased case management steps, and for some of the Courts' more vulnerable users, including self-represented and Indigenous parties.

3.110 Despite the criticism about the necessity to prepare the same form a number of times, the reviewers did receive positive comments about the requirement for a costs notice to be filed and served before each court event.[192]

3.111 The costs notice must include the party's actual costs, both paid and owing, estimated future costs and expenses paid or payable to an expert witness. In financial proceedings, the notice must also set out the source of funds paid or to be paid.

3.112 Participants referred to these notices as a reality check for the parties, giving judicial officers the capacity to test with them whether the asset pool can actually cover costs incurred or to be incurred, or if issues being raised are likely to extend the hearing time, and therefore the costs. They were regarded as worth the effort.

[192] See *Family Law Rules 2021* r 12.06.

3.113 The reviewers note that many of the case management issues raised by participants are amongst those already being considered within the Courts, as part of their own continuing reflection on the impact of their rules, practices and procedures, and a commitment to continuing improvement.

The role of registrars

3.114 The reviewers heard that the significantly increased number[193] and expanded role of family law registrars has had a substantial impact.

3.115 First, participants from within the Courts and the legal profession agreed that, as intended, the work undertaken by the registrars has relieved the judges of case management, interlocutory and interim work, enabling them to focus on the most complex matters and trial work.

3.116 A small number of participants expressed a preference for the Federal Circuit Court's previous docket management system whereby, from the time of filing, cases were randomly allocated to a judge who managed them from start to finish.

3.117 Several others suggested that they would prefer it if the current system allowed for each case to be managed by a team of the same judge and registrars.

3.118 The majority, however, from within the Courts and the legal profession, were of the firm view that the present system is a significant improvement, and that the effect has been especially profound for the FCFCOA (Division 2) judges. The reviewers received a range of comments to the effect that it has been a game-changer.

3.119 Many participants described what previously had been a crushing workload for Federal Circuit Court judges, each responsible for a docket of 330 cases on average, but sometimes up to as many as 500 cases.[194] The reviewers heard how judges were burdened by the pressure of handling so many cases, and the frustration of pressing interim and interlocutory work taking them from the trial work that was needed to reduce the number of waiting cases.

3.120 The reviewers also heard that, despite the Courts' heavy caseloads and the continuing hard work of the judges, the morale and wellbeing of FCFCOA (Division 2) judges have markedly improved, and that a more collegiate and collaborative relationship has flourished across the Courts. One respondent described what was almost 'a heaviness' and 'a sense of defeatism' in the Federal Circuit Court before, that had now lifted.

3.121 In this regard, there was a caution raised several times that it is important to ensure that the 'pressure', 'burden' or 'emotional stress' of the busy case management lists, previously borne by the judges, is now not simply transferred to registrars.

3.122 Many respondents were enthusiastic in their observations about the expanded role of the registrars, and their skills and expertise. Registrars were described as impressive, and it was apparent from the responses that they are regarded as a key part of the reforms' successes.

3.123 Even with those positive responses overall, there were some areas in which views were mixed.

3.124 One related to the transfer of cases from the FCFCOA (Division 2) to the FCFCOA (Division 1), which is discussed below.

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[193] In 2019/20, the average staffing level of family law registrars was 42 (see Family Court, *Annual Report 2019/2020* (2020) 53). In 2023/24, it stands at a total of 142: Information provided by the FCFCOA. Note that the FCFCOA Annual Report 2023/24 indicates that the number of registrars is 185 (see page 205), but the reviewers received advice from the FCFCOA that the Annual Report contains an error and that the correct figure is 142 registrars.

[194] *FCFCOA Annual Reports 2023/24* (n 151) 4.

3.125 Others related to the powers delegated to the registrars, with some saying that they might be too broad and others saying they were not broad enough.

3.126 There were also different responses as to whether the registrars are sufficiently prepared to step outside the designated case management pathway to tailor a particular outcome for a case, or as to whether or not some have the professional background or training for the more serious matters.

3.127 It is not possible to draw a certain conclusion from those mixed points of view. They may reflect experience in different locations, or from different perspectives, or that it is still relatively early days in which the new processes and personnel are settling.

3.128 The reviewers do note two objective measures of the registrars' overall success in the new case management processes.

3.129 First, the triage, case management, and interlocutory and interim hearings finalised before Compliance and Readiness Hearings (the last step before trial) are generally managed by registrars. It reflects well on their case management contribution that almost 70% of cases are resolved at that point.[195]

3.130 Secondly, the very low number of successful reviews of registrars' decisions is also a testament to their successful integration into the Courts' work.

3.131 Section 256 of the FCFCOA Act provides that FCFCOA (Division 2) judges may review the exercise of a power delegated under section 254. Similarly, section 100 of the Act provides that FCFCOA (Division 1) judges may review the exercise of a power delegated under section 98. In review hearings conducted under those sections, a judge is able to make any order that he or she thinks fit in relation to the matter in respect of which the power was exercised.

3.132 In 2023/24, only 2.5% of registrar decisions were reviewed, and only one in ten of those reviews was upheld or partially upheld.[196]

The role of Court Child Experts

3.133 Social science expertise has been embedded as a part of the federal family law jurisdiction since the Family Court was established.

3.134 What is now called the Court Children's Service employs a number of CCEs: qualified psychologists or social workers who have specialist knowledge in child and family issues after separation and divorce.

3.135 They hold statutory appointments as family consultants, by which they conduct assessments and prepare court ordered reports.

3.136 They are also authorised as family counsellors. In that role, they provide advice about children in court ordered dispute resolution conferences conducted by registrars. Some conduct triage file reviews or interviews in cases identified as high-risk as part of Lighthouse.[197]

3.137 The reviewers heard that, since the restructure, as for other parts of the Courts, there has been a focus on added support for the Court Children's Service, with investment in enhanced training and supervision, a new governance framework and a new literature database.

[195] Information provided by the FCFCOA.
[196] *FCFCOA Annual Reports 2023/24* (n 151) 8.
[197] FCFCOA, *Court Child Experts - FAQ*.

3.138 Otherwise, in the course of consultations, references to the CCEs related mainly to their role in dispute resolution (as discussed below), or in the preparation of Child Impact Reports and Family Reports.

3.139 Child Impact Reports, introduced in 2021, and generally ordered early in the case management pathway before an interim hearing or dispute resolution event, have been well received. They provide 'focussed information about the experiences and needs of children.'[198] Unless there is a clinical reason not to, children are interviewed for the Child Impact Report, or observed if too young for interview.

3.140 The reviewers heard that the preparation of these reports can sometimes cause delay before an interim hearing, but that this disadvantage needs to be balanced against the significant advantage of the availability of material – including the child's "voice" – at a time when there is otherwise limited evidence.

3.141 Family Reports, which are generally ordered prior to a Compliance and Readiness Hearing and prepared for the purposes of the final hearing in many parenting cases, can also be prepared by Regulation 7 family consultants (experts outside of the FCFCOA).[199]

3.142 The reviewers heard of long delays for a range of specialist reports from outside the Courts, but that the Court Children's Service has significantly reduced the wait times for its Family Reports from 36 weeks in September 2022 to 20 weeks in June 2024.[200]

Early risk assessment and triage

3.143 The Courts' emphasis on early risk assessment and triage is well explained by data reflecting that, in 2023/24, of the 77% of parenting proceedings in which at least one party completed the voluntary Lighthouse risk assessment,[201] a substantial number were rated 'high-risk'. Between November 2022 and June 2024, 61% of cases met that rating.[202]

3.144 In the 2023/24 Annual Reports, it was also noted that:

> *the latest data from the Notice of Child Abuse, Family Violence or Risk indicates that **70 per cent of parenting cases involve allegations of four or more risk factors**, including family violence, child abuse, mental health concerns, drug and alcohol abuse, threats of harm and risk of abduction.*[203]

3.145 Of the participants who commented on the Courts' emphasis on early risk assessment, the majority were positive about how much the understanding of family violence and other risk factors has improved across the Courts, and has helped to ensure that cases are managed in a way that reduces the further risk of systems abuse. The enhanced education and training in this regard was mentioned many times. See the further discussion in Chapter 5.

3.146 There were also positive references to the enhanced information-sharing and collaboration between federal family law and state and territory child protection and family violence systems, directed to the facilitation of a more cohesive and more timely response to family safety and child protection.[204]

3.147 It was acknowledged that easier and earlier access to information is especially helpful in specialist lists, such as the Evatt List for high-risk cases, and the longstanding Magellan List.

198 *FCFCOA Annual Reports 2023/24* (n 151) 20.
199 Ibid 41.
200 Ibid 39.
201 Ibid 30.
202 Ibid 31.
203 Ibid 5 (emphasis in the original).
204 Ibid 33.

3.148 Practitioners were strongly supportive of the Evatt List. One organisation, for example, described it as having helped to address the issue of the misuse of litigation as a form of abuse by perpetrators of family violence:[205]

> *And, you know, the Evatt List, for example, is a great initiative, and we are seeing a lot of matters either settled or be abandoned by the alleged perpetrator because they aren't able to continue systems abuse, like using the system in that way to commit family violence.*

3.149 Lighthouse was also referred to in especially favourable terms. There was a mention of early challenges in fully achieving the potential of Lighthouse, at a time when there were so many competing priorities between the new cases and the legacy cases. Overall, however, it was seen as an excellent initiative in early risk identification and management. It was described as a real benefit to invite risk assessment first thing, and to have risk 'front and centre'.

3.150 Responses were particularly positive regarding the combination of Lighthouse screening with the Evatt List. The reviewers heard that together, these initiatives had created a safe space within the litigation pathway that supports help-seeking by clients affected by family violence:

> *I think around Lighthouse, and having that specialist list [the Evatt List], that's a big improvement for most of our clients … and having that Lighthouse approach and that close case management of risk matters.*

3.151 A small number of respondents raised some areas for further consideration.

3.152 One was that the Lighthouse risk assessment process is not compulsory and, therefore, is not completed in every case. One was the need to improve information sharing between CCEs and case managers. Another was the need to ensure that the design of risk tools and risk training are sensitive to the cultural needs of particular groups.

Specialist lists

3.153 In addition to the Evatt and Magellan Lists, the Courts have a number of other specialist lists, including two that were specifically referred to in consultations.

3.154 The first was the Priority Property Pool Cases (PPP) List, started as a pilot by the Courts in 2020 and, with government funding support, expanded in 2023 to provide a simplified way for vulnerable parties to resolve property disputes. It minimises the risks and costs and helps to preserve assets in cases where the maximum net asset pool is in the vicinity of $550,000 (excluding superannuation).[206]

3.155 It was referred to favourably in consultations, and data in the Courts' most recent Annual Reports attests to its success.

3.156 Between October 2023 and 30 June 2024, 27.5% of property-only cases qualified for inclusion, a significant increase from the previous pilot. Significantly, 92.6% of those cases were able to be finalised by a registrar and, in 2023/24, the average time from initiation to finalisation was 5.4 months.[207]

3.157 Otherwise, several participants referred to the Specialist Indigenous Lists.

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[205] See on this issue, Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper 86, 2018) [8.44]–[8.49].
[206] *FCFCOA Annual Reports 2023/24* (n 151) 34.
[207] Ibid 37.

3.158 These lists were established some time before the restructure. They are now part of a suite of initiatives by the Courts to improve access to justice for First Nations families and communities, recognising that they frequently find the Courts hard to navigate, given language and cultural barriers, particular issues of family violence and trauma, remoteness, disadvantage in technological literacy and access to justice, and often with an entrenched wariness of the justice system.

3.159 Those initiatives – both before and since the reforms – have also included an increased number of Indigenous Family Liaison Officers (IFLOs), from only one before the 2021 reforms to 17 as at 30 June 2024,[208] alongside the appointment of an executive position in Indigenous Operations, Policy and Support.

3.160 The role of the IFLOs includes reaching out to those who otherwise might not come to the Courts, and supporting families to navigate the Courts and the case management pathway.

3.161 Cultural awareness is emphasised in the Courts' education and training. In 2023, the Chief Justice held the Courts' annual conference – an important part of its educational program – in Alice Springs[209] and, in August 2024, the FCFCOA hosted the inaugural First Nations Forum in Brisbane.[210]

3.162 The Courts' efforts in responding to the specific needs of First Nations families was recognised in the consultations. The reviewers heard from legal practitioners that the simplicity and efficiency of the single point of entry and the emphasis on early triage and risk are welcomed by Indigenous families, but with the caveats that one size does not fit all, and the experience of the Courts will depend on a range of factors, including culturally sensitive frontline staff and, as mentioned, culturally informed risk assessment tools.

3.163 The reviewers also heard that, currently, not every registry has an IFLO. However, the 2023/24 Annual Reports outline the significant commitment of the Courts to what the reviewers heard continues as a work in progress.[211]

Transfers

3.164 In considering the implementation of the single point of entry, many participants addressed the current process of transferring cases.

3.165 A small number referred to inconsistencies in decisions to transfer, and that there were still cases that were transferred "incorrectly" or too late, or that there were no clear guidelines for transfers.

3.166 Mostly, however, they were positive about the more seamless allocation of work across the Courts.

3.167 They noted that the transferring of cases 'back and forth' between Courts has largely been overcome. They affirmed that complex cases, such as Magellan and Major Complex Financial Proceedings, are being identified and transferred to the FCFCOA (Division 1) earlier than before. And they described the late transfer of cases from Division 2 to Division 1 as now less frequent, and cases transferred wrongly as rare.

[208] Ibid 13.
[209] FCFCOA, *'Federal Circuit and Family Court of Australia Judges travel to Alice Springs for two-way learning with local communities'* (Media Release, 21 June 2023).
[210] FCFCOA, 'The Courts hosts First Nations Forum in Brisbane and launches film' (Media Release, 1 August 2024).
[211] *FCFCOA Annual Reports 2023/24* (n 151) 12.

3.168 Several participants specifically referred to cases being too frequently transferred back to the FCFCOA (Division 2) from the FCFCOA (Division 1). However, data provided by the Courts shows that the number (and percentage) of such cases is in fact decreasing.

3.169 In 2022/23, a total of 615[212] applications for final orders were transferred from Division 2 to Division 1. In that period, 53 cases were transferred in the other direction, from Division 1 to Division 2. In 2023/24, a total of 819 cases were transferred from Division 2 to Division 1, and in that period, 44 cases were transferred back from Division 1.[213]

3.170 The 2024/25 figures are not yet complete, but the reviewers were advised that, to 7 February 2025, only 15 matters have been transferred from Division 1 to Division 2.[214]

3.171 The reviewers note that these numbers include legacy cases filed before September 2021. That is, they are not only cases that have been transferred into the FCFCOA (Division 1) under the new case management pathway. In addition, the data does not disclose the reasons for the return of cases from the FCFCOA (Division 1) to the FCFCOA (Division 2).

3.172 It was broadly recognised that it is the nature of cases that sometimes complexity is only revealed after proceedings have been on foot for some time, or that a complex matter becomes more straightforward when a substantial part of it resolves. In both instances, this will affect the time of the transfer. Participants also noted that even a streamlined system of transfers is not fool-proof.

3.173 It is important to note that, in the course of their responses about transfers, respondents revealed a common appreciation that, when it comes to the allocation of cases between the Courts, whilst the FCFCOA (Division 1) deals with the most complex cases, much of the work of the FCFCOA (Division 2) judges is also complex, that being the nature of the family law cases that reach the judges for hearing.

Dispute resolution

3.174 In general, a high degree of satisfaction was expressed in the consultations in relation to the Courts' dispute resolution conferences, and it was noted that the capacity to compel attendance at a conference (in appropriate circumstances),[215] was a useful tool not available outside the Courts.

3.175 The benefits too of parenting dispute resolution conferences being held when an ICL is already appointed, or once a Child Impact Report or other expert report is in place, were noted.

3.176 However, the reviewers also heard a concern as to whether those within the Courts possessed the level of expertise in family dispute resolution that existed within some community organisations.

3.177 Several respondents referred to speed and efficiency not being the only measures of success in family law cases. They emphasised the need for settlements to be durable.

[212] See ibid 44, for total number of filings; number of transfers provided to the reviewers by the FCFCOA.
[213] See *FCFCOA Annual Reports 2023/24* (n 151) 59, for total number of filings; number of transfers provided to the reviewers by the FCFCOA.
[214] Information provided to the reviewers by the FCFCOA.
[215] The FCFCOA Central Practice Direction provides that 'unless exceptional circumstances exist, within 5 months of the date of commencement of a proceeding, the parties will be required to participate in Dispute Resolution' (6.23). Where there are family violence and safety concerns, consideration is given to whether dispute resolution is appropriate, and what safety measures might be implemented (6.24). *Central Practice Direction* (n 146).

3.178 They also spoke of the need for those conducting settlement discussions to be mindful of inherent risks – especially of family violence – and the concern that, for example, a self-represented litigant might enter into an agreement despite genuine concerns of family violence that were not then specifically dealt with in the court process.

3.179 These were mostly raised as examples of matters to be considered, as opposed to proven shortcomings or issues overlooked by the Courts. The reviewers note that a few participants suggested a possible benefit in an evidence based analysis of the settlements being achieved in the Courts.

Remote hearings

3.180 Since the COVID pandemic, some of the Courts' work – predominantly in case management, interlocutory and interim hearings and family dispute resolution – has continued to be conducted online.

3.181 Respondents in both the Courts and the profession were clear about the pros and cons of remote hearings.

3.182 Many advantages were highlighted, including that parties and lawyers are saved the time and cost of travelling to and waiting at court – a particular advantage for those who would otherwise need to travel a long way.

3.183 Participants spoke favourably of the fact that those in regional and remote locations can have urgent matters heard without the delay of waiting for the next court circuit.

3.184 There was broad support for the practicality of remote hearings for simple procedures like orders in chambers and callovers.

3.185 There was also a wide appreciation of the flexible use of FCFCOA resources, with registrars and judges being able to step into a matter from any location. This has maximised the Courts' capacity to deal with urgent matters, and enabled cases to be heard that otherwise would have to be adjourned as not reached.

3.186 Disadvantages were raised as well. They included that, although remote hearings are convenient for many parties, others are hampered by unreliable internet connections or low technological literacy. They are often parties already facing barriers to access to justice, and the difficulties are sometimes exacerbated by cultural contexts or language difficulties.

3.187 The reviewers heard of the potential risk of a "disconnect" for litigants, given that they do not directly experience the gravitas of the courtroom.

3.188 Some participants also noted that, although specific efforts are being made within the Courts to ensure that litigants can still have access to co-located ancillary legal aid and family support services, such as the Family Advocacy and Support Service (FASS),[216] they remain less immediate or convenient than when proximate to them at court.

3.189 Two other disadvantages were repeatedly noted. One was that remote hearings reduce the opportunity for discussions that are often incidental to being at court but can lead to settlement or the narrowing of issues between the parties. The other was that young lawyers are missing out on the experience gained in the courtroom, and registrars, too, are gaining less courtcraft experience.

[216] See FCFCOA, *Family Advocacy and Support Services (FASS)* (Web Page) <https://www.fcfcoa.gov.au/fass>.

3.190 The reviewers understand that the Courts are alive to these issues, and working on ways to ensure that the best balance is achieved for its users, in a context that also must take into account the availability of courtrooms for case management lists and other hearings.

Chapter 4.
The allocations of original and appellate jurisdiction in federal family law matters

4.1 The Terms of Reference asked the reviewers to consider the impact of the structural reforms to the FCFCOA with respect to the allocations of original and appellate jurisdiction in federal family law matters.

What the legislation provides

Original jurisdiction

4.2 Section 132 of the FCFCOA Act confers original jurisdiction on the FCFCOA (Division 2) in relation to family law and child support matters.[217]

4.3 Section 25 of the Act provides for original jurisdiction of the FCFCOA (Division 1) upon the discretionary transfer of a family law or child support proceeding to it by the FCFCOA (Division 2),[218] by the Chief Justice[219] or by any Division 1 judge to whom the transfer power has been delegated by the Chief Justice.[220]

4.4 Section 50 prohibits the institution of family law or child support proceedings (other than appellate proceedings) in the FCFCOA (Division 1).

4.5 These limitations to the original jurisdiction of the FCFCOA (Division 1) give effect to the single point of entry for family law and child support matters, as discussed in detail in Chapter 3.

Appellate jurisdiction

4.6 The appellate jurisdiction of the FCFCOA (Division 1) is primarily set out in section 26 of the FCFCOA Act, and reflects the retention of the Family Court's previous appellate jurisdiction.

4.7 Although the section 26 provisions go further,[221] responses in the consultations focused on two aspects:

- appeals from FCFCOA (Division 1) judgments[222] (including a smaller number of appeals from the FCWA),[223] and
- appeals from FCFCOA (Division 2) judgments[224] (including a smaller number of appeals from the Magistrates Court of Western Australia).[225]

4.8 Section 32(1)(b) of the Act provides for appeals from a judgment of the FCFCOA (Division 1), or a judgment of the FCWA, to be determined by a Full Court.

4.9 A Full Court of the FCFCOA (Division 1) is defined in section 17 of the Act as consisting of three or more judges sitting together (or at least two judges remaining if one is unable to continue, and the parties consent). There is no longer a separate Appeal Division as there was in the Family Court prior to the reforms.

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217 Including matters under the Family Law Act, the *Marriage Act 1961* (Cth) and some matters arising under the law of a territory other than the Northern Territory and under child support legislation: *FCFCOA Act* s 132(1)(b)–(c).
218 See *FCFCOA Act* s 149.
219 See ibid s 51.
220 See ibid s 54.
221 The *FCFCOA Act* also provides for, for example, appeals from a judge of a state or territory Supreme Court exercising jurisdiction in relation to family law and child support proceedings, and appeals from a judge of a state or territory court of summary jurisdiction exercising jurisdiction in relation to family law and child support proceedings.
222 *FCFCOA Act* s 26(1)(a)–(b).
223 Ibid s 26(1)(da).
224 Ibid s 26(1)(c).
225 Ibid s 26(1)(f).

4.10 Section 32(1)(a) provides that in an appeal from a judgment of the FCFCOA (Division 2), or a judgment of the Magistrates Court of Western Australia, the appellate jurisdiction of the FCFCOA (Division 1) is to be exercised by a single judge, or by a Full Court 'if the Chief Justice considers that it is appropriate'.[226] Accordingly, the FCFCOA Act changes the previous default position for such appeals in the Family Court to be heard by a bench of three judges.

Background

Original jurisdiction

4.11 Prior to September 2021, the Family Court and the Federal Circuit Court shared concurrent original jurisdiction in relation to family law and child support matters (with the exception of adoption and applications for nullity or validity of marriage, which were solely within the jurisdiction of the Family Court[227]).

4.12 The confusion and inefficiencies arising from that overlap, and the broad support that existed for a single point of entry for federal family law matters, are described in Chapter 3.

Appellate jurisdiction

4.13 Prior to the structural reforms, the Family Court comprised an Appeal Division and a General Division.[228]

4.14 The Appeal Division, established in 1983,[229] included the Chief Justice, Deputy Chief Justice and other judges (eight of them at the time of the reforms)[230] assigned to it by the Governor-General.[231]

4.15 Judges assigned to the Appeal Division were still able to exercise the original jurisdiction of the Court.[232]

4.16 Appeals from a single Family Court judge were required to be heard by a Full Court,[233] while appeals from a judgment of the Federal Circuit Court were heard by a Full Court unless the Chief Justice considered that it was 'appropriate for the jurisdiction to be exercised by a single judge.'[234]

4.17 A Full Court was defined as three or more judges of the Family Court, a majority being members of the Appeal Division.[235]

[226] See ibid s 32(1)(a)(ii).
[227] Family Court, *Annual Report 2020-2021* (2021) 7; Federal Circuit Court, *Annual Report 2020-2021* (2021) 9; FCFCOA (Division 1) and FCFCOA (Division 2), *Annual Reports 2021-22* (2022) 71.
[228] *Family Law Act* s 21A, as at 31 August 2021.
[229] *Family Law Amendment Act 1983* (Cth).
[230] Family Court, *Annual Report 2020-2021* (2021) 34.
[231] *Family Law Act* s 22(2AA)–(2AB), as at 31 August 2021.
[232] Ibid s 28(2A).
[233] Ibid s 94.
[234] Ibid s 94AAA(3).
[235] Ibid s 4.

4.18 In its 2018 review of the efficiency of the operation of the federal courts,[236] PwC noted that:

- it was 'standard Appeal Division practice for Appeal Division judges to only sit on appeals and not on trials in the General Division'[237]
- General Division judges sat on an Appeal Division matter on only 74 occasions in calendar year 2017,[238] and
- 75% of appeals from Federal Circuit Court judgments were being heard by a Full Court of the Family Court.[239]

4.19 PwC concluded that within the Appeal Division there were underutilised judicial resources and a high number of pending matters, as well as a high cost of cases. It identified opportunities to enhance efficiency, including by increasing the number of single judge appeals, by having more Appeal Division judges hearing first instance matters and more General Division judges supporting appeals, as well as by changes to the management of appeal listing.[240]

4.20 The report had its critics but, in any event, government pursued a different course. The 2018 FCFCOA Bill proposed:

- the establishment of a new Family Law Appeal Division in the Federal Court, and
- that appeals from the new FCFCOA (Division 2) would be heard by a single judge in the Federal Court, unless determined otherwise.[241]

4.21 Criticism of the proposal to move the Appeal Division to the Federal Court was widespread. As noted in Chapter 1, stakeholders' concerns included that appropriate family law expertise did not exist in the Federal Court, and that the extensive family law experience and expertise of the Family Court, which had contributed to the development of family law jurisprudence, would be lost.[242] Stakeholders also questioned the practicality of the number of family law appeals – some for urgent parenting matters – being accommodated within the Federal Court appeal sittings.[243]

4.22 The 2018 FCFCOA Bill lapsed when Parliament was prorogued, and an alternative proposal, preserving the Family Court's appellate jurisdiction within the FCFCOA (Division 1), was introduced in the 2019 FCFCOA Bill.

4.23 In the second reading speech to the 2019 FCFCOA Bill, it was explained that:

> *While the bill will retain the appellate jurisdiction in the FCFC (Division 1), the bill provides that there will no longer be an appeals division for select judges to be appointed to but, rather, Division 1 judges will be able to hear appeals, both as individual judges and as members of a Full Court.* [244]

4.24 It was also explained that this structure reflected that of the Federal Court.[245]

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236 *PwC Report* (n 69).
237 Ibid 44.
238 PwC indicated that 391 appeals disposed in 2016/17 were heard by a Full Court (being 98% of Family Court appeals and 75% of Federal Circuit Court appeals): *PwC Report* (n 69) 44.
239 *PwC Report* (n 69) 44.
240 Ibid 92.
241 Commonwealth, Parliamentary Debates, Senate, 23 August 2018, 8254 (Kelly O'Dwyer, second reading speech to the 2018 FCFCOA Bill).
242 Senate Legislation Committee, Parliament of Australia, *Report on the 2018 FCFCOA Bills* (n 76) [3.31]–[3.34].
243 Ibid [3.33].
244 Commonwealth, Parliamentary Debates, Senate, 5 December 2019, 7054 (Christian Porter, Attorney-General, second reading speech to the 2019 FCFCOA Bill).
245 Ibid 7055.

4.25 Some stakeholders continued to express concerns that this reform put at risk the efficient and effective systems, and the expertise and jurisprudence, that had been developed in the Family Court.

4.26 The 2019 FCFCOA Bill also evolved the idea of prioritising single judge appeals for judgments from the FCFCOA (Division 2), providing that they would be heard by a single judge of the FCFCOA (Division 1), unless the Chief Justice determined that issues in the case warranted consideration by a larger appellate bench.

4.27 When the Senate Legislation Committee conducted its inquiry into the 2019 FCFCOA Bill, it heard concerns including that changing the hearing of appeals from a bench of three to a single judge would undermine authoritative jurisprudence in favour of a series of single-judge decisions and, given the concurrence of the Courts' jurisdiction, it would be inappropriate for a single Division 1 judge to hear an appeal from the decision of a single Division 2 judge, potentially just substituting one single judge's decision for that of another.[246]

4.28 However, in the second reading speech, the Attorney-General noted that:

> *… the bill will enable the court to deal with appeals more efficiently, as appeals from decisions of the FCFC (Division 2) will be ordinarily dealt with by a single judge from Division 1. The Chief Justice will have the ability to convene a Full Court to hear an appeal from Division 2, where appropriate. This will provide flexibility for a Full Court to hear appeals involving novel or complex questions of law.* [247]

4.29 In the Explanatory Memorandum to the Bill, it was emphasised that this reform:

> *… would free up considerable judicial resources to work on first instance family law matters, helping to reduce delays and the backlog of cases in the family law system.*[248]

Implementation

Original jurisdiction

4.30 The implementation of the single point of entry – and aspects of the change to the Courts' original jurisdiction to achieve it – are also discussed in Chapter 3.

4.31 The reviewers heard about two particular issues with respect to the implementation of the Courts' original family law jurisdiction since the reforms:

- As noted in Chapter 3, the Full Court of the FCFCOA (Division 1) resolved an early issue with respect to jurisdiction in legacy cases, holding that Division 1 has jurisdiction in proceedings that were pending in the Family Court from before the reforms.[249]
- Throughout the consultations, concerns regarding the construction of section 50 of the FCFCOA Act were frequently raised. This issue is considered below under the discussion of the review consultations, and further in Chapter 8.

[246] *Report on the 2019 FCFCOA Bills* (n 77) [2.62]–[2.66].
[247] Commonwealth, Parliamentary Debates, Senate, 5 December 2019, 7055 (Christian Porter, Attorney-General, second reading speech to the 2019 FCFCOA Bill).
[248] Explanatory Memorandum, 2019 FCFCOA Bill [23].
[249] See *Nevins & Urwin* [2022] FedCFamC1A 57.

Appellate jurisdiction

4.32 Procedural aspects of appeals have been provided for in Chapter 13 of the Family Law Rules 2021, and the Family Law Practice Direction: Appeals.[250]

4.33 The appellate jurisdiction of the FCFCOA (Division 1) is overseen by the Chief Justice, the Deputy Chief Justice and the Honourable Justice Austin, who was nominated by the Chief Justice as Administrative Head of Appeals.[251]

The review consultations

Original jurisdiction

4.34 A small number of participants were critical of the removal of original jurisdiction from the FCFCOA (Division 1) – predominantly on the basis that a superior court "ought" to have original jurisdiction and should not depend on receiving it by way of transfer from an intermediate court – but the majority of respondents were supportive of the change and the efficiencies achieved by it.

4.35 A significant jurisdictional issue, regarding the construction of section 50 of the FCFCOA Act, was raised by those both within the Courts and the profession.

4.36 Section 50 provides:

> *(1) A person must not institute family law or child support proceedings (other than appellate proceedings) in the Federal Circuit and Family Court of Australia (Division 1).*
>
> *Note: For the institution of proceedings other than family law or child support proceedings, see section 62.*
>
> *(2) If proceedings are instituted in the Federal Circuit and Family Court of Australia (Division 1) in contravention of subsection (1), then:*
>
> *(a) unless the proceedings are transferred to the Federal Court, the proceedings are, by force of this subsection, transferred to the Federal Circuit and Family Court of Australia (Division 2); and*
>
> *(b) the proceedings are taken to be as valid as they would have been if subsection (1) had not been enacted.*

4.37 Although neither appeal specifically turned on the issue, the construction of section 50 has been considered by two FCFCOA Full Courts.[252] In both cases, a proceeding had been transferred from the FCFCOA (Division 2) to the FCFCOA (Division 1) for hearing. In each case a party had, by amended application, sought leave to apply for spousal maintenance, in addition to an existing application for parenting orders in one case, and an alteration of property interests in the other.

4.38 It is not necessary to traverse the full complexities of these decisions here, but to note the conjecture to which they have given rise.

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[250] Both instruments commenced on 1 September 2021. The rules were last amended on 2 May 2024 (*Federal Circuit and Family Court of Australia (Family Law) Amendment (2024 Measures No. 1) Rules 2024* (Cth)), and the practice direction was updated on 9 December 2024.

[251] *FCFCOA Annual Reports 2023/24* (n 151) 68.

[252] See *Gilford & Cavaco* [2024] FedCFamC1A 55 ('*Gilford & Cavaco*') and *Vang & Chung (No 3)* [2024] FedCFamC1A 199 ('*Vang & Chung (No 3)*').

4.39 In *Gilford & Cavaco*, the majority[253] referred to authorities on the meaning of 'proceedings', and concluded that the appellant's Further Amended Initiating Application had sought to introduce a separate proceeding, and therefore fell within the section 50 prohibition on instituting family law or child support proceedings in the FCFCOA (Division 1).[254]

4.40 They referred to the prohibition in section 50 as being 'in absolute terms', not subject to other provisions in the Act or in the Rules, but '…to be construed by reference to [its] text, the statutory context and purpose of the legislation…'[255]

4.41 Riethmuller J dissented, noting that interpreting section 50 as referring to individual causes of action would leave different parts of an Amended Initiating Application pending in two different courts, thereby undermining a core objective of the Act, by creating a multiplicity of proceedings.[256]

4.42 He concluded:

> *… such an interpretation "appears to impose additional cost and a cumbersome procedural burden" on a litigant. It also creates a very technical approach which effectively denies jurisdiction in situations that may go unnoticed by many. Such an interpretation should be avoided.*[257]

4.43 In *Vang & Chung (No 3)*,[258] the majority[259] expressly preferred the reasoning of Riethmuller J, in his dissenting judgment in *Gilford & Cavaco,* saying that it:

> *…accord[s] with the objects of the FCFCOA Act set out in s 5 thereof, as well as with the directive to the Court in s 43 thereof, albeit that the said objects and directive [are] not determinative of the issue.*[260]

4.44 Their Honours favoured a position that, as far as possible, all matters in controversy between the parties should be completely and finally determined, and that a multiplicity of proceedings concerning any of those matters should be avoided.

4.45 In a separate judgment, Carew J declined to address the section 50 issue, as it was 'an issue that is not necessary for us to decide'.[261]

4.46 The considerations in those cases reflect the tension between competing objectives within the Act: one being to support the single point of entry, and the other to ensure that all matters in controversy are completed together and a multiplicity of proceedings avoided.

4.47 The issue relating to section 50 was raised with some consistency by participants, who expressed concern about the lack of clarity surrounding its interpretation. And, without resolution, it could see parties litigating in two courts, or facing the inconvenience, expense and delay of an application in Division 2 to transfer an Amended Initiating Application or Amended Response within proceedings otherwise before Division 1.

253 Harper and Brasch JJ.
254 *Gilford & Cavaco* (n 252) [41]–[42].
255 Ibid [51].
256 Section 43 of the FCFCOA Act requires the FCFCOA (Division 1) to, as far as possible, in every matter before it, ensure that 'all matters in controversy between the parties may be completely and finally determined; and all multiplicity of proceedings concerning any of those matters may be avoided'.
257 Ibid [90].
258 *Vang & Chung (No 3)* (n 252).
259 McClelland DCJ and Strum J.
260 *Vang & Chung (No 3)* (n 252) [155].
261 Ibid [206].

4.48 To resolve the uncertainties, the Chief Justice has recently delegated certain powers to all Division 1 judges. They now have the discretion to uplift an Amended Application or Response that adds (or seeks leave to add) a new cause of action, which by force of section 50(2) is otherwise taken to have been validly instituted in the FCFCOA (Division 2).

4.49 The details of this resolution are discussed in Chapter 8.

Appellate jurisdiction

4.50 With few exceptions, consultations revealed the widespread view that the move away from a separate Appeal Division has been positive. There was a similar view in relation to changes to the previous default position for Federal Circuit Court appeals to be heard by a bench of three judges, in favour of single judges. Participants referred to both in extremely enthusiastic terms, describing them as a significant improvement and amongst the great successes of the structural reforms.

4.51 Several went so far as to say that although they had been sceptical – or even critical – in advance of this particular reform, they now supported it as working well.

Management of appeals

4.52 In considering the successful implementation of these reforms, it is impossible to overlook the role of Justice Austin, whose effort and skill in implementing the new appellate model was noted a number of times.

4.53 The reviewers heard that strict pre-hearing management has facilitated a streamlined approach, one aspect of which has been the earlier identification, and resulting withdrawal or dismissal, of unmeritorious appeals.

4.54 It also appears that these changes have enabled a more flexible use of resources, with judges only being assembled when a group of appeals is ready to be heard in a particular registry, or when there is a single appeal ready to be heard online.

4.55 Although there was one mention that there is sometimes only short notice that an appeal will proceed on a certain day, that observation must be considered against the strong majority view of the efficiencies that have been achieved.

4.56 Those within the Courts and the profession commented favourably on the shorter timeframes achieved for the hearing of appeals. This view is supported by data in the Courts' annual reports showing that:[262]

- in 2023/24, the average time from filing a Notice of Appeal to finalisation was 3.2 months, compared with 6.7 months in 2020/21[263]
- in 2023/24, the average time from filing a Notice of Appeal to delivery of judgment was 4.2 months, compared with 9.0 months in 2020/21[264]
- in 2023/24, the percentage of appeals finalised within 12 months was 100%, compared with 88% in 2020/21[265]
- in 2023/24, 96% of appeal judgments were delivered within 3 months, compared with 79% in 2020/21.[266]

[262] Note: These figures include all appeals from judgments of the FCFCOA (Division 1), the FCFCOA (Division 2), the FCWA and the Magistrates Court of Western Australia.
[263] *FCFCOA Annual Reports 2023/24* (n 151) 71 (figure 3.4.2(a)).
[264] Ibid 71 (figure 3.4.2(b)).
[265] Ibid 72 (figure 3.4.2(c)).
[266] Ibid 72 (figure 3.4.2(d)).

4.57 Annual reports also show that the number of Appeal Notices being filed has reduced as follows:

- in 2023/24, 120 appeals from FCFCOA (Division 1) judgments were filed,[267] compared with 144 appeals from Family Court judgments in 2020/21[268]
- in 2023/24, 195 appeals from FCFCOA (Division 2) judgments were filed,[269] compared with 217 appeals from Federal Circuit Court judgments in 2020/21.[270]

4.58 The reviewers heard that one reason for fewer appeals is that, now that they are more timely, any strategic advantage in appealing simply to delay the execution of a trial judgment is lessened or lost.

Trial judges conducting appeals

4.59 It was repeatedly noted to the reviewers that the capacity to draw appeal judges more broadly from amongst trial judges has been advantageous in a number of ways, beyond just contributing to the faster finalisation of appeals. Many respondents specifically referred to the advantage of appeals being dealt with by judges who have daily experience of trial work.

4.60 They referred to the perception that specialist appeal judges could sometimes hold unrealistic expectations of trial judges and of the procedural challenges affecting trials. There was a commonly expressed appreciation that the tone of judgments is respectful of the work of trial judges, even when a decision is overturned.

4.61 Several respondents also noted what they believed is now a better application of the well established appeal principles in *House v The King*,[271] as to the circumstances in which an appellate court should interfere with a discretionary judgment.

4.62 Equally, it was frequently mentioned that it was valuable for trial judges to experience appellate work and, therefore, to better understand the appeal process.

4.63 This aspect was summed up as leading, at the same time, to better trial judges and better appellate judges.

4.64 The reviewers heard of the flow through to an improved sense of wellbeing and heightened sense of collegiality amongst the judges across both Courts, as well as reference to the constructive nature of judgments, and how such judgments enhance public confidence in the courts.

Jurisprudence

4.65 A small group still expressed the concern that, without a dedicated Appeal Division, there was a risk of too much inconsistency on important issues, and that family law jurisprudence could be diminished.

4.66 Participants expressed some ease, however, that in the allocation of appeal cases, there is appropriate recognition of the specialties and interests of particular judges, and the need for important issues to be determined in a consistent and timely manner.

[267] Ibid 70 (table 3.4.1(b)).
[268] Ibid 51 (table 3.5.1(b)).
[269] Ibid 70 (table 3.4.1(b)).
[270] Ibid 51 (table 3.5.1(b)).
[271] [1936] HCA 55 CLR 499.

4.67 On one objective measure, there has been no increase in the number of special leave applications granted or appeals allowed by the High Court from decisions of the FCFCOA (Division 1), since the reforms. Each year, from 2018/19 to 2023/24, the combined number has consistently ranged between zero and two.[272]

Single judge appeals

4.68 The reform to allow appeals from judgments of the FCFCOA (Division 2), or judgments of the Magistrates Court of Western Australia, to more frequently be heard by a single judge was strongly supported. The reviewers heard that it was a successful aspect of the reforms and better than the previous system.

4.69 Some respondents did refer to the risk of uncertainty that could arise from a single judge in one Court hearing an appeal from a single judge in another – in what were often predominantly discretionary matters – and also the uncertainty in jurisprudence if different Division 1 single judges made different decisions. However, this was a minority view.

4.70 The majority view was that this reform has succeeded in achieving greater efficiency, more timely appeals and a more effective use of court resources, with FCFCOA (Division 1) judges less frequently diverted from trial work. There was a high level of confidence in single judge appeal judgments and jurisprudence, as well as an appreciation of how hearing appeals from Division 2 judges has added to Division 1 judges' understanding of Division 2 work.

4.71 The suggestion that FCFCOA (Division 1) judges now have more time to spend hearing trials is well borne out by the figures supplied by the Courts, showing that:

- in 2023/24, only 6 of 202, or 3% of, appeals from the FCFCOA (Division 2) and the Magistrates Court of Western Australia were heard by a Full Court of the FCFCOA (Division 1), compared to
- in 2020/21, 184 of 237, or 78% of, appeals from the Federal Circuit Court and the Magistrates Court of Western Australia were heard by a Full Court of the Family Court.[273]

4.72 Overall, there was support for the balance struck by the reform, which has enabled the prompt hearing of straightforward appeals by a single judge, whilst providing for the Chief Justice to allocate appeals to a Full Court in cases that warrant it.

[272] *FCFCOA Annual Reports 2023/24* (n 151) 72; FCFCOA (Division 1) and FCFCOA (Division 2), *FCFCOA Annual Reports 2022-23* (2023) 53; FCFCOA (Division 1) and FCFCOA (Division 2), *Annual Reports 2021-22* (2022) 56; Family Court, *Annual Report 2020-2021* (2021) 37; Family Court, *Annual Report 2019-20* (2020) 39; Family Court, *Family Court of Australia Annual Report 2018-19* (2019) 35.

[273] Data provided to the reviewers by the FCFCOA.

Chapter 5.
Specialisation of judicial officers exercising family law jurisdiction

5.1 The Terms of Reference asked the reviewers to consider the impact of the structural reforms to the FCFCOA on the level of specialisation of judicial officers exercising federal family law jurisdiction.

What the legislation provides

5.2 Section 11(2)(b) of the FCFCOA Act provides in relation to the exercise of family law jurisdiction that a person is not to be appointed as a judge of the FCFCOA (Division 1) unless:

> *(b) by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with family law matters, including matters involving family violence.*

5.3 In relation to appointments to the FCFCOA (Division 2), sections 111(2)(b) and (3) of the FCFCOA Act provide that a person is not to be appointed as a judge unless:

> *(2) …*
>
> *(b) by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with the kinds of matters that may be expected to come before the person as a Judge of the Federal Circuit and Family Court of Australia (Division 2).*
>
> *(3) To avoid doubt, for the purposes of paragraph (2)(b), if the kinds of matters that may be expected to come before a person as a Judge of the Federal Circuit and Family Court of Australia (Division 2) are family law matters, the person, by reason of their knowledge, skills, experience and aptitude, is a suitable person to deal with those matters, including matters involving family violence.*

Background

5.4 As discussed in Chapter 1, the Family Court was created as a specialist court to deal solely with family law matters. Central to this design was a recommendation that it be 'composed of judges appointed specifically for their suitability for dealing with family law matters'.[274]

5.5 The requirement for appointment to the Family Court was found in section 22(2) of the Family Law Act. It provided that a person 'shall not be appointed as a judge' of the Family Court unless:

> *(b) by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.*

5.6 One of the motivations for this provision was complaints from the legal profession about the lack of family law expertise among state court judges, who generally sat on divorce lists on a rotational basis. This practice had meant that, prior to the establishment of the Family Court, family law matters were heard, sometimes reluctantly, by whichever judge happened to be rostered on.[275]

[274] Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, 2019) [2.7] ('*ALRC Family Law System Report*'). See also *Report on the Family Law Bill 1974* (n 11) [35].

[275] John Biggs, 'Stability of Marriage – A Family Court?' (1961) 34 *Australian Law Journal* 343, 348–50.

5.7 Writing at the time of the introduction of the Family Law Act, one commentator suggested that experience of family law decision-making in non-specialist courts had 'shown that many judges are ill equipped to deal with family matters, particularly those involving sexual behaviour and custody of children'.[276]

5.8 In contrast to the Family Court, the FMC (later known as the Federal Circuit Court) was established to operate as a 'broadly-based multi-jurisdictional court'.[277] Reflecting this design, the Federal Circuit Court Act contained no equivalent legislative requirement for appointment to hear family law matters.

5.9 Despite the original intentions for the Federal Circuit Court, by the time the FCFCOA reforms were proposed family law matters had grown to represent 90% of its caseload.[278] The Federal Circuit Court had also become the primary court for hearing federal family law matters.[279]

5.10 In this changed context, the absence of a requirement of suitability to hear family law matters in the Federal Circuit Court had begun to attract criticism and calls for reform.[280]

5.11 Around the same time, the release of several empirical studies pointed to gaps in the management of family violence by the family courts.[281] These studies highlighted the scope for adversarial processes to retraumatise victims and suggested the need for increased understanding among court personnel of domestic and family violence.[282]

5.12 Research conducted by the Australian Institute of Family Studies had also revealed the significant extent to which parenting matters in the family courts involved allegations of family violence and other safety concerns for children.[283]

5.13 In response to this evidence, various reviews of the family law system had proposed the use of specialist court pathways and team-based approaches to managing cases with significant safety concerns,[284] including the early assessment of risk and the use of integrated legal and support services.[285]

5.14 When the 2018 FCFCOA Bill was introduced to Parliament, although the requirements from the Family Law Act for the appointment of judges to the FCFCOA (Division 1) were preserved, the Bill did not include a specific provision regarding suitability to hear family law matters for judges appointed to the FCFCOA (Division 2).

[276] Frank Bates, 'Legal and Social Change in Australian Family Law' (1976) 9(3) *Comparative and International Law Journal of Southern Africa* 299, 310.
[277] See Federal Magistrates Court of Australia, *Federal Magistrate Court of Australia 2003-2004 Annual Report* (2004) 56.
[278] Federal Circuit Court, *Annual Report 2017-2018* (2018) 44.
[279] It heard around 89% of all family law matters filed at the federal level: see Federal Circuit Court, *Annual Reports 2017-2018* (2018) 47.
[280] See, eg, House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 285 ('*A Better Family Law System*').
[281] See, eg, Miranda Kaye, 'Accommodating violence in the family courts' (2019) 33 *Australian Journal of Family Law* 100, 102–3; Rae Kaspiew et al, *Domestic and Family violence and parenting: Mixed method insights into impact and support needs, Final Report* (Australia's National Research Organisation for Women's Safety, 2017) 174.
[282] Rae Kaspiew et al (n 281) 174–8.
[283] Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Australian Institute of Family Studies, 2015) 16.
[284] See Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper No 86, 2018) Proposal 6-3, xxi.
[285] See Family Law Council, *Families with Complex Needs and the Intersection of the Family law and Child protection Systems: Interim Report* (Report, 2015) 99.

5.15 As noted in Chapter 1, the introduction to Parliament of the 2018 FCFCOA Bills met with strong opposition from a wide cross-section of family law stakeholders. A key concern was that a merger of the Family Court and Federal Circuit Court would remove the specialisation that had been the hallmark of the Family Court,[286] with submissions noting the critical importance of family law experience to ensuring that judges who hear family law matters can effectively manage those cases.[287]

5.16 Submissions to the Senate Legislation Committee were also concerned that the FCFCOA Bill did not provide sufficient measures for either Court to address family violence. Women's Legal Services Australia, for example, proposed that any reforms to the family court system required a 'philosophical basis that places domestic violence, risk and safety at the centre of all practice and decision-making',[288] and that judicial officers hearing family law matters needed to be:

> *… as expert as possible in relation to issues of safety and risk because the impacts of decision-making are so great.*[289]

5.17 The Senate Legislation Committee recommended the qualifications for appointment to the FCFCOA (Division 2) be amended to ensure that judges hearing family law matters would have the appropriate 'skills, knowledge, experience and personality'.[290]

5.18 The 2019 FCFCOA Bills were introduced to Parliament in December 2019. In the meantime, the ALRC had released the final report of its family law system inquiry. Its report recommended that the requirement of 'personality' in the Family Law Act be changed to 'aptitude', and that future appointments of 'all federal judicial officers exercising family law jurisdiction' include consideration of the person's knowledge and experience relevant to hearing 'cases involving family violence'.[291]

5.19 Reflecting this recommendation, the 2019 FCFCOA Bill provided that appointment as a judge of the FCFCOA (Division 1), or of the FCFCOA (Division 2) if family law matters are expected to come before that judge, not be made unless:

> *by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with matters of family law, including matters of family violence.*[292]

5.20 Despite these amendments, many family law system professionals remained concerned that the proposed amalgamation of the Courts would negatively impact the development of specialist initiatives that had been enabled by having a standalone family court.[293]

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286 *Report on the 2018 FCFCOA Bills* (n 76) [3.6].
287 Ibid [3.51]–[3.53].
288 Evidence to the Senate Legislation Committee, Parliament of Australia, Brisbane, 13 December 2018, 34 (Angela Lynch) quoted in the *Report on the 2018 FCFCOA Bills* (n 76) [3.83].
289 Evidence to the Senate Legislation Committee, Parliament of Australia, Brisbane, 13 December 2018, 34 (Angela Lynch) quoted in the *Report on the 2018 FCFCOA Bills* (n 76) [3.84].
290 *Report on the 2018 FCFCOA Bills* (n 76) Recommendation 3.
291 The inclusion of the reference to family violence acknowledged that family violence 'is the most commonly raised factual issue in family law proceedings': *ALRC Family Law System Report* (n 274) [13.54].
292 See Clauses 11 and 111 of the 2019 FCFCOA Bill, noting that the replacement of the requirement of 'personality' with 'aptitude', and the requirement of 'training' with 'knowledge and skills' and inclusion of the words 'including matters of family violence' were new to the requirements for FCFCOA (Division 1), and the whole clause in relation to family law matters was new to the requirements for FCFCOA (Division 2).
293 See Department of Parliamentary Services, *Bills Digest: Federal Circuit and Family Court of Australia Bill 2019; Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019* (Digest No 42, 2020-21, 27 January 2021) 36.

5.21 A central issue for many stakeholders concerned the potential for poorer outcomes for families affected by family violence. For example, during the Senate Legislation Committee's inquiry into the 2019 FCFCOA Bills, the Queensland Law Society submitted:

> *The skill necessary to understand the complex dynamics relating to family violence and properly identify risk is essential to the practice of family law and the proper determination of family law disputes. Decisions made without this skill and expertise can place victims of family violence, including children, at increased risk.*[294]

5.22 Similar concerns were expressed during parliamentary debate of the Bills.[295]

5.23 The Senate Legislation Committee reported on 20 November 2020, recommending the 2019 FCFCOA Bills be passed.[296]

5.24 While it acknowledged the concerns raised by stakeholders, and the preference for 'a stand-alone specialist superior family court',[297] the Senate Legislation Committee declared it was satisfied that the Bills contained adequate 'provisions to ensure that families accessing the family law system will have access to a range of specialised services and experienced judges'.[298]

5.25 Many family law system stakeholders, however, continued to express concerns about the potential loss of specialisation before the passage of the legislation in 2021.[299]

5.26 Also relevant to this aspect of the Terms of Reference is the process for appointment to federal judicial office.

5.27 In its 2019 report on the family law system, the ALRC suggested the Australian Government should consider more transparent processes for appointing judicial officers generally.[300] It further developed this suggestion in its December 2021 report on judicial impartiality, recommending that:

> *The Australian Government should develop a more transparent process for appointing federal judicial officers on merit, involving:*
>
> - *publication of criteria for appointment;*
> - *public calls for expressions of interest; and*
> - *a commitment to promoting diversity in the judiciary.*[301]

5.28 In its response to this report, the Government agreed to this recommendation, noting that it had already embarked on implementing a process along these lines.[302]

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294 Quoted in *Report on the 2019 FCFCOA Bills* (n 77) [2.41].
295 Commonwealth, *Parliamentary Debates*, Senate, 17 February 2021, 759–60 (Louise Pratt, second reading speech to the 2019 FCFCOA Bills).
296 Australian Labor Party (Labor) Senators and the Australian Greens (Greens) issued separate dissenting reports, each opposing the Bills.
297 *Report on the 2019 FCFCOA Bills* (n 77) [2.44].
298 Ibid [2.88].
299 See for example, 'Open Letter to the Attorney-General from 155 stakeholders', 16 February 2021. https://lawcouncil.au/media/media-releases/family-court-merger-opposed-by-155-stakeholders-including-13-retired-judges.
300 *ALRC Family Law System Report* (n 274) [13.57].
301 Australian Law Reform Commission, *Without Fear of Favour: Judicial Impartiality and the Law on Bias* (Report No 138, 2021), 14 (Recommendation 7).
302 Australian Government, *Government Response to Australian Law Reform Commission Report 138: Without Fear of Favour: Judicial Impartiality and the Law on Bias* (2022) 4.

Implementation

5.29 Immediately following the introduction of the FCFCOA Act the Courts implemented a team-based, intensive case-management approach for all family law matters, to better identify and respond to cases involving family violence and other safety concerns for children.

5.30 Key elements of this approach, as discussed in Chapter 3, include the Lighthouse screening process, the Evatt List for high-risk cases in the FCFCOA (Division 2), and the early preparation of Child Impact Reports by CCEs.

5.31 Judicial officers who hear family law matters also undertake family violence training and education programs delivered by David Mandel and the Safe & Together Institute.[303] This training has been run in the FCFCOA since 2021,[304] and is now an embedded part of the FCFCOA Family Violence Plan 2023-2026 (the Family Violence Plan), which commits the Chief Justice to ensuring that all judges undertake the Safe & Together family violence training (or other nominated training) within the first year of appointment, as well as some form of family violence training annually thereafter.[305]

5.32 Reflecting the ALRC's recommendation, the present process for judicial appointments to the FCFCOA may include advertising the legislative criteria for appointment and seeking expressions of interest from suitable candidates, in addition to consulting with members of the legal professional community to seek nominations.[306]

The review consultations

5.33 Notwithstanding the acknowledged limits of the review, the consultations strongly suggest that the structural changes brought about by the FCFCOA Act have not led to a loss of family law specialisation in the Courts. The reviewers heard numerous positive reports about the recent family law appointments to both the FCFCOA (Division 1) and the FCFCOA (Division 2), including praise for the skills of recently appointed judicial officers with respect to family violence and the Courts' increased focus on judicial training and education.

5.34 Nevertheless, the reviewers also heard that family law matters in the FCFCOA (Division 2) are at times listed for hearing by judges who are not family law specialists – a function of the mixed-docket system that is a longstanding feature of that Court.

Judicial appointments – family law background

5.35 Among the consultation participants were stakeholders who had opposed the 2019 FCFCOA Bills or who had otherwise harboured concerns about the potential diminution of family law specialisation resulting from the restructure of the Courts. While some continued to advocate for a standalone specialist family court, most respondents reflected positively on the judicial appointments made since the 2021 reforms, with some acknowledging that their fears had not been realised.

[303] *FCFCOA Annual Reports 2023/24* (n 151) 40. See also on this point, See ANROWS, 'Safe & Together Addressing ComplexitY for Children (STACY for Children): Key Findings and future directions', *Research to Policy and Practice*, Issue 22 (October 2020) 5.
[304] *FCFCOA Annual Reports 2023/24* (n 151) 44.
[305] FCFCOA, *Family Violence Plan 2023-2026*, 4.
[306] Attorney-General's Department, *Judicial Appointments* (Web Page) <https://www.ag.gov.au/legal-system/courts/judicial-appointments>.

5.36 The consultations also revealed overwhelming support for the legislative criteria for judicial appointment in the FCFCOA Act, suggesting they are viewed as important, or even essential, requirements for family law appointments.

5.37 Participants also commended the current appointments process for judicial office and its role in helping to operationalise the new legislative criteria:

> *I think that's been an improvement in terms of being able to identify that the judicial officers have extensive experience, [that] the judicial officers who are being appointed are well known and experienced family law practitioners.*

5.38 While there were several respondents who said they had observed little change since the reforms, others considered the level of specialisation of judicial officers exercising family law jurisdiction had improved over the past few years. These responses tended to note that most of the recent appointments had come to the bench with considerable experience of family law practice:

> *I don't think that there has been that loss [of specialisation] at all. I think that it's largely, even looking at the more recent appointments since the commencement of the court, we've seen more of a specialisation in terms of the people being appointed and being solely a family law background. So, I would actually say it's probably improved.*

5.39 Particularly mentioned were the recent appointments of judicial registrars and senior judicial registrars, with a number of participants noting their significant family law experience and specialist skills.

5.40 Reflecting an understanding of the prevalence of family violence in family law work, some participants also emphasised the importance of having practised in the area to understanding the sensitivities and complexities of family law matters, such as being able to recognise the indicators of risk in Child Impact Reports:

> *I think the benefits of those particular appointments is that they can see the nuances of family violence, they can spot issues before anyone else.*

5.41 Some responses went further, suggesting that a lack of experience of family law practice can put parties and children at risk.

5.42 While some participants proposed that requiring an applicant for judicial office to have family law experience might unduly limit the pool of suitable candidates, others noted the importance of being across the case law, with one person pointing to the danger of undermining confidence in the justice system by having judges who are less familiar with the relevant law than the other lawyers in the courtroom.

5.43 A related issue that elicited a range of views concerned the diversity of family law practice backgrounds of recent appointees, which included solicitors and people with experience in legal aid or ICL work. Although not all participants agreed on this point, the reviewers heard strong praise for this diversity, with a number of respondents noting the strengths of having a judiciary drawn from a broad cross-section of family law backgrounds:

> *We've seen recently new appointments, a lot of new appointments, and the majority of them are coming with some family law experience or some with significant family law experience, whether they've been an Independent Children's Lawyer previously or counsel or lawyer working within the sector for a really long time.*

Judicial appointments – family violence skills

5.44 As discussed in Chapter 3, the review consultations revealed considerable admiration for the management of family violence and risk by the Courts since the restructure. Central to these views were positive reports about the levels of skill and experience among the more recently appointed judicial officers in dealing with matters involving family violence:

> *I think there are definite improvements. The court's management of family violence and risk I think has improved significantly and I think it helps that especially over the last couple of years, appointing judicial officers with family law experience, goes a long way towards that.*

5.45 Contrary to the concerns raised prior to the reforms, practitioners suggested there is now a more 'wide-ranging understanding of family violence from the bench':

> *I don't think the concerns [raised before the reforms] are actually coming to bear in reality…*
>
> *And especially with the specialist lists, with the Evatt List, with some of those matters, the way that those matters are managed as well, that sort of has been backed by greater understanding of family violence.*

5.46 These assessments included significant praise for the expertise of the judicial officers who sit on Evatt List matters, who were described by one legal practitioner as being 'really attuned to the issues'. Integral to these appraisals was a recognition of the skills and expertise necessary to manage high-risk cases:

> *And look that does require SJRs [senior judicial registrars] to have a particular skill. You need people with some considerable experience in my view to be in that role doing that. But my experience of it is that victims of violence in particular feel very sort of protected and heard within that Evatt List process.*

5.47 Participants also commended the senior judicial registrars in Evatt hearings for their sensitive engagements with parents who have used violence, suggesting flow-on benefits to children from referrals to support services and behaviour change programs:

> *In terms of engaging with the perpetrator, they also benefit from the Evatt List because they get a heads up [from the senior judicial registrar] about what they need to do and what they need to do differently and they often get sent off to courses very early with the knowledge that's going to be coming back to [court to] hear about whether they went and so on. So, it's ultimately [something] that helps the children.*

5.48 A number of participants also described positive impacts of the recent appointments on the ability of lawyers to advocate for clients affected by family violence, noting, for example, that they no longer had to explain the impacts of violence on children to the judge:

> *So this is the new point of difference post-merger that we can actually go through this process and there's a dedicated pathway for it, as opposed to having to take the bench on that journey with us.*

Judicial education and training

5.49 While supportive of the legislative criteria for judicial appointment, responses emphasised the importance of ongoing judicial education to maintain specialisation.

5.50 Reflecting the many reports that have recommended professional development for judges,[307] participants suggested a range of education needs for family law judicial officers, including training in family violence dynamics and trauma-informed practice.

5.51 As noted in the Implementation section of this chapter, the Courts have developed an extensive annual program of judicial education, with a strong focus on family violence, including training with the Safe & Together Institute. The Safe & Together training was generally spoken of favourably, both within and outside the Courts, with the consultation process revealing widespread recognition of what one organisation called the increased 'appetite' for understanding family violence within the Courts.

5.52 The reviewers learned that the Courts are rolling out a suite of new training for judicial officers in 2025, including modules on sexual assault developed in partnership with Griffith University,[308] and training on resisting inadvertent collusion with perpetrators of violence.[309]

5.53 Judicial officers spoke highly of the training they had received, with some suggesting it had helped them to develop a more nuanced understanding of family violence dynamics.

5.54 However, several participants expressed caution about the extent of change that can be achieved through professional development, noting that judicial officers cannot be compelled to participate in education programs following their appointment[310] and that there are always resisters to new knowledge in any organisation. While applauding the Courts' commitment to improving the knowledge of judges and other court personnel, these participants emphasised the complexity of domestic and family violence and the need for training to be ongoing and up to date.

Mixed dockets

5.55 It is important to note the issue of mixed dockets in this context.

5.56 The reviewers understand that 20 of the judges of the FCFCOA (Division 2) have a mixed docket, hearing both general federal law and family law matters.[311] The use of mixed dockets is a practice that dates from the establishment of the FMC, although it is not a feature of all registries. It is a practice that is particularly important and unavoidable in single-judge and smaller registries of the Courts.[312]

5.57 The reviewers heard that judicial officers with mixed dockets receive extensive training upon their appointment to support them to undertake work they may not have practised in prior to appointment.

[307] See Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems, Final Report* (Report, 2016) Recommendation 12; *A Better Family Law System* (n 280) Recommendation 27; COAG Advisory Panel on Reducing Violence against Women and their Children, *Final Report* (Report, 2016) Recommendation 1.4.

[308] *FCFCOA Annual Reports* 2023/24, page 44.

[309] See on this topic, Jo Neale, 'Abused women's perceptions of professionals' responses: valued support, or collusion with perpetrator?' (2018) 2 *Journal of Gender-Based Violence* 411.

[310] See on this point, *A Better Family Law System* (n 280) [8.78].

[311] As at 14 October 2024. Information provided by the FCFCOA.

[312] Such as Darwin, Cairns and Rockhampton.

5.58 Some participants reflected positively on the use of mixed docket judges, suggesting there are benefits in having judges with a broad skill set, for example, in family property matters.

5.59 The reviewers also heard that some judicial officers prefer to work across different areas of law, noting the knowledge-building effects and synergies between jurisdictions such as bankruptcy and family law.

5.60 Nevertheless, a small number of respondents from different locations submitted that the mixed docket model is not necessarily ideal for litigants in family law.

5.61 The main concern described by these participants was that it may take extra time to explain the relevant case law to a judge without a family law background, potentially lengthening trial times and creating extra financial costs for the client. Several responses also noted the added difficulties for self-represented litigants, who are not able to assist judges with the relevant law.

Chapter 6.
The change of the Courts' names

6.1 The Terms of Reference asked the reviewers to consider any impact of the change of names from the Family Court of Australia and the Federal Circuit Court of Australia to the Federal Circuit and Family Court of Australia (Division 1) and the Federal Circuit and Family Court of Australia (Division 2).

What the legislation provides

6.2 The FCFCOA Consequential Amendments Act repealed Part IV of the Family Law Act, which had provided for the creation of the Family Court.[313] The FCFCOA Consequential Amendments Act also repealed the Federal Circuit Court Act.[314]

6.3 However, the FCFCOA Act makes it clear that both the Family Court and the Federal Circuit Court continue to exist. The effect of section 8 of the FCFCOA Act is to alter the names of these Courts, rather than abolish them.

6.4 Section 8(1) of the FCFCOA Act provides:

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

6.5 Section 8(2) of the FCFCOA Act provides:

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

6.6 Section 9 of the FCFCOA Act confirms that the FCFCOA (Division 1) continues to be a superior court of record and a court of law and equity, as the Family Court was.

6.7 Section 10 of the FCFCOA Act confirms that the FCFCOA (Division 2) is a court of record and a court of law and equity, as the Federal Circuit Court was.

Background

6.8 The family court restructure proposed in 2010,[315] in line with the recommendations of the Semple Report,[316] was intended to effect a merger of the Federal Circuit Court's family law jurisdiction into the Family Court (see Chapter 1 for further discussion on this).

6.9 Although the 2021 structural reforms are often referred to as a merger, the 2019 FCFCOA Bill did not seek to amalgamate the two Courts into a single court. Instead, the FCFCOA Act brought the Family Court and the entire Federal Circuit Court 'together into an overarching, unified administrative structure to be known as the Federal Circuit and Family Court of Australia'.[317]

6.10 The two Courts are therefore preserved, but renamed, with the FCFCOA (Division 1) being 'a continuation of the Family Court' and the FCFCOA (Division 2) being 'a continuation of the Federal Circuit Court'.[318]

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313 *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth) sch 1 item 36.
314 Ibid sch 3 item 1.
315 See the Access to Justice (Family Court Restructure and Other Measures) Bill 2010 (Cth).
316 *Semple Report* (n 50) [119].
317 Explanatory Memorandum, 2019 FCFCOA Bill [4].
318 Ibid [7].

6.11 The Explanatory Memorandum to the 2019 FCFCOA Bill suggests that the intention in restructuring the Courts as two divisions of a single administrative structure was to 'create a consistent pathway for Australian families in having their family law disputes dealt with in the federal courts'. [319]

6.12 The Explanatory Memoranda to the 2019 FCFCOA Bill and FCFCOA Consequential Amendments Bill do not address the objective of renaming the Family Court and the Federal Circuit Court or the choice of names, nor do they identify the mischief to be remedied by the new names.

The review consultations

6.13 The consultations revealed a range of experiences of and perspectives on the impacts of the changes to the names of the Courts.

6.14 To some extent these differences reflect different roles within and relationships to the Courts. On the other hand, there was no uniform view of the name changes among the responses within most cohorts.

6.15 One point on which there was almost universal agreement, however, is that the new names for the Courts have not been well received.

6.16 Across the sample of consultation participants were numerous negative descriptions, including 'unwieldy', 'cumbersome', 'wordy', 'a mouthful', 'difficult to cite' and 'misleading'. The reviewers also heard that the names are a source of frustration and embarrassment.

6.17 The most common description of the impact of the new names was 'confusing'.

6.18 Many participants, for example, pointed to the length and complicated arrangement of the names, and suggested this made them challenging for clients to remember. Some also noted problems with the abbreviation FCFCOA, suggesting it is not a useful shorthand for clients, being difficult to both pronounce and recall.

6.19 Several respondents identified what they saw as a disconnect between the streamlining aims of the restructure and the confusion caused by the new names for the Courts. These participants noted the stressful nature of navigating legal processes for vulnerable parties and suggested the difficult names and acronym for the Courts had 'created an unintended hurdle' to their usability.

6.20 The reviewers heard that legal practitioners often resort to alternative shorthand terms for the Courts, such as "Division one" and "Division two", for ease of communication with other practitioners. Participants noted, however, that this approach is not particularly helpful for clients:

> *I see very confused applicants in the migration space because we tell them they're in Division 2 and people get so confused by that.*

6.21 Some respondents expressed concern about potential access-to-justice barriers for self-represented litigants, who have no legal adviser to guide them, noting the absence of anything in the names of the Courts to distinguish which of them does general federal law work or to indicate where to commence family law proceedings.

6.22 Several people suggested that the Division allocations were counter-intuitive for people not involved in the legal system, who are likely to believe the FCFCOA (Division 1) is the entry point:

[319] Ibid [8].

The reference to 'Division 1' and 'Division 2' provides no hint to self-represented litigants as to the different operations of these Courts.

6.23 Others, however, believed the names have had limited impact on litigant experiences, with some submitting that the court system has always been opaque to litigants. Some participants also noted that it had long been their practice to refer to both Courts as the 'Family Court' with family law clients, suggesting the new names had made little difference to that routine:

> *Look, apart from how wordy it actually is … I've always had to simplify it for clients. The only way you can really describe it is the family law courts. That's what I refer to it as, it's something that they understand. When you start telling them it's a Federal Circuit and Family Court of Australia, they start to sort of glaze over.*

6.24 In addition, the consultations suggest that some legal practitioners have now become accustomed to the new names for the Courts or, more commonly, have tended to ignore the changes and continued to use the Courts' former names.

6.25 Some legal practitioners, however, suggested that the new names have sometimes required them to reassure clients that the Court they are filing in has the expertise to decide their case:

> *It's important for me to let my clients know that they are going to a court that has jurisdiction and expertise to hear and determine their disputes. And if you start off with 'family' [in the court's name], you're immediately having to explain why they don't need to worry about that.*

6.26 This suggests that the inclusion of the word "family" in the name of the Court that hears general federal law matters is confusing.

6.27 In addition, the inclusion of the word "circuit" in the name of the Court exclusively exercising family law jurisdiction is confusing. Some respondents suggested that this gives the impression that the FCFCOA (Division 1) is now a generalist court. Several people expanded on this concern, pointing to the Family Court's longstanding reputation as the court that specialises in family law and submitting that the new name risks undermining confidence in the Court's family law expertise. As one response explained:

> *The Family Court of Australia was known as a specialist court dealing specifically with family law matters, including complex cases of family violence. The explicit 'Family Court' name signalled its specialisation and gave parties a sense of certainty that their family-related disputes would be handled by experts in that field. With the new nomenclature, the distinct identity of a Family Court has been absorbed into a broader brand, potentially blurring the lines of specialisation.*

6.28 Of further concern, some people submitted that there is a common misapprehension within the legal community, supported by the references to Division 1 and Division 2 in the Courts' names, that there is now a single two-tiered court known as the FCFCOA. Compounding this misunderstanding, a number of participants indicated that the focus on family law reform had led to a belief that the FCFCOA is predominantly a family law court.

6.29 Noting this misunderstanding, some participants expressed concern that the rebadging of the Federal Circuit Court, an independent intermediate court of federal jurisdiction, suggests it is now a lower division of the Family Court.

6.30 Some also suggested the inclusion of "Division 2" in the Court's name sends a message to litigants that the quality of justice it dispenses is "second tier".

6.31 The reviewers also heard criticisms of the complicated citations for the Courts' decisions that had resulted from the lengthy court names,[320] with one respondent describing these as 'Bletchley Park–like'.[321] Some responses referred to difficulties with citing cases in court, with several people explaining that they were often asked to repeat citations to allow judges and other parties to take an accurate note.

6.32 In addition, the reviewers heard that the difficulties with the new names had led some in the legal community to create informal ways of referring to the Courts. Among those mentioned during the consultations were terms such as the 'Focaccia Court' and the 'Family Circus Court'.

6.33 Despite the various concerns, and the general dislike for the new names, there were mixed views about the need for further change.

6.34 On the one hand, the reviewers heard calls for the Courts' former names to be reclaimed, both to restore dignity and confidence in the Courts and to enhance clarity and accessibility for court users. As one submission argued:

> *The renaming of the Family Court of Australia and the Federal Circuit Court of Australia into the Federal Circuit and Family Court of Australia (FCFCOA) Division 1 and Division 2 may seem primarily administrative. However, names matter. They convey the nature, focus, and priorities of institutions and can influence public perceptions and community trust.*

6.35 This was particularly noted in relation to Australia's Aboriginal and Torres Strait Islander communities, where historical mistrust and uncertainty about mainstream legal systems persist.

6.36 Some responses also took the opportunity afforded by the change of name issue in the Terms of Reference to call for the re-establishment of a standalone Family Court (see Chapter 7 on this).

6.37 On the other hand, there were participants who suggested that the new names had made little difference to their work, or who submitted that the confusion caused by the names did not justify the cost of removing them. Several people argued that there are more important policy issues to address to support clients, noting the significant resources that would be needed to change forms and signage to accommodate a further change of names to the Courts.

6.38 In addition, and despite describing problems created by the names, some respondents were simply weary of reform (for example, noting that the Federal Circuit Court has had three different names over its lifetime), or worried that the recent cohesion that had developed between the family courts might be disrupted if their former names were restored (see Chapter 2 for further discussion on this).

6.39 There were also participants whose responses suggest a sense of being caught between these competing imperatives. As one person explained:

> *I'm not one for suggesting the government has to go and rewrite the budget for stationery, but if it could, if I had a magic wand, I would name it Family Court because that's what the people who we work for understand, and they don't need another level of something that is defeating and hard to understand.*

[320] For example, citations for general federal law judgments have changed from the format of '[2024] FCCA 123' (before the name change) to '[2024] FedCFamC2G 123' (after the name change).

[321] Bletchley Park is where British codebreakers worked during World War II to decode secret messages, such as those encrypted by the German Enigma and Tunny cipher machines. See Robert Lewis, 'Bletchley Park', Britannica (Web Page) <https://www.britannica.com/place/Bletchley-Park>.

Chapter 7.
Unintended impacts

7.1 The Terms of Reference asked the reviewers to report on any aspects of the FCFCOA Act that have had unintended impacts on the operation or the effectiveness of the Courts' federal family law and general federal law jurisdiction, procedure or jurisprudence.

7.2 As noted already, the consultations with family law participants revealed concerns that the Act's prohibition on instituting proceedings in the FCFCOA (Division 1)[322] had unintentionally complicated the ability to add claims to matters after they have been transferred to Division 1. That issue is discussed in Chapter 4.

7.3 This chapter canvasses the other concerns relevant to this term of reference raised during the consultations, being the impacts of the FCFCOA restructure on the FCFCOA (Division 2)'s general federal law jurisdiction, along with suggestions made by consultation participants for changes to address these issues.

Background

7.4 Chapter 1 sets out the background to the 2021 reforms, noting the aim of the FCFCOA Act was to ensure 'the family law system meets the contemporary needs of families'.[323]

7.5 A suite of measures was introduced to facilitate this aim, including the creation of a single point of entry for family law matters[324] and amendments to the appointments criteria for judicial office to require that candidates expected to hear family law matters be 'a suitable person to deal with' those matters by reason of their 'knowledge, skills, experience and aptitude'.[325]

7.6 The general federal law jurisdiction of the Federal Circuit Court was preserved in the reforms.[326]

7.7 Nevertheless, the FCFCOA Act effected several changes, creating a new Deputy Chief Judge (General and Fair Work) position[327] to assist the Chief Judge of the FCFCOA (Division 2),[328] and inserting new criteria for judicial appointments to Division 2.[329] In addition to the family law criteria already mentioned, section 111(2) of the Act requires that a person not be appointed as a judge of the FCFCOA (Division 2) unless:

> *by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with the kinds of matters that may be expected to come before the person as a Judge of the Federal Circuit and Family Court of Australia (Division 2).*

7.8 As was noted in Chapter 1, the Federal Circuit Court was originally created as a multi-jurisdictional court to hear federal matters 'of a less complex nature' than were dealt with by the Federal Court and the Family Court.[330]

7.9 However, its general federal law jurisdiction gradually expanded, with both the addition of new areas of law and a widening of its jurisdiction in relation to existing areas of law. By 2004 the Court was hearing 'over half of all migration matters [and] nearly all bankruptcy work'.[331]

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322 *FCFCOA Act* s 50.
323 Explanatory Memorandum, 2019 FCFCOA Bill 2 [2].
324 *FCFCOA Act* ss 25, 50 and 132. See also Chapter 3.
325 Ibid ss 11(2)(b), 111(2)(b)–(3).
326 Explanatory Memorandum, 2019 FCFCOA Bill 3 [11].
327 This was one of two Deputy Chief Judge positions created by the FCFCOA Act, the other being the Deputy Chief Judge (Family Law).
328 *FCFCOA Act* s 10(2). See also the definition of Deputy Chief Judge in section 7(1) of the FCFCOA Act.
329 *FCFCOA Act* s 111(2).
330 Explanatory Memorandum, Federal Magistrates Bill 1999 (Cth) 1.
331 Federal Magistrates Court, *Federal Magistrate Court of Australia 2003-2004 Annual Report* (2004) 5.

7.10 In 2014, the KPMG Review reported that the number of Acts conferring jurisdiction on the Federal Circuit Court had expanded from 16 to over 70,[332] with stakeholder feedback to the review highlighting the 'increasing complexity' of the general federal law matters it dealt with.[333]

7.11 The general federal law work of the FCFCOA (Division 2) includes jurisdiction in migration law, bankruptcy, consumer law, human rights, fair work (industrial law), intellectual property and admiralty law.[334]

7.12 Jurisdiction is vested by relevant legislation on these matters[335] and much of this jurisdiction is concurrent with the jurisdiction of the Federal Court.[336] For migration matters, there is a clearer demarcation between matters heard by the FCFCOA (Division 2) and the Federal Court.[337]

7.13 Migration is one of the more dynamic areas of law exercised by the FCFCOA (Division 2), with frequent legislative amendments and case law developments.[338]

7.14 Migration matters also comprise the Court's largest area of general federal law work, representing 60% of the Court's general federal law filings.[339] Of the remaining federal law matters, bankruptcy matters make up 45% and fair work 37%.[340]

7.15 In 2023/24, around half of the Court's migration work related to judicial review of protection visa decisions made by the (then) Administrative Appeals Tribunal and the Immigration Assessment Authority.[341]

7.16 Migration applications also share some of the non-legal complexities that affect family law matters, such as a significant proportion (79%) of self-represented applicants,[342] many of whom require interpreters to present their matters to the Court.[343]

7.17 The FCFCOA (Division 2) has seen a significant increase in the number of migration applications over the past several years, resulting in a sizeable backlog of cases.[344] In 2023/24, there were 17,387 migration cases pending,[345] an increase from 14,497 in 2020/21.[346]

7.18 In response to this issue, the Court has developed a Central Migration Docket (CMD) to facilitate central case management of migration matters, complemented by the delegation to registrars of a power to hear applications for summary dismissal in migration proceedings.[347]

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[332] *KPMG Review* (n 48) 18.
[333] Ibid 26.
[334] *FCFCOA Annual Reports 2023/24* (n 151) 120, 137.
[335] *FCFCOA Act* s 131.
[336] Information provided by the FCFCOA. Some jurisdiction is also shared with state courts: *FCFCOA Annual Reports 2023/24* (n 151) 120. While much of the general federal law jurisdiction of the FCFCOA (Division 2) is concurrent with the Federal Court, the Federal Court has jurisdiction that extends beyond the jurisdiction that it shares with the FCFCOA (Division 2).
[337] Most first instance migration applications must be heard in the FCFCOA (Division 2): Federal Court, *Federal Court of Australia Annual Report 2023-2024* (2024) 35. See also *Migration Act 1958* (Cth) s 476A.
[338] *FCFCOA Annual Reports 2023/24* (n 151) 137.
[339] Ibid 139.
[340] Ibid 121.
[341] Ibid 137.
[342] Ibid 139.
[343] Ibid 139.
[344] Ibid 139–40.
[345] Ibid 140.
[346] Ibid 105.
[347] See *Division 2 GFL Rules 2021* r 21.01, table 21.1, item 58.

7.19 Newly filed migration matters are now pooled in the CMD until they are ready for allocation to a judge, replacing the previous process whereby matters were directly docketed to judges soon after filing.[348]

7.20 The CMD allows registrars and their support staff to analyse all of the migration matters before the Court and identify the legal issues and characteristics of each individual case to assist with case management and the allocation of matters to judges. These characteristics include, for example, interpreter requirements, legal representation, and whether the applicant is in immigration detention.[349]

7.21 The Court's latest annual report indicates that the CMD has enabled the FCFCOA (Division 2) to identify case cohorts and cases requiring expedition and has reduced the use of judicial resources for interlocutory and case management processes, where that work can be undertaken by a registrar.[350]

7.22 The latest annual report also indicates that the FCFCOA (Division 2) has commenced a pilot where certain summary dismissal applications are allocated to a migration registrar to determine. Again, this frees up judicial resources to be allocated to more complex matters.[351]

7.23 In 2023/24, the Courts were allocated funding for 10 additional migration judges.[352] This was later supplemented by additional resources in the 2024/25 Federal Budget, to assist with the migration backlog, including funding for:

- an additional four judges to be appointed from April 2025, two registrars (for two years) and 29 other staff, including pro bono coordinators, cultural liaison officers and staff to assist with interpreter services,[353] and
- the establishment of two Migration Hubs (in Western Sydney and Melbourne) that will be dedicated to hearing, and expeditiously resolving, migration and protection matters.[354]

7.24 In addition to these initiatives in the migration area, a Working Group from the FCFCOA (Division 2) is currently considering changes to the rules to better suit the Court's general federal law jurisdiction, including opportunities for harmonisation with the Federal Court's rules.[355]

7.25 It is also important to note that the FCFCOA (Division 2) provides a bespoke judicial education program for general federal law and migration content and holds a standalone annual conference for judges who hear migration and general federal law matters.[356]

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348 *FCFCOA Annual Reports 2023/24* (n 151) 137.
349 Ibid 138.
350 Ibid 137.
351 Decisions by a registrar are subject to the right of a *de novo* review by a judge. The 2023/24 FCFCOA Annual Reports indicate that reviews have only been sought in a very small percentage of matters finalised following a summary dismissal listing before a registrar: *FCFCOA Annual Reports 2023/24* (n 151) 138.
352 The Hon Mark Dreyfus KC MP and the Hon Clare O'Neil MP, 'Restoring integrity to our protection system' (Joint Media Release, 5 October 2023). See also Commonwealth, *Mid-year economic and fiscal outlook 2023–24* (2023) 271 and *FCFCOA Annual Reports 2023/24* (n 151) 139.
353 *FCFCOA Annual Reports 2023/24* (n 151) 6. See also Commonwealth, *Budget 2024-25: Budget Measures, Budget Paper No 2* (2024) 49 and the Hon Mark Dreyfus KC MP, 'Investing in access to justice and improving community safety' (Media Release, Attorney-General, 14 May 2024).
354 The Hon Mark Dreyfus KC MP, 'Investing in access to justice and improving community safety' (Media Release, Attorney-General, 14 May 2024). See also Commonwealth, *Budget 2024-25: Budget Measures, Budget Paper No 2* (2024) 49.
355 *FCFCOA Annual Reports 2023/24* (n 151) 6. Note that this does not include the Court's bankruptcy jurisdiction, where the FCFCOA (Division 2) has already adopted harmonised rules with the Federal Court: *FCFCOA Annual Reports 2023/24* (n 151) 127.
356 *FCFCOA Annual Reports 2023/24* (n 151) 6.

The review consultations

7.26 The reviewers met with a number of general federal law judicial officers, as well as legal practitioners working in areas of general federal law – including migration, fair work, bankruptcy and intellectual property law. The Courts Consultation and the Public Consultation were also open to judicial officers and lawyers working in general federal law areas.

7.27 Responses from some of these participants, as well as a number of family law participants, suggest the reforms may have impacted the general federal law jurisdiction of the FCFCOA (Division 2) in ways that were not intended or foreseen.

7.28 It is important to note the relatively small number of general federal law participants that the reviewers heard from.[357] The majority of the review consultations and survey responses focused on issues affecting the family law jurisdiction of the Courts. This reflects the family law focus of the FCFCOA reforms and the Terms of Reference. It is therefore difficult to draw any firm conclusions about the issues raised in this chapter. However, the reviewers believe it is important to include these concerns in this report.

7.29 The consultations revealed a range of views regarding the impact of the reforms on the general federal law jurisdiction.

7.30 Some participants suggested that the restructure had made little difference to their work, while others described significant improvements. For example, one participant commended the Court's recent initiatives in the migration area, with encouraging reflections on the development of the CMD and the increased use of registrars:

> *[A]t the moment we have quite a lot of improvements in terms of clearance rates because of the roles of the judicial registrars in summary dismissals etc … [T]he old system was clunky, and it relied a lot on the individual docket judge, and in that sense it was susceptible to changes of procedures depending on the docket judge and the docket judge's style. And so that, I think, has benefited from the central [migration] docket.*

7.31 There were also submissions noting the improved functioning of the Court since the reforms, praising its leadership by Chief Judge Alstergren.

7.32 Several responses also suggested that the workload of judges with mixed dockets had improved as a consequence of the changes in family law, and particularly since the greater use of registrars to triage family law matters (as discussed in Chapter 3).

7.33 On the other hand, the reviewers also heard a number of concerns about the impacts of the restructure on the general federal law jurisdiction including, as described in Chapter 6, as a consequence of the new names for the Courts.

7.34 These responses revealed a strong feeling that the standing of the general federal law area had been diminished by the restructure of the Courts, with its emphasis on family law. As one lawyer described the present perception of the 'Circuit Court' among the legal profession:

> *At present it's perceived I think as "family plus", and that's really unfortunate and I don't think it reflects the history of the Court or the qualifications of the judges.*

[357] The reviewers met with and heard from approximately 39 participants whose primary experience with respect to the Courts is in its general federal law jurisdiction and 17 participants who have mixed family law and general federal law dockets or practices, compared to 131 participants with primarily family law experience.

7.35 Others suggested that the Court's broad range of general federal law work had been obscured by the focus on family law or described a loss of stature or reduced status within the justice system, with several people expressing concerns that this may impact the jurisdiction's attractiveness for potential judicial candidates.

7.36 There were also participants who were concerned by what they described as a lack of consideration by policymakers for how the general federal law jurisdiction would fit into a structure that was designed to address problems in the family law system. Echoing this concern, a number of people observed that the general federal law jurisdiction seems out of place in what is now a predominantly family law–centred structure:

> *I think the oddity is Gen Fed sitting in that bracket.*

7.37 One such participant submitted that if proper consideration had been given to the general federal law jurisdiction at the time, it would have been apparent that the proposed structure was not ideal for general federal law work:

> *I think it should have been, ideally would have been, dealt with in a separate court from the family court.*

7.38 By way of addressing these issues, a number of respondents, including both general federal law and family law participants, made suggestions for further structural reform to achieve a clearer demarcation of the family law and general federal law areas of the FCFCOA (Division 2).

7.39 Various ideas were floated, including creating separate Family Law and General Federal Law Divisions within the FCFCOA (Division 2), relocating the general federal law jurisdiction of the FCFCOA (Division 2) to the Federal Court (as a second division of that Court), or creating a standalone intermediate court of federal jurisdiction – a Federal Circuit (or District) Court – that could hear all federal law matters other than family law.

7.40 As a number of these responses indicated, this would also allow the unity that has developed between the family law judges since the reforms (as discussed in Chapter 2) to be formalised by the creation of a specialist family court with two divisions.

7.41 Finally, a number of people spoke to the issue of specialisation in general federal law, noting the reforms to the criteria for judicial appointment in family law.

7.42 While the amendments in section 111(2)(b) of the Act were acknowledged, these responses observed that this provision did not adequately recognise the role of subject matter expertise. As one person explained:

> *It's not just simply a case of you've got family law specialty or a general law specialty. Within general [federal] law, some of the areas of practice are indeed their own specialisations.*

7.43 Legal practitioners in particular suggested that, in some cases, specialist knowledge can be critical to judicial decision-making, indicating a desire for the appointment of more people with solid experience of practice in certain areas. This was mentioned most often in relation to migration matters, but also other areas of general federal law that give rise to issues of complexity.

Chapter 8.
Conclusions and recommendations

8.1 This review was established pursuant to section 284 of the FCFCOA Act.[358] In accordance with the requirements of that section, the review began immediately after the third anniversary of the commencement of the Act, on 2 September 2024.[359]

8.2 The six-month timeframe for the review imposed a number of constraints on the reviewers, both in terms of the methods available to gather information about the impacts of the reforms and the number of consultations with stakeholders that could be achieved. This was particularly so given that the review included the period over Christmas and New Year when many legal services and workplaces are closed. As noted in Chapter 1, the limited timeframe meant that it was not possible to call for standalone written submissions. It also meant that information about the impacts on litigants has mostly been heard through feedback from legal practitioners and the Courts.

8.3 Reflecting the Terms of Reference, the review has predominantly consulted with judicial officers and personnel of the FCFCOA (Division 1) and the FCFCOA (Division 2) and with legal and support professionals who use the Courts.

8.4 The primary method used by the reviewers involved face-to-face meetings with key stakeholders. This included consultations with 59 judges, registrars and senior executives from the Courts (including from the FCFCOA Courts, the FCWA and the Federal Court) and 58 professionals whose work intersects with these Courts. These consultations took place across more than 40 meetings.

8.5 The meetings were supplemented by two online surveys. One was a closed consultation for judicial officers and personnel of the FCFCOA and the Federal Court (Courts Consultation). This survey was issued in late November 2024 and was open until mid-December. The reviewers received 73 responses.

8.6 The other survey was a Public Consultation to which the reviewers received only 23 responses.[360] As discussed in Chapter 1, there are a number of possible reasons for the low response rate to the Public Consultation. It may be that, given the largely positive reports by participants during the first stage meetings, the low response rate reflects a lack of continuing apprehension about the restructure of the Courts. It may also be that the timing of the survey, so close to the Christmas vacation period, influenced the availability of potential respondents, and that despite appropriate efforts to distribute the survey, not all stakeholders received notification.

8.7 The survey forms are attached at Appendix 3.

8.8 While several respondents to the Courts Consultation identified themselves as people the reviewers had met with during the face-to-face meetings, it is not possible to ascertain the extent of overlap between participants in meetings and survey responses, as the surveys were able to be (and mostly were) completed anonymously.

8.9 The reviewers acknowledge the time, effort and consideration given by participants in both the face-to-face meetings and survey responses. The reviewers are also grateful to the FCFCOA (Division 1) and (Division 2), the FCWA and the Federal Court for their generous assistance in the supply of material and access to judicial officers and other personnel from the Courts.

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[358] The review date was brought forward from the fifth anniversary of the commencement of the FCFCOA Act to the third anniversary by way of an amendment to section 284 of the FCFCOA Act made by the *Family Law Amendment Act 2023* (Cth).

[359] Section 284 requires that a review of the Act's operation be conducted 'within 6 months after the third anniversary' of the Act's commencement.

[360] Note some responses to the Public Consultation were from individuals, others represented the views of an organisation.

8.10 In the preceding chapters, the details of the consultation responses to each of the terms of reference are reported. In this chapter, the reviewers consider the key themes that emerged across the consultations.

Enhanced collegiality and cooperation

8.11 A significant feature of the consultations was the many descriptions of the extent of change in the relationship between the judicial officers of the two Courts, particularly in relation to family law.

8.12 The reviewers heard frequent descriptions of improved levels of collegiality and cooperation between the judges of the Courts, with many noting the stark contrast to previous tensions. Words such as cohesive, collegiate, friendliness, camaraderie, harmony and unity were used often.

8.13 Typically, participants credited the shift to a single head of jurisdiction and the clarity effected by the single point of entry, as well as the advent of harmonised family law rules, for this transformation. Some also noted the impact of the present Chief Justice's drive to create a culture of collaboration, with many pointing to the development by Chief Justice Alstergren of an annual joint conference for the Courts.

8.14 The reviewers also heard how resources are shared, how judicial officers attend common meetings and continuing education modules, and that an enhanced sense of shared respect has been fostered. To paraphrase the responses, the overall picture that emerged was that the two Courts have moved from a divided culture to operating with a common purpose in family law.

8.15 Alongside these descriptions of a changed workplace were frequent references to improved judicial wellbeing, often attributed to the reduced docket sizes of judges in the FCFCOA (Division 2) resulting from the increased role and number of registrars managing the early stages of family law matters.

How the Courts are known

8.16 A further matter that stood out in the consultations was the widespread dislike of the new names for the Courts. However, as described in Chapter 6, the depth of that dislike and the appetite for change varied.

8.17 Although the two Courts continue to exist, the reviewers were struck by how many respondents used the language of a 'merger' to describe the reforms, or believed that there is now a single court known as the FCFCOA. It became clear that the names created by the new legislation, which denote one Court as Division 1 and the other Court as Division 2, had most likely increased rather than reduced any confusion.

8.18 The reviewers heard often that, in contrast to their former names, the present names are lengthy, complicated and challenging, with no easy shorthand description. The Division allocations are regarded as demeaning for some inside the Courts and counter-intuitive for people outside the Courts.

8.19 However, opinions differed about the importance of these issues as an appropriate subject for further reform.

8.20 One participant suggested that 'names matter', especially for vulnerable family law and migration clients looking for specialist decision-making and, like many others, wanted a return to the Courts' former names.

8.21 Others, however, had become accustomed to the new names, or had largely ignored the changes and continued to refer to the Courts by their previous names, and saw no need to meddle.

8.22 The mid-ground was represented by participants who preferred the previous names but acknowledged the significant barriers to reclaiming them, including the costs of rebadging the Courts and the reform fatigue of family law system professionals.

8.23 Three issues are worthy of mention.

8.24 The first concerns the apparent confusion created by the changed names, particularly for clients expecting the specialist expertise of a court dedicated to family law, and the potential for this to undermine the streamlining aims of the reforms. The consultations on this issue suggest that a less complicated name that more clearly identifies the subject matter expertise of the Courts might have been a better choice for court users.

8.25 The second issue concerns the way in which the complicated names and difficult acronym, which have led to shorthand descriptions such as the 'Focaccia Court', present a risk to the reputation and standing of the Courts.

8.26 The third matter is one that affects the FCFCOA (Division 2). Some participants noted a misapprehension that the FCFCOA is a single two-tiered court with a dominant focus on family law, contributing to a concern that the former Federal Circuit Court is in danger of losing its identity as a broad-based intermediate court of mixed jurisdiction.

Management of the Courts' caseload

8.27 Integral to the reforms was the intention that cases would proceed through the Courts in a more timely way, and that the growing backlog of pending cases would be reduced.

8.28 That expectation has not yet been realised. A heavy load of legacy cases still hampers the Courts' capacity to reap the full benefit of the reforms. The backlog of cases, however, is reducing, and cases dealt with in the new system are showing promising signs, with faster timelines being met.

8.29 In this regard, it is apparent that the Courts are capturing and reporting appropriate and helpful data by which performance can be monitored and measured.

8.30 The reviewers did, however, identify one area in which further information about the new caseload could be helpful. It relates to the tracking of when cases are resolving along the case management pathway.

8.31 The Courts were able to provide information that 69% of matters are resolved before a Compliance and Readiness hearing (when matters are set down for trial), but were not able to provide further analysis as to the stages along the case management pathway, or the case management events, at which matters are finalised.

8.32 Among participants there was a general appreciation of the Central Practice Direction for the clarity it has introduced, gathering in one place the principles of and the steps within a national case management system.

8.33 Although the detail of case management processes engaged the minds of many respondents – both as to the parts they believed were working well, and those where they would like to see change – the reviewers recognise that case management is a matter for the Courts.

8.34 The reviewers noted, however, that the desired changes most reflected in responses were the need for fewer court events on the case management pathway, and more flexibility – especially to ensure productive court events – and to facilitate the earliest possible attention for urgent cases.

8.35 The reviewers acknowledge that the Courts are continuing their own consideration of these and other refinements to their rules, practices and procedures, as a part of their ongoing commitment to improvement.

8.36 As the transfer of cases lies at the heart of how the Courts' caseload is managed, it was not surprising that the topic was raised many times.

8.37 There were some differing perspectives on how transfers are being handled, but the view most commonly heard was that the previous experience of cases going back and forth between the Courts has been replaced by greater efficiency, clarity and certainty. Much of the credit for this lies with the registrars, who are mostly responsible for those decisions.

8.38 There were also some differing views about the Courts' dispute resolution conferences, as discussed in Chapter 3. However, the most common view was that they are an important part of the case management pathway, with many cases being resolved after a conciliation conference with a registrar or a parenting conference with a registrar and often with a CCE.

8.39 As to the family law appellate jurisdiction, despite much conjecture before the reforms, overall the changes appear to have been well received. It was recognised that the timeline of appeals has greatly improved, and there were many references to the benefits of FCFCOA (Division 1) judges combining trial and appellate work. There was also frequently expressed support for the freeing up of Division 1 judges to hear trials as a result of the change enabling more FCFCOA (Division 2) appeals to be heard by a single judge.

Section 50 of the FCFCOA Act

8.40 Although a small number of respondents questioned whether it was "right" to remove original jurisdiction in family law from the FCFCOA (Division 1), there was widespread recognition that the changes to the allocation of original jurisdiction between the Courts has supported the single point of entry and helped promote clarity and certainty.

8.41 There was a focus, however, on the construction of section 50 of the Act and its prohibition against instituting family law or child support proceedings in the FCFCOA (Division 1). The jurisprudential uncertainties that pertain to it are canvassed in Chapter 4.

8.42 To resolve those uncertainties, on 6 December 2024, pursuant to section 54 of the FCFCOA Act (which enables the Chief Justice to delegate certain powers to judges), the Chief Justice delegated the powers in section 51 of the Act to all Division 1 judges.

8.43 Section 51 permits the transfer to the FCFCOA (Division 1) of a proceeding pending in the FCFCOA (Division 2). As proceedings instituted in Division 1 contrary to the section 50(1) prohibition are, by force of section 50(2), taken to be transferred and validly filed in Division 2, Division 1 judges now have the power to uplift them for hearing in Division 1.

8.44 When deciding whether to transfer a proceeding from Division 2, section 51 requires a judge to have regard to a range of factors, including whether proceedings in respect of an associated matter are pending in Division 1,[361] and the interests of the administration of justice.[362]

[361] *FCFCOA Act* s 51(3)(b).
[362] *FCFCOA Act* s 51(3)(d).

8.45 Accordingly, combined with the Act's provisions directing the just resolution of disputes as quickly, inexpensively and efficiently as possible,[363] it appears that Division 1 judges now have the power and discretion to transfer an amended proceeding so that they can finalise all aspects of a case before them.

The increasing complexity of family law matters

8.46 Felicity Bell has written that 'Australian family law is neither simple nor straightforward'.[364] As well as legal complexity, including a now 'voluminous body of case law',[365] safety concerns are prevalent in litigated disputes[366] and many client families present with multiple and complex issues.[367] This means judicial officers and other court professionals need to be competent in understanding the dynamics of domestic and family violence, including its impact on children, and have trauma-informed practice skills.[368]

8.47 Although so much of the determination around a transfer to the FCFCOA (Division 1) pivots around whether or not a case is complex, the reviewers heard many times that, in fact, most family law cases remaining for a judge to determine at a final hearing are complex – in both Courts. As one legal practitioner submitted:

> *I think that Div 2 is dealing with quite a lot of complex matters, so I think the first thing I'd say is I think the assumption that Div 1 is dealing with the difficult stuff and Div 2 is dealing with the easy stuff, I don't accept that.*

8.48 This is not to second guess that the most complex cases (determined on the various measures that inform the discretion to transfer a case) are properly transferred to the FCFCOA (Division 1). It is simply to acknowledge that the judges in the FCFCOA (Division 2) also hear complex cases. The significant proportion of parenting cases involving multiple risk factors attests to this.[369]

8.49 This pervasive complexity highlights the need for specialist expertise among judicial officers hearing family law matters, an issue of some significance to stakeholders during the debates surrounding the FCFCOA Bills (see Chapter 5).

8.50 The review consultations suggest that the level of specialisation of judicial officers hearing family law matters has not diminished since the reforms, as had been feared by some, and that recent judicial appointments have included many with considerable experience of family law practice.

8.51 Participants generally applauded the appointments made since the passage of the FCFCOA Act, as well as the current appointments process for federal judicial office. The amendments to the legislative criteria for judicial appointments, which recognise the need for expert skills and knowledge of the jurisdiction, were well supported.

[363] *FCFCOA Act* ss 5, 67–8, 190–1.
[364] Felicity Bell, 'A Tale of Two Courts' (2020) 29 *Journal of Judicial Administration* 118, 126.
[365] Ibid.
[366] The 2023/24 FCFCOA Annual Reports indicate that 70% of parenting cases in 2023-24 involved four or more risks to a child: *FCFCOA Annual Reports 2023/24* (n 151) 9.
[367] See Rae Kaspiew et al (n 283) 16.
[368] See Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper No 86, October 2018) ch 10.
[369] See Rae Kaspiew et al (n 283) and Chapter 5.

8.52 Also pertinent to the concerns raised before the reforms, review participants indicated strong support for the increased focus by the Courts on competency to identify and appropriately respond to family violence. This focus includes a commitment to ongoing judicial education and, most especially, to the development of family violence initiatives such as the Evatt List and the Lighthouse screening process for high-risk cases.

8.53 As was made clear throughout the review, the effective handling of Evatt List matters requires considerable specialist skill and experience. The consultations suggest these attributes are well in evidence among the judicial officers who manage the list.

8.54 Although some responses emphasised the importance of ongoing education for judicial officers and other court professionals, the consultations overall suggest a greater level of confidence in the skills and expertise of family law decision-makers than was anticipated prior to the implementation of the reforms.

The increasing complexity of general federal law matters

8.55 The consultations suggest that general federal law matters have also seen increasing complexity in some areas, including migration, bankruptcy, industrial relations and intellectual property.

8.56 While the Federal Circuit Court was designed to hear matters 'of a less complex nature' than were dealt with by the Federal Court and the Family Court,[370] responses indicate that it is not uncommon for FCFCOA (Division 2) general federal law matters to involve complexities that require specialist knowledge of the particular area of the law.

8.57 Participants described a number of consequences of having cases with complex features listed before a judge who lacks a specialist understanding of the jurisdiction. Mirroring the submissions by family lawyers on this point, these included the possibility of extended hearing times and increased costs for clients.

8.58 Reflecting these concerns, some respondents referred to the need for greater recognition of the importance of specific subject matter expertise in the appointment of general federal law judges.

The impact of the restructure on general federal law

8.59 The consultations revealed a number of concerns about the impact of the family law reforms on the general federal law jurisdiction of the FCFCOA (Division 2), including as a result of the changed names for the Courts.

8.60 While acknowledging there had been a need for changes to the family law system, some felt that the general federal law jurisdiction's identity had been obscured in the process of bringing the Courts together, and that its standing in the legal community had been diminished.

8.61 The reviewers heard calls for a clearer demarcation of the family law and general federal law jurisdictions of the FCFCOA (Division 2), including a range of suggestions from both family law and general federal law participants for how that might be achieved.

8.62 There are several things to note about these submissions, as discussed in Chapter 7.

[370] Explanatory Memorandum, Federal Magistrates Bill 1999 1.

8.63 The first is that the numbers of general federal law participants in the consultations were relatively small. Reflecting the focus of the reforms and the terms of reference, most participants offered a family law perspective.

8.64 Secondly, it is important to emphasise that there were participants who felt the reforms had made little difference to their day-to-day work, as well as participants whose work had been improved by the changes, particularly among those with mixed dockets or practices.

8.65 The third matter to note is that, alongside the concerns about the impacts of the restructure, the reviewers also heard strong praise for recent innovations by the FCFCOA (Division 2), including the development of the Central Migration Docket, and for the leadership of the Court. Recent government funding initiatives, such as the appointment of additional migration judges, were also commended.

A calmer family law system

8.66 The prevailing impression conveyed by the consultations for this review is that, with the exception of the Courts' names and the problems created by section 50, the aims of the FCFCOA reforms have been largely successful. This is particularly so for the dual leadership appointments for the Courts, the single point of entry for family law matters, the new appeal processes and the specialisation requirements for appointment as a family law judicial officer.

8.67 This is not to overlook the responses with less positive perspectives, the respondents who suggested refinements or improvements, and the fact that the reviewers heard from a limited sample of family law practitioners.

8.68 The reviewers heard several direct, and many indirect, concessions that fears held about the reforms prior to their implementation had proven to be unfounded. As one legal practitioner expressed this:

> *[I]t is interesting to reflect where the profession was at before the court merged to where it is now, and just the level of angst that was there just doesn't exist.*

8.69 Perhaps the most telling feature of the consultations was the frequent expression of concern that the present review might lead to further significant change, which was clearly unwanted. While continuing improvements were sought and welcomed, some participants suggested that the courts have never been as cohesive, nor the family law system as functional, as they are at present.

8.70 Although a number of problems and cautions were raised, as discussed above and throughout this report, there was also a strong view that practice and procedure in family law has seen significant improvement over the past several years.

8.71 It is important to emphasise that a number of key elements of this improvement are a product of factors other than the legislative reforms.

8.72 One such factor concerns the leadership of the Courts.

8.73 Chief Justice Alstergren holds appointments as both the Chief Justice of the FCFCOA (Division 1) and Chief Judge of the FCFCOA (Division 2), being positions he already held prior to the reforms. The new FCFCOA Act permitted, rather than authorised, those dual appointments.

8.74 Although a small number of respondents expressed a preference for the FCFCOA (Division 2) (or the general federal law jurisdiction) to have its own separate head of jurisdiction, others expressed anxiety that much of what has been achieved could be undermined by a return to separate heads of jurisdiction for the two family courts.

8.75 Another important factor has been the role of government funding.

8.76 Woven throughout the review was the recognition and appreciation that, both before and since September 2021, the reforms had been supported by ongoing government funding, which had enabled key elements of the implementation of the reforms, particularly the significant increase in and changed role of registrars.[371] The reviewers also note the more recent funding for additional migration judges and the establishment of Migration Hubs dedicated to expeditiously resolving migration and protection matters.[372]

8.77 It is also important to recognise the unintended difficulties created by the restructure of the Courts, which was designed to address problems affecting the family law system. The positive sentiments regarding the bringing together of the federal family law judges contrasted with the less positive submissions regarding the impacts on the identity and perceptions of general federal law. This contrast raises a question as to whether it is possible to have both a unified family law jurisdiction and a broad-based intermediate federal court that includes family law.

Where does the review lead?

8.78 The reviewers were asked to consider and report on the impact of the structural reforms to the Family Court and the Federal Circuit Court, including with respect to the issues set out in the terms of reference.

8.79 As noted, the review was constrained by the statutory timeframe, and the reviewers recognise the possibility that not all interested stakeholders were reached.

8.80 While acknowledging these constraints, the feedback received suggests that the Courts' dual appointments, the single point of entry (with the exception of an issue with the operation of section 50 of the Act), the original and appellate jurisdictions in federal family law matters, and the level of specialisation of judicial officers exercising family law jurisdiction, are working well. As set out below, the reviewers have seen no need to make recommendations on these matters.

8.81 However, the reviewers received mixed feedback on the questions of the names of the Courts and the impacts of the reforms on the operation of the FCFCOA (Division 2)'s general federal law jurisdiction. Recommendations for further consideration of these matters, and the operation of section 50 of the Act, are set out below.

[371] Several of the major funding initiatives are referred to in Chapter 3.
[372] The Hon Mark Dreyfus KC MP, 'Investing in access to justice and improving community safety' (Media Release, Attorney-General, 14 May 2024).

Areas that are working well

8.82 The clear picture revealed by the review is that the FCFCOA reforms, combined with the Courts' own initiatives both before and since, have led to a range of positive impacts on the operation of the family law system.

Dual appointments

8.83 The dual leadership appointments for the Courts, which were expressly permitted by the FCFCOA Act, have supported the development of a new level of collegiality and cooperation across the two Courts, creating a sense of cohesion, common purpose and unity of approach in family law that had been challenging to achieve when there were separate heads of jurisdiction. The consultations suggest that the capacity to appoint a single head of jurisdiction for the federal family law jurisdiction is critical to maintaining this cohesion.

8.84 The reviewers also heard praise for the leadership of the general federal law jurisdiction, and the positive changes particularly in the migration area.

Single point of entry and original jurisdiction in family law

8.85 With the exception of uncertainty regarding the interpretation of section 50 of the FCFCOA Act, the changes to the original jurisdiction of the Courts, by which the single point of entry has been effected, have been key to the successes revealed by the review.

8.86 The implementation of the single point of entry, and the objects and overarching purposes in the FCFCOA Act, have been well supported by the Courts' commitment – both before and since the restructure – to harmonised rules, common forms, a clear case management pathway and a comprehensive Central Practice Direction.

8.87 While a number of concerns and suggested changes to the pathway were raised by participants, the reviewers acknowledge that case management is a matter for the Courts. The reviewers also recognise that the Courts are continuing their work on case management refinements, which they acknowledge are a work in progress.

Appellate jurisdiction

8.88 The changes to the appellate jurisdiction of the Courts – including all Division 1 judges undertaking both appeal and trial work, and the starting position that a single judge hears a Division 2 appeal – were some of the most controversial in the lead up to the 2021 legislation. However, participants regarded these as amongst the most successful reforms, with greatly improved management, timelines and practices.

Family law specialisation

8.89 The consultations suggest that the legislative provisions governing the appointment of family law judges, together with changes to the appointments process, have seen an increase in the level of specialisation among recently appointed judicial officers hearing family law matters, including skills and experience in dealing with family violence.

8.90 Although some participants identified concerns that family law matters are sometimes listed before a judge from a non–family law background in the FCFCOA (Division 2), the reviewers recognise the mixed-docket needs of some registries, and the benefits in having judges with a broad skillset, and acknowledge that the allocation of judicial officers to particular lists is a matter for the Court.

Areas for further consideration

8.91 Despite the many positive responses regarding key elements of the structural reforms, the reviewers have identified several areas where there are opportunities for improvement or a need for further investigation or reform.

Section 50 of the FCFCOA Act

8.92 The uncertainty surrounding the construction of section 50, prohibiting a person from instituting family law or child support proceedings in the FCFCOA (Division 1), was raised many times in the consultations.

8.93 Although there is no authoritative decision, the relevant Full Court cases – *Gilford & Cavaco* [2024] FedCFamC1A 55 and *Vang & Chung (No 3)* [2024] FedCFamC1A 199 – rehearse different interpretations of the section.

8.94 One approach favours a strict interpretation of the prohibition as 'absolute in its terms',[373] so that an amended application or amended response in a case already before the FCFCOA (Division 1) must still start in the FCFCOA (Division 2).

8.95 The other approach favours an interpretation that reflects the objects in section 5 and the directive in section 43 of the FCFCOA Act, to ensure that parties are able to finalise their proceedings in Division 1, without the need to return to Division 2 and without a multiplicity of proceedings.

8.96 The Courts have already recognised the need to bring clarity to this issue, and to ensure that parties are saved the delay and cost of seeking a transfer to Division 1 in these cases. To do so, the Courts have recently implemented a process that enables Division 1 judges to uplift and determine an amended application or response relating to a matter already before them, so as to bring all justiciable matters to conclusion at the same time.

8.97 That appears to deal with the issue, but reviewers recognise that the process has only recently been put in place, and is as yet untested. In any event, to ensure the certainty for family law litigants that was repeatedly called for in the course of the consultations, the reviewers recommend consideration of legislative amendment to resolve the issue.

Recommendation 1: Consideration be given to amending the FCFCOA Act to bring clarity and certainty to the operation of section 50 to resolve the issues raised in *Gilford & Cavaco* [2024] FedCFamC1A 55 and *Vang & Chung (No 3)* [2024] FedCFamC1A 199 regarding this section.

[373] *Gilford & Cavaco* (n 252) [51].

The Courts' names

8.98 The consultations regarding the impact of the changes to the Courts' names presented difficulties for the review. The predominant view was that neither the name of the Federal Circuit and Family Court of Australia nor the names of the respective Courts properly convey that they remain separate Courts. The review responses indicated that the new names have tended to obscure rather than clearly describe what they do. In addition, reviewers heard that the FCFCOA acronym is cumbersome and has given rise to the use of unfortunate nicknames for the Courts. These concerns led a number of respondents to call for a return to using the Courts' former names.

8.99 On the other hand, and despite the general dislike of the names and recognition of the problems they have created, the review also revealed opposition to any further change on a number of bases, including reform fatigue and the costs of rebadging the Courts.

8.100 The reviewers acknowledge the strong desire for stability voiced by many stakeholders during the course of the review. However, the reviewers also note the submissions describing adverse impacts of the current names on the accessibility and reputations of the Courts and believe that these problems should be addressed.

8.101 The reviewers recommend that the question of the Courts' names be considered at the same time as the question of unintended impacts on Division 2's general federal law jurisdiction, as discussed below.

General federal law jurisdiction

8.102 The question of the Courts' names is entwined with the consultation responses indicating some unintended impacts of the restructure on the general federal law jurisdiction of the FCFCOA (Division 2). These included concerns that the changed names for the Courts, and the widespread misapprehension that the FCFCOA is a single court, with a predominant focus on family law, had obscured the identity and specialist work of the general federal law jurisdiction.

8.103 Alongside praise for the leadership of the Courts, there were concerns that inadequate attention had been given to the implications for general federal law by the design of court reforms focused on the needs of the family law system.

8.104 There were also calls, by both family law and general federal law participants, for further structural changes to more clearly demarcate the family law and general federal law jurisdictions.

8.105 The material regarding these issues was insufficient for the reviewers to recommend any reforms. It is, however, sufficient to suggest the need for further consideration, including more extensive consultation with relevant stakeholders than was able to be achieved in the limited timeframe for this review.

Recommendation 2: The Attorney-General investigate whether there is a need for any reforms to the general federal law jurisdiction of the FCFCOA (Division 2).

Recommendation 3: The question of the Courts' names be considered at the same time as the investigation in Recommendation 2.

Appendices

Appendix 1 – Terms of reference

Objective

In accordance with s 284 of the *Federal Circuit and Family Court of Australia Act 2021* (FCFCOA Act), a review is to be conducted to consider the operation of the FCFCOA Act over the first three years since its commencement.[1]

Context

On 1 September 2021, through the enactment of the FCFCOA Act and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021*, the then Family Court of Australia and the then Federal Circuit Court of Australia were brought together under a single administrative structure known as the Federal Circuit and Family Court of Australia (FCFCOA) comprising two divisions.

Division 1 of the FCFCOA differs from the previous stand-alone Family Court of Australia in several key respects, including that it does not have original jurisdiction in family law matters and does not have an Appeal Division.

Matters to be considered

The review is to consider and provide a written report on:

1. the impact of the structural reforms to the Family Court of Australia and the Federal Circuit Court of Australia, including with respect to:
    a. dual appointments
    b. the operation of the FCFCOA (Division 2) as a single point of entry for federal family law matters
    c. the allocations of original and appellate jurisdiction in federal family law matters
    d. the level of specialisation of judicial officers exercising family law jurisdiction
    e. any impact of the change of name to FCFCOA Division 1 and Division 2
2. any aspects of the FCFCOA Act that have had unintended impacts on the operation or the effectiveness of the court's federal family law and general federal law jurisdiction, procedure or jurisprudence.
3. with respect to the above matters, whether the operation of the Act can be improved through legislative amendments or other non-legislative changes, including structural changes.

Broader consideration of the family law system and *Family Law Act 1975* (Cth) outside of the impact of the FCFCOA Act, resourcing for the courts, or an economic evaluation of the efficiency of the courts, are not to form part of the review.

[1] The review date was brought forward from the fifth anniversary of the commencement of the FCFCOA Act to the third anniversary following an amendment of s.284 made by the *Family Law Amendment Act 2023* (Schedule 8, item 1).

Conduct of the review

The review should consult as widely as the reviewer considers necessary, including with the Federal Circuit and Family Court of Australia, the Family Court of Western Australia, government funded legal assistance providers, the legal profession more broadly – including peak representative bodies – and the community.

In the event that there is more than one reviewer, the reviewers must provide a single, agreed report, including only joint recommendations.

Timing of the review

The review will commence after 1 September 2024 and must be completed on or before 1 March 2025. A copy of the report will be tabled in each House of the Australian Parliament within 15 sitting days of that House after the report is given to the Attorney-General.

Appendix 2 – Consultation meetings

Participants	Date	Format
Chief Justice, Deputy Chief Justice, senior executives and senior staff, FCFCOA	5-Sep-24	Face to Face
Victoria Legal Aid	9-Sep-24	Virtual
Chief Justice, Federal Court of Australia	11-Sep-24	Face to Face
Chief Justice, FCFCOA	11-Sep-24	Face to Face
Senior executives and senior staff, FCFCOA	11-Sep-24	Face to Face
Law Institute of Victoria	16-Sep-24	Virtual
Chief Justice and Judge, Family Court of Western Australia	16-Sep-24	Virtual
Geoffrey Dickson KC and Caroline Paterson, Family Law Bar Association of the Victorian Bar	16-Sep-24	Virtual
Women's Legal Service Victoria*	16-Sep-24	Virtual
JusticeNet SA	19-Sep-24	Virtual
Family & Relationship Services Australia	19-Sep-24	Virtual
Jaquie Palavra, NT Law Society and NT Legal Aid	19-Sep-24	Virtual
Judges, FCFCOA (Division 2)	19-Sep-24	Virtual
Judge, FCFCOA (Division 1)	19-Sep-24	Virtual
Judges, FCFCOA (Division 1) and FCFCOA (Division 2)	24-Sep-24	Face to Face
Judge, FCFCOA (Division 2)	24-Sep-24	Virtual
National Legal Aid	25-Sep-24	Virtual
Chief Justice and Judges, Federal Court of Australia	30-Sep-24	Virtual
Deputy Chief Judge, senior executive and senior staff member, FCFCOA	1-Oct-24	Face to Face
Senior executives and senior staff member, FCFCOA	1-Oct-24	Face to Face
Asylum Seeker Resource Centre	2-Oct-24	Virtual
Georgina Costello KC, Nick Wood SC and Angel Aleksov, Migration Law Bar Association of the Victorian Bar	2-Oct-24	Virtual
Senior executive, Federal Court of Australia	7-Oct-24	Virtual
Karyn Anderson, legal practitioner	7-Oct-24	Virtual
Judges, FCFCOA (Division 1) and FCFCOA (Division 2)	8-Oct-24	Hybrid

Participants	Date	Format
Family law registrars, FCFCOA	8-Oct-24	Hybrid
The Family Law Practitioners' Association of Queensland	8-Oct-24	Hybrid
Queensland Law Society	8-Oct-24	Hybrid
Deputy Chief Justice and Judges, FCFCOA (Division 1)	9-Oct-24	Hybrid
Law Society of New South Wales	9-Oct-24	Hybrid
Refugee Advice & Casework Service	9-Oct-24	Hybrid
The New South Wales Bar Association, Family Care and Adoption Committee	9-Oct-24	Hybrid
Law Council of Australia	14-Oct-24	Virtual
Chief Justice and senior staff member, FCFCOA	14-Oct-24	Face to Face
Top End Women's Legal Service	15-Oct-24	Virtual
Registrar, Federal Court of Australia	15-Oct-24	Virtual
Women's Legal Services Australia	15-Oct-24	Virtual
Family law registrars, FCFCOA	16-Oct-24	Hybrid
Josh Bornstein, legal practitioner	16-Oct-24	Virtual
General federal law registrars, FCFCOA	16-Oct-24	Face to Face
Law Society of Western Australia	21-Oct-24	Virtual
Law Council of Australia	31-Oct-24	Virtual
Jenny Firkin KC and Kate Burke SC	31-Oct-24	Virtual
No to Violence	31-Oct-24	Virtual
Deputy Chief Judge and Judges, FCFCOA (Division 2)	31-Oct-24	Virtual
Chief Justice, Deputy Chief Justice, Judge and senior staff member, FCFCOA	8-Nov-24	Face to Face
Chief Justice, Deputy Chief Justice, senior executive and senior staff member, FCFCOA	16-Dec-24	Virtual
Chief Justice, Federal Court of Australia	19-Dec-24	Virtual
Chief Justice and senior staff member, FCFCOA	20-Jan-25	Virtual
Chief Justice and senior staff member, FCFCOA	27-Feb-25	Virtual

* also included a participant from Women's Legal Service Australia

Appendix 3 – Public Consultation and Courts Consultation survey forms

Public consultation – Review of the Federal Circuit and Family Court of Australia Act 2021

About the review

Section 284 of the *Federal Circuit and Family Court of Australia Act 2021* (FCFCOA Act) requires a review of the FCFCOA Act to be undertaken within 3 years of the Act's commencement.

The Attorney-General has appointed the Hon Linda Dessau AC CVO and Professor Helen Rhoades OAM to conduct the review. They are to provide a report on the review to the Attorney-General on or before 1 March 2025.

Terms of reference

The review is to consider:

1. The impact of the structural reforms to the Family Court of Australia and the Federal Circuit Court of Australia, including with respect to:
    a. dual appointments
    b. the operation of the FCFCOA (Division 2) as a single point of entry for federal family law matters
    c. the allocations of original and appellate jurisdiction in federal family law matters
    d. the level of specialisation of judicial officers exercising family law jurisdiction
    e. any impact of the change of name to FCFCOA Division 1 and Division 2.
2. Any aspects of the FCFCOA Act that have had unintended impacts on the operation or the effectiveness of the court's federal family law and general federal law jurisdiction, procedure or jurisprudence.
3. With respect to the above matters, whether the operation of the Act can be improved through legislative amendments or other non-legislative changes, including structural changes.

Broader consideration of the family law system and *Family Law Act 1975* (Cth) outside of the impact of the FCFCOA Act, resourcing for the courts, or an economic evaluation of the efficiency of the courts, are not to form part of the review.

Read the full terms of reference for the review.

Structural reform of the courts in 2021

The FCFCOA Act commenced on 1 September 2021. The FCFCOA Act, along with the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021*, brought the Family Court of Australia and the Federal Circuit Court of Australia together under a unified administrative structure (FCFCOA).

There continues to be two courts. When the FCFCOA Act commenced:

- the Family Court of Australia became known as the Federal Circuit and Family Court of Australia (Division 1).
- the Federal Circuit Court of Australia became known as the Federal Circuit and Family Court of Australia (Division 2).

The FCFCOA (Division 1) has jurisdiction in family law and child support proceedings (federal family law matters). The FCFCOA (Division 2) has jurisdiction in relation to both federal family law matters and general federal law matters.

Particular aspects of the FCFCOA Act are described throughout the submission form.

Who reviewers want to hear from

This consultation is open to the public.

People who interact with the FCFCOA (Division 1) and/or the FCFCOA (Division 2) are encouraged to share their experiences of the impact of the structural reforms. This includes:

- legal practitioners, mediators and other professionals who provide a range of supports and services to people in the courts
- people who have had matters in the courts since September 2021.

The reviewers are separately consulting with judges, registrars and court personnel of the FCFCOA (Division 1) and the FCFCOA (Division 2).

Purpose and scope of the consultation

Reviewers will use your consultation responses to inform their review and report to the Attorney-General.

Please do not provide detailed information about personal legal matters or cases, or personal information pertaining to third parties. Please do not provide information that is the subject of legal restriction (for example, under section 114Q or section 114R of the *Family Law Act 1975*). Where that information is provided, reviewers may not be able to consider your submission in their review.

Please do not provide information about your experience of the operation of the *Family Law Act 1975*, or other issues that are outside of the scope of the terms of reference.

Apart from the question relating to consent, all questions in the survey are optional and you do not have to complete all of the sections.

Legal assistance and supports More Information

If the consultation raises concerns for you, supports are available, including:

- Lifeline: 13 11 14 or online chat
- Beyond Blue: 1300 224 636 or webchat

Reviewers are not able to respond to you or assist with your personal legal matters.

Information about how to contact your local legal aid commission or community legal centre is available from National Legal Aid and Community Legal Centres Australia.

Information about finding a lawyer in your state or territory is available on the Law Council of Australia website.

Information about legal advice and other supports available in relation to family violence is available on the Family Violence Law Help website.

Consent to publish your submission

We will provide the information you submit as part of the consultation to the reviewers, the Hon Linda Dessau AC CVO and Professor Helen Rhoades OAM, to inform their review and report.

Please do not provide detailed information about personal legal matters or cases, or personal information pertaining to third parties. Please do not provide information that is the subject of legal restriction (for example, under section 114Q or section 114R of the *Family Law Act 1975*. Where that information is provided, reviewers may not be able to consider your submission in their review.

We may publish the whole or part of your submission where you provide consent. We may also publish aggregated data drawn from the submissions received.

Where you consent to publication, we may publish:

- **your name** (if provided) if the submission is made by you as an individual
- **name of the organisation** (if provided) on whose behalf the submission has been made
- **your responses** and comments.

We will not publish information that is considered to be sensitive personal information, defamatory or otherwise inappropriate.

All responses and consultation information (even if not intended or approved for publication) may be subject to Freedom of Information (FOI) requests. Where there is an FOI request for submissions, it will be assessed in accordance with the *Freedom of Information Act 1982* (Cth).

Do you give consent for your response to be published?

(Required)

Please select only one item

- Yes, I consent to my submission being published.
- No, I do not consent to my submission being published but I understand that de-identified aggregate data may be published.

For more information on how we treat your information read our Privacy policy.

Regardless of permission to publish, information submitted as part of the consultation will be provided to the reviewers, to inform their review and report.

Your details

Your responses to these questions will be published as part of your submission if you have given us consent to do so.

What is your name?

Note: submissions may be made anonymously. This question is optional. You do not need to include your name.

If you choose to include your name here and have given consent to publish, your name will be included with your published response.

Name:

What is your email address?

If you enter your email address then you will automatically receive an acknowledgement email when you make your submission.

Note: this question is optional. Your response to this question will not be published.

Email:

Where are you located?

(Please select one)

Please select only one item

- NSW
- Vic
- Qld
- WA
- SA
- Tas
- ACT
- NT
- More than one location

What type of area are you located in?

Please select only one item

- Metropolitan
- Regional
- Remote

What best describes your engagement with the FCFCOA (Division 1) and/or the FCFCOA (Division 2)?

Please select all that apply

- Legal practitioner – barrister
- Legal practitioner – solicitor
- Family dispute resolution practitioner or mediator
- Family or Expert Report writer
- Court user
- Other
- Prefer not to say

You may provide details to explain your answer:

Which area of law does your engagement with the court relate to (select any that apply):

(Please select all that apply)

Please select all that apply

- family law

- migration
- administrative law
- admiralty law
- bankruptcy
- consumer law
- human rights
- industrial law
- intellectual property
- other
- all of the above
- none

You may provide details to explain your answer:

Review consultation

The Attorney-General has asked the reviewers to consider and report on:

1. The impact of the structural reforms to the Family Court of Australia and the Federal Circuit Court of Australia, including with respect to:
    a. dual appointments
    b. the operation of the FCFCOA (Division 2) as a single point of entry for federal family law matters
    c. the allocations of original and appellate jurisdiction in federal family law matters
    d. the level of specialisation of judicial officers exercising family law jurisdiction
    e. any impact of the change of name to FCFCOA Division 1 and Division 2.

2. Any aspects of the FCFCOA Act that have had unintended impacts on the operation or the effectiveness of the court's federal family law and general federal law jurisdiction, procedure or jurisprudence.

3. With respect to the above matters, whether the operation of the Act can be improved through legislative amendments or other non-legislative changes, including structural changes.

The reviewers are also interested in hearing about the impact of any other aspects of the structural reforms.

Please note that broader consideration of the family law system and *Family Law Act 1975* (Cth) outside of the impact of the FCFCOA Act, resourcing for the courts, and an economic evaluation of the efficiency of the courts, are not part of the review.

This form invites you to make submissions about these issues. Please leave your responses to the various terms of reference in the spaces provided.

1. The impact of dual appointments.

Relevant background:

Section 21 of the FCFCOA Act provides that nothing in the Act prevents the Chief Justice of the FCFCOA (Division 1) being appointed to, and holding at the same time, the office of Chief Judge of the FCFCOA (Division 2).

Section 21 also provides that nothing in the FCFCOA Act prevents the Deputy Chief Justice of the FCFCOA (Division 1) being appointed to, and holding at the same time, the office of Deputy Chief Judge (Family Law) of the FCFCOA (Division 2).

2. The impact of the operation of the FCFCOA (Division 2) as a single point of entry for federal family law matters.

Relevant background:

Before the structural reforms, federal family law matters could be commenced in either the Family Court of Australia or the Federal Circuit Court of Australia.

The FCFCOA Act created what is referred to as a 'single point of entry' for federal family law matters. The single point of entry is in Division 2. Federal family law matters must not be commenced in the FCFCOA (Division 1) (section 50 of the FCFCOA Act). Section 149 of the FCFCOA Act enables matters to be transferred from the FCFCOA (Division 2) to the FCFCOA (Division 1) in certain circumstances.

3. The impact of the allocations of original and appellate jurisdiction in federal family law matters.

Relevant background:

The FCFCOA (Division 2) has original jurisdiction in relation to federal family law matters. The FCFCOA (Division 1) has original jurisdiction in relation to federal family law matters that are transferred to it from Division 2.

The FCFCOA (Division 1) also has appellate jurisdiction in relation to federal family law matters.

Before the FCFCOA Act commenced, the Family Court of Australia had a separate Appeal Division. The FCFCOA Act removed the Appeal Division. All judicial officers in the FCFCOA (Division 1) can hear appeals.

Section 32 of the FCFCOA Act provides that an appeal from a Judge of the FCFCOA (Division 2) is heard by a single judge of Division 1, or the Full Court if the Chief Justice considers it appropriate. This is a change from the position prior to the structural reforms, when appeals from a Judge of the Federal Circuit Court were heard by the Full Court of the Family Court, unless the Chief Justice considered it appropriate for a single judge of the Family Court to exercise jurisdiction.

4. The impact of the level of specialisation of judicial officers exercising family law jurisdiction.

Relevant background:

Before the FCFCOA Act, section 22(2)(b) of the *Family Law Act 1975* (Cth) provided that a requirement for appointment to the Family Court of Australia was that: by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.

There was no similar requirement for appointments to the Federal Circuit Court.

Sections 11 and 111 of the FCFCOA Act require that, for judicial appointments to the FCFCOA (Division 1) and for judicial appointments to the FCFCOA (Division 2) where the person is expected to hear family law matters, the person must be 'by reason of their knowledge, skills, experience and aptitude' a suitable person to deal with family law matters, 'including matters involving family violence'.

5. The impact of the change of name to Federal Circuit and Family Court of Australia (Division 1) and (Division 2).

Relevant background:

Pursuant to section 8 of the FCFCOA Act, on the commencement of the FCFCOA Act:

- the Family Court of Australia became known as the Federal Circuit and Family Court of Australia (Division 1)
- the Federal Circuit Court of Australia became known as the Federal Circuit and Family Court of Australia (Division 2).

6. Any other impacts of the structural reforms to the Family Court of Australia and the Federal Circuit Court of Australia.

7. **Any unintended impacts on the operation or the effectiveness of the court's federal family law jurisdiction, procedure or jurisprudence.**

Note: this question relates to **federal family law**.

8. **Any unintended impacts on the operation or the effectiveness of the court's general federal law jurisdiction, procedure or jurisprudence.**

Note: this question relates to **general federal law**.

9. **With respect to the matters canvassed in questions 1-8 above, whether the operation of the Act can be improved through legislative amendments or other non-legislative changes, including structural changes.**

Courts consultation – Review of the Federal Circuit and Family Court of Australia Act 2021

About the review

Section 284 of the *Federal Circuit and Family Court of Australia Act 2021* (FCFCOA Act) requires a review of the FCFCOA Act to be undertaken within 3 years of the Act's commencement.

The Attorney-General has appointed the Hon Linda Dessau AC CVO and Professor Helen Rhoades OAM to conduct the review. They are to provide a report on the review to the Attorney-General on or before 1 March 2025.

Terms of reference

The review is to consider:

1. The impact of the structural reforms to the Family Court of Australia and the Federal Circuit Court of Australia, including with respect to:
    a. dual appointments
    b. the operation of the FCFCOA (Division 2) as a single point of entry for federal family law matters
    c. the allocations of original and appellate jurisdiction in federal family law matters
    d. the level of specialisation of judicial officers exercising family law jurisdiction
    e. any impact of the change of name to FCFCOA Division 1 and Division 2.
2. Any aspects of the FCFCOA Act that have had unintended impacts on the operation or the effectiveness of the court's federal family law and general federal law jurisdiction, procedure or jurisprudence.
3. With respect to the above matters, whether the operation of the Act can be improved through legislative amendments or other non-legislative changes, including structural changes.

Broader consideration of the family law system and *Family Law Act 1975* (Cth) outside of the impact of the FCFCOA Act, resourcing for the courts, or an economic evaluation of the efficiency of the courts, are not to form part of the review.

Read the full terms of reference for the review.

Structural reform of the courts in 2021

The FCFCOA Act commenced on 1 September 2021. The FCFCOA Act, along with the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021*, brought the Family Court of Australia and the Federal Circuit Court of Australia together under a unified administrative structure (FCFCOA).

There continues to be two courts. When the FCFCOA Act commenced:

- the Family Court of Australia became known as the Federal Circuit and Family Court of Australia (Division 1).
- the Federal Circuit Court of Australia became known as the Federal Circuit and Family Court of Australia (Division 2).

The FCFCOA (Division 1) has jurisdiction in family law and child support proceedings (federal family law matters). The FCFCOA (Division 2) has jurisdiction in relation to both federal family law matters and general federal law matters.

Particular aspects of the FCFCOA Act are described throughout the submission form.

Who reviewers want to hear from

This consultation is not open to the public and is directed at judges, registrars and court personnel of the FCFCOA (Division 1), the FCFCOA (Division 2) and the Federal Court of Australia.

You are encouraged to share your experiences of the impact of the structural reforms.

Purpose and scope of the consultation

We will provide the information you submit as part of the consultation to the reviewers. Reviewers will use your consultation responses to inform their review and report to the Attorney-General.

The consultation is optional. You do not have to complete all of the questions in the consultation or complete all of the sections. You may complete the consultation anonymously.

Your responses will not be published.

Where information from your submission is reflected in the review report, it will be done in a way that will not identify you.

The report may include aggregated data or information drawn from the submission responses received. For more information on how we treat your information read our Privacy policy.

All responses and consultation information (even if not intended or approved for publication) may be subject to Freedom of Information (FOI) requests. Where there is an FOI request for submissions, it will be assessed in accordance with the *Freedom of Information Act 1982* (Cth).

Please do not provide detailed information about individual legal matters or cases, or personal information pertaining to parties or anyone else involved in a legal matter or case. Please do not provide information that is the subject of legal restriction (for example, under section 114Q or section 114R of the *Family Law Act 1975*). Where that information is provided, reviewers may not be able to consider your submission in their review.

Your details

What is your name?

Note: submissions may be made anonymously. This question is optional. You do not need to include your name.

Name:

What is your email address?

If you enter your email address then you will automatically receive an acknowledgement email when you make your submission.

Email:

Where are you located?

(Please select one)

Please select only one item

- NSW
- Vic
- Qld
- WA
- SA
- Tas
- ACT
- NT
- More than one location

What type of area are you located in?

Please select only one item

- Metropolitan
- Regional
- Remote

What best describes your role? (select any that apply)

Please select all that apply

- FCFCOA judge (Division 1)
- FCFCOA judge (Division 2)
- FCFCOA registrar
- Court Child Expert
- FCFCOA – other
- Federal Court of Australia judge
- Federal Court of Australia registrar
- Federal Court of Australia – other

Which area of law do you primarily work in (select any that apply):

(Please select all that apply)

Please select all that apply

- family law
- migration
- administrative law
- admiralty law
- bankruptcy
- consumer law
- human rights
- industrial law
- intellectual property
- other
- all of the above
- none

You may provide details to explain your answer:

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Relevant background

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