

25 October 2018

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

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

Dear Committee Secretary,

**Submission to the Senate Legal and Constitutional Affairs Committee in response to the
*Federal Circuit and Family Court of Australia Bill 2018***

1. Introduction

- 1.1. Rape and Domestic Violence Services Australia (R&DVSA) thank the Legal and Constitutional Affairs Legislation Committee for the opportunity to comment on the *Federal Circuit and Family Court of Australia Bill 2018* (the Bill).
- 1.2. R&DVSA is a non-government organisation that provides a range of specialist trauma-informed counselling services to people whose lives have been impacted by sexual, family or domestic violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW who have experienced or have been impacted by sexual violence; Sexual Assault Counselling Australia for people who have been impacted by the Royal Commission into Institutional Responses to Child Sexual Abuse; and the Commonwealth Bank of Australia Domestic and Family Violence Line for staff and customers who are seeking to escape domestic or family violence.

2. Overview

- 2.1. R&DVSA urge that the Government suspend plans to merge the Federal Circuit Court and the Family Court of Australia (“the family courts”) to allow for proper consideration of how this reform might impact the safety and wellbeing of people impacted by family violence.
- 2.2. Responding to family violence has become the core business of the family courts. More than half of parenting cases that come before the family courts involve allegations of family violence.¹

¹ The Australian Institute of Family Studies (AIFS) evaluation of the 2012 family violence amendments showed that of the families who reported resolving their matters through courts, nearly half had safety concerns for themselves and/or their children, 85% reported a history of family violence involving emotional abuse, and

- 2.3. As such, R&DVSA is alarmed that in designing the most profound restructure of the family law system in over 40 years, the Government has failed to consider issues of safety.
- 2.4. In particular, R&DVSA is concerned that:
- In designing the Bill, the Government has prioritised the objective of cost savings over the need to ensure safety for Australian families.
 - The proposed reforms are not evidence-based.
 - The proposed reforms may result in unintended consequences, such as the loss of specialisation which is essential to the safety of people impacted by family violence.
- 2.5. R&DVSA acknowledge that merging the family law courts may have some positive consequences for people impacted by family violence. For example, the Bill may result in reduced delays and the simplification of court rules and procedures.
- 2.6. However, to ensure these benefits are not overshadowed by unintended consequences, it is imperative that the proposed reforms are subject to a comprehensive safety assessment that takes into account the views and experiences of people who have been impacted by family violence.
- 2.7. R&DVSA submit that the Australian Law Reform Commission (ALRC) is well positioned to conduct this safety assessment. As the Committee is aware, the ALRC is currently conducting a comprehensive inquiry into the family law system. The scope of this inquiry is unprecedented. In response to an Issues Paper published in March 2018, the ALRC received 480 submissions from a broad spectrum of stakeholders, notably including specialist family violence services and people who have used the family law system themselves. According to the recent Discussion Paper, these submissions revealed:
- a strong consensus that, in light of the changed nature of the system’s workload, advancing the safety and wellbeing of children and their families should be the system’s ‘fundamental’ objective and ‘primary’ focus and function.²
- 2.8. In light of this consensus, R&DVSA believe that the Bill must be reviewed. Otherwise, there is a significant risk that the proposed reforms will be incoherent with the ALRC’s reform agenda and more broadly, with the expectations of the Australian community.
- 2.9. Thus, we urge that the proposed reforms be referred to the ALRC for consideration as part of their comprehensive review of the family law system.

3. The Government’s reform agenda: cost savings over safety

- 3.1. R&DVSA is concerned that in formulating the proposed reforms, the Government explicitly prioritised the objective of cost savings over the need to ensure safety for children and families accessing the family law system.

more than half reported physical violence: Rae Kaspiew et al, ‘Evaluation of the 2012 Family Violence Amendments: Synthesis Report’ (Australian Institute of Family Studies, 2015) 16.

² Australian Law Reform Commission (ALRC), *Review of the Family Law System*, Discussion Paper No 86 (2018) 6.

The narrow focus of the PwC Report

- 3.2. The Government set out their reform agenda when they commissioned Price Waterhouse Coopers (PwC) to conduct a review into the potential efficiencies that could be achieved through a merger of the family courts.³
- 3.3. Given that no further consultation was undertaken beyond this review, it can be assumed that the terms of this inquiry encapsulate the Government's objectives for reform.
- 3.4. In their terms of reference, the Government tasked PwC with quantifying any "cost and time efficiencies" that could result from merging the family courts.⁴
- 3.5. The Government provided no scope for PwC to consider any other impacts that could result from the proposed reforms, such as any impacts on the quality of judicial decision-making or the safety and wellbeing of people impacted by family violence.⁵
- 3.6. Moreover, the Government explicitly prevented PwC from considering any "broader reform opportunities, revised budgetary allocations, [or] reform opportunities within the general law."⁶ As such, PwC could not consider whether any alternative reform might achieve the Government's goal of efficiency with fewer risks to safety or quality of decision-making.
- 3.7. Unsurprisingly, the resulting report was extremely narrow in scope and focused exclusively on efficiency considerations. The word 'safety' is mentioned only once. This mention occurs in the first sentence of the report where PwC acknowledges that "the protection of the best interests of children and their safety are cornerstones of an effective family law system."⁷ However, ironically, the issue of safety is never mentioned again.

The relationship between efficiency and safety

- 3.8. This narrow reform agenda is problematic given that considerations of efficiency are intimately related to considerations of safety in family law decision-making.
- 3.9. Certainly, excessive delay is often inimical to safe outcomes for parties experiencing family violence. In these cases, delay may result in an "exponential"⁸ escalation of risk because:
 - Parties may remain in unsafe living circumstances until their matter is resolved by the court;⁹
 - The uncertainty and stress of delay may exacerbate conflict and violence;¹⁰
 - Parties may be incentivised to consent to unsafe, unfair or uncertain arrangements that fall short of the level of protection a court order might provide;¹¹ and

³ Price Waterhouse Coopers (PwC), *Review of Efficiency of the Operation of the Federal Courts: Final report* (2018).

⁴ *Ibid* 12.

⁵ *Ibid*.

⁶ *Ibid* 3.

⁷ *Ibid*.

⁸ House of Representatives Standing Committee on Social Policy and Legal Affairs (SPLA), *A Better Family Law System to Support and Protect those affected by Family Violence: Final Report* (2017) 56 [3.20].

⁹ Australian Law Reform Commission (ALRC), *Review of the Family Law System*, Issues Paper 48 (IP 48) 53.

¹⁰ SPLA, above n 8, 58.

¹¹ *Ibid*.

- Parties may experience financial hardship as a result of protracted disputes, which may increase the risk that they will be exposed to future violence.¹²

3.10. However, “rushing family violence matters through the family law system can also place families at greater risk of harm.”¹³ This is because, where judges are pressured to make hurried decisions, their ability to review cases thoroughly and make appropriate responses is diminished. In these circumstances, family violence matters cannot be given the attention they deserve. Further, judges may be more likely to experience vicarious trauma as a result of their increased workload, which in turn may impact on their capacity to make appropriate and safe decisions in family violence matters.¹⁴

3.11. The complex dynamics between the objectives of efficiency and safety were acknowledged in the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs report, *A better family law system to support and protect those affected by family violence* (SPLA Family Violence Report). The report stated:

The Committee acknowledges that the family courts are overburdened, and that this results in long delays for families within in the court system. The Committee understands that for families experiencing family violence, such delays can increase the risk of harm and cause further trauma. The Committee also acknowledges that the time pressures placed on family law professionals within the family law system can compromise the quality of service delivery, and can lead to suboptimal decisions that place families experiencing family violence at risk of harm.¹⁵

3.12. Taking into account these nuanced considerations, the Committee concluded that the appropriate solution to the problem of delays was additional resources, rather than faster decisions. As such, it made the following recommendation:

Recommendation 31: The Committee recommends that the Australian Government considers the current backlog in the federal family courts and allocates additional resources to address this situation as a matter of priority.¹⁶

The possibility of alternative reforms

3.13. The above recommendation unveils the possibility that alternative reforms may achieve the Government’s objective of efficiency, while also enhancing the safety of families impacted by violence.

3.14. As noted above, PwC were barred from considering any “broader reform opportunities” apart from the merger.¹⁷

3.15. In contrast, the ALRC has been given broad scope to consider numerous reform possibilities that may improve the efficiency of the family law system in a way that is safe for parties experiencing family violence. For example, the recent ALRC Discussion Paper included proposals for:

- The simplification of family law legislation (Proposal 3-1).¹⁸

¹² State of Victoria. (2014-16). *Royal Commission into Family Violence: Report and recommendations*, Vol III, Parl Paper No 132, Ch 16, 169.

¹³ SPLA, above n 8, 281.

¹⁴ Ibid 282.

¹⁵ Ibid 288.

¹⁶ Ibid.

¹⁷ Ibid 3.

¹⁸ SPLA, above n 8, 34-35.

- The expansion of legally-assisted dispute resolution to matters involving family violence (Proposal 5-10).¹⁹
- The development of a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed (Proposal 6-1).²⁰
- The development of a specialist family violence list (Proposal 6-3).²¹
- The development of a workforce capability plan to ensure that family law system professionals meet core competencies, including an understanding of family violence (Proposals 10-1 and 10-3).²²
- The requirement that federal judicial officers exercising family law jurisdiction only be appointed where they have knowledge, experience and aptitude in relation to family violence (Proposal 10-8).²³

3.16. Each of these proposals may offer efficiency opportunities while simultaneously responding to the needs of people who have been impacted by family violence.

3.17. R&DVSA submit that the Bill should not be passed without informed consideration of alternative reform options.

4. The lack of evidence base

4.1. R&DVSA is concerned that the proposed reforms are not founded on any comprehensive evidence base.

4.2. We are disappointed that the Government did not engage in any consultation process. As a result, the proposed reforms have not been informed by:

- the expertise and knowledge of professionals working within the family law system, or
- the views and experiences of parties accessing the family law system.

4.3. Moreover, the Government has sought to rely on several reviews that it states establish a “clear and persuasive case for reform.”²⁴

4.4. However, upon closer analysis, it becomes clear that the Government has misrepresented these reviews. In fact, as demonstrated in the table below, not one of the reviews mentioned by the Government provides unqualified support for the proposed reforms.

¹⁹ Ibid 120.

²⁰ Ibid 126.

²¹ Ibid.

²² Ibid 238-239.

²³ Ibid 251.

²⁴ House of Representatives, *Federal Circuit and Family Court of Australia Bill 2018*, Explanatory Memorandum. In her second reading speech, Minister O’Dwyer listed five reports and reviews which she suggested provided support for the Government’s Bill. These reviews are dealt with in the table on page 6 of this submission.

Table: Review of evidence relied on by the Government to support the Bill

Source	Evidence
2018 PwC review - <i>Review of efficiency of the operation of the federal courts.</i>	<p>Of all five reviews, the 2018 PwC report provided the strongest support for the proposed reforms. However, the report also acknowledged numerous risks associated with the proposed reforms including that:</p> <ul style="list-style-type: none"> • structural reform may have “a negative impact on litigants and parties to the family law system”²⁵; and • structural reform may be “incoherent” with other reform opportunities “including those arising from the ALRC’s review.”²⁶ <p>Ultimately, PwC recommended that the Government suspend reforms until the conclusion of the ALRC review and then engage in further consultation before undertaking any structural reform. Specifically, it recommended that:</p> <ul style="list-style-type: none"> • The government consult stakeholders to the family law system on specific proposed changes “to understand where parties will be most affected and if there are particular barriers to change requiring action”²⁷ and • Where proposed reforms diverge from any recommendations made by the ALRC, the government seek advice from court stakeholders review in order to determine “which [opportunities] would bring about the greatest positive outcomes.”²⁸
2017 SPLA report - <i>Family Violence Report</i>	<p>The 2017 SPLA report noted potential benefits to simplifying “the system of the two federal courts with concurrent jurisdiction.”²⁹ However, the Committee concluded that it “did not receive sufficient evidence to support a specific recommendation at this stage.”³⁰ Instead, it recommended the issue be referred for consideration by the ALRC inquiry.³¹ It also found that under-resourcing was the primary cause of delays.³²</p>
2015 EY report - <i>High level financial analysis of court reform initiatives</i>	<p>The 2015 EY report made no comment on structural reform to the family law courts.</p> <p>In Section 8, the report stated: “The scope of potential changes to the jurisdiction of the Family Court was not sufficiently defined by the Department within the timeframe available to allow for any cost analysis to be included within this Report.”³³</p>
2014 KPMG review - <i>Review of the performance and funding of the FCA, the FCoA and the FCC</i>	<p>The 2014 KPMG review considered structural reforms to achieve <i>a greater level of independence</i> between the Federal Circuit Court and the Family Court of Australia, ie. the opposite objective of the current Bill. The review did not consider any proposal to merge the courts into a unified structure.</p>
2008 Semple review - <i>Future governance options for federal family law courts in Australia: striking the right balance</i>	<p>The 2008 Semple review did make some recommendations to merge operations between the Federal Magistrates Court, the Family Court and the Federal Court. However, this recommendation holds little relevance given that the family law system has undergone significant structural reform since this date. In May 2009, the Government adopted the recommendations from the Semple review. As such, “the pool of potential ‘efficiencies’ [proposed by this review] has already been tapped.”³⁴</p>

²⁵ PwC, above n 3, 69.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ SPLA, above n 8, 80.

³⁰ Ibid.

³¹ Ibid.

³² Ibid 34-35.

³³ EY, *High level financial analysis of court reform initiatives: Final Report* (2015) 31.

³⁴ KPMG, *Review of the performance and funding of the FCA, the FCoA and the FCC* (2014) 64.

- 4.5. R&DVSA submit that there is insufficient evidence to support the proposed reforms.
- 4.6. Even the PwC report, which forms the primary evidence base for the Government's initiative, provides only conditional support for structural reforms. Ultimately, PwC recommended that the Government await the recommendations of the ALRC review and then engage in further consultation with stakeholders to ensure that any reforms did not have negative impacts on people accessing the family law system.³⁵
- 4.7. Moreover, the methodology of the PwC report has been strongly critiqued by legal stakeholders including family court judges,³⁶ the Law Council of Australia,³⁷ and the NSW Bar Association.³⁸ They have argued that the conclusions of the report are unreliable because:
- The figures comparing efficiency between the FCC and the FCoA are misleading, given that the FCoA deals with the most complex 10 per cent of cases and the FCC figures included many cases concluded by consent order.³⁹
 - The report was based predominantly on a desktop assessment of court data which cannot measure the real impact on people accessing the family law system.⁴⁰ As the NSW Bar Association President Arthur Moses SC stated: "a justice system is not to be judged on spreadsheets. It is to be judged on the quality of justice delivered to people at the most vulnerable time in their lives."⁴¹
 - PwC were not able to consider alternative reform measures which may be preferable, such as increased funding to the courts.⁴²
- 4.8. R&DVSA believe that any reform of this magnitude must have a strong basis in evidence. This requires a process of consultation with experts and stakeholders in the family law system, including people who have accessed the family law system.
- 4.9. Without a comprehensive basis in evidence, there is an unacceptable risk that the Bill may cause harm to people accessing the family law system and/or result in a loss of confidence by stakeholders working within the family law system. Thus, we recommend the Bill be referred for further consideration by the ALRC.

³⁵ Ibid.

³⁶ Nicola Berkovic, 'Family judges revolt on work rate as court productivity gap revealed', The Australian, 17 August 2018, accessible at: <https://www.theaustralian.com.au/news/nation/family-judges-revolt-on-work-rate-as-court-productivity-gap-revealed/news-story/5a42654bdd361a7bacd699795b7fd8c>.

³⁷ Law Council of Australia, 'As it stands, merging courts unlikely to alleviate family law crisis', Media Release, 23 August 2018, accessible at: <https://www.lawcouncil.asn.au/media/media-releases/as-it-stands-merging-courts-unlikely-to-alleviate-family-law-crisis>.

³⁸ NSW Bar Association, 'Time to Talk about a Family court of Australia 2.0', Media Release, 31 July 2018, accessible at: https://www.nswbar.asn.au/docs/mediareleasedocs/Family_Court_MR2.pdf.

³⁹ Michaela Whitbourn, 'What the Family Court shakeup really means for families', Sydney Morning Herald, 18 August 2018, accessible at: <https://www.smh.com.au/politics/federal/what-the-family-court-shakeup-really-means-for-families-20180814-p4zxf.html>.

⁴⁰ Nicola Berkovic, 'Family judges revolt on work rate as court productivity gap revealed', The Australian, 17 August 2018, accessible at: <https://www.theaustralian.com.au/news/nation/family-judges-revolt-on-work-rate-as-court-productivity-gap-revealed/news-story/5a42654bdd361a7bacd699795b7fd8c>.

⁴¹ Whitbourn, above n 39.

⁴² Berkovic, above n 36.

5. The potential loss of specialisation

- 5.1. R&DVSA is concerned that the proposed reforms may result in the loss of specialist features of the current family law court system, including specialist knowledge of family violence. This is disturbing given that a specialist approach is essential to ensure safe outcomes for people impacted by family violence.
- 5.2. Under the proposed reforms, it appears that family law matters may increasingly be dealt with under a generalist court structure. Further, there has been suggestion by the Law Council of Australia that there may be no new appointments of judges to the specialised Division 1 of the new court, at least by the current Attorney General.⁴³ In effect, this would spell the end of a specialist family law court.
- 5.3. This proposal stands in direct contradiction to a broad suite of evidence which shows that specialist knowledge of family law and family violence is essential to ensure safe and just outcomes for Australian families. As stated by the SPLA Family Violence Report:

In order for the family law system to be accessible, equitable, responsive and prioritise the safety of families impacted by family violence, it is critical that all family law professionals have a strong understanding of family law and the complexities of family violence.⁴⁴

- 5.4. In fact, the ALRC family law review has recently proposed the need for greater specialisation to respond to the needs of families, especially those experiencing violence. It has suggested the following core competencies for all family law professionals:
 - an understanding of family violence;
 - an understanding of child abuse, including child sexual abuse and neglect;
 - an understanding of trauma-informed practice, including an understanding of the impacts of trauma on adults and children;
 - an ability to identify and respond to risk, including the risk of suicide;
 - an understanding of the impact on children of exposure to ongoing conflict;
 - cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people;
 - disability awareness; and
 - an understanding of the family violence and child protection systems and their intersections with the family law system.⁴⁵
- 5.5. In addition, the ALRC has proposed the need for a specialist family violence court list. Features of this specialist approach could include early risk assessment and triage, early decision making, case management, the ability to make a range of orders to respond to safety issues, and restrictions on interlocutory applications.⁴⁶
- 5.6. In light of overwhelming evidence that specialisation is essential to respond to the complex dynamics of family violence, R&DVSA is strongly concerned about the potential for this Bill to reduce specialisation in the handling of family violence matters.

⁴³ Morry Bailes, 'Merging family courts before review is to put the cart before the horse', *The Australian*, 14 September 2018.

⁴⁴ SPLA, above n 8, 259.

⁴⁵ ALRC, above n 2, 238-239.

⁴⁶ *Ibid* 132-134.

Summary

R&DVSA does not support the Bill being passed without further consultation.

We are concerned that:

- In designing the Bill, the Government has prioritised the objective of cost savings over the need to ensure safety for Australian families.
- The proposed reforms are not evidence-based.
- The proposed reforms may result in unintended consequences, such as the loss of specialisation which is essential to the safety of people impacted by family violence.

As such, we urge that the Government refer the proposed reforms to the ALRC for consideration of how this reform might impact the safety and wellbeing of people experiencing family violence.