Aboriginal & Torres Strait Islander
Legal Service (Qld) Ltd

www.atsils.org.au

Level 5, 183 North Quay Brisbane Qld 4000
PO Box 13035, George Street Brisbane Qld 4003
T: 07 3025 3888 | F: 07 3025 3800
Freecall: 1800 012 255
ABN: 116 314 562

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

By email:

Legcon.sen@aph.gov.au

23rd November 2018

RE: FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA BILL 2018 and FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (CONSEQUENTIAL AMENDMENT AND TRANSITIONAL PROVISIONS) BILL 2018

We welcome and appreciate the opportunity to make a submission in relation to the proposed *Federal Circuit and Family Court of Australia Bill 2018* and the *Federal Circuit and Family Court of Australia (Consequential Amendment and Transitional Provisions) Bill 2018.*

We note that the recommended amalgamation of the back office functions of the various federal courts has already occurred and the logic of that change.

Preliminary Consideration: Our Background for Meaningful Comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 26 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention

initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout the entirety of Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by four and a half decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

OVERALL COMMENTS

As noted by the former Attorney-General Senator Brandis QC the issues prompting the review of the family law system under the current ALRC inquiry included "the profound social changes and changes to the needs of families in Australia over the past 40 years" since the commencement of the *Family Law Act* 1975 in 1976 and "the pressures, (including in particular,financial pressures) on courts exercising family law jurisdiction".[1] One matter deserving special attention in that review are the reforms needed to address families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness.[2] The nature and number of complex matters before the Family Court has changed dramatically in the last forty years.

The history of the Family Court includes the review of its ability to handle cases involving allegations of child abuse and the introduction through the Magellan project of case-management procedures to address the complex cases involving child abuse in post-separation parenting matters. It was first trialled in 1997 and rolled out across the registries since 2003. At the time it was a world leading project and it has proved to be an important feature of our family law system.

[1]Senator the Hon George Brandis, Media Release,"First comprehensive review of the family law act" (27 September 2017) at: http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/ThirdQuarter/First-comprehensive-review-of-the-family-law-act-27-September-2017.html.

[2] Ibid. See also ALRC, *Review of the Family Law System*, Discussion Paper 86, October 2018, p. ii.

Generally speaking, for most legal disputes, parties are capable of resolving the matters themselves with no or limited recourse to the courts, however the courts are there to resolve legal disputes and impose a solution through court orders when parties are unwilling or unable to resolve the disputes themselves. This is as true of administrative, personal injury or commercial cases as it is of family law cases. However, what makes family law distinct is the nature of the parties that come before it and the nature of the disputes to be resolved. The parties before the courts are people who are mostly still in the early stages of denial, anger and loss, and the highly emotional nature of family disputes also attracts a large number of 'High Conflict Personalities' and 'borderline High Conflict Personalities'.[3] The determination of family law matters requires not only expertise in property, equity, commercial and tax law but also to address the issues of families with complex needs, it requires addressing matters concerning early and childhood development, psychological and mental health issues, cultural issues and family structures, family violence and post-separation family dynamics. In short it requires an array of specialists to achieve a proper determination of family disputes.

The roles of the two existing Courts and the proposed Bills

Currently, we have both the Family Court of Australia established under the *Family Law Act 1975* (Cth) as the superior specialist court which hears the more complex cases and the Federal Circuit Court established under the *Federal Circuit Court of Australia Act 1999* (Cth) which is a court of record but which hears matters that are less involved than those heard in the Family Court. The intention of the current Bills is to amalgamate the Family Court and the Federal Circuit Court but to create two divisions, the Federal Circuit and Family Court of Australia (Division 1) to undertake the current work of the Family Court and the Federal Circuit and Family Court of Australia (Division 2) to undertake the work of the Federal Circuit Court.

We would welcome changes to remove the use of different forms, rules and processes in family law that currently exist between matters conducted in the Federal Circuit Court and the Family Court of Australia. The creation of one set of forms, rules and processes for one specialist family law court would introduce greater efficiency and greater simplicity and clarity for parties.

[3] There has been research done both overseas and locally on the impact of high conflict divorce cases. In the words of one local researcher, 'High-conflict' divorce cases have been consistently identified as difficult, complex, time consuming, and costly. They place great strain on individuals, practitioners and courts, as well as on the family law and child support systems more generally. B. Smyth, at: www.aspc.unsw.edu.au/node/36/paper/2158

We are supportive of the continuation of a specialist Family Court, and while there are always avenues for improving the current Family Law system and the fiscal performance of the courts, this cannot be done in isolation from a legal review of the work that the Family Court does. It has been recognised for a few years that the Family Court is under-resourced and that has had a knock-on effect with the capacity of the Family Court to properly hear matters and resolve them in a timely manner. The rise of complex matters is well documented and needs a closer review. The accounting review brings many useful insights but the work done by the Family Court of Australia is different from the work of the Federal Circuit Court and without a proper understanding of how the complex family matters that arise in this country are to be properly addressed in a specialist Court, the very real danger is that implementing administrative recommendations in isolation from an analysis of the substance of the legal work will worsen the current situation instead of introducing benefits.

Specifically with respect to the proposed changes to the means of making Family Court Rules, we would seek a broader pool of rule makers. One of the factors requested to be examined by Senator Brandis in the ALRC review was rules of procedure and rules of evidence that would best support high quality decision making in family disputes. A constant feature of the submissions made by ATSILS over the years has been our focus on the needs of clients living in rural and remote communities and the need for reform so that the law caters for those living in rural, remote and regional communities as well as those living in urban communities. With respect to rule making by the judges of the Family Court, we would seek the continued input of the joint experience of the judges, including those who sit in regional centres across the country, and recommend that sections 123 and 124 of the *Family Law Act 1975* remain instead of the proposed section 56 of the Bill which would reduce the rule making power to the Chief Justice alone.

We thank you for the opportunity to provide input and thank you for your careful consideration of these submissions.

Yours faithfully,

Mr. Shane Duffy
Chief Executive Officer
ATSILS (Qld) Ltd.