

A new family 'super court' may not save time or result in better judgments

May 31 2018, by Miranda Kaye, Jane Wangmann

Attorney-General Christian Porter [has just announced the proposed merger](#) of the Family Court of Australia (FCA) and the Federal Circuit Court (FCC) to create a new "super court" with a mouthful of a name: the Federal Circuit and Family Court of Australia (FCFCA).

Porter says the merger, expected in January 2019, [will address](#) costly delays and inefficiencies, and reduce confusion experienced by families in the [family](#) law system.

But it's unclear just how the changes will succeed in [helping families save time and money](#).

A key concern is that prioritising possible gains in efficiency and cost reduction could have unintended consequences for families caught in the system. Most families that require judicial hearings have a range of complex needs. There are often problems involving [family violence](#), [child sexual abuse](#), alcohol issues, mental health concerns, and questions of parenting capacity. These families require a specialist response – not necessarily a fast-track through the system.

It also seems strange that the government would announce this proposal while the Australian Law Reform Commission (ALRC) is still conducting [the first comprehensive review](#) of the family law system since the Family Law Act was passed in 1975.

This review is due to be completed in March 2019 and the structure of

the [court](#) will no doubt be a fundamental part of its recommendations.

The proposed court merger

Family law matters are currently dealt with in two separate courts. The FCA deals with more complex cases, such as those involving allegations of family violence and child sexual abuse. The FCC, meanwhile, deals with less complex cases.

The merger, which is still subject to the passage of legislation, will create a new court, the FCCFCA, with two divisions. One division will focus solely on family law and involve existing judges from the FCA. The other will deal with both family law and general federal law matters and involve judges from the FCC.

The new FCCFCA is intended to streamline the process. It will create a single point of entry for people who have a family law dispute, with one set of forms, rules and processes. The new court will also be presided over by a single chief justice who covers both divisions.

The proposal also removes the appellate division of the FFC (the Full Court) and replaces it with a new Family Law Appeal Division (FLAD) in the Federal Court of Australia.

Problems in the current system

Without question, there are problems with the current family law system. The FCC, for starters, is not a specialist family law court, but the bulk of its caseload (approximately 90%) is in family law. This means that judges who are [not necessarily specialists](#) in family law are dealing largely with family law matters.

The court began as the Federal Magistrates Court in 2000, with the goal of hearing less complex family law matters and providing a faster avenue for litigants. Renamed the Federal Circuit Court in 2013, the FCC [now deals with 87% of family law matters](#) in Australia overall, while the FCA hears just 13% of cases.

Many family law experts, [including judges](#), have long highlighted the confusion created by having two different courts with different rules, forms and processes. The change back to a single point of entry into the family law system is welcome. However, it is disappointing the new court appears to be merely an expansion of the generalist FCC at the cost of destroying the more specialist FCA.

It is important to remember that when the Federal Magistrates Court was first proposed in 1999, the chief justice of the FCA, Alastair Nicholson, [raised concerns](#) about the same issues the government now seeks to solve:

"The fragmentation of the FCA's closely integrated system will result in a less satisfactory and more expensive service. The potential for public confusion, forum shopping and waste of resources on shuffling matters between courts is high. The funds proposed to be spent on the Federal Magistrates Court could be used far more effectively by providing magistrates within the framework of the Family Court of Australia."

Concerns with the current proposal

While the full details of the proposed merger are still unclear, the information available raises a number of concerns:

-The pressing need for more resources. The attorney-general maintains the reforms will improve the efficiency of the family law system by a third. It is hard to see how. Any increase in efficiency is

welcome, but there is still a need to address real resource issues rather than assuming a courts merger will automatically lead to a reduction in the delays and backlog of cases.

Indeed, when the new "super court" starts operations in January 2019, there will be the same backlog and same overall number of judges and court staff.

-The potential loss of specialisation. The FCA is a specialist court dedicated to complex family matters. One of the requirements for appointment to this court is that a [judge](#) must have the expertise to be considered a "suitable person to deal with matters of family law".

However, this is not a requirement for judges sitting in the FCC.

The attorney-general has said there would [not be a requirement](#) that judges appointed to the family law division of the "super court" have specific family law experience and that current Family Court judges will not be replaced as they retire.

This is of particular concern in the context of the proposed new appeal division of the Federal Court. Over time, judges on the appeal court who have no family law experience could be presiding over appeals from trial judges who also have no family law experience.

It has been suggested that the current Full Court judges [may bring a constitutional challenge](#) to the proposal to scrap the Full Court, but it's not clear yet whether this would be possible. It's also unclear how their vast institutional and legal knowledge will be used within the new structure.

-Speedy resolution does not necessarily mean better decisions.

While we agree there is an urgent need to address delays in the family

law system, this must not come at the expense of appropriate and safe decisions.

This is a particular concern in complex cases that involve allegations of family violence and/or child sexual assault.

-Lack of consultation. Changes to the family law system are frequent and continuous, but they are generally preceded by some level of consultation with the legal community, as well as others in the broader community. There appears to have been little, if any, [consultation on this proposal](#).

There are a number of problems with the current family law system in Australia. Delays, costs and inefficiencies do need to be addressed. At the same time, any proposal to deal with these problems needs to acknowledge the complexity of the families the courts deal with. This necessitates a court of specialisation – not one whose functions include other federal matters, or whose judges are not required to have expertise in family law matters.

Working out how to respond to the problems within the family law system requires a careful, detailed and consultative process. This is currently being undertaken by the ALRC. The government commissioned this review and should wait for the outcome and recommendations before making any changes to our Family Court system.

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