AUSTRALIAN FAMILY LAW – WHAT'S THE SOLUTION?

Speech by the Hon Diana Bryant AO QC to the 2018 Annual Dinner of the New South Wales Society of Labor Lawyers

30 November 2018

I pay my respects to the traditional owners of the land on which we meet, the Gadigal people of the Eora nation and to their elders, past, present and emerging.

The organisers offered me the opportunity to speak on any topic that I chose but I confess I have been struggling to find a theme other than the re-structure of the courts[1] which is so obviously in the forefront of family lawyers' and judges' minds. I did feel, however, that as there are now many submissions to the Senate Legal and Constitutional Affairs Legislation Committee (including my own) that all that could be said, has been said. Sections of the media are reporting various submissions as they are posted so there is some degree of saturation at present.

I have also read the comments of the members of the Labor Party who opposed the passage of the Bills (which ultimately passed) through the House of Representatives on Monday. But try as I may, I could not find anything as important or compelling to discuss and it's difficult in the present environment to avoid this discussion.

I also feel that in tackling this topic I am likely preaching to the converted, but it is an important issue and the arguments against the re-structure as currently proposed are worth repetition.

There is a high degree of clarity and consistency in the arguments of those who oppose the passage of the Bills. And interestingly, opposition comes from a wide variety of stakeholders. It cannot simply be said that the court and the lawyers are protecting their patch. Indeed, many in that group acknowledge the need for, and support reform, but not some of the more extreme measures proposed, without adequate consultation. But others who desperately want reforms like Women's Legal Services Australia, Safe Steps, Domestic Violence Victoria, for example, are equally concerned about the proposals. In fact, other than submissions from individuals involved in the legal process, there is a huge degree of opposition to the Bills.

There is general agreement that there are problems in the delivery of family law in Australia at present. Both courts are under pressure and times for hearings are unacceptably long. That puts pressure on families who deserve a better system for the delivery of justice.

The reasons for this are not without complexity and have never been adequately interrogated, which I would argue is a necessary pre-condition to reform of any system. But some things are clearer than others. It is a fact, that replacements of retiring judges in both courts have not been made in a timely way. I and others have often pointed out that if there are vacancies unfilled, then delays will occur, and they have. Somewhat surprisingly, the Price Waterhouse Coopers ('PwC') report commissioned by the Attorney, and upon which reliance for at least some of the reforms is based, does not include this in its assessment of efficiencies that could be

[1] Federal and Circuit and Family Court of Australia Bill and the Consequential amendments and transitional provisions Bill ('the Bills').

made. Perhaps they were not aware of it as they seem to have been unaware of other important issues.

There is also general agreement that there should be a much more integrated system operating between the courts. Some of those are now being addressed in the Bills but they can, with support from government, be addressed without major structural reform – harmonized Rules and a single point of entry are all things that have been on my agenda with government for many years but failed to attract their support.

Greater consistency of Rules, forms and processes and a single point of entry will make it easier for parties to navigate the system and that will be a benefit to them. But there is no reason to think that it will translate into the capacity of the courts to get through their workload any better without the courts being resourced properly.

But the proposed restructure goes far beyond these changes.

It is clear that what is proposed is a major policy change. The objective, not necessarily to be gleaned from the Bills themselves but announced by the Attorney, is to abolish the Family Court, a superior court with a specialist intermediate appellate division.

All family law would be dealt with by an intermediate court, the Federal Circuit Court ('FCC'), a court of mixed jurisdiction. All appeals would be heard by the Federal Court of Australia ('FCA'), a court of mostly commercial but also mixed jurisdiction, and appeals from the FCC would mostly be heard by a single judge.

The irony of that is that the next level of appeal will be the High Court – a court of at least five.

I want to make it clear at this point that in making these comments, I in no way denigrate or criticize the capacity and work of individual judges in the FCC; they work incredibly hard, and many are specialist judges. I am discussing structures.

The role of a superior court

If the current proposals become law, there will be a significant downgrading of the importance of family law and how it is delivered in Australia. Let us not forget that before the establishment of the Family Court the work was done by the State Supreme Courts. This proposal heralds an entirely different approach, and the end of family law as the work of a superior court.

Is this important? And if so, why?

A superior court brings many advantages in addition to the existing provision in section 22 of the *Family Law Act 1975* (Cth) ('Family Law Act') for specialist appointments.

There are issues of international enforcement that require orders of a superior court; the message it provides to the community is that this is an area of law that is respected and taken seriously; that the responsibility to make orders about the future of children is at least as important as a patent argument over the colour of a chocolate wrapper, or an action for misleading and deceptive advertising about whether one make of battery lasts three times longer than another. The last two examples are the work done in the FCA. Are parenting matters really so unimportant that we would remove them all from the jurisdiction of a superior court?

In what I thought was a very contemporary example of this, last week the Treasurer announced as part of a 51.5 million dollar package to hold banks accountable for misconduct, the appointment of two new FCA judges at a cost of 10 million dollars to hear potential cases arising from the expectation that more cases will be brought by the Regulator following the Banking Royal Commission. It is clear that resources are urgently needed in the family courts; but instead of shifting the appellate workload to the FCA, why not leave the appellate workload in the Family Court and let the FCA use their existing and apparently excess capacity for the regulatory cases. The funds could then be used to make appointments to the family courts. In the face of the proposals for the FCA to take over all the appellate work (apparently without the need for new appointments) this new proposal makes no sense to me.

Proper consultation

After over 40 years we might expect some consultation with stakeholders, and indeed the wider community, when such a significant change is proposed.

It is fair to say that most stakeholders would say that the system of setting up a separate court in 2000 for family law has not worked. But even that statement is more complex than it seems. It has worked for general federal law in the main, although the lists are long in migration matters. It probably did work quite well initially, but once there was a decision to enlarge the FCC and to reduce the number of Family Court judges, its *raison d'etre* changed, and as we now appreciate, it did so without any consideration of the consequences or a defined policy objective. And crucially funding was always lacking, creating a tension over allocation of resources and processes that in the latter years of my tenure, the government seemed reluctant to address in any way.

But it's now possible to address some of the issues and those changes could be made while the question of what structural changes should be made is further considered.

And it might be thought, that if it was a mistake to establish a separate court in 2000, then every care in making substantial changes to that system would be taken, so as not to repeat mistakes.

I would argue that has not occurred.

Major policy change, I think as most would agree, requires wide consultation and discussion if the best policy decisions are to be made. That is widely seen as the major vice of the introduction of the Bills. The benefits of consultation and discussion cannot be overstated; they can lead to the emergence of other options for the courts that might provide efficiencies and a better system, and which deserve consideration. The NSW Bar Association has put a proposal forward which should at least be seriously considered.

The government has put re-structure of the courts firmly in the spotlight, but it is unfortunate that because it is now in the form of legislation, without the opportunity for wide consultation, opposition to it can be labelled a political response. It should not have been so.

Hence some of the comments from those supporting the Bills in the House of Representatives on Monday are unfortunate. One speaker referred to the tragic events in Margaret River where the children's grandfather shot his daughter and four grandchildren. The father apparently told the speaker that a lengthy and costly court battle over custody added a high degree of emotional strain. One can understand the father's distress but what on earth has this to do with these Bills. His case was in the Family Court of Western Australia for a start, and of course proceedings which are highly contested are stressful.

There is no evidence of undue delay nor any nexus with the current reforms.

In addition we do not know what caused the grandfather to act in the way he did but certainly mental health issues have been mentioned. There is no evidence that any family law proceedings played any part in the grandfather's tragic actions.

The speaker then says "the most recent tragedy in a string of mass murders and family violence, occurred in a Perth suburb on 3 September when [he] allegedly murdered his wife and three children, murdering his mother in law the following day".

What is all this about? A string of mass murders – really! Where is the evidence for that? Of course, it is tragic when such events occur but there is no evidence that they have anything to do with delays in the courts. Indeed, if the speaker was familiar with the work that has been done on ficilicide in recent years, he might understand that the fact that some murders occur when there are family law proceedings on foot, completed or in contemplation, may be temporal, but there is no evidence to indicate the proceedings are causative.

I regard this rhetoric as highly inflammatory, and most unnecessary - it is in effect a dog whistle. What is the point of mentioning murders and suicides unless to try to link them to issues pertinent to the courts and there is nothing to so do. The purpose of this alarming rhetoric can only be to imply that these reforms will prevent these occurrences and those who oppose them, are at best permitting them to continue, and at worst in some way contributing to them. That is at best naïve and at worst scaremongering. But that is what happens when you turn this into a politically partisan issue.

Reforms of this kind are too important to be treated as a partisan political issue. It is useful to recall that in 1974 when the Family Law Act was passed (in the House by one vote), there was a conscience vote.

A process for consultation and a bi-partisan approach on the fundamental changes now being considered would surely have been the best process.

The other major vice as has been pointed out by many commentators, is that the Bill appears to be proposing a new structure based on a report from PwC, which has been aptly described as a "desktop" report, whose recommendations are made solely on the basis of throughput of cases.

I should say at the outset that there is nothing wrong with using such a report to assist in formulating policy.

But a family law system should take account of qualitative as well as quantitative elements. The qualitative element is entirely absent from the imperative for the reforms as explained by the Attorney. As all those who are involved in the system know, it is about families and their needs, not widgets on a production line. Of course, court efficiency is important, and data which assists us to understand it is useful, but it should never alone be determinative of policy, and especially major policy.

I have considerable misgivings about the assumptions in the report. I have addressed them in my submission and this venue is not the occasion to critique the PwC report; that has been done by me and others in our submissions to the Senate Committee. Suffice it to say that good policy would never be made on the basis of quantitative data alone, even if it was entirely reliable.

I referred to the need to interrogate the reasons for pressure of work in the courts (one is surely delay in appointments) and in particular a question we should be asking is why with all the resources available for resolution of parenting disputes, are the applications being made to the courts remaining relatively constant over many years?

With all due respect to the Australian Law Reform Commission Discussion paper, I don't think it grapples adequately with this question, although some of the ideas raised certainly address it.

Thus I think, we have not identified the drivers of the constant and continuing workload of the courts. Nor I think is it well understood, apart from those in the system, that our success in assisting parents to resolve disputes out of court (which we have done well), means that the matters that do go to court are the more difficult and in many cases, intractable disputes. Ask any Family Court judge and they will tell you their diet comprises cases of severe family violence, difficult cases involving sexual abuse allegations, parents with mental health issues and substance abuse and difficult relocation cases often involving a move to an overseas jurisdiction. These cases are unlikely to settle without a hearing and, in many cases, shouldn't settle. They often involve at least one party who is unrepresented.

That too is something I doubt is well understood. It is all well and good to propose "Parenting Management Hearings" for unrepresented parties in a non-adversarial setting, but it's entirely another thing to conduct a trial where there are significant issues of fact to be determined, some nuanced and circumstantial, where one or both are unrepresented. The latter does not lend itself to a non-adversarial process.

I have made the point in other presentations that adversarial processes have got a bad name. I can assure you they are necessary in some cases. The challenge for courts and case management is to have a system that differentiates and provides different processes. Both have a place.

And why we should ask, in the midst of this reform and a desire not to spend money, are we conducting pilots for Parenting Management Hearings at a cost of 10 million dollars with no idea as to who will use them and whether they will be of any real value. Surely these funds could have been put to better use in the system we already have.

My message is a relatively simple one: trying to fix the system without a clear understanding of its problems, is unlikely to be successful.

What other countries have learned from us

Many countries have used Australian family law and particularly the Family Court as their model, or at least aspects of it. Singapore is an excellent recent example of how another country has gone about achieving significant structural reform using much of the Australian system.

Family Justice Courts ('FJC') were established as a specialised body of courts comprising three courts: the Family Courts, the Youth Courts and the Family Division of the High Court, led by a Presiding Judge.

This is how it is described:

> "At one end of the spectrum, complex cases usually involving high-conflict parents are assigned to a single judge. There are plans to extend the docketing system by introducing an Individual Docket System ("IDS") for all divorce cases filed in the FJC. It is hoped that docketing will lead to more efficient and sustainable outcomes, as the assigned judge will be familiar with the case and unique needs of the family and children, and would be able to manage the case more efficiently, thereby reducing the strain of protracted litigation on parties and especially children.
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> "In order to achieve the aims of IDS, family judges will have to effectively utilise the "Judge-led approach" which was introduced into the Rules on 1 October 2014 and which empowers the judge to give robust directions for the conduct of proceedings.56 Whilst the judge-led approach does not replace the adversarial system, it may assist parties focus on resolving the issues in a less adversarial atmosphere. The introduction of IDS coupled with the judge-led approach are therefore key levers that, if effectively utilised, have great potential to neutralise the adversarial process."

Does any of that sound familiar? It should; many of these reforms came from our system.

At the Opening of the Legal Year in 2015, Chief Justice Sundaresh Menon announced the establishment of the "International Advisory Council" ('IAC') to bring together a group of internationally renowned leading experts and thinkers in the field of family justice, to discuss and share perspectives on the latest developments and trends in family law and practice, to situate FJC at the forefront of family justice. The Chief Justice said:

> "Beyond communities of judges, it is also important to develop conversations within the wider family justice eco-system. To this end, we have in 2016 established an International Advisory Council ('IAC') which brought together seven leading thinkers in the world in the field of family justice, to discuss and share perspectives on the latest developments in family law and practice. We have since added one more member and they come from Australia, Canada, Germany, Hong Kong, UK and USA. They are each experts in different fields, namely the courts, academia and the social sciences. I personally had the pleasure of chairing the first meeting of the IAC in September 2016,

where there was a lively and invigorating exchange of ideas on the latest developments and trends in various areas of family justice."

I am fortunate to be the Australian representative and it is inspiring to watch the Singaporeans taking ideas from other jurisdictions and adapting them to their specific needs. This is real collaboration at work.

Australia's family law system and specialized superior court has been widely regarded as setting the standard for best practice in family law policy and implementation. Any country considering reform would look to Australia for inspiration. That will certainly not be the case should the Family Court be abolished. Already the hallmarks of our early initiatives of counselling and mediation within the courts has disappeared.

In conclusion, while all this is disconcerting, a window of opportunity still remains to get reforms right.

There is now a unique opportunity to really consider what system will best suit the needs of Australian families in the 21st century with the Australian Law Reform Commission Review and with proper consultation with all relevant stakeholders about structural reforms. It would be both a wasted opportunity and a potentially wasteful exercise, to proceed with major change without such consultation.

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