

Submissions

The Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018

Background

1. Firstly, I wish to thank the Chair and Members of this Committee for the opportunity to make submissions and appear. I hope to appear in person, if circumstances permit. The matters under consideration are, in my view, of considerable importance to the community given the frequency with which Courts dealing with family law disputes are accessed.
2. I have spent the better part of my working life appearing in these Courts representing members of the community from all walks of life, in one capacity or another. Although now a Senior Counsel at the New South Wales Bar, practicing exclusively in the area of Family Law, my longer background is as firstly a Law Clerk, then briefly an employed Solicitor, then Sole Practitioner (in wider general practice) and subsequently a partner of a suburban legal firm (at Blacktown) then as a Barrister (20 years at Parramatta) and more recently as Senior Counsel in Sydney.
3. I began attending at the Family Court within a year or so of its establishment following the introduction of the Family Law Act.
4. I saw the Judges of the Parramatta Registry have their homes bombed, the Court building bombed, a Judge murdered and the wife of another likewise killed. Through those tragic and turbulent times, I observed the development of a close and cohesive group of judges who worked extremely hard under difficult circumstances under, ultimately, the leadership of Justice Eric Baker and that group was followed by Judges of similar ilk, one or two who remain sitting today. They were inspirational. That was the “system” that I grew up under in a legal sense.
5. I learned from the influence of these figures what service to the community meant. In conjunction with (then) Judicial Registrar David Halligan and David Collier, Barrister (later Mr Justice Collier), by way of example, a pro bono scheme was established to arrange representation for disadvantaged persons who might as a result of what were then called Contempt applications have their liberty put at risk or be subject to a penalty.
6. To this day, I, and many others take on pro bono work. For my own part (and there is nothing special about this – I only mention it to counter some ill-informed submissions made to this Committee) I try to appear at least one week per

annum via the pro Bono scheme conducted by The NSW Bar Association at no cost to deserving persons.

The issues at hand and “a time for plain speaking”

7. It is not my intention by these submissions to offend anyone or any group. If I do so it is unintentional. But Given the apparent advanced position regarding these Bills and the pronouncements of the Government I see a need to speak more plainly than I might otherwise. I do so noting that the motto of The NSW Bar Association is, “*Servants of all yet of none*”.
8. I must confess to having significant concerns as to the proposed future directions of family law under the Bills named above, and the pronouncements of this Government, as to their effects, both directly and indirectly.
9. The Bills provide in outline that the federal courts known as the Family Court of Australia and the Federal Circuit Court of Australia are to continue to exist as the Federal Circuit Court and Family Court of Australia, with the Family Court to be described as being Division 1 (and be a superior court of record) and the Circuit Court as being Division 2 (and not be a superior court of record).
10. What I oppose in principal is: -
 - i. The abolition of a specialist “*stand alone*” court dealing with all matters relating to the area of Family Law; and
 - ii. The abolition of the Appeal Division of the FCoA and the prospective loss of the expertise of its Judges. In this regard I would commend to the Honourable members the speech given at the recent ceremonial Sitting of the Full Court by Justice Thackeray;
 - iii. Any notion that it is a good idea to not replace the Judges of Division 1 as they retire – leaving it to the Judges of Division 2 to service cases of all types¹. Such a position could only be described as fraught.
11. The establishment of the Federal Magistrates Court (as the Federal Circuit Court formerly was) was in my view a retrograde step in so far as it established a system of two overlapping Courts dealing with family law. That the system of those two courts has been able to operate tolerably well is more a testament to the good will of those in the system and not to its good design.

An apt analogy

¹ As per the Governments Policy announcement

12. I would ask that the Committee consider, by reference to an apt analogy what in large part the loss of specialisation caused by the non-replacement of Division 1 judges will mean in a practical sense.
13. If one were to re-design a hospital system for the benefit of the public, who in their right mind would suggest it be done without specialist health practitioners? The answer is self-evident. No-one. And yet that seems to be the ludicrous position of the Attorney-general and the government!
14. It is true however, in my experience, that matters should be triaged to the most appropriate level of Court. For this reason, I am not opposed to differing levels of Judicial Officers. But in saying this it is my firm view that on the whole the Federal Circuit Court Judges do not have the necessary experience to determine the matters that the Family Court mostly hears, nor the resources to enable that to occur. I mean no criticism in saying this. That group of Judges, by and large, hear and determine a great many difficult cases. Cases might be legally straightforward but difficult because of the personalities or traits of litigants (for eg., mental health and drug issue might be present). The differences in difficulty as between cases heard by the two courts cannot be overstated. They are qualitative and very real. Further, Federal Circuit Court Judges, or Division 2 Judges, should not be expected to do so whilst carrying the case-load they presently have, let alone an increased one by virtue of the loss of Division 1 Judges.
15. The Family Court of Australia has become the “Gold standard” internationally as a Court in the area of Family Law. I hear this often when overseas. At home I view it as having had a difficult birth in that it also had to carry much of the responsibility of quite revolutionary legislation (no fault divorce) and rapidly changing community standards. It has done these things well in my view. They are never easy and carry with them much resentment from disaffected litigants and overworked (and /or ill-informed) politicians who have to deal with complaints about them and such matters as Child Support, which of course is not legislatively a matter within the ready compass of family courts following legislative changes quite some years ago.
16. The Family Court has “*set the agenda*” now for a number of decades in a way that could not, it is contended, have been achieved if it were merely a division of another Court. It has led the debate in these changing times and by and large the community has followed. In that regard, it must be said that legislative changes have assisted – such as for example the changes to Part VII of the Act dealing with children has seen a generation of children spending much more time and having substantial relationships with fathers. Decisions such as *McCall and Clark* [2009] Fam CAFC 92 have also assisted.

17. So too the Family Court (and particularly the Full Court) has led the way in its decided cases in relation to a great number of issues, including the pernicious issue of family violence. As a Superior Court of Record, it has the authority and imprimatur to speak upon such issues and to bind inferior Courts – and to expand the jurisprudence. A Division 2 Court could not do that.
18. Further, it must be noted that issues such as family violence and child abuse by way of example, are not easy issues to deal with and to ensure a just outcome cases must be looked at factually on a case by case basis. By a suitably qualified and experienced Judge who will have to make very difficult decisions. And as a result, there will always be criticisms.
19. Without its leadership the law and practice in this area of real importance to the community, would be significantly poorer.

Outcomes of the system, delays & other problems

20. But, any system, to be efficient and to continue to be so, needs to be monitored and maintained. It's not unlike a motor vehicle in that respect.
21. The Family Law “*system*” has in my view been poorly maintained by successive governments, and to the extent that it has not delivered timely outcomes it is not so much the fault of the “*system*” but of Governments.
22. There have been a number of concerns expressed about the ability of these two courts to bring about outcomes for those who have to utilise them, and properly so. I hear complaints about delays in giving Judgments and I see that as a problem – of both of the present Courts. But it seems to me it too is a problem of resources, and perhaps the overwork of its judges.

The Bills are inexplicably premature

23. Like the Law Council of Australia, whose detailed Submissions I support, I see a significant failure by these Bills not being aligned (or “*connected*”- as they put it) with the ALRC Review. It is, as is suggested by the LCoA a “*failure of public policy and a lost opportunity for the Australian community's future*”² . Such a failure is a large one indeed.
24. I support a Review of the system so as to achieve appropriate outcomes as quickly and in as cost effective a manner as possible or appropriate (and there are differences as to these two concepts).

² Page 12, Paragraph 11

Delays inimical to the administration of and delivery of justice

25. The Committee needs to understand that “*at the coalface*” nothing is more inimical to the administration of justice, and its perception, than significant delays.
26. Significant delays cause many serious problems, and aspects of those problems include:
- Separating couples often require their positions adjusted. That is, there is quite often a need to regularise their relations on such matters as: -
 - The time (if any) that their children live or spend with each parent;
 - Who might occupy the family home;
 - Spouse maintenance or financial orders;
 - Injunctions restraining the conduct, including the financial conduct of the other party.
27. It is in these often- difficult scenarios the position of the weak and vulnerable (including children) is to the fore and it is usually pressingly urgent. Their needs cannot be overlooked. Similarly, a non-resident parent who cannot co-operatively arrange appropriate time to see the children or have them live with him or her cannot wait for many months. Nor should they or their children have to wait that long.
28. When Courts are unable to deal with these terribly important issues at an appropriate time significant individual and community tensions build and often these have far reaching (and sometimes tragic) results. This submission is not made “*in terrorem*”, but from the learned experience of acting for client’s who have been shot and or killed and for acting for those imprisoned for such crimes. Clients are justifiably angry and upset that their lives are put on hold for up to three years in many cases. They can develop a sense of helplessness. The weak often settle cases poorly because they cannot withstand the actions of the other party and the delays.
29. Governments should be ashamed that in this day and age it often visits these circumstances upon its people. And it shamelessly does so, in my experience, announcing from time to time that it has or will introduce “efficiencies” to speed things up, while delaying or not replacing retiring judges.
30. Courts too, when in this position see the parties bring serial interim applications at both a cost to the parties and community but also at a cost to the proper administration of the Courts themselves as judicial resources are thereby diverted from hearing final cases, and, as one judge puts it trying to “apply a band-aid” to the matter.

31. Put simply, the recent levels of funding are grossly insufficient.
32. I note that by way of contrast the NSW Government yesterday announced the appointment of seven (7) new District Court Judges to alleviate delays.
33. I ask myself why, if a state government can do this (and on more than one occasion in recent years), why our Federal Government cannot adequately fund this basic infrastructure which is of such importance?

Appointment of sufficient judges and in a timely fashion

34. Judges need to be replaced when they retire. Moreover, there needs to be a proper level of Judges in the first place.
35. Allied to this Judges should be appointed on no basis other than merit (including a suitable personality or temperament). A good too many appointments in recent years do not unfortunately fit these criteria in my experience. Judges who rant and rave and/ or shout at practitioners are unsuited to their role and should face a Judicial Commission – and if there were one they might.
36. I am also critical of political appointments. They bring the administration of justice into disrepute. Attorneys- General should be under no misapprehension. Such appointments are obvious from the “get-go”. Usually they are obvious to practitioners as the appointee hasn’t ever been seen in one of the Family Courts or it becomes obvious to even inexperienced practitioners’ they have little clue what they are doing. Of course, there are some appointments from outside the jurisdiction which ultimately work out. The question even then remains as to why litigants should have to have their cases as the learning experience of such appointments.
37. Whilst the precise model of an ideal Court is a matter for detailed consideration, the Committee might wish to know that at least in my experience, the model which I found the most efficient was the model of the Family Court as it existed, for example, at Parramatta in the years prior to the Federal Magistrates Court. It consisted of about 6 full-time Family Court Judges, a Judicial Registrar hearing cases within his jurisdiction (interim parenting and property cases then up to \$2M), a Senior Registrar hearing more mundane interim cases but importantly Registrars to conduct Conciliation Conferences and to make Directions and manage the cases and very importantly, in-house Family Consultants who were resourced sufficiently to see urgent cases and prepare short reports – which led to an extremely high level of settlements. Overall, the approach was much more resourced and holistic than it has become. That was a process whereby matters were triaged and received appropriate and timely attention.

38. Having read the Submissions published on-line, I must address the question of legal costs and the attack made on the Legal Profession in this regard but note that it is not a matter under present consideration and a matter for another day. However, the greatest contributor to legal costs, without doubt, are delays. That a few might rot a system, any system, is self – evident and unfortunate. In my experience those examples are numerically rare. Such examples run a real risk of disciplinary action and I can say, having sat upon a Professional Conduct Committee of The NSW Bar that such matters are taken very seriously.
39. However, I have seen all too often that some clients will demand an extraordinary amount of attention from their Solicitor despite the cost associated with it. It is often difficult in costs disputes to see if there is a problem, but it is all too easy, and often just wrong, to attack lawyers.
40. It is my view, for what it is worth, the Family Court of Australia, is an institution which represents, as a stand- alone specialist Court, a worthy model, perhaps with tiers within it, deserving of our support and like any such institution, it requires appropriate funding, to properly serve the Australian community.
41. In Australia we have a tendency, or trait, to pull down or attack our institutions generally, be they the Courts, Parliament itself or even our football clubs or the referees that police our codes. That seems to be our nature.
42. As against that, over the years of my professional life in the family law jurisdiction and in the criminal jurisdiction alike, I have found that Australians, for good reason, are accepting of decisions given by the judges of this country – provided that they have received a “*fair hearing*” as they know and accept without question that the Judges are independent and trustworthy. That is a point of significant difference to many other Countries and it is of significance. It is in itself a characteristic worthy of support and which requires adequate funding.
43. Whilst it is self -evident that our institutions need to be kept relevant and responsive to the community they serve, they too deserve to be protected, especially from ill-informed or gratuitous attack. Such attacks upon the Family Court and the Federal Circuit Courts, and our judiciary are both wrong and ill-informed.
44. As Daniel Webster famously said at the laying of the Bunker Hill Monument, Charlestown, Massachussetts on June 17, 1825 in an American context (which I commend to the Committee is apposite here and now): -

“Let us develop the resources of our land, call forth its powers, build up its institutions, promote all its great interests, and see whether we also, in our day and generation, may not perform something worthy to be remembered.”

45. At this moment in time it would seem that this Senate Committee stands as the bulwark for the Australian community regarding this legislation which should be viewed as inimical to its interests.

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