JOINT SELECT COMMITTEE ON AUSTRALIA'S FAMILY LAW SYSTEM

PROFESSOR THE HONOURABLE NAHUM MUSHIN AM – OPENING STATEMENT

INTRODUCTION

1) I am a Professor of Practice in the Faculty of Law at Monash University where I have taught lawyers' ethics, mostly at graduate level, since 2012. I also coordinate the ethics course in the Faculty. Previously, I practised as a solicitor from my admission in 1972 and then as a barrister at the Victorian Bar from 1980. I was appointed as a Justice of the Family Court of Australia in 1990 and retired from that position in 2011. From 2005 to my retirement I was also a Presidential Member of the Administrative Appeals Tribunal.
2) My appearance before the Committee is initially by way of support of Emeritus Professor the Honourable Marcia Neave AO in her capacity as President of Court Network (CN) and particularly to support the reinstatement of its funding by the Commonwealth including extension throughout the family law system. I am able to speak to the essential work of Court Network from its inception from extensive personal experience.
3) I have also perused the Committee's Terms of Reference (ToR). To the extent that I am able, I make a number of comments on them which I hope the Committee will find of assistance. I do not address any ToR in respect of which I have nothing to contribute.

COURT NETWORK

4) My interaction with CN commenced with its inception when I was practising at the Bar. Family law is laden with emotion. Relationship breakdown is one of the most stressful events of most people's lives. All too frequently it involves dysfunctional behaviour by at least one party including violence, alcohol or other substance abuse or mental health issues. Many litigants represent themselves, particularly for financial reasons.
5) People cope with those stresses with varying degrees of success. In the Court setting many require support for themselves, witnesses and relatives and friends. CN workers, who are mainly volunteers, provide that support in a highly trained, professional, non-judgemental way. They do not give legal advice, thereby enabling the lawyers to concentrate on the conduct of the case including negotiation to achieve settlement. CN also gives referrals to other people and agencies. They include social workers, local government and NGOs.
6) The presence of CN workers in my Court supporting litigants was always very positive. The confidence which they inspire in their clients has a calming effect and assists litigants to focus on the issues. That, in turn, benefits the smooth conduct of the proceedings.
7) I have no hesitation in recommending –
   a) The reinstatement of Commonwealth funding of CN; and
   b) The expansion of CN to the Family Courts of all States and Territories.

ToR a.

8) I support the maintenance of the legal evidentiary standard of the balance of probabilities. There is no reason to change the onus of proof.

ToR b.

9) The requirement of truthful evidence in family law proceedings is no different to that requirement in all other Courts. A crucial part of a Judge's work is the determination of a witness's credibility. Cross-examination is a vital aspect of that process. The family courts have all the necessary powers and skills to make those determinations.
10) I do not accept the sometimes ventured view that there are frequent circumstances in which evidence, particularly of family violence and child abuse, is "made up" or "invented". Making such an allegation publicly is usually profoundly difficult for a litigant. In my experience, there are circumstances in which a victim of violence is not prepared to allege violence for fear of being disbelieved.
11) However, there are circumstances in which witnesses exaggerate allegations of violence as distinct from suggesting behaviour which has never occurred. That is not necessarily lying under oath. The human mind has the propensity to come to believe things as a result of the stressful nature of relationship breakdown. Part of a Judge's role is to determine the truth.
12) During my time as a Judge, non-compliance with orders was one of the most difficult problems in family law. There is no doubt that people flout orders of the Court, at times quite egregiously. Enforcement of orders must be considered as part of the overall needs of the family including, in particular, the paramountcy of a child's best interests. That is often an extremely difficult decision to make and must be considered on a case by case basis.

ToR c.

13) In addition to the proposed merger of the two Courts by way of two divisions of the Family Court of Australia, in my view there are the following further issues:
    a) Judges of the Court's lower division will presumably be drawn from the Federal Circuit Court. Those Judges should also be appointed pursuant to s.22(2)(b) of the Family Law Act 1975 (FLA);
    b) Between 2004 and 2008 I served as Administrative Judge for Victoria and Tasmania answering to the Chief Justice. I had very frequent dealings with the Federal Magistrates Court (FMC) (as it then was - now the Federal Circuit Court – (FCC)). While the pressures on Judges of the Family Court to dispose of cases was always very high and sometimes oppressive, the pressures on the FMC were unbearable. The anecdotal evidence, including media reports, suggests that if anything, those pressures have increased. That creates injustice to litigants and particularly their children and is a threat to access to justice and the rule of law. It is unreasonable to expect Judges to work under those pressures. Apart from needing time to write judgments, Judges require time to consider complex factual, legal and discretionary issues. The only way to overcome those pressures is to appoint more Judges and appoint them promptly when vacancies occur;
    c) I do not accept the proposition that it should be a requirement for Judges in family law to be married and/or have one or more children. If a Judge is appointed in accordance with the legislation referred to above, he/she will be appropriately qualified; and

d) The outsourcing of the counselling services has been a backward step. The Court should be re-funded to enable the inclusion of sufficient numbers of skilled people to service the reporting needs of the Court in child matters without the need to engage private counsellors.

ToR d.

14) The cost of legal representation in family law proceedings is a difficult issue. In my view, there are several steps which might be taken to alleviate the problems including –
   a) Disappointment fees are iniquitous and should be banned. While I am not familiar with their present use, my experience was that they stemmed from different briefing practices of the various State bars.
   b) Time costing should be banned in family law. It can, and occasionally does, lead to inefficiency. Time costing should be replaced by event or stage of matter costing. There would need to be a discretion to increase the fees in the event of an unforeseen circumstance. The capping of fees could be approached in that context. Consideration would also need to be given to the relevance of the Uniform Law to such a decision in those States which have enacted that legislation.
   c) Various legislative provisions require costing to be proportionate to the matters in dispute in the civil law. Any matter which is in issue must have a proper basis. I would be happy to provide the Committee with references to those provisions.
   d) The re-inclusion of the counselling services in the Court's structure referred to above would also reduce the cost of proceedings to litigants. Anecdotal evidence suggests that some of the charges levied by private professionals who perform assessments in child cases are prohibitive.
   e) Achieving better outcomes in resolution of property disputes requires better funding of mediators. Improvement of rates of settlement of property matters would be directly impacted by increasing the numbers of skilled mediators.

ToR g.

15) Applications by grandparents seeking contact with grandchildren are a difficult aspect of the family law jurisdiction. That is particularly so in an application against the joint wishes of the child's parents. In my view, there is no further intervention which might resolve the issue.

ToR k.

16) I strongly recommend the repeal of the presumption of equal shared parental responsibility in FLA s.61DA. I do so for two reasons:
   a) In practical terms the presumption is often mistaken for equal shared time rather than equal shared parental responsibility. That has created unrealistic and erroneous expectations of outcomes and increased the level of disputes in some cases; and
   b) As a matter of fundamental policy, the Parliament should not fetter the Court's discretion. Each matter must be decided on its own facts and a legislative

requirement such as the presumption, in a sense, ties the Court's hands in its determinative process.

17) Finally, the reductions in funding in many areas of the family law jurisdiction, particularly including legal aid and community legal centres, by successive governments has been false economy. It has resulted in a system which cannot cope with the demands on it. The consequence has been the degradation of crucial aspects of the regulation of society, particularly as they relate to areas of violence and abuse and power imbalances which are features of dysfunctional relationships. Australia's family law system was, for many years, the envy of many countries. It should be returned to that position.

CONCLUSION

18) On 4 September, 2017 I made a submission to the House of Representatives Social Policy and Legal Affairs Committee Inquiry Into a Better Family Law System. I refer the Committee to that submission in the event that it contains material of assistance in this inquiry. Otherwise, I would be pleased to make whatever further contribution the Committee may find of assistance.

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