



Family Court of Australia in the Parramatta Justice Precinct. Photo: Manfred Gottschalk / Alamy Stock Photo

Chronic underfunding is the cause of delays in family law

By Michael Kearney SC

In May 2018, the federal attorney-general announced the government's proposal to merge the Family Court of Australia and the Federal Circuit Court, a move that would effectively lead to the abolition of the Family Court of Australia.

The proposed merger would create a new single 'Federal Circuit and Family Court of Australia' from 1 January 2019, in addition to a new Family Law Appeal Division in the Federal Court of Australia to hear all appeals in family law matters from the new merged court.

At the time of the announcement, which took the profession largely by surprise, the federal attorney-general advised the president of the Bar Association, Arthur Moses SC, that he was willing to engage in discussions about the proposed reforms. To date, no discussions have occurred.

The announcement was made in the middle of a review of the family law system being carried out by the Australian Law Reform Commission (ALRC), which has been asked by the Australian Government to consider (amongst other matters) 'whether the adversarial court system offers the best way' of resolving parenting and property disputes.

The Bar Association's position has always been that real and lasting reform of family law has to be based on evidence which is aimed at reducing the unacceptable delays that exist in the current system. The provision of sufficient judicial resources and appropriate legal aid



funding is at the heart of dealing with those delays.

In late July 2018 the Bar Association released a Discussion Paper intended to foster debate and encourage the government to consult in relation to these important reforms.

The Discussion Paper called for a national conversation about the benefits of preserving a specialist family court in Australia and outlined a proposal for structural reform of the Federal Courts that maintains a stand-alone, properly resourced Family Court of Australia 2.0 as an alternative to the restructure proposed by the attorney-general.

The difficulties faced by the family law jurisdiction is experienced throughout New South Wales and is particularly acute in metropolitan and regional areas.

The delays in both the Sydney and Parramatta Registries of the Family Court of Australia mean that a case commenced today (involving children and/or financial issues) is unlikely to

be finally determined for at least three years and, in a significant number of cases, will take longer. That is unfair to families and is not sustainable.

Barristers in NSW are at the coalface of dealing with the problems that arise from stretched judicial and court resources.

In Dubbo and Orange, practitioners report that since about 2015, sittings for duty matters and hearings have reduced dramatically in the Family Court and the Federal Circuit Court. The Family Court sat in Dubbo for at least four hearing weeks a year until about 2017. Following the appointment of Justice Gill to the Canberra Registry it was announced that his Honour would sit for 20 weeks a year at Parramatta, to enable Justice Foster to cover the Dubbo sittings. As it turned out, Justice Gill did not sit at Parramatta for 20 weeks a year as proposed and the sittings of the Family Court at Dubbo ceased completely.

The resumption of the Family Court sittings at Dubbo for two weeks a year is under consideration. However, that would still represent only half of the sittings that have historically taken place at Dubbo.

Although there are scheduled sittings of the Federal Circuit Court in Dubbo and Orange in 2018, and it is recognised by local practitioners that the sitting judges work very hard – in one recent case, the court sat until 7.15pm so as to avoid having to adjourn a two day specially-fixed part-heard matter – there

are still significant delays, an inability to obtain an urgent or interim hearing date and a risk of matters being 'not reached' on more than one occasion.

Albury circuit

On the Albury circuit, a reduction in sittings is causing severe delays in the resolution of proceedings. In about 2015, sitting weeks reduced from about 10 a year to five weeks a year. Generally, the duty list operates on Monday of the sitting week and hearings are listed from Tuesday to Friday. Hearings are allocated for specific dates within the hearing week, rather than as a rolling list; however, local practitioners report that some matters inevitably roll over to the following day, and legal representatives are expected to be in a position to appear on any day of the sitting week. As with any list, some cases are adjourned and some resolve on the day of hearing. Others are marked 'not reached'.

By way of illustration, on a sitting week in December 2017, some 58 matters were listed before the court. Four matters involved interim hearings, and the balance were listed for directions. From Tuesday to Thursday of that week, 48 matters were listed for final hearing. At least one of those matters had twice previously been marked 'not reached', a not uncommon occurrence. Such 'over-listing' of final hearings results in a duplication of costs for clients in preparing for trial.

Legally aided matters often reach the cap in funding without the proceedings being heard. Multiple applications must be made if a matter is not reached. Delays in processing Legal Aid applications in turn result in funding not being granted in time for trial evidence to be filed in accordance with court orders.

Local practitioners report that final hearings are listed before the preparation of a Family Report, which is often released very close to the hearing date. Legal Aid will often not even consider applications for trial funding until the Family Report is released. This results in delayed preparation of trial documents. At a practical level, case management occurs during sittings. There is no provision for telephone directions hearings to occur, for example, after a conciliation conference or mediation or after the release of a Family Report.

More proceedings are now being transferred to Melbourne for hearing than was the case when 10 hearing weeks were allocated to the Albury Circuit. The costs associated with travelling to Melbourne is prohibitive for many litigants and difficult for regional practitioners. The listing of urgent interim hearings is sometimes delayed by up to three months, resulting in practitioners listing urgent matters before the Local Court or in Melbourne.

Coffs Harbour/Lismore

On the Coffs Harbour circuit, the Federal

Circuit Court sits for final hearings for about five weeks a year, which is a similar period to the Lismore circuit. The court also sits in both centres on other occasions for other hearings, sometimes by phone, other times physically.

In a recent Coffs Harbour circuit, in the week of 20 November 2017, there was a large number of matters listed each day at 9.30am, along with a sizeable list of mentions and interim applications, which often take up two hours of the court's hearing time. Coffs Harbour is a region with a large amount of parenting applications, which often, necessarily, take priority. To add to the workload, by the Thursday of that week, fresh final hearing matters were listed. Two matters were heard to finality in the course of the week. The position is similar in Lismore.

The delays are illustrated in one parenting case involving a child aged under two years, to whom the father did not initially have access. Following an appeal of an interim decision, the matter was listed for final hearing in June 2017. The matter was heard for one day, then marked part heard. The hearing resumed on 14 September 2017, at the end of which it was again marked part heard, and was again listed in December 2017.

Submission to review of the family law system

Against that background, the Family Law Committee prepared a submission in May 2018 on behalf of the association in response to an 'issues paper' released by the ALRC as part of its review of the family law system.

In that submission, the association stressed that fundamental to the federal review should be a recognition that family law in NSW has been adversely affected by a chronic and sustained lack of resources in both the Federal Circuit Court and the Family Court of Australia in its NSW registries, which has resulted from an absence of commitment by successive governments to the proper funding of the system.

'Any recommendations made by the ALRC as a result of this review need to recognise and acknowledge that without a commitment by government to a properly resourced family law system, such recommendations will be, at best, of limited utility,' the association stated in its submission.

'The association considers it imperative to ensure that, while alternative dispute resolution is utilised wherever possible and appropriate, the broader family law system, including the courts, is properly resourced, maintained and supported to administer justice for those affected by complex family law matters that cannot otherwise be resolved.'

The average number of cases in the docket of judges in the Federal Circuit Court is in excess of 400, a crushing workload. The lack of resources relates not only to an insufficient

number of judicial officers to deal with an expanding jurisdiction and increasing workload, but also insufficient funding to maintain counselling and assessment services previously provided by the courts.

The Bar Association's submission also stated that although there is a great willingness among the members of the NSW Family Law Bar to provide *pro bono* assistance, the association is concerned that the provision of *pro bono* assistance for those involved in family law proceedings simply cannot and should not be a substitute for the proper funding of the courts and the legal aid system for those in need of family law assistance.

Without a properly funded family law system the rights and interests of litigants and children alike cannot properly be protected. Without proper representation, there is a real risk of uneven playing fields and unfair outcomes.

The Family Law Committee's position is that a properly-resourced court must be a key part of any blueprint for the future of family law, just as it has been a critical, if underrated, part of the system's success over the last four decades.

Many parts of the ALRC's 'issues paper' make reference to various family law systems and models which operate around the world. What is missed is that so many different countries look to Australia as the 'gold standard' and benchmark of family law systems. Over the last four decades the Australian family law system has built up procedures and jurisprudence held in high regard in almost all areas of the world except, it often seems, Australia.

The most difficult matters and the most complex matters will ultimately require the assistance of a court. It is critical for the benefit of these clients and children involved in these cases that the court must be properly supported and resourced to adjudicate justly, promptly and affordably.

The Bar Association's submission to the ALRC concluded: 'The association recognises the work of the courts, the judiciary and the barristers who have achieved what has been achieved despite the chronic underfunding of the system and without the support and resourcing required. In conclusion, the association believes that the future of a fair, robust and just family law system must include a properly resourced, respected and supported court. The association encourages the ALRC to consider the resourcing and funding of the courts as a crucial part of any proposed reform and to call on government to support the courts' ongoing work for and on behalf of the community.'

As part of its review, the ALRC is scheduled to release a discussion paper in early October 2018, and the Family Law Committee will prepare a further submission in response to it on behalf of the association, which will be the subject of an article in a future issue of *Bar News*. The ALRC is due to provide its final report to the Attorney General on 31 March 2019.