



NEW SOUTH WALES
BAR ASSOCIATION

OPENING STATEMENT BY THE NEW SOUTH WALES BAR ASSOCIATION TO THE JOINT SELECT COMMITTEE ON AUSTRALIA'S FAMILY LAW SYSTEM

13 March 2020

Delivered by the Chair of the New South Wales Bar Association's Family Law Committee, Michael Kearney SC, appearing with the Director of Policy and Public Affairs, Elizabeth Pearson

** Check against delivery**

The New South Wales Bar Association is pleased to assist the Joint Select Committee with this important and timely inquiry.

I think we are all in agreement – those of us in this room today, court users, the legal profession, the parliament and judiciary – that Australia's once world-leading family law system is not serving the best interests of children and families as well as it could or it should at this time.

The fundamental question is this: how can we work together to improve it? This inquiry provides an opportunity to examine and commit to holistic reform to secure better outcomes for those in need of the system's services and protections.

At the core of so many of the issues confronted by the system is a chronic and sustained lack of proper funding and resources for the Family Court and the Federal Circuit Court. The impacts are borne by children and families already at their most vulnerable, and by judicial officers faced with unsustainable and crippling workloads.

Failing to properly support and invest in the system has resulted in unacceptable delays and costs that directly impact on the accessibility and quality of justice. Some families are having to wait up to three years, or longer, to have their family law disputes resolved. Broader costs and impacts to the community also result from family breakdowns not being determined in a timely manner.

Underfunding legal assistance has meant a significant number of parties cannot afford legal representation in family law matters and appear by necessity unrepresented in court. These factors have contributed to crippling judicial workloads. Both courts now have backlogs of more than a year's worth of cases. Many Federal Circuit Court judges have between 400-500 cases in their dockets, some as many as 630.

There is understandably much frustration with the current state of Australia's family law system. This frustration is shared by the New South Wales Bar, whose members assist and represent families, children and survivors of family violence in the broader family law system – not only in the courts but in the provision of advice and in various forms of alternative dispute resolution - and witness first-hand the impacts of a system in crisis each day.

The Association is a voluntary professional association representing more than 2400 practising barristers, including more than 185 who report practising in family law and guardianship. I serve as chair of the Association's family law committee and have worked as a family law practitioner for more than 25 years. I appear with the Association's Director of Policy and Public Affairs. The Association and its members are committed to promoting the administration of – and access to – justice.

The vast majority of family law matters do not involve direct engagement with the Court system. But for those matters and for the most intractable of matters that cannot otherwise be resolved – such as those involving allegations of family violence, child abuse or complex financial issues - the courts have a critical role to play.

Barristers play an important role in facilitating the just and efficient resolution of matters at all stages. Barristers in NSW appear on a daily basis assisting clients in the Federal Circuit Court and the Family Court, on an extensive pro bono basis as well as in matters funded by Legal Aid NSW and on private retainers. We both act as mediators and arbitrators and assist and represent clients in all forms of Alternate Dispute Resolution. Barristers contribute voluntarily, unpaid, to the development of the law and procedure of both Courts.

Barristers also make an important contribution to relieving pressures on judicial officers and the courts. One judge told a research study in 2000 after a very full duty list one day that the time taken to hear nine matters involving self-represented litigants would have been halved had they been represented.

We recognise the cost of accessing justice can be prohibitive, and this remains a great concern to us. We acknowledge that costs form a specific term of reference of this inquiry.

The legal profession is a profession, not a business. It is unlawful for a barrister in NSW to charge more than is “fair and reasonable in all the circumstances” of a case. No barrister is above the law – charging more than a fair and reasonable amount for legal costs can constitute unsatisfactory professional conduct or professional misconduct and result in disciplinary action.

But without doubt the most significant factor that impacts on the cost of a case – both in terms of monetary, time and social cost - is entirely out of the control of the Bar. That multiplying factor is delay caused by a family law system in crisis.

The New South Wales Bar Association believes the path to reform need not be complicated, costly or lengthy. Instead, the solution requires two primary commitments:

- a. First, a commitment to resourcing parts of the family law system that work well when adequately funded and resourced but have been starved by successive governments of the support they require to function effectively;
- b. Second, a commitment to implementing improvements identified by stakeholders, and supported by landmark research, to strengthen a standalone specialist family court to promptly and appropriately resolve matters including those involving family law, family violence and safety.

We have outlined in our written submission five recommendations to achieve this:

- a. Properly fund and resource the family law system, and commit to doing so on an ongoing basis;
- b. Maintain a specialist, stand-alone and properly resourced Family Court in Australia to continue to provide specialist assistance to children, families and survivors of family violence;

c. Adopt the Association's Family Court 2.0 Model and relocate judicial officers hearing family law matters and the family law jurisdiction of the Federal Circuit Court into a second division within the Family Court;

d. Oppose the reintroduction of the Government's merger proposal; and

e. Carefully consider and engage with the recommendations of the Australian Law Reform Commission's landmark review of the family law system, including recommendations to overcome any jurisdictional gaps and improve information sharing between state-based child protection and family violence prevention, and Commonwealth family jurisdiction

We would be happy to answer any questions the Committee may have.