

MEDIA STATEMENT

NSW BAR IS COMMITTED TO PRO BONO WORK

31 March 2018



On Monday, 26 March 2018 the NSW Bar Association received an enquiry from *The Australian* asking if the NSW Bar had told the Federal Circuit Court it was not interested in undertaking pro bono work to clear the backlog in family law cases as part of an initiative proposed by the Chief Judge.

The Weekend Australian on 31 March 2018 published a story titled 'Barristers urge rethink on family law backlog'.

Whilst it is not appropriate at this stage for the Bar Association to disclose communications which the President has had with the Chief Judge of the Federal Circuit Court or to release correspondence between the Federal Circuit Court and the Bar Association, it is important to ensure that the facts are clear in relation to the issue of pro bono work and the NSW Bar Association.

The Australian was informed that last month the Association put forward the names of around 30 barristers for the Family Law Settlement Service, a scheme which provides the Federal Circuit Court and Family Court access to accredited practitioners to provide mediation services at a flat fee.

The NSW Bar Association provides extensive pro bono assistance to the community of New South Wales and is committed to continuing to do so. In a family law context, this assistance is provided directly by the participation of barristers in the Family Law Settlement Service and the Legal Referral Assistance Scheme. This is quite separate from the pro bono matters that many of our members take on of their own accord.

The barristers of New South Wales appear on a daily basis assisting clients in the Federal Circuit Court and the Family Court of Australia. They do so on a pro bono basis, as well as funded by the NSW Legal Aid Commission and on private retainers. Barristers also contribute in many and varied capacities, but all in a voluntary and unpaid capacity, to the development of the law and procedure of both Courts.

The NSW Bar Association is concerned that the provision of pro bono assistance for those involved in family law proceedings should not, however, be a substitute for the proper funding of the Courts and the legal aid system for those in need of family law assistance. The Association has consistently expressed concern about the sustained underfunding of the family law system by successive governments of both political persuasions and continues to do so.

It is in this context that the NSW Bar has concerns about the 'family law callover' to be conducted in the Sydney Registry of the Federal Circuit Court in April 2018. The callover is to involve the referral

of matters to private mediation, family therapy interventions, arbitration and the preparation of privately funded expert reports. Many of the matters to be dealt with have been awaiting trial for years and the parties and children involved have spent considerable sums of money awaiting a decision. For instance, delays in the Parramatta Registry mean that a case commenced today (involving children and/or financial issues) is unlikely to be finally determined for at least 3 years and in a significant number of cases, for a greater period of time. This is unfair to families and is not sustainable.

The average amount of cases in the docket of judges in the Federal Circuit Court is well over 400. This is a crushing workload for these judges and raises real work, health and safety issues.

It is most unfortunate that the Court is required to embark upon endeavours such as callovers without proper funding as a result of the backlog of cases before it. But the family law litigants and children who are awaiting a just determination of their cases should not be put to the further expense, delay and risks of the referrals proposed. Without funding for proper participation and representation in the interventions proposed, there is a real risk that the rights and interests of litigants and children alike will not properly be protected – without proper representation, there is a real risk of uneven playing fields and unfair outcomes. It goes without saying that in many family law matters there is an “inequality of arms” in terms of the representation of men and women. Generally speaking, men have greater access to cash flows which permit them to retain lawyers and/or larger legal teams. The NSW Bar is very troubled that in the rush to effect mediations by the use of pro bono services, mistakes may be made or unjust outcomes may occur for women and children who are the subject of custody battles. If matters cannot be settled, they will go back into the lists and will have to join the long queue of cases awaiting trial.

It should not be forgotten, that the focus in all these matters must be on the interests of justice and families, not on improving statistics in the short term.

Recourse by the Court to the callover is no doubt an attempt to address the systemic problems plaguing the Federal Circuit Court, but it is not and cannot be an answer to the problems. Without a commitment to the proper funding of the Court and the proper support of the judges of the Federal Circuit Court the systemic problems facing the Court cannot be addressed and a callover only serves at best to postpone the need for real attention to the underlying issues. Regrettably, as a matter of fact and human frailty, relationships will break down and when a resolution cannot be reached between the parties, then matters can only be amicably resolved by the intervention of an independent Court. The amount of work before the Court will continue and the backlog of cases will mount up again.

The NSW Bar Association repeats and renews its call for a commitment by the Federal Government to the proper funding of the family law system and the Courts within it so as to provide a functioning and sustainable system of justice for those members of the community in need of family law assistance.

The new Federal Attorney-General, Christian Porter MP, has inherited the delays and funding issues associated with the family law jurisdiction. The NSW Bar is committed to working in a constructive manner with the new Attorney-General as he considers reforms to the family law system. Attorney-

General Porter should be given an opportunity to familiarise himself with the real issues in the jurisdiction and to look at long-term solutions which will assist all Australians who come into contact with these Courts.

The NSW Bar is also committed to continuing its long association and close relationship with the Family Court and the Federal Circuit Court, in order to assist both Courts in the difficult work which their respective jurisdictions require them to undertake on a daily basis. In recent days, judges of both Courts have been the subject of unfair criticism or commentary in circumstances where, because of convention, they are unable to defend themselves. The judges of both Courts are of the highest integrity and work ethic. The judges should be permitted to undertake their difficult work without being unfairly maligned or criticised.

Arthur Moses SC
31 March 2018