NEW SOUTH WALES
BAR ASSOCIATION

The evidence for rethinking the Family Court's future

Arthur Moses SC, President of the New South Wales Bar Association

The Federal Attorney-General in an opinion piece last week sought to argue against the NSW Bar's position that the Government should carefully re-consider its proposal to abolish the Family Court of Australia. I have no doubt that the Attorney-General, who I know to be a good lawyer and an honourable man, is advocating this policy in good faith but he needs to examine the evidence and not rush through the Parliament legislation that may cause harm to families.

In a court of law there is nothing more powerful than evidence. The best argument will fail unless supported by clearly established facts. The same is true of law reform. Despite best intentions, policy will not succeed unless supported by a carefully reasoned case for change founded in fact.

Australia's family law system is complex. If any proposed reform is to succeed, policymakers must understand the system's nuances and its practical operation. For this reason, in the absence of public consultation, the NSW Bar Association has called for an informed national discussion about the future of the Family Court, to promote the best outcomes for Australian families and children in need of its specialist services.

Regrettably, the Attorney-General's proposal to merge the Family Court into the lower, generalised Federal Circuit Court fails to address four facts on the public record.

First, the complexity of work performed by the Family Court and the FCC is fundamentally different. It is not possible to compare their disposition rates as an accurate measure of success, just as it is not useful to compare waiting times at a local GP with those at a hospital emergency room. The type of work, the intensity and complexity of cases that present are too different to be compared.

Commonwealth budget documents state that the Family Court handles "the most complex and difficult family law matters". This includes matters involving allegations of family violence, child abuse, complex property matters, international abduction, and approval for specialist medical procedures such as treatment for gender dysphoria in children.

In contrast, half the family law matters filed in the FCC are divorce applications. This work is largely paper-based and, according to the Court's 2016-17 Annual Report, largely undertaken by registrars, not judges.

It is no surprise that the complex, specialised cases heard by the Family Court take longer to resolve and are more resource intensive, by their nature, than the simpler matters handled by the FCC.

Differences in the Courts' disposition rates are not proof that the Family Court is failing nor a mandate for reform. They simply reflect the fact that the Courts perform work which differs substantially in complexity and content.

Second, increased court resources would benefit the family law system. The number of judges available to hear matters directly affects disposition rates. The Secretary of the Attorney-General's Department told Senate Estimates in February that "It's clear that, if we had more resources, we would deploy more judges in the daytime, and in the evenings if it suits people", adding he would "love to see more funding for the courts". Restructuring the Courts will not improve family law outcomes without a significant commitment from Government to increase resources.

Third, the FCC already faces a crushing workload. The Court's CEO gave evidence at Senate Estimates of a backlog of approximately 17,400 pending cases in the FCC. Further, he noted that the increasing number of migration referrals to the FCC comprises "a significant component" of its workload. This contributes to delays in the FCC's family law cases, which must compete directly with migration matters for resources and court time.

It makes no sense for the Attorney-General to dismantle a specialist family court and shift its most complex cases into a generalist lower court that is already over-burdened and under-resourced.

Fourth, court statistics are not a proper measure of a legal system's success. The quality of justice that families and children experience at court is an important factor that cannot be quantified on a spreadsheet.

Justice rushed is as dangerous as justice delayed. In recent evidence to a Senate Committee, the Council of Single Mothers and their Children submitted that "many of the most disconcerting stories we hear occur in the Federal Circuit Courts where issues of family violence are disregarded in comments from the Bench".

This evidence reinforces the need for us to consider as a society whether maintaining a specialist, properly resourced, stand-alone Family Court of Australia 2.0 would be more beneficial to the administration of justice than the Government's proposal.

The Association has offered for discussion an alternate model of reform involving a structural improvement to preserve a specialist family court and a proper resourcing commitment from government.

It is not too late to join the conversation. Our family law system is too important to Australian families and children to get this wrong.