NEW SOUTH WALES
BAR ASSOCIATION

OPENING STATEMENT BY THE NEW SOUTH WALES BAR ASSOCIATION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA BILL 2019

9 October 2020

Delivered by the Senior Vice President of the New South Wales Bar Association, Michael McHugh SC, and the Chair of the New South Wales Bar Association's Family Law Committee, Michael Kearney SC

* Check against delivery*

Mr McHugh SC:

Thank you for the opportunity for the New South Wales Bar Association to appear today. My name is Michael McHugh SC, I serve as Senior Vice-President of the Association. I appear with my colleague, Michael Kearney SC, Chair of the Association's Family Law Committee and family law practitioner of more than 25 years' experience.

In some respects, much has changed in our community since the last time the merger proposal was before this Committee - as the Law Council has outlined this morning.

Critically though, none of those changes have resulted in the merger proposal being any more fit for purpose than when it was first put before the parliament two years ago.

The Association acknowledges that amendments have been made to the original bills that attempt to protect victims of family violence. However, the merger proposal remains wholly inadequate to protect children, families and victims of family violence.

To assist the Committee, there are several misconceptions about the merger that Mr Kearney and I would like to address at the outset.

The first misconception is that the merger will not abolish the Family Court.

The *Family Law Act 1975* (Cth) created a bespoke, specialist, stand-alone, multi-disciplinary Family Court dedicated exclusively to hearing family law matters. A division in a generalist court is simply not the same.

Why does a specialist, stand-alone Family Court matter?

It matters because a specialist court is more than just its Judges. It includes support services, resources and processes. It includes specialised court infrastructure to support children and families, and to coordinate and locate legal and non-legal support services, including specialist conciliation and assessment services.

Even before COVID-19, almost 70% of matters before the Commonwealth family courts involved allegations of family violence.[1] Specialisation is critical to promote safe engagement for victims with the Courts and our justice system from the time a matter is filed, through appropriate triage, active case management and expedited resolution.

A specialist, stand-alone Family Court also matters because the former Chief Justice of the Family Court, Alastair Nicholson, and Margaret Harrison, warned in 2000 that "experience in Australia and overseas suggests that where a family court is a division of a generalist court… the quality of performance suffers greatly".[2]

That is why, instead of the merger, the Association has proposed the *Family Court 2.0 model* which has the significant advantage of bolstering, not undermining, a stand-alone specialist court and court services. It involves a straight-forward "lift and shift" of the Federal Circuit Court's family law jurisdiction and judges into a new lower division within the stand-alone, specialist Family Court.

Mr Kearney SC:

The second misconception is that merger will increase efficiencies and reduce delays.

We know the merger won't achieve its stated goals because the Government has tried a merger by stealth approach since December 2017 including through common management and dual leadership appointments to the Family Court and Federal Circuit Court. Since then, case backlogs and the number of cases in Federal Circuit Court judges' dockets have only increased.

The Productivity Commission reported in January 2020 that the backlog of all pending non-appeal applications in the Family Court has grown by 34 percent since 2012-13, while the backlog of all pending applications in the Federal Circuit Court has grown from 63 percent – in 2019 there were some 17,400 cases awaiting determination.

This week's Budget confirmed that both Courts fell short of their clearance targets in 2019-20. For the second year in a row now, the Federal Circuit Court disposed of just 62% of final order applications within 12 months – falling significantly short of its target of 90%. Remember, this is the Court into which these Bills propose to 'collapse' the work of the specialist Family Court of Australia.

Despite best efforts, the challenges faced by judicial officers struggling to meet their existing caseloads adversely affect the timeliness and quality of outcomes delivered for parents and children. The challenges also pose a threat to the work, health and safety of those Judges.

To be clear, this is not a reflection on any person; it is an indictment on why the merger cannot work.

In addition to the sheer diversity of work and crippling caseloads facing the court, the head of the merged entity would be required to manage more than 100 judges across 19 odd registries. This is not in the best of interests of the courts, the head of jurisdiction, the judges she or he leads, or the public they serve for this to continue. It has not worked for the last 2 years and there is no reasoned basis to conclude that it will work in the future.

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1 Women's Legal Services Australia, *Safety first in family law* (2019) <www.wlsa.org.au/campaigns/safety_first_in_family_law> ; see also House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (2017) [1.6].

2 The Honourable Chief Justice Alastair Nicholson AO RFD and Margaret Harrison, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24(3) *Melbourne University Law Review* 756.

The third misconception is that this reform has been informed by independent inquiries over a decade.

The merger proposal was not considered or recommended by any of the five consultancy reports cited by the Government. The 2008 Semple Report proposed an entirely different model, on which the NSW Bar Association's *Family Court 2.0 model* is based, which maintains a stand-alone specialist family law court.

The fourth misconception is that the merger has the potential to resolve an extra 8,000 cases a year and realise savings of $3 million.

Both claims, first made in 2018, were based on the flawed desktop PWC Report. The PWC Report's authors told the Senate inquiry into the original bill that they did not investigate the merger, or any other, reform opportunities. Their six-week desktop report does not provide any credible economic foundation for the merger. A large part of the PWC cost saving idea – the abolition of the appeal division of the Family Court – has been abandoned by the government. And the purported $3 million in savings figure no longer appears in the 2019 explanatory memorandum of the bill. There is no sound basis for this claim.

The fifth misconception is that everyone involved in the system has known for years it needs to be reformed but no one has been able to agree on the best way.

More than 110 stakeholders in the family law system agree that the merger is not the solution and oppose the Bill because it will put families at risk. Those stakeholders also agree they prefer the *Family Court 2.0 model* proposed by the NSW Bar Association.

How we do know the 2.0 model will work? Because it is already in operation in Western Australia and was recommended by the Semple Report.

In conclusion, the Association does not dispute that Australia's family law system requires reform. Australian families deserve more however than this merger proposal.

The merger was never a sound policy idea and should be opposed - but it has provided a key opportunity for a national discussion and agreement on a better way forward.

The Association encourages the Committee to embrace the *Family Court 2.0* alternative to best protect those most in need of family law services.

Mr McHugh and I would be pleased to answer any questions the Committee may have.