Leadership in Family Law

2 June 2016

Senator the Honourable George Brandis
Attorney-General
349 Sandgate Road
ALBION. Q. 4010

Dear Mr Attorney-General,

I write on behalf of the 900 members of the Family Law Practitioners' Association of Queensland (FLPA), and as the President of that organisation.

Resourcing issues in the Family Court of Australia has been on your agenda, and is an issue which requires no elaboration. That such issues are causing crisis in the delivery of family law services in Queensland is the subject of daily media attention.

The question '*What can be done*?' must begin with '*What is needed*?'.

It also begins with acceptance of the reality that where a great volume of work in the Family Law jurisdiction is processed by the Federal Circuit Court of Australia, the resourcing of two separate Courts is part of the same question.

Conceptually, resourcing always begins with the examination of history, and in turn, the 'purpose' of Courts – as follows:-

1. In 1975, the newly created Family Court was heralded as a specialist Court to provide married couples and families enduring breakdown with access to Judges determining their cases pursuant to new legislation – no longer part of the State system, it was designed to allow prompt determination of cases in a specialist area of law; and

2. In 2000, the Federal Circuit Court was introduced as a system to provide quicker, and cheaper, access to justice for Australian parents and families – less complex matters could be heard and determined on a truncated timetable, and therefore, at less cost to litigants.

Based on the information received from our members, who are, daily, practising grass roots family law in both of these Courts, neither of these purposes is presently being achieved.

As to the Family Court's Brisbane Registry:-

(a) Five years ago there were five 'trial' Judges sitting in Brisbane – today that number is two, increasing to three as from 9 March 2016;

(b) Registry statistics tell us that there are 368 pending matters in the Brisbane Registry[1]. Notionally therefore, each of those three Judges has over 120 pending cases in their lists;

(c) In Brisbane, 57% of matters are taking longer than 12 months to finalise, with the median time for a matter to reach trial being 21.5 months[2];

(d) Statistically 26% of matters filed in Brisbane will require determination in trial forum,[3];

(e) Each Judge disposes of, on average, 40 matters per annum, 15 of which are reserved decisions with written judgements[4];

(f) At that rate, about two years of judicial sitting time will be required to clear, via written, reserved final judgments, *existing* matters (without allowing for variables in sitting time, such as Judges' annual leave)[5];

(g) In reality, however, *new* matters are being filed each day, compounding the problem. Each of the three Brisbane trial Judges will, statistically, have a further 117 cases added to each of their lists during 2016[6];

(h) Applying the statistics above, 26% of those new matters, viz. about 30, will require determination by each Judge, via written, reserved final judgment, each year.

(i) At that rate, in each new year of filings in the Brisbane, <u>two</u> years of judicial sitting time will be required to determine them via written, reserved final judgment;

(j) Judges are therefore being required to go on and commence hearings in matters where their judgments in matters which have already been heard remain unwritten and unpublished;

(k) With insufficient dates for the Court to hear contested matters, matters are being allocated trial dates too short to hear all evidence, left 'part heard', and re-listed for the hearing of the remaining evidence many months ahead. This is in circumstances were parties may have already waited more than 12 months for the initial hearing of their matter;

(l) Cases involving the most complex issues – allegations of abuse, histories of family violence, and the special medical needs of children - are being kept in lengthy 'holding patterns', exposing those litigants, and the subject children, to the very consequences the litigation in which they are participant is designed to prevent;

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[1] Stakeholders' Meeting, Family Court of Australia, Brisbane, 21 January 2016.
[2] Justice Colin Forrest, 'Resourcing the Family Law Courts – A National Priority', delivered at Family Law in the Tropics, Cairns, 26 February 2016, page 5.
[3] *Ibid*, page 3.
[4] Stakeholders' Meeting, *op. cit.*
[5] 26% of lists of approx. 120 matters, viz. 31 matters @ 15 matters per annum.
[6] Viz. Average of 2,700 new filings, Australia wide, per annum, notionally apportioned across 23 trial Judges; Justice Colin Forrest, *op. cit.* page 2.

(m) Litigants regularly wait for judgments for over 12 months, during which time the subject matter of the proceedings is not static - children progressively grow older, and assets shift in value – judgments are pending so long that litigants are approaching the Court to *reopen* those matters for further hearings, given changes in circumstances – resources which have already been 'spent' on trial time are being lost as matters require the allocation of further hearing time to address the consequences of delay (with the resources of other organisations, such as Legal Aid's funding of Independent Children's Lawyers, also being affected by reopenings).

In the Federal Circuit Court of Australia, the situation is no better, as follows:-

(a) There are 17,000 filings per annum, apportioned across 65 Judges[7];

(b) In the list of some Federal Circuit Court Judges, interim hearings are not able to be allocated – those who are critically in need of interlocutory relief such as spousal maintenance are not able to have their applications heard, because the hearing of an application for orders arising from a specific power in the *Family Law Act* simply cannot be accommodated;

(c) The daily lists of some Federal Circuit Court Judges are so long (on occasions upwards of 40 matters are listed) that matters are unable to be heard, and parties who understood that applications for interlocutory relief would be heard, and prepared for that hearing, are left with no resolution. These litigants in many cases have not only had the expense of their lawyers attending Court, but also of the Counsel intrusted on their behalf;

(d) The median time for a matter to reach a trial is, nationally, 14 months[8]. In Brisbane, that is longer;

(e) In the lists of some Federal Circuit Court Judges, the allocation of matters which are presently ready for trial will not occur until sometime in 2017 (and in some cases, a callover of matters awaiting the allocation of a trial will not occur until 2017, such that the litigants can expect a further delay after that callover hearing);

(f) A Court unable to hear interlocutory applications, or to determine cases on a final basis, is being used as a tool to disadvantage spouses. Without the spectre of prompt judicial scrutiny, behaviour goes unchecked – spouses can cut off the financial support of their spouse or children, of fail to comply with orders, using the reality that such conduct will not see the inside of a Courtroom promptly, as a strategic weapon.

In short, as presently resourced, the 'Family' Courts are at saturation point. The Judicial Officers do their best to manage in this situation, but it is a losing battle. They become less and less equipped to deliver to parents, and families enduring breakdown, the things their Courts were historically conceived to achieve, with each passing year.

To return, then, to the question above – *What is needed*?

Firstly, in the Family Court, the answer is self-evident – the number of Judicial officers allocated to hear trials in, and sitting in, Brisbane, must be returned to, at least, the levels of five years ago. Existing matters presently incapable of reaching Judicial attention can be

[7] Justice Colin Forrest, *op. cit.* page 3.
[8] Justice Colin Forrest, *op. cit.* page 8.

allocated to newly appointed Judges to process the 'backlog', and newly filed matters can be assigned among all Judges, as determined by the Registry Manager.

Secondly, in the Federal Circuit Court, the appointment of at least 2 additional Federal Circuit Court Judges, sitting in Brisbane, is required. That is the only way of processing existing, and newly filed matters, through interlocutory stages, to a prompt trial. It is noted that the recent transfer of Judge Anne Demack to the newly created Rockhampton registry has resulted in one less Judge in the already overcrowded Brisbane Registry, with that vacancy yet to be filled.

Thirdly, the Judges appointed to each Court must come from a specialist Family Law background (from the Family Law bar, or senior solicitors with the majority of their careers having been in Family Law). The Judicial appointments made must be able to provide immediate relief to the problem at hand; appointments from those other than Family Law backgrounds cannot triage Family Law cases in the same way as an experienced Family Law practitioner.

The above is based on feedback, taken from our members, who are working daily in the cases which are awaiting the allocation of hearings, and awaiting publication of judgments. Being practical observations of our members, those who are living and breathing the problem, and witnessing firsthand its impact on parents, children and families, it represents the answers to the question '*What is needed*?'.

'*What can be done*?' is a question for you and your Government, if re-elected. It is not, it is acknowledged, a question with a simple answer. We are ready and willing, as an organisation, to provide further practical feedback to assist in reaching that answer.

Yours faithfully

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President
FLPA

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