



FEDERAL CIRCUIT COURT OF AUSTRALIA

Office of the Chief Executive Officer and Principal Registrar

Telephone: 03 8600 3963
Email: stewart.fenwick@federalcircuitcourt.gov.au

Owen Dixon Commonwealth Law Courts Building
305 William Street, Melbourne VIC 3000
Mail: GPO Box 9991, Melbourne VIC 3001

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Senator the Hon Ian Macdonald
Chair, Legal and Constitutional
Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

Email: legcon.sen@aph.gov.au

Dear Senator Macdonald

Senate Hearing into the *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill* – 1 August 2018

I refer to the Committee's inquiry into the passage of the *Family Law Amendment (Family Violence and cross-examination of Parties) Bill* and the hearing in Melbourne on Wednesday, 1 August 2018.

I note that neither the Federal Circuit Court of Australia ("the Court"), nor the Family Court of Australia participated in the committee hearing on Wednesday, 1 August 2018. As the Court did not take part in discussions at the Committee hearing, there was no opportunity to respond to some of the comments that were raised during the hearing.

The Court would, only in certain circumstances, seek to comment on proposed legislation. However, in this instance, the Court notes with interest, submissions made by some witnesses, in particular a member of the Law Council of Australia Family Law Division executive ("LCA") and the Chair of the Family Law Committee of the New South Wales Bar Association ("NSW Bar").

Before the Committee hands down its report, which we understand will be on 13 August 2018, the Court wishes to assist the Committee by correcting inaccuracies that were presented to the Committee in the evidence. In doing so, the Court asks that this letter form part of the record of the Committee's inquiry as it is important that the record not go uncorrected.

The Federal Circuit Court

The Court was established in 1999. When it started the object of the Court was to deal with less complex federal cases which would have ordinarily been heard by the Federal or Family Courts. It was to provide 'a quicker, cheaper option for litigants and to ease the workload' of the other two courts. Its enabling legislation emphasised that it would provide court services in regional areas, including mediation and other forms of dispute resolution.

By 2003 the Court's jurisdiction in family law became identical to the jurisdiction of the Family Court of Australia (save for a very small amount of Hague and special medical applications required to be heard by a superior court). The work of the Court in family law continued to increase with it hearing the greater proportion of all family cases in Australia by 2006, approximately 80% by 2008 and since 2011 it has continued to deal with approximately 88%-90% of all family law cases.

High conflict parenting cases are commonplace in the Court. They often involve a range of complex issues such as family violence, mental illness, substance abuse, parental alienation and relocation. In addition, property cases heard in the court often involve complicated corporate and trust structures, expert valuations and commercial evidence, forensic accounting and complex questions of law.

The Court is now Australia's largest federal court. Currently, it carries a substantial workload. The Court finalises over 100,000 matters a year including 17,500 applications which require judicial adjudication.

The Court has the highest number of specialist dedicated judges in family law of any court in Australia. All have the education, training and skill to conduct complex family law cases. These judges have an average of over 25 years' experience in family law and many have been on the Court for over 10 years.

The Court also has additional judges who are not only highly experienced in family law but also conduct cases in the Court's general federal law jurisdiction work of industrial law, administrative law (including the review of migration decisions), bankruptcy, human rights law (including anti-discrimination law), trade practices and the law of copyright, trade mark and design. This general federal law work makes up only approximately 10-12% of the Court's work.

The Court's judges are based in every capital city in Australia and in some regional cities. In addition, they travel on circuit to 30 regional locations to deal with family law disputes for rural and regional families.

Delays

I note the evidence given by Mr Kearney SC regarding delays in the Parramatta registry at page 22:

"...with the average litigated matter before the Federal Circuit Court, which does most of them in New South Wales, is three years, and if you go to Parramatta, which is a real problem registry in terms of socioeconomic issues, it's longer. You have children spending their childhood as the subject of litigation."

I wish to advise the Committee that:

In Sydney and Parramatta respectively, the average time taken to finalise a matter is 14.6 months from filing (Sydney) and 13.7 months from filing (Parramatta) not 3 years, and importantly the median time to finalisation is 10.4 months from filing (in Sydney) and 10 months from filing (in Parramatta) (50% of filings are finalised within 10.0 months). The Committee might be assisted to know that less than 10% of cases before the Court take longer than three years to finalise.

It is noted that neither the NSW Bar Association nor the LCA FLS sought data from the Court prior to this evidence being given.

In the last 9 months, from October 2017, the Court has increased its clearance ratio (between the number of cases filed in the Court and the number disposed of per year) to 104.3%. This

is the highest clearance rate the Court has achieved for 15 years. The Court not only disposed of a record number of cases in total, it also reduced the backlog of pending cases. This has included reducing delays in cases being heard by over 6 months in some registries.

Specialisation and experience

I note the following statement made by Mr Kearney SC at page 21:

“Where I have experienced them almost universally is in the Federal Circuit Court with appointments that are made from people with no family law background. Section 22 of the Family Law Act says a judge in the Family Court of Australia shall be appointed, if suitable, by reason of training, qualification or experience. It does not apply to the Federal Circuit Court and the spirit of it has not been applied. I cast no aspersions on the integrity and the work ethic of the Federal Circuit Court judges, but experience in the family law sphere is critical for judicial officers to properly determine family law cases.”

I advise the Committee of the following:

To be eligible to be appointed as a judge at the federal level a person must have been enrolled as a legal practitioner of the High Court or a Supreme Court of a State or Territory for at least 5 years.

In addition appointees are expected to have personal and professional qualities to the highest degree including:

- conceptual, analytical and organisational skills;
- decision-making skills;
- the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments;
- the capacity to work effectively under pressure;
- a commitment to professional development;
- interpersonal and communication skills;
- integrity, impartiality, tact and courtesy; and
- the capacity to inspire respect and confidence.

As stated above, family law comprises a vast majority of the work of the Court. A great majority of judges were drawn from the family law Bar and legal profession. Many have been specialists in family law in practice and on the Bench.

Of the 68 current judges, the Court has 40 specialist family law judges with an additional 16 judges experienced in family law conducting trials in both family and general federal law. They have education, skill and experience in family law, with an average of 25 years' experience between them, many of whom have been experts in their field, former Registrars of the Court and the Family Court of Australia, highly experienced barristers and solicitors, and many have been on the Bench for well over 10 years. Notwithstanding the extraordinary disposition rate of the Court's judges only 1% of their decisions are the subject of an appeal.

The Court has also introduced highly experienced national leaders in family law to manage the family law work of the Court. Their responsibilities include to oversee the national family law practice area, judicial education, mentoring, monitoring judgments and case management. The two family law national leaders have a combined experience in family law of 66 years. Senior family judges in each major registry have also been appointed to monitor and mentor family law workloads in each of those registries.

Judicial education and training

I note the evidence given by Mr Kearney SC at page 19:

“You have a difference in awareness and training of judicial officers so that your specialist Family Court judges, if I can generalise for the moment, are more aware of these things, as are the practitioners appearing before them, who will make the applications where necessary. That is not so in the Federal Circuit Court, in my experience.”

The Committee might be assisted to know that the Court values judicial education and the judges of the Court participate in both external and internal judicial education. Externally, our judges attend judicial education courses conducted by the National Judicial College of Australia (NJCA) and the Australian Institute of Judicial Administration (AIJA). The NJCA runs a National Judicial Orientation Program each year. It is a 5 day residential intensive program to assist new judges with the transition to judicial office. The Court supports and facilitates new judges attending this program. The NJCA also offers advanced education for judicial officers including programs on judgment writing, court room leadership and other programs targeting specific areas of law.

Judges are given leave to attend approved courses and training each year. This enables individual judges to seek training in the area of particular relevance to them. In areas of shared jurisdiction there are often opportunities for the judges to participate in judicial education programs hosted by other courts. Judges are also entitled to apply for study leave.

Internally, new judges are required to participate in an intensive induction program that includes tutorials from other experienced judges in the jurisdiction of the Court, case management, judgment writing and the conduct of running a trial. Both national and registry mentors are provided. Also as mentioned above, national and registry senior family law judges continue to mentor and monitor the conduct of family law in the Court.

The Chief Judge has also introduced a CPD judicial education program engaging judges from other courts such as the High Court, Supreme Court and Federal Court to provide education to Court’s Judges on areas of the court, as well as practice subjects like judgment writing and evidence. Additionally, regular seminars are convened by the child dispute services of the Court on topics of relevance to family consultants and judges in the context of the family law jurisdiction.

The significant role of judicial education in the Court is recognised by the establishment of a Judicial Education Committee which oversees a program of judicial education each year. That Committee comprises judges with PhDs and other professorial qualifications.

The annual judges plenary is seen as an opportunity for all judges to participate in judicial education which can cover a wide variety of topics with experienced speakers drawn from other courts, the Bar, and from the social sciences. The Judicial education planned for the

2018 Plenary will include a mandatory one day training program for all judges offered by the NJCA on family violence.

A list of the professional memberships and conferences and events attended during the year, by each judge, is set out in an Appendix to the Court's Annual Report; Appendix 6

<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/annual-reports/2016-17/2016-17-annual-report-part5#app6>

Judicial awareness of family violence issues

The Court has also developed highly effective strategies to address the challenges that may be experienced by victims of family violence during their participation in family law cases.

These mechanisms, both statutory and procedural, are able to be utilised according to the circumstances of the case, including during the conduct of a case. Judicial officers are able to access various services so that the level of protection is commensurate with the needs of the victim throughout the court process, from the initiation of proceedings through to final hearing.

Importantly, in a jurisdiction where family violence allegations are common, steps to protect litigants can be tailored according to the type of family violence alleged and its relevance to the matters in issue. Some of the protective mechanisms available are discussed below.

Mandatory filing of Notice of Risk

In all parenting disputes commenced in the Court, allegations of a risk of child abuse or family violence are addressed by the parties upon the filing of a Notice of Risk.

This document, filed at the commencement of proceedings in the Court, assists judicial officers from the outset of any family law proceeding to better identify a wider range of risks to children in parenting proceedings thereby assisting the Court to fulfil its obligation pursuant to section 69ZQ of the *Family Law Act 1975*. It also enables more timely notification to relevant child protection authorities and facilitates the early identification of a range of risks and ensures matters receive appropriate and targeted early intervention.

Family Violence Committee and the Family Violence Best Practice Principles

The Family Violence Best Practice Principles were developed by the Family Court of Australia and the Court under the aegis of the courts' joint Family Violence Committee. The Family Violence Best Practice Principles are designed to provide practical guidance to courts, legal practitioners, service providers, litigants and other interested persons in cases where issues of family violence or child abuse arise. They contribute to furthering the courts' commitment to protecting children and any person who has a parenting order from harm resulting from family violence and abuse.

The Best Practice Principles recognise:

- the harmful effects of family violence and abuse on victims
- the place accorded to the issue of family violence in the FLA, and

- the principles guiding the Magellan case management system for the disposition of cases involving allegations of sexual abuse or serious physical abuse of children.

The Best Practice Principles are applicable in all cases involving family violence or child abuse or the risk of family violence or child abuse in proceedings before courts exercising jurisdiction under the Act.

The Family Violence Committee keeps well abreast of the latest developments in research relating to family violence. In reviewing and updating the Best Practice Principles, the Family Violence Committee consults with relevant groups. It has formal links to the Australian National Research Organisation for Women's Safety (ANROWS).

Working with State and Territory departments and other agencies

Judges have access to protocols developed between the courts and child protection agencies to assist cooperation, clarify procedures and improve decision making and information sharing in cases that may occur in either or both the Commonwealth and State and Territory jurisdictions.

Information sharing at this level provides evidence directly to judicial officers presiding in family law matters involving allegations of violence and neglect. It is this direct access to timely information which assists the Court's judicial officer's to make informed decisions which protect children and to act according to the best interests of children.

Management of the Court

The Court has recently restructured the management of the Court to recognise that areas of work and registries have to be dealt with differently to ensure efficiency. As a result new National Practice Areas Committee has been created. The members of that Committee have national internal responsibility for specialist areas in the Court including family, migration and general federal law.

Each Judge who is a member of the Committee has specialist knowledge of that area and the requisite experience on the Court to ensure that the case management principles are as efficient as possible and that the level of experience of Judges in each practice area is appropriate.

I hope this information is of assistance to the Committee.

Yours sincerely

Dr Stewart Fenwick
Chief Executive Officer and Principal Registrar