



THE LAW SOCIETY
OF NEW SOUTH WALES



NEW SOUTH WALES
BAR ASSOCIATION

Our ref: FIC:GUel1093392

4 March 2016

The Hon. Malcolm Turnbull MP
Prime Minister
Department of Prime Minister and Cabinet
PO Box 6500
CANBERRA ACT 2600

By email: Malcolm.Turnbull.MP@aph.gov.au

Dear Prime Minister,

Urgent review of resourcing in the Family Court of Australia and Federal Circuit Court of Australia

We are writing to request that you initiate an urgent review of resources in the Family Court and the Federal Circuit Court ("Courts"), to reduce the delays experienced by litigants in family law matters.

The Law Society of NSW and NSW Bar Association are extremely concerned about the impact of current delays in family law matters in both Courts on the parties, and their families.

According to the most recent figures, the average time taken from lodgement to the first day of a trial in the Family Court is 15.9 months, and 15 months in the Federal Circuit Court.¹ In some registries, particularly Sydney and Parramatta, the average time is much longer.

Not only are there delays in hearing matters. In some cases parties are experiencing extensive delays in receiving judgments. The Courts' benchmark for handing down reserved judgments is within 3 months of the hearing, or receipt of written submissions. It is not unusual for the Law Society to make representations to the Court to expedite matters where judgments have not been delivered one or two years after the final court event.

Experienced legal practitioners have commented that they have never before experienced delays to the extent that has now become common. This is a significant concern in terms of access to justice.

¹ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Family Court of Australia Federal Circuit Court of Australia, Parliament of Australia, Canberra, 9 February 2016, 50 (Richard Foster, Chief Executive Officer).

When parties to family law matters are exposed to these kinds of delays in the hearing of their matters, this can have adverse impacts on their finances and emotional wellbeing, and the wellbeing of their children. Parties and the community also bear increased costs as a result of delays. In addition, legal practitioners have observed that delays have resulted in an increase in the numbers of independent children's lawyers appointed to cases.

The importance of the timely resolution of high-conflict disputes between parents and children cannot be overstated, particularly where there are allegations of family violence.

We are aware that there are a number of factors that may be causing these delays, including:

- The complexity of matters filed in both Courts has increased over the last decade and many matters involve allegations of family violence;
- The current workloads of judges hearing family law matters in the Federal Circuit Court. The Attorney-General and Courts' Chief Executive Officer have recently stated that "an unusually large number" of Federal Circuit Court Judges have fallen ill. Judges in this Court currently have 500-600 matters in their dockets, which Mr Foster referred to as an "intolerable workload";²
- Statutory limits on the number of judges that may be appointed, at least to the Federal Circuit Court;³
- The different pension entitlements of Federal Circuit Court judges; and
- Limited financial resources for the Courts' administration.

The Law Society wrote to the Commonwealth Attorney-General, Senator George Brandis QC, about these concerns on 23 June 2015. We enclose a copy of that letter, which provides more detail about the resourcing concerns that are being experienced by the Courts.

Given the significant concerns held about the impact of the current level of delays on the parties, and their families, we request an urgent review of resourcing in relation to family law matters.

We welcome the Attorney-General's announcement on 25 February 2016 of four judicial appointments to the Courts. However, these appointments are not a solution to the significant delays in both Courts.

² Ibid (Attorney-General, Senator George Brandis QC and Richard Foster, Chief Executive Officer) 54.

³ Ibid (Attorney-General, Senator George Brandis QC).

We note that the *Courts Administration Legislation Amendment Bill 2015* (Cth) will not address the urgent need for judicial resources in the Courts as it is designed to merge the corporate functions of the Courts. We are aware that the financial savings achieved as a result of these savings are to be reinvested in the Courts, however, the need for judicial resources is immediate. A correspondingly urgent response by Government to this crisis is required.

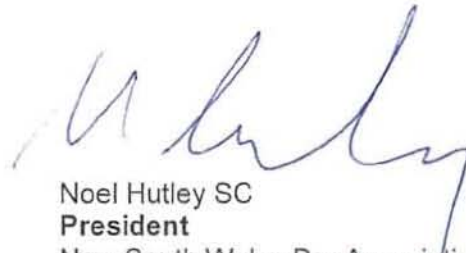
We would appreciate your consideration of this most urgent issue.

Yours sincerely,



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Copy to: The Hon. Senator George Brandis QC
Commonwealth Attorney-General
By email: senator.brandis@aph.gov.au



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: FIC:JFEel1018866

23 June 2015

The Hon. Senator George Brandis QC
Commonwealth Attorney-General
PO Box 6100
Senate
Parliament House
CANBERRA ACT 2600

By email: senator.brandis@aph.gov.au

Dear Attorney-General,

Judicial resourcing and increases in Court fees in the Family Court of Australia and Federal Circuit Court of Australia

I am writing on behalf of the Family Issues Committee ("Committee") of the Law Society of New South Wales. The Committee represents the Law Society on family law issues, as they relate to the legal needs of people in NSW and include experts drawn from the ranks of the Law Society's membership.

The Committee is very concerned about the lack of judicial resources in the Family Court and Federal Circuit Court and the impact of an increase in Court fees on access to justice.

1. Urgent need for judicial resources

The Committee welcomes the recent appointment of the Hon Robert McClelland as a judge of the Family Court, replacing the Hon Justice Fowler who retired in November 2013. The Committee notes that the selection process to replace Justice Bell has commenced and it is anticipated that the appointment process will not take as long as the process involving the Hon Robert McClelland¹. The Committee notes, however, that the Sydney Registry of the Family Court requires a further trial Judge to replace Justice Aldridge who was recently appointed to the Full Court of the Family Court.

The Committee also notes that further judicial appointments are being progressed for Sydney, Newcastle and Darwin² Registries of the Federal Circuit Court.

¹ *Hansard Senate Legal and Constitutional Affairs Legislation Committee Estimates 28 May 2015*, p 50 p 48.

² Note 1, p 47.

Committee Members are aware that Judges of the Federal Circuit Court are under significant pressure as their workloads increase as a result of a lack of judicial resources. Committee Members understand that Judges are responsible for between 500-700 cases at any one time. The increasing size of Judges' caseloads and the resulting delays in allocating hearings and delivering judgments was discussed publicly by the Honourable Judge Harman in May this year³. Committee Members share the concerns expressed by Judge Harman.

The Committee's view is that the very large judicial caseload is no reflection on the efficiency of the judicial officers in the Federal Circuit Court, but is a symptom of the inadequate number of judicial officers to manage an ever increasing caseload. The Committee notes that the earliest first return date for matters filed in the Sydney Registry is October 2015.

The need for judicial resources was also expressed by the Hon Chief Judge Pascoe AO CVO in the Federal Circuit Court's annual report. Chief Judge Pascoe stated⁴:

As every area of the work of the Court is of equal importance, and each litigant is deserving of comparable treatment, it is critical that the Court has the resources to respond adequately to its workload especially outside of the metropolitan areas.

Several factors are combining to make this increasingly challenging. As noted above, age retirements will now take place on a regular basis and therefore timely appointment of new judges will be needed if the Court is to manage its caseload. In addition, analysis of regional workload indicates there are locations in which filings exceed a level at which regular circuits provide adequately for community need. Additional appointments would enable the Court to improve the level of service to litigants in those locations, and relieve the pressure on those registries currently managing circuits in those locations.

I am also conscious of the health and welfare of members of the Court. A very high workload and associated stress can and does have an effect on health and morale in the Court. Any additional strain from rising demand or the impact of retirements only adds to the pressure on individual judges and their staff.

The delays, and the adverse effect of such delays, on parties (including children) are of particular concern to Committee Members, who believe that the delays can largely be attributed to a lack of judicial resources. The Committee requests that urgent action is taken to appoint a full complement of judges as expeditiously as possible. A full complement of judges is of particular importance in a "rocket docket" case management model, such as the Federal Circuit Court model. In this model, a Judge is responsible for all aspects of the proceedings from filing to judgment. The effectiveness of this type of model is significantly constrained where Judges' dockets are ever increasing in size.

The effect of delays causes parties great distress, particularly where the welfare of children is affected. Parties and the community also bear increased costs as a result of delays. These costs are associated with updating evidence and reports which are out of date due to the delays. It has also been observed that delays have resulted in an increase in the numbers of independent children's lawyers appointed to cases. This increases demand on already stretched legal aid resources and funding.

³ "Family Law Tsunami swamps Western Sydney court with 600 per cent blow out in cases", *Daily Telegraph*, 20 May 2015, p 7.

⁴ *Federal Circuit Court of Australia Annual Report 2013-2014*, p 3.

2. Impact of an increase in Court fees on access to justice

The Committee is concerned about the increase in Court fees on access to justice.

The Committee notes that from 1 July 2015, Family Court and Federal Circuit Court fees will be increased⁵. The Committee also notes that the aggregate revenue expected to be raised by this budget measure is \$87 million over four years. It is expected that \$52 million will be returned to the Courts to streamline the administrative processes of the Federal Court, Family Court and Federal Circuit Courts and to be spent on refurbishing the Court buildings. The remaining \$35 million is to be returned to consolidated revenue⁶.

The Committee notes that, despite an urgent need for additional judicial resources, no revenue is to be used to fund judicial resources.

The increase in Court fees is significant and has been described as a "divorce tax"⁷. The Committee notes the most significant fee increases include a \$350 increase to the full divorce fee (to \$1195), an \$80 increase to fees for consent orders (to \$235), a \$65 increase to fees for issuing subpoenas and a new fee category for amended applications (\$120)⁸.

The Committee is of the view that an increase in fees to this extent is unnecessary and will have an adverse impact on access to justice for people on low to middle incomes. Further, the Committee notes that \$35 million raised over four years is not to be returned to the Courts or to parties but is to remain in consolidated revenue.

The Committee is very concerned about the impact of an increase in fees on access to justice. The Committee is concerned that as a result of the significant increase in fees, particularly the divorce application fee, spouses who separate may no longer seek a divorce and may make alternative informal arrangements. Generally, informal arrangements are unsatisfactory and are unlikely to work in high conflict relationships.

The Committee is concerned about the legal consequences of informal arrangements on spouses and any children affected by such arrangements. The importance of the availability of Court adjudication of private family law disputes is obvious as is the capacity to seek the Court's determination of what is in a child's best interests in parenting matters and what is just and equitable in property settlements⁹.

The Committee notes that any informal arrangements may lead to increasing complexity in financial arrangements as separated spouses may maintain separate financial arrangements and separate households for extended periods of time. Further complexity will occur where separated spouses re-partner. Where the period of time for seeking a property settlement or parenting orders is extended, the complexity of the issues to be determined by the Courts will also increase.

The Committee is concerned that spouses in high conflict relationships, including those who have suffered family violence, may find it difficult to leave or bring a marriage to an end if it is too cost prohibitive to file divorce proceedings or seek property and parenting orders. This may be an issue where there is a power imbalance in a marriage and a

⁵ *Federal Courts Legislation Amendment (Fees) Regulation 2015* (Cth).

⁶ Note 1, p 50.

⁷ "Families in strife will face a 'divorce tax'", *Sydney Morning Herald*, 15 May 2015, p 9.

⁸ *Federal Courts Legislation Amendment (Fees) Regulation 2015* (Cth).

⁹ See *Family Law Act 1975* (Cth) ss 60Ca and 79.

spouse has been subject to economic (or other) abuse. Without the Court's intervention, a party may be prevented from finalising property and financial arrangements.

The Committee is aware that it is not proposed to change the reduced divorce fee, or the criteria to be applied when assessing whether payment of the fee would cause financial hardship. The Committee notes that to be eligible for a reduced divorce fee a party needs to be in receipt of some form of social security benefit or have been granted legal aid¹⁰. The Committee is concerned about the impact of the increase in fees on parties who do not meet the required criteria but are unable to afford the divorce fee of \$1195. The Committee submits that many low to middle income earners, particularly at the time of separation, would fall into this category.

Further, the Committee is concerned that the cumulative effect of the significant increase to a number of fee categories may lead parties not to file proceedings, or to withdraw from proceedings because of the increase in costs incurred.

If you have any questions in relation to this letter, please contact Emma Liddle, Policy Lawyer for the Family Issues Committee on (02) 9926 0212 or by email to emma.liddle@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John F Eades', written in a cursive style.

John F Eades
President

¹⁰ See Guidelines for reduced fee - divorce and decree of nullity application at <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/family-law/guidelines-for-reduced-fee-divorce-and-decree-of-nullity-application>, accessed on 15 June 2015.