THE AUSTRALIAN

Break-up is so hard to do

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12:00AM NOVEMBER 3, 2018 • 29 COMMENTS

The slow and dysfunctional family law system is set for a significant shake-up if the government and Australian Law Reform Commission get their way. For the exhausted litigants who use it, change cannot come soon enough. But at all levels, the grown-ups are fighting while the kids suffer.

The government has unveiled plans to restructure the family courts to improve efficiency but it is pitted against a powerful legal lobby opposed to the changes.

Separately, the ALRC has been working on a comprehensive review of the family law system.

But even within the legal advisory body, there has been disagreement about the best way to fix a system struggling with a backlog of 20,000 family law cases.

Cynics argue that the fierce opposition to court reform from some lawyers may be related to the income they derive from drawn-out divorces.

However, lawyers warn that the government's plan to merge the Family Court and lower level Federal Circuit Court will hurt litigants, especially women and children, by dismantling a court with specialist expertise in family dynamics and violence.

In a new book, *Inside Family Law*, released this week, a family law judge spoke out against lawyers who fuel conflict between divorcing couples, motivated by profit. Others criticised the "aggressive and combative" approach of some lawyers,

especially in Sydney, while in Melbourne people were “falling over themselves to settle”.

The head of the Law Council of Australia’s family law section, Wendy Kayler-Thomson, says the criticism is unfair and the vast majority of family lawyers help their clients to resolve disputes outside court.

“Most separating couples never go to court and of those who do, 84 per cent of Family Court cases settle,” she says.

But there is deep anger among many litigants at “parasitic” lawyers who “milk” their clients for “blood money” — as some readers put it this week.

Legislation to restructure the courts, which is stalled in the Senate, includes new powers for judges to hit lawyers with personal costs orders if they fail to help resolve disputes efficiently and if their fees become disproportionate to the issues in dispute. Litigants face similar penalties.

It will be up to judges to use those powers to force change on those who abuse the system — if the laws make it through the parliament.

At the same time, the government has appointed a respected legal academic, Melbourne Law School professor Helen Rhoades, to lead the wide-ranging ALRC inquiry into the family law system. It is understood there have been strong disagreements among those involved in the inquiry over the proposals.

A retired Family Court judge, a former family law section head and the chair of Relationships Australia have been appointed to assist Rhoades on the ambitious review.

Last month the ALRC set out its grand proposals for reforming the sector in a discussion paper. Some of its ideas have been warmly welcomed — including better triaging of cases as they come into court. But other suggestions have been rubbished as “bat-shit crazy”.

Separating couples would be able to visit Families Hubs to access a range of services, including dispute resolution, counselling and legal advice, and other services such as health, gambling help and financial counselling.

The hubs could build on the network of 65 family relationship centres nationally.

Rhoades tells Inquirer the package of proposals is aimed at reducing the financial and wellbeing costs of engaging with the system. “We’ve seen the way to do that is through ‘front-ending’ — to try to help people before conflict escalates and they might end up in court,” she says.

But the hubs could cost vast amounts of money. Family law expert Patrick Parkinson, dean of the University of Queensland’s school of law, questions whether any extra money could be better spent on the courts and existing services.

The ALRC also risks reigniting a bitter political fight between mothers and fathers groups over shared-parenting laws. The laws were introduced by the Howard government in 2006 in response to fierce lobbying from fathers who wanted more time with their children.

However, the law is so convoluted that it trips up even judges and has created a mistaken belief that parents are entitled to equal time with their children.

Instead, it creates a presumption in favour of equal responsibility (or decision-making) for parents in cases that do not involve violence. Judges also must consider whether equal time is in a child’s best interests and reasonably practical if an order for equal responsibility is made.

In its discussion paper, the ALRC has proposed simplifying the long list of factors judges have to consider when making parenting decisions. A child’s “safety and best interests” would become the paramount consideration (rather than best interests alone).

Rhoades says the changes are merely about simplifying the law. But Parkinson — who helped to write the 2006 changes — is not convinced.

He says it is “troubling” that under the rubric of simplification the ALRC is proposing “a radical departure” from the shared-parenting philosophy. “While there is a strong case for simplification … the ALRC team goes far beyond this to propose removing most references to the importance of both parents in children’s lives, or at least qualifying those statements heavily,” he says.

Kayler-Thomson also has concerns. “We think ‘best interests’ encompasses a whole range of factors that relate to a child’s welfare, including their relationship with their parents and their safety,” she says. “We’re worried the introduction of the phrase ‘safety’ is going to lead to more legal arguments about what ‘best interests’ means.”

Ahead of the ALRC’s final report, due in March, Attorney-General Christian Porter is attempting to merge the Family Court and lower level Federal Circuit Court, which both handle family law.

A key benefit would be to stop about 1200 cases a year bouncing between two different courts.

While opposition legal affairs spokesman Mark Dreyfus has argued any merger should be delayed until after the inquiry, Rhoades says the structure of the courts is not relevant to her review.

“It was always clear to us that wasn’t part of our terms of reference,” she says.

Some have described the courts restructure as a “surprise” but it has long been on the cards.

Both sides of politics have recognised that running three separate courts — the Family Court, Federal Court and Federal Circuit Court — is not the most efficient way to structure the federal judiciary.

In 2008 then Labor attorney-general Robert McClelland (soon to become Family Court deputy chief justice) tried to disband the lower level court and send its judicial officers to new second tiers of the Family Court and Federal Court. But the move was derailed by the then federal magistrates.

More recently, in October last year, then attorney-general George Brandis announced the government was open to "radical change" to the structure of the courts after having merged their back offices in 2015. He chose a new Family Court chief justice, John Pascoe, who would retire after a year and have no vested interest in any structure.

When Porter replaced Brandis in December last year, he took the reform ball and ran with it.

On paper, at least, Porter's restructure proposal is relatively modest.

Both the Family Court and Federal Circuit Court would continue their present roles but as two divisions of the same court. The Family Court would become Division 1 of the new court and the Federal Circuit Court would become Division 2.

Porter managed to put the legal profession offside, however, when he revealed he planned to phase out the Family Court.

As he told *The Australian* back in May: "The intention is that we won't reappoint into Division 1 … Over time there will no longer be a Division 1," he said.

The Family Court was created by the Whitlam government in 1976 as a specialist court for divorcing couples. It is a proud Labor achievement. There has long been suspicion that the conservatives wanted to dismantle it because it was viewed as overly favourable to mothers.

In 1999 Liberal attorney-general Daryl Williams opted to create the Federal Magistrates Court as a quicker, cheaper alternative to the Family Court — rather than giving the Family Court more resources to deal with its expanding workload.

Now known as the Federal Circuit Court, it has grown to handle almost 90 per cent of all family law disputes.

For Porter to announce he planned to phase out the Family Court was arguably a misstep; he could not even control whether future governments appointed more Division 1 judges.

But he told *The Australian* recently he did not regret the comments.

“I want people to know what we’re doing, and why. My view is Division 1, or the Family Court at the moment, is the less efficient of the two jurisdictions, so naturally you’d want to rebalance and shrink that and grow Division 2, (but) that may change over time.”

Both Pascoe and Federal Circuit Court Chief Judge Will Alstergren (who will replace Pascoe when he retires next month) support the courts restructure but have made it clear in recent speeches that they believe there will always be a need for superior-level judges to handle complex family law cases.

For the family law silks and high-end solicitors, the Family Court is where most of their business is conducted. The judges there are called on to decide big-money cases involving complex trusts and tax arrangements, and particularly difficult parenting cases. They also interpret the law, applied by lower level judges and lawyers working in the area.

A report by PwC — hotly contested by Family Court judges — found that litigants’ party/party costs in the Family Court were about $110,000 per matter, while in the Federal Circuit Court they were closer to $30,000.

Some say results in the Federal Circuit Court can be unpredictable — but Porter says there is no evidence to support this.

The Attorney-General also has angered Family Court judges by using the PwC report to argue they are less efficient than the lower level judges.

The judges have been furious that their chief, Pascoe, has failed to defend them over the attacks.

The data has been used to justify a controversial aspect of the reforms — to strip appeals from the Family Court and hand them to the Federal Court, which now does not do any family law. The move will free up Family Court appeal judges to handle trials.

Commercial and family law barrister Bridie Nolan, a former associate to now Federal Court Chief Justice James Allsop, believes it will also provide rigour to family law and commerciality, which is sorely lacking.

It shocks her, she says, that family lawyers “do not blink” at charging clients $250,000 for a fight over 20 per cent of a $1 million property pool in a no-costs jurisdiction.

She says Federal Court judges, who also handle migration law, are empathetic and well-equipped to handle appeals.

Family law partner Peter Magee says having Federal Court judges involved could prevent family law from being “insular”, and a single pathway for litigants will provide some efficiencies.

However, the Law Council’s family law section argues the plan will not achieve the efficiencies Porter promises and families are best served by a specialist court.

As Kayler-Thomson says: “At a time when there are calls for greater specialisation, experience and training in the complexities of family dynamics and violence, it is strange the government would seek to reduce (that).”

Porter has tried to allay some of the concerns by maintaining a requirement that all Division 1 judges have specialist expertise — although that is little comfort if he is not going to appoint to the division.

He also has added a new requirement that lower level and appeal judges have "appropriate knowledge, skills and experience".

However, the government has offered no new courts funding.

Unless the courts dramatically change their case management — which Alstergren is trying to improve — it will be difficult to clear the crippling backlogs.

Lower level judges have 350 to 600 cases in their dockets, according to the court's annual report.

The wait to reach a trial in the Family Court has blown out to 19 months, up from 11.5 months five years ago, and 17 months earlier this year, while in the Federal Circuit Court it is 12 months (down from 15 months earlier this year).

Some judges are also taking far too long — in some cases four years — to deliver decisions.

For now, Labor, the Greens and crossbench senators, including Rex Patrick, have managed to delay the restructure — meant to take effect on January 1 — until at least after parliament resumes next year to allow extra time for consultation.

For Labor, delay is politically expedient — it could shelve the restructure if it is elected next year or deliver the reform itself.

Whether the court changes and the ALRC reforms — which are a long way off from becoming reality — can fix the serious problems in the system remains to be seen.

Nolan, for one, would prefer more radical change. She believes all parenting cases should be heard in an inquisitorial tribunal, similar to the Guardianship Tribunal, with a counsel assisting in relation to the children.

Other groups, such as the Family Law Reform Coalition, want to do away with an adversarial system altogether.

Pascoe has suggested a royal commission if the public is still dissatisfied after the restructure and ALRC review. It will probably happen at some point.

But the misery of the present system is set to stay for at least a little while yet.