Why "radical" is not a dirty word in family law reform

Speech to the Newcastle Law Society 2019 Annual Dinner

Good evening ladies and gentlemen, colleagues and friends.

I acknowledge the traditional custodians of the land and sea of Newcastle, the AWABAKAL and WORIMI peoples, and pay my respects to elders past, present and emerging. I extend those respects to First Nations Australians with us today.

It is an honour to be here with you this evening. The profession in Newcastle has a proud 178 year history, and has built a sterling reputation for serving the local community and championing access to justice for the region.

I commend you on the important work you do, and thank President Gary Fox and the Newcastle Law Society for the kind invitation to join your Annual Members' Dinner.

When I first received Gary's invitation to speak this evening, Gary was kind enough to let me speak on any topic of my choosing. The jury is still out on whether this was a wise decision on Gary's part!

I have been called a great many things by many people in my time – including many Attorneys-General.

"Radical" has not been one of them.

So when the Commonwealth Attorney-General first called the family law reform policy advanced by the Law Council, the Family Law Section and our Constituent Bodies "radical", I confess this took me somewhat by surprise.

"Radical" is an odd word to use in a law reform discussion because the word itself adds very little that is useful. It says nothing about whether a

policy or law is good, bad or otherwise.

The Attorney has continued to use the word "radical" to seek to dismiss the position advanced by the legal profession.

There are two things I do not understand about this proposition.

First, what is so radical about what the profession is proposing?

And second, even if it is radical, why does that mean it is necessarily bad?

Why is "radical" a dirty word in family law reform?

I appreciate that Newcastle's legal profession has a diverse range of practices. But the reason I have chosen to speak with you tonight about family law reform is that we are on the eve of the Federal Government reintroducing the fundamentally flawed merger bill in the November sittings of the Parliament which will see the abolition of the specialist Family Court. The Government's stubborn and wrong headed approach to family law will see it advocate again for a bad law to be passed by Parliament – a law which it failed to pass in the last Parliament. This approach is not only irrational, but is extremely disrespectful to the views of the significant stakeholders in the family violence services sector. These dedicated professionals who understand this area better than any member of the Government have made it clear that this policy will hurt children and families. As lawyers and members of our community, we all have a stake in this, regardless of where and what we practice.

More Australians will have contact with the family law system than perhaps any other part of our justice system.

As Justice Abella of the Canadian Supreme Court once observed:

> *No area of law matters to more people than family law. Not many people do corporate takeovers, most do not commit crimes, but absolutely everyone has a family.*[1]

[1] Justice Abella, "The Challenge of Change', (1998) Speech to the 8th National Family Law Conference, Hobart Tasmania, 5 October 1998, 1-2.

It is no secret that Australia's family law system is not serving the best interests of children or families as well as it could or should.

There has been understandable frustration in the community with the speed and cost of justice the system delivers.

Frustration that is shared by the profession.

Few are more intimately acquainted with the challenges and pressures facing the system than the practitioners in this room who face the daily struggle of working to support clients in a system that has been neglected, chronically under-resourced and under-funded.

For too long Newcastle's families and family law practitioners have been forced to endure the cramped and overcrowded conditions of the Commonwealth courts building in Bolton Street.

The working conditions are unsafe for judges and lawyers. Jurisdictional gaps between Commonwealth jurisdiction and state child protection, and poor information sharing, pose risks to the safety of children and victims of family violence.

Those risks were well illustrated by the decision of Judge Betts on 12 February this year in the case of Munson & Munson[2]. The case involved an application by a father for interim parenting orders in relation to five children. The mother opposed this application and sought interim orders that the father spend only supervised time with the children through a professional supervision service. She also sought specific orders in relation to the father undertaking a comprehensive mental health assessment and sought an order that he enrol in a "Facing Up" course, being a course designed for perpetrators of family violence. Like many others, this was a case involving allegations of family violence that demanded immediate attention. But Judge Betts was unable to list the matter for hearing until the end of August. He said:

> *I do not consider 28 August 2019 to be an entirely appropriate date*

[2] Munson & Munson [2019] FCCA 670 (20 February 2019).

> *for the further hearing of this interim application. The regrettable reality is that these children require more attention than this court can give them at this time given the sheer state of the listings at this time, a matter which should by now be a matter of public record. The fact is that, on the latest numbers I have, my docket consists of 563 cases, each of which has its own significance, each of which has its own urgency.*[3]

Unfortunately, this is just one of the many cases where delay, cost and confusion continue to let down vulnerable families and children and sap public confidence in our courts and our justice system more broadly.

On behalf of the profession, the Law Council in lockstep with its Family Law Section have consistently argued that reform of the system is urgently needed for six reasons.

First, the experiment of sharing jurisdiction between and running family law matters in two separate federal courts – with separate rules and procedures – has failed. It has failed because of an incomprehensive and inconsistent internal case management approach, despite existing laws and rule making powers to create a common approach, or a single point of entry.

Second, the system has been systematically underfunded by successive Governments of both political persuasions for decades - not only the courts but also critical counselling and assessment services.

Third, the system has been adversely affected by a chronic lack and mismanagement of resources in both the Family Court and Federal Circuit Court. This has included a failure to promptly replace retiring judicial officers, or to appoint sufficient judges to deal with an expanding jurisdiction that now includes de facto relationships.

Fourth, underfunding legal assistance has meant a significant number of parties cannot afford legal representation in family law matters and appear

[3] Ibid, [10].

by necessity unrepresented in court.

Fifth, these factors have all contributed to the creation of crippling judicial workloads. The status quo is setting our judges up to fail, especially in the FCC, where some judges have more than 500 cases in their docket at any one time. This workload of the judges is unsafe for the judicial officers, and necessarily impacts upon the quality of justice which can be consistently administered by those judicial officers.

And last, despite best efforts, the challenges faced by judicial officers struggling to meet these caseloads adversely affect the quality of outcomes delivered for parents and children. Particularly in the FCC where judges are not required to meet the same statutory requirement of specialisation as judges of the Family Court under section 22(2)(b) of the *Family Law Act.*

This situation is unacceptable, unfair and unsustainable.

Newcastle has lived each of these factors in its own registries.

Newcastle has seen some of the largest increases in the number of final order applications in the Federal Circuit Court - 16 percent between 2012-13 to 2016-17[4].

With the government's failure to make timely appointments of new judges, this has led to a blowout of waiting times for trial of up to 19 months.

It has produced judicial workloads of nearly double the national average and increases in delays of finalisations.[5]

Yet successive governments have failed to do what is needed to improve the system: provide adequate funding, sufficient resourcing and a coherent structure to stop children and victims of family violence from falling

[4] PwC, *Review of efficiency of the operations of the federal courts – Final Report* (April 2018) 100.
[5] "Hunter domestic violence victims, children, at risk because of 'reckless ' judge shortage", Newcastle Herald, 30 June 2017, https://www.illawarramercury.com.au/story/4762659/reckless-judge-shortage-puts-domestic-violence-victims-at-risk.

through the cracks.

This paints a pretty compelling picture of the case for change.

And against this backdrop, the Law Council's advocacy hardly seems radical. So what exactly are we proposing? And why has the Attorney taken issue with it?

Our position, what we stand for, can be summed up in two words.

Specialisation matters.

The Law Council agrees there is a dire need to resource and reform the family law system.

We do not accept, though, that the way the Government has sought to go about this would deliver meaningful reform.

Last year, the Attorney-General announced in May a proposal to merge the specialist Family Court into the generalist Federal Circuit Court.

There was no consultation with the community or the profession over the proposal – only with three heads of jurisdiction.

The proposal was introduced to Parliament with a start date of 1 January 2019.

And the reaction from the family violence services sector, from the legal profession and from the Parliament was stark.

In the face of significant stakeholder concern, a Senate committee inquired into the Bill over a matter of some months and the 1 January start date was pushed back. The Committee proposed significant amendment to the bill.

In April, the government broke trust with parliament by inexplicably withholding the landmark Australian Law Reform Commission report from senators who were being pressured to vote on the merger in the last days of the 45th Parliament.

Ultimately, the bill was not brought on for a vote because the proposal

lacked the support of the Senate cross-bench needed to get it across the line, with or without amendment.

After the May election, the Attorney-General declared his "highest priority" in the new parliament would be structural reform of the family law courts.

Instead of taking the opportunity presented by the ALRC's once in a generation review of the system to look to holistic reform, the Attorney has committed to reintroducing the flawed merger proposal to the Parliament before Christmas.

The Law Council vehemently opposed the merger last year, and we will continue to oppose it because we do not support bad policy that will hurt children and families.

With or without further amendment, we remain concerned that the merger will result in the loss of a stand-alone, dedicated Family Court as we know it, to the detriment of those in need of specialist family law assistance.

Further, we do not accept the purported efficiencies it has been claimed the merger will produce. Rather, we are concerned it will further increase cost, time and stress for families.

The six-week desktop review by PWC presented as the original business case for the merger was ultimately discredited and disregarded by the Senate Committee inquiring into the merger bill. It is unclear how the Government can continue to claim these efficiencies would be realised if the merger were reintroduced, as these efficiencies were premised on the mooted changes to the Family Court's appellate jurisdiction, which were rightly rejected by the Committee.

The merger fails to alleviate the fundamental problems plaguing the system, including the risk of victims of family violence falling through the cracks.

This was all but conceded by the Former Liberal senator Ian MacDonald, who chaired the inquiry into the merger bill, when he told ABC radio in

July the proposal was only a “short term fix”.

We dispute it is even that.

Abolishing a stand-alone specialist family court, whether directly or by abeyance, is no fix.

Refusing to inject desperately needed funds and resources into a crippled system unless the Parliament votes for the Government’s plan is certainly no fix.

We are not alone in holding these concerns – they are shared by stakeholders and family violence support providers including Women’s Legal Services Australia, Rape and Domestic Violence NSW and Community Legal Centres.

But we accept it is unhelpful to simply shoot holes in well-intentioned proposals without providing any alternative.

So what has the Law Council proposed?

On behalf of the profession, the Law Council and Family Law Section have advanced essentially three propositions.

First, we have urged the Government to retain and properly resource a specialist, stand-alone family court. Greater resourcing, funding and investment in the system is critical and would make a tangible difference to the quality of justice clients experience.

As the federal budget heads back into black, investing in this critical social justice infrastructure must be a priority.

Second, we have encouraged the Government to carefully consider alternative holistic structural reform of the system, such as recommended by the Semple Report, and now the Australian Law Reform Commission, to bolster – not undermine – a specialist, accessible family law system.

Third, we have said the Government must consult with stakeholders and carefully consider recommendations of the Australian Law Reform

Commission's recent landmark report on the family law system.

To suggest any one of these propositions is "radical" is a fake argument.

There should be nothing radical about the concept that critical social justice infrastructure – let alone a Chapter III Court – should not be irrevocably altered without informed consultation and discussion with those who use the court, work in the court, or whose lives are irreversibly shaped by its decisions.

The structure recommended by the Semple Report is a structure already in place in the Attorney's home state of Western Australia. A structure for which the Attorney himself was responsible for, for four years in his role as Attorney General of Western Australia from 2008 to 2012.

There is a direct nexus between resourcing, judicial appointments and case disposition times.

So is it "radical" to call for a specialist family law court to be maintained?

At the outset it's important to be clear about what we mean by a specialist family court. The establishment of a standalone specialist court was radical in and of itself.

For more than forty years, the Family Court of Australia has been a premier legal institution, a specialist superior court admired by other family law jurisdictions around the world for its innovative management of the most complex and difficult family law matters.

In the lead up to the introduction of the Family Law Bill 1974, the National Council of Women of Australia and some 620 affiliated groups strongly advocated for "specialised Family Courts" comprised of "specialist judges of superior status, working in one unified court alongside judicial officers at a lower level "specially appointed and trained" for the work".[6]

[6]Justice Stephen Thackray, 'The Rule of Law and the Independence of the Judiciary: Values Lost or Conveniently Lost or Conveniently Forgotten? The David Malcolm Memorial Lecture' (Speech to the University of Notre Dame, School of Law, 27 September 2-18), 136.

The Family Court was established as a "specialist multi-disciplinary court, incorporating the creation of an in-house counselling section staffed by psychologists and social workers with child welfare expertise, and the requirement to place the interests of children at the forefront of parenting disputes. This was followed by the establishment of mediation as a fundamental part of the system, and provision for less adversarial trial proceedings in child-related proceedings."[7]

The Attorney-General has sought to downplay claims that the merger would 'abolish' a specialist court or undermine specialisation.

This is an abrupt about face from the Government's position last year, when the Attorney-General said clearly no further judges would be appointed to Division 1 of the merged court – ie the current Family Court. It would therefore be abolished by attrition as remaining judges retired.

Former Chief Justice of the Family Court John Pascoe reiterated the vital importance of maintaining specialisation in family court matters, explaining:

> *"There is a clear need for a superior court in family law to deal with matters such as complicated financial cases that involve complex trust and corporate structures; allegations of extreme child abuse; international cases that involve conflicts of laws, adoption and abduction; and those that are on the cutting edge of developments in technology, medicine and psychology. These require the attention and precedent-setting decisions of a superior court."*[8]

The Government has subsequently backtracked from this and in recent discussions with stakeholders has mooted including a fixed number of judicial officers in Division 1 by regulation.

This is inherently problematic because to include in regulation a minimum number of judges is to place the continued existence of a specialist Chapter

[7] ALRC Report, [1.12] https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf
[8] Chief Justice of the Family Court of Australia, the Honourable Chief Justice John Pascoe, 'State of the Nation' (Speech delivered at 18th National Family Law Conference, Brisbane, 3 October 2019), 2.

III Court in the sole hands of the Executive.

But to suggest this guarantees specialisation is to fundamentally misunderstand the issue and why specialisation is important.

Why does specialisation matter?

One reason specialisation matters is to keep victims of family violence safe.

In 2010, the ALRC and NSW Law Reform commission advised that "the specialisation of key individuals and institutions is crucial to improving the interaction' of the different legal frameworks governing family violence in Australia".[9]

As many as 70 percent of family law matters in the Commonwealth courts involve an allegation of family violence.

The alarming prevalence of family violence in the system makes specialisation all the more important 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 is important to ensure specialist knowledge and training for judicial officers, registrars and court staff to equip them to identify and manage risk, and protect children and victims in need of the courts' assistance. To identify and respond appropriately when family violence presents and to engage effectively, safely and respectfully with victims of family violence.

Specialised court infrastructure is also important to support children and families, for example when giving evidence or appearing in matters involving the alleged abuser.

Moving away from a stand-alone specialist court with co-located legal and non-legal support services goes against the advice of expert reports and

[9] Quoted in ALRC Report, [4.83].

research, including the ALRC review. The 2016 Report by the Victorian Royal Commission into family violence explained that specialist family violence services mattered because "there is no single pathway into the family violence system". Justice services operate on the front line in responding to violence, alongside police and support services and when elements of the system are fragmented, it makes it much harder and more complex for victims to access the help, resources and pathways they need to stay safe, seek protection and uphold their rights and obligations.

A specialist family court is much more than the sum of a number in some legislative instrument.

It is important to be clear about what we mean by a specialist Family Court and why the Law council believes the merger would see it dismantled.

In this we need your help to continue to communicate and explain to the public, to politicians and to others why this is so important.

It is a part of a holistic, specialist ecosystem of interrelated and co-located support services and resources. This is particularly important with respect to family violence and responding to children at risk.

A specialist court is about more than just its judges – it is the support services, resources and processes. The Family Court has excelled at the provision and application of specialist conciliation and assessment services. Registrars and family consultants, when properly resourced and deployed, are an integral part of case management. They provide an invaluable service in the early identification, narrowing and resolution of issues.

The proposed merger will see these specialist services and resources diluted or worse lost. Together with the skills of specialist judges, these services and resources do not sit readily in a generalist court and ought not to have compete with the needs of litigants in a generalist court for resourcing and judge time.

In addition, the merger will continue to undermine specialisation because

of the significant differences in the requirements for the qualification and experience of judges appointed to its two divisions – both of which would handle family law matters, albeit of different complexity.

Specialist family court judges are essential to the proper administration of justice.

The Family Court deals with most difficult and complex family law matters that come before our courts, with direct, life-altering and irreversible consequences for the children and families concerned.

One of the most admired features of the Family Court is the fact only those who "by reason of training, experience and personality" are suited to deal with family law cases ought to be appointed as judges as required by section 22(2)(b) of the *Family Law Act 1975 (Cth)*.

This same requirement does not apply to Federal Circuit Court judges who hear family law matters.

Nor would this requirement apply to judges in 'Division 2' of a merged court.

In evidence to a Senate committee, the Council of Single Mothers and their Children said "many of the most disconcerting stories we hear occur in the Federal Circuit Courts where issues of family violence are disregarded in comments from the Bench[10].

The lack of specialisation, coupled with time and resources, has the potential to impact negatively on the quality of outcomes experienced by family law litigants in the Federal Circuit Court. It also places an unfair burden on FCC judges called to make difficult decisions on these matters under significant pressures.

Importantly, the merger will also effectively remove the specialist appeal division of the Family Court.

[10] Council of Single Mothers and their Children, Submission 6 to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Family Law Amendment (Family Violence and Cross-examination of parties) Bill 2018* (2018), 2.

The Attorney-General has now suggested the appellate function would be retained within the merged court, rather than transplanted into the Federal Court as it suggested last year.

The problem is the appellate function currently performed by the specialist skills of the Family Court's appeal bench would devolve to all Division 1 judges, undermining the retention of specialist appellate jurisdiction in a different way.

Former Chief Justice Pascoe has also acknowledged the "*critical importance of a thorough, in-depth and expert knowledge of family law"* to ensure just and proper conclusions are reached in appellate matters. He said:

> *"It is important that single-judges dealing with appeals in Family Law have appropriate family law background and experience, and that larger panels include judges with relevant Family Law experience. The High Court has noted on several occasions that hearing an appeal of a discretionary decision is no easy task and this certainly accords with my experience."*[11]

Currently, the default position is that family law matters appealed from the FCC are heard by appeal bench of the Family Court consisting of three members whereas appeals in respect of the Court's general work are heard by a single judge only.

Under the merger proposal, appeals in family law matters will heard by a single judge only. This single judge may be any current Family Court judge, rather than a member of the current appeal bench.

This is inconsistent with the treatment of parenting and financial issues before any other Court, including the Supreme and District Courts and the Federal Court, and does not promote the best justice outcomes.

If a system is struggling to realise its key purpose or deliver a key service, the policy answer is not to compromise or do away with that service. The

[11] Op. Cit.

answer should be to better resource and support its service delivery.

A specialist court must not be destroyed, whether by stealth or abeyance, based on a mirage that this will fix problems which in reality require more resources and holistic reform.

It is, therefore, very difficult to conceive of what is so radical about proposing to retain a specialist court.

But even if what we were proposing was radical, what's so wrong with that?

In 2017, then Attorney-General Brandis said the government was open to change to improve the system, "if need be, radical change".

Reform of the courts must be part of a holistic approach to the family law system and a whole-of-system response to do what is in the interests of Australian families and children.

Senator Brandis commissioned the Australian Law Reform Commission to undertake the first root and branch review of the Family Law Act 1975 in more than 40 years. That comprehensive report was handed down in April this year and highlighted the fragmented nature of the current system.

The ALRC's first recommendation was that the government consider fundamental changes to the identity and structure of the courts to deal with both family law as well as with family violence and child protection issues, which have traditionally been the province of the states.

The government is yet to respond to that recommendation or to any of the 59 other recommendations by the ALRC.

As a rule, family violence and child abuse issues are dealt with by the states and territories and financial and parenting issues arising on family breakdown fall to the Commonwealth.

This results in delay, additional cost and too often in an inconsistent response to families and children in crisis. There is a real risk of children

and victims of family violence falling through what the commission called the "jurisdictional gap".

The ALRC recommended establishing family courts in each state and territory to provide a comprehensive response to these difficulties.

The Attorney said this too was "radical". He described it as "largely impractical" and a "radical Gordian knot approach",[12] and has dismissed it without further consultation.

Regrettably, the word "radical" appears to have become code for "the too-hard basket".

There is a response available that would address both the issues identified by the ALRC and those confronting the family law system.

The government should lead consultation over necessary structural reform by seeking to assume responsibility from the states and territories for all aspects of the welfare of children and in addressing family violence.

The answer is not to be found in reviving the flawed merger.

When the Coalition party room met for the first time in the 46th parliament, the Prime Minister reminded his government that serving the Australian people means ensuring "that we focus on fixing the problems that need to be fixed".

There is now a real opportunity to have an informed and proper discussion and consideration of *all* options available to fix this most important of systems.

The recently announced parliamentary inquiry into Australia's family law system has the potential to drive an informed, holistic parliamentary response to the challenges facing our family law system now and into the future.

But to achieve this, the inquiry must ensure a full, complete and open-

[12] https://www.attorneygeneral.gov.au/Media/Pages/family-court-and-federal-circuit-court-plenary-opening-address-7th-august-2019.aspx

minded review of the family law system, involving all impacted by the system.

This inquiry must not be compromised by the government pressing ill-conceived changes in the face of the inquiry and it must not be derailed by any preconceived views or pre-determined outcomes, particularly in relation to family violence.

What Australia needs is a comprehensive blueprint to protect families and children into the future. Not the regurgitation of a flawed stopgap that is fundamentally unfit for purpose and will hurt Australians who have already suffered enough.

The Law Council has called for the inquiry to be conducted in a respectful, safe and inclusive manner, informed by expert advice and empirical evidence.

And we are committed to holding the inquiry to account for the need to undertake a full examination of all aspects of the family law system.

To do otherwise would be an opportunity lost and relegate the inquiry to yet another expensive, cynical political ploy.

In the meantime, this inquiry should not stop the government from addressing immediately the pressing need for proper resourcing and funding of those parts of the system in crisis.

This means sufficient funding for family violence support services, proper legal assistance funding for those in need and adequate funding to ensure Australian children and families are not waiting for three or more years for justice.

Our Parliament must do what is right. Not what is politically expedient or looks like a short term fix.

We have an obligation as a community to ensure any change to the family law system has the best interests of children at heart, and promotes meaningful sustainable outcomes to secure justice.

And to speak out in defence of the Rule of Law and the administration of justice – even and especially when it is unpopular – or dare I say, radical – to do so.

We make no apologies for carefully scrutinising and putting to proof any proposed reform to the family law system.

The Law Council has worked and will continue to work tirelessly in close collaboration and cooperation with the Family Law Section to advocate for meaningful reform in this space in the interests of justice, children and families.

I commend the FLS for its fierce advocacy in defence of the administration of justice, under the leadership of a section executive led by Chair Mr Paul Doolan and Deputy Chair Michael Kearney SC.

But we also need your help to continue to explain and to prosecute these concerns and the case for holistic change. To inform public debate with your own professional experiences and lend your expertise to help drive long-term solutions.

Martin Luther King Jr famously said "When you are right, you cannot be too radical".

The Law Council does not profess to have all the answers. And as the Prime Minister has conceded, in family law there is no perfect solution.

What we do know is that any change to Australia's family law system directly impacts on the lives of children and families already at their most vulnerable.

That does not mean we should not change it. We *must* change it because we know the current system is letting down those most in need.

But we must commit to change to better the law, not short term fixes or change for change's sake.

And if radical change will produce the best outcomes for vulnerable Australians, and secure a safe, specialist and accessible system for all, then

radical change is what we must pursue.

Australian children and families deserve nothing less.

Thank you.