

**Speech by the Hon. Diana Bryant QC, Chief Justice, Family Court
of Australia**

**Inaugural Family Law System Conference, 19 & 20 February 2009
Old Parliament House, Canberra**

In this panel we have been asked to address:

- what is being done well and what are the challenges in the family law system,
- what issues raised in the document 'Towards a National Blueprint for the Family Law System' do we agree or disagree with
- how do we ensure people get the services they need in respect of the entry point, and
- can the ideal pathways in the 'Towards a National Blueprint' be used as a starting point for a national blueprint.

The other members of the panel, with whom I've spoken, are going to address these matters in some detail. I have chosen to leave the practical to them and to focus on the theoretical or perhaps even the philosophical. My comments are also unapologetically court focussed.

Most of the next two days will be appropriately spent talking about the practical solutions to family law so I thought that I would start this two days with somewhat more of a general look, in the hope that we might discuss some of the philosophical underpinnings of our system: not only what works, but why it works, and whether we would seriously want to change it.

I have chosen this approach because we are in danger, I think, of living Santayana's *aphorism on repetitive consequences*, namely that "those who cannot remember the past are condemned to repeat it."

If you will bear with me I think it is constructive to consider just what has occurred since the family law system as we know it started in 1976 because I think it may assist us in the next two days to come forward with a useful blueprint for the future, a blueprint which I hope will underline some of the fundamentals of our system and the reasons that underpin them.

In 1980, only four years after the Family Court commenced its operation, Parliament appointed a Joint Select Committee on Family Law.

Again in 1987, the Advisory Committee on the Australian Judicial System (the 'Jackson Committee') received numerous submissions on the position and role of the Family Court in the federal judicial structure.

In 1992 there was the *Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act*, quickly followed in 1993 by the *Joint Select Committee on Certain Family Law Issues*. The Family Law Pathways inquiry advisory group was established in 2000 and *Out of the Maze*, its report, was launched in 2001.

More recently of course we have had the *Every Picture Tells a Story* parliamentary inquiry and subsequent report, which memorably recommended the establishment of a Families Tribunal, despite that issue not forming part of the Committee's terms of reference.

I highlight that particular issue because it seems to me that it has not entirely left the agenda of those who bring their minds to bear on family law from time to time. I would like to make the point strongly that there has not been any discussion in a public or informed way about the efficacy of a tribunal, how it would operate, its strengths or weaknesses, and how it would compare with our existing system. In my view, until such an analysis has been carried out, it has no serious credence as a viable option.

In addition to these major reviews, there have been numerous reviews of the operation of parts of the family law system, including the child support scheme and the Law Reform Commission's *Managing Justice* inquiry, which very much involved the practical case load workings of the Family Court and other federal courts.

Almost without exception, each major review has been succeeded by significant legislative amendment, including the 1995 reforms and the 2006 amendments, colloquially known as the shared parenting reforms.

Thematically, the outcome of each discrete review and the intent of legislative responses have been very similar. All, quite properly, emphasise the importance of integration, of a whole of system approach, of a client focus, and of reducing the upset and trauma associated with relationship breakdown, particularly for children. These are matters that are captured in the Blueprint we will be discussing over the next two days.

If I turn to paragraph 5 of the materials under the heading 'A more effective family law system', there are 13 bullet points. I don't want to comment on all of them at this point because we will be dealing with them in more detail over the course of the next two days but suffice to say I doubt that anyone would disagree that any of the elements set out are indeed the components of an effective family law system.

The first point I would like to make is that many of the 13 points raised are already inherent in our system. The second point is that it does not matter what we do, we are never going to have a perfect system.

Perfection is unattainable and if we measure our achievements by perfection then we will consistently be disappointed. That I think means that we need to focus, as the paper suggests, on the **strengths** as well as the weaknesses of the system.

I want to focus particularly on the first point “provides access to justice”. I think this is an important point that must not be overlooked. The provision of access to justice is one of the fundamental cornerstones of our legal system and one which requires in my view some careful thought. It also repays consideration in the context of both impediments to access (for example, requiring parties to have a certificate before being permitted to file an application in a court) and placing alternative decision making processes in the path of litigants ultimately seeking a determination from a court.

This group will obviously want to consider in more detail the kind of discouragements in the path of coming to court in more detailed consideration of question 13.

At this point I want to raise for reflection whether it is proper to put barriers in the way of family law clients from having their disputes determined by a court, and if so, what the limits of those barriers should be. I think we need to find better means of identifying those cases that will need access to courts from those that don't – a bit like triage to use a medical analogy.

First let me say that I am not at all opposed to mandatory family dispute resolution or to the requirement for certification, as is presently the case. Indeed, as many of you will be aware, the Family Court itself introduced pre-action protocols designed to ensure parties did participate in ADR, where appropriate, before coming to court.

There are perfectly good and legitimate reasons why we should discourage litigants from having their case determined by somebody else rather than reaching their own agreement:

- The very nature of family breakdown makes it conflictual and there is a natural tendency which, if not checked, would result in many people positively choosing contested and adversarial pathways. We know that escalating and continuing conflict between parents is positively disadvantageous to the welfare of children and for this reason alone we should be actively discouraging people from adopting that path if it can be avoided.
- Mediation and family dispute resolution is applied by all courts these days in civil litigation and if ever there was an area where it is entirely appropriate, it is family law.

However, I suggest it is one thing to do whatever we can to discourage litigants reaching court without fully exploring and being exposed to other options, but it is quite another to prevent those who do need a decision, for whatever reason, from having access to courts.

While I appreciate that in some quarters what I am about to say would be regarded as heretical, I proffer the view that courts are not bad. The judicial officers in the family courts – the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court – comprise judicial officers who are experienced and who have spent most of their working lives in family law, as practitioners as well as judges. They have sensitivity about the issues concerned. They understand them. But they also understand the need for decisions to be made, and often hard decisions to be made.

Family law is the one area in which you can absolutely never please everyone.

Almost everybody here will be aware of the tragic incident which occurred recently in Melbourne on the Westgate Bridge, when a father threw his young daughter over the bridge's barrier in front of horrified commuters. I noted that, ironically, the commentators on this broke down immediately into gender but their one unifying factor was their blame of the Family Court or at least the family law system. The men said it was because 'men didn't get a fair deal and didn't see their children enough' and felt frustrated, distressed and ultimately, presumably, were consumed by madness. The women said it was because 'the Court allows dangerous fathers to have contact with their children.'

A quiet and calm analysis of these competing comments will quickly reveal the inevitable family law divide. Whatever the courts do, one party and then later, one gender, will not like the result.

While I will, as long as I have breath, continue to endeavour to have rational debate about these issues, on the other hand I think we must all accept that this criticism is in a sense inevitable. One might simplistically be tempted to say that the courts must be getting it right if both sides are dissatisfied. But the system is not simplistic and there are no easy answers.

We should not however be tempted to respond to the loudest voices.

Those of us who work in family law, and that is everyone here, knows the complexities that attend family law disputes that find their way to court. Much of the media, and many of the public they inform, regrettably have no interest in complexities and while that view prevails there will be a continuing criticism by those who do not, or will not, understand. What I think I am saying is that we have to accept that the uninformed and the sensation seekers will continue to be critical of the system whatever it is and we should try not to be distracted by that in our search for best practice.

As to decision making outside the courts, I personally think it would be foolish to think that a decision maker under any other name, applying the provisions of the Family Law Act, determining issues of credit, making findings of fact on disputed evidence (sometimes about whether abuse or violence has occurred), and receiving expert evidence by the way of family reports about the dynamics of a family and the views of children, would be any better, worse or different from the system that we presently have of carefully chosen judicial officers who have a commitment to family law.

And I think we should be careful about trying to place impediments in the path of people coming to 'court', as if the court is somehow evil because of the uninformed and partisan public opinion and the worst aspects of the media.

We should also, in my view, be careful not to treat family law as somehow different from other areas of law. We allow those who have a fencing dispute have access to the courts. I would not like to see us denying those with family law disputes access to the courts as well.

I recently attended a meeting in Brussels, jointly sponsored by the European Commission and the Hague Convention on Private International Law for networks judges. There were 82 different countries represented and all of those countries from Europe, the Asia-Pacific, Africa, and the Americas have systems of law similar to ours

where parties have access to courts for the determination of their disputes. Courts populated by judges like our own, who are committed to finding the best outcomes for children.

Courts are important. They provide transparency. Reasons for judgment are provided. Appropriate appeal systems are in place. Our jurisprudence provides robust rules around bias and discrimination. The family law system in Australia as a whole, and particularly the funding of expert evidence and pre-filing family dispute resolution, is the envy of the world. We are admirably spending two days looking at how we can improve the system. I can assure you that there are many countries who would love to have our system, however imperfect we think it is.

Then there is also the overall importance of family law as an area of law. We should not in my view treat the law and access to courts regarding children's matters as somehow less important than other areas of law and being able to be carried out by lawyers acting as arbitrators or by tribunals.

Family law work is important. Citizens have the right to have their disputes determined, especially disputes regarding their children. As we know, there are significant decisions that have to be made. They are controversial and we hear about them every day: issues regarding medical procedures, findings about whether abuse has or hasn't

occurred, international relocation and so on. I would certainly be concerned if there was a view that in Australia family law work, including difficult parenting decisions, was seen to be unimportant enough to be done outside a court.

I appreciate that many of you here would not necessarily have turned your minds to some of these issues but I think they are important to at least bear in mind when some of the discussion over the next two days will be taking place.

So I suppose I would like to see us coming to the end of our two days with the courts as the centre of an improved family law system and I hasten to add that I am always in favour of improving the system, as long as we understand what core elements we need to retain.

For my own part, I think our system pretty well strikes a balance between affording a right of access to the courts and encouraging parties to arrive at their own arrangements where possible. But that said however, we can certainly aspire to do it better and the practical aspects can be improved.

Access to justice requires a well supported legal aid system for it to be truly effective and I would certainly like to see us looking critically at whether that is being achieved at the moment over the next two days.

A country like Australia, which operates according to a system of cooperative federalism, will always have its own tensions. Child

protection is a key area in which these arise; indeed it is a veritable San Andreas fault. Do we accept, as it seems we must, that it will be some time before we have a unified and unitary system for protecting children? How do we improve integration between the Commonwealth and the states in this critically important area?

How do we break the ideological impasse that exists between 'men's groups' on one hand and 'women's groups' on the other around family violence? How do we move towards a focus on safety and personal protection, particularly for children, over jostling for political position? One answer to that question may well lie in the 'Wingspread' example from North America. The Wingspread conference on domestic violence and family courts was held in 2007 and was an initiative by leaders of the National Council of Juvenile and Family Court judges and the Association of Family and Conciliation Courts. It was designed to overcome a discursive stalemate around family violence and to open a productive dialogue for the ultimate benefit of children and families. I think a similar initiative in Australia might be useful to consider.

How can we better link in with community based services to provide families with 'post-operative care'? By that I mean equipping parents to live within the parameters of new arrangements and assisting them to think constructively about how to respond when tensions arise, as they inevitably will. One of the deficiencies of the family law system is that we tend to expect warring couples to somehow transform

themselves into respectful, obliging and intuitive parents by the time orders are pronounced. The reality is of course that parents need assistance and support in learning to live within the parenting arrangements that have been agreed to or imposed upon them.

Where do we draw the line between levels of funding for the family law system and levels of service? Do we accept that, in a cost/benefit analysis, a 'Magellan' case management approach is simply too resource intensive to be available in every case in which allegations of child abuse or family violence are made?

What can be done to improve contraventions and enforcement? This has been a vexed question for many years. What is clear however is that various changes to the system of enforcing orders, and particularly parenting orders, have not been entirely effective. I think this is because enforcement proceedings as currently conceived are a very blunt instrument. I think we must seriously discuss the Family Law Council's recommendation that there be an enforcement officer of some kind appointed, at least to bring proceedings on behalf of parents who allege breach of orders. There will hopefully be an opportunity to discuss this in some more detail during the next two days.

When I was being interviewed for the Jon Faine program last week I undertook to raise at this forum some of the suggestions that callers

made to me to improve the family law system. They included the use of enforcement officers, litigation caps, penalties for perjury and counselling to assist parents adjust to new orders, especially where a change in residence is involved. They are all issues worthy of consideration today and tomorrow.

It would be easy to be depressed and cynical at the very number of inquiries and significant reconsiderations that have occurred in the last 30 years. However, I am not cynical. I believe that opportunities like this, which enable us to appropriately and critically consider how to improve the system, are a valuable contribution.

My wish is that we come out at the end, not with just some recommendations for the appropriate system but also with some strong endorsements of that part of our system which we believe is important and underpins what we call the family law system.