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— FAMILY LAWYERS —

FAMILY COURT MERGER: When Two Becomes One

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You may have heard in the news that Parliament has just passed a law to merge the Family Court and the Federal Circuit Court. This has sparked a number of colourful headlines such as “*Family Court merger condemned by former judges and legal experts after legislation passed*” (ABC News); “*A devastating outcome: Legal experts condemn Family Court merger*” (SBS News); and “*Family Court merger sparks fresh outrage*” (The New Daily).

I wanted to go behind the headlines to study details of the merger and understand why there’s been such negative publicity about the move.

What’s happened is as follows:

- Parliament has passed the *Federal Circuit and Family Court of Australia Act 2020* and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2020*.
- The new Acts will create an amalgamated Federal Circuit and Family Court of Australia (FCFCA) with two Divisions: one which will include judges presently in the Family Court of Australia dealing with the most complex matters and hearing appeals; the other consisting of judges presently in the Federal Circuit Court of Australia. The FCFCA will be the single point of entry for all family law and child support cases.
- The FCFCA will continue to have a statutory obligation to have regard to the need to protect the rights of children and to promote their welfare, and protect them from family violence.
- There are presently 33 “specialist” family law judges in the Family Court. Their current workload (complex matters and appeals) takes up about 10% of all family law cases. By August, it is intended that this work will be performed by 35 judges in “Division 1” of the new FCFCA. The legislation prescribes that the number of judges in Division 1 cannot be below 25.
- There are presently 40 judges that deal with the other 90% of family law cases in the more generalist Federal Circuit Court. By August it is intended that this work will be performed by 43 judges in “Division 2” of the new FCFCA. The current judges of the Federal Circuit Court have an average of 25 years of family law experience between them, and many are former Registrars of the Family Court, experienced family law solicitors, barristers, senior counsel and senior academics.
- The Court will continue to focus on implementing initiatives such as the national COVID-19 List i.e. a court list dedicated to dealing with urgent family law disputes that have arisen as a direct result of the COVID-19 pandemic (e.g. family violence, travel arrangements, failure to comply with orders, disputes about vaccinations).

The Attorney-General argues the merger will result in a simpler, faster and cheaper legal system for those hoping to settle family disputes. For example, removing unnecessary confusion and duplication in the existing dual court system.

So far so good you might think. Surely it’s a sensible idea to reduce complexity in the system by consolidating two overlapping courts into the one court with a single point of entry rather than two? The government claims that the changes will reduce backlogs with as many as 8,000 extra cases resolved each year.

So what's the controversy?

Well, for a start it's been opposed by the Law Council of Australia, Women's Legal Services Australia, Community Legal Centres Australia and the National Aboriginal and Torres Strait Islander Legal Services and more than 155 other stakeholders who are concerned that the merger effectively abolishes the specialist, stand-alone Family Court which will harm, not help, Australian families and children. In particular:

- In support of the merger, the government relies on a report carried out by PWC in 2018 on the "efficiency of the operation of the federal courts". However, opponents argue that the report is flawed, widely discredited and is not a proper basis for the claimed benefits of the merger.
- Opponents are concerned the merger will put an extra burden on an underfunded system. They point out that the new Court will be under heavy scrutiny to deliver court efficiency, resolve 8,000 additional cases, reduce costs, reduce the time separating families will spend before the court and reduce delays, even allowing for the impact of COVID-19, but with insufficient resources to do so. They argue that the minimum number of 25 judges in the new Division 1 was far too low and that more judges, not less, are needed to meet even existing demand.
- Many groups dispute the government's claims that new court will lead to a more efficient system and are concerned that judges with "no real knowledge" of family law may preside over cases, leading to even longer delays for families trying to settle disputes.

CEO of Women's Legal Services Australia, Angela Lynch, has said it was a great loss for vulnerable women and children who turn to family courts for protection. Ms Lynch told the ABC that: "The judges are already under pressure. The families are already under pressure... there definitely could be people falling through the cracks". She's instead pushing for extra funding for specialist representation for domestic violence victims who were increasingly having to represent themselves.

As with all major reforms, it may ultimately take a number of years of the new FCFA operating before we're really able to assess the impact of the merger.

One point, however, remains a safe bet, namely that taking matters to the family court – in whatever new guide or division - is going to remain a more difficult and expensive method of resolving disputes compared to processes such as mediation and interest-based negotiations, and should only be used as a place of last resort or in the event of genuine and serious urgency.