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Courts' divorce makes for a long split

Les Stubbs
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Even as a divorce lawyer, I found it good news to hear the Bureau of Statistics reported last week that the divorce rate is decreasing. The bureau said there were 47,963 divorces granted in Australia last year, down from 51,375 in 2006. If people are staying married, that's a good thing.

But, notwithstanding the statistics, I am still concerned for those who, sadly, realise they have to separate, and who then require the assistance of a court to do so.

The Family Court of Australia's latest annual report analyses the court's performance against its targets. It shows that, on the whole, delays are endemic. It takes 26 months to finalise 90 per cent of cases; and a further 10 months if you appeal. That's three years to officially split.

The court's benchmark for determining urgent applications is to complete 90 per cent within three months of an application being filed. But it is taking 8.5 months (which is more than the previous year) to achieve that target, despite the establishment of the Federal Magistrates Court to hear some disputes.

The former government said its desire was that "Australians from all walks of life should be able to access the court system when their circumstances require it". That has not been fulfilled.

The Federal Magistrates Court was created in 1999, largely to reduce the workload in the Family Court. Robert McClelland, then the shadow attorney-general, told Federal Parliament at the time: "If it works ... I will be the first to congratulate the government. However, if, as everyone expects, the bill does little to address this problem, then Labor will review the operation of the court ... to see whether a more effective approach is available."

Fast forward to March this year, and, as promised, McClelland, as Attorney-General, announced a review by KPMG consultant Des Semple of the system in which these two courts operate, because delays continue to put an enormous strain on people whose family life has broken down, and who desperately need the courts' judgement.

Criticisms of the establishment of a separate Federal Magistrates Service back in 1999 were considerable. It was claimed the government had not justified the need for a separate court, and that the \$27.9 million required could be more efficiently spent in the existing court structures.

Moreover, the Federal Magistrates Service would take \$5 million a year away from the Family Court, and that would only increase delays.

The worrying problem was establishing concurrent jurisdictions between the Federal Magistrates Service and the Family Court and Federal Court, complicating and confusing the delivery of court services for litigants. Rather than reducing delays, the Federal Magistrates Service would, in fact, increase demand for litigation and thereby contribute to the delays.

Measures proposed at the time by the Labor opposition were largely ignored by the Howard government.

Indeed, the inquiry into the Federal Magistrates Bill consisted of only two days of public hearings, in Sydney and in Melbourne. There was a widely held belief at the time that the creation of the Federal Magistrates Service had more to do with the desires of the government to appease interest groups who claimed that the Family Court was biased against men; and a perceived personal animosity between the then attorney-general, Daryl Williams, and the then chief justice of the Family Court, Alistair Nicholson.

The Family Court's budget was massively reduced in 1996-97, and it never recovered. Introducing another new court to the equation only added to delays in the system. As Nicholson warned, the confusion fragmented the court system, and led to forum-shopping and matters being reshuffled between the courts. Far from improving services to the public, we have seen the service heavily reduced.

This is not the fault of the judges, federal magistrates and registrars who work in the three federal courts. Social change over recent years has led to an increased range of matters coming before them.

We need to properly review the interaction between the federal courts to ensure resources are properly distributed between them, and their effective operation. Hopefully, this will lead to a proper integration of the Family Court and the Federal Magistrates Court, rather than resources being split haphazardly between two courts exercising the same jurisdiction under the Family Law Act as at present.

We need to overhaul the system to reduce the delays, before justice delayed really does become justice denied for too many people in trying circumstances.

Les Stubbs is a Director with Harris Freidman lawyers