Prescient McClelland knew the story behind modern families

MARK DREYFUS

When Gough Whitlam introduced the Family Law Bill 1974 into parliament, the bill that created the Family Court, he had a lot to say about its special nature: "The essence of the Family Courts is that they will be helping courts. Judges will be specially and carefully selected for their suitability for the work of the court.

"There will be attached to the court a specialist staff, notably marriage counsellors and welfare officers, to assist the parties at any stage — and even independently of any proceedings. These courts will therefore be very different from the courts that presently exercise family law jurisdiction."

In 2018, the modern Family Court has moved on somewhat from Whitlam's original vision. No longer are there marriage counsellors attached to the court. But the intent is very clear: the creation of a specialist court to deal with family law matters, a "very different" court, to reflect the special nature of the cases that would come before it.

It has taken more than 40 years for the Family Court's existence to be threatened. But that is happening now. The reason has a lot to do with the creation of another court by the Howard government in 1999 — the Federal Magistrates Court, now called the Federal Circuit Court.

When that court was set up, the rationale for doing so was to hive off the simpler cases from the Federal Court and Family Court, freeing them up to do the most complex and difficult work and develop the according jurisprudence. Federal Labor did support the bill that created the FCC in parliament. But we did so with grave concerns and reluctance.

Looking back through the parliamentary debates at that time is instructive. Then shadow attorney-general Robert McClelland, who of course has just recently been appointed Deputy Chief Justice of the Family Court, made some arguments that seem prescient.

In his second reading speech on October 18, 1999, McClelland spoke of "massive delays" in the Family Court system that are depressingly similar to today — two years in Brisbane, 28 months in Melbourne.

He spoke of the government's refusal to consider alternative approaches to the establishment of a separate court, such as the integration of magistrates within the existing Family Court, an idea that had the support of representative bodies such as the Law Council. He despaired at the money being spent on an additional bureaucracy that could have been used to appoint three or four additional Family Court judges.

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Most significantly, McClelland warned of the "waste and confusion" of the overlapping jurisdiction between the two courts, and the "integration complexities" with separate rules and case management systems. The delays in the system, he concluded, would simply not be addressed without additional resources.

"The magistracy will neither achieve what the government wants — that is, providing greater access to justice — nor remove these horrific delays that exist particularly in the Family Court."

Nearly 20 years on, it's hard to say he was wrong.

This is not a criticism of the hardworking staff or judges of the FCC. But the evidence shows the duplication of jurisdiction in family law simply has not worked and, without additional resourcing, delays have not lessened.

So when Christian Porter says, as he did to the Law Council's family law conference recently, that "the system of two courts exercising largely concurrent jurisdiction ... is described almost universally as a failure", be in no doubt that it is the Liberal Party's failure.

But Porter appears to be repeating the mistakes of his predecessors, as he now ploughs ahead with another attempted restructure of the court system against the advice of nearly all stakeholders — just as attorney-general Daryl Williams did in 1999, the consequences of which struggling families are dealing with now.

There is a lesson in this. The family law system is difficult and complex, and there are no easy answers. The Family Courts deal with raw emotion every day, and vulnerable families are more than just a number in a management consultant's report. Don't try to make major changes in haste, and don't think you can move the needle of delay and backlog without additional resources.

The case has not yet been made for Porter's restructure. If the Attorney-General really wants to make change, he needs to slow down, consult properly and explain to the Australian people how these changes will improve the system. He has failed to do so — and there is a real risk his changes will only make things worse.

Mark Dreyfus is opposition spokesman for legal affairs.

Law change a win for employers

If Christian Porter is right, a small change is about to restore common sense to a contentious area of discrimination law.

If it works, the immediate beneficiaries of the Attorney-General's plan will be employers who will be less likely to be hauled before the Australian Human Rights Commission for refusing to give sensitive jobs to criminals.

That is what happened to Suncorp, which made headlines in July when the commission chastised it for refusing to employ a man with a child pornography conviction.

Suncorp stuck to its guns and also refused to comply with a recommendation from the commission that it should pay this man compensation of $2500.

This company's stance has now been vindicated by Porter's decision to rewrite the regulation that formed the basis for the commission's actions.

If the new rule works, all employers owe Suncorp a vote of thanks. But so does the commission, which will be less likely to become the focus for community outrage for applying a flawed law.

Porter's plan injects a degree of flexibility into the blunt rule that was used against Suncorp.

The AHRC regulations will be changed to make it clear that employers can indeed refuse to give jobs to those with criminal convictions if the convictions are "relevant" to the job in question.

This does not amount to open slather. It is based on the Attorney-General's assessment that most people would consider it unreasonable to impose a lifetime employment ban on anyone.

As a result, employers will not be entitled to withhold jobs from criminals if their convictions are irrelevant to the job in question.

The bottom line, however, is that business will soon have greater certainty.

The old rule banned discrimination in employment based on a person's criminal record. The new rule permits such action if it is based on a "relevant" criminal record.

The Attorney-General explains the change like this: "Obviously, it's reasonable for a bank to reject an applicant who has a conviction for embezzlement.

"In such a situation, the conviction is relevant to the performance required of a job applicant.

"However, the amendment will make it unlawful for an employer to discriminate on the basis of an irrelevant criminal record, consistent with equivalent (state and territory) prohibitions.

"This change should provide employers greater ability to exclude candidates who previously committed a dishonesty offence from positions of employment that can reasonably be characterised as requiring substantial levels of integrity and trust."

This really amounts to a belt and braces approach to preventing a repeat of the Suncorp case.

In July, when the ruling was in the headlines, Porter said it was a reasonable proposition that had the matter been lodged after last year's procedural changes to the commission "there may well have been a determination that there was no reasonable prospect of the matter being settled by conciliation and it would not have proceeded".

ONLINE: Sean Selleck on modern slavery

THE DRIVE FOR

THE AUSTRALIAN LEGAL REVIEW

This is the first in a three-part series marking the publication next Friday of The Australian Legal Review, a magazine devoted to legal affairs.

This week, legal affairs editor CHRIS MERRITT speaks to top managers from leading litigation funders IMF Bentham, Burford Capital and LCM, as well as the founder of Immediation, an online dispute-resolution company that plans to disrupt a market worth $1.5 billion.

Part 2, which appears next Friday, focuses on the way technology and innovation are transforming private law firms.

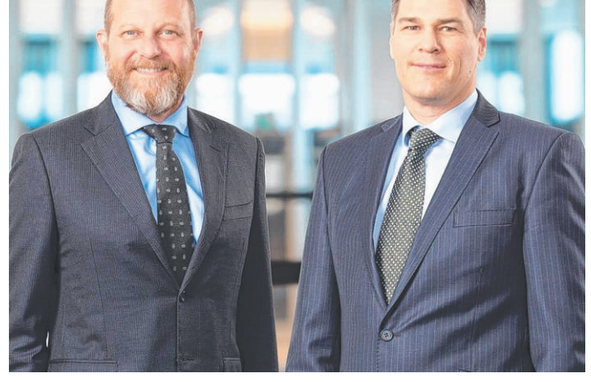
The final part of the series examines law schools and their embrace of change that is producing tech-savvy graduates.

The series will be accompanied by 10 video reports, starting today, that will appear over the next three weeks in the Legal Affairs section of *The Australian*'s website.

Stringent picks for private enforcement

IMF BENTHAM

IMF Bentham global managing director and chief executive Andrew Saker and the company's chief executive for Asia and Australia, Clive Bowman, say the litigation funder is growing internationally.



Andrew Saker, left, and Clive Bowman of IMF Bentham

Chris Merritt: Do you win most cases?

Clive Bowman: We have a success rate of 90 per cent.

Merritt: How do you manage that?

Bowman: We have investment managers who review the cases. There's a very stringent process, and if they decide to fund the case, it goes to an investment committee that has a number of permanent members, including former judges.

Merritt: So is it majority rule?

Bowman: No. It's unanimous and we think it imposes a particular discipline.

Merritt: So what proportion of applicants get through that selection process?

Bowman: Probably about 5 per cent?

Merritt: How much of the settlements are returned to clients?

Bowman: About 60 per cent goes to clients and 40 per cent goes to the funders and legal fees.

Merritt: Why do cases settle?

Bowman: Because they are good cases, primarily. IMF has, as I said, a very stringent selection process so when a funder comes on board defendants realise they cannot play the game of seeking to run the plaintiff out of money.

Merritt: Is this private enforcement of corporate law and is that a good thing?

Andrew Saker: It is in part. It's in part a response to the limited resources available to the government to enforce all types of legal outcomes and, as a consequence, the niche has grown for private enforcement opportunities.

Merritt: Do you see private enforcement and public enforcement as complementary?

Saker: We do. We see that there is a niche for both public enforcement and private enforcement.

Merritt: The company has been around for a while now, where is it going to grow?

Saker: We have expanded internationally and now have 14 offices in six countries. We do see some additional geographic expansion, primarily into continental Europe, but also within jurisdictions as there is a greater acceptance of litigation funding.

Merritt: Will future work be predominantly Australian?

Saker: Our present mix of our portfolio is approximately 60 per cent in the US and 40 per cent in the rest of the world. We do expect that to balance out in the near term as the rest of the world expands its investments, particularly in Asia and in Canada.

But we are expecting to see an overall growth in the total portfolio, so we expect expansion across all jurisdictions.

Merritt: Where in Asia?

Bowman: We are based in Singapore and Hong Kong, and we have been there for about a year and a half and seen very significant growth, particularly in the area of arbitration and insolvency.

Merritt: Why is arbitration so popular?

Bowman: The advantage is it's private, and also where companies are operating in jurisdictions where the court systems aren't as robust, they choose, by agreement, to nominate a particular place.

Merritt: Is it a competitive market?

Saker: The market is competitive. It's growing in its degree of competitiveness. In the US, in particular, we have seen a significant expansion of the number of funds that are offering third-party litigation funding or dispute finance. In Australia, less so, but there have been some recent entries of international funders into this market.

Merritt: What sort of regulation should there be?

Saker: IMF Bentham has a constant and consistent view about regulation of the industry and we support the Australian Law Reform Commission's recommendations.

At the moment that looks like they are going to be requiring litigation funders to get registered with the Australian Prudential Regulation Authority, which we think is a positive development.

Merritt: Why?

Saker: It provides the users of litigation finance, both as clients as well as defendants and the court, some degree of certainty as to the financial capacity of litigation funders to meet not only the cost of the prosecution of their claims but also any adverse costs in the instance that there is a loss.

Merritt: What would you oppose in terms of the regulation agenda?

Saker: The only matter that came out of the ALRC's recommendations that cause us a degree of concern was the implications about the relaxation or dilution of the rules and regulations about disclosure and misleading and deceptive conduct. We thought that was a step backwards in terms of the efficacy of the market and the confidence that consumer and users of the capital markets can have, so we weren't particularly supportive of that.

Next Friday's edition of *The Australian Legal Review* focuses on how technology and innovation are transforming the market for legal services and legal education. It examines the strategies of the leading litigation funders and features a cover essay by Chris Kourakis, Chief Justice of South Australia. The magazine, which appears twice a year, is free with next Friday's newspaper and will be online at the legal affairs section of *The Australian*'s website.