

18 December 2019

Committee Secretary

Joint Select Committee on Australia's Family Law System

PO Box 6100

Parliament House

Canberra ACT 2600

By email: familylaw.sen@aph.gov.au

Dear Committee,

RE: Inquiry into Australia's Family Law System

1. The Women's Legal Centre ACT ('WLC') is pleased to have the opportunity to contribute to the inquiry into Australia's family law system.

Who We Are

2. The WLC is a women's specialist community legal centre committed to providing high quality legal services to vulnerable women. We also assist government to improve policy, legislation and implementation. We do this through making constructive, solutions-oriented submissions based on evidence and draw on our front-line experience in our legal and social work practices in the ACT.



What We Do

3. The WLC regularly provides advice, support and representation to women in the ACT with family law matters. The family law system disproportionality affects the most vulnerable, including those who are marginalised financially, culturally and socially.
4. Our work is often focused on supporting women at the earliest stage and help them to navigate the complex family law system to reach practical and sustainable solutions to their problems. We also adopt a trauma-informed approach to service delivery, and support women holistically with their legal needs.

Response to Terms of Reference

a) Ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems and family and domestic violence jurisdictions, including:

- i. The process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders; and*
- ii. The visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings;*

5. The interaction and information sharing between Federal Circuit Court and Family Court registries and State and Territory Child Protection systems, including the State/ Territory child protective services and the state/ territory Children's Court registry could be improved by:

- a. Having a shared portal where all courts can have access to any interim and final orders made in relation to the children, including restraining orders and bail conditions relating to criminal charges. This means courts do not have to rely upon



parties or their legal representatives providing these documents or requesting the file from another registry. Requesting a file from another court registry is cumbersome, which could be avoided if basic court documents were accessible by judicial officers, including Registrars, and potentially the appointed Independent Children's Lawyer.

- b. A national care and protective system, where the Family Court and Federal Circuit Court deal with care and protection matters, rather than individual state and territory children's courts. This would not only lead to improved information sharing, yet more streamlined and consistent outcomes for children, where the approaches of the state/territory children's courts vary greatly from the Commonwealth courts.
6. The current legal standard and onus of proof based upon the civil law standard of 'balance of probabilities' is appropriate. People who experience domestic and family violence face difficulties in providing corroborating evidence to the court due to the insidious nature of domestic and family violence. That is, domestic and family violence often occurs in the home where there are no other witnesses, or the children are the only witnesses. Many people who experience domestic and family violence do not disclose to police or their treating medical practitioners, and many forms of violence, such as financial abuse and emotional/psychological abuse do not have corroborating evidence.
7. In relation to the visibility of and consideration given to restraining orders in family law proceedings, the WLC submits orders are already given adequate consideration and visibility. This includes the considerations of orders under s60CC of *Family Law Act 1975* (Cth) ('the Act') in determining the child's best interests and in providing mandatory protections for parties under s102NA of the Act.



Recommendation: a shared portal between State/Territory and Commonwealth Courts, and referral of state powers to Commonwealth to determine Care and Protection matters.

b) The appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and efficacy of the enforcement of such orders;

8. The family court has adequate powers to ensure parties in family law proceedings provide truthful and complete evidence and can charge a person with contempt and order criminal sanctions (s112AP of the Act) in extreme cases.
9. However, the Family Court could improve their internal processes for compliance, particularly in relation to property matters, where much court and client time is wasted when parties have not provided adequate financial disclosure, and/or complied with procedural orders. The telephone compliance check regime currently trialled in the Federal Circuit Court Registry a week prior to a Conciliation Conference proceeding, has been effective in reducing time spent in court attending conferences that are not ready to proceed due to lack of financial disclosure. Courts already have the power to make costs orders for non-compliance, and we are aware that different registries are more willing to make costs orders for non-compliance than others. The WLC recommends more consistent and simplified processes for applying for costs orders for breach of court directions in financial matter to deter non-disclosure.

Recommendation: National implementation of telephone compliance checks prior to conciliation conferences, and expansion of compliance checks for property matters.



c) *Beyond the proposed merger of the Family Court and the Federal Circuit Court any other reform that may be needed to the family law and the current structure of the Family Court and the Federal Circuit Court;*

10. We refer to the Women’s Legal Services Australia open letter to the Attorney-General in relation to the proposed merger for comment on structural issues¹.

d) *The financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning “disappointments fees”; and*

- i. *Capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters; and*
- ii. *Any mechanisms to improve the timely, efficient, and effective resolution of property disputes in family law proceedings;*

11. Many of our clients are referred from private legal practitioners or have referred themselves as they cannot afford private lawyer fees. The average cost of a private lawyer in the ACT is in excess of \$500 per hour, plus GST. This is clearly beyond the reach of many individuals. However, the WLC does not endorse a cap on fees. Due to the complicated nature of family law matters, many matters which start simply can take a dramatic and unexpected turn. For example, in some cases, due to the actions of one of the parties such as causing intentional damage to property, the value of the property pool can be dramatically reduced during proceedings. The proceedings will still need to continue if no agreement is reached, often to protect clients from future debts and the need to finalise

¹ Women’s Legal Services Australia http://www.wlsa.org.au/submissions/open_letter_-_concerns_about_proposed_family_court_merger [3 December 2019]



the financial separation between the parties. This all involves lawyers' time, which should be accounted for. If fees were to be capped, many clients would still need legal services even if the size of the pool is less than the cost of the fees due to needing finalisation of their matter. Further, each state/territory already have professional regulatory frameworks and regulations which provide that lawyers must provide adequate costs disclosure to their clients.

12. However, property proceedings and their resolution could be made more efficient and cost-effective if:

- a. Courts were better resourced to deal with matters on the day they are listed and at the allocated time in the court list. For example, if the matter is listed for a first return date (the date it is first listed before the court), and some interim matters need to be resolved prior to further directions being made, currently due to the large court lists, the matter is listed for yet another court date on a different day. Further, even for the matter to be heard at the allocated time in the duty list, often it requires clients and lawyers to be at the court for hours waiting for the matter to be called. As lawyers charge usually on a time-costed basis, this causes significant expense due to lengthy duty lists. Courts should be better resourced to have multiple duty lists so they are not overloaded with matters;
- b. More matters are dealt with by Registrars rather than judges. This can include requests for administrative adjournments (e.g. requests for adjournments over email), and direction orders, such as orders for financial disclosure; and
- c. Compulsory lawyer assisted Family Dispute Resolution (unless there are exceptional circumstances). Many matters can be resolved at mediation **with the assistance of lawyers**. Currently, the Centre is referred many matters from our local Relationships Australia and Family Relationship Centres for family law advice and representation. If there was a greater focus on lawyer-assisted mediations, the WLC anticipates more matters would be resolved and avoid court as the lawyers can



draft the basic agreements on the day of the mediation and provide the necessary advice before agreements can unravel. Of course, for more technical matters, these matters may take longer to draft and clients generally need financial and taxation advice. However, for basic matters, more lawyer-assisted mediations would lead to less matters proceeding to court.

Recommendation: support and investment in lawyer-assisted mandated mediations (with exceptions).

e) The effectiveness of the delivery of family law support services and family dispute resolution processes;

13. The family law support services available, such as Community Legal Centres, Legal Aid's Family Advocacy and Support Services, Family Dispute Resolution services, and supervision and parenting programs via Marymead offer excellent support to parents in the family law system. However, these services are severely limited due to funding restrictions. For example, Marymead is the only community organisation in the ACT which offers supervised time for a minimal cost. However, the waiting list is currently 6 months. Even if you have parents who have consented to a supervised time arrangement, often these matters will end up in court due to parents wanting time to commence as soon as possible. There needs to be a proper investment in access centres which provide supervised time and parenting supports for high risk families so children who do have a relationship with parents with complex needs can maintain their relationship.

14. The WLC also advocates for greater support and funding to the legal assistance sector who could act in lawyer-assisted mediations to avoid matters proceeding to court. In our experience, matters are much more likely to settle when there is legal representation and



advice available to reality test potential outcomes with clients if their matter proceeded to court.

15. The WLC also recommends greater resourcing for the legal assistance sector to provide non-legal, culturally appropriate 'holistic' support, such as social worker support and liaison officers. Since the WLC adopted a social work practice, the Centre has been able to address more of the broader issues affecting clients and keeping matters out of court. For example;

Linda is an Aboriginal woman who contacted the WLC. Linda has two kids under the age of 10. The children hadn't seen their father since they were very young. Linda also reported that he had used drugs throughout the relationship. Linda's ex-partner had made an application to the court to see the children. Linda's income was around \$40,000 a year, but her application for Legal Aid had been rejected due to her taking some additional shifts in another job. She could not afford a private lawyer. The Centre's specialist Family Law Solicitor spoke with Linda to understand her views of what was best for her and the children. Linda wanted the children to know their biological father provided he was no longer using drugs and she could be sure they would be safe.*

Linda, the Solicitor and Centre's social worker discussed the concept of supervised time and agreed to seek an adjournment of her case to go to mediation to explore this possibility without having to take the matter to court. Linda was very anxious about being in the vicinity of her perpetrator at mediation and the Centre's social worker supported her to prepare. The mediation resulted in a very slow introduction of supervised time. Over this time, the social worker and Linda worked together to support Linda through the process so she could support her children in the way she wanted to. The Centre also stayed in touch with the matter to ensure the support she received was culturally informed. Linda also went to an Aboriginal medical service to access culturally appropriate counselling support. The Centre's multidisciplinary team worked together in a way that was led by Linda and mindful



of her cultural needs and the effects of trauma in her life and relationships. The Centre worked to support Linda to understand her rights and obligations and her desire to focus on supporting her children and staying safe and keeping the matter out of court.

Recommendation: greater investment in supervised time services and the legal assistance sector to conduct lawyer-assisted mediations and provide holistic support.

f) The impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;

16. Family law proceedings are stressful, expensive and at times traumatic for all parties involved. Further, family law proceedings can be another form of violence where perpetrators can protract proceedings as a form of systems abuse. Generally, even once a final hearing is completed, there can be significant delays with judgements being issued by the judges. Delays are further exacerbated by the lack of family consultants available to do detailed and meaningful family reports. This means families are living in 'limbo' which can cause much anxiety. The WLC recommends greater investment in court resources to expedite court processes, including the appointment of more judges, registrars, family consultants and liaison officers to support families through the court process.

17. The WLC also supports the **Women's Legal Services Australia's 'Safety First in Family Law – 5 Step Safety Plan'**² recommendation to introduce effective family violence risk assessment practices in Court and promote the early determination of family violence through early testing of evidence in family violence. Currently, courts cannot make a finding of fact on an interim basis and this can delay orders being made to spend time with a parent or establish a care arrangement that is not safe. Early testing of evidence involves

² Women's Legal Services Australia http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf 23 October 2019



conducting preliminary hearings to ascertain whether family violence occurred and whether it is a continuing risk to the children and parties involved.

Recommendation: to invest in more family report writers and judge positions to expedite court processes, including making findings of facts relating to family violence earlier in the process.

g) Any issues arising for grandparent carers in family law matters and family law court proceedings;

18. The WLC recognises Grandparents often become unwitting third parties in family law matters either as supervisors for children’s time spent with a parent demonstrating risk behaviours, or as the primary carers themselves. Grandparents need greater access to legal assistance to obtain advice and if necessary, representation, to make informed decisions about taking on this significant role.

19. Further, many of the primary and additional considerations in s60CC only applies to parents, which creates an arbitrary distinction between parents and other primary attachment figures. Section 60CC factors should be extended, or greater clarity given, to apply to primary attachment figures other than biological or declared parents.

Recommendation: More resourcing for grandparents to obtain free legal advice and representation and amend s60CC to recognise other primary attachment figures.



h) Any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners;

20. All professionals engaging with people who are utilising the family law system should be appropriately trained and understand the effects of trauma on an individual and their capacity to engage with the family law system. For those who have experienced trauma, their experiences of the family law system can be triggering due to the high conflict, adversarial and high stakes nature of litigation. All professionals would be better equipped to manage challenging client behaviours if they received trauma-informed training. This may also lead to greater understandings of complex family dynamics, leading to better and more robust recommendations in family reports, as well as more sustainable outcomes if orders made by the court consider that family's specific circumstances.

Recommendation: That family report writers, family lawyers, family dispute resolution practitioners and judicial officers receive trauma-informed training.

i) Any improvements to the interaction between the family law system and the child support system; and

21. Currently, if parents wish to reach agreement about child support matters, they are required to enter into a binding child support agreement or seek a non-departure order. Further, there are great difficulties enforcing child support. The WLC recommends more streamlined processes so people can self-represent to seek payment of child support arrears, and greater scope to seek binding child support orders as consent orders.



j) The potential usage of pre-nuptial agreement and their enforceability to minimise future property disputes; and

22. The WLC is cautious about using pre-nuptial agreements to minimise future property disputes, as there are too many future unknowns which potentially could leave one party significantly financially disadvantaged. For example, if parties enter into a pre-nuptial agreement prior to having children which provide that each party retains 50% of the assets upon separation, there is no recognition for the future needs of the party who will have the majority care of the children. Even though binding financial agreements currently provide for parties to have legal advice about the effect on the agreement and the advantages and disadvantages of the agreement, it is difficult to advise as lawyers cannot predict the future. Further, the WLC is cautious about binding financial agreements in relationships where there are significant power imbalances. For example, this may be in relationships where one party does not speak English, where one party is the carer of the other party, and in violent relationships, as clients can be coerced into signing these documents. Whilst there are provisions to set aside agreements when there has been duress, this requires lengthy litigation and often there is little corroborative evidence. The WLC recommends the limited use of pre-nuptial agreements, and rather, a greater focus on transparency of decision making and greater education about the property settlement process so people can make informed decisions at the commencement of a relationship.



Thank you for the opportunity to contribute to this discussion.

Your Sincerely,

A handwritten signature in blue ink, appearing to read 'C. Maclean', written in a cursive style.

Claudia Maclean

Principal Solicitor

Women's Legal Centre ACT

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