Women's Legal Services Australia

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SUBMISSION IN RESPONSE TO THE FAMILY COURT RESTRUCTURE BILLS*

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* *The Federal Circuit and Family Court of Australia Bill 2018* and *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018*

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About WLSA

Women's Legal Services Australia (**WLSA**) is a national network of community legal centres specialising in women's legal issues, which work to support, represent and advocate for women to achieve justice in the legal system. We seek to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women. Some of our centres have operated for over 30 years.

Our members provide free and confidential legal information, advice, referral and representation to women across Australia in relation to legal issues arising from relationship breakdown and violence against women. Our legal services are directed to vulnerable and disadvantaged women, most of whom have experienced family violence. Therefore, our primary concern when considering any proposed legal amendments is whether they will make the legal system fairer and safer for our clients – vulnerable women.

Our members' principal areas of legal service work are family violence (family violence intervention orders), family law, child protection and crimes compensation. Our members also deliver training programs and educational workshops to share our expertise regarding effective responses to violence and relationship breakdown.

Finally, both WLSA and its individual member services work to contribute to policy and law reform discussions, primarily focused on family violence, to ensure that the law does not unfairly impact on women experiencing violence and relationship breakdowns.

We are informed by a feminist framework that recognises the rights of women as central.

Summary of Recommendations

1. Scrap (or at least delay) the Bills until after the Australian Law Reform Commission (**ALRC**) Family Law Review report is tabled.

2. Amend the terms of reference for the ALRC Review to include consideration of alternative court restructure and extend the time for submissions so there can be proper consultation about alternative court structures as well as court practice and procedure.

Definitions and Terminology

Below is a list of the abbreviations and definitions used in this submission:

AIFS	Australian Institute of Family Studies
ALRC	Australian Law Reform Commission
Draft Bills	The Federal Circuit and Family Court of Australia Bill 2018 and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018
EM	Explanatory Memorandum for the draft bills
ICL	Independent Children's Lawyer
FVPLS	Aboriginal Family Violence Prevention and Legal Service
FCA	Family Court of Australia
FCCA	Federal Circuit Court of Australia
FCFC	Proposed Federal Circuit and Family Court of Australia
Other Measures Bill	Family Law Amendment (Family Violence and Other Measures) Bill 2017
WLSA	Women's Legal Services Australia

Summary

WLSA Response and Position

WLSA is deeply concerned about the Coalition Government's:

- Lack of attention in the Bills to considerations of safety.
- Lack of consultation with family violence experts and victim-survivors.
- Unbalanced focus on financial efficiencies and 'desktop analysis' and statistics.
- Attempts to rush through these draft Bills.
- Separation of the court restructure from the ALRC Review of the Family Law System – the most comprehensive review of the family law system since the commencement of the *Family Law Act* in 1976.

The draft Bills, which purport to improve the response of the family law system to victim-survivors of family violence, will in the view of WLSA members instead:

1. Diminish the specialisation and status of family law at a time when more, not less, specialisation is required to address the increasing complexities of modern Australian society, families and the needs of children.
2. Be driven by, and almost exclusively are focused on, financial efficiencies instead of the safety and wellbeing of Australian families.

Family is the most fundamental unit of modern society.

Outcomes for families in the family law system should not be primarily determined by reference to financial efficiencies. In the 2012 Skehill review, Mr Skehill noted that in applying the Expenditure Review Principles of appropriateness, effectiveness, efficiency, integration, performance assessment and strategic policy alignment, this "does NOT require that the least expensive option must be adopted. The Principles focus on effectiveness and value for money, not avoiding expenditure *per se*."[1]

Practice and procedure should encourage the efficient use of resources but this should not be the overarching purpose.

The overarching purpose of practice and procedure provisions in relation to family law proceedings in the new court should be to reduce risk and promote safety for all members of the family, and noting the gendered nature of family violence, particularly women and children.

We note the ALRC has just released its Review of the Family Law System Discussion Paper which proposes both safety and best interests of the child as the paramount

[1] Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio, 2012 at p6.

principles in Part VII of the *Family Law Act*. This includes not exposing children or carers to "abuse or family violence or otherwise impair their safety".[2]

WLSA supports this.

The lack of recognition of the need to consider safety in these Bills is concerning and highlights the need for the ALRC review to consider proposals for restructure of the court and for Bills about this not to proceed until after the tabling of the ALRC review final report.

Reform is needed, but the current Bills are not the solution

WLSA agrees that the current family court system needs reform.

The objectives of the draft Bills should be to:

- Improve efficiency of the family law system.
- Provide appropriate protection for vulnerable people.
- Ensure the expertise of suitably qualified and experienced professionals to support families in need.

WLSA considers the draft Bills in their current form will not achieve these objectives.

There needs to be further and more detailed consultation about alternative court structures and related processes and concerns, including:

1. proper funding of the court system and the legal assistance service sector, such as community legal centres, including specialist women's legal services and programs; specialist Aboriginal and Torres Strait Islander community controlled legal services, such as Aboriginal Family Violence Prevention and Legal Service (**FVPLS**) and Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions;

2. better integration with state courts and systems dealing with family violence protection orders, criminal matters and child protection matters;

3. increased specialisation and accreditation of all professionals in the family law system including family dispute resolution practitioners, lawyers, family consultants and report writers and judicial officers in family law and family violence, as well as culturally competency and disability awareness;

4. the criteria and process for appointing judges to ensure transparency, independence and specialisation;

if the family law system in Australia is to improve its response to family violence and promote safety and reduce risk for Australian families. We note the ALRC Discussion Paper proposes "all future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person's knowledge, experience and aptitude in relation to family violence."[3]

[2] ALRC Discussion Paper, Proposals 3.3 and 3.4.
[3] ALRC Discussion Paper, Proposal 10.8

We further note the recommendations in the House of Representatives family law and family violence inquiry for increased specialisation in the family law system, including in family violence.[4]

Potential Alternatives

There are many alternative options for court structures which WLSA strongly recommends should be explored to see what court structure may best meet the needs of Australian families and particularly women and children and those who are family violence victim-survivors or at risk of family violence.

An alternative proposal for a federal family court system for Australia could involve:

- One specialist court called the Federal Family Court of Australia as a court of superior record and a court of law and equity which specialises exclusively in family law and family violence.

- The family law caseload of the Federal Circuit Court be merged in with the proposed new Federal Family Court of Australia.

- The Federal Circuit Court either remain or be merged in with the Federal Court of Australia as a separate list with the exception that it no longer determines family law matters.

- The specialist Federal Family Court have 2 divisions – with the more complex matters (i.e. relocation, Hague convention, child sexual abuse and matters where trial is longer than 5 days) and appeals to be referred to Division 1. Family law matters commencing in state courts (e.g. Magistrate or Children's Courts) could be transferred into the new Federal Family Court and the Principal Registrar assess for complexity and assign to either Division 1 or 2. This is similar to how the Family Court of Western Australia currently delineates family law matters as between the registrars, family law magistrates and judges.

- Appeals continue to be heard in the specialist family court by a panel of three judges.

- The new common set of rules for the Federal Family Court could distinguish between cases being determined in each division so that the more complex cases can be subject to further procedural steps to assist the judge and parties prepare for their determination. We note the ALRC review is also seeking feedback on an increased role for registrars, another reason to delay consideration of any Bills regarding a court merger until after the tabling of the ALRC review final report.

- All judicial officers in the new Federal Family Court to be specialist in both family law and family violence, as well as culturally competent and disability aware.

[4] Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* ('House of Representatives inquiry'), Recommendations 27-28.

We support the NSW Bar Association proposal of a single specialist Family Court with 2 divisions, with Division 1 made up of current Family Court of Australia judges and Division 2 of current Federal Circuit Court of Australia judges hearing family law matters.

We support the proposal of funding currently spent on the Federal Circuit Court of Australia to be split according to the case load – e.g. the NSW Bar Association suggests 90% family law and 10% other and this funding go to funding Division 2 of the specialist Family Court and a lower division of the Federal Court of Australia respectively.

We share the concerns of the NSW Bar Association that an increase in migration matters in the current Federal Circuit Court will lead to increased delays in the Federal Circuit Court hearing family law matters. This could be avoided if there was a single specialist court dedicated only to family law matters that is adequately funded. We agree that the appellate jurisdiction should remain within the specialist Family Court and that to ensure one judge's decision is not overturned by another single judge's decision that a panel of three judges continue to hear appeals.

Despite suggestions that the current issues with the family law system are not resourcing ones, reviews regarding the federal courts have highlighted the problem in establishing a separate Federal Magistrates Court for less complex family law matters that never received separate or adequate funding.

Call to Action

WLSA calls on the Coalition Government to:

1. Scrap (or at least delay) the Bills until after the ALRC Family Law Review report is tabled; and

2. Amend the terms of reference for the ALRC Review to include consideration of alternative court restructure and extend the time for submissions so there can be proper consultation about alternative court structures as well as court practice and procedure.

Overview

Current draft Bills

WLSA agrees in principle to a single specialist Federal Family Court with consistent case management and common leadership.

However, we do not support the current model of how this could be achieved.

Concerning aspects of the current draft Bills

There are a number of extremely concerning aspects of the draft Bills which WLSA considers may ultimately increase risk to families – particularly family violence victim-survivors who are overwhelmingly women and children, and which may ultimately lead to

unjust and unsafe outcomes for such women and their children.

We are concerned about the inadequate funding of legal assistance services and the courts. In 2014, the Productivity Commission recommended an urgent immediate injection of an additional $200 million in funding for legal assistance services for civil and family law prior to determining the longer term contribution required.

We are also concerned about the following aspects of the Bills:

- That the overarching purpose of the draft Bills is to facilitate the just resolution of disputes, according to law, and as quickly, inexpensively and as efficiently as possible with limited focus on safety and reducing risk.

- That the draft Bills mean there will no longer be a free-standing federal court that specialises solely in family law (let alone family violence), which will result in a more generalist court structure and the loss of that specialist expertise and knowledge developed over the past 40 years.

- That the criteria for appointing Division 1 judges does not include expertise or experience in family violence matters (noting that over half of family law matters involve family violence[5] and the ALRC proposal that all future federal judges exercising family law jurisdiction have this expertise).

- That the criteria for appointing Division 2 judges does not include expertise or experience in family law or family violence matters.

- That the model proposes merging "the Family Court into a division of a generalised lower level court and creat[ing] a new Family Law Appeal Division in the Federal Court of Australia",[6] thus the loss of a specialist family court and no guarantee there be specific funding for family law matters (both of Division 1 and Division 2, noting over 90% of the work undertaken by the current Federal Circuit Court of Australia is family law.

- Changes to powers relating to interrogatories and discovery in Division 2 which may undermine considering least intrusive forms of evidence first as proposed in the ALRC Discussion paper.

- The additional powers to punish parties and lawyers if proceedings are not undertaken as "…quickly, inexpensively and efficiently as possible" (which could easily be misapplied to put undue pressure on family violence victim-survivors to agree and settle parenting disputes with unsafe care arrangements).

- That the name of the new court not simply be the Federal Family Court of Australia (to ensure it has a plain language meaning and that lay persons understand which court to seek help from without needing legal advice to inform them).

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[5] Moloney, L, Smyth, B, Weston, R, Richardson, N, Qu, L and Gray, M, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings. A Pre-reform Exploratory Study*, 2007, Australian Institute of Family Studies, Melbourne, Key Findings.

[6] NSW Bar Association*, A Matter of Public importance: Time for a Family Court of Australia 2.0*, July 2018 at p5.

- The proposed new appeal procedure (removal of most of the Family Court's appellate jurisdiction and a new appeal procedure in a new appeal division in the Federal Court by judges who may be inexperienced in family law and family violence matters). We need specialist family law/family violence judges especially on appeals which tend to be more complicated and we believe that three judges should remain hearing appeals.

- The proposed imminent start date for these changes. We note the Hon. Christian Porter, Commonwealth Attorney-General has indicated he expects the new court will come into being at the beginning of April 2019.[7] (It is concerning that the government has sought to implement these significant structural changes without sufficient time to develop the necessary court rules, practice and procedure and training of professionals regarding same to ensure that court users understand how these changes will affect them in their individual matters and ensure that court users at risk of family violence don't fall through the gaps.)

- That the reform (which is amongst the most significant in the 40 year history of the Family Court) is being rushed through so there is no opportunity for these changes to be informed by the findings of the ALRC review. As noted in the 2009 Semple Review "The system as a whole has to be considered in recommending changes to any part, to ensure that solutions to problems at particular points in the system do not cause problems elsewhere."[8]

The court restructure should be considered and then implemented contemporaneously with further reform to improve the response of the family law system to families experiencing family violence which is currently being explored in depth and with detailed consultation by the ALRC.

General Comments

Elimination of Discrimination against Women from Gender Based Violence

WLSA agrees with the statements in the Explanatory Memorandum (**EM**) that gender based violence is discrimination against women and commends the Government for the unapologetic and unabashed acknowledgement of this.

It is an important step in the right direction.

The overwhelming majority of acts of family violence and sexual assault are perpetrated by men against women, and this violence is likely to have more severe effects on female than male victims.[9]

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[7] Nicola Berkovic, *Christian Porter admits government will miss start date for restructuring family courts*, The Australian, 19 September 2018.
[8] *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (The Semple Review), August 2008 at p16.
[9] *Our Watch, Facts and Figures* citing Diemer K 2015 ABS Personal Safety Survey: Additional analysis on relationship and sex of perpetrator, University of Melbourne.

Over half of all family law matters involve family violence.[10]

To effectively protect women against any act of discrimination, WLSA considers the family law system must emphasise safety and there must be proper funding of the legal assistance service sector, such as community legal centres, including specialist women's legal services and programs; specialist Aboriginal and Torres Strait Islander community controlled legal services such as FVPLS and Aboriginal and Torres Strait Islander Legal Services; and Legal Aid Commissions, which specialise in assisting women to give meaningful effect for the proper realisation of equality of men and women and to protect them against discrimination in court.

An example of a form of discrimination in this sense is the advancement of the allegation that a mother is alienating the children from their father if she discloses family violence and seeks protective orders to protect the children from the short and long term effects of family violence on their safety and development.

A family law system which is not focused on safety and on reducing risk and is instead focused on financial efficiencies is not an appropriate measure and will not modify the social and cultural patterns of conduct of men and women to eliminate prejudices.

If anything, it is likely to increase such risks by giving perpetrators and under resourced court staff another tool by which to pressure victim-survivors of family violence into agreeing to unsafe outcomes for their children.

Specialist Response is Needed

It is important for the family law system to focus on early and ongoing risk identification and assessment. It is equally important that the family law system is structured and the professionals working within it are properly and appropriately trained to support early screening and ongoing risk assessment so that the risk once identified can be properly and safely responded to.

The ALRC Review Discussion Paper acknowledges the need for increased specialisation, proposing core competencies, including understanding of family violence. We recommend this includes an understanding of the nature and dynamics of family violence, including the identification of the primary victim and primary aggressor; an understanding of how perpetrators of violence use violence; and an understanding of how to respond to family violence. Core competencies should also include an understanding of sexual violence and child abuse as well as trauma informed practice. We also support cultural competency and disability awareness being included in the core competencies.

One such mechanism is to increase the specialisation of the family law courts. WLSA considers the proposed merger of the two courts into the proposed Federal Circuit and Family Court of Australia (**FCFC**) and the proposed changes to the appeal process is taking a step in the wrong direction.

We need to be increasing, not decreasing specialisation.

Ways in which the current Bill could be amended to increase specialisation are discussed further below.

[10] Above n 5.

Diminished Specialisation in Appeal Procedures

The EM notes that a fundamental change in establishing the FCFC would be:

- The removal of most of the appellate jurisdiction of the Family Court except for limited appellate jurisdiction to hear appeals from State and Territory courts of summary jurisdiction (this does not include Western Australia where such appeals go to the State Supreme Court).

- The proposal that appeals in family law matters from the FCFC would be heard in a new Family Law Appeal Division of the Federal Court (to be established) and specifically:

    - Appeals from Division 1 would be heard by the Full Court of the Family Law Appeal Division.

    - Appeals from Division 2 would ordinarily be heard by a single judge of the Family Law Appeal Division.

In terms of the appeal process, WLSA considers that a safe family law system is one whereby:

- Appeals from Division 2 are heard by more than one judge. The family law appeal process needs to properly evaluate how the judge at first instance applied the law. In such a discretionary area of law, this cannot be properly done with one judge as this risks the appeal judge who hasn't had the benefit of seeing the evidence being tested coming to a different view.

- Appeals need to be heard by a judge with specialist family law and family violence expertise and experience.

  The family law and family violence expertise of the judges from the Federal Court who will be the appellate judges is unclear.

> Family law is an area of specialist legal knowledge. Family violence is another area requiring specialist training and experience. Family violence in family law are some of the most complex matters to be determined. We need specialists in this area.
>
> - Quote from WLSA member.

A Unified Court is welcomed

WLSA believes that there should be one specialist federal family law court (specialising in family law and family violence).

The experiment undertaken to create the Federal Magistrate's Court which resulted in the current two family law courts with nearly concurrent jurisdiction has not worked effectively. As many of the reviews of the federal family courts have found the problem stems from

establishing a separate Federal Magistrates Court for less complex family law matters that never received separate or adequate funding.

However, WLSA considers the current proposal to merge "the Family Court into a division of a generalised lower level court and create a new Family Law Appeal Division in the Federal Court of Australia",[11] will not only result in the loss of a specialist family court, but may also increase delays with no specific funding for family law matters allocated.

Further, in the most recent government commissioned report on the efficiency of the federal courts undertaken over a six week period, PwC acknowledged they did not "look at the detailed processes associated with case management"[12], had difficulties in "substantiating the extent of variation in complexity of cases between the two courts"[13] and did not consider "practical barriers to implementation" of their recommendations.[14] They recommended further collection and analysis of data.[15] They also expressed the view that increased specialisation could have a potential impact of "reducing number of appeals/number of transfers".[16] Significantly, they indicated there is a risk of a "negative impact on litigants and parties to the family law system through the implementation process" which could be mitigated if stakeholders to the family law system are consulted on specific proposals to identify "where parties will be most affected."[17]

This is particularly so when:

(a) The changes are not undertaken contemporaneously with further reform to improve the response of the family law system to families experiencing family violence which is currently being explored in depth and with detailed consultation by the ALRC.

(b) There is a lack of commitment to replacing the Family Court of Australia specialist judges (to be the new Division 1 judges) once they each reach the age of compulsory retirement and a lack of commitment to ensure that the Federal Circuit Court of Australia judges (the new Division 2 judges) to hear family law disputes are formally accredited and experienced in family law and family violence.

Need for Court Restructure to be informed by ALRC and more detailed consultation and be co-designed

The restructure of the family law courts is a chance to update the family court system to better meet the needs of modern Australian families.

It should be seen by Government as an opportunity to co-design from the ground up a system that is informed by the experience of past court users, family violence victim survivor advisory groups, professionals assisting court users and especially advocacy

[11] NSW Bar Association, *A Matter of Public importance: Time for a Family Court of Australia 2.0*, July 2018 at p5.
[12] PWC, *Review of the efficiency of the operation of the federal courts*, April 2018 at p53.
[13] Ibid at p47.
[14] Ibid at p56.
[15] Ibid at p69.
[16] Ibid at p59.
[17] Ibid at p69.

bodies assisting those who currently experience barriers to access the family court system and who end up with unjust, unfair and unsafe outcomes.

The ALRC provides the vehicle for such considerations and WLSA strongly supports the delay of the current draft Bills and amendment of the Terms of Reference for the ALRC review to include court restructure and an extension of time to allow for proper consultation.

Common approach to Case management is welcomed

WLSA agrees that there should be a common case management approach in all courts exercising family law jurisdiction to reduce confusion and increase court users' awareness and understanding of procedures (and therefore increase their access to these services), particularly court users who are disadvantaged and cannot afford legal representation.

A common set of rules (which are less complicated and supplemented by Case Management Guidelines) which are both easy to read and available on the Court website and translated into different languages would assist to create uniform case management practice, and make it easier for court users to understand the system and what is required of them. This in turn improves access to justice and confidence in the family court system for professionals and court users alike.

This approach is currently used in the Family Court of Western Australia whose rules by and large mirror those of the Family Court of Australia, and Case Management Guidelines and Practice Directions otherwise provide more detail and supplement the rules to produce an overall consistent case management approach of all judicial officers in that court.

WLSA also notes the Other Measures Bill (now law) which may mean more family law matters will be commenced in other court systems, albeit the merged court would be the single point of entry into the family law jurisdiction of the federal court system for those states who participate in that system.

There will not be a single entry point into the family law system in Australia.

Nor should there be, recognising that for family violence victim-survivors there are many pathways in related legal systems and there should be multiple doors into the system, but once in the system there should be a common consistent approach which has the safety of families at its primary objective.

The common and consistent approach to case management also needs to extend to those state courts which may be exercising more family law jurisdiction as a result of the Other Measures Bill.

WLSA further considers there would be a benefit to having a single set of forms for court users (provided these were developed with and informed by self-represented litigants and those who can't afford traditional legal representation). This would greatly enhance access to justice provided it went hand in hand with proper funding for the legal assistance service sector, such as community legal centres, including specialist women's legal services and programs; specialist Aboriginal and Torres Strait Islander community

controlled legal services such as FVPLS and Aboriginal and Torres Strait Islander Legal Services; and Legal Aid Commissions to ensure that court users received legal advice prior to filing court documents. This would assist to reduce unmeritorious applications and ensure that proper safety planning can be done for women and children victim-survivors of family violence, including seeking procedural orders that could increase safety and including proper but safe disclosures of family violence.

Increasing Access to Justice

Name should be Federal Family Court of Australia

From a court user perspective, if the court specialises solely in family law the name of the new court should be the Federal Family Court of Australia.

This will assist to distinguish it from state courts which will have increased jurisdiction to make orders in family law matters and from the state Family Court of Western Australia.

The current proposed new name (the Federal Circuit and Family Court of Australia) is long and will be confusing for many clients, especially those for whom English is not a first language. Most people understand what family law means even if they don't understand the framework by which family law matters are determined.

The Federal Family Court has a simple definition in plain language that is understood by court users without the need for additional explanation.

WLSA expects that with the current proposed name many court users would require further information and potentially legal advice to understand which court to apply to. While family court is in the current name, it is the second part of the long name and won't show up in many internet (and google) searches. This will make it more difficult for people trying to access the system to know where they should go, or even to find information about resolving their matter without applying to court.

Courts on circuit

WLSA agrees that the new court should not only sit in the major and capital cities in Australia, and that the Bill should facilitate and encourage courts to go on circuit and to include circuits to remote communities so that there is greater access to justice and visibility of those systems and services in remote communities.

This could go some way to increasing the cultural competency of the judiciary of the Family Courts by increasing awareness and knowledge of Aboriginal and Torres Strait Islander communities. It would also increase their visibility and help build confidence in remote areas in the family law system.

To do this successfully, there must be training for judicial officers and other court staff to ensure cultural competence.

In remote Aboriginal communities, comments have been made by Aboriginal service providers that the community is well aware which types of services physically come to their area. In the context of discussing the under representation of Aboriginal and Torres Strait Islander people in the family law system and their over representation

> in the care and protection systems, the comment was made 'where is the family court van [coming into community]'. The community see the police, they see state child protection but nowhere do they see the family court.
>
> - Quote from WLSA member

Access to Justice for Aboriginal and Torres Strait Islander communities

WLSA calls for the Bills to take more measures to facilitate and encourage greater access to the family law system for Aboriginal and Torres Strait Islander families.

Any new court structure should ensure the inclusion of initiatives to improve access to justice for Aboriginal and Torres Strait Islander families which have been developed in consultation with Aboriginal and Torres Strait Islander led organisations and communities.

These initiatives could include measures such as:

- Compulsory, regular and accredited cultural competency training for all judicial officers, court staff and all other family law professionals working in system, noting the ALRC proposal of cultural competency being a core competency for all professionals working in the family law system.

- The expansion of separate Indigenous Lists and options of provision of cultural advice to the court by Aboriginal and Torres Strait Islander Elders.

- Identified positions for judicial officers and other court staff for Aboriginal and Torres Strait Islander people.

Again, we emphasise the need for such measures to be developed and undertaken in consultation with Aboriginal and Torres Strait Islander-led organisations and communities.

Cost Orders against lawyers personally

WLSA is concerned that the proposed changes to increase opportunities for when a judge can order a lawyer to bear costs personally will unnecessarily decrease access to justice.

At present, a judge can order a lawyer to bear costs personally when they meet the requirements outlined in s117 of the *Family Law Act*. This includes when a party has conducted themselves in a way so as to necessitate the proceedings (and the incursion of additional and unnecessary costs, including failing to comply with orders) and where the case has no merit (is wholly unsuccessful).

The proposed changes suggest that a judge should order a lawyer to bear costs personally if they don't, according to that judge, facilitate the resolution of the disputes as "inexpensively and efficiently as possible".

WLSA is deeply concerned that the strong focus on resolution of disputes as efficiently as possible will lead to pressure being exerted on families experiencing or at risk of

experiencing family violence to agree to unsafe outcomes.

The focus should be on safety and reducing risk and not solely on financial efficiencies.

A judge who is not sufficiently experienced in family violence may hold a certain view about how family law proceedings where there are allegations of family violence should be conducted. This may be contrary to the established principles of risk assessment and trauma informed practice employed or at least aspired to in the family violence sector, but which will inevitably shape their view about how individual parties and lawyers have conducted the proceedings.

The risk of a personal cost order against a lawyer if they didn't conduct themselves in the manner that a specific judge, who may or may not be appropriately specialised in either family law or family violence, thinks is most efficient would create an additional deterrent to pro bono lawyers and those funded by legal aid commissions to work in this space.

There is already a significant gap in legal service delivery arising from the need for family law property advice of families who cannot afford the rising expense of private family lawyers and the lack of legal aid funding to meet this gap.

The government should avoid any steps which deter lawyers from helping to meet this gap in legal service delivery, including those from community legal centres who are already chronically underfunded and not properly supported to do this complex specialised work, as well as private lawyers on legal aid panels who undertake a significant amount of work pro bono as current legal aid grants do not reflect the amount required to assist family court users based on scale rates.

Legal representatives can play an important role in identifying family violence and issues in dispute. For example, the Australian Institute of Family Studies (**AIFS**) Evaluation of the 2012 Family Violence Amendments report found the majority of judicial officers agreed that when a Notice of Risk form is completed by a legal representative, the information included helps the judicial officer to understand the risks to parents and/or children in the case, compared to the majority of judicial officers disagreeing that the information in the Notice of Risk helped them to understand the risks to parents and/or children when completed by a party that was self-represented.[18]

Legal representation by those experienced in family violence is also an important safeguard for vulnerable parties who otherwise may not know the legal framework or otherwise feel pressured and intimidated to agree to the proposal by the other party.

This includes the benefit of a specialist family law barrister to cross-examine the family report writer and family violence perpetrator as the Independent Children's Lawyer (**ICL**) may base their decisions on family reports even when those reports are flawed and could arguably be biased towards and even facilitate systems abuse by the perpetrator.[19]

The safety of vulnerable parties and children is dependent on parties receiving legal

[18] AIFS, Evaluation of the 2012 Family Violence Amendments, 2015 p 41(55) at https://aifs.gov.au/sites/default/files/efva2012-synthesis-report.pdf.

[19] The AIFS Independent Children's Lawyer Study Final Report raises concerns regarding the focus given to some issues in family reports at the expense of giving adequate focus to the presence of family violence; the weight given to these reports; and the seeming lack of critical analysis of such reports resulting in the reports often going untested. See AIFS, Independent Children's Lawyer Study Final Report, 2013 at p130, 134.

support and representation from lawyers experienced in family law and family violence and their matters being conducted by judges and other court staff (including report writers) who have the same level of specialist experience.

Further, the Committee on the Elimination of Discrimination against Women (**CEDAW**) Concluding Observations[20] recommended the bills not proceed until after the ALRC review.

Proposed Start Date

WLSA members are deeply concerned about the proposed start date for these changes (we note the Hon. Christian Porter, Commonwealth Attorney-General has indicated he expects the new court come into being at the beginning of April 2019[21]).

As the EM itself notes, the Bill proposes major structural reform and time is required once the Bill is passed to ensure that guidance materials can be developed so that professionals and court users (including unrepresented litigants) can be educated about the changes – this is required to ensure procedural fairness.

Changes arising from the Other Measures Bill 2017 may enhance the power of state courts to make family law orders. There will need to be new court processes and procedures developed to ensure there is consistency as between all courts exercising family law jurisdiction and there is a need to educate and train court staff and professionals using the system of these changes to lessen the risk that vulnerable court users fall through the gaps.

The new case management rules and guidelines should be developed prior to the start date of this Bill and include processes arising from the Other Measures Bill.

This will ensure the new court structure and case management provisions start at the same time which will assist both court users and court staff and professionals assisting court users to better understand how all of the proposed changes will apply to the new court system.

This is essential to ensure court users have access to justice, both in terms of accessing the system and understanding how to pursue their legal rights once in the system.

Response to Specific Clauses

Clause 5 - Object of the Bill

Clause 5 should be amended so that an object of the Bill is to promote safety and reduce risk for women and children.

The concept of a just outcome needs to be tied to safety to prevent the family law system from being used to perpetrate systems abuse primarily against women and children.

[20] CEDAW, Concluding observations on the eighth periodic report of Australia, 2018 at p4.
[21] Berkovic, above n 7.

Clauses 9 and 10 - Chief Judge etc

While we appreciate the constitutional reasons noted in the EM for the appointment of a Chief Justice, Deputy Chief Justice and Chief Judge, WLSA is concerned the dual commissions will create confusion particularly for those court users who are not represented and the workload may be overwhelming.

WLSA supports the inclusion of material on the court's website which explains the different roles and has a diagram to explain the relationship and hierarchy of roles within the new proposed system. The case management guidelines should further explain for the benefit of professionals and court users what the functions of each roles specifically are and include practical examples of the types of matters which should be drawn to the attention of each.

Clauses 11 and 79 - Appointment of judges (Division 1 and Division 2 respectively) and Clause 80 - Assignment of judges in Division 2 to Divisions

WLSA agrees that Division 1 judges should by reason of training, experience and personality be a person suitable to deal with matters of family law.

Clause 79 however should be amended to specifically require that person to have experience and professional accredited training in family law and family violence, noting the ALRC Discussion Paper's proposal.

WLSA seeks that the same requirement also apply to Division 2 judges, particularly noting the intention that most matters will be resolved in Division 2, again noting the ALRC's proposal.

At present clause 79 indicates that "a person must not be appointed as a Judge unless the person has appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the FCFC (Division 2).

WLSA strongly advocates for this to specifically include family law and family violence expertise and experience.

We note that paragraph 10.62 in ALRC Discussion Paper refers to the submission by the National Judicial College with respect to requirements of judicial officers and recommends a focus on "competencies, rather than personalities". ALRC has recommended "knowledge, experience and aptitude" in relation to family violence in the Discussion Paper.

This is yet further evidence why the current Bills should be delayed so they can be informed by the ALRC Inquiry.

As noted above WLSA also recommends identified positions for judicial officers and other court staff for Aboriginal and Torres Strait Islander people and for the government to consult with Aboriginal and Torres Strait Islander led organisations and communities to seek feedback around this issue.

Clause 104 provides that the Division 2 of the new court would comprise 2 divisions – General Division and Fair Work Division.

As noted above WLSA advocates for a standalone specialist federal family court.

Clause 13 - Authority of judges for case management

WLSA agrees with clause 13(2) that when managing a class or classes of proceedings, a judge is subject to any direction from the Chief Justice.

WLSA has advocated for a specialist pathway for the determination of family law disputes where there is family violence and also for the determination of property settlements where there is a small asset pool.

There are proposals relating to these in the ALRC Discussion Paper, again highlighting the need for ALRC to also consider possible restructure of the court and for the bills not to proceed until the ALRC review report is tabled and considered.

Whether or not there should be specialist pathways and how these would deal with family violence matters should be a matter for the ALRC to explore in more depth and following proper detailed consultation with stakeholders including family violence victim-survivors and past family court users.

For transparency, all directions should be made available on the court website and translated into different languages and accessible by visually impaired users.

Clause 28 - Determination of matter completely and finally

The EM at paragraph 85 states that:

> *Clause 28 provides for the determination of every matter before the FCFC (Division 1) completely and finally. In doing so, the Court must grant all remedies to which any of the parties appears to be entitled so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning those matters may be avoided.*

It is unclear how this applies in the context of existing court forms, practice and procedure and how it sits with the limitation of the Court to only make orders to alter the interests of parties in property where it is just and equitable to do so.

Just and Equitable

It can be common in family violence matters for a woman to have been the subject of financial abuse and/or have her income earning capacity impacted directly by the perpetrator not allowing her to leave the house to work, making it difficult to do so or indirectly by inflicting harm traumatising her so that she is unable to work.

Here, the woman and children may be living in the former family home and be unable to take over payment of the mortgage so that it could be transferred into her sole name. In such cases, a just outcome can be to adjourn the proceedings for a specified period, usually determined by reference to an event, at which time the positions of the parties will be better known and orders can be made at that time to finalise their financial relationship (as per the existing s 81 of the *Family Law Act*).

WLSA is concerned that clause 28 removes the ability of the Court to make orders in situations as per the above.

Existing Court Practice

It is not clear from the Bill how clause 28 affects current court practice – is the Bill imposing more of a requirement on judicial offers to identify all potential causes of action of litigants.

At present, the family court system requires both/all parties to the proceedings at the commencement of the proceedings to outline the specific orders they seek. The orders they seek depend on their understanding of their rights and entitlements at law which is increased if they have had the benefit of independent legal advice prior to filing. It is the experience of WLSA members that many clients do not understand their entitlements and require advice from legal assistance services to be informed of their potential causes of action, including spousal maintenance and child maintenance and support, and the types of orders the Court can make with respect to them. Further, they often don't know what information they need to put before the Court before orders could be made in their favour.

In addition, for women seeking superannuation splitting orders it can be a barrier to seeking an order if they don't have the benefit of a lawyer drafting the extremely technical wording for those orders and complying with the requirements to effect procedural fairness for the superannuation trustee.

At present there is a significant gap in legal aid for family law property matters which means that many women experiencing disadvantage only receive limited advice (if they receive any at all) for family law financial matters.

WLSA is supportive of initiatives which lessens the burden placed on victim-survivors of family violence to articulate in legal terminology what they are seeking. This will assist those women who are unable to access ongoing representation from legal services and reduce the risk that they will miss out on their entitlements because they don't quality for legal aid but cannot afford legal representation or because the community legal centres aren't properly funded or supported to provide this service to those in this gap.

WLSA seeks that clause 28 be amended so that the requirement to determine matters finally is when it is safe for the parties and their children to do so.

Clauses 34 and 117 - Transfer of proceedings between Divisions

WLSA agrees with the proposal that there should not be a right of appeal from decisions of Division 1 to transfer proceedings under this clause.

However, to prevent complicated matters which require the attention of Division 1 from being transferred inappropriately to Division 2, it should be clear in the Rules and supporting Case Management Guidelines the types of matters which are to be dealt with by Division 1. This should be able to be understood not just by lawyers but also by unrepresented court users, including those who don't speak English or who have visual impairment.

Clauses 40 and 144 - Filing of documents

WLSA has no objections with clause 40 (if a document is required or permitted to be filed in the FCFC (Division 1), it is to be filed at a registry of the Court, or in accordance with an arrangement made under clauses 58 or 59, and in accordance with the Rules of Court) provided that the Rules do allow for the filing of hard copy documents in certain circumstances noting that it is the experience of WLSA members that:

- In family violence cases it is often not safe for the woman to use a computer (where she may be monitored or under surveillance by the perpetrator).

- Where the woman has fled the family home, she may not have access to internet or a computer.

- Many clients don't have the technological competency to use the court forms or Portal without assistance. The community legal centre sector is not funded to provide this type of technological support particularly when assistance is provided to clients on a discrete basis as opposed to ongoing court representation when the centre may be on the record.

Clauses 48 and 157 - Overarching purpose of family law practice and procedure provisions

WLSA considers that clause 48 be amended to include that the purpose of the family law practice and procedure provisions include:

- The promotion of safety and reducing risk for families; and

- The just resolution of disputes efficiently and inexpensively (remove the wording 'as possible'' which is subjective and which may pressure litigants to agree to unsafe outcomes for themselves and their children).

Clauses 49 and 158 - Parties to act consistently with the overarching purpose

WLSA seeks that clauses 49 and 158 be amended.

There is a risk that the constant emphasis in the Bill on resolving disputes "…as quickly, inexpensively and efficiently as possible" will result in family law matters with family violence not being properly dealt with or concerns being dismissed in favour of a quick (but unsafe) resolution. WLSA acknowledges the need for efficient use of resources but cautions against this being the sole driver.

WLSA is concerned, especially if clause 48 is not amended (as per above), that this provision will allow for the greater perpetration of systems abuse by perpetrators by creating another legal mechanism by which the person alleging family violence can be intimidated or threatened with.

For example, a victim-survivor of family violence might not disclose the violence to a

professional working within the family law system[22] or might not have been asked about family violence by professionals in the family law system.[23] If family violence has not been identified or a family law system professional does not understand how perpetrators of violence use violence, the family violence dynamics may have been missed. In such circumstances the family law system professional may be persuaded and susceptible to the suggestions by the perpetrator that the victim is 'making it up', trying to alienate the children from him and/or has mental health issues and should not be believed.

In such circumstances there may be different views about the "most efficient way to resolve that case'' than when all professionals working in the family law system have a thorough understanding of the nature and dynamics of family violence and how perpetrators use violence and the impact of trauma. A victim-survivor of family violence may feel they are being pressured which could make it more difficult for them to seek safe outcomes for themselves and their children.

These changes could make the system 'work against them' even more so than the current system does now.

Lawyers are by nature conservative and risk adverse. If they consider their client or themselves may be at risk of breaching the law or a cost order, they will tend to err on the side of caution and not proceed with that course of action. WLSA members consider that the current wording of clauses 48 and 49 means that lawyers will be more cautious about encouraging their clients to disclose family violence, given that once a disclosure is made, it will impact on the complexity of the proceedings and make it longer and more expensive to resolve.

WLSA is concerned that the clauses as currently worded may deter family violence victim-survivors from disclosing family violence.

It may also increase the risk that lawyers will be put in a position of having to disclose or explain to the court what advice they provided to their client if they need to defend a personal cost claim being made against them. This is not in the interests of victim-survivors of family violence or those lawyers who do the very difficult and often dangerous work of representing them.

The family law system needs to be more trauma informed if it is to improve its response to families where there is family violence (which is a large proportion of the matters before it, not including those matters where families who decide not to pursue their legal entitlements through the Family Court due to their fear of their family violence allegations not being believed).

WLSA considers that clauses 48 and 49 should impose a duty on parties to conduct the proceedings consistently with the overarching purpose which should be to achieve a just (and safe) resolution of the proceedings efficiently and inexpensively.

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[22] AIFS found 38% of parents reported holding either or both family violence and safety concerns and not disclosing these concerns to family law professionals. See Kaspiew, R., Carson, R., Dunstan, J., Qu, L., Horsfall, B., De Maio, J et all AIFS, *Evaluation of the 2012 family violence amendments: Synthesis report*. Melbourne: AIFS, 2015 at p34.

[23] In relation to courts, AIFS found in 2014 31% of court users reported that they had not been asked about family violence and child safety. See Kaspiew et al *Evaluation of the 2012 family violence amendments: Synthesis* report p 33.

WLSA considers the current provisions of the *Family Law Act* in relation to cost orders against lawyers are sufficient to protect against parties and lawyers not properly discharging their obligations for the reasons outlined in s117(2) of the *Family Law Act*.

There is also concern about how these clauses will reduce the availability of services for unrepresented litigants noting that the legal assistance sector is already not properly funded or supported in family law matters, especially property and financial matters.

Community Legal Centres currently assisting parties as and when they have capacity may consider it too much of a risk management issue to represent clients in family court disputes if there is an increased risk that costs may be awarded against them.

WLSA recommends the Government refrain from any changes which will decrease access to justice and reduce the availability of legal service delivery.

The administration of justice cannot be done if the sole focus is on resolving disputes as quickly and cheaply as possible. The focus should be on just and safe outcomes for Australian families.

Clause 50 - Power of the FCFC (Division 1)

In principle, WLSA agrees Division 1 judges should be able to dismiss the proceedings in whole or in part, strike out, amend or limit any part of a party's claim or defence, disallow or reject any evidence; or award costs against a party.

However, such a clause will only improve service delivery if it is exercised by judges who are properly and appropriately experienced and trained in family law and family violence.

Clauses 56 and 118 – Rules of Court

WLSA agrees that there should be consistent rules. Which rules should apply to the new court will have a significant impact on how cases are handled and on the outcome for the family concerned. There are some rules from the Family Court of Australia which are clearer and provide mechanisms which aid in the resolution of disputes, while there are some rules currently applicable to the Federal Circuit Court which encourage the speedier resolution of disputes.

WLSA members note that in Western Australia, the rules of the Family Court of Western Australia largely mirror those of the Family Court of Australia (with some exceptions) but these are supplemented by Case Management Guidelines and Practice Directions issued by the Chief Justice which ensures that by and large there is a consistent approach to the resolution of disputes through the Family Court. While there is some discretion for judges in individual cases, for the most part court users can expect their matter to be dealt with the same way and it is not dependent on the individual judge assigned to their matter.

There needs to be proper and detailed consultation with the sector, including from court users and victim-survivors of family violence themselves (e.g. through a Victim Survivor Advisory Group) to ensure that the rules promote safety and just outcomes and are able to be understood and assist unrepresented parties – not just those who can afford private legal representation.

Clause 64 – Registries

Clause 64 provides that the Minister must ensure that Registries of the FCFC (Division 1) are established as the Minister sees fit. It is expected that the Minister would establish such registries as are required according to workload and regional needs.

WLSA is concerned to ensure the accessibility of the family court, including in regional, rural and remote areas. We note efficiencies proposed in the past have included cuts to the Federal Circuit Court travelling to regional, rural and remote areas. It is vital the family court is accessible, including by travelling to regional, rural and remote areas.

Clauses 74 and 239 – Procedural information to be given to unrepresented parties

WLSA supports the provision of information being given to unrepresented parties and suggests there be proper resourcing to facilitate that information being provided in different languages and accessible by visually impaired persons to increase accessibility.

Clause 106 – Exercise of jurisdiction (Division 2)

Clause 106 provides that the jurisdiction of the FCFC (Division 2), including its appellate jurisdiction, is to be exercised by the Court constituted by a single Judge. WLSA reiterates it concerns about the appeal being determined by a single judge (see above comments).

Clause 143 – Interrogatories and discovery

WLSA is concerned by the current clause 143 about interrogatories and discovery. The EM describes the provision as modelled on s 45 of the *Federal Circuit Court Act.* However, there are significant differences between s 45 and proposed clause 143.

Section 45 states:

> *(1) Interrogatories and discovery are not allowed in relation to proceedings in the Federal Circuit Court of Australia unless the Federal Circuit Court of Australia or a Judge declares that it is appropriate, in the interests of the administration of justice, to allow the interrogatories or discovery.*
>
> *(2) In deciding whether to make a declaration under subsection (1), the Federal Circuit Court of Australia or a Judge must have regard to:*
>
> *a. Whether allowing the interrogatories or discovery would be likely to contribute to the fair and expeditious conduct of the proceedings; and*
>
> *b. Such other matters (if any) as the Federal Circuit Court of Australia or the Judge considers relevant*

Clause 143 states "Interrogatories and discovery are allowed in relation to family law and child support proceedings in the Federal Circuit and Family Court of Australia (Division 2)" with no requirement that the court or a judge declares it appropriate.

The ALRC Discussion Paper includes a proposal about excluding evidence of "protected confidences". This acknowledges the detrimental impact on a therapeutic relationship

when sensitive records are accessed and the need to first seek least intrusive forms of evidence. We are concerned if there is no judicial oversight regarding interrogatories and discovery. This again highlights why the court restructure bills should not be considered in isolation but rather be included as a term of reference within the ALRC review.

Acknowledgments

We acknowledge the family violence victim survivors with whom we work.

Further Resources and Information

If you have any queries or would like any further information in relation to this submission, please contact WLSA National Policy Coordinators,
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