

Submitted online
23 November 2018

Submission on the Federal Circuit and Family Court of Australia Bill 2018

Dear Committee Members,

Community Legal Centres NSW welcomes the opportunity to make this submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Federal Circuit and Family Court of Australia Bill 2018 (the Bill).

ABOUT COMMUNITY LEGAL CENTRES NSW

Community Legal Centres NSW is the peak representative body for almost 40 community legal centres in NSW. Community legal centres are independent, non-government organisations that provide free legal services to people and communities facing economic hardship, at times when that help is needed most.

Community Legal Centres NSW represents the views of community legal centres to government and the broader community, advocates on key law reform and policy issues, and supports community legal centres to improve the efficiency and quality of services they deliver to the community, with the aim of increasing access to justice for people in NSW.

Most community legal centres in NSW help people and families to navigate the family law system. This submission is informed by our member organisations' deep understanding of the significant access and safety issues that people facing economic hardship experience this system in NSW.

EXECUTIVE SUMMARY

If enacted, the Bill will significantly reform the Family Court of Australia. Community Legal Centres NSW agrees that the family court system needs reform. However, we are deeply concerned that the proposed reforms take an already overstretched and chronically underfunded system in the wrong direction. Our key concerns are that the reforms:

1. are being unnecessarily rushed and should be withdrawn or delayed until the Australian Law Reform Commission reports on its review of the Family Law System in March 2019
2. will lead to a loss of specialisation within the family law system at a time when more not less specialisation is needed to address the increasing complexities of modern Australian society, families and the needs of children

3. prioritise economic efficiencies over safety and fail to address the chronic underfunding of the family court.

Community Legal Centres NSW endorses the submission and recommendations made by Women’s Legal Service Australia.

SUMMARY OF RECOMMENDATIONS

1. The Federal Government should withdraw the Bill immediately (or at least delay its passage) until the Australian Law Reform Commission has published its final report on Family Law System, so that any structural changes to the court system can be informed by its findings and recommendations.
2. The Federal Government should extend the Australian Law Reform Commission’s terms of reference (and its timeframe for reporting) to include consideration of proposed structural reforms to the Family Court of Australia.
3. Any reform to the family law system should guarantee increased specialisation and accreditation for all legal professionals – including family dispute resolution practitioners, lawyers, family consultants, report writers and judicial officers – in family law and family violence, as well as cultural competency and disability awareness.
4. The Federal Government should engage in meaningful consultation with family violence experts, victim-survivors and the legal profession before pursuing these reforms.
5. The Federal Government should prioritise increased funding for the Family Court and critical services that reduce the impact of family violence and increase participation in effective family law dispute resolution, such as specialised legal assistance services.

DETAILED ANALYSIS

Pre-empting the Australian Law Reform Commission’s review of the Family Law System

Community Legal Centres NSW is concerned the Federal Government is rushing the Bill through parliament, without adequate consultation with key stakeholders, particularly from the community legal and family violence sectors. We agree that the Family Court of Australia needs reform. However, we have strong concerns that the Bill proposes reforms that will take the system in the wrong direction.

Without proper consideration and consultation, the Bill risks creating a cascade of unintended consequences (discussed further below), which will have a disproportionate, negative impact on those most vulnerable within the system, particularly women and children experiencing domestic and family violence. According to the Law Council of Australia, in an area as complex

and fundamental as family law, these risks multiply exponentially.¹ Effective consultation with stakeholders is critical to guard against unintended harm.

Community Legal Centres NSW is concerned that the proposed reforms are not informed by the Australian Law Reform Commission's (ALRC) current review of the Family Law System, which is due to report in March 2019. Although the Federal Government excluded structural court reform from the ALRC's terms of reference, in our view it is both ill-advised and impractical to conduct a review of the efficiency and effectiveness of the family law system that does not explicitly address the structure and functioning of the courts.

We also note and endorse the numerous submissions to this inquiry (see for example submissions by the Law Council of Australia, Women's Legal Services Australia, and ANROWS), that raise similar concerns that the Bill is being pursued without reference to the ALRC Review, and that timeframes for submissions and input are too restricted for careful response.² The Law Council of Australia notes, for example, that a small group of its members were given just four business days to view a confidential 530-page exposure bill. This is an exceptionally rash approach to reform, which increases the risk of unanticipated negative consequences.

Past reviews and reports of court governance

In a media release announcing the Bill's introduction, the Attorney General noted that the proposed reforms are informed by several government-commissioned reports on court governance. These include the 2008 Semple Review,³ a trio of reports by KPMG, Ernst & Young and Price Waterhouse Coopers (PWC),⁴ and the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs Report.⁵

Community Legal Centres NSW understands this is intended to suggest that the need and direction for reform is well understood and that no further inquiry into court structure is needed before the reforms can proceed. However, even these reports note the need for caution and careful consideration of unintended consequences when pursuing reforms to the family law system. For example, the Semple Review noted, 'the [family law] 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.'⁶

Similarly, PWC's 2018 report specifically highlights that due to constrained timeframes, it was unable to consider many important issues, including the practical effects of negative and

¹ Law Council of Australia, *Justice Project*, 'People who Experience Family Violence' (Report, August 2018).

² Law Council of Australia, 'As it stands, merging courts unlikely to alleviate family law crisis' (Press Release, 23 August 2018) <<https://www.lawcouncil.asn.au/media/media-releases/as-it-stands-merging-courts-unlikely-to-alleviate-family-law-crisis>>; Women's Legal Services Australia, 'WLSA urges Government to extend reporting period before dismantling Family Court' (Press Release, 10 September 2018) <http://www.wlsa.org.au/media_releases/wlsa_urges_government_to_extend_reporting_period_before_dismantling_family_court>.

³ Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (Final Report, Attorney General's Department, August 2008).

⁴ KPMG, *Review of the performance and funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia*, 2014; Ernst and Young, *High Level Financial Analysis of Court Reform Initiatives*, 2015; PricewaterhouseCoopers, *Review of the Efficiency of the Operation of the Federal Courts*, April 2018.

⁵ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017).

⁶ Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (Final Report, Attorney General's Department, August 2008).

unintended impacts it identified as arising from the reforms.⁷ PWC notes that it was not able ‘to substantiate the extent of variation in complexity of cases between the two courts [Federal Circuit Court and Family Court of Australia]’⁸ and that the averaging process used meant it could not factor critical considerations into its analysis, such as ‘the preferences and practices of different judiciary, the capability and capacity within each court, and the behavior of litigants and their legal representation.’⁹ Finally, PWC was unable to assess practical barriers to implementation, including ‘a detailed analysis of process, capability and impact assessment ... [which] could limit the true value of opportunities, and/or the potential cost/time change might take to implement.’¹⁰

Given its limitations, Community Legal Centres NSW’s view is that the PWC report cannot and should not be relied on to guarantee an effective reform process. We note the Queensland Law Society’s submission to this inquiry, which describes PWC’s report as uncertain, detached from the range and diversity of the caseloads that both courts work with, and unable to demonstrate that the merged court system will actually increase the courts’ throughput of cases without any additional funding being allocated.¹¹

Recognising these flaws, PWC itself recommended that further data collection and analysis should be undertaken, together with stakeholder consultations, to mitigate unforeseen risks to vulnerable parties in the family law system.¹² Community Legal Centres NSW agrees with that recommendation.

In addition to these reports, several independent reviews of the family law system have been conducted in the past decade.¹³ The general theme emerging from these is that reform must be grounded in a specialised approach to family law jurisprudence, and must be accompanied by increased funding for courts and support services.

The government should ensure proper scrutiny and debate of any Bill to alter the structure of Australia’s judiciary. The current ALRC review of the family law system offers a comprehensive process through which stakeholders can consider the consequences of significant structural court reform on access, safety, effectiveness, capacity and other crucial issues.

⁷ PricewaterhouseCoopers, *Review of the efficiency of the operation of the federal courts*, April 2018, 47, 53, 59.

⁸ PricewaterhouseCoopers, *Review of the efficiency of the operation of the federal courts*, April 2018, 47.

⁹ PricewaterhouseCoopers, *Review of the efficiency of the operation of the federal courts*, April 2018, 53.

¹⁰ PricewaterhouseCoopers, *Review of the efficiency of the operation of the federal courts*, April 2018, 56.

¹¹ Queensland Law Society, Submission No 5 to the Senate Legal and Constitutional Affairs Committee, *Federal Circuit and Family Court of Australia Bill* (28 September 2018).

¹² PricewaterhouseCoopers, *Review of the efficiency of the operation of the federal courts*, April 2018, 69.

¹³ See e.g. Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, 2012; Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*, 2012; Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever*, 2015; COAG Advisory Panel on Reducing Violence Against Women and their Children, *Final Report*, 2016; Victorian Royal Commission into Family Violence, *Final Report*, 2016; South Australian Social Development Committee Inquiry into Domestic Violence, *Final Report*, 2016.

RECOMMENDATION 1:

The Federal Government should withdraw the Bill immediately (or at least delay its passage) until the ARLC has published its final report on Family Law System, so that any structural changes to the court system can be informed by its findings and recommendations.

RECOMMENDATION 2:

The Federal Government should extend the ALRC's terms of reference (and its timeframe for reporting) to include consideration of proposed structural reforms to the Family Court of Australia.

Erosion of judicial specialisation in the family law system

Judicial practice in family law requires a considerable commitment to developing specialised knowledge. Community Legal Centres NSW is concerned the proposed changes will cause a loss of this specialisation in the Australian family law system at a time when more not less specialisation is needed to address the increasing complexities of modern Australian society, families and the needs of children.

Under the Bill, family law specialisation would only be required in Division 1 courts, even though Division 2 courts will be able to hear family law matters. In addition, appeals will be heard by judges who may not be family law specialists. This will replicate the systemic inconsistency, irregularity of procedure, and risk to vulnerable people that is currently seen in lower level courts across the country.¹⁴ Recognising these risks, the NSW Bar Association recommended in July 2018 that rather than merge the courts in the manner proposed, 'the Federal Circuit Court should be abolished, and its matters distributed between new lower divisions of the Family Court of Australia and the Federal Court of Australia.'¹⁵

The Queensland Law Society notes that family law judicial practice requires a multidisciplinary knowledge of a diverse range of legal disciplines, including property, commercial, taxation, trusts and criminal law, as well as an awareness of family violence issues, child development, social and psychological issues facing litigants, family dynamics and structures, and cultural diversity concerns.¹⁶

Any reform which erodes family law specialisation in judicial practice risks limiting access to justice, perpetuating power imbalances, and delivering unsafe outcomes for vulnerable people accessing the family law system. For example, judges who do not understand the complexities and dynamics of family violence, may understate its risks and effects and minimise or even reject a victim-survivor's story. Matters involving Aboriginal and Torres Strait Islander people, families from culturally and linguistically diverse backgrounds, people with intellectual disability

¹⁴ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland* (Report, 28 February 2015); State of Victoria, *Royal Commission into Family Violence: Summary and Recommendations* (March 2016).

¹⁵ NSW Bar Association, *A Matter of Public Importance: Time for a Family Court of Australia 2.0* (Discussion Paper, July 2018).

¹⁶ Queensland Law Society, Submission No 5 to the Senate Legal and Constitutional Affairs Committee, *Federal Circuit and Family Court of Australia Bill* (28 September 2018).

and LGBTIQ+ people, require additional competencies to ensure processes and outcomes are culturally and practically safe for the parties involved.¹⁷

Multiple recent reports into how the courts deal with family violence have identified that inconsistency of practice among magistrates based on fundamental differences in their understanding of the issue leads to inconsistent and potentially unsafe outcomes for litigants from case to case.¹⁸ Examples include inconsistent responses to protection order breaches and approaches to sentencing.¹⁹

Lack of specialised judicial insight may also worsen the procedural problems associated with traditional adversarial court practice, compounding harms to vulnerable parties and reducing the likelihood of achieving just outcomes.²⁰ As the Australian Institute of Family Studies notes, 'the adversarial nature of family law proceedings (including a reliance on cross-examination as a fundamental means of testing evidence) has led to concerns about the trauma posed to parties with experiences of family violence or abuse when engaging in the court process, with potential for this measure to facilitate misuse of process by a perpetrator.'²¹ Judicial experience and specialisation, supported by appropriate training, are essential to mitigate these problems.²²

As a result, numerous reports have recommended that family violence training be made a mandatory professional development requirement for all family law practitioners. In fact, the ALRC's current discussion paper on the family law system devotes a full chapter to the need for specialist training for all family law professionals, including core competencies in family violence, cultural safety for Aboriginal families, as well as the specific issues faced by people with a disability and LGBTIQ+ people who access the system.²³

To date these recommendations have not been implemented,²⁴ despite the fact that family violence is present in half of all family law matters.²⁵ However, Community Legal Centres NSW notes the Family Court of Australia's submission to the ALRC Review, which states that family court judges will soon be able to attend family violence training presented by the National Judicial College of Australia.²⁶

Judicial officers must have specialised knowledge if they are to handle the complexities that arise in family law matters safely and consistently. Therefore, Community Legal Centres NSW is concerned that under this Bill the number of judicial officers with specialist knowledge of family law and family violence will decrease.

Currently, the requirement that judges be suitable people to deal with matters of family law 'by reason of training, experience and personality' only applies to Family Court and not Federal

¹⁷ Law Council of Australia, *Justice Project*, 'People who Experience Family Violence' (Report, August 2018).

¹⁸ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland* (Report, 28 February 2015).

¹⁹ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Final Report No 114, NSWLRC Final Report No 128, Chapter 4.

²⁰ Domestic Violence Victoria, Issues Paper Submission No 23 to the ALRC, *Review of the Family Law System* (May 2018).

²¹ Australian Institute of Family Studies, Issues Paper Submission No 206 to the ALRC, *Review of the Family Law System* (August 2018).

²² Australian Institute of Family Studies, Issues Paper Submission No 206 to the ALRC, *Review of the Family Law System* (August 2018).

²³ ALRC, *Review of the Family Law System* (Discussion Paper No 86, 2 October 2018) 237-66.

²⁴ Law Council of Australia, *Justice Project*, 'People who Experience Family Violence' (Report, August 2018).

²⁵ Consultation, noted in Law Council of Australia, *Justice Project*, 'People who Experience Family Violence' (Report, August 2018).

²⁶ Family Court of Australia, Issues Paper Submission No 68 to the ALRC, *Review of the Family Law System* (18 May 2018).

Circuit Court judges. It is unclear whether the requirement will be extended to Division 2 judges under the proposed reforms. It is also unclear whether Division 1 judges will be replaced by people with specialist family law knowledge and experience when they resign or retire.

Given the increasing complexity of family law matters and that 87% of the family law caseload is heard in the Federal Circuit Court,²⁷ this would be an unacceptable outcome. At a time when a range of inquiries have recommended increased specialisation, including in family violence, any court reform should safeguard against intended or unintended decreases in such specialisation.

RECOMMENDATION 3:

Any reform to the family law system should guarantee increased specialisation and accreditation for all professionals – including family dispute resolution practitioners, lawyers, family consultants, report writers and judicial officers – in family law and family violence, as well as cultural competency and disability awareness

Inadequate focus on safety

Family violence is endemic in Australian society. In 2016, Australian police dealt with an average of 5,000 family violence matters a week – one matter every two minutes.²⁸ Unsurprisingly, there is also a high prevalence of family violence in family law matters. Two-thirds of separated parents report experiencing emotional or physical violence, either before or during separation.²⁹ And at least 50% of matters in the family law courts involve family violence. Due to high rates of under-reporting, even these figures may not represent the full extent of the problem.³⁰

The Law Council of Australia notes that family violence is an area of legal intersection, where survivor-victims face multiple forms of disadvantage, such as financial instability, homelessness, mental health concerns and questions of parenting capacity, adding to the complexity of the legal problems they face.³¹ As discussed above, in light of this complexity specialised judicial knowledge is needed to ensure procedural fairness and protect parties from harm during legal processes.³²

As such, Community Legal Centres NSW is deeply concerned that the Bill is being considered by Parliament without meaningful consultation with family violence experts, victim-survivors, or the legal profession. Meaningful consultation is critical to ensuring the safety of victim-survivors and their children is at the heart of reform. Instead of carefully assessing the impact of reforms on participants' safety, the Federal Government proposes to simply erase the specialist features

²⁷ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017).

²⁸ Law Council of Australia, *Justice Project*, 'People who Experience Family Violence' (Report, August 2018).

²⁹ Australian Institute of Family Studies, *Evaluation of the 2012 Family Violence Amendments: Experiences of Separated Parents Study* (2015); Australian Institute of Family Studies, Issues Paper Submission No 206 to the ALRC, *Review of the Family Law System* (August 2018).

³⁰ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (Report, 28 February 2018) 5.

³¹ Law Council of Australia, *Justice Project*, 'People who Experience Family Violence' (Report, August 2018).

³² Australian Institute of Family Studies, Issues Paper Submission No 206 to the ALRC, *Review of the Family Law System* (August 2018).

of the current system by forcing the Family Court list into a generalist court structure that is ill-equipped to provide an adequate focus on safety for victim-survivors of family violence, children, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and other vulnerable parties.

RECOMMENDATION 4:

The Federal Government should engage in meaningful consultation with family violence experts, victim-survivors and the legal profession before pursuing these reforms.

Chronic underfunding in the family law system

The Australian family law system is chronically underfunded. In response to the Bill, the Law Council of Australia noted:

‘Chronic underfunding for more than a decade has led to a court system which continually struggles to meet the needs of the community.

The funding of the court system has failed to keep pace with the growth in the number of Australians who need access to it. The breadth and complexity of the issues dealt with by the courts on a daily basis have also increased, including as a result of the proper recognition afforded to the prevalence and impact of family violence.

As it stands, the measures introduced into parliament provide no extra funding for the chronically under-resourced court system or associated support services, which enable the court system to deal with cases more quickly.’³³

Governments in all jurisdictions have failed to map increases in family law funding to increases in caseloads, or with reference to the unique complexity of problems that participants bring. This has led to unmanageable court delays.³⁴ Instead, endemic funding shortfalls and budgetary freezes throughout the family law system and its associated services have become commonplace.³⁵

The Bill does not address the chronic underfunding of the courts. In the absence of adequate resources, meaningful systemic reform that improves accessibility and safety and reduces delays is impossible. Instead, the primary aim of the Bill is to use institutional restructure to drive efficiency and cost-savings, which the Federal Government has identified as a priority through a number of commissioned reports.³⁶

³³ Law Council of Australia, ‘As it stands, merging courts unlikely to alleviate family law crisis’ (Press Release, 23 August 2018) < <https://www.lawcouncil.asn.au/media/media-releases/as-it-stands-merging-courts-unlikely-to-alleviate-family-law-crisis>>.

³⁴ Law Council of Australia, *Justice Project*, ‘People who Experience Family Violence’ (Report, August 2018).

³⁵ Pasanna Mutha-Merrenge, ‘Insights into Inequality: Women’s Access to Legal Aid in Victoria’ in Asher Flynn and Jacqueline Hodgson (eds) *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Bloomsbury, 2017)

³⁶ Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (Final Report, Attorney General’s Department, August 2008); KPMG, *Review of the performance and funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia*, 2014; Ernst and Young, *High Level Financial Analysis of Court Reform Initiatives*, 2015; PricewaterhouseCoopers, *Review of the Efficiency of the Operation of the Federal*

The Federal Government expects that merging the Federal Circuit Court and the Family Court of Australia will save \$3 million per year over forward estimates and that these savings will be reinvested into the court system. However, compared with the economic cost of family violence to the Australian community, these efficiencies are insignificant and may be counterproductive. According to a 2015 PWC report for the Victorian government, family violence costs the economy over \$12.5 billion per year.³⁷ Without significant reform across the whole-of-government, violence against women will cost the Australian economy \$323.4 billion over the thirty-year period from 2015 to 2045.³⁸

Rather than pursuing institutional efficiencies that risk compounding the trauma of family violence for people accessing the family law system, governments should adequately resource the family court system, as well as community based family violence and legal assistance services that deliver culturally competent services to parties experiencing economic disadvantage.³⁹ As the Productivity Commission noted in its 2014 inquiry into Access to Justice, limitations on legal assistance undermine the quality of outcomes for a significant proportion of families, particularly where family violence is present.⁴⁰

RECOMMENDATION 5:

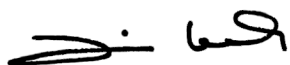
The Federal Government should prioritise increased funding for the Family Court and critical services that reduce the impact of family violence and increase participation in effective family law dispute resolution, such as specialised legal assistance services.

Final comments

Thank you for taking the time to consider our submission. Community Legal Centres NSW welcomes the opportunity to take part in the oral hearing in Sydney, currently scheduled for Wednesday, December 12.

If you have any questions or require further input, please contact our Senior Policy Officer, Emily Hamilton, via emily.hamilton@clcnsw.org.au or (02) 9212 7333.

Regards,



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Courts, April 2018; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017).


³⁷ PricewaterhouseCoopers Australia, Our Watch and the Victorian Health Promotion Foundation, *A high price to pay: The economic case for preventing violence against women* (November 2015) 11.

³⁸ PricewaterhouseCoopers Australia, Our Watch and the Victorian Health Promotion Foundation, *A high price to pay: The economic case for preventing violence against women* (November 2015).

³⁹ Law Council of Australia, *Justice Project*, 'People who Experience Family Violence' (Report, August 2018).

⁴⁰ Productivity Commission, *Access to Justice Arrangements* (3 December 2014) vol 2.

This Community Legal Centres NSW submission is endorsed by:



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