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Submission to ALRC Review of the Family Law System

Feminist Legal Clinic Inc. is a new community legal service that works to advance the human rights of women and girls through a combination of targeted casework, community legal education and law reform work. This includes supporting feminist groups and services, such as the Women's Family Law Court Support Service which operates out of the Sydney Family Court.

We welcome this inquiry into the Family Law System and are grateful for the opportunity to make this submission. For convenience of reference we have adopted the broad subject headings used within the Issues Paper.

1.Objectives & Principles (Question 1 & 2)

The Family Law System should provide an affordable and accessible system for helping people resolve disputes over children and shared property in a manner designed to maximise safety and well-being.

It is well documented that domestic violence and child sexual abuse is gendered crime and the overwhelming majority of perpetrators are men. This fact must be reflected in strong legislative protections for women and children. The safety of mothers, as well as their children, must be prioritised, since the two are intricately interrelated and this should be the guiding principle in any redevelopment of the Family Law System. The presumption of equal shared parenting responsibility has resulted in significantly increased exposure of women and children to violence and abuse; it must be urgently reconsidered.

2. Access & Engagement (Questions 3-13)

The Family Court System is currently a costly and intimidating adversarial environment which favours aggressive litigants and those with greater financial resources. Due to the prohibitive cost of legal representation and the scarcity of Legal Aid, parties are too often navigating the system unsupported. Domestic violence perpetrators are regularly misusing legal processes to intimidate and impoverish women, and too often this results in arrangements that are both unfair and unsafe.

Any revamped system must be user friendly and accessible for self-represented litigants. Instead of affidavits, simplified forms should be introduced that are accessible both on-line and in paper and which use question and answer where possible. Electronic lodgement should be made available and the requirement for litigants to provide multiple printed copies of documents such as appeal books should be abolished. The website and materials must be rationalised and designed to be navigated by non-legally trained individuals. In general, the system should be made as simple as possible with reduced bureaucratic requirements. For example, rejecting the lodgement of documents by self-represented litigants on the basis that they have used double side copying or don't have adequate paragraph numbering is unacceptable.

Adequate Legal Aid services must be available on-site and should not require a separate appointment in a distinct location or lengthy form filling. It should be built into the court process and should be universally available along the lines of our current Medicare system, with rostered legal practitioners allocated accordingly. It is essential that Legal Aid solicitors and other appropriately trained staff are available to provide support to individuals at a particular disadvantage – such as having an ATSI or CALD background, a disability or mental illness or being a victim of domestic violence.

Funding must also be restored and expanded for women's refuges and other domestic violence support services. Support through the legal process should be available from community-based feminist services rather than from welfare organisations run by religious agencies or organisations focused primarily on defendant rights, since a feminist framework has been shown to be the most effective in empowering women to escape oppressive relationships. To this end it is essential that the Women's Family Law Support Service in the Sydney Family Court should have its funding renewed and increased and that this model should be expanded and replicated in courts around Australia.

3. Legal Principles in relation to Parenting & Property (Questions 14-19)

Presumption that children will reside with their mothers

There must be recognition that babies and small children should not be removed from their biological mother except in the most extenuating of circumstances. The presumption in favour of equal shared parental responsibility should be removed from the legislation and replaced instead with a presumption that it is in the best interests of babies and young children to remain in the primary care of their mother. Contact with fathers should be determined on a case by case basis and take account of both the child's and the mother's safety, including her mental health and well being, which must be prioritised if the best interests of the child are to be paramount. It must be

acknowledged that where there is a context of family violence, an ongoing relationship with both parents may not be in the best interests of the child.

In cases where the father and/or community services perceive a risk posed by third parties, such as the mother's new partner, women must be given unequivocal independent advice to this effect and the necessary support to make appropriate changes. If a mother is herself unfit to parent on account of suffering from substance abuse or mental health issues, specialised supported accommodation services must be made available as an alternative to the removal of her children. Strong amendments must be made to bail and sentencing legislation to ensure women are not separated from their children as a consequence of short term incarceration, and that community treatment programs that take account of care responsibilities are made available as sentencing alternatives.

Misuse of legal process must be recognised as family violence. Mothers must be guaranteed financial support independent of their relationship with a man.

Misuse of legal process should be added to the definition of family violence and provisions made to allay this systemic problem. In particular, the nexus between financial matters and having care of a child must be broken. Too often claims for residence of the child are made with the primary purpose of reducing liability for child support or gaining an advantage in relation to the property division. Too often abusive or coercive fathers are escaping their financial responsibilities when mothers are too fearful of the repercussions to claim their full entitlements. Women and children must be freed from dependence on individual men for adequate financial support if we want to empower them to escape violent and abusive relationships.

Solutions to this difficulty may to some extent lie outside the Family Law System. For example, child support could be funded by a levy imposed on all fathers through the tax system and indexed according to income. Such a levy could go some way to pay a universal basic income to mothers and thereby assuage to some extent the gender pay gap that currently impacts most significantly on women who have had children. Provisions for spousal maintenance would also be superseded by a universal payment of a living wage/child support by the state to mothers.

We would suggest that binding financial agreements primarily serve the purpose of protecting the wealth of one party by ousting the jurisdiction of the court. We would suggest that they should only constitute evidence of the intentions of the parties at a point in time and should not be binding since there is typically an inequality of bargaining power between the parties.

Family structure should not detract from the rights of mothers and children

There need be no distinction made between the provisions for married and unmarried couples. Indeed in terms of family structure, we would suggest that the bond between a mother and child is the most fundamental unit of society rather than the "family", which is increasingly difficult to define. While some children are raised by guardians, they should be acknowledged as such rather than regarded as displacing the biological parents. There must be acknowledgement that continuing contact with the biological mother is in a child's best interests unless there is substantive evidence to refute this.

Currently we are seeing an increasing commodification of women and children which must be stopped. Adoption and surrogacy arrangements involve serious breaches of the human rights of both women and children. The commissioning of surrogacy arrangements should be banned as no amount of regulation can remove the ethical problems with what amounts to reproductive prostitution. Women should not be viewed as mere vessels for the carriage of babies for others. The role of the mother cannot be reduced in this manner without significantly impacting on the well being of children. The critical bond between a mother and child must be recognised and preserved wherever possible.

4. Resolution & Adjudication Processes (Questions 20-30)

Family dispute resolution processes should take place within the proceedings rather than requiring parties to submit to a separate FDR process and obtain a s60I certificate in advance of proceedings. The confusing array of dispute resolution, mediation and arbitration offerings should be replaced by conciliation services built into the structure of proceedings and occurring at every mention date.

Every time the parties attend court for what would currently constitute a mention, the opportunity should be used for a conciliation conference with an experienced and legally trained mediator – at no additional cost to the parties. Where there is any context of family violence, the parties should be legally assisted during this process. Ultimately, this procedure will be more timely and cost-effective than the current arrangements where parties incur significant time and expense attending court for mentions and directions that do not even attempt to resolve the pressing issues they are immediately facing.

Online dispute resolution processes should be used as far as possible to assist people resolve family law matters without intervention. The online form should be designed to narrow the issues and evidence obtained from government bodies could be used to populate fields to ensure accurate financial disclosure so that division of property can be accurately determined. An indicative determination should be calculated that can be used by the parties as a basis for their negotiations.

Whilst arbitration may offer a cheaper alternative to the traditional adversarial model it does not provide the benefits of mediation/conciliation and should be unnecessary where the system is itself functioning in a manner which is timely and cost-effective. To ensure matters are determined within a short time frame, evidence gathering processes should be instigated at the first opportunity and as far as possible carried out by the family law system independently of the parties.

5. Integration & Collaboration (Questions 31-33)

There should be no need for parties to submit to multiple different hearings of the facts - they should only have to describe the facts of their situation once - not repeatedly to separate services and across multiple jurisdictions. It is essential that a new family law jurisdiction should provide a one-stop shop for the resolution of all related matters including child residence and contact and property division, as well as determining care and protection matters and issuing apprehended domestic violence orders as appropriate. This will reduce the cost for everyone and relieve parties from having to attend many separate proceedings and to repeatedly tell their story and be subjected to cross-examination.

We appreciate that the logistical difficulties of achieving this proposal may be multifarious in view of the division between State and Federal jurisdictions. However, it is essential that federation is not used to impede the protection of women and children's human rights. The external affairs power under the Australian Constitution does provide the Commonwealth Government with the means of overcoming these obstacles where required.

6. Children's Experiences & Perspectives (Questions 34-40)

The excesses of an adversarial process must be modified for the purpose of family law proceedings and the environment designed so that it is less formal, non-intimidating and child friendly. Where appropriate there should be an opportunity for children to directly communicate their wishes.

7. Professional Skills & Well Being (questions 41-44)

The interests of lawyers in increasing billings are in conflict with the best interests of clients in achieving a quick and efficient resolution of their dispute. Lawyers and decision makers in this jurisdiction must have a diverse range of skills, including training in the dynamics of domestic violence and child psychology, so that they are adequately equipped to understand and address key issues that may be preventing resolution of family disputes and ensuring that outcomes are in the best interests of children.

8. Governance & Accountability (questions 45-47)

Section 121 should be retained, but accountability should be increased by having statistics and anonymised case studies released to the media on a regular basis.

9. Summary & Conclusion

The safety and financial security of mothers and their children should be the priority of the Family Law System. The bond between mother and child should not be sacrificed in the interest of apparent 'fairness' or 'equality' of parenting arrangements. There needs to be recognition that the current adversarial system provides an advantage to those with financial resources, typically men and is open to abuse and manipulation, which places vulnerable women, especially those suffering domestic violence, at further risk. The system needs to be streamlined and processes simplified, legal aid must be made universally available and support services and opportunities for dispute resolution need to be built into the system.

If you require any further information in relation to this submission, please contact Anna Kerr.

Yours faithfully

Anna Kerr
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