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The Executive Director
Australian Law Reform Commission
GPO BOX 3708
SYDNEY NSW 2001

By email to: familylaw@alrc.gov.au

Dear Executive Director,

ISSUES PAPER 48 – REVIEW OF THE FAMILY LAW SYSTEM

The Townsville Community Legal Service Inc. (TCLS) welcomes the opportunity to make submissions to the Australian Law Reform Commission's Review of the Family Law System.

We thank the Commission for granting an extension of time to respond to the Issues Paper. We apologise that we have not had time to draft a more comprehensive submission addressing most of the issues and hope to provide more detail in response to the next stage of the review.

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ABOUT TOWNSVILLE COMMUNITY LEGAL SERVICE

TCLS is a non-profit community legal centre offering free legal advice and assistance since 1991. We are located in Townsville but provide legal assistance to the wider community of North Queensland including residents of Charters Towers, Ayr, Home Hill, Ingham, the Atherton Tablelands, Cairns, Mt Isa, the Whitsundays, and Mackay.

Since inception, the TCLS has assisted more almost 35,000 clients.

Demographically, our clients are almost equal numbers men and women.

A significant focus of TCLS' work has been in family law. Family law clients and legal problems have always represented about 30% of TCLS services. In 2017, 'Parenting arrangements' was the leading single legal problem type across all of TCLS's services, Family Law Property disputes was number 4 and Divorce/Separation was number 6. TCLS provides advice and unbundled legal assistance on all family law and related matters including separation and divorce, parenting issues, property settlement, child support, domestic and family violence, elder abuse and child protection.

TCLS provides family law services through daytime appointments with employed solicitors and support staff, two (2) evening clinics (Tuesday and Thursday) with volunteer solicitors from the local legal community and students, and a clinical legal studies program offered in partnership with James Cook University School of Law students. While many clients self-refer, TCLS has a formalised referral relationship and process with the Townsville Family Relationship Centre (FRC) and provides early intervention legal advice to many clients who have registered for compulsory Family Dispute Resolution (FDR).

TCLS also provides a Family Advocacy and Support Service (FASS) duty lawyer in partnership with Legal Aid Queensland. The FASS service is only available to parties with a family law matter in the Federal Circuit Court duty list, or through Registry referral to the Legal Aid Queensland FASS intake worker where family violence is a factor in the matter. TCLS also accepts referrals of older persons involved in the family law system and sponsored spouses who are experiencing family violence. Both are areas of TCLS' specialist competency. TCLS provides its services in accordance with the National Partnership Agreement on Legal Assistance (NPA).

TCLS' clients often have issues that make their family law and related disputes more complex such as substance abuse, mental illness, child protection allegations or involvements, chronic financial stress, and intergenerational family dysfunction. Family violence features in most of TCLS's family law clients' services.

FOCUS OF SUBMISSION

Our submission is brief and focusses on objectives and principles, access and engagement, and professional skills and wellbeing. While we have our own views about the technical aspects of the family law system, we will await the release of the discussion paper which will no doubt reflect the contributions of many technical experts.

OBJECTIVES & PRINCIPLES

We consider the proper view of the family law system is through the lens of Australia's obligations under various international human rights instruments including, and most importantly, the Convention on the Rights of the Child (CROC) but also the Convention on the Rights of persons with Disability (CRPD) and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

The human rights Australia has agreed to provide under each instrument (and others) must be genuinely reflected in the family system, and in a manner that balances those rights appropriately. For example, the rights of a child to live free from violence, abuse and neglect¹ should never be compromised by the imposition of arrangements purportedly to reflect another's rights, interests, obligations or interests.

In our view, human rights are at risk where the system is fragmented and has separate bodies and Courts considering and making determinations in isolation from each other even though the decisions are interrelated and effectively indivisible from each other. This happens frequently in matters involving family law courts, state and territory child protection courts and family violence courts. Centrality of principles and forum, and simplification of process would assist in many cases. That some families have to traverse a trio of jurisdictional processes (family law, child protection and family violence) that all purport to have centrally consistent approaches and a desire for the same and/or interrelated outcomes is problematic. This is even more difficult where the families are self-represented.

In terms of a human rights approach, rather than focus on aspects of the CROC that reflect a child's rights to enjoy parenting by both parents, it may be more helpful to view the Convention as a whole and ask: How does the family law system measure up to all of the expectations and norms in CROC ?

Does the system, for example, satisfy the requirement that, "[R]ecognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,..."² The developmental outcomes expected by the human rights contained in the CROC are equally as important as procedural expectations such as article 9. It matters little if procedures are fair but outcomes are poor and out of step with human rights norms.

Over time, much emphasis has been placed on CROC article 9, which provides:

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

¹ Article 19, Convention on the Rights of the Child.

² Preamble, Convention on the Rights of the Child.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

However, the CROC is not a static document. It continually evolves through the work of the Committee and through jurisprudence. See for example:

- General Comment No.14 on the right of the child to have his or her best interests taken as a primary consideration;³
- General Comment No.20 on the Implementation of the Rights of the Child during Adolescence.⁴

Has our family law system continued to evolve in line with international developments and discourse? One might take the view that children are actually the clients of the system and everyone else is a proxy assisting the system to arrive at best possible arrangements to suit children's interests and evolving identity. Using an example, the Issues Paper poses a question about how the system has changed:

Recent studies indicate that the nature of the family law system's client base is also very different from the one that was envisaged at the time it was created. While most separating couples are able to work out their arrangements with limited or no recourse to the family law system, many of the families who do turn to the family law system for support have complex needs.⁵ (Emphasis added)

As noted, another view might be that the CROC imposes an obligation to have an even greater focus on children as the client. The "best interests" principle is described as "[T]he right of the child to have his or her best interests taken into account as a primary consideration is a substantive right, an interpretative legal principle and a rule of procedure."⁶ This is a non-negotiable for the family law system, however, many legal systems have moved on to principles that better reflect the importance of autonomy, agency, identity, inclusion and participation.

For example, the Convention on the Rights of Persons with Disability (CRPD) has moved decision-making systems away from best interests to one where the "will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives."⁷ While the CROC does not couch Australia's obligations in the same terms as the CRPD, elements of the will and

³ CRC/G/GC/13, 29 May 2013.

⁴ CRC/C/GC/20, 6 December 2016.

⁵ Paragraph 32.

⁶ Above note 3, ¶22.

⁷ See for example Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws, ALRC Report 124, August 2014.

preferences approach could be considered as framing principles. For children with disability in the family law system, an approach that balances both sets of principles is obviously needed.⁸

A shift in how the system views its role, at least for parenting and children's arrangements, is needed. To truly comply with the outcomes expected by the CROC, the family law system needs to change a number of dynamics including creeping adversarialism and legal formalism.

Where parties have no children and matters are procedural (divorce) and commercial (property interests), different imperatives might be important.

ACCESS & ENGAGEMENT

The 1994 Access to Justice Advisory Committee noted, "access to justice" as embracing three broad objectives: equality of access to legal services and effective dispute resolution mechanisms; national equity (that is, access to legal services regardless of place of residence); and equality before the law (that is, the removal of barriers creating or exacerbating dependency and disempowerment).⁹ In our view nothing has changed since this report was released. The same problems remain, and if anything, the equality of access issue has grown larger and more prominent within the family law system.

Community legal centres, by virtue of their place in the legal assistance landscape, are often a port of last resort for people seeking family law assistance. They often come to CLCs when they have run out of funds to brief private lawyers or have been refused legal aid. The context of CLC family law clients therefore is desperation, frustration, anger, confusion and fear. Added to this, many of them are victims or perpetrators of family violence, have poor health, are living in poverty or have drug and alcohol issues. Clients often present at this stage of having been through "the system" and lack trust in lawyers and the Courts. The clients often have part resolved matters that lawyers once had carriage of, but now are in the hands of the litigants themselves. Keeping these clients focussed on realistic and appropriate outcomes can be difficult, particularly where violence is involved.

The current FDR process does offer many clients an opportunity to find a shared, appropriate outcome (at least by their reckoning) for free. There are of course waiting times and additional problems for those in RR areas. Where a client lives in the vicinity of a FRC, the barrier to resolution is generally only a matter of time – a wait for their turn to enter the process. In many ways the natural delay gives clients time to focus their thoughts, put together their preferred statement of outcomes and obtain advice, usually through a CLC/FRC referral partnership. For those outside RRR areas, dispute resolution services are less accessible. They generally remain anchored in geographic locations and rarely travel to the clients. This may be a product of financial efficiencies but further consideration should be given to ensure equity of access to this principal method of FDR.

Equity of access is often raised by men's groups. Our view is that men have adequate access to services including generalist CLCs, legal aid commissions and private lawyers. As noted later, conflict of interest rules bear mentioning here. Since the Full Court's decision in *Osferatu v Osferatu* [2015] FamCAFC

⁸ Also see article 23, Convention on the Rights of the Child.

⁹ Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994), 7-9

177, there has been a departure from the 'no theoretical risk' approach. See for example *Wilmer & Golding (No. 2) (2017) FamCAFC 213*. Our experience however is that there is an inconsistent application of conflict rules across the legal assistance landscape. Some providers will refuse access based on the other party ever having been a client for any type of legal matter. Others, like TCLS, look at the nature of the former client's matter, and form a view after careful consideration. We do this because we are acutely aware that we may be the last port of call. Flippant refusal for improper or poorly settled conflict reasons does not serve the rule of law, nor does it observe proper ethical standards. It is a fundamental barrier to accessing justice.

OLDER PERSONS

One particular interest of ours is the treatment of older persons within the family law system. This includes older persons who are primary carers and/or secondary carers for children. The ABS reports that 10% of men and 13% of women cared for children that were not their own.¹⁰

The interplay between elder abuse, particularly of older women, and the family law system bears some consideration. There are a number of issues around the abuse of older persons in their role as carer or grandparent in family law contexts.

The first matter is one of withholding time with children, either as a form of abuse in itself or as leverage for other forms of abuse such as financial abuse. TCLS sees older persons who seek involvement in the family law system but have limited means to achieve this. The Australian Institute of Family Studies has identified this issue with respect to Aboriginal and Torres Strait Islander persons and we view their comments as applying in a broader sense:

Two factors that were identified as having particular implications in the Aboriginal context were cultural obligations and the circumstances of grandparents. From a cultural perspective, Aboriginal norms in relation to reciprocity, the expectation that resources will be shared, and kinship (where a wide variety of relationships are involved in familial and community networks), are dimensions that complicate understandings of whether and how elder abuse is occurring. The extent to which calls on grandparent resources to care for grandchildren are culturally reasonable or unreasonable was also highlighted by the research. Substantially more work is required to understand and conceptualise elder abuse in the Aboriginal context, especially among different groups in different circumstances, given the diversity among Aboriginal and Torres Strait Islander communities.¹¹

We know from our client experience that this issue affects a range of extended, blended and other modern family structures after separation. Importantly, the issue means that where one parent gains greater time with children, the consequence is that that parent's parents will likely have greater opportunities for time. The converse is true, the less time for the parent, the less time for the grandparents.

¹⁰ Australian Bureau of Statistics, 2071.0 Where and How do Australia's Older People Live - Reflecting a Nation: Stories from the 2011 Census, 2012–2013

¹¹ <https://aifs.gov.au/publications/family-matters/issue-98/elder-abuse>

Similarly, in cases where supervised time is ordered or agreed, the grandparents of the parent subject of supervision often play a role. It isn't uncommon for that time (supervising their own child's contact with their child) is essentially counted as their time also. Clearly this creates a fundamental unfairness for the supervising grandparents. It places the supervising grandparent in a moral and legal bind, they agree to supervision to ensure contact for their own child and themselves but are accountable for ensuring no harm comes to the child.

Further, issues arise when parents are prevented from having contact with their children and grandparents are suspected of (by the other parent) or forced (by their own children) to allow contact with the parent for whom no contact is allowed. The refusal to provide children to a grandparent because of a fear they will facilitate contact in breach of an existing order or agreement is a relatively common situation.

The system poses (grand)parents against children-parents in a number of ways. The breakdown of the relationship between grandparent and in-law-parent is also common, and grandparents regularly have to traverse tricky social relationships to maintain a relationship with the in-law-parent while still offering loyalty and support to their own child.

In respect of property issues, older persons have a number of problematic issues within the family law system. Increasingly the existence of financial abuse occurs through loans, gifts and property arrangements with their own adult children or grandchildren. The rise of superannuation and increasing domestic property market values means that older persons are often targeted to enter arrangements for granny flats, co-guarantees, securities, loans, or other family financial arrangements that potentially put the older persons at a disadvantage if separation occurs between the other parties.

The money provided to their children, even if protected by a family agreement, may not ever be recovered. The place of older persons in the property settlement aspects of the family law system should be clarified. In some cases, the only asset that parties retain that might be able to repay the older person is superannuation, but they do not have access to this as a remedial measure.

Ironically, and in many instances, the leverage used to attract older persons into these family arrangements is the likely proximity to their grandchildren, both as an ideal in retirement for the older person and to fulfil a role as informal carers. The breakdown of the relationship between adults can leave the older person at risk of homelessness, with limited resources and without meaningful contact with their grandchildren.

TCLS notes the issues paper has virtually no references to the role of grandparents in the family law system. We recommend that the Discussion paper ought to canvass issues that:

- Relate to how the family law system inadvertently promotes elder abuse
- Address how elder abuse can be prevented by systemic safeguards and offer remedial solutions if appropriate and

- Places grandparents in an appropriate context within the parenting arrangements provisions.

TOWNSVILLE RRR ISSUES

TCLS clients come from surrounding communities and this raises a range of access issues for them. Townsville has a Family Court and a Federal Circuit Court so is very well served by judicial officers. However, it also plays a central “hub” role that means it is a busy registry.

While private lawyers, CLC lawyers and LAQ provide services to clients in RRR areas, many people still do not have access to family law advice in a timely or ongoing manner. The uptake of pro bono work by the private legal profession in areas of work such as civil law has not been mirrored in the area of family law, especially in RRR areas. CLCs do benefit from volunteers through evening advice sessions and other arrangements, however these services are unable to address the demands of more intensive legal task assistance such as drafting affidavits and court pleadings, including applications, responses, submissions, expert requests, formal notices and subpoenas.

The increase in family law duty services has assisted to address the burden of self-represented litigants at Court but does not address the needs of litigants between duty days and the ongoing issues litigants have in attending to and complying with orders. The application of conflict of interest rules has a disproportionately unfair impact in RRR areas given the limited access available. In many cases TCLS sees, the only possible referral is for a telephone appointment with a CLC in another city or area.

Legal aid is principally provided to ensure that complex matters are case managed but isn't available for most people who have no matters before the Court or who cannot satisfy strict eligibility criteria. Similar criteria now apply to all legal assistance providers under the National Partnership Agreement on legal assistance. The growth in demand for legal assistance in family law has not been matched by any real growth in legal assistance funds. Triaging and prioritisation of legal assistance resources has meant that only a small cohort of individuals is able to obtain deeper assistance in the areas of representation. Overall TCLS takes the view that access to legal assistance services requires a significant injection of funds.

Townsville has a slightly younger population than Queensland and Australian averages. It also has slightly more men than women, unlike Queensland and Australia averages. Townsville's Aboriginal and Torres Strait Islander population is served by a number of specialist legal service providers. Accordingly, we defer to those agencies to provide details about Aboriginal and Torres Strait Islander's experience of the family law system.

Townsville's population is transient at times for a number of reasons:

- Townsville is a “garrison city” with a large population of Australian Defence Force members both serving and civilian
- Townsville is a public service hub for state and federal Governments and
- The region is home to many companies and workers involved in Fly in Fly Out (FIFO) industry and mining.

Townsville is a garrison city and 8% of its population (~15,000) are members (or dependents) of the ADF. The majority of these members are aged between 20-30 years. Operational deployment often happens from Townsville leaving dependents to deal with the impacts, of long periods of absence of one parent, and service-related mental health disorders such as PTSD on return. The large number of ADF personnel in Townsville does create issues with respect to relocation matters. Similar issues are seen in public service relocation for parenting disputes.

The Impacts of FIFO are becoming better known, but we note that the Queensland Parliament's Infrastructure, Planning and Natural Resources Committee found the impacts were wide-ranging and included:

- Commuting practices
- Travel time
- Rostering practices
- Fatigue
- Mental health
- Substance use
- Poor health management and
- Obesity

The Committee noted the comments of the Fly-in Fly-out Australian Community of Excellence Network which identified the following risks factors for partners of FIFO workers:

- *higher rates of distress*
- *parenting challenges*
- *family stress, and*
- *relationship dissatisfaction.*

The organisation further stated,

'The challenge of providing for the emotional and physical needs of children, compounded by the lack of a partner at home, can add to stressors for families involved in FIFO'. 324 The '[p]otential impacts on children can include escalating behavioural problems, particularly for males, linked to the working away parent's absence'.

TCLS confirms the issues identified by the Committee regularly manifest in family law disputes, particularly parenting disputes. Additional complexities are thrown up by one or more parents, (including step-parents or blended family members) working FIFO.

FIFO has also seen an increased involvement of bankruptcy issues in family law property disputes as FIFO families tended to carry larger and less sustainable debt burdens than most families. In separation the burden of debt becomes a major issue with many families struggling with debt over vastly devalued assets such as boats, jet skis and home furnishings.

The three examples of ADF, Public Servants and FIFO workers illustrate how added layers of complexity can be present within RRR contexts and within occupational contexts.

Property Pools and Access to Justice

TCLS, along with the North Queensland Legal Assistance Forum (NQLAF) was involved in a project looking at access to legal assistance in property disputes. The project identified that persons with low value, no value or negative value property pools were often unable to obtain access to legal assistance for various reasons. Similarly, women (mostly) with superannuation only pools or those related to failed business partnerships found it difficult to obtain legal assistance to divide property or in many cases responsibility for debt.

Professional skills and wellbeing

TCLS considers that clinical legal education of undergraduate law students offers the best possible work-integrated learning opportunities to introduce law students to the family law system. TCLS notes that the perceptions of law students about family law often shifts after they have assisted clients with family law assistance. Students often have a more favourable view of future work in the area of family law and are able to use their training in trauma-informed practice with these clients.

TCLS uses Katz and Haldar's article as a starting point for clinical teaching around TIP in family law clinic.¹⁷ While based on a US pedagogy, it does set out some useful competencies for trauma-informed lawyering.¹⁸

Townsville Community Legal Service Inc.

¹⁷ <https://www.aals.org/wp-content/uploads/2015/06/Katz-Haldar.pdf>

¹⁸ See also http://www.law.nyu.edu/sites/default/files/upload_documents/Katz%20-%20Halder%20Pedagogy%20of%20Trauma-Informed%20Lawyering.pdf