

16 May 2018

Prof Helen Rhoades
Commissioner
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: familylaw@alrc.gov.au

Dear Prof Rhoades

Review of the Family Law System

1. Women's Legal Service NSW (WLS NSW) thanks the Australian Law Reform Commission for the opportunity to comment on the Review of the Family Law System Issues Paper.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. WLS NSW has an Indigenous Women's Legal Program (IWLP). This program delivers a culturally sensitive legal service to Aboriginal women in NSW and has been operating for over 19 years. We provide an Aboriginal legal advice line, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for Aboriginal and Torres Strait Islander women.
4. An Aboriginal Women's Consultation Network guides the IWLP. It meets quarterly to ensure we deliver a culturally appropriate service. The members include regional community representatives and the IWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.
5. WLS NSW is a member of Women's Legal Services Australia (WLSA). We endorse the WLSA submission. We also endorse the People With Disability Australia submission. We also support the No to Violence position on responding to family violence – one that has an evidence based understanding of family violence and acknowledges the gendered nature



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of such violence; focuses on the safety of women and children; and holds perpetrators of family violence accountable for their behaviour.

6. This submission is limited to providing further comments on improving the accessibility of the family law system for Aboriginal and Torres Strait Islander families. It also makes recommendations regarding response to child sexual abuse.
7. In summary, we recommend:
 - 7.1 The expansion of the Indigenous list within Federal Circuit Courts, including to regional, rural and remote areas, noting the need to consult locally with Aboriginal and Torres Strait Islander communities and organisations about what is needed and how it can be implemented.
 - 7.2 Safety rooms and meeting rooms in courts are large enough to accommodate large groups.
 - 7.3 Appropriate safety planning including with regards to accessing the court buildings and a safe exit from the court.
 - 7.4 Implementation of the 2012 and 2016 Family Law Council recommendations relating to improving accessibility of the family law system for Aboriginal and Torres Strait Islander people.
 - 7.5 Ongoing training in family violence, child abuse, and trauma informed practice; cultural competency with respect to working with Aboriginal and Torres Strait Islander families, culturally and linguistically diverse families and lesbian, gay, bisexual, transgender and intersex families; and disability awareness for all professionals working within the family law system.
 - 7.6 Further consultation with Aboriginal and Torres Strait Islander people and Aboriginal and Torres Strait Islander organisations about the establishment of a Council of Elders in each family court registry.
 - 7.7 Section 65C of the *Family Law Act 1975* (Cth) be amended to give standing to members of the child's Aboriginal and Torres Strait Islander kinship group as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs.
 - 7.8 Aboriginal and Torres Strait Islander people have access to culturally responsive Family Dispute Resolution services.
 - 7.9 Section 60CC of the *Family Law Act 1975* (Cth) (*FLA*) be amended to reflect the importance of considerations of culture when determining the best interests of Aboriginal and Torres Strait Islander children, including removal of the term "enjoy" from the *FLA*.

- 7.10 The definition [of "parent"] should include a provision that recognises that a parent *"may include a person who is regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom"* as recommended by the Family Law Council.
- 7.11 Principles be developed for guidance in family law matters involving Aboriginal and Torres Strait Islander children. These principles should be developed by Aboriginal and Torres Strait Islander people and Aboriginal and Torres Strait Islander organisations, including SNAICC.
- 7.12 Implementation of Recommendation 19.1 of the 2010 Australia Law Reform/NSW Law Reform Commission *Family Violence – A National Legal Response Final Report*: that *"Federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children's safety. Where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services"*.
- 7.13 That a formal, independent, transparent and open investigation take place into the way that child sexual abuse matters are currently being approached and handled in the family law courts, as recommended by Women's Legal Service Queensland.

Improving accessibility of the family law system for Aboriginal and Torres Strait Islander families

8. In order for Aboriginal and Torres Strait Islander women to access the family law system they need to be able to identify they have a legal issue and know where to go and who can assist them. Culturally responsive community legal education, outreach and community development work is key to making this happen.
9. In the words of WLS NSW's Indigenous Women's Legal Program (IWLP) team members *"it's about being, knowing and doing and core Aboriginal and Torres Strait Islander values of caring, sharing and respect"*. IWLP community engagement and outreach takes place at places where Aboriginal women gather and through opening up conversations in a safe way, for example, a yarn while participating in arts and craft activities. Adopting trauma-informed principles and focusing on cultural safety, clients are met in a space where they feel safe, their culture and beliefs are respected and where they are supported by a community access worker as well as a lawyer.
10. The NSW WLS's Indigenous Women's Legal Program have supported and represented clients through the Indigenous List operating in the Federal Circuit Court in the Sydney Registry. Clients have felt more included in the process when seated at the one table, including with the Judge and being directly asked questions by the Judge.
11. Based on our experience in the Indigenous List, WLS NSW supports the expansion of the Indigenous list, including to regional, rural and remote areas, noting the need to consult locally with Aboriginal and Torres Strait Islander communities and organisations about what is needed and how it can be implemented.

12. We acknowledge child rearing practices within Aboriginal and Torres Strait Islander families involve extended family members.
13. It is also important for the family law system to be aware of and understand the dynamics of violence within some Aboriginal and Torres Strait Islander families and communities, including as a consequence of intergenerational trauma, which can be brought to the family law dispute. This may be evident in one party's family members minimising the family violence; a party bringing several family members to the court as a way to intimidate the other party; the need for a police escort out of town for one party and their family members due to safety concerns.
14. For these reasons, there need to be safety rooms and meeting rooms in courts large enough to accommodate larger groups, including in regional, rural and remote areas.
15. As with any matter involving family violence, there also needs to be appropriate safety planning, including with regards to accessing the court buildings, for example, staggered arrival and departure times; different entrances and exits for the different parties; the victim-survivor and their family/support being met by and accompanied by security staff within the court precinct as well as, for example, to a car. It is important these protections are also available in regional, rural and remote areas.
16. We refer to the Family Law Council's (FLC) 2012 report: *Improving the Family Law System for Aboriginal and Torres Strait Islander clients* and the Family Law Council's *Families with Complex Needs and the Intersection of the Family Law and Child Protection systems* report. We support implementation of the recommendations, including embedding Aboriginal and Torres Strait Liaison Officers in each family court registry; funding for Aboriginal and Torres Strait Islander Family Consultants;¹ building an Aboriginal and Torres Strait Islander Workforce in the family law system; a focus on accessible and culturally responsive community education about family law, care and protection and family violence; promoting cultural competency across the family law system, including through ongoing training.
17. WLS NSW acknowledges the importance of all professionals working within the family law system having ongoing training in family violence, child abuse, and trauma informed practice; cultural competency with respect to working with Aboriginal and Torres Strait Islander families, culturally and linguistically diverse families and lesbian, gay, bisexual, transgender and intersex families; and disability awareness.
18. It is imperative that all professionals working within the Indigenous List are culturally competent and undertake ongoing training in cultural competency.
19. The FLC refers to the Victorian Children's Koori Court and recently reinstated Queensland Murri Courts involving the Aboriginal community in the court process *"through the*

¹ Noting the importance of all family consultants also being family violence and trauma informed.

participation of Elders and Respected Persons who provide cultural advice to the judge or magistrate in relation to the young person's situation".²

20. The WLS NSW IWLP team also advocate for the importance of the participation of Elders and Respected Persons to provide cultural advice to the judge or magistrate in regards to family law matters. For example, this could take the form of a Council of Elders that could be established in each family court registry. We support further consultation with Aboriginal and Torres Strait Islander people and Aboriginal and Torres Strait Islander organisations about this proposal and reiterate that any reforms impacting upon Aboriginal and Torres Strait Islander people must be led and co-designed with Aboriginal and Torres Strait Islander people.

Standing

21. Section 65C of the *Family Law Act 1975* (Cth) (*FLA*) sets out who may apply for a parenting order, with standing being limited to parents, the child, grandparents, or a *"person concerned with the care, welfare or development of the child"*.
22. Where a person is not a parent or grandparent of the child, the person does not have an automatic right to seek orders, rather the Court must determine whether or not the applicant is a *"person concerned with the care, welfare or development of a child"*.
23. In the case of Aboriginal and Torres Strait Islander children, there may be people in the child's kinship group other than parents and grandparents, who ought to be able to bring an application for parenting orders, but for whom the need to seek leave creates an unnecessary hurdle. An application may be appropriate where the parents are not in a position to care for the child – perhaps to avoid state child protection proceedings, or it may be needed to ensure that the unique kinship obligations and child rearing practices of Aboriginal and Torres Strait Islander cultures are carried out.
24. Therefore, in order to facilitate the recognition of appropriate and necessary kinship care arrangements, WLS NSW recommends that s 65C of the *FLA* be amended to give standing to members of the child's Aboriginal and Torres Strait Islander kinship group as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs.
25. WLS NSW believes that it is essential that Aboriginal and Torres Strait Islander people have access to culturally responsive Family Dispute Resolution (FDR) services to facilitate self-determination and enable them to resolve disputes about Aboriginal and Torres Strait Islander children outside of the court system where possible. In order for such FDR programs to be culturally responsive, WLS NSW notes the work of Professor Judy Atkinson on Aboriginal Healing Frameworks.³

² Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection systems, Final Report, 2016*, p 99 (p107) and p149 (p158)

³ Judy Atkinson, *Trauma-informed services and trauma-specific care for Indigenous Australian children*, Resource sheet no. 21 produced for the Closing the Gap Clearinghouse, Australian Institute for Health

Right of Aboriginal or Torres Strait Islander children to “enjoy” their culture

26. The 2013 Family Law Council *Report on Parentage and the Family Law Act* took the view that the current provision in the *Family Law Act* “does not adequately recognise the ways in which a child’s Aboriginal identity and connection to their culture is maintained and enhanced”.⁴ WLS NSW agrees.
27. The FLC recommended that s 60CC(3)(h) of the *FLA* “should be strengthened by acknowledging the benefit to Aboriginal and Torres Strait Islander children of enjoying their culture with people who have the responsibility to pass on that culture to the child” (Recommendation 4). WLS NSW endorses this recommendation.
28. However, Aboriginal and Torres Strait Islander staff at WLS NSW have expressed strong concerns about the use of the term “enjoy” in ss 60CC(3)(h) and (6) of the *FLA*. They feel the word “enjoy” belittles and trivialises the tremendous importance of culture to Aboriginal and Torres Strait Islander people. Accordingly, WLS NSW recommends that s 60CC of the *FLA* be amended to reflect the importance of considerations of culture when determining the best interests of Aboriginal and Torres Strait Islander children, including removal of the term “enjoy” from the *FLA*.

“Parent” under Aboriginal tradition or Torres Strait Islander culture

29. Aboriginal and Torres Strait Islander peoples have child rearing practices and approaches to family structure that differ from non-Indigenous cultures. In particular, we note that in most Aboriginal cultures, non-parents have responsibilities for Aboriginal children, particularly where the parent has passed away or is unable to care for the child.
30. The 2013 Family Law Council Report recommended that:

The definition [of “parent”] should include a provision that recognises that a parent “may include a person who is regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom.” (Recommendation 3)
31. WLS NSW supports this recommendation.
32. We note that when determining who is a parent under Aboriginal tradition or Torres Strait Islander custom, the court is likely to need to have access to experts capable of providing guidance on the relevant customs and traditions of the child’s kinship group/s. It is essential that such evidence is provided by people who have the necessary cultural knowledge and understanding and are able to speak on behalf of the tribe belonging to the kinship group. We refer to the proposal above that a Council of Elders be established for each family law registry, and we suggest that one function of such a council could be to provide guidance on who can give expert evidence on Aboriginal tradition or Torres Strait Islander custom.

and Welfare and Australian Institute for Family Studies, July 2013 accessed at: <http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Publications/2013/ctg-rs21.pdf>

⁴ Family Law Council, *Report on Parentage and the Family Law*, 2013, p34.

33. We note that it is essential that judicial officers are provided with proper guidance through clear legislative measures, expert witnesses, and cultural competency training, to ensure that the best orders are made for Aboriginal and Torres Strait Islander children. We note the conclusion of Ruska and Rathus after undertaking a review of cases involving Aboriginal and Torres Strait Islander children:

*the cases reveal that even with this guidance, there may be a tendency for judicial officers to slide towards their own familiar norms, thereby contributing to a privileging of parents over other kinship carers.*⁵

Guiding principles – Aboriginal and Torres Strait Islander Placement Principles

34. In the NSW Child Protection jurisdiction, there are Aboriginal and Torres Strait Islander child and young person placement principles, which provide guidance for those making decisions in relation to Aboriginal and Torres Strait Islander children in that jurisdiction. The FLC acknowledges that while cultural plans are integral in some child protection jurisdictions they are absent in the family law jurisdiction and there is no requirement of “a clear articulation of how the child’s ongoing connection with kinship networks and country will be maintained”.⁶
35. WLS NSW recommends that principles be developed for guidance in family law matters involving Aboriginal and Torres Strait Islander children. These principles should be developed by Aboriginal and Torres Strait Islander people and Aboriginal and Torres Strait Islander organisations, including SNAICC.
36. We note in particular that the NSW Aboriginal and Torres Strait Islander placement principles explicitly state that where an Aboriginal or Torres Strait Islander child is placed with a non-Aboriginal or Torres Strait Islander person, “arrangements must be made to ensure that the child or young person has the opportunity for continuing contact with his or her Aboriginal or Torres Strait Islander family, community and culture”.⁷ We support the inclusion of a similar provision in any family law principles, but note that such arrangements must not be token, as can occur in child protection matters.

Child sexual abuse

37. WLS NSW supports the concerns about the way child sexual abuse can be dealt with in the family law system raised and articulated in the Women’s Legal Service Queensland submission to this inquiry.
38. In NSW we have experienced poor investigatory responses to child sexual abuse issues in family law cases. As a community we need to have full confidence in the ability of the

⁵ Keryn Ruska and Zoe Rathus, *The Place of Culture in Family Law Proceedings: Moving beyond the dominant paradigm of the nuclear family*, (2010) 7 (20) *Indigenous Law Bulletin* 8

⁶ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection systems, Final Report, 2016*, p99 (p107).

⁷ *Children and Young Persons (Care and Protection) Act 1998 (NSW)* s 13(5)(a)

family law system to respond to child abuse allegations with a robust, evidence based, trauma informed and well resourced service.

39. We support implementation of Recommendation 19.1 of the 2010 Australia Law Reform/NSW Law Reform Commission *Family Violence – A National Legal Response Final Report*:

Federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children's safety. Where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services.

40. We also refer to the Women's Legal Service Queensland submission and support their recommendation "that a formal, independent, transparent and open investigation take place into the way that child sexual abuse matters are currently being approached and handled in the courts".

If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Co-ordinator or Janet Loughman, Principal Solicitor [REDACTED]

Yours faithfully,

Women's Legal Service NSW

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