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Submission to Australian Law Reform Commission: Review of the Family Law System Issues Paper No. 48.

Thank you for this opportunity to make a submission to this inquiry. We are all researchers in Law at the University of Technology Sydney; as a research team we bring together expertise in domestic and family violence, family law and other legal responses, victims' experiences in the courtroom and the conduct of empirical research.

We were recently awarded a research grant from Australia's National Research Organisation for Women's Safety (ANROWS) for 2018-19 to examine the impact and effect of **self-representation by one or both parties in family law proceedings involving allegations of family violence.** This project will consider all the potential issues that flow from self-representation including potential delays, frivolous claims, cross-examination, inappropriate questioning of other witnesses, use of proceedings to control or intimidate a victim, the capacity to effectively present and test evidence, and the possibility of adverse outcomes. It will also seek to identify and assess the use of tools, services and other measures that have been developed to assist self-represented litigants (SRLs) with a particular focus on the needs of parties experiencing family violence. This project obviously looks directly at issues raised by Questions 3, 4 11, 12 and 13 of the Issues Paper together with many other intersecting Questions and issues. Although the research will not be completed by the time the final ALRC Report is due to be delivered to the Attorney-General, we hope to provide submissions and updates about this research project to the ALRC for consideration in its work. We are very happy to make ourselves available to the Inquiry team if that might be of assistance.

General comments in relation to reform of the Family law system:

A number of clear themes have emerged in submissions to recent inquiries or commentaries about the family law system and its operation. These are: the lack of resources currently

available; the complexity and confusion added by the two-court system; and the complexity of the legislation itself.

The Hon Justice Thackray identified these three problems in his farewell speech to the Full Court of the Family Court on 23 March 2018[1] as the main reasons for the "current inefficiency of the Australian family law system". As Thackray J explained:

> *First, there are **not enough judges and registrars**. And those judges that we do have are either not replaced or they are replaced after inordinate delay.*
>
> *Second, we have what I consider to be a **bizarre structure** where two courts share an almost identical jurisdiction. Instead of working together, almost everywhere they work in isolation, confusing the hell out of everyone with separate forms, rules and processes.*
>
> *Third, we have been lumbered with the most **extraordinary legislation that has grown like topsy** and appears to have been drafted by a committee of people charged with the responsibility for making things as difficult as possible for judges and the poor old self represented litigants.*

We agree with Thackray J, and would add that these areas of concern particularly impact on SRLs in the system and we comment further on those reasons below.

a) Insufficient number of experienced judicial officers

In relation to the **lack of judges** in the system, Miranda Kaye is currently interviewing Independent Children's Lawyers (ICLs) in NSW and Victoria in relation to their perspectives on SRLs in the family law system. That research is at an early stage, but we are struck by the comments of ICLs in relation to delays in the system caused by a lack of judicial officers. This is particularly striking in the interviews with practitioners based outside metropolitan areas. For example, practitioners based in Albury, NSW are choosing to file matters in the Melbourne registry rather than the local Albury registry because the Albury FCCA circuit only sits 5 times per year. The number of matters listed for hearing on each day of that circuit sitting mean that many listed matters are not heard and so matters are listed for trial 3 or 4 times at 2 monthly intervals before they might be heard. This involves a huge waste of costs, time and emotional energy for the parties.

Similarly, practitioners based in Lismore where a court sits every six weeks commented that a matter would come before the court every 6 months due to lack of court/ judicial time. The burdens on judges managing lengthy lists are enormous and these burdens are passed on to the parties when matters cannot be resolved in a timely manner. Whilst we welcome the ALRC review of the family law system, the legislation and the system in which it is implemented can only work effectively if it is adequately resourced and this includes the

[1] Family Court of Australia, 'Ceremonial Sitting of the Full Court to Farewell The Honourable Justice Thackray' (2018) <http://www.familycourt.wa.gov.au/_files/Publications_Reports/Thackray-Farewell-23-Mar-2018.pdf>.

appointment of a sufficient number of suitably experienced judicial officers. While the 2011 changes to the Act in relation to family violence in parenting matters were important and welcome, as Patrick Parkinson has noted:

> *The law, as applied by the judges, can only play a protective role if people have sufficient access to justice.*
> *No amount of tinkering with the law, no amount of amendment, can bring about better outcomes for victims of violence and abuse unless the resources are there to litigate the case. Inevitably, the greater the problems of cost and delay in gaining access to justice, the less protective the family justice system will be. Most people, out of necessity or exhaustion, will compromise or acquiesce in ways that might, in some cases, adversely affect their safety or what is developmentally best for the children.*[2]

b) Complexity added by two court systems with different rules and requirements

In relation to the **"bizarre structure"** of the Australian family law system where two separate courts operate, we note and agree with paragraph 112 of the Issues paper that "particular confusion about the operation of different rules and procedures in the Family Court of Australia and the Federal Circuit Court.... can exacerbate the difficulties for self-represented parties in identifying the correct forms." The existence of two courts and two sets of rules and procedures creates uncertainty for practitioners and SRLs. There should be ONE family law court with one single set of rules.

c) Complexity of the legislation itself

(**Question 14)** In relation to the **"extraordinary legislation**" – the *Family Law Act* - we could not agree more with His Honour. In particular, Part VII of the Act is overly complex and leads to misunderstandings by the general public in relation to parenting matters.[3] We suggest that changes are required to Part VII to reduce unnecessary complexity. At the same time, the main focus of any changes must be on prioritising the safety of children in parenting matters involving any form of family violence. In our view:

- The presence of the "two tiers" of primary and additional considerations in section 60CC is confusing and ultimately unhelpful for decision-makers.
- The presumption of equal shared parental responsibility (ESPR) is unnecessary and creates a climate in which parties think that equality of outcome is the ideal option. The legislation does not need to refer to equal time or substantial or significant time – judges are able to make orders and parties are able to negotiate outcomes with reference to the particular children and circumstances without references to a certain amount of time. As long as the shared parenting focus remains, "victims of violence will continue to agree to shared parenting arrangements and the courts will

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[2] Patrick Parkinson, 'Shared Physical Custody: What Can We Learn From Australian Law Reform?' [2018] *Journal of Divorce & Remarriage* 1, 10–11.
[3] Helen Rhoades et al, "Another look at Simplifying Part VII" (2014) 28 AJFL 114 at 114;

continue to make such orders".[4] However, it is not only family violence and abuse which damage children, but also exposure to high levels of conflict between parents.[5] ESPR and shared care will often not be in a child's best interests where there is conflict.

- If a substantial revision of Part VII is to take place, we refer the Commission to the simple model for reform suggested by Professor Richard Chisholm.[6] This might be a useful starting point. In our view, any checklist in relation to the child's best interests should start with a provision that the overriding considering in determining children's best interests is the protection of children from harm caused by family violence, neglect and abuse. Any changes must ensure that the important and welcome changes made in relation to family violence in 2011 are not lost. Family violence is relevant beyond safety considerations – some of the effects of violence on children, parenting and parties are mentioned in the FCA Family Violence Best Practice Principles.[7]

The definition of family violence and the recognition of legal systems abuse

The Issues Paper asks whether any changes should be made to the definition of family violence contained in the *Family Law Act* (FLA). This definition was inserted in the Act in 2012. It is a comprehensive and flexible definition that not only details specific acts and behaviours (in a non-exhaustive list) but also how those acts and behaviours function in a relationship characterised by family violence (that is the behaviour coerces or controls the victim, or causes the victim to be fearful). Before the definition is amended in any way, consideration needs to be given to the purpose of the definition in the FLA and whether it meets and satisfies those multiple purposes. In this context, it is worth considering whether further tinkering with the definition will assist in meeting these purposes, or whether greater consideration needs to be devoted to 'how' that definition is implemented by the various professionals (legal and non-legal) in their work. We suggest that it is here, in the difficult space of implementation, that more work needs to be done – how the various professionals understand family violence (that is how they give meaning to the definition) matters.

The Issues Paper lists a number of forms of abuse that are not expressly referred to in the non-exhaustive list set out in the FLA. For example, misuse of process as a form of abuse,

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[4] Adiva Sifris and Anna Parker, "Family violence and family law: Where to now?" (2014) *Family Law Review* 3 at 18,

[5] McIntosh, J., Smyth, B., Kelaher, M., Wells, Y., & Long, C. (2010) Post-separation parenting arrangements and developmental outcomes for infants and children. Attorney-General's Department: Canberra.

[6] Richard Chisholm, "Rewriting Part VII of the Family Law Act: A Modest Proposal" 24 (2015) Australian Family Lawyer. See also, Richard Chisholm's comments on the unnecessarily complex drafting of s68 L in "Simplifying the Family Law Act: Saying Less and Saying it Better" (21) Australian Family Lawyer 11.

[7] Family Court of Australia and Federal Circuit Court of Australia, 'Family Violence Best Practice Principles' (Edition 4, December 2016) F.

and psychological abuse. It is also possible to point to other forms of abuse and violence that are also not expressly referred to in the current FLA definition. It is important, and a strength of the current definition, that it can encompass these acts and behaviours, without them being explicitly listed. However, this strength depends upon the legal and non-legal professionals involved in the case having an adequate and deep understanding about family violence; that they are able to really listen to the allegations about violence; and are able to effectively translate these in legal form to satisfy the broad and flexible scope of the definition. In turn, it rests on the understanding of the judicial officer who deals with the case to be able to listen to and appreciate the significance of the allegations about particular acts that form family violence in the context of parenting and/or property decisions. We note the ALRC and NSWLRC's previous recommendations about the need for more training and education for a wide range of professionals who respond to family violence.[8] As the Commissions noted:

> *a proper understanding of the nature and dynamics of family violence and its impact on victims better enables those in the system—including judicial officers, legal practitioners, police prosecutors, and other professionals—to support and assist victims. The Commissions note that family violence has a disparate impact on vulnerable groups in the community, such as children, women with a disability, and Indigenous women specifically, and that it is important to ensure that education and training addresses these impacts.*[9]

In terms of legal systems abuse – which has recently emerged as a key area of concern in research and advocacy – we agree, there is no question that litigation can become a form of abuse.[10] As noted above, the FLA's definition of family violence can already encompass this form of abuse without it being explicitly listed. It is important that all professionals working in the family law system (and other areas of law that respond to family violence) are aware of the potential for the legal system to be misused to further abuse. These professionals need to develop skills to assist them to be able to identify when the legal system is being used in this way, and to have knowledge about what tools or steps are available to address and prevent this misuse. We consider that rather than explicitly inserting this in the definition, it may be better, and of greater assistance to victims of family violence, to encourage the court to utilise those tools it already has at its disposal to prevent the legal system from being deployed in this way. For example, it is already possible for the court to prevent cross-examination of a 'particular witness' in child-related proceedings.[11] It may also be desirable to enhance and further develop measures to address and limit legal systems abuse. For example, extending the above-mentioned provision enabling the prevention of cross examination to financial/property proceedings, and considering how to respond better to vexatious applications. The issue of direct personal cross examination by an alleged perpetrator of family violence is discussed in more detail below. In addressing the

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[8] ALRC and NSWLRC, Family Violence – A National Legal Response (2010), recommendation 31-1, 31-3, 31-4/
[9] Ibid, [31.27]
[10] Heather Douglas, 'Legal Systems Abuse and Coercive Control' [2017] *Criminology & Criminal Justice* 1.
[11] *Family Law Act 1975* (Cth) s 69ZX(2)(i).

problem of legal systems abuse, care is required to ensure that any measure put in place does not have negative and unintended impacts on victims who are also seeking to advance their legal rights.

As noted in the Issues Paper, the Attorney General released an Exposure Draft Bill to protect witnesses from direct cross-examination by an alleged victim or perpetrator of family violence in cases where one or both parties has been convicted or charged with a violent offence in relation to the other person, or where there is a civil protection order in place between the parties, or where an injunction has been issued under the *FLA*.[12] If none of these trigger circumstances is present, the proposed amendments also provide the court with discretion to prevent direct cross-examination where there are allegations of family violence.

We welcome the Federal Government taking steps to address this important area of concern and we are strongly in favour of measures being introduced to assist victims of family violence in family law proceedings where one or both parties are without representation. We made a submission to this effect in relation to the provisions of the Bill. We believe that this issue requires considerable thought before the Bill is implemented. We attach a copy of a journal article that we have written on the topic (Kaye, M., Wangmann, J., & Booth, T. (2017). Preventing personal cross-examination of parties in Family Law proceedings involving family violence. *Australian Journal of Family Law*, 31(2), 94-117). The main points made in our submission were:

- The Bill appears to be based on State models protecting from direct cross-examination in criminal and / or civil protection orders. However, such models vary considerably and none of these models have been evaluated.
- Victorian Legal Aid, who have extensive experience undertaking the cross-examination in criminal and civil proceedings in that jurisdiction, do not recommend a similar approach in family law. They recommend the piloting of a "counsel assisting" role. Consideration of such a role is appropriate, as is the proper funding of legal representation to reduce the numbers of self-represented litigants.
- The Bill simply states that "a person appointed by the court" undertake the cross-examination on behalf of the self-represented litigant. The Bill should not be introduced "as a matter of urgency" until, who this person should be, and how they are to be funded, is resolved.
- Family law proceedings are quite different in nature to civil protection and/ or criminal proceedings. Violence may be the sole factual and legal issue for determination in these latter proceedings. Family law matters may traverse numerous issues and the alleged victim is a party to the proceedings.

[12] Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017 (Cth) (Exposure Draft).

- We are concerned that the circumstances that would trigger the mandatory prohibition of cross-examination are very narrow.
- We are concerned that, given that the current discretionary protections to limit cross-examination do not appear to be used widely by the court (as is noted above in the discussion on misuse of legal processes), that leaving most cases to the discretion of a judicial officer might not improve the situation.

Please do contact us if you require any further detail.

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Attached: M. Kaye, J. Wangmann & T. Booth, 'Preventing personal cross-examination of parties in family law proceedings involving violence' (2017) 31 AJFL 94.