



# Submission to ALRC Family Law Review

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Fitzroy Legal Service and Darebin Community Legal Centre welcome the opportunity to contribute to this important review of the family law system in Australia. We have reviewed ALRC Issues Paper 48 'Review of the Family Law System'; this submission has been formulated to address questions 1, 4, 6, 10, 11, 13, 21, 23, 24, 26, 30, 31, 32 and 33 in particular.

We note the remarks in paragraph 5 of the Issues Paper in regard to matters not considered under the terms of reference for the Review, in particular the operation of state-based systems, such as child protection and family violence. We support the observation made in that paragraph that the critical interaction of state-based systems with the federal family law system necessitate these matters being taken into account by the Review.

We also note with approval the remarks in paragraph 4 of the Issues Paper, which refer to "the resolution of family disputes as quickly and affordably as possible, and in a way that is the least harmful, and most protective, of the safety and wellbeing of all involved, particularly children." Our submission specifically addresses this aspect of the Review, from the perspective of lawyers working with some of the most marginalised and vulnerable sectors of our community, including those who face systemic barriers to accessing the system due to their cultural or linguistic background, history of family violence, homelessness, poverty or other factors.

## 1. About Us

**Fitzroy Legal Service (FLS)** is one of the oldest community legal centres in Australia. From a pioneering beginning in 1972 as a volunteer-run service, over its 45+ year history our organisation has grown to be a significant provider of free and low-cost legal services in the inner Melbourne suburbs of Fitzroy, Collingwood, Richmond and surrounding areas.

Our service employs more than 20 staff and draws on a network of almost 300 volunteers. We provide a free drop-in advice service five nights a week; free or low-cost legal representation in criminal, family law and family violence matters; duty lawyer services; specialist advice clinics in family law (including an LGBTIQ clinic), animal law and employment law; and advocacy and strategic litigation supporting vulnerable and marginalised communities. We also publish *The Law Handbook*, a comprehensive and accessible guide to the law for lawyers and non-lawyers alike, now in its 40<sup>th</sup> edition.

Our vision is to be an independent and influential voice that empowers and strengthens the community through access to legal services, education, information, and law reform activities.

**Darebin Community Legal Centre (DCLC)** has served the inner north of Melbourne, especially the City of Darebin, for 25 years. We specialise in legal advice, referral and casework for those in the Darebin area who are unable to receive Legal Aid or access the private practice. We operate a daily duty lawyer service at the specialist family violence division of Heidelberg Magistrates' Court as well as providing casework court support. Our generalist service advises and represents in tenancy, debt, motor vehicle, neighbourhood disputes, prisons and personal safety and operates weekly outreach as well as twice-weekly evening drop-in advice services.

DCLC engages in health-justice partnership programs in hospitals and community health settings, and operates Victoria's longest-running prisoner advice service. We lead the programs 'Women Transforming Justice', in partnership with the Law and Advocacy Centre for Women, and 'Flat Out', a specialist list in the Melbourne Magistrates' Court for women on remand and those with complex needs or at risk of imprisonment.

We have extensive experience with those who have lived experience of the family law system, particularly those who have experienced family violence.

## 2. Our Family Law Practices

The family law practice is a core part of Fitzroy Legal Service. We primarily assist clients who identify as victims/survivors of family violence or who qualify for legal aid or are able to pay low-cost fees. At the Neighbourhood Justice Centre (NJC), FLS provides duty lawyer services to clients from diverse backgrounds accessing the NJC in relation to Family Violence Intervention Orders.

Since 2013, DCLC has been funded by the Commonwealth to provide family law advice and representation to those who are affected by family violence. DCLC's family law service is focused on clients who lack the capacity to privately fund, or obtain a grant of legal aid, for their matters. DCLC's focus is on parenting and divorce matters where there are legal or personal complications such as family violence, children at risk and clients from a CALD background or with special needs.

For both FLS and DCLC, the majority of our clients are women from culturally and linguistically diverse (CALD) backgrounds who have been victims of family violence and who need support with securing intervention orders or putting parenting arrangements in place. Many of our clients are refugees or other humanitarian program migrants who have experienced significant violence in their source countries and are facing multiple challenges including poverty, homelessness and welfare dependency as well as being subject to family violence. More than 70% of FLS family law clients have low or no income.<sup>1</sup>

As such, our services are particularly well placed to understand the considerable structural and systemic issues faced by some of the most vulnerable and disadvantaged participants in the family law system.

## 3. The Family Law System in Australia

From our perspective as lawyers working with vulnerable clients, the family law system suffers from a number of significant deficiencies:

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<sup>1</sup> FLS Strategic Plan Assessment, July 2015.

1. People from CALD backgrounds often struggle to navigate and engage with a system that is highly formal, complex and daunting. For people whose experience of state-sanctioned violence or civil unrest in their country of origin has made them distrustful of governmental authority, the formality of the system may be a major barrier to access.
2. Since the current system was established in the mid-1970s, Australia has grown to be an increasingly culturally diverse nation; however the family law system lacks the cultural competency to respond to the diverse needs of recent arrivals from different cultures. In our experience, judicial decision-makers, family consultants and independent children's lawyers are not well-placed to comprehend the diverse cultural and religious drivers of family violence, the gender and power dynamics in some communities, and how women in particular can become isolated in their community when they decide to leave a relationship. Work needs to be done to challenge cultural norms in some migrant communities where family violence is tolerated and women are disempowered, and to increase awareness and understanding of rights and obligations under family law.
3. There is a critical lack of coordination between the Family Court and Federal Circuit Court systems and other relevant components of the legal and policy framework. Clients of our practice commonly present with multiple, overlapping and interconnected issues including parenting, family violence, child protection and migration, as well as underlying problems such as homelessness/housing stress, mental health issues, drug use, and involvement in the criminal law system. The difficulty of navigating disparate, complex and often under-resourced systems, especially for people with low English literacy or educational attainment, is often overwhelming and potentially leaves vulnerable women and children exposed to further violence or abuse.
4. In particular, the family law and family violence systems are completely separate, conducted in different courts and with different procedures and requirements, yet for many vulnerable clients these issues are inescapably intertwined. The primacy of federal parenting orders over state intervention orders can make this an acute issue where those orders conflict with each other. In our experience, clients often struggle to understand why their issues can't all be dealt with together, and are frustrated by the need to make multiple applications to different courts (often involving different legal representatives) for what they understand to be a single problem. This represents a fundamental barrier to access to justice for these clients.
5. Similarly, there is an almost complete disconnect between the family law and child protection systems, both of which have the purpose of protecting children from abuse. Where children have been subject to violence or abuse, there may be three or more legal processes operating at the same time (child protection, parenting and intervention orders) but with virtually no co-ordination between them.
6. At the heart of this issue is the division of responsibility for the various systems between federal and state governments. These jurisdictional conflicts create confusion, duplication, waste and are a barrier to access to justice, especially for the most vulnerable members of our community.
7. The family law system is intrinsically judicial, adversarial, slow, and inflexible. While mediation has long been a requirement in parenting matters, it operates as an adjunct to the

courtroom process and is often dispensed with or circumvented. Perpetrators of family violence are frequently adept at manipulating the system to frustrate or delay processes, and victims of violence are repeatedly brought back into contact with perpetrators throughout a long and often grinding litigation process. We believe the family law system should be flexible enough to make use of different forms of alternative dispute resolution (ADR) according to the different needs of different families. Moreover, we argue the system should be reoriented to centralise problem-solving and protection of children and vulnerable parents, with formal court processes used only in the final stages of the process, when there is immediate risk to children or parties, or as a last resort when other processes have failed. It should be a system of mediation/ADR with court orders as an option, not the other way around.

8. There has been insufficient investment in services across the family law and family violence sectors. Services are under considerable strain to meet demand and there are lengthy waiting periods to access critical services. For example, in Melbourne there is currently a waiting period of up to six months for supervised contact centres, and no access to long-term supervised contact. Greater investment is needed in Community Legal Centres, counselling, family support, and post-separation and supervised visiting services, by both federal and state governments, especially in rural and regional areas and areas with large migrant communities. We support the submission of the Victorian Federation of Community Legal Centres, which more directly addresses the need for greater funding for CLCs and related services.
9. At present, lack of availability of counselling and mediation services means that for impecunious clients, going to court is often the only option. Where post-separation services are unavailable, clients at risk are sometimes under pressure to agree to arrangements which place them at risk of harm. For example, parents who are unable to access supervised visiting services (these often have waiting times of many months) may be under pressure to have visits supervised by untrained or unreliable family members, or to agree to unsupervised visits.

## 4. Case Studies

### (a) Lawyer-assisted mediation

Samiya<sup>2</sup> has had a hard past, marred with disadvantage, drug dependency and mental health issues. Her biggest motivation to get clean and manage her mental health was her nine-year-old daughter. Lawyer-assisted mediation provided Samiya with a voice and opportunity to demonstrate the hard work she had undertaken to set up a stable lifestyle in which she could re-establish a relationship with her daughter.

Although lawyer-assisted mediation created some anxiety and stress for Samiya, it was a far better option for her than initiating court proceedings. At mediation, Samiya could discuss her daughter's best interests without seeing or speaking to her ex-partner. At mediation, Samiya felt comfortable to show her development and worth as a parent, without being judged for her past and without having the entirety of her medical records reviewed by her ex-partner. As part of the mediation process, Samiya and her ex-partner also got to hear from their daughter, through

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<sup>2</sup> Names and other identifying details in the case studies have been changed.

the 'KidzTalk' process, and what her daughter had to say ultimately focused her parents and led to an agreement about future parenting arrangements.

In our experience, mediation is a far better alternative to going to court, particularly for families like Samiya's. However, without greater resources and funding for ADR services, people like Samiya can be forced into the courts. Our services currently rely heavily on volunteer support in order to appropriately prepare matters like Samiya's for success at mediation. If community legal centres and community support services were appropriately funded, we could do so much more to assist clients like Samiya and their families.

### **(b) Lengthy court proceedings with poor outcomes for children**

Tim's parenting matter has been in court for five years; it has been through a three-day final hearing and has another final hearing scheduled. There have been multiple court hearings and reports. Throughout the time the matter has been in court, the mother's grievances towards Tim have solidified and become entrenched. The children have been exposed to these grievances and, over time, have become increasingly reluctant to have a relationship with their father.

Throughout the proceedings, the mother has failed to comply with court orders and has delayed proceedings on a number of occasions due to her involvement in other legal disputes. Despite Tim's compliance with court orders, the recently released family report recommends that the mother have sole parental responsibility and that Tim only spend time with the children in accordance with their wishes. Tim feels that the mother's non-compliance with court orders has given her the outcome she desired. Tim's only wish now is that his children one day understand how hard he tried to have a relationship with them.

### **(c) Child protection directing parents to the family law courts**

Linh speaks limited English. She has three children and is the victim/survivor of family violence perpetrated by their father. The children have been exposed to and are victims of the family violence. The father has criminal convictions in relation to these family violence incidents.

In 2016 the father initiated family law proceedings. Linh did not have a lawyer. An interim order provided for unsupervised time between the children and their father. Child Protection then became involved with the family and told Linh the children should spend no unsupervised time with their father. Child Protection told Linh to apply to vary the interim orders, but did not engage an interpreter to explain this advice. Child Protection did not tell the court or the Independent Children's Lawyer they were involved with the family; nor that they thought it was not safe for the children to spend unsupervised time with the father. Linh was very confused and came to Fitzroy Legal Service. Since then, her lawyer has had to liaise extensively with Child Protection to clarify their position in relation to the children's time with the father.

## **5. Recommendation: establish problem-solving centres with an integrated family court**

Australia has a proud history of being an innovator and leader in family law. Our family law system has been progressively modernised and improved by the adoption of the *Family Law Act* in 1975; the referral of powers relating to ex-nuptial children and de facto partners in the late 1980s; the 1995 reforms that centralised the best interests of children in parenting disputes; and the 2006 reforms that established mediation as a fundamental part of the system of

resolving disputes. The present review provides a new opportunity to achieve world-leading reform by creating a truly innovative, family- and community-centred system to resolve family disputes in a holistic, client-focused and culturally responsive way.

In making this recommendation, we are inspired by the model of the Neighbourhood Justice Centre (NJC) in Collingwood, Melbourne. Established in 2007, the NJC houses a Court with the combined jurisdiction of the Magistrates' Court, Children's Court, Victims of Crime Assistance Tribunal and VCAT, along with legal services, ADR services, treatment and welfare agencies, community-based crime prevention and justice education under one roof. The co-location of 15 support and welfare agencies with the Court has enabled the development of innovative programs to support court users through a problem-solving approach that employs therapeutic techniques to address the underlying social problems that lead to people being in court.

While it has no jurisdiction to hear Family Law Act matters, many of our clients have benefited from the innovative, culturally-appropriate approach at the NJC in their related legal issues including family violence and tenancy.

We recommend that consideration be given to adopting a similar model for resolving family law disputes. One way of achieving this would be through a network of Family Justice Centres, to link dispute resolution, violence prevention, support and related services under a single roof. These centres might exist alongside the existing Family Court and Federal Circuit Court infrastructure and directly target vulnerable people who have experienced family violence and who would benefit from a multidisciplinary, multi-jurisdictional, case-managed approach.

Each centre would incorporate a cross-jurisdictional problem-solving court on the NJC model; we envisage this as a State/Territory court with the necessary powers of the Federal Circuit Court vested in it. The centres would operate on a case management model, with capacity to link applicants into a range of relevant services (including housing, drug and alcohol treatment, mental health as well as parenting, post-separation services, legal advice and representation, supervised contact and interpreters).

In the first instance, most applicants would engage with case managers, social workers and family dispute resolution professionals rather than the court. Supported by legal advice and representation where appropriate, applicants would be given the opportunity to engage in a flexible suite of strengths-based alternative dispute resolution modalities, including mediation, restorative justice, problem-solving conferencing and victim-offender mediation to endeavour to both resolve the family dispute and address the underlying causes that may have contributed to the dispute or are barriers to its resolution. Through the same service, clients at immediate risk would be able to access family violence intervention orders and supervised contact services.

Each centre would operate with the necessary autonomy and flexibility to adapt to local community needs, especially for those CALD communities where religious and cultural customs are intertwined with traditional notions of family. The services co-located on these centres would be linked by a common commitment to child-focused problem solving and facilitating parent-child contact in a safe and sustainable way. By working with local communities, the centres could become a welcoming place where early intervention for family disputes is available, resolving problems before they get out of control and thus keeping families together where appropriate or supporting them to separate safely. These centres could provide ongoing

support beyond the making of court orders, to ensure children and vulnerable family members are protected and supported.

While operating with the authority of a court, problems would be addressed by social work mediated processes with involvement of lawyers, not the other way around. At all times, the option of court orders would remain available within the same facility, but the emphasis would be on resolving disputes, where possible, without court involvement.

Such a model has great potential to avoid expensive court processes, take pressure off existing Family Courts and Federal Circuit Courts, and deliver positive outcomes that support the diverse needs of families, vulnerable parents, children and communities.

Such a program would require considerable collaboration, both in developing enabling legislation and delivering the service, between federal and state governments. Adequate funding for legal aid/CLC-delivered legal services would be critical to its success. The establishment of a pilot Family Justice Centre could be considered in the first instance to test and develop the model before rolling it out in additional locations/jurisdictions.

## **6. Conclusion**

Australia's family law system has a proud history of innovation and progressive change that has given families autonomy and centralised the protection of children. But for users of the system who come from vulnerable and marginalised sectors of society, the formality, inflexibility and lack of cultural competence of the system combine to create substantial barriers to access at what is often the most difficult time of their lives. For those partners and children who have experienced violence or other forms of abuse, the overlapping but disconnected approaches to violence prevention, children's welfare and family dispute resolution are, at best, frustrating and opaque and, at worst, risk exposing them to ongoing danger.

In this submission, we have highlighted the deficiencies of the current system when it comes to vulnerable clients, and suggested an alternative, holistic, community- and family-centred approach. The proposal we have made will require significant coordination and investment to achieve but, in our submission, represents a genuinely innovative alternative to the current court-centred system that will ultimately save costs, protect people at risk, and realise the law's healing potential.

We thank the ALRC for the opportunity to contribute to the Review and would be willing to provide further input as needed.

## **7. Contact details**

Correspondence in relation to this submission should be directed to:

