**NEW SOUTH WALES BAR ASSOCIATION**

**SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION REVIEW OF THE FAMILY LAW SYSTEM – ISSUES PAPER 48**

INTRODUCTION

1. The New South Wales Bar Association (**the Association**) welcomes the opportunity to make a submission to the Australian Law Reform Commission (**ALRC)** in relation to Issues Paper 48 “Review of the Family Law System” (**the Issues Paper**). References in this submission to terms defined in the Issues Paper have the same meaning, unless otherwise indicated.[[1]](#footnote-1)
2. The Association has had the benefit of considering the Law Council of Australia’s submission in response to the Issues Paper. Members of the New South Wales Bar are represented in the LCA’s Family Law Section and have actively contributed to preparing the LCA’s submission, which comprehensively addresses each of the 47 questions posed by the Issues Paper. We commend the LCA’s submission to you.
3. The state of family law in Australia is of critical concern. The Association welcomes the opportunity presented by this review to engage and collaborate with the ALRC, the LCA, the Courts, Government, stakeholders and the public to develop targeted reform to improve and promote access to justice for clients. We believe it is important that there is consensus amongst the Australian legal profession as to how we respond to the challenges facing our family law system.
4. As noted consistently throughout the Issues Paper,[[2]](#footnote-2) the family law system involves the intersection of many aspects of Commonwealth and state and territory laws and systems. The Association appreciates that jurisdictional intersection is a key concern of the ALRC’s review[[3]](#footnote-3) and can speak from experience to the challenges facing clients and practitioners in accessing the family law system and the Courts in registries within New South Wales (**NSW**).
5. Accordingly, in addition to endorsing the LCA’s submission, the Association is pleased to assist the ALRC by providing a complementary submission informed by the experience and expertise of our members who practice at the Family Law Bar in the state of NSW.

1. Fundamental to any review of the family law system is a recognition that family law in this state has been adversely affected by a chronic and sustained lack of resources in both the Federal Circuit Court and the Family Court of Australia in its NSW registries, resulting from an absence of commitment by successive Governments to the proper funding of the system. Any recommendations made by the ALRC as a result of this review need to recognise and acknowledge that without a commitment by Government to a properly resourced family law system, such recommendations will be, at best, of limited utility.
2. The Association considers it imperative to ensure that while alternative dispute resolution (**ADR**) is utilised wherever possible and appropriate, the broader family law system including the Courts is properly resourced, maintained and supported to administer justice for those affected by complex family law matters that cannot otherwise be resolved.

CONTENTS

1. This submission addresses the following:
   1. The Family Law Bar in NSW;
   2. The state of family law in NSW;
   3. The role of the court in family law;
   4. Australia as a world-leading example.
2. In drafting this submission and responding to the Issues Paper, the Association has recognised and sought to apply:
   1. Australia’s obligations under international law, including under the *UN Convention on the Rights of the Child*;[[4]](#footnote-4)
   2. Barristers’ professional obligations, including under the *Legal Profession Uniform Law* (NSW) and the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (**Barristers’ Rules**); and
   3. The objectives and principles espoused in the *Family Law Act 1975* (Cth), particularly concerning the consensual and non-litigious resolution of issues involving Australian families and children where possible.

THE FAMILY LAW BAR IN NSW

1. The Association is a voluntary professional association comprised of more than 2,300 barristers with their principal place of practice in NSW.[[5]](#footnote-5) Currently, 176 of our members reportedly practice in the area of family law and guardianship.[[6]](#footnote-6) The Association also includes amongst its members judges, academics, and retired practitioners and judges. The Association is committed to promoting the public good in relation to legal matters and the administration of justice.[[7]](#footnote-7)
2. Barristers are specialist advocates,[[8]](#footnote-8) both in and outside of the courtroom.[[9]](#footnote-9) Barristers owe their paramount duty to the administration of justice.[[10]](#footnote-10) In addition, barristers must “promote and protect fearlessly and by all proper and lawful means the client’s best interests to the best of the barrister’s skill and diligence and do so without regard to his or her own interest or to any consequences to the barrister or to any other person”.[[11]](#footnote-11)

1. It is incorrect to characterise barristers’ practice as purely litigious, or to state that an “inquisitorial system” necessarily produces better outcomes for vulnerable parties than an adversarial legal system. The Association refers particularly to the LCA submissions regarding the misapprehension in the Issues Paper in relation to the nature and processes of the so-called “inquisitorial system”.
2. ADR forms a significant part of barristers’ practice in this state, particularly in the area of family law.
3. All barristers have a professional duty under the Barristers’ Rulesto inform their clients or instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, to permit the client to make decisions about the client’s best interests in relation to the litigation.[[12]](#footnote-12)
4. Barristers in this state are accredited as arbitrators pursuant to the *Family Law Act 1975* (Cth) and also as mediators. Our members, particularly in the area of family law, participate in both arbitrations and mediations on a regular basis.
5. In 2012 the Association, together with the NSW Law Society, joined with the Federal Circuit Court in the establishment of the Family Law Settlement Service,[[13]](#footnote-13) a scheme which provides the Federal Circuit Court and Family Court access to accredited practitioners to provide mediation services at a flat fee. In February 2018, as part of a regular review of the members of the Service, the Association put forward the names of around 30 barristers who volunteered to participate.
6. The barristers of NSW appear on a daily basis assisting clients in the Federal Circuit Court and the Family Court of Australia. They do so on a pro bono basis, as well as in matters funded by Legal Aid NSW and on private retainers. Barristers also contribute in many and varied ways, all in a voluntary and unpaid capacity, to the development of the law and procedure of both Courts.
7. The Association provides extensive pro bono assistance to the community of NSW in a family law context through barristers’ participation in the Family Law Settlement Service and the Legal Referral Assistance Scheme. This is separate from the pro bono matters that many of our members take on of their own accord.
8. The Association’s Family Law Committee is comprised of 14 appointed barristers with active practice in family law,[[14]](#footnote-14) including five Senior Counsel, who volunteer their time and expertise.
9. Representatives of the Family Law Committee meet regularly with Federal Circuit Court judges and Family Court judges to provide feedback and put forward the views of the profession in relation to the conduct of hearings and the management of delays in the Courts.
10. This submission reflects the expertise, experience and concerns of the Association’s members including through the above initiatives.

THE STATE OF FAMILY LAW IN NSW

1. Family law in this state has been severely affected by a lack of resources both in the Federal Circuit Court and in the Family Court of Australia in its registries within NSW. These resources include not only an insufficient number of judicial officers to deal with an expanding jurisdiction and increasing workload, but also insufficient funding to maintain counselling and assessment services previously provided by the Courts.
2. Delays in the both the Sydney and Parramatta Registries mean that a case commenced today (involving children and/or financial issues) is unlikely to be finally determined for at least three years and in a significant number of cases for a greater period of time. This is unfair to families and is not sustainable.
3. The average number of cases in the docket of judges in the Federal Circuit Court is in excess of 400. This is a crushing workload and presents real work, health and safety issues for judges.
4. The Association has consistently expressed concern about the sustained underfunding of the family law system by successive governments of both political persuasions and continues to do so.
5. Although there is great will amongst the NSW Family Law Bar to provide pro bono assistance to deal with some of the issues, the Association is concerned that the provision of pro bono assistance for those involved in family law proceedings simply cannot and should not be a substitute for the proper funding of the Courts and the legal aid system for those in need of family law assistance.
6. Without a properly funded family law system the rights and interests of litigants and children alike cannot properly be protected. Without proper representation, there is a real risk of uneven playing fields and unfair outcomes.
7. The Association has repeatedly called for a commitment by the Federal Government to the proper funding of the family law system and the Courts within it so as to provide a functioning and sustainable system of justice for those members of the community in need of family law assistance.
8. The NSW Bar is committed to working in a constructive manner with the Government to ensure the family law system is adequately resourced to promote access to timely and affordable justice for those family law litigants and children.
9. The NSW Bar is also committed to continuing its long association and close relationship with the Family Court and the Federal Circuit Court, in order to assist both Courts in the difficult work which their respective jurisdictions require them to undertake on a daily basis. The judges of both Courts are of the highest integrity and work ethic but are simply unable to sustain the increasing workloads required of them.

THE ROLE OF THE COURT IN FAMILY LAW

1. In 1975, Parliament enacted the *Family Law Act 1975* (Cth). It was considered a breakthrough piece of legislation. In the introduction to his book *Guide to the Family Law Act 1975*,[[15]](#footnote-15) Peter Nygh, then Professor of Law at Macquarie University, later to be a justice of the Court and one of the most eminent authors and jurists in the area noted the following:

Family law, as it operated in Australia until 1976, represented a hotchpotch of various historical and social influences. The strongest of these influences was the ancient canon law of the Church which, until 1857, exercised jurisdiction over most family law matters in England. In both England and Australia this jurisdiction had been transferred to the secular courts, but the Church law and its influence remained visible. The *Matrimonial Causes Act 1959*, whilst it took the important step of unifying most of the matrimonial law on a federal basis, did not effect many profound reforms in the structure of that law. It was essentially a consolidating measure.

1. Further, Nygh explained that:[[16]](#footnote-16)

To administer this new structure of family law, the Act creates the Family Court of Australia which is a federal tribunal completely devoted to family law matters and staffed by persons with particular aptitude and training in dealing with such problems.

1. The focus of the *Family Law Act 1975* (Cth) was to overhaul a disparate system, unifying many relevant areas in the one place. In due course, ex-nuptial children came under this umbrella, as did same-sex relationships. The initiative aimed to, and did to a far greater degree than before, create a “one stop shop”.
2. It is a matter of curiosity that today we stand perhaps the furthest in some time from the concept of a “one stop shop”. There are now two Courts effectively exercising one jurisdiction. There is the potential for a separate tier in the form of mooted “parenting management hearings”. There is discussion about devolving areas of the work back to the state courts. There is also the prospect of broadening decision-making into private arbitration. Self-evidently, there is the risk of moving back to the un-unified “hotchpotch”.
3. Over time there have been many critics of the family law system and the Family Court. This is inevitable given the area of family law, perhaps more so than most areas of law, attempts to deal with issues of high emotion. Indeed, the *Family Law Act 1975* (Cth) came into being as a direct function of a number of areas of discontent prevalent at the time.
4. As recognised in the Issues Paper, there have been significant societal changes during the 43 years since the *Family Law Act 1975* (Cth) came into effect. Similarly, there have been significant changes to the legal landscape, including the increasing use of bodies other than courts to resolve disputes via ADR, such as arbitration or mediation. Despite this change, in some cases it remains in the best interests of some clients and indeed necessary for their matter to be resolved in the Courts. In some cases, Court resolution may also be in the best interests of some children and arguably our society. For example, in complex issues such as allegations of abuse, there may need to be findings of fact in a judgment which provides a secure factual foothold to build upon for future planning and assistance, including therapy and associated services.
5. As the Issues Paper acknowledges, most families manage separation without having recourse to the family law system, and of those who do, even fewer approach the Courts to resolve their dispute.[[17]](#footnote-17)
6. Nevertheless, over the last four decades the Family Court has operated, it has performed a vital function in the community. This is recognised by the Issues Paper, which states that:[[18]](#footnote-18)

There is now clear evidence that many of the people who approach the family law system for assistance today have complex support needs, including in relation to family violence and other safety concerns for children, and that these disputes often involve a co-occurrence of risk issues, such as drug and alcohol misuse or mental health concerns.

1. The ALRC previously noted in 2000 that:[[19]](#footnote-19)

The Family Court, for example, deals with real and distressing family problems which impact through society. The Court has been described as a 'front line institution to resolve family violence’.

1. These understandings may seem obvious or self-evident, yet when such understandings become accepted and common place, it can be easy to underestimate the systems needed to address the challenges which arise daily.
2. Whilst there is definitively a place for processes such as ADR, mediation, arbitration and the like, there is a fundamental need for a court in the modern family law system. Regardless of what other models are in place, cases involving “complex support needs” will still require the complex responses which a court offers, and for that matter, a robustly resourced court.
3. As noted above, barristers have professional duties and obligations which include advising on alternatives to fully contested litigation. These duties are one of a number of safeguards which protect against unmeritorious litigation and promote the best interests of clients and children.
4. Unfortunately, the Courts have repeatedly been subjected to unfair criticism. With respect, this is often a criticism borne out of a misunderstanding of the complexity of the issues managed by the Court and, in relation to the criticism from certain quarters, is sometimes borne out of self-interest.
5. While ADR should be encouraged and utilised wherever appropriate, the Association believes that the Courts, properly resourced, have an important role to play in Australia’s family law system in the twenty-first century. The Courts provide important opportunities for vulnerable people to access justice in complex cases, where other alternatives fail to secure just outcomes. Like some social infrastructure such as hospitals, while Courts are a place of last resort and alternate avenues should first be exhausted where appropriate, there are some cases that can only be resolved by court. In these cases, it is critical that properly-resourced infrastructure be available, accessible and affordable to those requiring its services.
6. A properly-resourced court must be a key part of any blueprint for the future of family law, just as it has been a critical, if underrated, part of the system’s success over the last four decades.

AUSTRALIA AS A WORLD-LEADING EXAMPLE

1. Although reform can bring significant benefit, it should be acknowledged that Australia’s family court system is highly regarded internationally and recognised as a leading example.
2. The Honourable Justice Thackray recently observed that:[[20]](#footnote-20)

The full history would occupy a book, but it’s a tragedy, in my view, that the people of Australia do not know just how highly regarded this Court really is in every place in the world other than in Australia. So it’s perhaps sad that most people don’t know, for starters, that our original Family Law Act has been plagiarised in many places around the world. I know a good deal about the family law system in Fiji, for example, and I know that after careful study they decided to adopt the Australian law and the Western Australian method of applying it. As another exotic example, Barbados adopted our Family Law in 1983 and hopefully they have been sensible enough to leave it in the original form.

The Australian family law system is revered in the United Kingdom. Just ask any visiting judge from that part of the world. And the international high regard for this Court continues to the present day…

1. Many parts of the Issues Paper make reference to various family law systems and models which operate around the world. What is missed is that so many different countries look to Australia as the “gold standard” and benchmark of family law systems. Over the last four decades the Australian family law system has built up procedures and jurisprudence held in high regard in almost all areas of the world except, it often seems, Australia.
2. A court is a necessary and vital part of the Australian family law system. That is not to say that decision-making may not occur in alternative ways. But the most difficult matters and the most complex matters will ultimately require the assistance of a court. It is critical for the benefit of these clients and children involved in these cases that the court must be properly supported and resourced to adjudicate justly, promptly and affordably.
3. An analogy can be drawn to the health system. When a patient is ill, the appropriate course will often be medication or therapy prescribed by a doctor which satisfactorily addresses the issue. In more serious cases however, there may be a need for the patient to be hospitalised and possibly even to undergo surgery. This is generally seen as a last resort and if a patient requires hospitalisation, the system aims to have the patient hospitalised for the least amount of time. If a patient does require hospitalisation, it is in the best interests of that patient that the hospital is state-of-the-art, sufficiently staffed by highly-trained experts with access to the best equipment.
4. Likewise, a participant in a court process does not look forward to the experience. No-one relishes being involved in a court case. As outlined above, barristers have professional obligations to advise on alternatives to fully contested litigation and to act in the best interests of their clients. The fact remains that from time to time a client’s best interests will be served by their matter being heard and resolved by the court.
5. In that case, if it is necessary for a person to be involved in a court case, particularly one affecting personal rights or the welfare of children, that person is entitled to expect the Court system to be properly resourced and “fit for purpose”.  It seems that we have developed a form of thinking whereby it is embarrassing, or perceived as a sign of failure, to be involved in disputes and/or litigation.  Such a form of thinking is both wrong and dangerous because it causes us to lose our focus on ensuring we have the best Court system available for people who are at their most vulnerable.
6. As noted by the LCA’s submission, an inquisitorial model does not necessarily deliver better outcomes than an adversarial system, particularly when the latter is tempered with protections for clients, whether in the form of barristers’ professional obligations or statutory obligations imposed by the *Family Law Act 1975* (Cth) or *Evidence Acts*.
7. It is important to recognise that the present Court system is one that has incorporated less adversarial practices and procedures for some time. The Family Court developed a less adversarial approach to the determination of parenting cases which led to the introduction of Division 12A of the *Family Law Act 1975* (Cth).  This approach was in turn adopted by the Singaporean Courts amongst others.
8. If the most complex family law cases are to be properly managed, we need a strong, robust and resourced Family Court to operate in conjunction with the Federal Circuit Court, albeit that each Court may use different case management processes and procedures to properly deal with the differing nature of the work undertaken by each Court.
9. We should also expect that the Courts will attract criticism. It is impossible to adjudicate the hardest of family law cases without disappointment. Indeed, if the Courts did not attract some criticism, they would likely not be doing the job properly.
10. The Association recognises the work of the Courts, the judiciary and the barristers who have achieved what has been achieved despite the chronic underfunding of the system and without the support and resourcing required. In conclusion, the Association believes that the future of a fair, robust and just family law system must include a properly resourced, respected and supported court. The Association encourages the ALRC to consider the resourcing and funding of the Courts as a crucial part of any proposed reform and to call on government to support the Courts’ ongoing work for and on behalf of the community.

**7 May 2018**

1. See ‘Terms used in the Issues Paper’, *The Issues Paper*, 15-16, [22]-[28]. [↑](#footnote-ref-1)
2. See, eg, *The* *Issues Paper*, 13, [5]; 68 [226]-[227], 73 [244]. [↑](#footnote-ref-2)
3. Ibid, 13, [5]-[6]; 72, [240]-[244]; 74, [248]. [↑](#footnote-ref-3)
4. *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990). [↑](#footnote-ref-4)
5. New South Wales Bar Association, *Statistics*, as at 2 May 2018

   <https://www.nswbar.asn.au/the-bar-association/statistics>. [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. New South Wales Bar Association, *New South Wales Bar Association Strategic Plan* (2017) <http://inbrief.nswbar.asn.au/posts/4df95d7a2fb43495d59665ad061e3db4/attachment/strategic.pdf>. [↑](#footnote-ref-7)
8. *Barristers’ Rules* rule 4(c). [↑](#footnote-ref-8)
9. See *Barristers’ Rules* rule 11(c)(d). [↑](#footnote-ref-9)
10. *Barristers’ Rules* rules 4(c), 23. [↑](#footnote-ref-10)
11. *Barristers’ Rules* rule 35. [↑](#footnote-ref-11)
12. *Barristers’ Rules* rule 36. [↑](#footnote-ref-12)
13. New South Wales Bar Association, *New South Wales Bar Association Annual Report 2011-12* (2012) 29 <https://www.nswbar.asn.au/docs/webdocs/ar121.pdf>. [↑](#footnote-ref-13)
14. New South Wales Bar Association, *Appointments* (2018) < https://www.nswbar.asn.au/the-bar-association/appointments>. [↑](#footnote-ref-14)
15. P Nygh, ‘Introduction’, *Guide to the Family Law Act 1975* (Butterworths, 3rd ed, 1982) 1, [101]. [↑](#footnote-ref-15)
16. Ibid, 5, [111]. [↑](#footnote-ref-16)
17. *The Issues Paper*, 52, [165]. [↑](#footnote-ref-17)
18. *The Issues Paper*, 52, [166], citing Rae Kaspiew et al, ‘Evaluation of the 2012 Family Violence Amendments’ (Synthesis Report, Australian Institute of Family Studies, 2015), 16. [↑](#footnote-ref-18)
19. Australian Law Reform commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No. 89 (2000), 10. [↑](#footnote-ref-19)
20. Family Court of Australia, *Speech to the Ceremonial Sitting of the Full Court to Farewell the Honourable Justice Thackray*, 23 March 2018. [↑](#footnote-ref-20)