

27 November 2018

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: familylaw@alrc.gov.au

Dear Director

Re: Review of the Family Law System – Discussion Paper (DP 86)

Caxton Legal Centre is pleased to provide this submission in response to the Review of the Family Law System Discussion Paper 86.

Caxton provided a submission to the Issue Paper 48 on 7 May 2018.

Established in 1976, Caxton Legal Centre is Queensland's oldest community legal centre. We are an independent, non-profit organisation providing free legal advice and social work support to low income and disadvantaged clients including those experiencing domestic and family violence and family law issues. Our goals are to promote access to justice, provide free legal advice and information, empower people to address their legal problems, increase community awareness of the law, produce plain-English publications and work to change unfair laws.

Our submissions need to be read in the context of our goals. We appreciate the many competing considerations that necessarily will be brought to the table by all concerned individuals and organisations who provide a submission to this issue paper. We acknowledge local and overseas research about family law issues and processes, and the academic rigour concerning an ideal family law system. In line with our goals, we include in our submissions our preference for practical options that overcome the barriers low-income and disadvantaged people have in accessing the family law system. We promote options

that empower self-represented parties to address their family law issues in a cost-effective, supported and fair manner.

Caxton has extensive practice experience in the area of family law with some practitioners having practised in private practice, held specialist family law accreditation, worked in the family law courts, engaged in previous family law reform and provided a range of family law services for over 20 years. We also draw experience from the wide variety of family law programs our lawyers and social workers are engaged in including:

- Family Law Duty Lawyer—court-based legal advice provided five days per week at the Brisbane Registry of the Federal Circuit Court of Australia and Family Court of Australia
- Family Advocacy and Support Service—court-based legal advice and social work support five days per week at the Brisbane Registry of the Federal Circuit Court of Australia and Family Court of Australia
- legally assisted family law mediations for culturally and linguistically diverse (CALD) clients—in partnership with Family Relationships Australia, Mt Gravatt
- family law advice and casework program—day-time and evening advices and casework. Our evening advices are delivered by volunteer family lawyers
- Domestic Violence Duty Lawyer—court-based legal advice for respondents in the Domestic Violence Court, Brisbane Magistrates Court, including the provision of family law advice.

Clients who usually access our services are either court users or people who do not qualify for legal aid and cannot afford private legal services. We are a service-of-last-resort for people who are resolving their family law issues informally or who are self-representing in family law proceedings. For property settlements, our clients are usually those who are supporting a high level of debt and small property pool, and/or are the ‘working poor’ and cannot afford ongoing private representation. For parenting issues, our clients are usually those who have complex family law issues, have been denied (or would not qualify for) legal aid and/or again are the working poor who want assistance negotiating parenting arrangements or navigating the family law system, but cannot afford ongoing private representation throughout those negotiations.

1. Proposals 2-1 to 2-8

- 1.1 Supported.
- 1.2 The family law system information package should explain clearly how the family law system interacts with state child protection, and state family and domestic violence legislation.
- 1.3 The package should not only address the legal framework, services and processes. It should include easy-to-understand explanations about how the legal framework is applied in parenting and property settlement matters.
- 1.4 Information that summarises accepted research on the impact of family violence and substance abuse on children should be included in the package.
- 1.5 Information about child development and parenting arrangements that may support the child's best interests at different developmental stages should be included.
- 1.6 Self-represented litigants need access to a bank of precedent clauses and explanations for the use of these clauses. Information that assists in negotiating and documenting agreements and completing forms/affidavits is highly desirable and should be included in the information package.

2. Proposals 3-1 to 3-19

- 2.1 Supported (save for proposals 3-13, 3-14 and 3-18, which have not been considered in this submission).
- 2.2 A redrafted s 60CC should include connection to culture as a specific factor.

3. Question 3-1

- 3.1 It is our experience that self-represented parents regularly seek advice in our family law advice sessions and from our family law duty lawyers about conflict over decision making.
- 3.2 Decision-making disputes can include choice of doctors or other health professionals, babysitting and childcare choices, supervision by extended family members and extra-curricular activities.

- 3.3 There is a lack of understanding amongst self-represented litigants about who has authority to make decisions about certain matters, and whether those decisions require consultation or can be made unilaterally.
- 3.4 There is misunderstanding amongst self-represented litigants about what processes to use to incorporate consultation and to comply with orders that require joint decision making or consultation in real time when decisions need to be made.
- 3.5 Conflict over decision-making rights and responsibilities contributes to the number of contravention applications being brought.
- 3.6 Related to the misunderstanding about decision-making rights and responsibilities is a misunderstanding about what information concerning the child is to be shared. For example, health and education records that form an important basis for making decisions can be inaccessible to one parent.
- 3.7 Decision making is an emotionally laden activity. Some parents who do not have practical decision-making input, regularly seek advice about how to increase the way in which their views will be considered when important decisions are being made. They express that their feelings of being 'locked out' of important decisions impacts their view of their relationship with their child and the other parent. Other parents describe decision making to be fraught with tension and unwarranted scrutiny, and that consultation that is not practical or possible in some instances is fatiguing and raises the level of conflict between parents. Lack of clarity around decision-making responsibility exacerbates these issues.
- 3.8 Parents do not appreciate the impact of conflict and family violence on the degree to which consultation can be incorporated in decision making.
- 3.9 There should not be a prescribed list of what decisions should be made unilaterally and which ones should be made jointly or with consultation. This must be decided on a case-by-case basis.
- 3.10 There should be guidance in the *Family Law Act 1975* (Cth) (FLA) about what decisions usually fall within the notion of unilateral decision making. This could be achieved by way of Notation. A Notation containing examples would provide insight without determining the issue, which may be different from case to case.

- 3.11 The family law information package should contain information about decision-making responsibility along with information about services and processes that can be used to resolve decision-making confusion and conflict.
- 3.12 Family law court forms should be reviewed to include a non-exhaustive list of decision-making areas and corresponding decision-making responsibilities from which parents/carers can select. It would be practical for this list to include the most important decision-making areas that cause the most conflict (e.g. schooling, health, extra-curricular activities, religion). It would be practical for this list to also include choices about information-sharing authorities.
- 3.13 Technological solutions offering processes for parents/carers to engage in consultation and joint decision making should be explored.
- 3.14 There should be a requirement that the issue of decision-making and information-sharing authorities must be addressed pre-filing in family dispute resolution processes.
- 3.15 ‘Equal shared parental responsibility’ is not a phrase self-represented litigants easily understand. Advice is regularly sought about what this means, and advice provided does not necessarily translate into practical and conflict-free outcomes. ‘Decision making responsibility’ is a preferable phrase.

4. Proposal 4-1

- 4.1 Supported in principle, subject to adequate ongoing resourcing and the type of service model used to deliver a joined-up system response to family law issues.
- 4.2 Appropriate information-sharing protocols and integrated case planning should be considered as part of the Families Hubs model.
- 4.3 Assessment of legal support needs should be made by legally qualified staff.
- 4.4 Legal advice and advocacy should be accessible for all participants in family dispute resolution processes.

5. Proposal 4-2

- 5.1 Supported.

6. Proposal 4-3

- 6.1 Families Hubs should include workers from the Department of Human Services (parenting payments and child support).
- 6.2 Families Hubs should include workers from state child protection bodies.
- 6.3 Community legal centres (CLCs) are best placed to provide joined-up co-located legal assistance services including discrete task assistance, which is the core work of CLCs.

7. Proposal 4-4

- 7.1 Supported.

8. Proposal 4-5

- 8.1 Supported.
- 8.2 Caxton’s experience providing FASS services is that self-represented litigants are very focused on receiving legal advice but not social supports at first and subsequent mentions. Uptake of the service would be improved if referrals to the service were made prior to court dates (e.g. when family system users first attend registries to obtain information or file documents). Referrals from community services prior to court dates should also be encouraged.
- 8.3 The requirement for the issues to be ‘urgent’ before a referral to FASS can be made should be removed.
- 8.4 The scope of issues are broad in family law matters and are not limited to domestic violence. The issues include drug and alcohol, mental health, and financial and homelessness matters. Expanding the FASS service to clients who have other complex needs is supported.
- 8.5 Having specialist legal and support services for clients who are affected by family violence and those who have used family violence is supported.

9. Proposal 4-6

- 9.1 Supported.

9.2 Expanding this FASS model to provide case management would, for clients predominately focused on their legal issues at court, increase opportunities for engagement and supports that are relevant to the next court appearance.

9.3 Case management should be specifically extended to perpetrators of family violence because of the limited availability of programs and support services for respondents.

10. Proposals 4-7 and 4-8

10.1 Supported.

11. Proposal 5-3

11.1 We acknowledge the general notion that a court application should be the last step for individuals seeking to resolve a property/financial dispute. However, if the legislation is amended to require parties to attempt family dispute resolution, consideration needs to be given to other factors such as the availability and costs of service providers.

11.2 It would be essential to significantly increase funding to dispute resolution service providers and affordable legal services, including community legal centres, particularly in cases where litigants cannot afford to pay for private service providers.

11.3 Legally assisted dispute resolution is the preferred dispute resolution model for resolving property settlements. There needs to be increased funding for legally assisted family dispute resolution (FDR) for disadvantaged family law system users.

11.4 There needs to be increased funding to assist individuals to be able to formalise any agreements into legally enforceable agreements.

11.5 The list of exceptions to the requirement for pre-action FDR are too broad and vague to apply. It is preferable to limit the exceptions and provide increased funding to increase supports that address the issues of concern. For example, an imbalance of power or the complexity of the asset pool could be addressed with a legally assisted FDR model. Complex asset pools are not a reason on their own to form an exception to FDR. An experienced mediator/arbitrator is able to manage more complex property settlement disputes.

- 11.6 Disclosure requirements for pre-action FDR should be set out clearly in the FLA. The current categories of documents are not necessarily relevant. The list of required disclosure documents should relate to the type of assets the parties own and the issues in dispute about them. The categories should be clear to self-represented litigants.
- 11.7 Non-disclosure in the course of preparing for FDR could form the basis of a separate right to apply for directions from a registrar.

12. Proposal 5-7 and Question 5-2

- 12.1 Setting out the penalties for failure to comply with disclosure requirements may encourage family law users to ensure they are fully discharging their obligations. On the other hand, it creates a considerable risk for self-represented or vulnerable individuals if they have not received advice or do not have the capacity to comply with disclosure requirements. It would be important for the court to maintain discretion about any penalties. Criminal implications should be avoided.
- 12.2 Where there is a small amount of property in dispute, to impose a penalty may reduce the available property pool or income available to service debts. Staying or dismissing an application would prolong the financial relationship between separating parties who are trying to divide assets.
- 12.3 Consideration should be given to broadening the role of registrars to check compliance.
- 12.4 The Australian Government should work with industry and government agencies to reduce the costs in obtaining information under subpoena.
- 12.5 A disclosure regime that provides mechanisms for courts to be provided with information from Australian government departments, such as the Australian Taxation Office, would assist with disclosure.

13. Proposals 5-9 and 5-10

- 13.1 Supported.

14. Proposals 6-1 and 6-2

14.1 Supported.

15. Proposal 6-3 and 6-7

15.1 Supported as to the simplified small property claims process list.

15.2 A specialist family violence list is not supported. The focus should be on creating clearer triaging and case-managed approaches for matters involving the full range of complexity in family law matters including family violence, mental health, substance addiction, allegations of child abuse, capacity issues and high conflict. All professionals in the family court system should have specialist family violence knowledge and experience.

15.3 Specialist Aboriginal and Torres Strait Islander services and communities ought to be consulted as to what model would best assist the hearing of family law issues for Aboriginal and Torres Strait Islander clients.

16. Proposals 6-4 to 6-6

16.1 Supported, provided family law system users who cannot afford a lawyer are able to access legal advice prior to and during the process.

16.2 A simplified court process for smaller property pools should be joined up with opportunities for legal advice for those who are self-representing, and at stages of the process where the advice would be of most value. Refer to our prior submissions about the need for increased funding for discrete task assistance/legal advice at certain stages in the family law court process including advice that assists to prepare for a conciliation conference. Increased funding to community legal centres that already provide discrete task assistance, and which is stated to be used for legal services that relate directly to a simplified small property pool court process, would increase the prospects of a just and fair outcome especially for clients who experience disadvantage.

17. Question 6-2

17.1 There are inherent risks to clients of early fact-finding hearings.

- 17.1.1 There is a real possibility that early fact-finding hearings about alleged family violence would require parties to give evidence under cross-examination three times: at the early fact-finding hearing, at local court domestic violence hearings and at a final family court hearing.
- 17.1.2 Early fact-finding hearings for an aggrieved who has only just left an abusive relationship may be too soon if other specialist services are not in place to assist and support the aggrieved.
- 17.1.3 A finding of fact in relation to the existing history of abuse or violence without the contemporaneous making of orders to protect the aggrieved or children from recent and ongoing abuse would provide a disjointed response to safety.
- 17.1.4 Findings about allegations of abuse or domestic violence as a targeted fact-finding exercise without consideration of broader and related issues, such as mental health, may lead to siloed outcomes derived from findings of fact made in a narrow process that do not benefit ultimate decisions made about the best interests of children.
- 17.1.5 Clients unable to afford legal representation and unable to access joint property or resources would be disadvantaged in an early fact-finding hearing.
- 17.1.6 Early fact-finding hearings that precede investigations of allegations of abuse by state child protection authorities may be premature in terms of having all available evidence.
- 17.2 The benefits of early fact-finding hearings include:
 - 17.2.1 resolving issues of risk for the making of appropriate interim parenting orders
 - 17.2.2 case management processes for complex matters that may benefit from early findings of fact
 - 17.2.3 reduction in delays for resumption of contact that has been suspended pending an assessment of risk
 - 17.2.4 findings of fact that may support early intervention strategies (e.g. making orders that require one of the parties or child to attend therapy)

- 17.2.5 reduction in the number of contravention applications filed for contact withheld due to allegations of risk.
- 17.3 An early fact-finding process designed to limit risks could include:
 - 17.3.1 ensuring clients are joined up with domestic violence support services prior to triaging into a fact-finding hearing
 - 17.3.2 early fact-finding hearings that should include a power to make domestic violence orders under state family and domestic violence legislation or trigger a process for the making of those orders
 - 17.3.3 adequate funding to legal aid bodies and community legal centres to provide legal advice, assistance and representation to clients preparing for the early fact-finding hearing
 - 17.3.4 consideration to make early fact-finding hearings private. Domestic violence proceedings in state courts are usually closed-court hearings
 - 17.3.5 consideration regarding the manner in which evidence is given including by video-link, in a closed-court session or with support from a support worker
 - 17.3.6 early fact-finding hearings to only take place in limited circumstances, where it is necessary to make findings of fact to provide an accurate assessment of risk, and where it is likely to result in a substantial change to a child's arrangement on an interim basis
 - 17.3.7 early fact-finding hearings to only take place where there is a sufficient factual basis to proceed including the availability of relevant evidence.
- 18. Proposal 6-9**
 - 18.1 Supported, provided sufficient funding is also provided to legal aid bodies and community legal centres for advice about post-order parenting issues.
- 19. Proposal 6-12**
 - 19.1 Supported.

20. Proposals 7-1 and 7-2

20.1 Supported.

21. Proposals 7-3 to 7-11 generally

21.1 A set of child-inclusive principles that underpin how children participate in family law proceedings should be developed and should include the following statements (this is a non-exhaustive list):

21.1.1 Parents, not children, bear the responsibility for making decisions about parenting issues.

21.1.2 Parents should refrain from discussing with and involving children in making decisions about parenting issues.

21.1.3 A child's genuinely held wishes are relevant to making decisions about what is in the child's best interests.

21.1.4 Whether or not and how a parent has directly or indirectly influenced the wishes of a child is relevant to making decisions about what is in the child's best interests.

21.1.5 The wishes of a child, the age at which they are expressed and the veracity with which they are held may be determinative of what is in the child's best interests.

21.1.6 Whether or not and how a child participates in family dispute resolution and the court process is to be determined in each case in the best interests of the child.

21.1.7 Unless in exceptional circumstances, children should not directly participate in family court hearings.

21.1.8 Information about the nature of a child's relationship with their parents/others is relevant to whether or not and how their wishes are to be taken into account.

21.1.9 Whether or not and how independent information about a child's wishes is to be obtained is to be determined in each case in the best interests of the child.

21.1.10 A person who conducts child-inclusive family dispute resolution, mandated therapeutic counselling, observations of supervised contact and family report interviews has a responsibility to explain to the child where appropriate how the information will be used.

21.1.11 Children should not be exposed to conflict that results in their emotional, psychological or physical harm.

22. Proposals 7-3 and 7-4

22.1 Not supported.

23. Proposal 7-5

23.1 Supported to the extent that it is congruent with the above principles.

24. Proposals 7-6 and 7-7

24.1 Supported.

24.2 Consideration should be given to the appointment of an independent children's lawyer (ICL) in all parenting matters whose function includes identifying risk and making recommendations based on evidence obtained about how to address risks (if any).

25. Proposal 7-8 to 7-11

25.1 Not supported.

25.2 A child advocate represents a duplication and complication of systems required to support safety and best-interest decision making for a child.

25.3 In child protection proceedings in Queensland, a child can have: (a) a separate representative—best interest lawyer; (b) a child advocate—child's views and wishes; and (c) a direct representative—acts on instructions. This type of model is unsustainable from a funding perspective and cumbersome in practice.

25.4 Training and skills required of an ICL should be the focus of improvement including how ICLs are to work holistically with the child's school, state welfare agencies and other support services.

26. Question 7-2

- 26.1 A new body should be created to manage and coordinate the training and appointment of all ICLs.
- 26.2 Our lawyers, including a lawyer with long-standing experience as an ICL, noted that the current situation of each Legal Aid Office being responsible for appointments has resulted in many ICLs being appointed who do not have adequate training, maturity, experience or the right attitude towards the proactive and delicate role they must undertake to assist the child, family and the court.
- 26.3 Consideration should be given to lawyers nominating to practising exclusively as ICLs as a specialty practice area.
- 26.4 ICLs should be appointed as early as possible when an application is filed.
- 26.5 ICLs identified as having a particular level of expertise should be appointed to complex family law cases.

27. Question 7-3

- 27.1 The role of the ICL should continue. Communication between the ICL and the children should remain confidential with the usual exception relating to harm to the child.
- 27.2 The ICL should not become a witness in a matter.

28. Proposal 7-12

- 28.1 It should be within the role of an experienced ICL, with the assistance of a family consultant or the child's therapist, to consider in appropriate circumstances the child communicating with judicial officers directly, how that communication ought take place and whether it should be communicated to the other parties.
- 28.2 The ICL should communicate to the child that their views and wishes are not the only issues the judicial officer must consider.

29. Proposals 9-1 to 9-8

- 29.1 Supported.

- 29.2 Consideration should be given to the fact that people with disabilities coupled with other barriers to accessing justice (e.g. being elderly or from a CALD background) require support throughout the entire duration of the proceedings.
- 29.3 A supported decision-making framework should include:
- 29.3.1 the development of a best-practice framework for family law proceedings
 - 29.3.2 access for the support person to legal advice
 - 29.3.3 social work interventions and evidence from health professionals to identify how the disability impacts on capacity and recommendations for social and legal supports that promote and increase capacity to engage in legal processes (if possible).
- 29.4 Consideration should be given how to include participation in proceedings of services who already provide supported decision-making advocacy to persons with disability and decision-making support issues. Additional funding to community legal centres and legal aid bodies with multidisciplinary models (social worker-lawyer) and advocacy services such as ADA Australia would provide a mechanism for the appointment of supporters.
- 29.5 Training should be made available to the family law system workforce (including lawyers and related services) to be better equipped to identify clients with decision-making support needs either prior to an application is filed or early in the proceedings.
- 29.6 Training for FDR practitioners and the inclusion of supporters in FDR and pre-action procedures should be made available.
- 29.7 Consideration should be given to the FLA containing a statement about the human rights of people with disabilities similar to those contained in sch 3 of the *Power of Attorneys Act 1998* (Qld).
- 29.8 Consideration should be given to supporters having immunity for personal liability for costs and how that interacts with state legislation that imposes liability for persons appointed under an enduring document.
- 29.9 The FLA should also include provisions for the vetting and review of a supporter, should there be issues.
- 29.10 A supporter should only be appointed with the consent of the person being supported to the extent their views and wishes can be obtained.

- 29.11 The FLA should contain provisions about the suitability of a supporter including a declaration from the supporter that there is no conflict of interest.
- 29.12 The FLA should include provisions that require available evidence relating to decision-making support to be filed with an initiating application.
- 29.13 Consideration should be given to provisions that enable the court to request a report from the Public Trustee or Public Guardian in each state as to the decision-making support needs of a person and/or to be joined in the proceedings.
- 29.14 Consideration could be given to whether an application seeking the appointment of a litigation representative be served on local state and territory Public Trustee and Public Guardian bodies that require their attendance at the first return date.
- 29.15 The FLA should include provisions that require the court to consider making directions that support recommendations made by social workers or health professionals about how to best promote the person requiring supports to be involved in the proceedings (e.g. leave to participate by video link from home).
- 29.16 The FLA should include provisions that include the right of the person to participate in the proceedings to the extent they can, irrespective of the appointment of a litigation representative noting that decision-making capacity can be subject or domain specific.

This submission was prepared by lawyers and social workers from the Family, Domestic Violence and Elder Law Practice of Caxon Legal Centre Inc. Unfortunately, due to limited resources and the short period of time available to consider the Discussion Paper, carry out consultations and draft this submission, we had to limit our consideration to certain issues.

For further information, please contact Cybele Koning on [REDACTED]

Cybele Koning

Director

Family, Domestic Violence and Elder Law Practice

Caxton Legal Centre Inc.