Shoalcoast Community Legal Centre Inc
Legal Advice & Advocacy
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SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION BY SHOALCOAST COMMUNITY LEGAL CENTRE:

REVIEW INTO THE FAMILY LAW SYSTEM: DISCUSSION PAPER (DP 86)

20 November 2018

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About Shoalcoast Community Legal Centre

1. Shoalcoast Community Legal Centre (Shoalcoast) is a generalist legal service established in 1999. Based in Nowra on the South Coast of New South Wales, we assist clients from Berry in the North, to Eden in the South. Services are primarily delivered by telephone with numerous face-to-face outreach services delivered to key communities across our catchment area.

2. Our mission is to provide an accessible, professional legal service, responsive to the needs of those most disadvantaged and which promotes just and lasting solutions to legal and social issues in our community.

3. In addition to a significant proportion of calls to our generalist phone advice service being in respect to family law issues, Shoalcoast has a number of specialist projects that are directly relevant to the ALRC inquiry including the Indigenous Family Law Project (IFLP), Family Relationship Centre (FRC) Legal Partnership, Legal Aid NSW CARE Partnership, the Family Violence/Family Law Project and the Regional Women's Outreach Program (RWOP). We provide initial parenting advice and ongoing representation for certain client groups. Generally, our assistance in family law property matters is limited to procedural property advice.

Introduction

4. Shoalcoast welcomes the opportunity to respond to the ALRC Review of the Family Law System: Discussion Paper (DP 86). Shoalcoast did not make a submission to the initial Issues Paper (IP 48) but did endorse the Community Legal Centre NSW (CLCNSW) Submission (#34).

5. This submission addresses the proposals and questions in order as listed in the Discussion Paper. We have not addressed all matters raised in the Discussion Paper, but have focused on those pertinent to our practice based on our experience as a community legal centre servicing remote, rural and regional, financially and socially disadvantaged clients.

General Observations

6. Shoalcoast welcomes the review into the Family Law System and many of the proposals made by the ALRC. We note the effectiveness of many of the proposals requires adequate resourcing, a problem that has plagued the current system.

7. We also note, whilst not part of the original terms of reference, the Discussion Paper has been released at a time the Federal Government is proposing structural reform of the Federal Circuit Courts and Family Courts. Whilst we appreciate submissions on this issue should be directed to the Senate Standing Committee, we submit this is an issue that the Federal Government should refer to the ALRC for consideration as part of this substantive review and are concerned not only about the loss of the Family Court's specialisation should the merger proceed, but also how the merger will impact the implementation of the final proposals by the ALRC.

Response to Questions and Proposals

Question 3–1 How should confusion about what matters require consultation between parents be resolved?

8. Shoalcoast welcomes simplification of the concept of "equal shared parental responsibility" to a concept of "decision-making responsibility". We note under the current legislation consultation is only required on major long-term issues, not day-to-day decisions and this should continue for any changes to the concept of "equal shared parental responsibility" considered by the ALRC. We note the *Family Law Act 1975 (Cth)* (the '*Act*') currently provides an extensive explanation as to what is considered to be a "major long-term issue" and any restructure of the Act should maintain this information in an easily accessible way.

Question 3–4 What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to: greater use of registrars to consider urgent applications for interim spousal maintenance; administrative assessment of spousal maintenance; or another option?

9. We welcome the proposal for improved accessibility to spousal maintenance, particular if the measures proposed can assist self-represented litigants. There is frequently an imbalance between the financial control and status of separating parties, which is often gendered, disproportionably impacting female clients. In our experience, this can prevent or delay a party from seeking legal advice, as the affected party will often be ineligible for a grant of legal aid and the option of alternative payment arrangements with private practitioners, such as deferred payment plans, are often limited or non-existent in rural, remote and regional areas.

10. A simpler process to access spousal maintenance, supported by an information campaign raising awareness about the ability to pursue spousal maintenance, would provide greater financial support for these clients, as well as provide means to obtain ongoing legal advice and representation. However, we also note, the matters where a person has sufficient capacity to meet spousal maintenance obligations, often involve complex financial and legal structures that belie the true financial position of a party, which could result in a simple administrative assessment deeming the person as not having the capacity to meet spousal maintenance payments. In these instances, a process similar to the special circumstances re-assessment for child support payments may need to be instituted, although this would obviously result in delays to the assessment of spousal maintenance in these particular matters.

Case Study 1

11. Belinda*[1] worked part-time hours on a casual basis due to health issues and had fulltime care of the parties four children. Darren, Belinda's husband, was a senior partner of his own business based in the CBD, but structured his income so that his taxable income was negligible. Darren was refusing to pay child support or comply with the party's informal agreement to service a number of joint debts post-separation. The party's relationship prior to separation was subject to controlling and coercive behaviour and financial abuse which worsened post-separation. Belinda became aware via the children that post-

[1] *Not the client's real name.

separation Darren had purchased a penthouse apartment in a prestigious CBD apartment building. Belinda was falling behind on bills and relied on income from her eldest child's after school job to provide food for the family. A simple administrative assessment in this instance may not identify Darren's true financial position and the ability to seek special or more in-depth assessment may be needed.

Question 5–1 Should the requirement in the Family Law Act 1975 (Cth) that proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship be revised?

12. Anecdotally, it is our experience that delays in instigating property proceedings often lead to increased complexity, particularly where married parties have been separated for a significant amount of time without getting divorced or arranging property matters. The increased complexity and assessment of post-separation contributions reduces the ability of parties to self-represent in such matters, and there are risks of impacts on the property pool from post-separation debts where there are significant delays in proceedings. We note, leave can be sought in matters were significant hardship would be caused if leave were not granted.

13. In the context of encouraging more meaningful engagement with family dispute resolution process and ensuring genuine attempts at resolving property matters are undertaken prior to initiating court proceedings, we acknowledge there is the potential for the property time limits to expire. Perhaps in such cases, attaching evidence with the application of genuine engagement with a dispute resolution process which contributed to the expiration of the limitation periods could be sufficient to trigger a limited extension of the time limits.

Question 5–2 Should the provisions in the Family Law Act 1975 (Cth) setting out disclosure duties be supported by civil or criminal penalties for non-disclosure?

14. We are aware of a number of clients, typically, although not always, female clients, who are significantly disadvantaged by the other party failing to comply with their disclosure obligations. This often results in increased legal costs for both parties, as it results in legal representatives needing to engage in protracted correspondence and searches in an attempt to encourage the other party to comply with their obligations for full and frank disclosure.

15. There can often be doubt that the other party has complied with their obligations, and tracing assets back can be problematic without some sort of knowledge or indication of their existence gleaned from other disclosure documents. Rather than persevere with the process, client's will often accept a poorer property settlement as a result of this failure to disclosure due to fatigue with the process and a lack of financial resources to continue property proceedings (with the party failing to disclose financially strong enough to wait out the result).

16. We therefore support measures to strengthen mandatory financial disclosure, however, amendments should not inadvertently penalise the other party who has complied with their disclosure obligations.

Proposal 6-3 Specialist court pathways should include a:

- **A simplified small property claims process;**

- **A specialist family violence list; and**
- **The indigenous list**

17. We welcome the proposal for specialist court pathways but emphasise a need to ensure the roll out of such pathways includes provision, or circuits, of these lists to regional, rural and remote, as well as urban areas.

18. A simplified small property claims process, would greatly assist many of our clients, many of whom choose not to pursue property settlement as the cost of legal representation would exceed the value of the asset pool. The development of specific resources to support self-represented litigants through a simplified process would be most welcomed. Appropriate checks and balances would be needed for such a process to ensure that vulnerable parties would not be exploited.

19. Due to the high numbers of cases that identify family violence, we submit there should be resourcing across the whole court to identify and triage family violence issues, not just a limited number of specially trained judicial officers or lists or it may result in another barrier to family violence victims in accessing justice with others. A specific, properly resourced, list for high risk family matters (Proposal 6-7), would also be welcomed in addition to an overall focus and awareness of family violence throughout the family law system.

20. We believe expansion of the indigenous list would greatly facilitate access to justice to Aboriginal and Torres Strait Islander clients. We recognise the importance of culturally safe practices and how this can provide comfort and trust in legal processes and note the importance of consulting with local communities and organisations before expanding the list in a particular area.

Case Study 2

21. We note that acknowledging culturally safe practices can have a profound effect on clients. In a recent family law mediation, our Aboriginal client commenced the mediation by undertaking an acknowledgement of country. The client reported feeling more comfortable with the mediation process, and that culture was at the forefront of everyone's minds during the mediation.

Question 6–1 What criteria should be used to establish eligibility for the family violence list?

22. We support the suggestions at 6.32 of the Discussion Paper and would caution against any limitation on assessment for the list on the basis of a narrow, incident-based approach given the complex and nuanced nature of family violence. We further support early and ongoing risk assessment by all professionals to identify risk of family violence and identify matters to be triaged for a family violence specific list. This would require ongoing and regular training provided for all legal practitioners, court staff, family consultants and judicial officers of all levels. We also reiterate our earlier comment of ensuring accessibility to a family violence list by regional, rural and remote communities.

23. We also support multiple approaches to assessment for each matter, noting there is evidence that self-assessment alone is insufficient. We refer to the 2014 *AIFS Evaluation of the 2012 Family Violence Amendments* which found 38% of respondents did not disclose family violence or safety concerns to Family Law professionals, 46% did not disclose in Family Dispute Resolution and 22% did not disclose to the courts.

Question 6–2 What are the risks and benefits of early fact finding hearings? How could an early fact finding process be designed to limit risks?

24. We welcome earlier, meaningful, court dates for all family law matters to reduce the risk of further family violence. This will require all parties being given adequate access to legal advice and representation where possible prior to attending hearings.

Proposal 6–12 The Australian Government should ensure that all family court premises, including circuit locations and state and territory court buildings that are used for family law matters, are safe for attendees, including ensuring the availability and suitability of: waiting areas and rooms for co-located service providers, including the extent to which waiting areas can accommodate large family groups; safe waiting areas and rooms for court attendees who have concerns for their safety while they are at court; private interview rooms; multiple entrances and exits; child-friendly spaces and waiting rooms; security staffing and equipment; multi-lingual and multi-format signage; remote witness facilities for witnesses to give evidence off site and from court-based interview rooms; and facilities accessible for people with disability.

25. We welcome this proposal and note the need for greater provision of family court circuits in regional, rural and remote locations, including the far south coast. We refer to CLCNSW submission (#34) to the Issues Paper and note that better access and availability to AVL facilities should also be a consideration to facilitate participation and access to the family courts, and potentially, to specialist lists.

Question 8–1 What are the strengths and limitations of the present format of the family violence definition?

26. We submit the current definition of family violence is too narrow and there should be more scope under the definition to recognise all forms of family violence. We refer to the definition of family violence under the National Domestic and Family Violence Bench Book 'Understanding family violence' at 3.1 for guidance.[2] A balance needs to be struck from being overly prescriptive, to providing enough guidance to litigants about the extensive and nuanced forms of family violence.

27. Ongoing risk assessment and understanding of the dynamics and danger that flows from certain abusive behaviours is of particular importance and could help the system take steps to prevent fatalities in families involved with the family court.

Question 8–2 Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

28. We support ARLC proposal 8-3 to amend the definition of family violence to include systems abuses. We further support the CLCNSW submission (#34) to the inquiry that the definition of family violence be broadened and additional types of abuse be included including systems abuse, technology facilitated stalking and harassment, as well as emotional and psychological abuse. For plain English definitions we again refer to section 3.1 of the National Domestic and Family Violence Bench Book referenced above.

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[2] See link http://dfvbenchbook.aija.org.au/terminology/understanding-domestic-and-family-violence/

Question 8–3 Should the requirement for proceedings to have been instituted 'frequently' be removed from provisions in the Family Law Act 1975 (Cth) setting out courts powers to address vexatious litigation? Should another term, such as 'repeated' be substituted?

29. Shoalcoast is supportive of the proposal to amend the requirement for proceedings to have been instituted "frequently". "Repeated" could be an appropriate alternative or a broader discretion could be made available to the judicial officer to apply a threshold that, not only are the proceedings a necessary application, but consideration as to whether proceedings could be avoided, or, is the application being used as a tactic by the applicant to further harass, intimidate or threaten the respondent.

Question 8–4 What, if any, changes should be made to the courts' powers to apportion costs in s 117 of the Family Law Act 1975 (Cth)?

30. Shoalcoast is not in support of changing the courts' powers to apportion costs in s117 of the Act. We support a wider discretion to judicial officers to dismiss unmeritorious applications and to make orders it sees fit where parties have not complied in a timely manner.

Question 9–2 How should a provision be worded to ensure the definition of family member covers Aboriginal and Torres Strait Islander concepts of family?

31. We welcome the proposal that the definition of family member be expanded to better encapsulate the concept of family for Aboriginal and Torres Strait Islander communities. We note that the concept of family varies by country, and even within individual families and would welcome a definition that is flexible enough to accommodate the different concepts of family in the community.

Case Study 3

32. For example, Paula* was raised by her great aunt on her father's side. Paula referred to her grant aunt as "Nan" and was considered by the great aunt as one of her "grandchildren". Paula further referred to her second cousins as "aunt" and "uncle".

Question 10–6 Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?

33. We submit that a cultural report should be mandatory in parenting proceedings, particularly where one of the parties is not indigenous. Where both parties are indigenous, the need for such a report may not necessarily be a requirement, although may be needed where there are significant differences in country or parent's identification with their cultural heritage. We welcome the ALRC proposal that the report includes a cultural plan regarding the child's ongoing connection with kinship networks and country. This will require report writers to have knowledge of the culture and community relevant to the individual children in the matter.

Question 11–1 What other information should be shared or sought about persons involved in family law proceedings? For example, should:

- **State and territory police be required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence?**

34. Weapons of any kind, registered and registered, are a risk factor where family violence is present and information sharing of this kind may be beneficial. There is some risk of lack of self-reporting in this approach by the person seeking the issue or renewal of a gun licence and we question what the police response would be where family law proceedings are on foot. However, this information being fed-back to the family court may assist the family court look at patterns of violence and elevate risk assessments.

- **State and territory legislation require police to inform family courts if a person makes an application for a gun licence and they have disclosed they are involved in family law proceedings?**

35. See above.

- **The Family Law Act 1975 (Cth) require family courts to notify police if a party to proceedings makes an allegation of current family violence?**

36. Shoalcoast is concerned that such a requirement would in fact create another barrier to family violence victims disclosing incidents of violence. Many victims already do not disclose for fear of how it will impact upon children and desire not to antagonise a perpetrator due to the ongoing need to see the perpetrator for child contact visits.

- **The Family Law Act 1975 (Cth) give family law professionals discretion to notify police if they fear for a person's safety and should such professionals be provided with immunity against actions against them, including defamation, if they make such a notification?**

37. Shoalcoast notes that exceptions already exist under the *Uniform Legal Profession Conduct Rules* at rule 9.2.5 that permit notification to the police in circumstances of risk of imminent serious physical harm, and would not necessarily support an expansion of right or responsibility to notify the police under the Act.

38. An alternative option to elevate the safety of client's experiencing family violence, would be through the introduction of key competencies and additional training for legal practitioners in how to identify and make notifications pursuant to rule 9.2 as it can be a very difficult decision to have to make.

Question 11–4 If a child protection agency has referred a parent to the family courts to obtain parenting orders, what, if any, evidence should they provide the courts? For example, should they provide the courts with any recommendations they may have in relation to the care arrangements of the children?

39. We support information sharing from child protection agencies to the family courts.

Contact Information

40. We appreciate this opportunity to contribute to the review and can be contacted for further comment if required on 4422 9529 or info@shoalcoast.org.au.