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Parliament of Australia
Joint Select Committee on Australia's Family Law System

Submission

16 December 2019

Authorisation

This submission has been authorised by the NFAW Board

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Joint Select Committee on Australia's Family Law System

This submission is being made by The National Foundation for Australian Women (NFAW).

NFAW is dedicated to promoting and protecting the interests of Australian women, including intellectual, cultural, political, social, economic, legal, industrial and domestic spheres, and ensuring that the aims and ideals of the women's movement and its collective wisdom are handed on to new generations of women. NFAW is a feminist organisation, independent of party politics and working in partnership with other women's organisations.

The Family Law system affects women and men in different ways; it is not gender neutral. This submission responds to the terms of reference through a gender lens.

Recommendations:

1. The Government should be requested to respond to the recommendations of the ALRC and this response should be included in the deliberations of the Committee
2. The Parliamentary Committee should consider and refer to the recommendations of the ALRC Review of the Family Law System before making further recommendations.
3. All members participating in this Parliamentary Inquiry should be required to participate in family violence training to ensure that they understand the context within which Family Court matters are determined.
4. The ALRC recommendation to establish Family Courts in all state and territory jurisdictions should be considered.
5. Information sharing systems between all state and territory jurisdictions must be developed and implemented.
6. The proposal to merge the Family Court with the Federal Circuit Court should be abandoned
7. Funding for the Family Court is inadequate, and must be increased to ensure that the Court can deal with matters in a timely manner.
8. Legal assistance and other support services, including services available for interventions, need to be adequately funded to ensure that all parties, not just those with resources to fund legal assistance, have access to justice; including but not limited to:
 - a. the National Partnership on Family Advocacy and Support Services.
 - b. the Health Justice Partnerships.
 - c. Legal Centres specialising in financial abuse establish a partnership with financial institutions to develop training materials to recognise and address financial abuse.
9. The recommendations of the ALRC in respect of a presumption of equal contributions in property matters be endorsed, subject to the Court being able to make adjustments where the outcome is manifestly unjust.
10. Division of superannuation be simplified by:
 - a. Ensuring that the ATO is able to disclose details of superannuation holdings to the Family Court
 - b. Reviewing the circumstances in which a superannuation "flagging" order is allowed
 - c. Allowing the appointment of an independent trustee to a self-managed superannuation fund where required to ensure the preservation of assets.

Discussion:

NFAW notes that the Australian Law Reform Commission published its final report on the Family Law System¹ in March 2019. In preparing this report the ALRC consulted widely and considered the views of experts in the operation of the Family Court over an 18 month period.

The ALRC made 60 recommendations to improve the operations of the Family Court, in the following categories:

- Closing the Jurisdictional Gap
- Children's Matters
- A Simplified Approach to Property Division
- Encouraging Amicable Resolution
- Arbitration
- Case Management: Efficiency and Accountability
- Compliance with Children's Orders
- Support Services in the Courts
- Building Accountability and Transparency
- Legislative Clarity
- Secondary Interventions

We are of the view that the terms of reference of this Parliamentary Inquiry substantially overlap the work done by the ALRC, and the Parliamentary Inquiry should not have been initiated until the Government has responded appropriately to the recommendations of that report.

Recommendations:

1. The Government should be requested to respond to the recommendations of the ALRC and this response should be included in the deliberations of the Committee
2. The Parliamentary Committee should consider and refer to the recommendations of the ALRC Review of the Family Law System before making further recommendations.

The family law system is inherently controversial as it is dealing with emotional issues around children and property at a time when the parties are in conflict; and it is often not possible to sever a relationship with the other party, particularly where children are involved.

We note that the majority of family law matters do not engage with the Court. A minority of separating couples go to court. Of those who separate, 70% manage to work out their arrangements (children and property) without lawyers, formal dispute resolution or court. Those who do need help of lawyers and who may end up at court, are more complex – family violence allegations, drug and alcohol problems, mental health concerns and sexual abuse allegations.

In this context, it is important to ensure that children are protected from harm, whether developmental, psychological, emotional or physical. All Family Court proceedings should be expeditious and resolved efficiently to minimise the cost and other burdens to all parties, and to allow them to regard matters as settled.

¹ <https://www.alrc.gov.au/inquiry/review-of-the-family-law-system/>

We also endorse the “Safety First in Family Law” plan announced by Women’s Legal Services Australia in October 2019² to ensure that victims of family violence are protected in family law proceedings through

- A stronger response to family violence;
- Legal aid for disadvantaged clients;
- education on family violence for family law professionals;
- safe models of dispute resolution; and
- addressing the gaps between the Family Court, Family Violence and Child Protection services.

We note that these reform proposals are broadly consistent with the detailed recommendations of the ALRC report.

In particular, we urge all members participating in this Parliamentary Inquiry to undertake formal family violence training in order to properly understand the environment within which the Family Court functions, and to understand the context of the evidence and submissions that will be presented to the enquiry.

Recommendations:

3. All members participating in this Parliamentary Inquiry should be required to participate in family violence training to ensure that they understand the context within which Family Court matters are determined.

NFAW does not provide services directly to women engaging with the Family Court, however we make the following submission in relation to the policy settings that are relevant in the following terms of reference.

a. Information sharing and f. Wellbeing of Children and Families with particular reference to Domestic Violence

It is essential that information sharing across jurisdictions is improved, particularly where there is a record of family violence or where orders are made in respect of the custody or well-being of children. There have been recent improvements with national recognition of Family Violence Orders through the filing of notices of risk, but these improvements were well overdue.

The Commonwealth must work closely and effectively with State and Territory Ministers to ensure the foundations are in place to achieve reductions across Australia. An Australian woman’s freedom from domestic violence and sexual assault should not be determined by which state she lives in. Violence against women does not stop at state borders –and it is critical that the Commonwealth facilitates, encourages and invests in collaboration and joint work.

Commonwealth policies and funding for housing, remote indigenous policy and programs, reforms to family law, and other matters are critical to effective state government action. Cooperation and sharing ideas between the Commonwealth, State and Territory governments will be critical to effective action especially for smaller states and territories which do not have the same level of resources.

² [http://www.wlsa.org.au/campaigns/safety_first_in_family_law#Safety First in Family Law Plan announced today](http://www.wlsa.org.au/campaigns/safety_first_in_family_law#Safety%20First%20in%20Family%20Law%20Plan%20announced%20today).

For both victims and perpetrators, it is critical that the Commonwealth encourage collaboration and joint work. Cooperation and sharing ideas will be critical especially for the smaller states and territories that do not have the same level of resources. The Commonwealth must work closely and effectively with State and Territory Ministers to ensure the foundations are in place to achieve reductions for the nation overall.

All Australian governments (whatever their politics) need to collaborate closely. The Commonwealth has demonstrated across its history that it has a range of mechanisms which can be used to both encourage and require co-operation including economic measures and financial incentives. The Commonwealth has a number of different mechanisms it uses to encourage State governments to adopt and deliver Commonwealth priorities. It is time for the Commonwealth to use these levers.

Recommendations:

4. The ALRC recommendation to establish Family Courts in all state and territory jurisdictions should be considered.
5. Information sharing systems between all state and territory jurisdictions must be developed and implemented.

c. Structure of the Family Court and e. Effective Delivery of Services

NFAW is opposed to the proposed merger of the Family Court and the Federal Circuit Court. We acknowledge that there are lengthy delays in access to the Court, however we do not believe that the proposed merger will resolve the issue. It will lead to a deskilling of the specialist services and expertise currently associated with the Family Court.

We are also opposed to the suggestion that the specialist Family Court be replaced by a tribunal of citizens. Such a tribunal would not have the expertise necessary to adjudicate complex matters of law, which often involve consideration of “family violence, mental health, and substance abuse” (Diana Bryant, 2016) and this lack of expertise would result in longer delays to resolve matters.

Successive governments have failed to deliver proper funding for the family law courts. This is at the heart of problems the courts have in meeting increasing demand. The government has ignored the recommendations of its own inquiries about this (eg the KPMG report in 2014) and even the PriceWaterhouseCooper report that was used to justify the idea of the merger of the courts, said funding problems continued to be an issue.

It is not appropriate for the Government to tie resourcing of the Family Court to the proposed merger. The failure by this government to address the resourcing crisis means families will continue to suffer and languish in courts that cannot respond to their needs in an appropriate fashion.

We refer the Committee to the ALRC report which recommends that the Federal Court establish state and territory family courts in each jurisdiction. The experience in Western Australia, which has retained a separate Family Court, has shown that this can facilitate legal proceedings.

We remain concerned about the lack of funding to assist vulnerable parties in family law disputes. Funding cuts to Legal Aid, Community Legal Centres and frontline domestic violence services can leave clients unrepresented when arguing matters related to family law and property settlements, and this can result in matters being delayed or returning to the Court for redetermination. The number of unrepresented parties appearing before the Court not only results in an asymmetry of

information putting the unrepresented party at a disadvantage, but increases the burden on the Court as it slows down the processes of the Court.

Legal assistance and other support services, including services available for interventions, need to be adequately funded to ensure that all parties, not just those with resources to fund legal assistance, have access to justice. NFAW recommends that funding be continued for the National Partnership on Family Advocacy and Support Services.

The model of incorporating legal assistance into other health services accessed by victims of domestic violence is effective at reaching people who otherwise may not access legal assistance. We note that Health Justice Partnerships operated by Community Legal Centres and some Legal Aid Commissions across Australia have been effective in terms of addressing domestic violence because they get to clients otherwise not reached because of the health care setting. We would advocate for funding the HJP to be increased in a way that builds on existing partnerships.

Specifically, we agree with the ALRC recommendation that imbalance in bargaining power take account of an imbalance in knowledge of financial arrangements. A recent report by RMIT into financial abuse between intimate partners stated that: 'Economic abuse is a form of domestic violence that has a significant impact on the health and financial wellbeing of victims, but is understudied.' Financial abuse is also difficult to measure because it is not recognised as abuse by those who are experiencing it.

NFAW recommends that the Government funding to enable Legal Centres specialising in financial abuse establish a partnership with financial institutions to develop training materials to recognise and address financial abuse.

Recommendation

6. The proposal to merge the Family Court with the Federal Circuit Court should be abandoned
7. Funding for the Family Court is inadequate, and must be increased to ensure that the Court can deal with matters in a timely manner.
8. Legal assistance and other support services, including services available for interventions, need to be adequately funded to ensure that all parties, not just those with resources to fund legal assistance, have access to justice; including but not limited to:
 - a. the National Partnership on Family Advocacy and Support Services;
 - b. the Health Justice Partnerships;
 - c. Legal Centres specialising in financial abuse establish a partnership with financial institutions to develop training materials to recognise and address financial abuse.

d. Property Disputes

The ALRC Report made a number of recommendations in respect of a simplified approach to the division of property.

The ALRC recommended that the Family Law Act be amended to presume an equality of contributions during a relationship. We support this recommendation as a presumption that can be contested where this results in an unjust outcome. It is increasingly rare to find families where one party is considered the sole breadwinner throughout the relationship, with part time work and sharing of parental duties becoming normalised work patterns. It is appropriate for this to be

recognised through the presumption of equal contribution, and an equal sharing of property of the relationship.

Superannuation does pose particular problems. Since the inclusion of superannuation in the property provisions of the Family Law Act in 2001, there is a mechanism to address future income insecurity as well as address current requirements. Superannuation held by both parties is considered part of the asset pool, however in many households the only assets held are both illiquid assets, being preserved superannuation and the family home. This does create complexities in the division of assets.

We are aware that a party to a property settlement may fail to disclose substantial superannuation assets, and it can be difficult for the other party to obtain access to that information. To this extent we welcome the announcement in the 2018 Women's Economic Security Package that the Family Court will be allowed to request information from the Australian Tax Office to facilitate the full disclosure of superannuation holdings in proceedings before the Court.

The division of superannuation is complex, with the onus on the trustee of the superannuation fund to give effect to a division of funds. Where a superannuation split is determined at the time of the property settlement the superannuation balance can be established and the matter can be resolved. However there are two circumstances where there are particular complexities.

Where the superannuation is held in a self-managed superannuation fund, the structure may need to be dismantled and the fund may need to realise assets, which are effectively under the control of parties to the relationship. There are particular concerns that need to be addressed in respect of preservation and valuation of assets.

There are also particular complexities for certain funds, particularly defined benefit funds, where the value of the superannuation interest is based on conditions applied when a condition of release is met. In such cases the superannuation account is "flagged" to ensure that the settlement is actioned at that time. However, there are relatively few of these funds remaining. It would be appropriate to limit this form of superannuation division to such funds, removing the option in respect of accumulation style funds.

Recommendations

9. The recommendations of the ALRC in respect of a presumption of equal contributions in property matters be endorsed, subject to the Court being able to make adjustments where the outcome is manifestly unjust.
10. Division of superannuation be simplified by:
 - a. Ensuring that the ATO is able to disclose details of superannuation holdings to the Family Court
 - b. Reviewing the circumstances in which a superannuation "flagging" order is allowed
 - c. Allowing the appointment of an independent trustee to a self-managed superannuation fund where required to ensure the preservation of assets.