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Confidential

Joint Select Committee on Australia's Family Law System
PO Box 6100
Parliament House
Canberra ACT 2600

By email: familylaw.sen@aph.gov.au

Dear Committee Secretariat

Inquiry into Australia's Family Law System

Thank you for the opportunity to provide comments on the Joint Select Committee Inquiry into Australia's Family Law System.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

We note that the Joint Select Committee reporting date is currently scheduled for 7 October 2020 and reiterate our view that further inquiry is unlikely to identify issues which have not already been considered, and, may postpone any benefit or improvement to the current system. We encourage the Federal Government to consider the Australian Law Reform Commission (ALRC) Family Law System Review Final Report, delivered on 31 March 2019, as well as the QLS submission made in response to the ALRC Review.

This response has been compiled by the QLS Family Law and Domestic and Family Violence Committees, whose members have substantial expertise in this area.

Terms of Reference

QLS supports a comprehensive and open-minded review of the family law system. However, we are concerned that the Terms of Reference imply a pre-determined outcome in relation to a number of issues, including in relation to family violence. The underlying inference risks ignoring the impact and prevalence of family violence in our community.

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Family Law Section of the Law Council of Australia

Overall, we support and endorse the submission made by the Family Law Section of the Law Council of Australia (LCA) in response to this inquiry.

We make the following additional comments:

- a. ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems, and family and domestic violence jurisdictions, including:***
 - i. the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders, and***
 - ii. the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings;***

We support the views of the LCA on this issue. QLS has consistently advocated for improved interaction and information sharing between the family law courts and state and territory child protection agencies, police and state health authorities, as a means of enhancing the capacity of the family law courts to properly assess the risk of family violence.

QLS supports initiatives announced by the Attorney-General's Department earlier this year, aimed at improving information sharing and co-ordination between family law, family violence and child protection systems.¹ The announced funding will primarily be used to pilot a co-location model, whereby state and territory child protection and police officers are present in family court registries around Australia. Funding will also be provided for improving technology to facilitate information sharing between family law courts and state and territory child protection systems.

Finally, we refer to our comments below in relation to ongoing education of judicial officers and professionals engaging in family law work and note that education around domestic and family violence is crucial to the capacity of the courts to properly assess any risk of violence or child abuse identified in material provided by child safety authorities.

- b. the appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders;***

QLS strongly supports the comments made by the LCA in relation to the ability of the court to ensure parties provide truthful evidence. Robust processes dictate how evidence is to be received in legal proceedings, including in family law proceedings. Parties providing evidence in family law proceedings are required to declare that their evidence is truthful via sworn oath or affirmation. Evidence is also tested through cross-examination at final defended hearings. Judicial officers are highly experienced in making determinations in the face of complex and often conflicting evidence. The responsibility to make full and frank disclosure is set out in the respective Rules of the Courts.

¹ See <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Pages/default.aspx# National Plan to>

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We agree with the LCA view that the lack of adequate resourcing of the family law courts has contributed to the inability of the courts to effectively enforce its own orders in a timely and cost-effective manner. Non-compliance with orders can have a significant impact on families and can result in, for example, children not spending time with a parent. We note that the ALRC made several recommendations in relation to this issue.

Importantly, we note the lack of empirical evidence to support the notion that false allegations of family violence are regularly made in an attempt to gain an advantage in family law proceedings. In contrast, extensive research confirms the difficulties victims of domestic and family violence encounter when disclosing their experience to courts; including fear of not being believed and fear that disclosure will increase the risk of violence to them or their children.²

***c. beyond the proposed merger of the Family Court and the Federal Circuit Court
any other reform that may be needed to the family law and the current structure
of the Family Court and the Federal Circuit Court;***

QLS has consistently advocated for the creation of a single, specialist court for determining family law matters, with one set of rules, procedures and processes. In our view, this would better facilitate timely and cost-effective resolution of disputes. However, we do not support the amalgamation of the Family Court and Federal Circuit Court, as proposed.

We maintain the view that the proposed court amalgamation does not represent evidence-based policy. The Price Waterhouse Cooper report relied on in support of the court merger does not adequately demonstrate an increased capacity to properly hear and determine family law matters, particularly complex matters, without additional funding.

The court merger, as proposed, will involve a move away from family law specialisation within the court. The proper determination of family law matters requires a high level of skill and extensive knowledge of a wide range of issues and areas of substantial law. In the experience of our members, a lack of expertise in family law can result in erroneous decisions and poorer outcomes for families. There is a significant risk that the quality and propriety of family law decisions will be compromised where determinations are made by judicial officers without family law expertise. These decisions are also more likely to be appealed, further increasing the demand on court services.

The skill necessary to understand the complex dynamics of domestic and family violence and identification of risk is critical to the practice of family law and the proper determination of family law disputes. Decisions made without this skill and expertise can place survivors of family violence, including children, at increased risk.

Finally, while QLS welcomes improvement to efficiency, this cannot occur without appropriate resourcing. Chronic underfunding has drastically impeded the capacity of the family law courts to hear matters in a timely and effective manner. Current wait times are unsustainable and can lead to detrimental outcomes for children and families. In matters involving domestic and family violence, these delays potentially expose a person experiencing violence to greater risk.

² Australian Law Reform Commission, Family Violence – A National Legal Response (ALRC Report 114), 2010, <https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/18-evidence-of-family-violence-3/difficulties-in-giving-evidence/>; Also see Richard Chisholm, Family Courts Violence Review (2009) and Family Law Council, Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues (2009).

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QLS supports the LCA recommendation in relation to the restructure of the court and the need for a properly funded Family Court Counselling Service.

- d. the financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning 'disappointment fees', and:**
- i. capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters, and**
 - ii. any mechanisms to improve the timely, efficient and effective resolution of property disputes in family law proceedings;**

Access to legal assistance in the early stages of a dispute can prevent or reduce the escalation of legal problems and reduce cost to the justice system overall. Private legal practitioners generally provide high quality, tailored family law advice and play an important role in resolving family law matters, including by identifying relevant issues and providing relevant information to the Court. Access to legal advice and representation is key in the resolution of matters and helps to ensure litigants are properly informed.

We note that sustained cuts to the legal assistance sector, including Legal Aid, Community Legal Centres and Aboriginal and Torres Strait Island Legal Services, have impacted the ability of a significant proportion of the community to obtain access to specialist family law advice. Additional funding to the legal assistance sector is essential to improving accessibility to the family law system and reducing cost to clients.

QLS does not support capping of legal fees. In our view, it is reasonable for private legal practitioners, like any other professional group, to charge a professional fee commensurate to the work undertaken. As noted by the LCA, the fees incurred in family law matters are impacted by a range of factors including the complexity of the issues before the court, the dynamics between parties and the emotional and social issues impacting a particular client. A small property pool does not necessarily mean the legal issues in a particular matter are less complex. We share concerns expressed by the LCA that litigants who reach any capped cost limit are likely to become self-represented litigants.

We note that solicitors are extensively regulated by the *Legal Professional Act 2007* (Qld) in the manner in which disclosure is to be made and the information which must be provided to clients. Solicitors' fees are subject to an overarching requirement that they be 'fair and reasonable'. Gross overcharging is a matter that is characterised as 'professional misconduct'.

QLS further notes that seemingly disproportional legal fees cannot be viewed in isolation from the systemic issues, including extensive delays, in the family law courts, which protract proceedings and can exacerbate conflict between parties.

QLS supports the LCA's views in relation to improvements to the timely, efficient and effective resolution of family law proceedings.

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e. the effectiveness of the delivery of family law support services and family dispute resolution processes;

As noted above, access to specialist family law advice is critical to the resolution of family law disputes. Family lawyers work diligently to resolve matters outside of the court system wherever possible. The overwhelming majority of family law disputes are resolved without court intervention.

We support the LCA response on these matters.

f. the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;

QLS acknowledges the significant impacts of protracted family law proceedings on the health, safety and wellbeing of children and families. We support prioritisation of safety and wellbeing of children and their families in all family law processes and services. The serious, long-term developmental impacts of parental conflict on children are well documented.³ Consistently, expert evidence indicates that a key predictor of poor outcomes for children with separated parents is ongoing exposure to parental conflict.

QLS strongly supports the comments made by the LCA in relation to these issues. We also support the recommendations of the ALRC in relation to harm minimisation in family law proceedings. We make the following additional comments:

Legislative framework

- QLS supports the recommendations set out in the ALRC Family Law System Final Report around simplification of Part VII of the *Family Law Act 1975* (Cth) and, in particular, removal of any link between the presumption of parental responsibility and the need for the court to consider a particular care arrangement. Provisions around parenting should not prioritise or favour any particular parenting arrangement, as is currently the case.
- Similarly, presumptions in relation to parental responsibility unreasonably fetter the discretion of the court. Parental responsibility should be a matter for the court to determine in the circumstances of each case, guided by the paramount consideration principle.

Process

- The operation of the adversarial system can be problematic, particularly in parenting matters where the objective should be to reduce ongoing conflict between parties for the benefit of children. There are advantages to adopting less adversarial court processes in a family law context. In our view, less adversarial processes may be more likely to facilitate cooperative and respectful engagement between parties to aid more expedient resolution matters, as well as after matters have been resolved.⁴
- Decisions involving children should be made without undue delay. Extensive delays can exacerbate frustration and conflict and the implications of this for parties and their

³ See, for example, Jennifer McIntosh research J McIntosh, *Children's responses to divorce and parental conflict: a brief guide for family lawyers*, Family Law Education Reform Project, AFCC and the Center for Children, Families and the Law at Hofstra Law School, New York, 2009.

⁴ This understanding led to the establishment of Less Adversarial Trials in the Family Court. See the LAT Handbook.

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children are significant. In matters involving family violence, these delays potentially expose a person to greater risk.

- The manner in which a child's views come before the court must be carefully managed, under the guidance of an appropriately qualified expert. Crucially, a child's views must be heard in a manner that does not further expose the child to conflict or burden the child with adult responsibilities.
- We emphasise the importance of expert guidance and participation in dispute resolution processes, particularly wherever children are involved. Government commitment to appropriate resources for Independent Children's Lawyers, family consultants and family reports is critical in supporting the wellbeing of children and their families.

Research

- QLS supports ongoing research into all areas of family law, including the experiences of children and young people in the family law system. QLS acknowledges the importance of this research in improving outcomes for children and their families.

g. any issues arising for grandparent carers in family law matters and family law court proceedings;

We endorse the views of the LCA with respect to grandparents in family law matters.

h. any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners;

QLS supports the proper regulation of all professionals working in the family law system. Solicitors operate under a range of professional obligations, which inform conduct with clients, the court, fellow practitioners and the community. The overwhelming majority of solicitors comply with their ethical duties and professional responsibilities in undertaking their work. A robust disciplinary process is in place in Queensland, to respond to allegations of unprofessional conduct or professional misconduct by solicitors.

The QLS Ethics Centre supports solicitors through the promotion and maintenance of professional standards. QLS recognises that family law is a complex and emotional area of law. Solicitors are encouraged to take extra care in matters involving children and are reminded of their particular obligations as solicitors practising in this area.

Practitioners who engage in family law work generally demonstrate the sensitivity and understanding of complex dynamics relating to family violence. QLS agrees that this skill is vital to practitioners' ability to identify risk. Practitioners who engage in family law practice are encouraged to undertake ongoing education around issues including domestic and family violence, child development and family dynamics. QLS offers an extensive range of training opportunities for practitioners to enhance their skills in these areas.

In addition, QLS has developed Best Practice Guidelines for Queensland solicitors working with clients affected by violence. All legal stakeholders have a responsibility to ensure that

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they contribute to the knowledge base of their staff and preferred suppliers and to provide policies, procedures and resources that are domestic violence 'informed'.

QLS agrees with the LCA position that the Government plays an important role in ensuring the effective operation of the family law system. A focus on the performance of professionals involved in the family law system without addressing areas within government responsibility which require urgent attention is purposeless. These areas include proper funding for court buildings and infrastructure; additional funding of the legal assistance sector; a commitment to the prompt appointment of appropriately experienced and skilled judges; and a commitment to pursuing legislative amendments which have been identified as necessary to improve the operation of the law.

QLS strongly supports LCA's comments on the need for appropriate funding for Independent Children's Lawyers. As the LCA notes, increased funding would allow ICLs to undertake the work required in order to comply with the *Guidelines for Independent Children's Lawyers*.

Similarly, we support the view that family report writers are a vital component of a functioning family law system and that perceived problems with the quality of some family reports are the result of a significant shortage in the number of experts prepared to undertake this work and diminution of funding of both in house family consultants and Regulation 7 family consultants. Increasingly few family report writers are willing to undertake Legal Aid funded family reports, as the fee does not adequately reflect the expertise of the family report writer and the significant work provided. In addition, vexatious complaints and personal threats by litigants also serve as a disincentive for family report writers to undertake this work. In our view, more appropriate funding would facilitate the engagement of appropriately experienced family report writers.

We support comments made by LCA in relation to the appointment of judges exercising family law.

i. any improvements to the interaction between the family law system and the child support system;

QLS supports the views of the LCA in relation to the intersection between the family law system and the child support system.

j. the potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes;

QLS supports the view of the LCA in relation to the potential usage of financial agreements and their enforceability to minimise future property disputes.

If you have any queries regarding the contents of this letter, please do not hesitate to contact

Yours faithfully

Bill Potts
President