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Legal and Constitutional Affairs Legislation Committee
Department of the Senate
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By email:
legcon.sen@aph.gov.au.

7th February 2018

RE: FAMILY LAW AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2017;

RE: FAMILY LAW AMENDMENT (PARENTING MANAGEMENT HEARINGS) BILL 2017

Dear Colleague,

We welcome and appreciate the opportunity to make a submission in relation to the proposed bills: the *Family Law Amendment (Family Violence and Other Measures) Bill 2017*, and the *Family Law Amendment (Parenting Management Hearings) Bill 2017*, and the consequential changes to the family law system.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education; and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Aboriginal and Torres Strait Islander deaths in custody).

Our submission is informed by over four and a half decades of practice in the law as it impacts Aboriginal and Torres Strait Islanders. We represent clients who live in rural, regional and remote areas, including the Torres Strait Islands, the Gulf, and North-West and South-West Outback Queensland. Our submissions are informed by the diversity of circumstances of our clients and their

experiences of seeking to obtain access to justice and equality before the law. We trust that our submission is of assistance.

OVERALL COMMENTS

Our comments on the proposed amendments are largely informed by two major concerns. One arises from the obstacles for Aboriginal and Torres Strait Islander parties to participate effectively in court or panel-based dispute resolution and to obtain just outcomes, whether that dispute resolution system be adversarial or non-adversarial.

The other major concern is that a child's right to enjoy his or her Aboriginal or Torres Strait Islander culture, including the right to enjoy that culture with other people who share that culture should not be adversely impacted by the proposed changes, both in the letter of the law and the practices that arise in its application.

THE FAMILY LAW AMENDMENT (PARENTING MANAGEMENT HEARINGS) BILL

We support the rationale behind the Bill to reduce delays in the resolution of family disputes and the desire to assist families to access the most effective mechanism to resolve their parenting disputes. There is currently a shortage of judges and justices in the Federal Circuit Court and Family Court which results in significant delays in final hearings in both courts. We would support the appointment of more judges instead of introducing further processes to the family law system. Family Dispute Resolution is a process currently available to parties who wish to negotiate their disputes however parties who wish to avail themselves of FDR have difficulties to do so as Legal Aid Queensland does not fund Family Dispute Resolution unless there is a significant dispute. Increased funding for FDR might assist increased numbers of negotiated matters.

We note that, with respect to assisting families to access the most effective mechanisms to resolve their parenting disputes, the use of Parenting Panels has been proposed as a means of achieving that end. The recommendation, to create a less adversarial approach to resolve parenting disputes, is drawn from reviews and reports into the family law system, specifically from the House of Representatives Standing Committee on Family and Community Affairs 2003 report, *Every Picture Tells a Story*, and the report of the Family Law Council in 2016 in *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*.

Aboriginal and Torres Strait Islander parties to family law proceedings often face considerable challenges, not only in adversarial systems but also in non-adversarial[i] tribunals and panels as well. Those challenges were identified in *Every Picture Tells a Story* and in *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, and both reports go into a considerable level of detail on the obstacles to ATSI participation and make a number of recommendations to overcome those obstacles. In our view those recommendations should be read in conjunction with the recommendation for parenting panels.

Specifically, those reports referred to:

- The under-utilisation of the family law system by Aboriginal and Torres Strait Islander people, and identified the range of barriers affecting ATSI access to family law services. These barriers include issues of legal literacy, language and communication difficulties, a lack of culturally appropriate services and cultural safety, and geographic and economic barriers. Apart from difficulties with mainstream legal processes, which can be culturally intimidating and unresponsive to an Aboriginal world view, the reports noted a continuing mistrust of the family law system among Aboriginal and Torres Strait Islander people associated with its links to the child protection system and the high rates of removal of Aboriginal children from their families by child protection departments.
- Solutions identified in the reports included the need to work with Aboriginal and Torres Strait Islander communities and organisations to develop and deliver culturally appropriate post-separation parenting programs and family dispute resolution services.
- Stakeholders also submitted that the way forward must incorporate efforts to both improve the cultural competency of family law system professionals and to enhance cultural safety for Aboriginal and Torres Strait Islander clients of the family law system.
- Importantly, the reports identified ongoing cultural competency training being needed for family law system professionals, including judicial officers, that builds an understanding of the multiple and diverse factors contributing to the high levels of family violence in Aboriginal communities, and an understanding of Aboriginal and Torres Strait Islander family structures and child rearing practices.

With respect to Domestic Violence issues, the reports noted that Aboriginal and Torres Strait Islander family law clients are more likely than non-Aboriginal clients to have complex needs, including family violence and child safety related needs exacerbated by the experience of inter-generational trauma. The reports identified support needs associated with issues of disability, mental health, drug and alcohol abuse, family violence and engagement with child protection systems and the reports called for greater collaboration between the family law system and Aboriginal and Torres Strait Islander-specific services and recognised that inter-sectoral collaboration was understood as being critical to improving both access to and the experience of family law services for Aboriginal and Torres Strait Islander clients.

Our concern is that the proposed amendments are virtually silent on the above-mentioned aspects of those reports and how they intersect with the proposed amendments. Some of these aspects are raised below. The concern is that the Parenting Panels will not have the desired outcomes without the accompanying recommendations being implemented as well.

The very limited information released indicates that these hearings are for self-represented parties and the indications are that they will not be legally represented at any stage of such hearings. This raises concerns about self-represented victims of domestic violence and the safeguards that would be in place generally for parties. Further questions arise as to whether there would be culturally competent support or assistance for unrepresented Aboriginal and Torres Strait Islander Parties and whether constituted panels would have the necessary experience and cultural competence to decide the matters. The following illustrate some of the sources of difficulty:

(a) Cultural obstacles

"A" is an ATSI woman who represented herself in QCAT. She had consulted with an ATSILS lawyer before attending but when in the Tribunal did not raise any of the matters that she had discussed with the lawyer. Afterwards, when she was asked why she had not told the tribunal about those matters, she explained that people were intimidating or shouting so she didn't say anything. Even had she had a support person, that would not have been adequate because a support person is not a lawyer and could not properly assist the client to identify what should be raised in response to the matters being discussed in proceedings.

(b) Behavioural difficulties

The challenges for victims of domestic violence is that their verbal behaviour frequently follows one of two common patterns: one being silence, the other being firing up over issues. Either course of action might lead to the Tribunal forming an unfavourable view of the unrepresented person and likely making adverse findings.

(c) Unwitting cultural bias

The areas of expertise described for the panel members do not as they stand now include an Aboriginal or Torres Strait Islander member nor experience in working in either Aboriginal or Torres Strait Islander communities. The concern is that where there is an ATSI and non-ATSI parent, a panel member has the potential to quickly conclude that the ATSI parent is not competent to look after the children or to downplay the importance of connection to culture. We have observed in State Tribunals and panels that a panel should be constituted with an ATSI member, in practice they often are not. Both in the letter of the law and in the practice of constituting panels, the panel should include an Aboriginal or Torres Strait Islander member to resolve matters concerning an ATSI child.

SPECIFIC COMMENTS ON PROVISIONS:

Section 13L Court may refer Part VII proceedings to Parenting Management Hearings Panel

(1) This section applies if a child is the subject of proceedings under Part VII in the Family Court, the Federal Circuit Court or any other court prescribed by the regulations for the purposes of this section.
(2) The court may make an order referring one or more matters arising in the proceedings to the Panel to be dealt with in a parenting management hearing in relation to the child.

…

(5) If a matter arising in proceedings is referred to the Panel for a 2 parenting management hearing in relation to a child:
(a) the parties to the proceedings are taken to be the parties to the hearing; and
(b) the parties are taken:
(i) to have made an application for a parenting determination in relation to the child under section 11K; and

(ii) to have complied with the requirement in 10 subsection 11KB(2); and
(iii) to have consented to the making of the application in accordance with section 11KC.

…

(7) An appeal does not lie from a decision of a court exercising jurisdiction under this section.

There are and continue to be good reasons why parties should bring their matters in the Family Court rather than refer their matters to Parenting Panels, not least of which is their access to legal representation in the resolution of their matters. It is a concern that for judges with heavy lists that matters will be transferred too readily to Parenting Panels that should stay in the Family Court and the parties would not elect to transfer the matter. The language of the provision that "parties are taken to have consented" and the absence of a right of appeal from the exercise of discretion removes the voluntariness of the recourse to the alternative proceedings and force parties to be in a forum that might be quite unsuitable to their needs.

Section 11NA When Panel must dismiss an application for parenting determination

When there is a registered parenting plan

(12) The Panel must dismiss an application for a parenting determination in relation to a child if a registered parenting plan is in force in relation to the child.

It would seem to be unnecessarily limiting if the effect of s 11NA is that only new matters can be referred to the Panel for resolution.

The concern about the obligation for the Panel to dismiss an application where a parenting determination is registered and in force, is that where parties have problems with the parenting plan, it would be beneficial to refer that problem to the panel to resolve the issue more quickly and informally.

The other implication that seems to arise from this provision, is that there is now a risk to registering parenting plans, because if parties choose to register a plan they then place themselves at a disadvantage by losing the option to bring an application for a parenting determination to the Panel.

Finally, if the process fails, is there an effective mechanism to resolve the matter, for example by bringing an application to Court or by a provision to allow a re-opening?

Section 11PB How parenting determinations are made

Section 11PB (1) allows for a determination to be made orally or in writing and Section 11PB (6) allows for reasons for a determination to be made orally or in writing. Where a determination has been made orally, there is machinery for a party to request the determination to be given in writing s 11PB (2) but only within 28 days unless there is an exercise of discretion. Similarly, there is also machinery for a

request for the reasons for the determination to be made in writing however that must be done within 28 days or within a longer period by exercise of a discretion: s 11PB (7).

The concern is a practical one, it is likely for unrepresented parties to encounter obstacles to understand the significance of these requirements and to comply with them. For an unrepresented party to know how their rights have been affected and to have any hope of then seeking legal assistance, they may ask for a determination in writing but only within 28 days and must comply with the formal requirements. They may need then to go seek legal advice. Given the demands placed on our service and on other community legal centres, they may need to wait for an appointment and not get an appointment within the time limit. The party may also be affected by other delays commonly experienced by remote and regional clients such as time needed to travel in various seasons, or intervening community obligations such as funerals. As the provisions are drafted now it would not require much to render meeting these timelines and formal requirements impractical.

An oral determination, especially one that uses legalese to describe the outcome can be confusing for anxious parties. Given the potential confusion, it would be better for determinations to be made in writing as a matter of course.

Section 11PC Duties of the Panel when making parenting determinations

(5) If a person to whom the parenting determination is directed is represented by a legal practitioner, the Panel may request the practitioner:
(a) to assist in explaining to the person the matters mentioned in paragraphs (2)(a) and (b); and
(b) to explain to the person the matters mentioned in paragraphs (3)(a) and (b).

(6) If a request is made by the Panel to a legal practitioner under paragraph (5)(a) or (b), it is the duty of the practitioner to comply with the request.

The provision of paragraph (6) is unclear as to what is the extent of the obligation of the legal practitioner in assisting to explain the matters mentioned in paragraph (2) and to explain the matters mentioned in paragraph (3). While obviously a practitioner will endeavour to discharge their duties to the best of their ability and provide all practical assistance, it is unclear what the extent of the duty is if the client does not understand properly and if the Panel has elected not to provide a document setting out matters in paragraph (3).

This might also have significant ramifications for the party if subsequent conduct is alleged to be a breach of an order, be it a recovery or relocation or other order, especially if their first language is not English and the Panel did not supply a written document.

FAMILY LAW AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL

We acknowledge the goals of the proposed legislation to reduce the need for families to interact with multiple courts across the federal family law and state or territory family violence and child protection systems and to avoid inconsistencies between family violence orders and family law orders.

We also note the impact that the changes will make to improve access for communities to a greater number of courts in rural and remote areas rather than only the four family court locations of Cairns, Townsville, Rockhampton and Brisbane. Having said that, we also consider it important that the amendments are not intended to make state and territory courts the primary fora for resolving family law disputes.

A Child's Right to Enjoy his or her Aboriginal or Torres Strait Islander Culture

The Family Law Act as it now stands is drafted to ensure a consideration of the best interests of children caught up in family proceedings and so reflects the language of the *Convention on the Rights of the Child*, ratified by Australia on 17 December 1990. Further, consistent with other international instruments and principles of Human Rights, it is also drafted to ensure a child's right to enjoy his or her Aboriginal or Torres Strait Islander culture, including the right to enjoy that culture with other people who share that culture. As s60CC currently stands, that is a factor that must be considered by the Court and it only becomes a discretionary factor if the court is considering a consent order.

As highlighted recently in the final Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory, connecting an Aboriginal child or young person to the relationships with their land and kin is not just a 'factor' to be considered but intrinsic to their best interests.

SPECIFIC COMMENTS ON PROVISIONS

Section 45A Summary decrees

The test for when a proceeding or part of the proceeding may be dismissed is couched in terms of the proceedings having "no reasonable prospect of success." The concern is for clients who already contend with cultural and language issues to access the courts and who often find mainstream legal processes culturally intimidating that a judge with a heavy list may be too quick to dismiss an application or to dismiss the prospects of defending the proceedings.

Amendments to Section 68P

17 After subsection 68P(2)

Insert:

(2A) Subparagraph (2)(c)(iii) does not apply to a child if the court is satisfied that it is in the child's best interests not to receive an explanation of the order or injunction.

(2B) Paragraph (2)(d) does not require inclusion of a matter in an explanation given to a child if the court is satisfied that it is in the child's best interests for the matter not to be included in the explanation.

(2C) In determining whether it is satisfied as described in subsection (2A) or (2B), the court:
(a) must have regard to all or any of the matters set out in subsection 60CC(2); and
(b) despite section 60CC, may have regard to all or any of the 17 matters set out in subsection 60CC(3).

It is a central tenet of the Family Law system that the Court considers the best interests of the child when making its determinations. Subsection 60CC (1) requires the Court to consider both the subsection 60CC(2) factors and the subsection 60CC(3) factors when determining what are the best interests of the child. The Subsection 60CC(2) factors and subsection 60CC(3) factors only become discretionary factors under subsection 60CC(5) when the court is considering whether to make a consent order.

For the purposes of determining whether an explanation should be given to a child, the Bill as currently proposed seeks to render discretionary consideration of any of the matters set out in subsection 60CC(3). We consider that at least two factors in subsection 60CC(3) are crucial for the consideration of the best interests of an Aboriginal or Torres Strait Islander child and the same way that subsection 60CC(2) factors continue to be considered, so too should subsection 60CC(3)(b) and (h).

(3) Additional considerations are:

(b) the nature of the relationship of the child with: (i) each of the child's parents; and (ii) **other persons (including any grandparent or other relative of the child);**

(h) if the child is an Aboriginal child or a Torres Strait Islander child: (i) the **child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture**); and (ii) the likely impact any proposed parenting order under this Part will have on that right;

(6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
(a) to maintain a connection with that culture; and
(b) to have the support, opportunity and encouragement necessary:
(i) to explore the full extent of that culture, **consistent with the child's age and developmental level** and the child's views; and
(ii) to develop a positive appreciation of that culture.

The indivisible link between connection to culture and relationships with other Aboriginal people has been described by Mr Jackomos and quoted most recently in the final Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory:

> "For us culture is about our family networks, our Elders, our ancestors. It's about our relationships, our languages, our dance, our ceremonies, our heritage. Culture is about our spiritual connection to our lands, our waters. It is in the way we pass on stories and

> knowledge to our babies, our children; it is how our children embrace our knowledge to create their future. Culture is how we greet each other and look for connection. It is about all the parts that bind us together. It is the similarities in our songlines."

Given the critical importance of family and kinship to a child from a very young age, these factors should remain as factors which must be taken into account and which should be explained to a child. Subsection 60CC(3)(h) read in conjunction with Subsection 60CC(6) already takes the child's age and developmental level into account.

Section 68C

Repeal the section, substitute:

68C Offence for breaching injunction

(1) A person (the respondent) commits an offence if: (a) an injunction is in force under section 68B that is expressed to be for the personal protection of another person; and (b) the injunction is directed against the respondent; and (c) the respondent engages in conduct; and (d) the conduct breaches the injunction. Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

No consideration of evidence of self-induced intoxication

(2) Despite subsections 8.2(3) and (4) of the Criminal Code, evidence of self-induced intoxication cannot be considered in determining, for the purposes of subsection (1) of this section, whether: (a) conduct was accidental; or (b) a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
(3) Despite subsection 8.4(1) of the Criminal Code, evidence of self-induced intoxication cannot be considered in determining, for the purposes of subsection (1) of this section, in relation to any part of a defence that is based on actual knowledge or belief, whether that knowledge or belief existed.

The continuing concern for the breadth of operation of Commonwealth offences as opposed to State offences is the definition of the offence that (c) the respondent engages in conduct and (d) the conduct breaches the injunction is capable of casting too wide a net and criminalising wholly innocent acts, especially the acts of those living in tiny communities and carrying out the necessary tasks of daily living. For example, former partners who both use the only shopping centre in the township might inevitably run into each other there or at a local bus stop or communal facility and that in turn would lead to one being charged regardless of the wishes of the other partner. Additionally, attempts by the other partner to seek contact to occur, such as seeking assistance for a sick child when other support is not available. These would be treated as a breach by the Responding party and attract criminal charges but should be capable of some exception.

Removal of 21 day limit

We are concerned that if orders will no longer be returnable to the Court in 21 days then the practical effect will be that there will be much longer delay depending on the judge's diary. What follows is that lack of access to the child may become entrenched and when later the matter is before the court,

the case could be assessed on the basis of no contact in the intervening time, placing the other parent as a disadvantage.

Conclusion

We support the ambitions of these two Bills however would seek to ensure that factors critical to access to justice for Aboriginal and Torres Strait Islander parties and factors intrinsic to the best interests of the child are not overlooked in the implementation of these important changes.

We thank you for your careful consideration of these submissions.

Yours faithfully,

Mr. Shane Duffy
Chief Executive Officer
ATSILS (Qld) Ltd.