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20 October 2020

Senate Amanda Stoker
Chair
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Dear Chair

Senate Legal and Constitutional Affairs Committee – inquiry into Federal Circuit and Family Court of Australia Bill 2019 and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 – supplementary submission

Thank you for your invitation to provide information to supplement our evidence to the Committee at its hearing on 9 October 2020. We appreciate your recognition of the truncated nature of the evidence that was able to be taken on that day. With the benefit of having heard the testimony of other witnesses, and considering some of the written submissions provided by others, we would like to offer the following remarks.

The following material supplements our original submission to this inquiry, and our opening statement (which was provided to the Committee Secretariat by email on 8 October 2020, but which time limitations at the hearing precluded us from presenting).

Matters of general agreement and the position of Relationships Australia

Submitters have generally agreed that:

- Australian families need and deserve a standalone specialist family law court – Relationships Australia has consistently supported the need for specialist expertise across family law, family violence, child development and child protection systems

- family law courts should offer a single point of entry, common processes, forms etc - Relationships Australia has consistently advocated these, in alignment with our argument that the burdens of fragmentation and complexity should not be outsourced by governments to distressed and overwhelmed families

- the two court system has been a failure – Relationships Australia does not take a position on this point, and

- family violence is a prevalent presenting feature in the family law system – we have supported this proposition across several submissions.

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Common themes raised by other submitters and the position of Relationships Australia

Importance of specialisation

The need for specialist courts emerges from the behavioural, emotional and psycho-social factors that are present in family separation, including the pivotal need to focus on children's developmental needs, as well as the presence of co-morbidities in most matters that are taken through to filing parenting and property applications. Those factors and co-morbidities are core business for relationships services like Relationships Australia. Our goal in serving families who go through the court process is not simply to manage those co-morbidities for the duration of their journeys through the court system, but to provide therapeutic responses that address and ameliorate them in a sustained way, long after the litigation has ended. This enables parents to build confidence and capacity in their parenting, so that the children of separated families are not trapped in inter-generational cycles of violence, conflict and trauma.

Accessible and ongoing funding for these services, and their ready availability at all stages of families' separation, is key to ensuring that:

- families can readily access specialist therapeutic services to address problematic behaviours and complex co-morbidities
- parents can be given tools to enhance their parenting capacity during and beyond separation, and
- judicial time is carefully stewarded and deployed for disputes that are legal, not behavioural, in nature and that require a specifically judicial resolution.

We have previously advocated for demonstrated pre-appointment skills and expertise. We have also welcomed the considerable work done in developing and offering specialist training, as well as initiatives like the Family Bench Book.

We agree with Women's Legal Services Australia that the Government should act on the recommendation, made by the Australian Law Reform Commission, that all federal judicial officers appointed to make decisions in family law matters should have experience in family law and family violence.[1]

Chronic under-funding across the family law system

Relationships Australia agrees that all parts of the family law system, including the courts, suffer from chronic under-funding and a short-term approach to providing resources. Australian families need adequate, secure and ongoing resourcing for all services that support them before, during and post separation.

Funding is not a panacea

Some submitters appear to premise their opposition to the Bills on a view that Australians' complaints about the family law system arise from – and even only from - under-funding, and its

[1] Australian Law Reform Commission, Report 135, Review of the Family Law System, Recommendation 51.

inevitable consequences of delays, costs and ongoing conflicts. But these issues are – ultimately – surface issues only. At a deeper level, Australians' dissatisfaction, while unquestionably exacerbated by these surface issues, derives from a recognition that a system that weaponises the pain, the grief, the anger of parents who can no longer love each other, that turns them into combatants and labels them as 'winners' or 'losers' is a system that will inevitably fail to protect the vulnerable and to give proper attention to the safe and healthy development of children. We note that many of the complaints and concerns canvassed by bodies such as the Australian Law Reform Commission in its review of the family law system and the ongoing Joint Select Committee inquiry into Australia's Family Law System raised questions of perceptions of bias and lack of integrity on the part of institutions and individuals working in the family law system. These are not concerns that can adequately be addressed by Parliament simply appropriating more money, however large the appropriation might be. They are not concerns, either, that can be answered merely by positing a binary choice between and adversarial law system and an inquisitorial law system. They can only be answered by a radical transformation of how society as a whole supports separating families.

Relationships Australia considers that existing family law system, which accords primacy to the courts, is inherently and intractably unfit for purpose in assisting separating families. It is this innate unsuitability, we consider, that is the root cause of problems with a 'family law system'. In particular, it is unconscionable to continue propping up a system that institutionalises parental conflict. Instead, we advocate system transformation in which family wellbeing replaces the current touchstone of family law.

We note submissions that point to the high regard in which the Family Court of Australia is held internationally. However, the key test for public services in Australia, including the courts, is not – or should not be – how they are viewed internationally, but how they are seen as serving Australians. The distress, frustration and trauma of separating families will not be assuaged with directing more money to a fundamentally unsuitable structure. What is required is fundamental transformation.

Money is a necessary precondition of robust research and adequate service provision to those who need it.

But it is not a sufficient precondition to achieve safe and strong families or support optimal child development.

This requires long-term cultural and structural changes:

- to attitudes and beliefs about the primacy of children's safety and development
- to a more precise and nuanced definition of the role of therapeutic services, psycho-social education, the law, the courts and civil society more generally in supporting separating families
- among governments, to have a seamless system that does not outsource navigation and coordination to families under pressure

- to funding structures, to ensure continuous delivery of safe, locally relevant and supportive services, most especially by moving away from short-term pilots to long-term investment.

Need for sustained investment, not short term 'sugar hit' pilots

Spending taxpayer money on short-term pilots to serve families in crisis only guarantees an ongoing need for recurrent spend into the next generation. It does not enable the community to reap the benefits of safe, strong families or enjoy the downstream savings delivered by lower expenditure on health and intergenerational social welfare dependency. At the same time, sporadic pilots are costly to establish and run for periods that are too short to build key enabling relationships or to develop a robust evidence base.

In the absence of a radical transformation to adopt a Family Wellbeing System, moving from short-term expenditure to long-term investment would be the biggest single game changer. Government must develop processes that enable funding of trials and pilots that run for a sensible length of time (to allow for adjustments as data emerges) and the funding of services over longer periods of time (up to 10 years)

Long-term, secure funding is crucial to:

- establish trust and enabling relationships within communities (and often with a client base that is impacted by complex trauma)
- employment and retention of a specialist, skilled workforce
- rigorous data collection and analysis

Chronic underfunding impairs the family law courts' capacity to use existing powers to expedite, simplify and de-escalate conflict

The Family Court of Australia has a range of powers that, if exercised whenever appropriate circumstances exist, would go a long way in meeting the needs of Australian families; for example, powers conferred in Division 12A of Part VII of the *Family Law Act 1975*.

Relationships Australia supports the courts receiving sufficient funding to enable them to exercise their extant powers to de-escalate conflict, shorten the time that families are in contact with the courts, simplify processes and minimise costs to families. We join with the Law Council of Australia in commending the Court for initiatives including the family violence guidelines, establishment of the Magellan list, practice standards for family report writers, and differential case management.

<u>The over-arching purpose provisions</u>

Several submitters have proposed that the over-arching purpose provisions as currently drafted do not accord proper weight to the safety of children and adult victim-survivors of family violence.

Relationships Australia agrees that safety needs to be accorded primacy. We share the concern, expressed by Women's Legal Services Australia in its submission to this inquiry, that emphasis on efficiency can undermine attention to safety and risk. We are also concerned that, as presently framed, the over-arching purpose provisions maybe used to pressure vulnerable parties to agree to unsafe or unduly disadvantageous arrangements and be weaponised as part of systems abuse.

Minimum number of judges to be prescribed

Relationships Australia agrees with other submitters that any prescribed minimum number of judges should be included in primary legislation, not left to subordinate legislation. Proposed reductions (or increases) in the minimum number of judges should be considered by Parliament as a whole, reflecting the grave importance of the courts having a sufficient number of judges to deal with family law matters in a timely and expert way.

Family Court of Australia 2.0 model

Relationships Australia acknowledges the Family Court of Australia 2.0 model, developed by the New South Wales Bar Association, and the breadth of support that model has received from a range of key stakeholders.

There will always be a need for family law courts to articulate and enforce norms, and to resolve *legal* (as distinct, for example, from behavioural or psycho-social) issues. Those courts must be adequately resourced and served by specialist staff.

However, we do not advocate any particular model of jurisdictional architecture. Rather, we take the position that, regardless of the structure of federal family law courts, they should form part of a holistic family wellbeing system with the co-equal pillar of therapeutic services and alternative dispute resolution. Courts would no longer occupy a central position, or be seen as the 'gold standard' by which adult rights can be asserted and adult grievances vindicated. The key focus would be on family safety and child development. We also stress the need for a change in those community attitudes which create an expectation of judicial resolution as the public and official vindication or rebuke of an adult's conduct.

Family law courts as centres of co-located services

Relationships Australia supports co-located multi-disciplinary service provision, and agrees that family law courts should be resourced to offer a range of relevant facilities and services. We acknowledge that the Family Court of Australia should be a 'stand-alone specialist court with co-located legal and non-legal support services' and

> …part of a holistic, specialist ecosystem of interrelated and co-located support services and resources.[2]

[2] Speech by Arthur Moses SC, then President of the Law Council of Australia at the Newcastle Law Society 2019 Annual Dinner, attached to the submission made to this inquiry by the Law Council.

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This aligns with the original vision of the Family Court of Australia as a helping court.

However, consistent with our view that courts should not be (or be positioned as) the physical or institutional centre of a family wellbeing system, we continue to advocate for family wellbeing hubs, located within the community. This would also serve the vast majority of families who do not approach the courts for assistance.

Self-represented litigants

Relationships Australia supports measures to improve access to justice, including through the provision of legal assistance. While people should have the right to choose to self-represent, self-representation should not be forced by lack of access to skilled professional representation. In particular, our practice experience suggests that legally-assisted family dispute resolution is extremely valuable in enabling disputants to 'reality test' their positions, and can expedite resolution without seeking judicial determination.

We have recently been involved in the three year pilot of Legally-assisted and Culturally Appropriate Family Dispute Resolution, which offered services to culturally and linguistically diverse, as well as Aboriginal and Torres Strait Islander, families. That pilot ended with expiry of its funding on 30 June 2020. Despite an evaluation having been conducted, a report on that evaluation has not, at time of writing, been published.

This pilot served particularly vulnerable families, and it is regrettable that (unlike the pilots of the Family Advocacy and Support Services, Domestic Violence Units and Health Justice Partnerships), it has been allowed to lapse.

Conclusion

Thank you for allowing Relationships Australia the opportunity to augment our truncated evidence. Please do not hesitate to contact us if we can provide further information to assist the Committee.

Kind regards

Nick Tebbey
National Executive Officer