



Law Council
OF AUSTRALIA

Office of the President

25 September 2019

The Hon Kevin Andrews MP
Chair, Joint Select Committee on Australia's Family Law System
PO Box 6100
CANBERRA ACT 2600

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

Dear Chair

Joint Select Committee on Australia's Family Law System

The Law Council of Australia (**the Law Council**) writes to provide a preliminary submission and recommendations to the Joint Select Committee on Australia's Family Law System (**the Committee**) directed to assisting the Committee in undertaking the Inquiry. The Law Council will provide further submissions in due course.

The Law Council and its Family Law Section are committed to promoting the administration of justice and development of meaningful policies and law reform in the best interests of the families, children and community we serve.

We have consistently called for a thorough review of all options for reform of the family law system. This Inquiry provides a critical opportunity to examine all options for holistic reform with full stakeholder consultation and engagement. The Law Council provides five preliminary recommendations to assist the Committee to plan and undertake this important inquiry:

Recommendation 1: That family violence awareness training be provided to all parliamentarians, including Committee Members and participating Members and Senators prior to the start of the Inquiry.

Recommendation 2: That the Committee upload contact details for family violence support and counselling services to the Committee's website.

Recommendation 3: That the Committee examine and consult with stakeholders on the 60 recommendations of the Australian Law Reform Commission's (ALRC) 2019 [Family Law for the Future: An Inquiry into the Family Law System – Final Report](#) (ALRC Report), including the ALRC's Recommendation 1 (Closing the Jurisdictional Gap).

Recommendation 4: That the Committee inform itself and build upon the work of previous reports and inquiries into family law and family violence, including the ALRC Report and the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs report [A better family law system to support and protect those affected by family violence](#) (House of Representatives Report).

Recommendation 5: That the Committee investigate and critically analyse models for structural reform of the family law system, including but not limited to the Government's merger proposal, the ALRC's Recommendation 1 and the model proposed by the 2008 Report by Des Semple titled [Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance](#) (Semple Report).

Family violence awareness

The House of Representatives Report acknowledged that:¹

one in four Australian women have experienced at least one incident of violence from an intimate partner since the age of 15, and one in 19 Australian men have experienced physical or sexual violence by a current or former partner.

Further the report stated:²

In light of the statistics, it is perhaps unsurprising that 50 per cent of matters before the Family Court of Australia (the Family Court), 70 per cent of matters before the Federal Circuit Court of Australia (the Federal Circuit Court) and 65 per cent of matters before the Family Court of Western Australia, involve allegations of family violence. As a result, responding to family violence has been described as 'core business of the federal family courts'.

The Law Council strongly recommends that all parliamentarians including those who participate in this Inquiry be provided with family violence awareness training at the outset to help them undertake their important roles in the Inquiry but also considering any recommendations from the Inquiry.

This would inform and assist the Committee to better understand the complexities and dynamics of family violence, engage with witnesses and develop meaningful and appropriate policy responses. It is suggested this training would include raising awareness of underlying causes and signs of family violence, different forms and wide-ranging experiences of family violence, impacts of family violence on victims, children and vicarious trauma for others in the family law system, why incidents may not be reported, engagement with the family law system and how relevant services and jurisdictions within the family law system interact.

This Inquiry must be conducted in a respectful, safe, honest and inclusive manner. Committee members must be careful not to use words that may incite those currently engaged in the system or dissatisfied with a court outcome to engage in violence against partners, children or judges. The credibility of this Inquiry will be diminished and it will not succeed if responsible and temperate language is not used, including because public confidence in it will be undermined.

There are a range of models, programs and training available. The most suitable model should be determined in consultation with key stakeholders including family violence support service providers. The Law Council suggests consideration be given, by way of example, to a similar model of family violence awareness training to that provided to judicial officers, through the national Judicial College of Australia, funded by the Attorney-General's Department.

Landmark Report by the Australian Law Reform Commission

The ALRC has recently undertaken invaluable work on the family law system that would be of great benefit and assistance to the Committee. On 31 March 2019 the ALRC Report was delivered to the Commonwealth Attorney-General, the Hon Christian Porter MP. The ALRC Report marked the first "root and branch" examination of the Australian family law system since the inception of the *Family Law Act 1975* (Cth) and creation of the Family Court of Australia in 1976.

Despite its terms of reference disavowing any examination of court structural issues, and despite repeated statements by the Government that the Report would not contain matters

¹ *House of Representatives Report*, [1.3], citing ANROWS, *Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012, October 2015 and ABS, Personal Safety Survey 2012*, viewed 11 September 2017; see also, ANROWS, *Submission 73.1 to the House of Representatives Report*, p. 3.

² *House of Representatives Report*, [1.6], citing Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms, 2009*, p. 314 and Monash University – Castan Centre for Human Rights Law (Castan Centre for Human Rights), *Submission 57 to the House of Representatives Report*, p. 2.

relevant to the Federal Circuit and Family Court of Australia Bill 2018 (Cth) and its accompanying Transitional Bill (**the Merger Bills**), Recommendation 1 of the ALRC Report proposes that whilst the power to make laws in relation to family law matters should remain with the Commonwealth, that decision making should be undertaken by Courts at a State and Territory level. This recommendation aims to close the 'jurisdictional gap' between state and territory child protection, family violence jurisdiction and law enforcement, and Commonwealth family law jurisdiction, and ensure children and victims of family violence do not slip through the cracks between systems.

The Government is yet to respond to the ALRC's 60 Recommendations. Parliamentarians did not have the benefit of the ALRC's Report when the Government sought a vote by Senators on the Merger Bills in April. The Inquiry provides an opportunity for the Government to promptly provide its response to the ALRC's recommendations, and for the Parliament to independently explore these recommendations in order to determine a holistic model of reform.

Alternate models for holistic reform of the family law system

Reform must be a priority for the 46th Parliament but reinstating the Government's flawed proposal to merge the Family Court and Federal Circuit Court will not fix the problems. It will only hurt children, families and victims of family violence in need of the courts' assistance.

Despite widespread community concern and opposition, and notwithstanding the establishment of this Inquiry, the Government has indicated it intends to reintroduce the merger bill to Parliament this year. The Law Council calls on the Government not to reintroduce the merger proposal during the course of this Inquiry as the Inquiry's work is too important to pre-judge.

The family law system is one of Australia's most important pieces of social infrastructure. Australia created a world leading family law system but it has been broken for some time. Chronic underfunding and under-resourcing by successive governments has resulted in case backlogs and long delays for families. Some families are having to wait three years, in some cases longer, to have their matters determined.

Systemic failures plague the system. Children and victims of family violence are slipping through the cracks. The Law Council and FLS have long advocated that a holistic approach to family law reform, including consideration of both the law and court structure, is necessary to ensure the system protects and promotes the rights of all Australians and meets the safety and best interests of the most vulnerable members of our society.

The merger proposal that was not passed by the 45th Parliament does not meet that aim and should be abandoned in favour of careful consideration of other proposals, including the ALRC's Recommendation 1 and the model proposed by the Semple Report.

Former Senator the Hon Ian Macdonald, Chair of the Senate Committee that inquired into the Merger Bills, observed in June that the merger was only a "short term fix". By contrast, the ALRC Report provides an opportunity for meaningful holistic reform and merits close and careful consideration by the Committee in the context of this Inquiry.

Consideration of the merger proposal and the ALRC's Recommendation 1 is directly relevant to at least five of the Committee's Terms of Reference, including:

- 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;

- 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;
- e. the effectiveness of the delivery of family law support services and family dispute resolution processes;
- f. the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;
- i. any improvements to the interaction between the family law system and the child support system;
- k. any related matters.

Term of Reference (c) exhorts the Inquiry to look at reforms to the structure of the Courts beyond that the subject of the current proposal and not be bound by the narrow and ill-conceived strictures of that proposal. The Inquiry will be constrained from its inception if it is to proceed from a position where such proposal is legislated and to be implemented regardless of the conclusions and recommendations of the Inquiry.

Indeed, the Committee cannot fulfil its mandate in respect of Terms of Reference (a), (e), (f) and (i) if the Committee does not examine questions including:

- i. whether the Merger Bills are fit for purpose, will achieve their purported goals and should be passed by the Parliament;
- ii. how the Merger Bills interact with recommendations and concerns of the ALRC Report;
- iii. whether and how the Merger Bills will impact ongoing issues 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;
- iv. the Merger Bill's impacts on and risks to children, families and victims of family violence.

The Law Council has consistently said the Government must consult widely with all relevant stakeholders, including the community, Courts, judges, family violence service providers and the legal profession, on what change would be most beneficial to families and to ensure any proposed reform is in the best interests of children, victims of family violence and families.

In conducting this Inquiry, the Law Council urges the Committee to engage with all stakeholders. It is important the Inquiry be informed by expert advice and empirical evidence.

The Law Council encourages the Committee to inform itself and build upon the work of previous reports and inquiries into family law and family violence, including the ALRC Report, House of Representatives Report and the Semple Report.

Further information on these issues is also provided in the Law Council's submissions to the [Senate Legal and Constitutional Affairs Committee's Inquiry into the Federal Circuit and Family Court of Australia Bill 2018](#); [ALRC's Review of the Family Law System: Issues Paper 48](#); and the [ALRC's Review of the Family Law System: Discussion Paper](#).

The Law Council will provide a detailed substantive submission as the Inquiry proceeds. In the interim, we would be pleased to assist the Committee with any questions it may have.

Please contact the Adviser to the President, Elizabeth Pearson, at in the first instance if you would like any further information.

Yours sincerely

Arthur Moses SC
President