HOUSE OF REPRESENTATIVES

SOCIAL POLICY AND LEGAL AFFAIRS COMMITTEE

INQUIRY INTO A BETTER FAMILY LAW SYSTEM

SUBMISSION – PROFESSOR THE HONOURABLE NAHUM MUSHIN AM

INTRODUCTION

1. I am pleased to make this submission to the House of Representatives Social Policy and Legal Affairs Committee's Inquiry into a Better Family Law System (the Committee).
2. I am an Adjunct Professor in the Faculty of Law at Monash University where I teach Lawyers' Ethics at graduate level. I was admitted to practice as a Barrister and Solicitor of the Supreme Court of Victoria in 1972 and practised as a solicitor until I went to the Victorian Bar in 1980. My practice was general until about 1986 when I developed a speciality in family law. I was appointed as a Justice of the Family Court of Australia (FCoA) in 1990 and retired from that position in 2011. For the last 6 years of my judicial appointment, I also held a commission as a Presidential Member of the Administrative Appeals Tribunal.
3. My position on the Family Court was primarily as a trial judge but I also sat on many appeals. I was the administrative judge for Victoria and Tasmania from 2004 – 2008 and also chaired the Court's Cultural Diversity Committee for many years.
4. I address the Committee's Terms of Reference below. I also note several issues which I do not propose to address in detail but will be pleased to expand on at the Committee's request.

TERM OF REFERENCE 3

5. I address Term of Reference 3 by considering –
    a. Legal Aid funding; and
    b. Expert evidence.
6. **Legal Aid funding** – The consequences of significant reductions in legal aid funding have serious consequences on Courts, litigants and families, and particularly on children. An unpresented party in family law proceedings faces unreasonable hurdles which are exacerbated in matters involving family violence. The worst of those hurdles is the need to face the perpetrator of the violence and even cross-examine him/her. That can often re-victimise the victim with obvious consequences.
7. It is very difficult to ensure balance in a case in which one or both parties, more one than both, is unrepresented. Ensuring that the unrepresented party receives a fair hearing while not prejudicing the represented party requires careful management. With no criticism, the unrepresented party does not know the procedures and may not be ensuring that all available evidence and submissions are put before the Court. Judges are limited in the assistance they might give to an unrepresented party while attempting to ensure that everything is before the Court to enable an appropriate outcome of the matter in accordance with the law.[1] To disregard that principle is to

[1] *Re F,* (2001) FLC 93-072.

invite a suggestion of bias, either actual or perceived, something which is not uncommon in family law proceedings.

8. I submit that if Governments of all persuasions are serious about family law in general and family violence in particular, there needs to be a considerably greater commitment to legal aid funding for those in need.
9. **Expert evidence** – One of the great strengths of Australia's family law system and the creation of the FCoA was its reliance on expert evidence from inside the Court. That particularly relates to expert evidence in matters concerning the best interests of children. With the steady reductions in funding, the great proportion of that evidence now comes from private practitioners, particularly in matters before the (Federal Circuit Court (FCC).
10. My experience in cultural diversity established that litigants from many new and emerging cultures are wary of reports from private practitioners. One of the strengths of the concept of in-house reports was the preference of many parties to family law proceedings was a greater trust in the Courts' expert witnesses, particularly in matters in which family violence was relevant.
11. Anecdotal evidence suggests that the costs of reports from a small number of private practitioners are exorbitant. There are circumstances in which a report from a private practitioner in a child case is necessary. However, it is submitted that the Courts' funding should be increased to return to the former structure of reports in child cases being prepared in-house. Further, there should be consideration of a scale of costs for reports by external experts.

TERM OF REFERENCE 4

12. The issue of the exercise of discretion in property applications under s.79 of the Family Law Act 1975 (the Act) has been vexed for most of the history of the Court.
13. In the leading case of *Kennon v Kennon* the Full Court of the Family Court of Australia (FCoA) held that there needed to be a "course of conduct" of family violence. The Court held:

> *Put shortly, our view is that where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79. We prefer this approach to the concept of ``negative contributions'' which is sometimes referred to in this discussion.*[2]

The requirements of *a course of violent conduct* and *significant adverse impact* have had a significantly restrictive consequence on recognising the role of family violence in property proceedings. While our understanding of family violence and its significance have increased exponentially since *Kennon*, the law has not kept pace with those developments.

14. It is clear that family violence affects different people in different ways. It discounts the actuality that one incident can, and often does, change a victim for the rest of their life. I submit that those restrictions should be removed and it be open to the Courts to

[2] *Kennon v Kennon*, (1997) FLC 92-757; p.84,294.

assess its significance on a case by case basis without restriction in accordance with the discretionary requirement in s.79(2) of the Act.

15. The Courts' consideration of family violence in property proceedings has been variously considered under the headings of contribution and what are known as *the s.75(2) factors*. *Kennon*[3] refers to it as being relevant to contribution but it has also often been considered under s.75(2)(o) of the Act. In my submission, it is appropriate to consider it under the heading of contribution. Section 79(4) of the Act should be amended to add a provision worded as follows or in like wording:

> *Any family violence by one party to the other party and the consequences thereof on the victim.*

Family violence is defined in s.4AB of the Act. That definition is much wider than that which was considered in Kennon. An amendment in accordance with the above submission would appropriately widen the consideration of family violence in property proceedings.

TERM OF REFERENCE 5

16. As previously noted, I retired from the FCoA in 2011. I am not aware of the present state of practice in this area. Accordingly, my submissions in this area are general and refer to my past experiences.
17. During my time on the Bench there was constant, high level education of Judges and other family law professionals within the FCoA on all areas of the jurisdiction. As our understanding of family violence and its consequences improved so did the level of education in the area. There were some decisions which demonstrated a lack of understanding of family violence but reported cases suggest that that has improved considerably. In my view, the amendment of the Act to include the definition of family violence in s.4AB has significantly contributed to that improvement.
18. My experience of hearing cases led me to the view that the legal profession's understanding of family violence was, in many instances, less than adequate. I give occasional lectures on family violence to professional bodies and have been impressed with a general improvement in knowledge and understanding.
19. I have always regarded the fragmentation of jurisdictions as between the States and the Commonwealth as an encumbrance to the proper development of all issues of family law and particularly family violence. The States have responsibility for criminal law and child protection while the Commonwealth has jurisdiction in family law. The Commonwealth's jurisdiction is exercised by two Courts, the FCoA and the FCC, which have effective conjoint jurisdiction with no formal legislated delineation of the apportionment of cases.
20. I was constantly concerned by the dangers of a lack of communication between the various Courts to ensure that everyone had all the relevant information about each matter. For example, if the FCoA did not know about the existence of an intervention order, the consequences for a child in granting the perpetrator contact could be catastrophic. Judges live with that fear constantly.
21. At the time I was of the view that coordination between the Courts was inadequate. There needed to be a central coordination body, administered at a high level, to ensure the constant flow of information and compliance with established rules.

[3] Ibid.

TERM OF REFERENCE 6

22. My consideration of the previous Term of Reference is equally applicable to Term of Reference 6. Ideally, there would be a national approach to all the issues being considered by the Committee. Again, Australia's federal system, and particularly the division of powers in the Constitution, is militating against the proper delivery of family law services to the community. That affects victims of family violence and particularly children. In a developed society such as Australia, that should be unacceptable.

OTHER STRUCTURAL BARRIERS TO THE IMPROVEMENT OF VIOLENCE ISSUES IN FAMILY LAW

23. I do not propose addressing structural issues in detail here. I refer to them briefly and would be pleased to expand them if the Committee wishes. They are:
    a. The creation of a Family Division of the FCC;
    b. Judges assigned to the proposed Family Division of the FCC be appointed with the same qualifications as provided in the Family Law Act 1975 s.22(2); and
    c. Clear Rules of Court of the Family Court of Australia (FCoA) and the Federal Circuit Court (FCC) with regard to the division of work between them. More complex, longer matters should be heard by the FCoA.

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