

20 August 2014



Committee Secretary  
Senate Finance and Public Administration Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [fpa.sen@aph.gov.au](mailto:fpa.sen@aph.gov.au)

Dear Committee Secretary

**Senate Finance and Public Administration References Committee - Inquiry into Domestic Violence in Australia**

This submission is made on behalf of the Family Law Section of the Law Council of Australia.

The Law Council of Australia is the peak national organisation of the legal profession representing around 60,000 practitioners across the country. The Family Law Section (FLS) is the largest of the Law Council's specialist Sections.

Since its inception in 1985, FLS has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. FLS is committed to furthering the interests and objectives of family law and family lawyers for the benefit of the community.

***Background***

Following a request by Senator Waters (Queensland) on 26 June 2014, the following matter was referred to the Finance and Public Administration References Committee for inquiry and report by the 27 October 2014:

- a. the prevalence and impact of domestic violence in Australia as it affects all Australians and, in particular, as it affects:
  - i. women living with a disability, and
  - ii. women from Aboriginal and Torres Strait Islander backgrounds;
- b. the factors contributing to the present levels of domestic violence;
- c. the adequacy of policy and community responses to domestic violence;
- d. the effects of policy decisions regarding housing, legal services, and women's economic independence on the ability of women to escape domestic violence;
- e. how the Federal Government can best support, contribute to and drive the social, cultural and behavioural shifts required to eliminate violence against women and their children; and
- f. any other related matters.

***Focus of this submission***

FLS considers it appropriate to focus its submission on the effects of policy decisions regarding legal services, particularly within the family law system, on the ability of women to escape domestic violence.

The prevalence of domestic violence has a critical impact on the delivery of all services within the family law system. The Family Court of Australia, the Federal Circuit Court and the Family

Court of Western Australia (“the Family Courts”) deal with a high number of matters involving allegations of family violence and/or child abuse, with such allegations being raised in the majority of matters<sup>1</sup>. The experience is that those cases are more likely to require judicial determination, and less likely to resolve outside the Court system, and this is recognised by the exemptions in s60I(9) of the Family Law Act.

That in turn means that issues affecting access to the Courts, and the speed with which the Courts can deliver services, have a particular impact on families in which violence is an issue.

In January 2010, the FLS welcomed the Government’s release of three key reports which examined the operation of the family law system, as well as how the family law courts deal with cases involving family violence. Those reports were the Australian Institute of Family Studies Evaluation of the 2006 Reforms, the Family Courts Violence Review Report by Professor Richard Chisholm, and the Family Law Council Report on Improving Responses to Family Violence in the Family Law System. FLS commends those reports to the Committee.

It remains the long held position of FLS that any changes to the family law system must be based on providing the services which those using the system really need, and delivering those services in the most effective way.

While the Family Law Act acknowledges the profound effect that family violence has on children and families, the family courts system is not adequately resourced to deal as well as it should with violence and its effects. From the basic issue of litigants feeling and being safe at court, to the resources available to investigate allegations and risk, to access to services which support victims of violence, the system is under-funded.

While FLS strongly encourages and supports the use of family dispute resolution services that are available outside the court system, it must be remembered that the family law courts provide a vital resource for those unable to resolve issues arising from the breakdown of family relationships through non-court based interventions. These most vulnerable parties need a court system which is flexible, accessible and adequately resourced.

### ***Impact of the 2012 Family Law Reforms***

The amendments to the *Family Law Act* introduced by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) had the important effect of:

- (a) broadening the definition of family violence to include, appropriately, a wider range of coercive and abusive behaviours;
- (b) highlighting the need for close examination of family violence issues in parenting cases, and prioritising the protection of children;
- (c) acknowledging the issues which arise from the intersection of Federal family law and State-based criminal and child protection laws; and
- (d) emphasising the importance of prompt judicial resolution of matters involving family violence.

The Family Courts have in turn continued their focus on developing best practice models for dealing with cases involving violence. In October 2012, the Courts released the third edition of the Family Violence Best Practice Principles. The principles apply in all cases involving family violence or child abuse or the risk of family violence or child abuse in proceedings before courts exercising jurisdiction under the Family Law Act. The aspirations expressed by the principles reflect the determination of the courts to ensure that the best possible information is available to the courts to better inform decisions, that those decisions are made promptly, and that they are protective of children and victims of violence

The overarching difficulty, however, is that those aspirations are not presently being met because of a lack of resources.

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<sup>1</sup> Evaluation of the 2006 Family Law Reforms, Australian Institute of Family Studies, 2009, page 319.

## ***Impact of the 2006 Family Law Reforms***

While the 2012 Reforms inserted a new provision to make it clear that in any clash between the primary considerations articulated in section 60CC of the Family Law Act, the safety of children was to be prioritised, it is nevertheless the case that the 2006 Reforms have contributed to a greater focus both on shared parenting in families where violence is not an issue, and on ongoing involvement in children's lives by the perpetrators of domestic violence.

The perception of some in the community that there is a "legal right" on the part of parents to equal (or at least substantial) time with their children, contributes to a presumption by some that a "right" to contact with children is held by the perpetrators of domestic violence or (put another way) that there is a presumption that it is in the best interests of the child to maintain a relationship even with an abusive parent.

There are cases where it is simply not in the best interests of a child to have a relationship with a particular parent. While those cases have always been difficult, the 2006 Reforms (and the public perceptions of their effect) have arguably made them more so. The 2012 Reforms provided legislative confirmation that the safety of children was to be prioritised, but the difficulties associated with the 2006 Reforms largely remain.

## ***Independent Children's Lawyers and court experts***

For the Family Courts to make the best possible decisions in complex cases involving family violence and related issues, the availability of both appropriate expert psychiatric and psychological evidence, and the assistance of a well qualified and experienced Independent Children's Lawyer (ICL), can be vital.

Again, resourcing issues affect both. A court may make an order for an Independent Children's Lawyer to be appointed under the Family Law Act only to find that such order is meaningless because the appointment will not be funded by legal aid.

Independent Children's Lawyers safeguard the interests of the children they represent. In cases in which violence is a risk, the ICL can and should collect information, ensure the child's voice is heard and provide an independent view of any proposed order. The lack of funding for ICL's in all cases, and particularly if violence is alleged, means the court is not properly assisted in assessing the risk of family violence or protecting children from such risk as it is obliged to do under section 60CG of the Act. That is particularly the case where both parties are self-represented.

The general under-resourcing of legal aid has adverse effects on all parties and children when violence has occurred or is alleged. Competent representation in court ought not be a luxury only the well-off can afford. The court has in any event an overriding obligation to consider the best interests of children and can only properly do so if information is gathered and evidence properly presented.

Self-represented litigants can be at a significant disadvantage. For victims of violence the task of presenting a case, including cross-examining the perpetrator, can be very difficult. If perpetrators are unrepresented this means they may be personally cross-examining the victim. These outcomes are increasingly frequent as the availability of Legal Aid diminishes.

Legal aid generally also applies a "merits test" assessing the prospects of success of the applicant's case. If perpetrators of violence fail the merits test then legal assistance is denied - that impacts not only on the perpetrator but also on the victim. Self-represented litigants can increase the costs of legal proceedings for the other side, and delay the smooth running of the case at a cost in terms of judicial time and other court resources.

Perpetrators who admit past violence and who then want to access programs and assistance also have great difficulty in finding such programs, especially if unrepresented, and also affording such programs or assistance.

The Committee is referred to the Independent Children's Lawyers Study – Final Report released by the Australian Institute of Family Studies in 2013.

### ***Children's Contact Services***

In cases where it remains in the best interests of a child to have contact with a parent who has perpetrated family violence, the availability and affordability of children's contact services can be critical.

The resources available to provide these important services are inadequate. That in turn leads to a significant number of cases where there is simply no contact service available, or where that availability is subject either to severe time restrictions, or inordinate wait times.

Those issues can lead to increased interaction between the perpetrator and victim of family violence, as the perpetrator seeks to make arrangements to spend time with the children, and to increased demands on Legal Aid and the courts.

The Services should be appropriately resourced to ensure that waiting times for both contact changeover services and supervised contact are minimised. The families, and particularly children, who require the assistance of contact services are often the most vulnerable of all families who access the family law system.

As already noted, without appropriately funded contact services, the outcome for these families is usually the adoption of contact arrangements that do not provide suitable levels of safety for children (and parents), or the cessation of all contact between a child and a parent. Neither outcome meets the objects and principles of the *Family Law Act* to promote the best interests of children.

FLS accepts that funding for the family law system is not unlimited. However, in determining the funding priority to be given to the various sectors of the family law system, priority should be given to the services which support the most vulnerable families (and children) in that system.

### ***Legal Aid***

The Law Council's longstanding position in relation to the inadequacy of Legal Aid funding generally is also well known to Government.

Prompt access to justice and to effective legal representation is critical for women and children seeking to escape domestic violence. Many women who are victims of domestic violence are also the victims of economic abuse, and are simply unable to access legal advice without Legal Aid. That in turn affects their capacity to access the court system and other services, and their ability to escape their violent circumstances.

### ***Resourcing of the Family Courts***

It has long been the position of the FLS and Law Council that the Family Courts are inadequately resourced. Successive Governments have done little to address that longstanding problem. To the contrary, Government efforts have focused on searching for ways to effect savings in an already under-resourced system. Our Family Courts now find themselves in an impossible financial position.

While there are always improvements that any organisation can make, we have a hard working and conscientious judiciary who are always looking for ways to do things better, and to do more with less – but they simply cannot cope with the existing workload.

Family courts around the country are drowning under the current pressures. The 2006 reforms in relation to shared parenting have contributed to that workload, both by virtue of the community's misunderstanding of what those reforms actually say, and the convoluted decision-making pathway that the reforms prescribe. The 2012 changes in relation to family violence, which require courts to take prompt action in relation to allegations of child abuse or family violence, only compound the problem – and it is a cruel irony that Parliament should pass legislation requiring the courts to deal with those critical cases speedily, while at the same time reducing their ability to do so by withholding resources.

Further, the redistribution of resources away from the courts into other areas of dispute resolution means that the courts are now trying to manage significant workloads with fewer resources, which only leads to further delay. While acknowledging the valuable support provided by agencies outside the court system, it is important to remember that people resolve their disputes at varying points along the pathway. In many cases, the knowledge that an 'umpire' in the form of the court is available, and can be accessed promptly, helps parties to reach their own resolution. Conversely, if the court cannot be accessed without inordinate delay, that can contribute to poor quality agreed resolutions.

An under-resourced Family Courts system means:

- (a) delay in access to that system;
- (b) less capacity on the part of the system to deal urgently with matters requiring that;
- (c) delay in final resolution of cases which require judicial determination; and
- (d) greater scope for the stresses and issues facing at-risk families being exacerbated or recurring as a direct result of that delay – a vicious circle in which lack of resources leads to delay, and delay leads itself to increased demand on those same resources..

Those issues affect all consumers of the family law system, and not simply those facing issues arising out of violence. It is clear, however, that the impact is greatest on those families and children most at risk – i.e. those where violence, mental health issues, sexual abuse and substance abuse issues are prevalent.

There can be no doubt that the ability of women to escape domestic violence is adversely affected by the under-resourcing of the Family Courts.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Martyn Hagan', written in a cursive style.

MARTYN HAGAN  
SECRETARY GENERAL