

Review of the Family Law System – Issues Paper

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Submission by the NSW Young Lawyers Family Law Committee

The Executive Director

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The NSW Young Lawyers Family Law Committee (Committee) makes the following submission in response to the Review of the Family Law System – Issue Paper.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Family Law Committee (**Committee**) comprises members interested in all aspects of family law. The Committee coordinates family law related Continuing Professional Development (CPD) Programs and keep family law practitioners informed and connected by running regular Committee regarding legislative changes, important judicial decisions and current matters of interest in the area of family law. The Committee also provides a networking platform for students and lawyers working across all aspects of family law.

The Committee welcomes the opportunity to respond to the Review of the Family Law System – Issues Paper. The Committee supports the submissions made by the Law Society of NSW and to the extent the Committee's submissions differ or special mention is warranted, our submissions follow below:

Question 3: In what ways could access to information about family law and family law related services, including family violence services, be improved?

A considerable amount of information about family law and family law related services is available on the internet and, in particular, the Family Court and Federal Circuit Court websites, including a number of Fact Sheets and 'do it yourself' kits. However, parties who are unfamiliar with the family law system, particularly the difference between the Family Court and the Federal Circuit Court and the different forms, rules and procedures used in each court, indeed some registries, may have difficulty navigating the available

information and identifying which information is in fact relevant to their circumstances. The Committee submits a one court system would minimise the confusion for parties and allow the court's website to be streamlined, forms simplified and information consolidated in one user-friendly website.

While there are a number of 'do-it-yourself' kits and information brochures available on the courts' websites, the Committee submits the use of video guides and interactive forms would be of benefit. In addition, the resources available on the courts' websites should be available in languages other than English. For example, information on the courts' website about "Family law in Australia"¹, which has links to brief summaries about parenting cases and the best interests of the child² and financial cases³, is only available in English notwithstanding it is a summary of the cornerstones of the family law system. Fact sheets and do-it-yourself kits should be available in a multiple languages and the increased use of video-guides would be relatively easy to translate or subtitle in the languages other than English.

The Committee supports the adoption of a one court system, which would in turn streamline the provision of information and reduce confusion for parties and practitioners. If a one court system is not adopted, the Committee submits the Federal Circuit Court website should be simplified and family law and general federal information presented separately, which could be achieved relatively easily with a pop-up prompt upon accessing the website.

Question 4: How might people with family law related needs be assisted to navigate the family law system?

The Committee submits that navigation of the family law system will be assisted by a simplification of the Family Law Act and the courts' rules, preferably through the adoption of a one court system. The legislation as it stands is convoluted and the rules often differ significantly between the courts, creating confusion for parties and practitioners alike. If concepts such as the presumption of equal shared parental responsibility

¹ Family Court of Australia, *Family Law in Australia*, <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-law-in-australia/>>

² Family Court of Australia, *Parenting Cases – the best interest of the child*, <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-law-in-australia/parenting-cases-the-best-interests-of-the-child/parenting-cases/>>

³ Family Court of Australia, *Financial cases*, <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-law-in-australia/financial-cases/financial-cases/>>

and the frequently referred to “four-step process”⁴ in financial matters are retained, they ought to be specifically referred to in the legislation and the relevant sections should flow in a logical sequence, preferably without the need to cross-reference multiple and at times un-related sections in the Act.⁵ The Committee also submits a simplification of the Act and the Rules and clear and logical pathway in the Act for both parenting and property matters would enable such pathway to be clearly articulated in an interactive guide on the courts’ website.

In addition, parties and practitioners alike would be better able to navigate the family law system if there were consistency in registry practices and procedures. Committee Members’ experience is that court processes often vary significantly between registries, creating confusion and the risk of inconsistency of experience and outcome in the court system.

Question 9: How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

The Committee submits the increased use of technology is essential to ensure people living in rural and regional areas are able to readily and easily access the family law system. Litigants and practitioners are routinely expected to travel significant distances for short court matters which could easily be conducted by telephone and video-link. The Committee submits that some procedural matters could also be conducted online (for example, divorce hearings), as is the case in some Supreme and District Court matters.

The Committee submits there is an opportunity for the court to improve the online portal. There are still a number of court documents, such as subpoenas and urgent applications, which can only be filed in the registry either in person or by post, which is a particular disadvantage to rural and regional parties and practitioners. Documents such as subpoenas and urgent applications which require a Registrar’s consideration could be filed online and remain 'unsealed' until a Registrar has considered them, similar to the current process for the filing of an Application in a Case.

⁴ See, eg, *Bevan & Bevan* [2013] FamCAFC 116, which acknowledges the regular application of the four-step process while cautioning it is simply a means to an end and not “statutory edict”.

⁵ For example, in property matters, a consideration of s79 or 90SM in de facto matters requires a consideration of s75(2) or 90SF(3). Superannuation provisions are contained much later in the Act at s90MT.

The Committee submits that court listing practices in rural and regional registries often means that matters are not afforded sufficient time or simply not reached at all. It is not uncommon for interim and final hearings to be triple listed and up to 40 mentions listed in one day. The Committee submits that a greater use of telephone and video-link for mentions and directions hearings in regional registries would free up the court's time during circuits to hear substantive matters.

Question 10: What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

The Committee submits the best way to reduce the cost of family law proceedings is to ensure the family law system is appropriately funded and, in particular, that there is an increase in the number of judicial officers. The current delays in the family law system only seek to increase parties' costs. The Committee also submits the accumulation of costs to clients can be attributed to the significant differences in processes between the registries (referred to at Question 9), as well as quality and content of services provided across Australia. For example, the Committee understands the Melbourne Registry often calls Family Consultants to give oral evidence without the need for a written report, which reduces the court's costs associated with preparing reports and the concomitant delay in waiting for the reports to be prepared and released before matters can progress.

Committee Members have experienced a significant degree of variation when it comes to the content of the reports; some Family Consultants provide a lot more detail and information in their reports, and there appears to be individual discretion amongst Family Consultants as to whether or not they will speak directly with children's schools, counsellors etc., or meet with members of the parties' extended families. These discrepancies not only make it difficult for clients to resolve their disputes but also make it difficult for legal practitioners to assist their clients navigate the system, which can vary significantly depending on the registry. If more detailed reports were available earlier in the proceedings (unlike the current process, at least in Sydney, whereby the current waiting list for a more detailed family report is 12 months from the date the order is made), parties would be more likely to resolve their matter, avoid a final hearing and reduce their costs.

The current delays in the allocation of final hearing also reduces the incentive to obtain a privately funded report as although the report can be obtained much quicker, hearing dates are not. In the meantime, the

report goes “stale” and often requires updating once the final hearing dates are allocated, at further expense to the parties.

Question 14: What changes to the provisions in Part VII of the Family Law Act could be made to produce the best outcomes for children?

The Committee submits the children’s best interests must⁶ continue to underpin Part VII of the Act; however, the Act must be simplified and parental responsibility should not be linked to time arrangements. The Committee submits the determination of a child’s best interests should also expressly refer to the developmental needs of children and all subsections should apply to all parties, not limited to “parents” as is currently the case.⁷

The Committee submits that all steps should be taken to avoid protracted litigation in matters involving children and the increased use of alternative dispute resolution is part of that process. Addressing concerns about the arbitration process⁸ and expanding it to include straightforward parenting matters, would encourage engagement and reduce the number of matters in the court system. The mediation process, particularly the requirement to attend family dispute resolution before commencing proceedings, has become a “tick box” for many parties to commence litigation rather than resolve disputes. The Committee submits that section 60I process and the circumstances in which a certificate can be issued and when need to be clarified and applied in a more consistent manner. The Committee notes some anecdotal reports that mediators are not given specific training about the circumstances in which a Section 60I certificate may be issued, which can cause delays for parties and means matters may proceed to court without first engaging in pre-action mediation.

Question 17: What changes could be made to the provisions in the Family Law Act governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989 (entered into force 2 September 1990), article 3.

⁷ See, eg, *Family Law Act 1975* (Cth), s60CC(2)(e).

⁸ See, eg, Patrick Parkinson, ‘Family Law: Arbitration in family property proceedings: Exploring the potential’ (2016) 21 *Law Society Journal* 78.

The Committee submits a simplification of provisions relating to property and financial matters would promote fairer and more consistent outcomes for parties.

The Full Court has noted that the process undertaken during financial matters "*merely illuminates the path to the ultimate result.*"⁹ The Committee submits litigants and practitioners would benefit from a clearer legislative pathway, which may include a codification of the "four-step process" if it is to be retained. The Committee submits the application of sections to married and de facto couples is appropriate and would minimise confusion and improve comprehensibility of the law and how it is applied.

The Committee submits that any simplification of the Act ought to minimize the need to cross-reference sections. For example, when considering whether to make and order in property settlement proceedings, section 79 of the Act refers to subsection 75(2) which is named "*Matters to be taken into consideration in relation to spousal maintenance*", some of which are clearly not relevant to property settlement proceedings.¹⁰ The cross-referring between apparently unrelated sections and considerations creates a confusion which could be avoided if the matters set out in section 75(2) were also separately set out in section 79, as relevant.

The Committee submits that a simplification of the Act would improve clarity and comprehensibility for parties, practitioners and the court and lead to more consistent outcomes. A clear legislative pathway would assist the accessibility and transparency of property division for litigants who do not necessarily have access to or knowledge of the underlying body of case law. Litigants and practitioners would be able to follow a logical legislative pathway which would, of course, be informed and interpreted by judicial guidance.

Further, the Committee submits the inclusion of matters relating to financial disclosure in the Act (rather than in the Rules, which differ between the courts) would also promote clarity and result in fairer outcomes, particularly in matters where non-disclosure is an issue. Including disclosure obligations in the Act would enable it to be addressed in a more decisive and comprehensive manner and would provide litigants struggling with a spouse who refuses to provide financial disclosure adequate recourse. In Committee Members' experience, vulnerable parties are often forced to initiate court proceedings due to a spouse who consistently hinders settlement by refusing to provide financial disclosure. However, when the matter is litigated, it is Committee Members' experience that the Court's discretion to take into account a failure to

⁹ *Bevan & Bevan* [2013] FamCAFC 116, 71.

¹⁰ See, eg, *Family Law Act 1975* (Cth), s75(2)(h).

provide non-disclosure when making orders for a property settlement is rarely exercised and should be remedied.

Finally, the Committee submits that specific reference to family violence in both the assessment of contributions and s75(2) factors may promote more consistent and just outcomes. For example, the principles enunciated in *Kennon & Kennon* [1997] FamCA 27 could be codified.

Question 18: What changes could be made to the provisions in the Family Law Act governing spousal maintenance to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Similar to the submission at Question 17, the sections relating to spousal maintenance could also be simplified and set out in a more sequential manner. The current format requires litigants and practitioners to move between multiple sections in the Act and, in the Committee's submission, setting out the process enunciated in *Bevan & Bevan* (1995) FLC 92-600 in the Act, preferably in the one section, would improve clarity and comprehensibility and promote fairer and more consistent outcomes.

Finally, if family violence is to be specifically included as a consideration in property matters, it should also be included as a consideration in an application for spousal maintenance.

Question 20: What changes to court processes could be made to facilitate the timely and cost-effective resolution for family law disputes?

The Committee submits there are a number of court processes which currently contribute to the delay and costs of family law disputes. As noted at Question 10, there are significant discrepancies and inconsistencies in processes between courts and registries. At present, judges in the Federal Circuit Court case manage all matters taking up valuable time that could be allocated to hearing substantive disputes. Committee Members' experience is that there are significant delays associated with having judges case manage matters at the early stage of proceedings, with parties waiting for significant periods for their matter to be called only to be told the court is "too busy" to hear the matter and resolve even procedural disputes. The Committee submits that staggered listing practices could be adopted in duty lists in the same way

divorce hearings are staggered to minimise the need for parties to wait for extended periods for their matter to be called.

The Committee submits that greater consistency in listing practices between not only registries but also judges would also facilitate the more timely and cost-effective resolution of matters. For example, some courts call matters alphabetically, others call matters according to their number in the list, and other courts call matters according to perceived complexity or whether a party is self-represented. While a standardised approach to listing practices may not be possible, more information would be of assistance. For example, court lists are released at 4.00pm the day prior to the listing date. While the court portal shows a matter's listing date, it could also set out the number of other matters listed at the same time, which would help parties and practitioners determine whether they are likely to be heard, should brief counsel or be prepared to be at court for a number of hours.

As noted above, the Committee's submissions are all made on the basis that the family law system needs to be better resourced. The longer matters spend in the court system, the greater the costs. The more time judges spend case managing matters, the less time they have to hear substantive issues. The more court events parties are required to attend, particularly court events which do not progress the matter, the greater a party's costs.

Question 22: How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

The Committee submits the introduction of mandatory pre-filing mediation in property matters be considered for all matters, not just small property matters. Any provisions would need to contain exemptions similar to those in 60I(9) and include provisions relating to financial disclosure. The Committee submits that family dispute resolution practitioners in property matters should have an added requirement of being a lawyer, preferably with family law experience, to assist the parties in navigating legal concepts including whether the parties' agreement is "just and equitable".

For mandatory mediation in property matters to be effective, pre-action procedures will need to be standardised between the courts (if the two court system is retained) and the repercussions for non-compliance bolstered. In addition to standardised pre-filing procedures, the Committee also submits a small claims list would be an effective and economical method for resolving smaller property matters. The list

could draw on the approach adopted by in the small claims list for industrial disputes in the Federal Circuit Court where the Judge is not bound by the rules of evidence and may act in an informal matter without regard to legal form. The Judge is also permitted to correct errors in the application. The Indigenous List, currently operating in the Sydney Registry of the Federal Circuit Court provides somewhat of a template, in that the list is run in a way that is resolution-focused and with minimal emphasis on legal etiquette and procedure.

A small claims list with clear structures in place to limit hearing time would also provide structure for litigants in person and clear limits on hearing time will prevent the common situation whereby uncomplicated matters are heard for a disproportionate amount of time because a litigant in person does not understand the court's process. A small claims list would also be an opportunity for young lawyers to run a case to final determination, develop core competencies¹¹ and less adversarial advocacy skills and reduce parties' costs.

Question 23: How can parties who have experienced family violence or abuse be better supported at court?

The Committee submits that greater consideration could be given to the impact of the court's current listing practices on parties who have experienced family violence, particularly, the common practice of over listing matters, matters regularly being marked "not reached" with no apparent priority afforded on the next occasion and parties being required to wait at court, in confined spaces, for hours on end without any clear explanation as to how the court list is being called or whether their matter will actually be heard. The practice of double and in some cases triple listing final hearings has the potential to force parties in the "not reached" matter to negotiate despite inequality of bargaining power and agree to a settlement that may not be in the best interests of the children or just and equitable simply because the next final hearing may be months, if not years, away and the costs of attending and preparing for the "not reached" hearing have effectively been thrown away.

While safety plans go some way in supporting parties at court, the court and court officers also need to be aware of how the calling of the list can play a part. For example, the Committee is aware of instances in which parties may bring multiple support people into court effectively filling the public gallery in an apparent attempt to intimidate the other party. While it is important the courts remain open to the public, the Committee notes the experience of some practitioners in courts when the court officer essentially triages

¹¹ As referred to at Question 41 of the Issue Paper.

matters and calls through the list in, say, groups of three, limiting the number of people in the courtroom at any one time which may be less intimidating for particularly vulnerable parties. Safety plans also appear to be underutilised in regional and rural registries, particularly those that sit in the Local Court, due to lack of resources (such as one security guard and no safe rooms) and apparent tensions between Local Court staff and court staff (such as the Federal Circuit Court security guard restricted to the courtroom and not able to deal with issues that occur elsewhere).

The Committee notes the scarcity of appropriately qualified and trained family violence support workers outside cities and the larger regional registries and submits ongoing and increased funding for family violence support services be extended to ensure regional registries are not left behind.

Question 25: How should the family law system address misuse of process as a form of abuse in family law matters?

The Committee submits the use of costs orders is the most effective way to prevent a misuse of the court process as a form of abuse. Whilst the Act already allows the making of costs orders, Committee Members' experience is that costs orders are rarely made, particularly in the early stage of a matter, and the most common order is simply to reserve a party's costs. Where very few matters make it to final hearing, the reservation of a party's costs has little practical impact on the non-compliant party.

The Committee submits that a simplification of the costs process and consideration and a specific section relating to the non-compliance with procedural directions, with limited considerations, is an appropriate way to discourage and deal with misuse of process as a form of abuse. The Committee submits that the simplification of the provisions and considerations relating to costs particularly for the non-compliance with procedural directions would encourage their use and therefore their effectiveness. As part of the simplification of costs provisions, the courts' costs schedules should be harmonised and costs made in accordance with the schedules should require limited reasons (as opposed to, say, making an order for party-party costs or costs on an indemnity basis).

The Committee submits other mechanisms that should deal with abuse of process, including provisions relating to vexatious proceedings, are rarely used in practice and ought to be simplified.

Question 28: Should online dispute resolution process play a greater role in helping people to resolve family law matters in Australia? If so,

how can these processes be best supported, and what safeguards should be incorporated into their development?

As submitted in response to Question 9, access to the family law system will be improved through the increased use of technology. The Committee submits online dispute resolution should play a greater role in family law matters for two key reasons:

1. Online dispute resolution will facilitate engagement for people in rural and regional areas.
2. Online dispute resolution may also be a useful tool in matters involving allegations of family violence where parties do not want or cannot be in the same room but nevertheless want to try and resolve their dispute without the need to commence proceedings.

To support the move, Family Relationships Centres will need to have appropriate video conferencing facilities and should not require special hardware or software for parties to participate. In addition to current considerations about the appropriateness of dispute resolutions, specific safeguards will need to be in place to ensure the mediation is operated in a secure manner.

Question 41: What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

The Committee submits family law practitioners should be required to undertake a percentage of their Continuing Professional Development (CPD) points in family law related topics. Specific training in identifying and dealing with matters involving family violence should also be expected.

The Committee submits family law should be a mandatory subject at law school and added to the 'Priestley 11'.

Question 43: How should concerns about professional practices that exacerbate conflict be addressed?

The Committee again submits that reducing delays in the family law system is a key to reducing conflict between parties, whether or not it is exacerbated by professional practices or the parties themselves. Delays in the court system give the emotionally or financially stronger party a strategic advantage and the longer the

matter is in the court system the greater the likelihood that a party will file additional interim or procedural applications, exacerbating conflict, increasing costs and further contributing to the delays in the court system.

The Committee submits that in addition to the comments made at Question 41 above, some professional practices are exacerbated by inappropriate levels of supervision of young lawyers. Appropriate supervision of young lawyers by their supervising partners not only ensures young lawyers are able to effectively manage clients and navigate the court system in a resolution focused way but it also assists them in dealing with tactics that may be employed by other professionals that have the effect of exacerbating the conflict between the parties. The Committee has taken an active role in ensuring young lawyers are afforded opportunities for professional development, principally through the Professional Skills Series held at the Parramatta registry of the Federal Circuit Court and programs such as Confidence in the Courtroom.¹² Such programs depend on the willingness of judicial officers and senior practitioners to contribute their time and knowledge and are often limited to the city registries. The Committee submits that the more programs that are available, particularly programs that link the court to the profession, the better outcomes are likely to be for not just young lawyers but the profession as a whole.

Question 44: What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

The Committee, along with the Law Society of NSW, has repeatedly called on the government to ensure the family law system is adequately funded.¹³ Ensuring the family law system is adequately funded is the best way to promote the wellbeing of family law professionals, including judicial officers. The Committee notes it is not uncommon to hear judicial officers in the Sydney registry complain to the profession that their workload is untenable and the reason for extensive delays. The Committee submits that a simplification of the Act and Rules (and preferably a one-court system) along with greater judicial resources (including ensuring retired judges are replaced without delay), will reduce judges' workloads and reduce delays in the family law system. The Committee submits that the current delays, which can see matters languish in the system for at two to three years as a minimum, does not promote the wellbeing of the parties, practitioners or judicial officers.

¹² The Law Society of New South Wales, *Family Law Committee* <<https://www.lawsociety.com.au/legal-communities/NSW-young-lawyers/committees/family-law>>

¹³ See, eg, The Law Society of NSW, 'Resources for family law courts urgently needed' (Media Release, 7 December 2017) and 'Courts and family law services face less certainty amidst more pressure' (Media Release, 23 November 2017).

Question 45: Should s 121 of the *Family Law Act* be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?

The Committee notes the natural tension between the principles of open justice and the protection of privacy, particularly for children. The Committee does not support any amendment to s121 that would breach a child's right to privacy.¹⁴ The Committee submits that any amendment to s121 should be limited to a consideration of whether the restrictions end after the matter has concluded and is no longer before the courts or the child has turned 18. The Committee can foresee situations where children and parties wish to discuss or publish their experiences for a legitimate purpose well after proceedings have concluded¹⁵ which would be a breach of s121 in its current form.

Question 47: What changes should be made to the family law system's governance and regulatory process to improve public confidence in the family law system?

The Committee submits the establishment of an independent, accountable and effective complaint system is an important feature in improving the public's confidence in the family law system. The current system is such that complaints (usually about delays in the delivery of judgment) are made to the Chief Judge of the relevant court and, for the most part, there appears to be no oversight or transparency as to how complaints are handled. There is also no prescribed timeframe for which complaints are to be processed and resolved, if ever and there is no effective remedy or recourse if the complaint is not resolved. For example, the Committee is aware of a number of cases where judgements have not been delivered for years, without any explanation or recourse to the parties. The Committee submits that the implementation of a more structured regulatory process would address those concerns and increase the public's confidence in the system.

¹⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989 (entered into force 2 September 1990), article 16.

¹⁵ See, eg, *Carter* [2018] FamCAFC 45 in which a 53 year old man sought access to his parents' 1977 court file to "make some sense" of why his family had become "dysfunctional".

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

Contact:



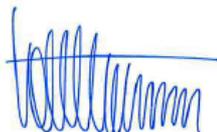
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