

Your submission

Please provide a brief summary of your experience and any relevant issues. Your submission should respond to one or more of the committee's Terms of Reference

Feminist Legal Clinic Inc. is a community legal service that works to advance the human rights of women and girls through a combination of targeted casework, community legal education and law reform work. We receive more requests for assistance in relation to family law than in any other area and regard it as an epicentre of human rights abuse of women and children. One of our main concerns is the forcible separation of mothers and children at the behest of perpetrators of violence and the abuse of the legal process to render women distraught and impoverished.

Our work includes supporting the Women's Family Law Court Support Service (WFLCSS) operating in the Sydney Family Court. This service was originally established by the NSW Women's Refuge Movement over 10 years ago and provides non-legal support to victims of domestic violence involved in family law proceedings. An evaluation of the service in 2011 found that "they should have this in every court". However, despite this it has struggled to retain its meagre funding (\$120,000 per annum) which was cut by the NSW Government at the end of June 2019. With the support of the Sydney Family Court our unfunded service has stepped in and is currently operating the service daily with a roster of volunteer staff.

We usually state that we welcome the opportunity to make a submission, but in this case we have already made several previous submissions on this same topic and question why yet another inquiry is required when the issues have already been clearly identified. We note that the preparation of endless submissions drains time and energy from an already under-resourced sector and distracts many services from their core work of supporting individuals. Accordingly, we will be keeping our submission brief.

We are also concerned by indications that this inquiry is predicated upon views that question women's veracity when they make reports of domestic violence and child abuse in a context of family law proceedings. Our firsthand experience, which is supported by academic research, would indicate that contrary to community perceptions, women who raise these concerns are rarely fabricating them and not only do they not gain any advantage in family law proceedings, but instead risk complete removal of their children. Experienced legal practitioners in this jurisdiction routinely advise women against raising domestic violence and child abuse allegations unless there have been convictions against the perpetrator, which is too rarely the case. Women making these claims are met with counter claims that they are mentally ill, delusional or pathologically manipulative.

However, the high rates of domestic violence and child sexual abuse, in respect to which men are overwhelmingly the perpetrators, would indicate that women's concerns are generally not unfounded. Unfortunately, women caught up in these circumstances are not only battling their perpetrators but societal wide scepticism and victim blaming, including by other women. This can include paternal grandmothers who need to take a long hard look at their sons before supporting them in a vendetta against their ex-wives and partners, and women in general. Not only are domestic violence and child sexual abuse very largely committed by men but they are also notoriously difficult to prove and to prosecute, so victims often have no evidence of convictions to sway family law proceedings in their favour. This is a systemic problem.

To offset this difficulty, there needs to be acknowledgement that mothers are generally best placed to keep children safe and to determine their best interests, unless there is strong evidence to the contrary. Mothers also need to have independent access to adequate financial support while engaged in parenting and should not be reliant upon extracting this support from an abusive man. Undermining the authority of mothers and failing to acknowledge maternal rights to retain and care for their children is pandering to perpetrators of violence and putting both women and children at risk.

If there is insufficient room above to summarise your experience and relevant issues, please attach an additional page to this submission.

Proposed solutions

Please indicate any proposed solutions you may have that correspond to the committee's Terms of Reference

- 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;*

Clearly, we need a single specialist court that has jurisdiction to deal with family law, domestic violence and child protection issues together and which is supported by a specialist police service with officers trained in the dynamics of domestic violence and sexual offending. The women's police stations introduced in parts of South America would appear to be an effective model. The artificial divisions in jurisdiction caused by Australia's federal system are responsible for a great deal of injustice with significant loss of time and money by parties and inconsistent outcomes, with the result that many women are forced to give up and settle for arrangements that put themselves and their children at risk. The Federal Government must use its external affairs power under the constitution to introduce reforms to family law, domestic violence and child protection laws to enable it to meet its international human rights obligations to women and children.

We support the adoption of an inquisitorial system, as the current adversarial system is an inappropriate model for the resolution of disputes of this nature. Too often the formal application of the rules of evidence are used to hamper proper airing and consideration of all concerns and places self-represented parties at a distinct disadvantage. Women who are victims of domestic violence typically have less access to financial resources than men and are psychologically vulnerable and are falling through the massive gaps in a severely under resourced legal aid system. As a result, the existing legal system facilitates perpetrators ongoing abuse of their victims.

- b. *the appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders;*

Unfortunately, there is no reliable means of compelling a witness to be truthful and more practiced liars are more likely to withstand the vigours of the court process than an individual still recovering from the effects of a relationship with just such an individual. Cross-examination in the hands of an untrained self-represented individual, often still suffering the effects of trauma, is a particularly poor tool for getting at the truth. The recent introduction of the Family Violence Cross Examination Scheme is unlikely to cure the difficulty, since it does not extend to interim hearings when a lot of damage is already done. The rules of evidence in an adversarial system often work to conceal rather than expose the truth. Failure to declare finances honestly or completely appears to be commonplace but can only attract penalties for non-compliance if the other party has the wherewithal to prove it and seek those orders and typically they do not. In cases involving allegations of child sexual abuse against fathers, admissions are highly unlikely and more typically result in counter allegations that the mother is mentally unstable or a pathological liar. Convictions are notoriously difficult to secure in relation to these matters so that the court is often faced with deciding whether the father is a pedophile or the mother is delusional and has coached and alienated the children. Given this scenario research shows that judges tend to favour the latter with the result that these cases often result in mothers losing care of their children all together into the care of a man they suspect of molesting them.

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;

There is a need to dispense with the many legal formalities that operate to intimidate and deter parties and impede access to justice by imposing unnecessary cost and difficulty. Simple question and answer forms that can be completed on-line should be the norm and replace the use of affidavits. Legal Aid staff should be available to assist parties who need support with completing these forms. The court should have powers to request specific documents, reports or information to resolve disputed facts, rather than relying on parties to have the means to issue subpoenas and then comb through masses of private documentation to identify pertinent details. The requirement that appellants should prepare multiple indexed appeal books should be dispensed with and instead the relevant material, much of which has already been filed with the court, should be made available to judges electronically. Printing and copying costs in appeals are currently prohibitive even in cases where filing fees are waived due to the limited financial means of the appellant. While some of these suggestions will entail greater expense on the part of the court system and government bureaucracy, the savings to the community as a whole of having these matters dealt with more effectively should more than offset any additional administrative expense.

d. the financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning 'disappointment fees', and:

- i. capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters, and*
- ii. any mechanisms to improve the timely, efficient and effective resolution of property disputes in family law proceedings;*

There should be a universal legal aid system available to all parties and the system should be one where the role of the lawyer is to advise, support and prompt but should not displace an individual's capacity to express their concerns directly to the adjudicator. The jurisdiction is currently characterised by unconscionable charging on the part of lawyers with the result that many individuals have exhausted all their financial resources before the matter has reached a hearing date so that they are unrepresented at this crucial time. Opportunities for negotiation and settlement, facilitated by trained court staff, should arise at every mention date in a manner similar to that in tribunals such as NCAT. An inquisitorial system with three adjudicators with diverse areas of expertise should replace the current inappropriate adversarial model. Parties should not need to attend multiple different court hearings and mediations in disparate jurisdictions and locations in an attempt to have the various elements of their dispute resolved.

e. the effectiveness of the delivery of family law support services and family dispute resolution processes;

For cases in which there is a context of domestic violence or allegations of abuse, the support services and family dispute resolution processes are manifestly under resourced and inadequate. Legally assisted FDR's are often not made available due to limited resources which means that cases with a context of domestic violence are either considered unsuitable for FDR or victims are inappropriately required to submit to a process in which they are unsupported and vulnerable to being bullied into agreements that are not in their or their children's best interests. At Sydney Family Court, Legal Aid's Family Advocacy Support Service (FASS) provides only one social worker for women for the entire court. Considering that the vast majority of cases which reach the court are characterised by domestic violence it is unsurprising that our unfunded volunteer service receives regular referrals. Meanwhile in the same year that the Women's Family Law Court Support Service has been defunded, the government has found funding for FASS to provide a full-time social worker for men. Domestic violence is crime overwhelmingly committed by men against women so this staffing ensures that perpetrators are now receiving as much support as victims.

f. the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;

The impacts of family law proceedings, particularly where children are separated from their mothers and placed with fathers who are perpetrators of domestic violence and/or abuse, is devastating and the health, safety and wellbeing of many women and children is being put at risk as a result. Aside from this the cost of the system and its tendency to enable fathers to use contact with children as pawns in ruthless financial negotiations results in many women being impoverished and homeless following relationship breakdown. Too often parenting claims are being made by fathers with the purpose of reducing liability for child support and gaining an advantage in respect to the division of property. This nexus between contact with children and financial matters must be broken to enable women to escape mercenary and abusive men. The payment of a basic living wage to all mothers would improve the health, safety and wellbeing of children and families by reducing women's vulnerability to male abuse and exploitation generally.

g. any issues arising for grandparent carers in family law matters and family law court proceedings;

I have seen paternal grandmothers provide strong support for their sons to have care of their children in a context where the mother and primary caregiver is alleging domestic violence and child abuse. Unfortunately, their keenness to have a continuing involvement in the lives of their grandchildren can cloud their judgement in relation the child's best interests.

Fewer grandparents would be over burdened with the care of grandchildren if adequate support could be provided at an earlier stage to the many vulnerable mothers, including in those in abusive relationships. Rather than dismantling the NSW Women's Refuge Movement, these feminist services should have been expanded to provide longer term supported accommodation for vulnerable mothers and their children, including those battling mental health and substance abuse problems. Numerous apologies by government have documented the damage done by removal of children from their mothers.

h. any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners;

We receive many accounts from women of biased treatment by professionals within the family law system. We would suggest a Tribunal system with a panel of three adjudicators with diverse backgrounds and suitable qualifications rather than a single judge, is less likely to be vulnerable to bias. This is particularly the case where the parties and their children have an opportunity to address the adjudicators directly rather than relying entirely upon legal representatives, ICLs and report writers to fairly communicate their concerns.

i. any improvements to the interaction between the family law system and the child support system;

It is a real problem that so many children are removed from their mothers by child protection authorities on account of their continuing relationship with a violent or abusive father who the family law system is not allowing her to effectively escape. Mothers who suspect child abuse by the father, but cannot prove it, are deciding to remain in these relationships so that they can supervise all contact between the child and the father. Should they separate it is unlikely that this will be possible. Women must be emotionally, financially and legally supported to cut ties with men they identify as perpetrators of violence and should not be forced into continuing contact with them on account of family laws prescribing equal shared parenting responsibility. Sole parenting is not an easy job and it is rare for women to exclude all contact with fathers out of pure malice where there is no context of domestic violence or abuse.

*j. the potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes;
and*

These agreements largely favour the interests of those in control of greater wealth (most often men) and are typically used to protect the better resourced party in relationships where there is an imbalance in bargaining power. They should not be used to oust the jurisdiction of the family law, particularly in cases featuring family violence, and their use is unlikely to minimise future disputes.

k. any related matters

Please consult past submissions on family law previously supplied by our office and many other women's organisations and services. We are happy to expand on any point if requested. On one point our position has altered, and that is that we now believe section 121 of the Family Law Act must be repealed because the need for public scrutiny of family law proceedings now outweighs the need for these proceedings to be kept private.

If there is insufficient room above to discuss your proposed solutions, please attach additional pages to this submission.