



Joint Select Committee on Australia's Family Law System  
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Submission to the Joint Select Committee on Australia's Family Law System

By: Aboriginal Legal Service of Western Australia Limited (ALSWA)

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### **About the Service:**

The Aboriginal Legal Service of Western Australia Limited (ALSWA) provides legal assistance services to Aboriginal and Torres Strait Islander peoples throughout Western Australia in accordance with its Grant Agreement with the Commonwealth Attorney General's Department. ALSWA has a head office in Perth and offices in 11 regional locations.

ALSWA regularly appears in Family Court matters in the Family Court of Western Australia sitting in the Perth registry and on circuit in regional locations. ALSWA also regularly appears in the Childrens Court of Western Australia in Protection and Care matters, both in Perth and regional locations. These matters, at times, intersect with Family Court matters.

ALSWA provided submissions to the Australian Law Reform Commission on its Issues paper on the review of the Family Law system in 2018. ALSWA now seeks to provide feedback to the Joint Select Committee on Australia's Family Law System due to the importance of this area of law to Aboriginal people in Western Australia who face real issues in accessing justice within the current system.

### **ALSWA submission to selected terms:**

**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:**

In Western Australia, child protection matters are heard in the Children's Court which is empowered to make child protection orders placing a child under the care of the CEO of the Department of Communities – Child Protection and Family Support. It does not have power to make parental responsibility/ parenting orders under the *Family Law Act 1975* (Cth) nor the corresponding *Family Court Act 1997* (WA). Where Child protection proceedings are on foot, Family Courts are not permitted to make orders without the authorisation of the relevant State Child Protection Government department.

ALSWA has represented a number of clients in child protection proceedings where a clear identified protective outcome is for the child to live with a relative who should be granted parenting orders to that effect. The Children's Court may make 'Special Guardianship Orders', but does not have power to make parenting orders that would often be most appropriate for the family. It does not have power to transfer the proceedings by its own order - putting the burden on already overwhelmed relative carers and family to make the application to the Family Court and recommence proceedings in that court.

ALSWA has experience of families going back and forward between the Courts – with clients not knowing which court to attend on the day and becoming confused by the complex procedures. This is so much more difficult for those who have no funding for legal representation.

This could be resolved by:

- Empowering the Family Court and Children's Court to transfer proceedings between them;
- Empowering the Children's Court to make parenting and parental responsibility orders for children in appropriate circumstances;
- Empowering the Family Court to make child protection orders in relation to children and siblings who are or have been subject to Family Court proceedings; and
- Ensuring adequate funding for legal representation and support for all family members involved in court proceedings where there are issues of child protection and safety.

Western Australia is in the unique position of having a state Family Court. The Children's Court and Family Court have each established protocols and procedures, written into Practice Directions to allow for the sharing of information. ALSWA recommends this process should be legislated, to enable the courts and parties to proceedings concerning the same child to have ready access to all relevant documents in each court.

There is a Child Protection Officer employed by the Department of Communities - Child Protection and Family Support who is located within the Family Court of Western Australia and this officer facilitates effective information sharing. This is commended by ALSWA.

- 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;**

ALSWA considers that the most appropriate way for truthful and complete evidence is by ensuring the court takes a more collaborative and less adversarial approach to the reception of evidence and information.

The court setting and the 'win or lose approach' is not, in ALSWA's view, the best way to reach decisions in the best interests of children – who require their parents and family members to collaborate where possible.

ALSWA has worked with many clients who lack of trust in the courts because they are viewed as 'white people's courts' and who have lived family experiences of the courts and government departments being complicit the removal of their children.

We commend to the Committee the Human Rights and Equal Opportunity Commission Report Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, April 1997, which outlines the historical and current treatment of Aboriginal and Torres Strait Islander people. ALSWA seeks full implementation of the 54 recommendations in that report. (See: <https://www.humanrights.gov.au/our-work/bringing-them-home-report-1997>).

In 2018-2019 the Family Court of Western Australia undertook a pilot project in Newman, in the North West of Western Australia named the Jiji Nyirti' (little children in the Martu language) where a Magistrate, Family Consultant and lawyers for the parties including Independent Children's Lawyers encouraged families to resolve family law problems through a simplified procedure and by sitting in a circle to openly discuss issues, problems and lived experiences. This encouraged parties to share with one another and with the court in an open way with a view to resolving the matter. ALSWA recommends this model be considered and expanded.

SNAICC (Secretariat of National Aboriginal Islander Child Care) - Family Matters has published widely on Aboriginal family led decision making – a model supported by SNAICC for Aboriginal families and communities to lead discussions and decision making about their children (See: <https://www.snaicc.org.au/snaicc-report-aboriginal-torres-strait-islander-family-led-decision-making-trials-queensland-jan-2016-jun-2017/>).

- 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;**

Western Australia has a State-based family court making it easier to collaborate with state agencies such as the Department of Communities - Child Protection and Family Support, WA Police and other agencies.



ALSWA refers to its response to (b) above in relation to more collaborative style procedures. ALSWA recommends the family inclusive decision-making processes should be incorporated into the family law system because it is essential for many Aboriginal families. (See SNAICC model in (b) above).

ALSWA has represented parents, where the child was considered to be at risk of harm for different reasons. The presiding judicial officer has adopted a less formal manner of dealing with the parents and invited family members to be included and to contribute to discussions about the welfare of the child in each case. While these were formal court events (and both interim hearings, not trials), the court on those occasions chose to adopt a less formal and more inclusive approach, in an effort to secure a more child-focused outcome which, ALSWA believes, was successful.

Presiding judicial officers have held proceedings with families outside of formal court rooms and with the assistance of family consultants, also leading to well accepted decisions by family members.

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

ALSWA commends the legally-assisted, culturally appropriate dispute resolution (LACAFDR) at Family Relationship Centres and legally assisted dispute resolution conferences held at Legal Aid Western Australia.

ALSWA is concerned that there is a need to improve court processes for Aboriginal people who are accessing or might wish to access the family law courts. In this regard, it is noted that different models have been trialed, including:

- i. Judge Sexton (FCA, Sydney) has conducted an Indigenous list in the court at Sydney over recent years, such an approach could be rolled out in other registries and courts.
- ii. The Koori Family Hearing Day, held in the Family Division of the Broadmeadows Children's Court (child protection jurisdiction), is an instructive model to consider for alternative court processes for Aboriginal families. Proceedings are conducted in a 'roundtable' fashion, in the presence of a Magistrate and an Aboriginal Liaison Officer, with parties and family members being invited and encouraged to lead discussions, and lawyer involvement is less prominent:
- iii. In WA, Child Dispute Conferences (CDCs) can, in limited circumstances, be convened by a family consultant—in the absence of the judicial officer—in an attempt to resolve disputes about children without the cost, complexity and delay associated with judicial intervention. ALSWA has represented a parent in whose case four CDCs were held over a 12-month period without the parties ever having to appear before the Magistrate. This approach allowed parties to reach

incremental agreements with respect to interim issues and has significantly progressed the case towards a final resolution. However, there are substantial delays with scheduling of CDCs due to insufficient resources. Additional family consultants would alleviate this problem and could enable the expansion of the CDC to allow for it to be more available in more cases, more often. Moreover, Aboriginal family consultants should be employed to support this approach.

- iv. Individual judicial officers should be encouraged to be mindful of the adoption, whenever appropriate, of more flexible or informal ways of conducting court proceedings. For example, ALSWA acted for a young Aboriginal parent, where the other parent (also Aboriginal) was not represented. The child was very young, and both parents had lived sporadically in the household of the paternal grandparents. The grandparents therefore had significant involvement with the child and the parents. The presiding magistrate elected to conduct proceedings in a less formal conference style format having all parties seated around a table and including the grandparents in the discussions. ALSWA found this approach appropriate, and also successful, in the circumstances of the case.
- b. ALSWA notes that the Coordinated Family Dispute Resolution (CFDR) pilot, conducted over two years from 2012 to 2013 at five sites including Perth, is an example of a sophisticated mediation model which should be considered for rolling out across Australia. The model applied to parenting cases involving family violence and involved extensive screening by Legal Aid WA's mediation unit, with each party being allocated a clinical case worker. If both parties were then willing to negotiate, each would work independently with their clinical case worker to positively resolve the violence issues, and then work towards attending multiple conferences (with additional clinical support) to try to finally resolve past issues around family violence and reach agreements about their children.
- c. ALSWA refers to its response to (b) and (c) above.

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

ALSWA highlights that Aboriginal people have suffered trauma throughout their lives as well as intergenerational trauma from the effects of colonization and laws which devastated Aboriginal communities including the Stolen Generation. We refer to the Human Rights and Equal Opportunity Commission Report Bringing them Home (referred to in (b) above). Sadly the court experience for many families contributes to re-traumatisation. This affects parents, children and families.

The adversarial processes encourages families taking opposing stances in order to win their cases, often inadvertently drawing their children into further conflict and trauma.

Family law system clients engage with and use a range of different services including legal assistance services, housing, employment services, mental health services, drug and alcohol rehabilitation, counselling services, and parenting and/or behaviour change programs. Being educated about and navigating the multitude of different services, and knowing what services are best to use, is in ALSWA's experience extremely difficult for service users. Further, sharing of information between service providers from areas of treatment or practice is greatly hindered by various factors including confidentiality and privacy requirements, and the tendency for services and agencies to work in 'silos'. ALSWA suggests:

- i. That the recommendations of the Human Rights and Equal Opportunity Commission Report Bringing them Home (referred to in (b.) above) be fully implemented;
- ii. That the FASS model currently being piloted by LAW, of social workers being co-located with lawyers, is a potentially excellent way to assist clients to learn about services available, navigate services and ensure clients have an appropriate case manager to deal with as many of the issues as possible.
- iii. For Aboriginal Communities, a FASS style service should be replicated – to be provided by ATSILS – so that Aboriginal social or support workers, preferably from or very familiar with the local area, are co-located with family lawyers and can work directly with clients.

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

ALSWA represents many grandparents who care for their grandchildren or who are excluded from their grandchildren's lives and need to use the Family Court system to seek a relationship with them.

Responsibility for children in Aboriginal families can often vest in different relatives, who are known by the child as their grandparent, and accordingly it is proper that such persons be part of a conversation about the relevant children. For many Aboriginal communities, elders are integral to the life of the child, enabling them to grow up to be culturally secure and connected. ALSWA asks the Committee to consider the paper: 'Strengths of Australian Aboriginal Cultural Practices in Family Life and Child Rearing'. Lohar, Butera and Kennedy, Child Family community Australia paper no 25 of 2014, Australian Institute of Family Studies (see <https://aifs.gov.au/cfca/publications/strengths-australian-aboriginal-cultural-practices-fam>).

ALSWA has experience of parents separating where one parent is Aboriginal and the other is not and where the non-Aboriginal parent seeks to exclude the whole Aboriginal family from the child's life.

ALSWA also has experience where the protective member of the family is the grandparent and the family court process doesn't enable family support – but forces



the grandparent to choose between supporting their child and the protection of their grandchild.

ALSWA recommends the use of simplified forms and means for grandparents to play a role in proceedings, so that they do not need to become interveners or full parties, but take an intermediary role.

ALSWA recommends more collaborative models be adopted and enabled and refers to our response in (b.) and (c.) above.

**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;**

At the outset, it needs to be recognised that family law issues are traumatic for all involved in the process. Families don't become involved in court processes unless no other form of resolution has succeeded or they find themselves in an emergency situation, such as commencing proceedings for a recovery order or because of the intervention of the child protection system.

This trauma not only impacts the children and families before the courts – but also those assisting them at all levels – from judicial officers to front desk workers, from lawyers to legal assistants and those involved in other forms of counselling and dispute resolution.

Sadly, the adversarial system and the trauma experienced by the family can also 'rub off' on those working in or involved in the family law system day after day. A caring and understanding trauma informed approach needs to be taught and practiced by all involved in this difficult and emotional area.

For Aboriginal people, cultural competency needs to be prioritised not only for lawyers who routinely represent Aboriginal people, but for all lawyers, family consultants and judicial officers practicing in family law on the basis that any practitioner could be involved in a case at any time with Aboriginal people. Lack of understanding around cultural differences – for example, different attitudes or values regarding parenting or language barriers, can lead to misunderstandings which, in turn, increase conflict.

All judicial officers, of any court, who are required to exercise family law jurisdiction at any time should be required to have competency in a broad range of areas including child development and health, forms of attachment (including multiple attachment e.g. in Aboriginal families), sibling relationships, addiction, mental health, violence and other related harms and the effects of various types of harms upon children and parents. For financial cases, judicial officers should understand the effects of financial abuse and control through financial means and the effects on parties and children and deprivation and lack of resources.

The courts have, on numerous occasions, expressed views about the conduct of lawyers contributing to increased conflict and, in ALSWA's view, courts should be encouraged

to take this role and to seek that parties and their representatives rethink their combative stance and focus again on the best interests of the child and building relationships.

In ALSWA's observation, the workloads of judicial officers and many legal professionals are too high. Better resourcing of courts and legal services would enable work to be spread between more individuals thereby reducing some of this pressure. ALSWA otherwise supports initiatives related to mental health awareness, and therapies, being made readily and widely available to professionals throughout the family law system. It should be noted that these professionals are experiencing vicarious trauma on a daily basis.

Finally, all experts reporting on Aboriginal parties should be required to undergo cultural competency training and be up to date with the use of assessment tools including psychological testing tools and their relevance for Aboriginal and Torres Strait Islander people. Where possible, Aboriginal psychologists and social workers should be requested to report – or at least to review reports and provide cultural input. All expert reports relating to Aboriginal people must include Aboriginal peer reviewed papers and reports within their reference materials to ensure that their reports are culturally appropriate.

**k. any related matters.**

ALSWA strongly recommends the implementation of all recommendations made by the Human Rights and Equal Opportunity Commission Report Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, April 1997 and the consideration of reports and papers referred to in this submission.

ALSWA seeks increased representation for those before the family courts, with assistance of social science professionals as well as the provision of additional resources to enable duty lawyer services located at family law courts to be expanded and to cater for 'conflicts of interests'.

ALSWA recommends the role of Aboriginal liaison officers within Children's and Family Courts.

 Peter Collins

Director, Legal Services

Aboriginal Legal Service of Western Australia Limited