Peninsula Community Legal Centre

Submission to Review of the *Federal Circuit and Family Court of Australia Act* 2021

10 December 2024

Submission

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1. Introduction

Peninsula Community Legal Centre (PCLC) welcomes the opportunity to make a submission to the Review of the *Federal Circuit and Family Court of Australia Act* 2021 (the FCFCOA Act). We make this submission as a legal assistance provider (community legal centre) that works extensively in the family law jurisdiction, particularly in the Federal Circuit and Family Court of Australia Registry at Dandenong, Victoria.

2. About Peninsula Community Legal Centre

Peninsula Community Legal Centre (PCLC) is an independent, not-for-profit organisation that has been providing free legal services to vulnerable and disadvantaged people in Melbourne's outer southeast since 1977. It is one of the largest community legal centres in Australia, with programs including large family violence and family law programs serving a population of over one million people across six local government areas. PCLC's head office is in Frankston, with branch offices in Bentleigh, Cranbourne and Rosebud, and 18 visiting outreach services across the catchment.

PCLC provides legal information, advice, ongoing legal assistance and representation and undertakes community legal education, community development and public advocacy activities. The Centre operates programs and services in the areas of family law, family violence, fines, tenancy, rooming house outreach, civil law and criminal law. PCLC provides clients with free and accessible legal services, particularly the most disadvantaged and marginalised in our community who may otherwise fall through the gaps as they cannot afford private lawyers and would not qualify for legal aid. 81 per cent of our clients exist on no or low income.

The most common legal problems for our clients are family law and family violence, with roughly half of clients grappling with family violence. Notably, a third of those clients come from culturally and linguistically diverse backgrounds. Our catchment area includes the outer south-eastern local government area of Casey, which has consistently had the highest number of reported family violence cases of all municipalities in Victoria over recent years.

Contrary to a common misunderstanding about the work conducted by community legal centres, PCLC's specialist programs in family law and family violence often involve complex and significant casework. Our family lawyers regularly conduct family law matters from start (negotiations/pre-action procedures) to finish (settlement/trial). Most of the family law matters we deal with involve risk factors, including family violence, mental health concerns, and drug and/or alcohol issues. Of the clients assisted by PCLC's family law litigation team, 75 per cent instruct that they have experienced family violence either during the relationship or after separation.

In the 2023-2024 financial year:

- Our family law lawyers assisted **1571** clients, providing 464 duty lawyer services, 272 representation services, and 1807 legal advice services.

- Our family violence lawyers assisted **1,657** clients, providing 2,238 duty lawyer services (at the Frankston and Moorabbin Specialist Family Violence Courts), 128 representation services, and 1,111 legal advice services.

Our family law services include our generalist family lawyers that assist unrepresented litigants in family law matters. Additionally, PCLC is currently funded by Victoria Legal Aid (VLA) to operate two programs that assist victim-survivors of violence in the family law system. These programs are:

- The *Family Advocacy and Support Services* (FASS) duty lawyer service at the FCFCOA Dandenong Registry five days per week from a dedicated office, providing legal assistance to unrepresented litigants who have been affected by family violence.

- *The Family Violence to Family Law Continuity Program*, which provides family law advice, casework and representation to clients who have experienced family violence. The program allows PCLC to conduct casework on a legally aided basis by making application for grants of professional costs, meaning that we can represent clients from start to finish in their family law matters, something which would otherwise be difficult to achieve with the usual community legal centre funding arrangements.

Many of our clients report an escalation of family violence during separation and family law proceedings. In our experience, many perpetrators use the legal system itself to continue and increase the abuse of the partner and children, often over many years, as an ongoing method of coercive control. These tactics can force victim-survivors of family violence to incur huge legal fees, or if they cannot afford a lawyer and do not qualify for legal aid, to represent themselves in court. As a result, very often they end up being forced to agree to unfair parenting and child support arrangements, or stay in the abusive relationships.

We note that a lack of legal representation continues to be an extremely significant disadvantage despite efforts by Courts to accommodate and assist unrepresented litigants appearing before them. In PCLC's experience, many unrepresented litigants have great difficulty handling their legal case, including filling out forms or even articulating their problem, let alone identifying and gathering supporting evidence. This is particularly the case for those with additional barriers, such as being subjected to family violence, mental health issues (often related to being subjected to family violence), financial disadvantage, lack of education, disability, limited or no English and inability to use or access technology**.**

Extent of submission

We provide a limited response to the Review's terms of reference and address the following items:

- 1 b., 1 c., 1 d., and 1 e.
- 3.

Please note that we do not address issues relating to migration and general federal law matters in this submission as we do not deal with those practice areas.

3. Introduction of the Federal Circuit and Family Court of Australia

When the 2021 structural reforms to the Courts were being debated, we joined with over 155 stakeholders in the family law system to oppose the proposal to abolish the specialist, stand-alone Family Court and introduce the Federal Circuit and Family Court of Australia ("FCFCOA").[1] We signed an Open Letter to the then Attorney-General expressing concerns about the proposed family court merger ("Open Letter").

The main points of the Open Letter were:

- The safety of children and adult victim-survivors of family violence are the priority in family law.
- Any reform should strengthen the family law system, not lead to the diminution of specialisation.
- In acknowledging the need to prioritise safety issues, Government commissioned inquiry after inquiry has recommended increasing specialisation in both family law and family violence, including the 2019 Australian Law Reform Commission inquiry into the family law system[2].
- Support for a single-entry point to the family courts and common rules so the family law system was easier for families to navigate, which could have been achieved without the creation of the FCFCOA.
- Support for a model that would have retained a stand-alone specialist superior family court and increased family law and family violence specialisation, such as the model proposed by the New South Wales Bar Association[3].

We continue to advocate for a stand-alone, specialised Family Court of Australia that would deal with all family law matters and no other areas of law, such as the model proposed by the New South Wales Bar Association.

4. Recent experiences in the FCFCOA

We note the overarching purpose of the family law practice and procedure provisions of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (FCFCOA Act), being to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. When the FCFCOA commenced operation, new family law case management procedures and measures were also introduced. New measures since September 2021 have included:

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[1] *Family Court merger opposed by 155 stakeholders, including 13 retired judges* (updated 16 February 2021 – originally issued 11 November 2019), accessed at https://lawcouncil.au/publicassets/eb829425-e96f-eb11-9439-005056be13b5/Joint%20Med%20Rel%20%20%20Open%20Letter%20-%20Family%20Court%20merger%20opposed%20by%20155%20stakeholders.pdf

[2] ALRC, Family Law for the Future: An inquiry into the Family Law System, 2019, Recommendation 51; Standing Committee on Social and Legal Affairs, *A better family law system to support and protect those affected by family violence*, 2017, Recommendations 27- 28.

[3] New South Wales Bar Association, *A Matter of Public Importance: Time for a Family Court of Australia 2.0*, July 2018, accessed at: https://inbrief.nswbar.asn.au/posts/bb24741e67431b27a08039cbb31b5ffc/attachment/Family_Court_2.pdf

- A single point of entry.
- A single set of court forms.
- A single set of rules of Court (the *Federal Circuit and Family Court of Australia* (Family Law) Rules 2021 (Family Law Rules).
- Harmonised case management pathway and use of registrars in case management.
- Expansion of the Lighthouse risk screening, triage and case management model (Evatt List).
- Increased focus on dispute resolution, including the introduction of Court-based dispute resolution conferences in parenting matters.
- Technological changes, including the introduction of electronic hearings for early Court events.

Some of the reforms have been beneficial, such as a single point of entry and the expansion of the Lighthouse Project and Evatt List. However, other measures have not always been beneficial for unrepresented litigants and/or clients of our Legal Centre. These are addressed further below. While some matters may be beyond the scope of the Review as they relate to case management and procedures, we include them by way of important background or context about working in the FCFCOA since its inception.

In our view, many of the measures aimed at streamlining processes and increasing efficiencies and could have been implemented without structural reform of the Courts. Additionally, we submit that speed and efficiency are not the only important benchmarks where family law matters involve complex issues such as family violence, child abuse and neglect, mental health concerns, drug and alcohol abuse, threats of harm and/or risk of abduction. As stated in the Open Letter:

> *While we support just, quick and cheap access to justice, and there is a role for increasing efficiencies within our court systems, this must not come at the cost of the safety of children and adult victim-survivors of family violence. These two important imperatives are not mutually exclusive, and one ought not be abandoned at the expense of the other*[4]*.*

Difficulties with certain measures

Increased documentation requirements

Initiating and responding to family law applications became more onerous in the FCFCOA, with a substantially increased amount of documentation to be prepared after September 2021. The requirement for more forms to be completed makes family law matters more complex and time-consuming. The increased documentation also makes it significantly harder for unrepresented litigants to navigate requirements and complete forms.

The increased documentary requirements and complexity increase the workload and pressure on lawyers in the legal assistance sector – our services are stretched further - and increase costs for parties with private representation. For example, our duty lawyers often used to be able to assist an unrepresented parent to prepare an urgent application for a recovery order in the course of a day as, pre-September 2021, the applicant needed to file an Initiating Application, a supporting affidavit and a short Notice of Risk.

In our view, the additional documentation does not add meaningfully to legal matters and there is often no consequence to parties who fail to file all required documentation in a compliant manner.

[4] *Open Letter,* page 2.

Risks around settlement for vulnerable unrepresented litigants

PCLC welcomed recent changes that have been made to the family law system, such as the expansion of the Lighthouse Pilot and the Evatt List to identify and deal with matters deemed as "high risk", which are valuable reforms. Some of our matters have been transferred into the Evatt List following the risk screening process, including matters involving very serious safety issues such as a parent in possession of child abuse material, and a parent alleged to have committed sexual offences against the other parent. It is appropriate and beneficial for these matters to be conducted in the specialist Evatt list. We also welcomed the significant changes to the *Family Law Act* 1975 that commenced in May 2024, including an increased focus on safety when considering parenting arrangements. We also look forward to the commencement of the recently passed Family Law Amendment Bill 2024, which will provide for family violence to be better considered in family law property disputes.

However, we remain concerned for some vulnerable unrepresented litigants in a Court system where some 80 per cent of family law proceedings settle before proceeding to a final hearing. This means that in most cases a finding about family violence will not have been made by the Court. PCLC considers there is a continuing risk that for victim-survivors of family violence who are not legally represented, the issue of family violence may get "lost" in the proceedings leading up to settlement. This may result in victim-survivors consenting to settlement terms which do not properly protect themselves or their children.

For example, our duty lawyers have seen unrepresented parties who have experienced family violence who have been bullied or pushed into parenting orders by the lawyers for the opposite party, or even succumbed to pressure to agree by a judicial officer, in a context where the opposite should be happening. Other unrepresented litigants have reported that they consented to final orders which were not in their own or their children's best interest because they were so fatigued by the perpetrator's ongoing threats and the litigation itself that they just wanted to get out of the system to try to protect themselves. These kinds of settlements may be "efficient" in system terms, but may not be appropriate or safe, particularly in circumstances where an unrepresented party can't enunciate or document their experiences sufficiently. We remain concerned that there is still the potential for serious cases of violence to not get picked up by the system.

One of the most effective ways to assist unrepresented litigants is to provide additional and increased funding for community legal centres and Legal Aid Commissions for family law and family violence services. This is particularly needed at this time when there have been significant changes to the family law system and when we are facing a national family violence crisis.

The following case study illustrates how unrepresented litigants can struggle to articulate the extent and severity of risk in FCFCOA proceedings.

Casey's Story*

Casey had a family violence intervention order (FVIO) against her ex-partner, Tim. She had attempted to report breaches of the FVIO, but the police appeared reluctant to assist her. Tim has a long criminal record and uses illicit substances frequently.

Tim commenced proceedings in the FCFCOA for parenting orders in relation to their three children, who Casey withheld from him. Tim continued to breach the FVIO after the family law proceedings were initiated, including through violence against the children.

Casey earns too much money to be eligible for a grant of legal aid, but too little to be able to afford a lawyer. She prepared her own response to the father's FCFCOA application. When she consulted with our duty lawyer on a hearing day, he noted that her affidavit did not sufficiently deal with the extraordinarily violent and obviously harmful behaviour of Tim towards the children.

Our duty lawyer noted that if the allegations against the other party were true, that this was a most distressing case of child abuse and that he was unsure sure why action had not been taken before by the Magistrates' Court and police. Casey's response to the father's application in the FCFCOA was wholly inadequate as she had not been able to obtain legal advice before she drafted the documents. Our duty lawyer advised her to seek an order for an Independent Children's Lawyer and after the hearing to immediately report the matter to the relevant authorities.

**Please note this case study has been de-identified*.

Timing and interim order issues

In our experience, family law matters may move through the Court slightly more quickly since September 2021. First court events (procedural hearings conducted by Judicial Registrars) are listed more quickly, within 1-2 months. However, it can now take longer to obtain interim parenting orders in some matters than it used to before September 2021. This is because early Court Events are now listed before Judicial Registrars who have power to make procedural orders but don't have the power to impose parenting orders on parties, and can only make parenting orders by consent. This results in many matters now being listed for Interim Defended Hearings before Senior Judicial Registrars who have the power to impose parenting orders, creating additional workload and costs, including preparation of a Case Outline and often briefing Counsel to appear. Our family law litigation team has been under increased pressure since September 2021 as a result.

This contrasts with pre-September 2021 where interim issues were often able to be resolved at the first return date with a short hearing before a Judge (including negotiations on or around the day of the hearing). The threat of a Judge's decision on issues was often enough to bring the parties to agreement on interim issues, or at least to narrow down the issues in dispute. To address this inefficiency, PCLC recommends that second return dates be listed before a Senior Judicial Registrar with the power to make parenting orders without consent. In the absence of consent, the Senior Judicial Registrar could then make interim parenting orders based on the documents filed, about interim matters such as the commencement of supervised spend time and/or drug testing.

Electronic hearings

While the introduction of electronic hearings for early Court events has brought about increased efficiencies within the FCFCOA and has been beneficial for many parties, we observe that remote hearings can present a range of challenges for some unrepresented litigants, particularly where they are vulnerable and disadvantaged and/or from a culturally and linguistically diverse background where interpreting may be required or in-person communication may be easier. Parties without computer equipment who need to rely on using their phone can also struggle with electronic hearings. The introduction of electronic hearings has also resulted in a decrease in clients accessing the Family Advocacy and Support Services (FASS) duty lawyer service at the FCFCOA Dandenong Registry, leaving us concerned that vulnerable community members may be unable to access assistance and justice.

Divorce applications

We have also received a notable increase in requests for assistance with divorce matters since national listing commenced in September 2021. Many clients are seeking assistance after filing their divorce application with requests by the Court for additional information such as supplementary affidavits, or for assistance with service issues. This is a trend experienced by other colleagues in the community legal centre sector, and it is having an impact on our sector's resources. In one matter, a divorce application was sent back to a client several times over very minor, perhaps even trivial, matters. In another matter, there were five procedural hearings relating to service issues where a respondent could not be located.

4. Responses to term of reference

1. The impact of the structural reforms to the Family Court of Australia and the Federal Circuit Court of Australia, including with respect to:

b. the operation of the FCFCOA (Division 2) as a single point of entry for federal family law matters

The single point of entry operates well and efficiently. It is a significant improvement on the previous system where parties had to choose whether to apply to the Federal Circuit Court of Australia or the Family Court of Australia, and is certainly simpler for unrepresented litigants to navigate. This is a reform that we supported as a signatory to the Open Letter which stated, "*We understand and support having a single entry point to the family courts and common rules so the family law system is easier for families to navigate*".

c. the allocations of the original and appellate jurisdiction in federal family law matters

In our view, this is operating well and efficiently. We note that parties are generally unaware that they are in fact filing in the Federal Circuit and Family Court of Australia (Division 2).

d. the level of specialisation of judicial officers exercising family law jurisdiction

In our view, all judicial officers exercising family law jurisdiction should have specific expertise in family law. For judges, this should include recent and high-level experience as a lawyer or barrister working in the family law system. We note that sections 11 and 111 of the FCFCOA Act require that, for judicial appointments to the FCFCOA (Division 1) and for judicial appointments to the FCFCOA (Division 2) where the person is expected to hear family law matters, the person must be "by reason of their knowledge, skills, experience and aptitude" a "suitable person" to deal with family law matters, "including matters involving family violence". However, we support reform of the Act to strengthen the requirements for appointees to have specific expertise in family law, including matters involving family violence, rather than the weaker requirement of being a "suitable person to deal with family law matters" by reason of knowledge, skills, experience and aptitude. As stated by the New South Wales Bar Association:

> *Family law is factually and legally complex, emotionally-charged and produces life altering consequences for families and children. Judges working in this area not only require specialist technical knowledge, legal reasoning, fact finding and analytical skills, they also require highly effective communication and interpersonal skills and experience"*[5].

[5] New South Bar Association media release, *Time to Talk About a Family Court of Australia*, 31 July 2018, accessed at https://nswbar.asn.au/docs/mediareleasedocs/Family_Court_MR2.pdf

We are concerned that sometimes urgent matters may be listed before a judge with comparatively less family law experience because the judge is available. These urgent matters can potentially be the most sensitive family law matters involving applications for recovery orders or airport watch list orders where the stakes can be very high.

It is also critical that that registrars have expertise in family law and are fully conversant with the practices and procedures of the Court and the Family Law Rules. Registrars are now essentially the "frontline" of the FCFCOA in many ways under current case management pathways. All three categories of Registrar exercise aspects of judicial power which has formally been delegated to them by the Judges of both Divisions of the Court. In exercising these delegated powers, Registrars manage cases from the point of filing and undertake tasks which would otherwise be completed by Judges. Some matters may even settle on a final basis without the parties ever appearing before a Judge. Although this can work well in some matters, we are concerned about the loss of cumulative judicial expertise and interventions in the early stages of proceedings.

In our experience, there can be notable inconsistencies in the conduct of matters between individual registrars and different registries despite the aim of a consistent national case management system. Some Registrars are very strict about compliance with the Family Law Rules, while others can be quite lenient. There can also be a wide variation in what is taken to be an "urgent" matter, which can have a big impact on our clients.

e. Any impact of the change of name to FCFCOA Division 1 and Division 2

The name change has had minimal impact. We note that unrepresented litigants are probably unaware that there is both a Division 1 and a Division 2 of the FCFCOA. People not usually involved in the family law system might think it unusual that you "enter" the Court in Division 2. Additionally, there is nothing in the name to indicate that Division 1 of the FCFCOA is the specialist and appeals Division of the Court.

As a small note, the full name of the Court is unwieldy, and is confusing for those outside the family law system. As community legal centre lawyers, we need to explain the name of the Court and how the family law jurisdiction works daily, often using interpreters to assist. The actual name of the Court that deals with family law matters can be a confusing point to start with.

3. With respect to the above matters, whether the operation of the Act can be improved through legislative amendments or other non-legislative changes, including structural changes.

We refer again to our previous endorsement of the Open Letter to the then Attorney-General and our support for a stand-alone specialist superior family court with increased family law and family violence specialisation, such as the 2018 model proposed by the New South Wales Bar Association. This would be a single, specialised Family Court with one point of entry, unified court rules and procedures across divisions and appellate jurisdiction. In our view, judicial officers with specific expertise in family law matters should be hearing only family law matters in a single specialist Family Court. PCLC advocates for further discussion and consultation about different options to create such an entity.