

## **The New Normal in Family Law: current inquiries, reforms and the future.**

Feminist Legal Perspectives Seminar - Wednesday 9 September 2020.

Panel discussion:

- Dr Felicity Bell, UNSW Law School;
- Deena Palethorpe, Solicitor and Chair of the NSW Young Lawyers Family Law Committee;
- Catherine Spain, Barrister Waratah Chambers.

Panel moderators: Jenna Smith and Melissa Marshall for the WLS Foundation.

You can watch a recording of the seminar here: <https://vimeo.com/wlsnsw>

***Will the Australian family law system ever progress from its current inexorable state of inquiry after inquiry to a state that we can be proud of: well-resourced with highly attuned attention to family violence and child abuse. The system established in 1976 broke new ground and was the envy of the world. We know how to do it. Can we do it again?***

### **Seminar overview**

Dr Felicity Bell UNSW spoke of the long history of inquiries into the family law system – we have had 30 different reviews covering much of the same ground and most of them including resourcing. The ALRC Inquiry report which was published in early 2019 was a comprehensive report into the family law system, except that the courts were not included. Felicity considered the broad scope may have been a problem and it may have been better to target sections of the system. She reminded us that inquiries are not research (referring to the work of academics Jane Wangmann and Miranda Kaye) and that we have great research bodies such as AIFS and the [presently unconstituted] Family Law Council.

Felicity reflected on how family law is used for political ends, noting that the current debate is more highly politicised than it has been in the past – and this is not a good way to make policy.

Deena Palethorpe, Family Law Solicitor and Chair of the NSW Young Lawyers Family Law Committee talked on the ALRC first recommendation – that state and territory family law courts be established to exercise jurisdiction under the Family Law Act. Deena reflected on how the legislation was now 45 years old, is constantly changed and has become complicated and not easily understood. There is a structural problem in that the legal system is bifurcated with federal courts dealing with the Family Law Act and state and territory jurisdictions dealing with child protection and family violence protection. Family law focuses more on relationships and the state and territory laws and courts focus more on abuse.

The first recommendation from the ALRC report was that the Australian Government consider establishing state and territory family law courts to exercise jurisdiction under the Family Law Act in conjunction with state and territory child protection and family violence jurisdictions.

Deena talked about how the States would have to cede jurisdiction to the Commonwealth and how there were constitutional barriers for the other way round. The ALRC proposed that the Commonwealth retain legislative responsibility but the courts would be state courts, as in WA where the family law court is a state court exercising federal jurisdiction.

But again, a prominent issue is chronic under funding and Deena asked is the money put to better use in the current system?

The federal government has introduced a Bill to merge the Family Court and Federal Court of Australia. Deena talked of the Price Waterhouse Coopers report on court inefficiencies which the government relied on to promote this idea, and how the Law Council has discredited this report. A merged court would lose the current appellate structure and risk a loss of specialisation.

Deena concluded that this was not a solution. Chronic underfunding in the system is the one thing everyone (but the government) agrees on. Judges are not replaced after retirement. Delays follow. Costs increase. Self-represented litigants increase. Further delays follow. Deena advocated for putting funding into the system to fix it but reflected on how there isn't the political will to do this.

Catherine Spain, Barrister Waratah Chambers

Catherine was asked to address the question of the extent to which, and how appropriate it is, to use the Local Court jurisdiction in family law cases. Catherine noted that Local Courts are often used in country NSW, especially for consent orders or in urgent recovery order applications. But many magistrates are not willing to hear family law cases and will use their powers under the Act to transfer matters to the Federal Circuit Court. Catherine thought that Magistrates need to be resourced and trained to run family law lists and as it is set up at the moment it's not fit for family law matters. The Local Court jurisdiction is underutilised for good reason at the moment.

The seminar turned to a discussion of the new provisions to deal with unrepresented litigants cross examining in family violence cases. The reform is a positive one, but Catherine reflected on some problems she saw in practice such as legal representatives being appointed at the last minute when a party had run out of funds shortly before a hearing; and how it seemed a perpetrator of violence could get funding (noting there is no means or merit test, which is appropriate for the policy objective of the measure) and that systems abuse can follow.

All 3 panel members were asked to predict how the family law system would look in the future.

Felicity reflected on how the egregious failures in the system, for example homicides, usually are the result of multiple failures – so we need to improve all different parts as much as we can. If you take out the ALRC first recommendation, for which there is no practical political will in the States to implement, then there are many recommendations that will improve the system.

Deena commented that we have the nuts and bolts of a really great system. Chronic underfunding needs resolving.

Questions from the floor included the use of technology; the use of arbitration; and how can we get practitioners and judges to recognise coercive controlling family violence. All panellists expressed a need and a demand for specialist training on coercive control.

This seminar can inform and inspire you to join Women's Legal Services around Australia to advocate for a safe and just family law system. See the Safety First in Family Law 5 step plan here:

<https://www.wlsnsw.org.au/law-reform/safety-family-law/>

You can access the 2019 Australian Law Reform Commission (ALRC) summary report into the family law system here:

[https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_report\\_135\\_summary\\_report\\_web\\_1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135_summary_report_web_1.pdf)