Launch – *Stepping Stones: Legal Barriers to Economic Equality after Family Violence*
22 September 2015

Chief Justice Diana Bryant AO, Family Court of Australia

Joanna Fletcher, Rosie Batty, Michael McGarvie and Attorney-General Pakula, distinguished guests, ladies and gentlemen, it gives me great pleasure this morning to have been invited to speak at the launch of what I regard as an important and ground-breaking report by Emma Smallwood. My sincere congratulations on the project and the report.

Many of the issues identified by the report, in terms of economic impediments faced by women after separation, are not confined to those experiencing family violence.

However, those impediments are particularly egregious for those who have suffered family violence because, in such cases, there have usually been one or more violent events prior to and sometimes during the process of separation, making the situation all the more precarious. In these circumstances, separation is likely to have a more drastic effect on the needs of the women and children concerned, who require more urgent attention due to the acrimonious nature of the breakdown of these relationships.

But before I turn to that, I want to make the point that the benefit of the report and what it highlights is to demonstrate the need to address these problems across the board for separating women.

I think increased powers in intervention orders to, for example, return property, take possession of a motor vehicle and/or access joint bank accounts is a matter we should seriously look at as soon as possible, with support for enforcement of these remedies by the police.

But I want to focus on the availability of the courts to provide a mechanism for proper redress without complex processes, something that is identified in the report. These processes are fundamental to providing access to justice and we are failing in our obligation as courts to provide access to justice if we don't have appropriate remedies available.

Resourcing is, of course, always an issue and no more than now, but I think we have to learn to do more with what we have and hope that we may be able to persuade governments to fund something new.

One option might, for example, be a small claims tribunal, perhaps as part of VCAT, to deal with small property claims and debt arising from or in the context of family violence. Such a claim could be quite separate from property claims under the *Family Law Act 1975* (Cth) ('the Act'), which could still be pursued later if necessary but with immediate needs being met in a less expensive and more available forum.

Perhaps it is of value to look at this kind of claim as something apart from family law property interests, at least initially.

Of course, if the courts are available to provide mechanisms, then these can and should be used.

Reflecting on the evolution of our current property system, operating in both the Family Court and the Federal Circuit Court (although I do not speak for the Federal Circuit Court), I think we can identify current failings with what I might call 'small' claims that require urgent attention. How has that happened? When I started as a lawyer in the 1970s, there was ample opportunity for small and urgent property claims to be addressed.

When we first set up the Federal Magistrates Court, as it then was, in those first couple of years when we had small lists we had the capacity to deal with these kinds of issues. But overall financial structures became more complex and courts designed rules and processes to deal with that complexity. In doing so, I'm afraid to say that much of the previous simplicity was abandoned. As family law cases, both parenting and property, became longer and more complex, the availability of a quick hearing where necessary started to diminish.

The availability of legal aid for property proceedings has also almost entirely ceased, whereas it was once readily available.

The wide availability of mediation outside the courts (which I support) has meant that the courts do not have a cohort of less complex cases to deal with and focus on the more complex, expecting that the others will settle. Now everything is treated as necessarily being complex and the challenge of dealing with urgent interim matters is almost entirely focused on parenting issues, for obvious reasons.

Because the processes are designed for complex cases, the legal costs are often prohibitive.

So you can see what has happened with the evolution of processes and procedures:

- lack of legal aid for property matters;
- complex processes and procedures designed for complex and lengthy cases;
- expensive legal fees; and
- difficulty in obtaining urgent hearings for property matters.

As a system, we need to address the question of whether these cases can be dealt with in a simple, accessible way in federal courts within our current resourcing. If not, then I would be looking at something different, such as the aforementioned small claims tribunal or, alternatively, perhaps increasing the monetary limit in the Magistrates' Court so that they could deal with these matters — however, I am conscious of the pressures on them as well.

I want to mention the question of spousal maintenance because I think it could and should be used much more in these kinds of cases. There is a process in the Family Court for accessing urgent maintenance and it's not particularly complex; lump sum maintenance is available, and so is maintenance requiring the payment of debts or the provision of a motor vehicle.

Urgent maintenance orders are quite a good remedy for urgent financial relief including, for example, the repayment of debts.

I have my concerns about binding financial agreements and their negotiation where there has been family violence, including economic abuse. Lawyers need to be trained about the effects of family

violence on these kinds of settlements. The policy behind binding financial agreements is to provide autonomy to parties in reaching an agreement without the paternalistic interference of a court, save in particular circumstances. The Act requires complex technical legal requirements to be met when binding financial agreements are entered into and many of them fall foul of those requirements, including the necessity that each party receive independent legal advice. The capacity of a victim of family violence to make informed decisions, even with legal advice, at the time when a binding financial agreement is made is a matter about which I think we should be concerned.

If the technicalities in the creation of a binding financial agreement are met then the court has no role in overseeing it, even if it appears to be unfair. Agreements can be set aside on the same principles applicable to determining the enforceability and effect of contracts, and this includes duress. However, legal duress is difficult to prove and it might be useful for the Act to include some reference to family violence, including economic abuse, in the setting aside of binding financial agreements.

The *Stepping Stones* report makes reference to the issue of family violence in relation to property proceedings generally, and I agree with much of what is said about family violence being taken into account in this context. Such a capacity exists but is perhaps unevenly applied. It might be of more benefit to have a specific reference to family violence in the factors to be considered under s 75(2), without the court having to determine whether the violence has reached a particular threshold to become relevant, as is presently the case. I can certainly see an argument for that.

On the good news front, I can indicate that the Family Court has drafted some rules in relation to arbitration and I would hope that they will come into effect early in 2016. Whilst the Act provides for the use of arbitration, it has not been widely used. I hope that the rules will enable it to become a more useful and perhaps more frequently used alternative to the court system. Whilst one tends to think of arbitration as being appropriate for complex cases with wealthy parties, there is no reason at all why arbitration cannot be used in relation to small property claims that require urgent determination. Legal aid commissions might want to think about funding such arrangements and, with what I hope will be an increasing pool of available registered arbitrators, this might become one avenue to address some of these concerns.

May I conclude by congratulating the Women's Legal Service Victoria and Emma Smallwood for an excellent and timely report on a much-needed an innovative project.

This report should be essential reading for federal and state politicians and departments as well as courts, both state and federal. In particular, I think it is clear that access to justice in this area needs urgent addressing and we should all be thinking of ways in which we can best do that.

Thank you.