

ALRC FAMILY LAW REVIEW SUBMISSION FROM THINK LAW GROUP

SUBMISSION AS TO QUESTIONS 22 & 28

Q22 - How can current family dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

Q28 - Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?

It's time to make technology work to resolve family property matters in Australia. The enhanced use of technology promotes access to justice and is:

- Future focused
- Adaptive
- Innovative
- Outcomes focused
- Sustainable and efficient.¹

Think Law Group, in consultation with Professor Patrick Parkinson, have developed The Family Property Tool. The Family Property Tool is an online family dispute resolution tool for separated Australian families to resolve their property matters in a simpler, more timely and cost effective way. The Family Property Tool is for use by the general public, as well as lawyers, mediators, arbitrators and any other professionals that assist families going through separation.

Who developed The Family Property Tool?

The brainchild behind The Family Property Tool is Professor Patrick Parkinson. Professor Parkinson is a professor of law and a specialist in family law, child protection and the law of equity and trusts. He is a nationally accredited mediator and arbitrator in family property matters. He developed the concept for The Family Property Tool and prepared a first draft of the questionnaire that it uses to obtain relevant information from the parties.

Professor Parkinson has been involved in many family law reforms (e.g. the establishment of Family Relationship Centres). He believes that The Family Property Tool has the potential to reduce considerably the cost to ordinary Australians of resolving their property and financial issues in the aftermath of relationship breakdown.

¹ KPMG, *AGD Future Focus of the Family Law Services*, Available at <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyRelationshipServices/Documents/AGD-Family-Law-Services-Final-Report.pdf>, 2016, at page 80

[Think Law Group](#) is a couple in law and business and together they bring specialist experience in family law and legal technology. Specifically:

- [Fiona Kirkman](#) has practised almost exclusively in family law in Australia for 15 years and is an Accredited Specialist in Family Law, a Nationally Accredited Mediator, Family Dispute Resolution Practitioner and is a collaborative law practitioner. She has her own family law firm, [Kirkman Family Law](#) and is on the panel of the [Family Law Settlement Service](#). Fiona also lectures at the Law Society of New South Wales in the subject [Family Law Fundamentals for Lawyers](#) and as an Adjunct Lecturer at the College of Law in the [PLT Program](#).
- [Tim Kirkman](#) has qualifications as a Bachelor of Creative Arts and New Media and a Masters in Computer Studies. He has 20 years experience successfully building, managing and delivering software products across many industries, including roles as Product Director and Head of Technology and Innovation in leading e-learning, development and e-commerce companies. As technical founder of Think Law Group, he is the architect and designer of The Family Property Tool and leads its ongoing development and direction.

Think Law Group are founding members of [ALTA](#) (the Australian Legal Technology Association) and have successfully implemented [LawSwitch](#) into law firms throughout Australia (see www.lawswitch.com). They are now tackling the challenge of providing a better way for families to do property settlements.

What does The Family Property Tool do?

The Family Property Tool assists parties resolve their property and financial issues (with limited involvement from lawyers and courts), in the following ways:

1. Each person is asked to respond to a detailed questionnaire online, which not only provides most of the information that the courts require in the financial statement, but also can provide a lawyer or mediator with quite a detailed picture of the parties' contributions and factors relevant to future needs. That is, the questionnaire is both about their current situation and the factors that the court would need to take into account in the exercise of its discretion.
2. Each person is then asked to upload to the website (to a secure client portal) all the documents which the court requires under the disclosure rules (e.g. tax returns) and other documents to support contributions and future needs contentions.
3. Helpful third party services are integrated to assist each person to accurately identify and value the assets.
4. The answers to the questionnaire auto-populate a balance sheet. Each party can edit his or her side of the balance sheet but cannot alter the other party's data.
5. Each person will have the opportunity to comment on why they have put forward a particular value for an item and/or made a contention about contributions and/or future needs.
6. Once disclosed, each person sees the complete answers given and all documents uploaded by the other and it automatically indicates if there are any areas where they disagree.

7. Automated prompts (e.g. pop-ups, videos, chatbots) provide guidance as to the relevant legal principles, summarise the issues in agreement and dispute and ask questions as to evidence that could be obtained to support the valuation or other contention (e.g. upload a document which verifies the amount of an inheritance if the parties disagree about it or methods for getting a valuation on a house or business).
8. The information generated on each side could then be shown to legal advisers for each party and/or could go to a mediator as the background information to support a mediation.
9. A report is automatically generated which provides a complete overview of the case with all of the supporting documents.
10. If the case cannot be resolved through mediation or negotiation, it could be referred to arbitration (or neutral evaluation) or court proceedings could be commenced.

The Family Property Tool provides the following benefits:

1. It is designed to provide general legal information on all aspects of family property issues and provide the structure to work through an entire property settlement, including financial disclosure and contributions and future needs. It will then provide an interactive and collaborative balance sheet and summary of the effect of the property settlement agreement reached;
2. It will not exclude reliance on lawyers (and it will not provide legal advice or automated outcomes using Artificial Intelligence) - people will be encouraged to obtain their own legal advice; and
3. It will avoid the need to incur great expense on legal fees in straightforward matters.

The Family Property Website provides:

1. Assistance to help people to work out what to do when they separate and what pathway to take to resolve their property matters.
2. A gateway to resolution of property issues in dispute through mediation and arbitration/binding evaluation, as well as referrals to lawyers, financial professionals and other professionals that assist families going through separation; and
3. Published and peer reviewed resource links to information for families going through separation and/or professionals assisting those families.

Family Property Settlement Plan

In response to **Question 22**, we propose that the law be amended to allow for relatively straightforward property matters to be resolved by a Family Property Settlement Plan. Family Property Settlement Plans would be effective to offer finality and would have the same stamp duty and capital gains taxation (CGT) exemptions as for Court Orders and Binding Financial Agreements. It would not displace the jurisdiction of the Court if an application for property division were made within the year after divorce or two years after the ending of a de facto relationship, but - just like Parenting Plans - the Court would need to take Family Property Settlement Plans into account. It would provide absolute finality, subject to an

application for spousal maintenance (for the same reasons as given in [section 44](#)), after the expiry of the normal time limits.

The recommended key elements of Family Property Settlement Plans are:

1. Parties will always have a choice between entering into a Family Property Settlement Plan and Property Consent Orders.
2. Family Property Settlement Plans can only be entered into for “small property matters”. It is recommended that the definition of “small property matters” is as follows:
 - Matters where the total net asset pool is less than \$1,000,000;
 - Matters where there is no company, trust or other business structures;
 - Matters where there is no real estate or other assets shared jointly with third parties or where there are life tenancy issues.
3. To have any legal impact, Family Property Settlement Plans will need to be signed and dated by the parties (including electronic signatures).
4. The parties will be encouraged to obtain legal advice before signing a Family Property Settlement Plan.
5. Family Property Settlement Plans are not binding and enforceable financial orders and cannot be enforced by the Court.
6. Family Property Settlement Plans are completely different from Binding Financial Agreements in that they will not require legal advice and will not oust the jurisdiction of the Court.

Many separated families never take into consideration the relevant legislative principles before reaching a property agreement (e.g. superannuation, contributions and future needs) and never formalise that agreement into Property Consent Orders, thus risking a future claim. The Family Property Tool and Family Property Settlement Plan provide the framework for families in small property matters to reach similar conclusions that the Court would arrive at and offers the prospect of a final resolution of property issues without the need for Orders to be drafted by lawyers and made by the Court. The Family Property Tool will automatically create a Family Property Settlement Plan with an agreed Balance Sheet and the effect of the financial agreement reached, which can then be dated and signed electronically by the parties.

Proposed Resolution Pathway (Question 22)

1. Separated families and professionals should be encouraged to use The Family Property Tool in all property matters.
2. If it is a small property matter and the parties reach agreement (between themselves and/or with the assistance of professionals), the parties should enter into a Family Property Settlement Plan.
3. If it is not a small property matter and the parties reach agreement (between themselves and/or with the assistance of professionals), the parties should enter into Property Consent Orders (with the assistance of lawyers). The Consent Order Kit should be simplified and made available for completion online.

4. We strongly support the recommendation by the Productivity Commission that the requirement in s. 60I of the *Family Law Act* to attempt FDR prior to lodging an application for children's orders be extended to financial matters.²
5. If the parties cannot reach agreement at mediation, then we propose that the matter be referred to an independent arbitrator for a binding evaluation on the papers. The mediator will, with the consent of both parties, provide a short form report as to the agreements reached and the issues that remain outstanding at the conclusion of the mediation. The Arbitrator will also have access to all of the information in The Family Property Tool. The Arbitrator will then make a binding Award.
6. The parties can only appeal the Award on a question of law.

Benefits of the Family Property Pool and the Family Property Settlement Plan:

The benefits of the The Family Property Tool in conjunction with the Family Property Settlement Plan are:

1. It provides accessible information and dispute resolution processes for separated families that are separating and provides processes that enable them to resolve their issues without incurring significant legal costs.³
2. It helps families with less complex needs to manage their separation in a way that maximises their own control over the process.⁴
3. It provides online legal information and a gateway to professionals that can assist separated families.⁵
4. It provides the availability of a dedicated dispute resolution pathway that is appropriate to the nature and complexity of the issues involved (instead of the 'one pathway for all' approach).⁶
5. It should dissuade more parties from coming to the Court years after separation to seek a property settlement in circumstances where there has already been an informal property division. Parties can currently make a formal property settlement up to the expiry of the time limitation period, which is two years after separation for de facto couples and one year after the Final Divorce Order for married couples (although many separated married couples never actually apply for a divorce so this could be an infinite period), or with the leave of the Court. As informal property settlements are not recognised at all by the Court, parties who have already had an informal property division years earlier can then have a 'second bite of the cherry' with a formal property settlement (this often occurs where the other party receives an inheritance or other windfall). The introduction of Family Property Settlement Plans should limit these types of applications.

² Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) page 875

³ ALRC, *Review of the Family Law System*, Available at https://www.alrc.gov.au/sites/default/files/pdfs/publications/issues_paer_48_19_march_2018_.pdf, page 63

⁴ ALRC, *Ibid*, page 63

⁵ ALRC, *Ibid* page 63

⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence*, Available at http://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024109/toc_pdf/Abetterfamilylawssystemtosupportandprotectthoseaffectedbyfamilyviolence.pdf;fileType=application%2Fpdf, 2017.

6. It provides a less formal and lower cost dispute resolution option for property matters that involve small asset pools.⁷
7. It promotes the obtaining of fair financial settlements⁸ as it provides general family law information and guidance as to the considerations when looking at a property settlement.

Safeguards:

It is important to consider the implications of web-based, technology driven tools in the context of data sharing legislation and the storing of personal client information.⁹

The Family Property Tool uses:

1. Google Cloud based services but is stored in Australia and is compliant with the Australian legislation on the storage of private data.
2. Strongly encrypts all collected data in the process, from transmission through to processing and storage.
3. Follows industry best practices in terms of security, including two-factor authentication for the back end, input sanitisation, and salted and hashed passwords.

Support:

Initially, The Family Property Tool is being offered as a fixed price per person with concessions to certain individuals and organisations.

Ideally, The Family Property Tool should be funded by the Government (e.g. the Attorney General's Department) and made free (or at a small filing type fee) to the general public and lawyers, mediators, arbitrators and other professionals assisting families going through separation.

Investment in The Family Property Tool, The Family Property Website and Family Property Settlement Plan model provide an innovative and good value for money approach to improve the resolution of family property matters in Australia.

We look forward to your feedback on this submission.

References:

⁷ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) Available at <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>, 2014 at page 871

⁸ Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol IV, ch 21 Available at <http://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Reports/Final/RCFV-Vol-IV.pdf>, 2016.

⁹ KPMG, *Ibid*, at page 80

1. KPMG “AGD Future Focus of the Family Law Services” Available at <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyRelationshipServices/Documents/AGD-Family-Law-Services-Final-Report.pdf>, 2016.
2. Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol IV, ch 21 Available at <http://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Reports/Final/RCFV-Vol-IV.pdf>, 2016.
3. House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence*, Available at http://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024109/toc_pdf/Abetterfamilylawsyste mtosupportandprotectthoseaffectedbyfamilyviolence.pdf;fileType=application%2Fpdf, 2017.
4. Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) Available at <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>, 2014 at page 871