

Submission to the Review of the Family Law System

Australian Law Reform Commission

P Bachmann

Purpose of this submission

I hope I have been successful in understanding what you want from submissions to your enquiry. As I understand it, in Sep 2017, the then Federal Attorney General, Senator Brandis, asked you (a committee of the ALRC headed by Prof. Helen Rhoades) to conduct an inquiry into the family law system. He provided a list of things that you should be looking in to ("Terms of Reference"). In Mar 2018, you published an "Issues Paper" which is 93 pages long and has 424 links to other documents; many of those documents are also very long. You seem to explain the purpose of the Issues Paper in paragraph 11 of that document:

"This Issues Paper is intended to encourage informed community participation by providing some background information and highlighting the issues so far identified by the ALRC as relevant to the areas listed in the Terms of Reference."

... having already stated in paragraph 8 that:

"... the ALRC does not propose to revisit each of the matters that have been examined elsewhere."

Which suggests that previous inquiries have already put some matters to bed, and you don't want to go over those issues again. However, I struggle to reconcile that with another passage from paragraph 8:

"[we will] consider the redevelopment of the family law system as a whole, in an integrated and holistic, rather than piecemeal, way"

So, I'm confused as to whether you want to start from a blank slate or build from a base of existing knowledge. Additionally, I am troubled by the apparent disconnect between the Terms of Reference and the Issues Paper. Some of the items listed in the Terms of Reference do not appear, or are barely mentioned, in the Issues Paper.

To take just three examples (which I do not believe they have been adequately addressed in recent inquiries either):

1. The Attorney General asked you to consider:

"mechanisms for reviewing and appealing decisions"

... implying that there should be a way to change of decision when a judge makes a mistake or where there is a sufficient change of circumstances. That is a well-established principle in family law, and it is

no surprise that Senator Brandis wanted to see if this could be done cheaper, with less trauma, and more effectively.

In your Issues Paper you interpret this Term of Reference quite differently, you say that:

"An issue that is central to [the question of appeals mechanisms] is the potential for court proceedings and other family law system processes to be misused to maintain a dynamic of abuse."

ie. You say, people who want decisions reviewed are troublemakers. Now, I'm sure a lot of them are, that there are parents obsessed in the battle with their former spouse, and that this ongoing battle will hurt everyone. For example, it was reported in Currie & Wilkins [2017] that a father wanted to get even with his ex in court. Via SMS, he told her:

"So game on at trial. I can't wait to tear your fat arse apart."

Clearly, the father may have been more concerned about hurting his ex than improving matters for his children, or even for himself. Are all separated parents like that father? I doubt it. By suggesting that people wanting decisions reviewed are misusing the system, and not articulating reasons why reviews might sometimes be desirable, suggests perhaps that you have no interest in considering legitimate appeals. Moreover, what if there is systemic failure? A properly functioning appeals/review mechanism is essential to highlight failure points and stop the rot from spreading.

2. Equally, the Attorney General asked you to think about how to ensure people follow the court's rulings:

"the desirability of finality in the resolution of family disputes and the need to ensure compliance with family law orders and outcomes"

But none of your questions specifically refer to this issue. For some people, compliance is a huge issue. Sitting judges, amongst others, have expressed the view that there is no point having court orders if people feel free to ignore them.

3. Senator Brandis also asked you to consider whether courts should be used at all:

"whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children"

Again, none of your 47 questions refer specifically to this issue, though it does appear very briefly in your 93 pages of commentary.

If the Attorney General puts certain issues front and centre, and you move them off to the side, I think we are entitled to wonder whether you are really prepared to explore these issues.

My recommendations

So, having wasted most of the day trying to understand what you want from me, let me cut to the chase and give you my recommendations. Here is what I think you should tell the government in your final report:

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- Don't change the system.
- Don't make any new laws.
- Don't make any structural changes.
- The family law system isn't the problem, the political system is the problem; Politicians should get their own house in order.

Now, before you snigger and wipe your arse with my submission, let me tell you a story:

Explanation for my recommendations

In far-off New Zealand they had a family law system with many of the same problems we have here. After much consultation with the public, new laws were introduced and took effect in 2014. Judges and court staff worked hard to make the changes work. Despite their best efforts, some people didn't like the new laws. Lawyers, for example, seemed annoyed that they were less involved than formerly.

In 2017, an online newspaper Newsroom (newsroom.co.nz) started operation in New Zealand and ran an intense campaign against the new laws. Dramatic footage was presented (and is still available online) showing a young child being forcibly removed from her mother's home. Incredibly, the faces of the police officers were shown. (<https://www.newsroom.co.nz/2017/08/07/41459/taken-by-the-state>). This footage was presented to a still-in-opposition Jacinta Ardern who said she would do something about it if elected. Of course, the media have always been hugely influential in politics, but the degree to which media, including social media, influences politicians at the moment is extremely worrying. The Newsroom website didn't stop there: In another article, they attacked judges who made comments that Newsroom did not approve of: (<https://www.newsroom.co.nz/2018/04/18/105481/family-court-judges-comments-ludicrous>)

In late 2017, there was a change of government in New Zealand and now there will be a new inquiry and the expectation now is that the laws will change as dramatically as they did only 4 years ago.

You may say, "Well, that's New Zealand. What's that got to do with us?"

Stated simply: Even if you embraced the Terms of Reference item that asked you to address:

"the need to ensure compliance with family law orders and outcomes"

and devised legislative, systemic or structural reform that solved the problem for once and for all. And even if, by some miracle, these new laws and systems got enacted without significant alteration, one can safely assume that not everyone will be happy with the changes and the calls for family law reform will be as strident in a few years as they are now. Just as in the NZ experience, your efforts would be washed away.

A modern government would be up to the task of withstanding the vagaries of modern sentiment.

Let's look at an example from our not-so-modern political system:

A constituent decided to take her complaint to her local Senator, Derryn Hinch. Whatever else might be said of Senator Hinch, he has certainly been active in committees delving into family law issues, more so than most politicians. In a very rare example of a politician using Senate Estimates to ask about the

“enforcement” issue I alluded to earlier, he showed that he was prepared to listen, learn and ask questions. On 24 May 2017, he asked Attorney General Brandis:

“[...] the ABC reported that Chief Justice Bryant said:

‘... the court was so under-resourced it had no ability to provide any post-order service to check whether family orders were being complied with.’

I followed up on that. Justice Bryant referred to it, saying that, ‘Enforcement is problematical.’ She also said, ‘We have no resources to enforce court orders.’ So you have got cases where arrangements are made—like you have talked about with these conciliation groups—where a deal is made and the court rubber stamps it, and that is all done. But if the father gets access for, say, once a week, takes that child away and that child does not come back, the courts have no way of finding out. They have not got the money or have not got the staff to track that down and sort out.”

Senator Brandis’ reply was 100% accurate, and 0% useful:

“A couple of things: first of all, I should point out that the vast majority of contested family law matters are not dealt with in the Family Court, in Justice Bryant’s court; they are dealt with in the Federal Circuit Court. More than 85 per cent—in fact, approaching 90 per cent—of contested family law matters are now dealt with in the Federal Circuit Court, which has the same jurisdiction to deal with family law matters, subject to a couple of exceptions that are not immediately relevant, as does the Family Court. The Federal Circuit Court has a very nimble—if I may say so—culture of disposing of matters as promptly as can be, rather than allowing them to be bogged down in technicality. I have not had the chief judge of that court, the court that deals with the lion’s share of family law matters, make that complaint to me.

Secondly, you talk about enforcing orders. All courts have the jurisdiction to enforce their orders, but they do not do it in a self-initiating way. If a person is in breach of an order of a court, then ex hypothesi they are in contempt of court. Proceedings can be brought back on to ask the court to enforce its order. It is not something the court initiates. It is something that awaits the party who complains that they are not being given the benefit of an order in their favour because of disobedience by the other party to bring before the court. The courts do not have that supervisory function in the way that you describe, except in the limited sense that having made an order, it is always open to them to hear proceedings in which a party wants to bring back a complaint that the order is being breached.”

Senator Hinch then had the following exchange with an official from the department:

Senator Hinch: “I raise it with you because I have an example. I have a constituent who went through it all. She received a parenting order that gave her majority custody of her now 10-year-old daughter. The father picked the daughter up for his court-approved weekend and he never returned. That was 21 months ago. The only contact she has had are some monitored phone calls. They know where he lives. The

local police—Victoria police, of course—say, 'It's not our problem. It's a federal problem.' I have been made aware, and I am sure that you are aware, that there is a small unit in the federal police in which a complaint can be made to them and they can go—it is almost a kidnapping charge. The federal police have a very small unit which can do that. Is that correct?

Ms Saint: There are probably two issues here. One would be the breach of the Family Court order. As the Attorney explained, enforcement action in respect of that would need to be brought by the other parent in the Family Law Act. But that contact that you refer to could also give rise to some other criminal offence, which would then fall within the remit of the law enforcement agencies.

Senator HINCH: And there is a federal police unit that do apparently do this sort of retrieving of children. It is almost kidnapping.

Ms Saint: There is a unit within the AFP who does look after things like international parental child abduction, correct; but for domestically I would need to take that on notice.

So, the official told Senator Hinch he would have to wait for a full answer. When the answer arrived (5 months later) it did not provide much insight into how often, or how effective, were the execution of federal Court Orders to retrieve a child:

“The role of the Australian Federal Police (AFP) in family law matters is primarily to act on orders issued by a court, and to prevent the unlawful removal of children from Australia. This includes orders issued pursuant to the Family Law Act 1975 and the Family Law (Child Abduction Convention) Regulations 1986 such as recovery orders, arrest warrants and the Family Law Watchlist.

The AFP is also responsible for the coordination of family law related orders (with the exception of recovery orders in Western Australia). The Crime Operations Response section in the AFP has responsibility for many crime types, including domestic and international parental child abduction and other family law related matters. The AFP also has cooperative agreements in place with the various State and Territory police services throughout Australia for the execution of orders. The AFP does not have dedicated units that deal solely with domestic and international parental child abduction or other family law related matters, as this is covered by the Crime Operations Response Section.”

I invite members of the ALRC to compare the Newsroom response with the political response to issues around enforcement of court orders:

1. Who responded more quickly?
2. Who was more persuasive?
3. Who was cheaper?
4. Who, ultimately, is in charge?

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Summary

I could have answered your 47 questions, but felt it was futile to answer most of them: there are 1000s of issues in family law. You get rid of ants by destroying their nest or moving their nest, not running around squishing the little buggers one at a time.

The government should be building systems that automate the process of monitoring and maintaining the family law system so that it's always in good nick. Any other approach will be quickly eroded by the corrosive forces of endemic self-interest.

Postscript

As intimated previously, I feel disinclined to answer your 47 questions on the basis that a proposal to address concerns raised in one question will affect, often adversely, some of the areas focused on in other questions, leading to a whole lot of activity with little result.

However, I like Question 1, and I will answer that:

What should be the role and objectives of the modern family law system?

1. Quick identification of a range of possible long-term outcomes for the family (particularly the children) and the relative benefits/drawbacks of each outcome (including financial cost).
2. Identification of which outcomes are most achievable.
3. Encouragement of families to make good decisions, only make decisions for them as a last resort.
4. Ongoing monitoring to ensure family outcomes stay on track.
5. Feeding of results back into system to improve future decisions and processes.

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