

Submission to the Australian Law Reform Commission Review of the Family Law System
Issues Paper

- 1 This submission is being made in my personal capacity as a Family Lawyer.
- 2 As a broad observation, it is my view that Family Law reform has been driven historically by factors other than sound research by persons with involvement in the system. Accordingly, comprehensive review which focuses on the impact on children and families, as observed by those working with children and families, has to be the focus of any improvement to the system.
- 3 The nature of disputes upon relationship breakdown is such that it is likely that one or both parties will be aggrieved. Grievances with one another are often reinvented as grievances about the system which does not deliver the desired outcome. Parties are in dispute and, accordingly, it is likely that that dispute, whether resolved by agreement or otherwise, will require that one or both parties do not obtain an outcome which they think is right. An approach which ensures that there is a system designed to assist parties to resolve disputes and, in the event that they are unable, determine then quickly, is a system which will help people both because the costs will be less and the exposure to conflict will be shorter.
- 4 Ultimately, an understanding that a properly resourced Family Law system will have financial benefits to the larger society in improved productivity and reduced reliance on public services is a sound economic approach to the allocation of greater resources to assist those who require them.
- 5 This submission addresses some of the questions in the issues paper only.

Question 1 - What should be roles and objectives of the modern Family Law System?

- 6 The role and objectives of the modern Family Law system would be to assist parties to reach agreement and, in the absence of agreement, to determine disputes in a timely fashion and with a view to the interests of children.

Question 3

- 7 The location of information within the Court by appropriately qualified people has in the last six months aided that process. That system should continue to be funded and co-located within Courts.

Question 9 – How can the accessibility of the Family Law System be improved for people living in rural, regional and remote areas of Australia?

- 8 The restrictions on the availability of funds within the Courts have seen a reduction in the circuiting of Judges in both the Family Court and Federal Circuit Court. Proper circuits should be established with an allowance for attendance directions by telephone where required. Recent funding by Relationships Australia of properly qualified Mediators to attend in rural and regional centres to conduct Mediations (this was occurring in Albury) is an appropriate approach and should be continued.

Question 14 – What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?

- 9 Part VII of the Act could be streamlined.
- 10 In streamlining the Act it is submitted that removal of the presumption in favour of equal shared parental responsibility would be to the advantage of children. The introduction of a presumption of equal shared parental responsibility has been productive of further litigation. Perhaps unintentionally, the language contained in the presumption has created a climate in which parties think that equality of outcome, not just in respect of decision making (parental responsibility), but also in respect of time, is a presumptive option, likely option, the ideal option, rather than taking an approach which would see that parenting arrangements for most families are dictated not by equality of time but by an arrangement which works best for those individual children and their parents.
- 11 The Court can in all cases make orders for parental responsibility, be it equal or otherwise, without the operation of a presumption and the manner in which the presumption currently triggers considerations is unnecessary and cumbersome.

- 12 It is not necessary in the legislation to refer to equal time or substantial and significant time. Everybody understands what type of orders can be made and, defining them in quantitative terms is productive of conflict and litigation. If Part VII were to commence with a statement of the paramountcy principle and include a checklist in similar terms to that currently contained in section 60CC(3), that would be the appropriate way in which the Court might inform itself about what orders would be in the best interests of individual children.
- 13 Any amendment to Part VII should take into account the suggestions contained in Professor Richard Chisholm AM's article "Rewriting Part VII of the Family Law Act: A Modest Proposal" 24/3 Australian Family Lawyer, July 2015.

Question 16 – What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?

- 14 The difficulties that have arisen in this regard tend to stem from the use of the word "parent" without definition in the Act. It creates a potential hierarchy of persons who can be applicants for orders under the Act between parents and non-parents. "Parent" has multiple meanings. The Court deals with applications by biological parents, adoptive parents, psychological parents. There have been multiple sets of proceedings, both at first instance and appellate level, which have concentrated on the concept of whether or not any particular significance attaches to being a legal parent when it comes to application of the Act. In order to decrease litigation about this issue, a definition of "parent" could be inserted or, in the alternative, "parent" could be removed from those sections of the Act so that the Court is asked to consider the matter from the perspective of the parties to the proceedings, be they parents or otherwise. In that way children who are effectively the children of single parents by choice, of same sex couples, of friends, of stepparents, would all be treated the same way.

Question 17 – What changes could be made to the provisions in the Family Law Act governing property division to improve the clarity and comprehensibility of law for parties to promote fair outcomes?

15 The question presupposes that the Act as currently drafted lacks clarity or comprehensibility or fails to promote fair outcomes. It must be remembered that the vast majority of separating couples do not require a litigated resolution of their financial adjustment following separation. They bargain in the shadow of the law and prepare consent orders, financial agreements or enter into informal arrangements based on that advice (or conceivably absent advice). Fundamentally, the current system provides a mechanism for recognising the financial and non-financial contributions of parties to a relationship and recognising their future financial needs at the end of the relationship. It may be that there is some scope for introducing a codification of the steps undertaken by a Judge to reach the decision. This would involve:

- (i) a codification of ascertainment of the asset pool as at the relevant time (usually the time of hearing but, in appropriate circumstances, at another date);
- (ii) an analysis of the contributions be they economic or non-economic of the parties to the relationship, including contributions made at the commencement of cohabitation, prior to the commencement of cohabitation, during cohabitation and after separation;
- (iii) a consideration of whether or not it is necessary to do justice and equity as between the parties to make a further adjustment to one or other of the parties to take into account their financial position at the end of the relationship.

16 Notwithstanding the comments to the effect that the discretionary system appears to serve the interests of justice, to the extent that some amendment is seen as desirable, the areas which tend to cause conflict or controversy are as follows:

- (i) Treatment of Inheritances

At present the statutory regime looks at the assets and liabilities of the parties and contributions to them. It does not exclude or quarantine monies

received by one or both of the parties by way of inheritance. Depending upon when inheritances are received, the receipt of an inheritance (particularly a large inheritance) can have an impact on whether or not the matter is capable of resolution. A proposal whereby an inheritance is not included in the asset pool available for division upon relationship breakdown would provide clarity and comprehensibility to the public. There would have to be acknowledged that two disadvantages of such a proposal are as follows:

- (a) when inheritances are not wholesale excluded, those funds received by way of inheritance are able to be utilised to provide a just and equitable property settlement as between parties in circumstances where the party who did not receive the inheritance would otherwise not have their contributions acknowledged in a monetary sense because the pool available for division only consisted of the inheritance. This could be the case in circumstances where parties had lost monies during the relationship or where the relationship had not been one in which the parties were able to save any monies;
 - (b) another disadvantage is that for public policy reasons acknowledging financial disparity as between separating couples has the capacity to make financial provision for one spouse from the assets of the other spouse and in so doing potentially relieve some of the burden of support by the State.
- (ii) It needs to be remembered that timely adjudication of financial disputes will also improve the clarity and comprehensibility of the law to parties. At present the necessity that parties might have to have multiple interim applications to deal with their changing financial circumstances pending a final hearing creates a lack of clarity and comprehensibility.

Question 18 – What changes could be made to the provisions in the Family Law Act governing spousal maintenance to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

- 17 At present the costs of obtaining an order for spouse maintenance usually make an application for spouse maintenance a non-commercial decision for most lower and middle income people.
- 18 In terms of the statutory regime, if the Act were to be simplified, having a section which deals with the criteria to be taken into account on an application for spouse maintenance which is separate and not connected to the matters which may be taken into account to adjust contribution based entitlements under section 79 would be appropriate. A stand alone spouse maintenance section would deal with the same sorts of matters as presently contained in sections 72 and 75, that is, maintenance should remain the obligation of one spouse to the extent that he or she is capable where the other party is for any reasonable reason unable to adequately support him or herself.
- 19 The matters to be taken into account could be those in section 75(2) as currently drafted.
- 20 It is appropriate that if a person were to enter into a subsequent de facto relationship that would be a matter which would be taken into account to mitigate against the need for the former spouse to provide support.
- 21 There could be a simplified approach to applications for interim spouse maintenance, which would require the filing of a Financial Statement and short Affidavit to be dealt with in a standalone spouse maintenance list and requiring the respondent strictly to comply with those current rules which require provision of financial documentation. A process whereby parties were given information about the capacity for spouse maintenance orders to be registered with the Child Support Agency is appropriate as the capacity for registration, at least in respect of PAYE taxpayers, avoid the costs of enforcement.

Question 19 – What changes could be made to the provisions in the Family Law Act governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

- 22 The provisions in respect of financial agreements could be repealed.
- 23 At present the law provides neither clarity, comprehensibility or fair outcomes, whether for those who seek to protect their assets by way of a financial agreement or those who find themselves wishing to set aside an agreement which appears, having regard to the circumstances in which it was made appears to not promote a just outcome.
- 24 Fundamentally the current legislation permits parties to contract out of the remedial provisions designed to ensure that injustice is able to be remedied (whether that injustice is a failure to recognise non-economic contributions during a relationship, a failure to recognise financial contributions not reflected in legal title or a failure to acknowledge the financial impact of a relationship on a parties' financial position when that relationship ends). The system of contracting out of remedial legislation is fraught (perhaps for good reason). It should cause reflection on the aim and purpose of family law legislation as a whole.
- 25 The difficulty with the system as currently enacted arises because it promises things it cannot deliver.
- 26 If a system of financial agreements to be entered into by parties to relationships is to be enacted, it is my view that it should be one which is subject to some judicial supervision.
- 27 This position comes from a view that private ordering in and of itself is not an absolute good. The capacity to make an agreement which ousts the jurisdiction of the Court does have advantages:
- (i) parties do not need to engage in litigation if their relationship breaks down;
 - (ii) parties can honour promises to other persons, such as children of a first relationship, an obligation to financially assist elderly parents, an obligation to other family members in a family company, protection of inheritances, etc.

- 28 The beauty of a system which requires some measure of judicial oversight at the time at which the agreement is entered into is that it has the potential to avoid that litigation based on an analysis of whether or not the circumstances at the time at which the agreement was entered into were productive of the reasons why it should now be set aside. Judicial scrutiny at this stage could prevent those claims.

Question 20 – What changes to Court processes could be made to facilitate the timely and cost effective resolution of Family Law disputes?

- 29 It must be stated that it is currently delay in the hearing and determination of disputes which is productive of the most distress and expense.
- 30 Both Courts exercising Family Law jurisdiction require funding.
- 31 As the Chief Judge of the Family Court of Western Australia noted at his farewell speech on resignation from the Family Court of Australia, Full Court in Sydney in 2018:

So why, with all of this innovation, with all of this world-best practice, with all of this hard work and commitment, are the judges of this Court and the judges of the Circuit Court blamed for what is the undoubted current inefficiency of the Australian family law system?

I think there are a lot of reasons, but I haven't got time, so I will single out just three.

First, there are not enough judges and registrars. And those judges that we do have are either not replaced or they are replaced after inordinate delay.

Second, we have what I consider to be a bizarre structure where two courts share an almost identical jurisdiction. Instead of working together, almost everywhere they work in isolation, confusing the hell out of everyone with separate forms, rules and processes.

Third, we have been lumbered with the most extraordinary legislation that has grown like topsy and appears to have been drafted by a committee of people charged with the responsibility for making things as difficult as possible for judges and the poor old self represented litigants.

- 32 Parties to proceedings need to know what is going to happen on each directions hearing and return date of an application. The number of adjournments which are

occasioned by an incapacity in the Court to accommodate the number of matters is productive of expense for parties. Matters need to be triaged by an appropriately qualified person such as a Registrar in order to determine what is going to happen. In those circumstances parties would be confident that they only need to prepare for a hearing when a hearing is to occur, they only need to brief and incur the expenses of Counsel when a hearing is to occur. This is particularly the case in respect of the first return date of interim applications either for parenting or financial relief. A party is entitled to know whether or not his or her application will be dealt with on that date.

- 33 Family lawyers (even litigators) do not want to earn their livelihood by charging one person to attend Court eight times. The preference of all concerned would be if the family lawyer charged eight people one time only. This increases client satisfaction and decreases the costs of determination. This can only happen if there are judicial resources. It is, in the main, not accurate to see increased costs of litigation as a problem solely within the control of lawyers.

Question 21 – Should Courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate early resolution of disputes?

- 34 In my view the system for alternative dispute resolution is working well. Parties use family relationship centres. Parties use mediation services for financial matters. Parties use therapeutic approaches to mediation in parenting matters. The Court provides opportunities for referral to in-house family consultants. The Court provides conciliation conferences to those parties who qualify. The Court does not need to provide greater opportunities for parties to be involved in alternate dispute resolution services. They do so at present and those services already exist and are utilised. The difficulty with an overemphasis on perhaps mandatory and repeated referrals to dispute resolution is that those occasions can in effect be productive of further costs. If parties are sent to dispute resolution in circumstances where they feel they have exhausted all dispute resolution services they are incurring costs. What happens then is that the costs burden is shifted from the Court to the parties themselves who compromise their proceedings out of frustration that they cannot

reach a resolution in a timely fashion or because they have run out of funds. This disposes of the matter but it does not do so in a way that does any justice to either of the parties to the proceedings and increases their frustration with the system.

Question 22 – How can current dispute resolution processes be modified to provide effective low cost options for resolving small property matters?

35 The arbitration or small property disputes model used by Legal Aid Queensland seems appropriate.

Questions 32 and 33

36 Information sharing across the Commonwealth/State divide could be enhanced by direct judicial communication (like Hague Network Judges use). It would need to be open and transparent.

37 Ideally a unified family court could hear a greater range of disputes.

38 Where allegations of violence involve children and require the children to be cross-examined those transcripts and/or tapes should be received as a matter of course.

39 The Act allows for receipt of transcript and findings (where appropriate) in Division 12A proceedings. This is a useful tool.

Question 38

40 There are significant risks to children of involving them in decision making or dispute resolution. That is not said in aid of excluding them. Children who have the age and maturity to be informed (in a developmentally appropriate fashion), eg school age children, should have a procedurally understanding that there are rules and

mechanisms for gauging their opinion (if they wish to give it) about their relationships and living arrangements.

- 41 The significant risks arise for children who become enmeshed in the parental dispute.
- 42 Adult parties to litigation often give children inappropriate power by delegating parental decision to children (eg compliance with Court orders).
- 43 In the most serious cases children lose relationships with one parent in circumstances where, objectively, the conduct of that parent does not warrant the child's response. There are complicated psychological explanations for these circumstances (well beyond my expertise as a lawyer) but seeming to arise out of the combination of empowerment with a lack of maturity – the effect of which appears to increase black and white or concrete thinking.
- 44 The continuation of a “best interests” model of independent children's lawyers (properly funded) is the best approach to assisting children's participation in a healthy manner.

Question 43

- 45 This is a CLE/CPD issue. Lawyers are trained to approach the case from the perspective of their own client. Good lawyers see the matter from the perspective of the other side. Great lawyers see it as a judge would.
- 46 Most lawyers help problem solve. Some lawyers exacerbate conflict.

Question 45

47. No.

S Christie

Culwulla Chambers, Sydney