



Australian Law Reform Commission
GPB BOX 3708
SYDNEY NSW 2001

Attn: The Executive Director

1 June, 2018

Dear Sir/Madam,

RE: PUBLIC SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION'S REVIEW OF FAMILY LAW

I write in response to the recent media coverage of proposed reforms in the Family Law System by Attorney General Porter and respectfully request that my submission, although late by some 22 days, be considered in the Australian Law Reform Commission's Review of Family Law. I request this because it was only due to the media coverage this week that I became aware of the review.

Can you please advise by return email that you are going to accept this submission for consideration it in your report. If I do not receive your confirmation I will be directly lobbying my local Federal Member, Tony Abbott and the Attorney General to ensure by voice is also heard.

The Family Law System is universally recognised as deeply flawed in Australia. My submission is brief and is as follows:

Better accountability to the community for Family Lawyer Misconduct

The Family Lawyers Association advocates an increase in judicial officers to expedite family law disputes. This is sleight of hand. I submit that it is the family lawyers themselves that are partially if not totally responsible for delays and costs through self interest. My reasons are as follows:

1. Family lawyers in Australia are the most complained about lawyers of any jurisdiction by far;
2. The Australian Family Law Association Charter first and foremost requires these lawyers to serve the interests of Family Lawyers before all others, even children; and
3. Family lawyers often are promoted to barristers and judicial officers perpetuating cynical conduct within this area of the law.

Stronger disincentives are required preventing lawyers from conducting themselves in self serving ways not in the communities interests. This will facilitate an earlier end to disputes.

I suggest that as part of the practicing certificate requirements, Family Lawyers must provide a rating indicating the mean times it takes them to dispose of matters on a yearly basis and a standardised client satisfaction rating. This must be accessible to members of the community seeking their assistance. There will be resistance to this from the Family Law Association due to argued 'complexity' in matters. However if every lawyer is subject to this, the community can meaningfully seek out lawyers who are committed to the early resolution of disputes. Those who do not perform, can be weeded out by natural selection.

There is no greater incentive for lawyers to improve their conduct than the threat of serious financial penalty and disbarment. Any review must examine this as a way of making punishing Family Lawyers who act poorly more severe. This review must be from an independent body like the legal ombudsman, not the association itself. This will facilitate better outcomes for Australians requiring the assistance of Family Law. It will not be suggested by the Family Law Association as it is not in their interests.

Increasing the scope of the Family Law Review to include a Child Support System Review

The intent of the Child Support System was as I understand it to ensure that children are equitably financially supported until adulthood. Removal of Child Support from the judicial function was to ensure that participants in the system did not have to seek costly recourse in the courts for child support. Like the Family Law System this urgently requires review because:

- The system is subject again to by far the most numbers of Federal Civil Administrative Complaints;
- The system is confusing and lacks transparency;
- It is perceived as arbitrary and without proper oversight;
- Its powers are becoming too wide without proportional independent recourse;
- Demand on the system is increasing every year; and
- Its administration currently perpetuates, not solves family disputes.

More resourcing for mediation both prior to, during, and after the process

It is a well established fact that the vast majority of Family Law Matters are resolved prior to a final hearing. Why then, are so many litigants dissatisfied with the current court system? Other submissions will detail this. My view is that potential litigants are not adequately informed of alternative measures for dispute resolution *early on* in the process by those interested in facilitating family conflict for self interest. The judicial system is adversarial, stressful for litigants, and their children, and because of poor administration, is a dysfunctionally long process.

Mediation is not a panacea, however in most instances is a far the more effective way of resolving family disputes. This is because mediation done correctly, is not positional, but ascertains the underlying interests behind positions. With the right practitioner, it enables creative solutions to disputes, including family law disputes, where an adversarial legal

process magnifies strong positions and attempts to minimise weak positions for a party. The other party does the same. This results in a polarising effect not conducive to constructive solutions. Of course, this is well known to Family Lawyers who currently only pay lip service to mediation, always insisting that their way is better, until litigants have no money left to give them. Then, mediation is wonderful. The cynical system at work. Mediation truly is wonderful. Its application must be sustained through the process and even after it to minimise risks of repeat litigation and must be legislated as such.

The early and expeditious resolution of allegations against children

It is accepted practice now that where families with children are in dispute that the time with the children between the parents is established before financial settlement takes place. The logic being that without knowing the time children spend with their respective parents it is difficult to carve up the asset pie. Justice Watson of the Family court was the primary architect of this reform in the 1980s and ongoing family law reforms have built on this concept.

What this concept fails to appreciate is that when time with children is contested under the current adversarial system it is in one parent's financial interest to make allegations against the other parent. This impact is compounded by the delays experienced by litigants resulting in children often losing touch with the excluded parents. Who is ultimately accountable for this? I suggest three methods of dealing with this:

1. Expeditiously dealing with allegations to children before all other issues;
2. Enhancing the powers of the law to penalise those found making false allegations. The current system relies on a much weaker test;
3. Requiring the lawyers themselves to be held to account if they themselves have not examined the evidence prior to making submission on behalf of their clients.

These three methods will dissuade litigants and lawyers from making false allegations and using it for tactical advantage in the courts or in mediation.

Acknowledgement of Parental Alienation and incorporation of this into the definition of Family Violence

There appears to be controversy around the concept of parental alienation as a form of Family Violence. I suspect this is because the current system has no answer for this, choosing to sweep it under the carpet rather than tackle it with legitimacy. Parental Alienation must be addressed in any reforms as it simply happens in an overwhelming number of cases to a greater or lesser degree in family law disputes involving children. This has long term impacts on child development.

The concept of the voice of children

The Family Court espouses the concept of children having a voice in proceedings, particularly as they mature. If the law says that a child cannot drive, or even fill up petrol in a petrol station, how on earth is it fair that a child without access to a parent can determine which parent they spend most time with?

Accounting for evolving gender roles

Society has changed again from when the Whitlam Government introduced the landmark 'no fault' divorce concept. Since the inception of the court, fathers have much more hands on experience in raising children and mothers have much more access to the workforce. Gender roles have blurred and in my view this is for the betterment of society. This changes the moment disputes are before the Family Courts. All of a sudden it is 1950s again and fathers are walking wallets and mothers are stay at home carers. This is compounded by the Child Support System. Family Law is out of step with modern family relationships and it is resulting in poorer outcomes.

Conclusion

Australia is a wonderful, advanced, and for the most part egalitarian country, full of hope and optimism. The maxim, 'A fair go' is part of our lexicon. The Family Law System here was formed with the best of intentions under the Whitlam Government. Over the last 40 years has lost its way. Too many pigs with their snouts in the trough have meant that several generations of Australians have had their lives irrevocably and unfairly altered while a select few within the system have profited shamelessly. This is un-Australian.

The Commission is tasked with unravelling this self interest and modernising Family Law in a way that reduces litigation and fosters mediation. It will need strong political will, the will of the public, and honest and fair minded administrators. I hope that one day the Family Law System will again reflect our community values. The very future of families in Australia is at stake.

This Australian thanks you for taking his fair minded submission into consideration in the Australian Law Reform Commission's Review of Family Law. If called to, I would be happy to speak on my views further.

Yours faithfully,

Stan Fitzroy-Mendis

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