

SOUTH AUSTRALIAN BAR ASSOCIATION
RESPONSE TO ALRC
REVIEW OF THE FAMILY LAW SYSTEM – ISSUES PAPER

General

1. The Family Law Committee of the South Australian Bar Association (“SABAR”) provides this response to the Review of the Family Law System Issues Paper¹ released by the ALRC.
2. In providing this response, consideration has been given by SABAR to the Policy Responses prepared and submitted by the Family Law Section of the Law Council of Australia (“the Family Law Section”).
3. SABAR adopts and supports the position of the Family Law Section, but would like to provide some brief additional comments from the South Australian perspective.
4. In providing this response SABAR has consulted with its members who practice predominately/exclusively in the family law jurisdiction.
5. The response of SABAR is tempered by two overarching concerns:
 - a. Firstly, the need for adequate resourcing of the family law system; and
 - b. Secondly, the specific needs of the Adelaide Registry, where at present there is only one Judge appointed to the Adelaide Registry of the Family Court (since the retirement of Justice Dawe in 2016 there has been no replacement Judge appointed).
6. SABAR note the specific experience in the Adelaide Registry of the Federal Circuit Court, and in that regard SABAR are concerned as to the heavy case load of the Federal Circuit Court Judges which impacts on the delivery and access to justice of the litigants coming before it.
 - a. There are significant delays to trial, which anecdotally are anywhere between 18 months to 3 years from the date of commencement of proceedings (usually approximately 12 months or more from the date on which the matter is referred to trial, which is usually no less than 12 months from the commencement of proceedings).
 - b. The delays to trial impact on the number of interlocutory proceedings that require judicial determination consuming the time of a judicial officer and having the potential to further delay the litigation.

¹ Issues Paper 48, March 2018

- c. The caseload of Judges on first return “duty lists”, where anywhere between 15-20 matters are listed before a single Judge, often involving complex / difficult / urgent issues which can not be fully ventilated in a timely fashion, increasing the level of acrimony and disputation between the parties, together with their costs. The impact of this is that litigants (with the assistance of their legal representatives) often make compromises to resolve interim issues against their interest so that they simply have the benefit of an Order that can be enforced.

Question 20 – What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

7. As already set out herein, SABAR are concerned as to the ability of litigants to access justice in a timely and cost effective way in family law litigation.
8. SABAR equally accepts that adequate resourcing of the family law system is not the panacea solution to the myriad of issues confronting the jurisdiction.
9. SABAR considers that there are some areas which might be refined / improved within the current model which would facilitate timely access to justice, including but not limited to:
 - a. Judicial Settlement Conferencing;
 - b. Consistency in listing of matters between Judicial Officers;
 - c. Refining the docket management system;
 - d. Expedition of children’s cases where there are allegations of abuse.
10. SABAR suggest that consideration be given to making legislative amendments to provide for Judicial Settlement Conferencing in property cases in both the Federal Circuit Court and the Family Court, and in particular cases involving a small pool of assets, and in that regard:
 - a. SABAR do not intend to define what might be considered a “small pool”, given the differences that exist between states.
 - b. In South Australia over the last 12 months, the Judges of the Federal Circuit Court have been referring out to private mediation property cases where there is a pool of assets in excess of approximately \$500,000.
 - c. In South Australia, there is a small family law bar, and a small pool of AIFLAM accredited Mediators, including the now retired Family Court Judge, the Honourable Rodney Burr AM.
 - d. The experience of mediations conducted by Mr Burr, is that often the gravitas of a former judicial officer (as against a trained family law practitioner) conducting the mediation and expressing a view carries significant impetus to the parties to reach a resolution.

- e. SABAR considers that a judicial settlement conferencing model, particularly in small pool property cases would lead to greater early resolution of cases which both removes those matters from the court's case load, but also reduces the costs to the parties.
 - f. SABAR accepts that this model would require an initial period of significant judicial resourcing, but suggest that after that initial period and with the reduction of the Court's case load, a judicial officer will ultimately have more time to hear contested hearings in those cases that require the same at either an interim or final stage.
 - g. It is also acknowledged that any introduction of judicial settlement conferencing would impact on the docket system presently operated in the Federal Circuit Court, and to that extent, any judicial settlement conference would necessarily need to be conducted by a different docket judicial officer.
11. SABAR have also considered the different models of listing adopted in the Federal Circuit Court Judges within their respective dockets. While it is acknowledged that a docket system enables individual judicial officers to manage their lists and the consistency and "knowledge of the matter" to be maintained throughout the currency of litigation, SABAR consider that there should be some listing consistency to enable legal representatives to manage their client's expectations as to what is to occur at court events, for example:
- a. The manner in which first return applications are dealt with, and whether argument will be heard on the first return, or listed to another date; and
 - b. How contravention applications are dealt with.
12. Inter-related to consistency in listing in the federal Circuit Court, SABAR considers that some refinements could be made to the docket management system, including for example:
- a. The delegation of the making of final consent orders for property settlement to a Registrar, so that those simpler matters are not consuming the time of a Judicial Officer; and
 - b. The delegation of procedural matters and consent orders on a first return duty day to a Registrar assigned to an individual Judge who is able to manage matters in the fashion that the docket Judge prefers.
13. SABAR is concerned as to the delay to trial of matters, particularly those involving allegations of abuse as the delay to trial in those matters often results in the parent against whom allegations are made becoming estranged from their child(ren), until the evidence is tested at a trial.
- a. SABAR's concern is that in those cases, and particularly where allegations are ultimately not substantiated, there are often significant delays to trial (and often pending the outcome of criminal proceedings where in any event a different burden of proof is applied), and it is difficult for an estranged parent to restore a relationship with a child after the passage of time.

- b. SABAR acknowledges that prior to the retirement of Justice Burr, the Adelaide Registry of the Family Court operated the Magellan list to expedite complex children's matters and particularly those involving allegations of abuse and/or family violence. The benefit of matters being referred to the Magellan list was the expedition of information gathering from the various agencies who may have had involvement with a family / child, including but not limited to in South Australia SAPOL, Families SA, and Child and Adolescent Mental Health Services, which enabled matters to be listed for trial in a timely fashion. Since the retirement of Justice Burr, the Magellan list has not operated and the delays to trial are compounded as there is only one Judge appointed to the Adelaide Registry of the Family Court.
- c. SABAR also notes that s69ZR of the *Family Law Act* enables the separate and early determination of specific issues in children's cases, which would go some way to alleviating the concerns of SABAR, however the ability to do so is likely to be impacted by judicial case loads and adequate resourcing of the court.

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 the law for parties and to promote fair outcomes?

- 14. SABAR acknowledge the submissions of the FLS regarding Full and frank disclosure, and note the comments of the FLS in their submission.
- 15. SABAR have considered whether the imposition of mandatory pre-action discovery, in the form akin to the mediation requirements contained in s60I, would assist the timely expedition of property cases, whether by negotiation or through a judicially determined outcome, and in that regard:
 - a. Legislated mandatory disclosure obligations would make for clarity and certainty in advising parties, but also assist self-represented litigants to understand the obligations on them.
 - b. In cases where there are not allegations of family violence, mandatory pre-action discovery from the issuing party would assist in limiting interlocutory disputes as to discovery, which often consume significant time as and between the legal representatives, resulting in applications before the court and a strain on the time of the docket Judge.
 - c. It is accepted however that much like the s60I Certificate regime, there would need to be a carve out in particular cases, for example cases involving family violence.

PREPARED BY PENELOPE KARI AND MEREDITH DICKSON

on behalf of the Family Law Committee of the South Australian Bar Association

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