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AUSTRALIAN INSTITUTE OF FAMILY LAW
ARBITRATORS AND MEDIATORS

AUSTRALIAN LAW REFORM COMMISSION REVIEW OF THE FAMILY LAW SYSTEM

Submissions of the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) to the March 2018 Issues Paper 48.

Introductory

AIFLAM is looked to by the Judiciary and Government as the spokesperson for Family Law mediator and arbitrator interests. The Institute trains mediators to the National Accreditation system standards and provides required specialist training of arbitrators under the Family Law Regulations. The Institute maintains the list of arbitrators qualified to conduct arbitrations under the Family Law Regulations. The AIFLAM Board has representatives of the Judiciary and Federal Government assisting with continued liaison for the promotion of mediation and arbitration services in family law.

AIFLAM appreciates the opportunity to be able to make a submission on the Issues Paper.

The focus of the AIFLAM submissions will be on matters relative to issues surrounding mediation and arbitration raised by the questions in the Issues Paper.

Question 22

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

AIFLAM supports the suggestion at the final point in paragraph 175 of the Issues Paper namely to roll out an arbitration process for small property matters where the Queensland Legal Aid office model is discussed. We note that this model has had continuing success in Queensland and that for a successful roll out nationally, adequate funding will need to be provided to enable training of the arbitrators and to assist with the costs of those organizations who would provide the service.



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Question 26

In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

- a) In answer to this question, AIFLAM consideration should be given to giving power to the Family Law Courts to order parties to attend mediation. There is no power currently under the Act for the Court to order parties to attend mediation in property matters unless it is to a Registered Dispute Resolution Practitioner.
- b) In comparison, the Federal Court under Section 53A of the Federal Court of Australia Act can by order, can refer proceeding in the Court or any part of them to mediation. It does not need the consent of the parties. Under s.53A, arbitration can also be ordered, but similar to the Family Law Act provisions, this can occur only with the consent of parties (53A(1A)).
- c) A scheme of, in effect “compulsory” mediation in property cases in the Federal Circuit Court works in Queensland where it is expected of practitioners that all matters for property settlement coming before the Court should be prepared to have private mediation after the first return date. In the regional registries, Conciliation conferences on the whole take the place of mediations. Reported outcome from mediators are that above 75% of cases settle at mediation.

Question 27

Is there scope to increase the use of arbitration in family disputes? How could this be done?

AIFLAM sees large scope for increased use of arbitration however there are some real and perceived inhibitors to its current use. The following are seen to be inhibitors to its uptake.

- (i) unfamiliarity with the process by practitioners;
- (ii) apparent lack of support by the Judiciary;
- (iii) perceived needs for legislative amendment to put arbitration awards on the same footing as Court orders.

Under (iii) the following for example have been raised by the profession and commentators as uncertainties that may be inhibiting larger uptake and which could be remedied by amendments to legislation: -

- A s.13E arbitrator has less jurisdiction in property matters than a private arbitrator;



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- availability of State stamp duty exemption on transfers made pursuant to awards whether registered or not – this suggests a required amendment to s.90 of the Family Law Act;
- reviews of awards should not be limited to questions of law but encompass the same grounds as appeals to the Full Court. This proposal has already been adopted as policy by the Family Law Section and AIFLAM.
- some of the Regulations are better suited to be made Rules of Court and Chapter 26B of the Rules could be amended to incorporate them;
- clarification that Third Parties can be parties to an award;
- superannuation splitting in awards might not be recognised by trustees of funds since in the strict sense they are not splits made pursuant to an “order” – an award is not an order but has the effect of a decree of the Court;
- Clarification of reg. 67Q(3) – on what grounds can one object to registration of an award.