Philip Theobald

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This submission is from an individual

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Question 1

To provide a dignified, efficient and simple pathway for separated parties to resolve disputes about parenting and property at the lowest emotional, psychological and financial costs to their children and themselves.

Question 2

Any redevelopment of the family law system in Australia should be based on the basic principle that the breakdown of a relationship should do the least possible harm to the children of the relationship. This implies that parenting issues should be resolved in a way that protects children from physical, psychological, emotional and financial harm as quickly and efficiently as possible without adding to level of rancour naturally arising as a result of relationship breakdown. Only when parenting issues have been resolved should financial matters become important otherwise the innocent parties (the children) inevitably become the filling in the sandwich.

Question 3

The information available is good, education as to where to find it is what needs improving. The Federal Government is good at telling people where to find information about matters that may lead to re- election. Some of that expertise could be applied to telling the public where to look for information about family law. Maybe the term family law is in itself a reason for people not looking for the information. Possibly something like Information about how to resolve problems after a relationship breaks down might attract more seekers.

Question 4

Family Relationship Centres were a great idea before they became institutionalised. Maybe 'Mygov/relationship breakdown' is the answer but the information needs to be easy to understand and correct.

Question 5

I work in western NSW and Tasmanian so I can't comment about Torres Strait Islander people. The Aboriginal people I speak to in both NSW and Tasmania have ideas about how to do this and I suggest the Commission listens to them rather than european professionals.

Question 6 I can't comment

Question 7

Obviously it depends on the disability. The question is too wide. Is there merit in the establishment of a panel of practitioners who would be available to the Court to be appointed as legal representative (if there are resources) or by Legal Aid in the same way ICL’s are appointed (if there are no resources)?

Question 8

If they are literate then why do they need anything different from heterosexual people. This question implies they are different and are presently treated differently in the system. I work in Family Law every day and have never heard a complaint based on gender preference about access to the system. I have heard discriminatory remarks from litigants both in court and in waiting areas but that is not what this question is about. Current forms and other means of data collection within the Family Law Courts fail to comply with the Australian Government Guidelines on the Recognition of Sex and Gender because they fail to recognise individuals that may identify and be recognised within the community as a gender other than the sex they were assigned at birth or during infancy, or as a gender which is not exclusively male or female.

Question 9

The answer to this is complex. At present information is available on the net but services are few and far between and in many cases inadequate. When I talk with lawyers working in Domestic Violence in their Moree office and they tell me their territory extends to Bookend at times down to Dubbo I am amazed they can service any client properly. The provision of people on the ground is expensive and governments don't want to pay. It gets down to economics in the end and if one was cynical you could conclude their aren't any votes in paying for more legal services in the bush. There needs to be more money for legal services for Legal Aid Commissions, Aboriginal Legal Aid and Womens Legal Centres as well the Federal Circuit Court to provide both judicial services and dispute resolution.

Question 10

At present the system is a one size fits all. I sat in the Public Area of the Federal Circuit Court n Hobart yesterday and among a great number of court mentions I heard about a property matter involving net assets of $150,000 which solicitors were suggesting may take two or more days. The FCC was set up to provide a summary service and was then given a large jurisdiction so it has a process geared to large dollar disputes. Summary hearings by Registrars or mediations or court subsidised arbitrations similar to the arbitration service offered by Qld Legal Aid may be better. Parenting disputes need more vigorous mediations with experienced mediators who operate in a safe environment. At present the NGO services avoid matters where family violences is an issue while Legal Aid Offices who have more experienced mediators tend to offer mediations to clients who have left violent situations. It seems to me the process needs to be able to be modified readily to accommodate resolution of disputes quickly and efficiently based on an assessment of issues and complexity. In property cases dollar amounts are treated as complexity measures while in children's cases an earlier examination of what the dispute is really about may well lead to shorter lists. As part of the process of better triage and differential case management, is there a role for far greater use of the Case Assessment process than is currently occurring – one of the most effective procedural amendments during the 42 year history of the Act almost destroyed by the Federal Circuit Court docket management system. The USA there has been an adoption of the concept of a multi door court with trained and competent gate keepers guiding disputes into dispute appropriate channels. Of course, they make greater use of mediation and arbitration to keep matters out of judicial lists.

Question 11

The problem with changing court procedures to improve accessibility for self representing litigants is the possibility that represented litigants may see the court as favouring the self represented litigant. As a mediator I come across many self represented parties and I believe more research needs to be done to establish why persons are self representing. It is too easy to use the self represented as an unfortunate who cannot afford legal representation. Many, of course do fall into that category and they deserve assistance to enable them to properly access the system and minimise the financial effect on the other party resulting from delays and failures to comply with court processes. The problem is significant. Courts can attempt to alleviate th problem by publishing guides for the self represented or even employing legal assistants to guide parties through the court process. Legal aid could be extended to provide specific help to self represented parties to guide them through the process. The optimum would be for legal aid to be expanded so that people are not forced to self represent because they fall outside guidelines. The voluntary self represented may use facilities selectively.

Question 12

1. A proper summary procedure for small and simple disputes. 2. Expansion of the FDR programme to include property disputes. 3. An expansion of use of arbitration for small disputes 4. Expansion of use of mediation to divert parties from the court system.

Question 13

The reintroduction of child minding services for litigants would assist so that children do not have to wait with litigants in public areas. The provision of safe rooms for concerned parties. The provision of video facilities so that concerned parties can participate from a safe location.

Question 14

In my experience the introduction of lists of 'considerations' by parliament, though well intentioned has created a situation where every matter is treated as complex since the court is required to apply section 60CC in all cases. Te inevitable result is a lack of efficiency and an increase in costs without any discernible benefit to parents or children. The steps to producing better outcomes are: 1. Simplify S60. The principle considerations are good but after that the harm outweighs the benefit 2. Rewrite the whole part so that a parent reading it can understand the principles and find them readily. 3. Clearer provisions for referral to mediation. Most parenting disputes are capable of settlement with competent and experienced mediators.

Question 15

Should not “systems abuse” (appropriately defined) be part of the definition of family violence, noting the limited but relevant discussion of this at question 25 – at paragraph 255

Question 16

Perhaps a better definition of family to make it clear that the legislation applies to all forms of family including those where children are cared for by persons who may not be directly related. In my experience judges are usually able to recognise different family styles but the legislation relates to disputes between biological parents. The definition therefore of party to a parenting dispute needs to be widened to readily permit others with an interest in the parenting and welfare of a child to be involved. Similarly the legislated recognition of every child's right to know and be cared for by both parents may need to be reworded to reduce the possibility of that being read to exclude others.

Question 17

As part of the process of better triage and differential case management, is there a role for far greater use of the Case Assessment process than is currently occurring – one of the most effective procedural amendments during the 42 year history of the Act almost destroyed by the Federal Circuit Court docket management system. I suggest consideration be given to removing from s79 the subsections which only apply in limited circumstances so that s79 becomes the overall section and provisions for third parties and death of a spouse are each in its own section. That would enable the great majority of litigants to see easily the matters that are taken into account by a court in making a property decision. I would also remove the Stanford requirement because in reality it is little used except by lawyers and not understood by lay litigants.

Question 18

I don't think this needs any change, it is the one part of the Act which litigants in my experience can readily understand

Question 19

I suggest we start by deciding if prenuptial agreements are really necessary and whether they should be binding if circumstances of parties change. It is, a legal fiction, to pretend that any person can see the future so clearly as to be bound by an agreement made often years before when the world for some reason looked pink and his or her mind was on the next few days or weeks and not on five years hence with tw or more children and no income. The whole issue of prenuptial agreements needs to be carefully examined. They have become in many cases no more than a convenient way for a dominant party to exploit a weaker party usually female. The provisions about Financial Agreements are found in Part VIIIA (matrimonial), Part VIIAB (de facto) and Part VIIIB (superannuation) of the Act. As presently drafted the legislation makes clear that agreements relating to a marriage can be entered into before marriage, during marriage before separation, during marriage and after separation and after divorce. In the case of de facto relationships agreements can be entered into before the commencement of a de facto relationship, during a relationship (prior to the breakdown of the de facto relationship) and after the breakdown of the de facto relationship. If an agreement is drafted under Part VIIAB of the Act (de facto) and the parties to that agreement subsequently marry their agreement will not apply in the event their marriage breaks down. Though it is possible to enter into an agreement that purports to be made under both Part VIIIA (matrimonial) and Part VIIAB (de facto) the Family Law Act 1975 (Cth) does not make this expressly clear. The Act should be amended to make clear that an agreement entered into under Pt VIIIAB (before or during a de facto relationship) can be enforced under Pt VIIIA if the parties later marry.

Question 20

The process needs changing to further promote non judicial resolution either through a dispute resolution process or arbitration so that going before a judge is only available as a last resort. This will require considerable re-education of the public and the legal profession. Both groups see the judge as the desirable decision maker though litigants lose faith in that belief as legal bills mount. Promotion of alternatives requires competent practitioners and some supervisory tailing authority. In Australia there are also constitutional difficulties. As part of the process of better triage and differential case management, is there a role for far greater use of the Case Assessment process than is currently occurring – one of the most effective procedural amendments during the 42 year history of the Act almost destroyed by the Federal Circuit Court docket management system

Question 21 See my previous answers.

Question 22

The Legal Aid Commission of Queensland is already operating one. The provision of legal aid for property settlements up to a value of say $2,000,000 with a repayment facility provided the matter is referred to arbitration would be a revolutionary way to divert litigants and would save the court money as well as the litigants. The lawyers would probably not be happy.

Question 23

Safe facilities in all courts would be a good start. Multiple entries would help. I have seen men wait outside court entrances and follow their spouse in, ofter without saying anything. Then the spouse starts to shake. The security people look on regardless. Police in courts would be a help as would court facilities that readily allowed attendance from another part of the building.

Question 24

Yes, provided the resolution practitioner is experienced in dealing with potentially violent people and power imbalances and the facilities could cater for safety.

Question 25

I have encountered what appear to be misuse of process in three areas: 1. In the litigation pathway where a party, in the majority of cases, a self-litigant, brings multiple contravention applications for trivial matters and keeps the other party involved in what could be classified as a negative intimacy situation. Alleged contraventions can range from being 5 minutes late for a telephone call to failing to fill in the communication book adequately to satisfy the requirements of an equal shared parental responsibility order. Misuse of process in the litigation stream should be included in the definition of family violence and judicial officers should have the power to require litigants with a history of frequent applications to obtain leave to bring contravention applications; 2. In Child Support matters there is ample opportunity to make frequent applications for variations. Only yesterday in a property mediation the husband admitted somewhat proudly that he had lodged 37 applications with the Agency for variations in two years. The Agency has no power apparently to limit applications. The legislation could be amended to permit the child support registrar to declare a party vexatious and limit the number of applications for variations; 3. In the FRC pathway parties can make requests for conferences when they wish and force the other party to attend to negotiate rather than have a certificate issued which may infer an unwillingness to take part in a conference. There could be a legislated limit on the number of conferences a party can ask for in a twelve month period. 3.

Question 26

There are FDR and conciliation processes available in metropolitan areas and in major regional areas. When I mediate/conciliate in rural areas I find parties and lawyers most welcoming. The most frequent complaint is about the availability of experienced competent ADR practitioners (just like the complaints about the lack of GPs). The answer is more money to attract competent agency and private ADR practitioners. It is expensive to work in regional areas and there is not enough work in most rural and regional areas for a practitioner to live in the area. Travel and accommodation is expensive and travel time is work time lost.

Question 27

Arbitration is rarely used. The reasons for its lack of popularity range from ignorance of the process to concerns about the right to appeal to concern about being blamed as lawyer for recommending or choosing an arbitrator who a client later criticises. Cost is another problem. The resolution of these problems requires community education about the process, education of lawyers about tailoring the arbitral process so that it is proportional to the dispute, possibly changing the appeal legislation so that the appeal from an arbitrator is the same as from a judge and setting up facility for a body like the Australian Institute of Family Law Arbitrators and Mediators to appoint arbitrators on a joint request from each party if they cannot agree. Arbitration ought to be extended to painting matters as it has apparently successfully in the UK. There are constitutional problems in Australia in ordering arbitration other than by consent. Some judicial officers eem better able to obtain consent than others so an education programme for judges may also be of benefit. Lately in discussions I have encountered some enthusiasm for the use of a med-arb process. The NSW Workers Compensation Commission uses a med-arg model with considerable success.

Question 28

Online dispute resolution is in its infancy in commercial dispute resolution in Australia and is used in family law parenting matters in my experience in both NSW and Queensland. It takes the form of conference telephone calls and the use of email and messaging to move documents. something similar could easily be developed for property mediations and for arbitrations which could result in faster and more efficient resolution of disputes. In arbitrations where evidence needs to be taken the parties would need to be in locations where an impartial third party could be present to ensure evidence was not corrupted by partisan third parties helping the witness and there would need to be facilities of a formal nature to ensure exhibits were tendered properly and copies provided. IT could be done and again, education would be crucial.

Question 29

This is already being done by some Family Court Judges. The FCC Judges have such large case loads that they do not have time to problem solve. Mediation in parenting matters is also a form of problem solving-decision making with the actual decisions being made by the parents after a problem solving dialogue on occasion with assistance for professionals such as psychologists. It seems to me that it is a matter of expanding what is already bing done rather than setting up a new programme.

Question 30 I am not sure what this means

Question 31 I am not sure what this means

Question 32

Why is the concern only for child safety? The Police are usually the first responder to Family Violence and the local court is the appropriate place for the Police to bring applications. Where there are or are likely to be parenting applications in the family court then the State legislation should enable a state Magistrate to make an interim order to be in place until discharged or varied by a court of similar jurisdiction. The Family Courts should be given the power to discharge or vary Family Violence Orders made by State Courts and similarly there should be a power in the state courts to vary, discharge and enforce a Family Violence Order made in one of the Family Courts.

Question 33

I don't know, the degree of co-operation varies between states and within states. There appears to this observer to be a degree of 'protecting my jurisdiction' in some places. The Federal, State and Territory Attorneys need to agree on the desirability of co-operation and then to ensure the staff know that there is an agreement and they are expected to carry it out.

Question 34 Information from an impartial disinterested third party would be a good start.

Question 35

I think the question should be rewritten to include the words 'correctly' or 'accurately' after informed. This is difficult because parents usually have first access to children and their interpretation of a court result will be coloured by their own perceptions about the result. ICL's do good job when they are involved in talking to children but again their role is difficult because the children usually already have a version or even more that one. I can't answer this, it's a real conundrum.

Question 36

The Child inclusive conference is a good start and in more complex cases a family report or a child psychologist provide a filter to exclude or recognise third party influence of the child's wishes.

Question 37

The support of a trusted but not involved adult can assist as can an experienced dispute resolver.

Question 38

Children don't like upsetting the adults they love and those adults are the ones in dispute in most cases. Children feel disloyal if they sy something one of their parents don't like or their siblings don't agree with. There are considerable risks that children will be emotionally harmed by their involvement and even physically harmed.

Question 39

The first step is to make sure the wish is genuine and independent of third party influence. The next step, once the first step is completed positively is to have a culturally appropriate but disinterested adult mentor them through the process with particular instructions to avoid culturally unsafe actions or words.

Question 40 Feed back from the children themselves.

Question 41

Iy depends on the nature of their profession. For lawyers, knowledge of the relevant legislation and legal processes is basic. Knowledge of resources for separating couples and knowledge of dispute resolution pathways are also basic. An ability to listen and advise clearly and proportionally to the presenting person and problem is also basic. Continuing CLE and education in negotiation techniques are both important to maintain competency. To this should be added the desirability of taking part in education about family dynamics, child psychology, educational facilities and theory, property and chattel valuation methods, in rural areas cattle, sheep and crop farming and marketing, some migration law and self preservation.

Question 42

The Family Law Act sets out the desirable qualities of a family Court Judge. They haven't changed.

Question 43

Education of the general public about what to expect from their lawyer and an enforceable code of conduct might help. In my experience parties after separation often seek a professional who has a reputation for aggression. The emotional need for aggression reduces over time at a faster rate for the litigant than for the professional who often enjoys the fight with its need for tactics and strategy. The professional acts on instructions and parties can and do tell their champion to back off. I have seen it time and time again in mediations.

Question 44

Professionals need education to recognise when they need a break or to slow down or even to avoid the types of cases which affect them badly. Judges need more support in the form of more judges and time off and time to write decisions. That will cost money.

Question 45 They can now provided its anonymous and that works well.

Question 46

I don't see the need for change in the system. People need to know they can got o court and watch how it's done. Family Law is emotional stuff and people will blame the system when they don't achieve the result they believe is right, fair or just. We have to live with that, it's like sentencing in the criminal court.

Question 47

The governance is fine, the regulatory processes are cumbersome and bureaucratic. The whole system is run to minimise cost and as result mimosa personal service. The phone system says it all.

Other comments?

File

The results of this submission may be viewed at:

<https://www.alrc.gov.au/node/8362/submission/7419>