Rose Davies

**ALRC-Review of the family law system**

1. On 27 September 2017, the then Attorney General of Australia (Senator the Hon George Brandis QC) published the Terms of Reference (“Terms of Reference”) for a review of the Family Law System.
2. Such terms stated the review was to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to ss 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of whether, and if so what, reforms to the family law system are necessary or desirable having regard to various factors including:
* the importance of public understanding and confidence in the family law system;
* the desirability of encouraging the resolution of family disputes at the earliest opportunity and in the least costly and harmful manner;
* the paramount importance of protecting the needs of the children of separating families;
* the pressures (including, in particular, financial pressures) on courts exercising family law jurisdiction;
* the appropriate, early and cost-effective resolution of all family law;
* the protection of the best interests of children and their safety;
* family violence and child abuse, including protection for vulnerable witnesses;
* families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness; and
* **any other matters related to these Terms of Reference, including a consideration of what changes, if any, should be made to the family law system; in particular, by amendments to the *Family Law Act* and other related legislation** (my emphasis).

**Proposed Reform**

1. I propose a reform to the family law system by an amendment to the *Family Law Act 1975* (Cth) (“the Act”) to address the following questions contained in the Terms of Reference:

**Question 10** What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

**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?

**Question 47** What changes should be made to the family law system’s governance and regulatory processes to improve public confidence in the family law system?

**Current Legislation**

1. Currently, s.67ZBB of the *Family Law Act 1975* (Cth) states:

***“Court to take prompt action in relation to allegations of child abuse or family violence***

* 1. *This section applies if:*
1. *a notice is filed under* [*subsection*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s69c.html#subsection)*67Z(2) or 67ZBA(2) in* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *for an order under this Part in relation to a child; and*
2. *the notice alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:*
	* 1. *there has been abuse of the child by one of the parties to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings)*; or*
		2. *there would be a risk of abuse of the child if there were to be a delay in the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings)*; or*
		3. *there has been family violence by one of the parties to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings)*; or*
		4. *there is a risk of family violence by one of the parties to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings)*.*
	1. *The court must:*
3. *consider what interim or procedural orders (if any) should be made:*
	* 1. *to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and*
		2. *to protect the child or any of the parties to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings)*; and*
4. *make such orders of that kind as the court considers appropriate; and*
5. *deal with the issues raised by the allegation as expeditiously as possible.*
	1. *The court must take the action required by* [*paragraphs*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s69c.html#paragraph)*(2)(a) and (b):*
6. *as soon as practicable after the notice is filed; and*
7. *if it is appropriate having regard to the circumstances of the case--within 8 weeks after the notice is filed.*
	1. *Without limiting subparagraph (2)(a)(i), the court must consider whether orders should be made under section 69ZW to obtain documents or* [*information*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#information) *from State and* [*Territory*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s111ca.html#territory) *agencies in relation to the allegation.*
	2. *Without limiting subparagraph (2)(a)(ii), the court must consider whether orders should be made, or an injunction granted, under section 68B.*
	3. *A failure to comply with a provision of this section does not affect the validity of any order made in the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *for the order.”*
8. Currently,s.117 States:

*“(1) Subject to* [*subsection*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s121.html#subsection)*(2),* [*subsection*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s121.html#subsection)*70NFB(1) and sections 117AA, 117AC and 118, each* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party) *to* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *under this Act shall bear his or her own costs.*

*(2) If, in* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *under this Act, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to* [*subsections*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s121.html#subsection)*(2A), (4), (4A) and (5) and the* [*applicable Rules of Court*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s112aa.html#applicable_rules_of_court)*, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.*

*(2A) In considering what order (if any) should be made under* [*subsection*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s121.html#subsection)*(2), the court shall have regard to:*

1. *the financial circumstances of each of the parties to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings)*;*
2. *whether any* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party) *to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party)*;*
3. *the conduct of the parties to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *in relation to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;*
4. *whether the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *were necessitated by the failure of a* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party) *to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *to comply with previous orders of the court;*
5. *whether any* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party) *to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *has been wholly unsuccessful in the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings)*;*
6. *whether either* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party) *to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *has made an offer in writing to the other* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party) *to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *to settle the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *and the terms of any such offer; and*
7. *such other matters as the court considers relevant.*

*(3) To avoid doubt, in* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *in which an independent children's lawyer for a child has been appointed, the court may make an order under* [*subsection*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s121.html#subsection)*(2) as to costs or security for costs, whether by way of interlocutory order or otherwise, to the effect that each* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party) *to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *bears, in such proportion as the court considers just, the costs of the independent children's lawyer in respect of the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings)*.*

*(4) However, in* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *in which an independent children's lawyer for a child has been appointed, if:*

*(a) a* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party) *to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *has received legal aid in respect of the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings)*; or*

*(b) the court considers that a* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party) *to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *would suffer financial hardship if the* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party) *had to bear a proportion of the costs of the independent children's lawyer;*

*the court must not make an order under* [*subsection*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s121.html#subsection)*(2) against that* [*party*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102p.html#party) *in relation to the costs of the independent children's lawyer.*

*(4A) If:*

1. *under section 91B, an officer intervenes in* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings)*; and*
2. *the officer acts in good faith in relation to the* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings)*;*

*the court must not, because of the intervention, make an order under* [*subsection*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s121.html#subsection)*(2) of this section against the officer, or against an entity (including the Commonwealth or a State or Territory) by or on behalf of whom the officer was engaged or employed.*

*(5) In considering what order (if any) should be made under* [*subsection*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s121.html#subsection)*(2) in* [*proceedings*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fla1975114/s102q.html#proceedings) *in which an independent children's lawyer has been appointed, the court must disregard the fact that the independent children's lawyer is funded under a legal aid scheme or service established under a Commonwealth, State or Territory law or approved by the Attorney-General.”*

**Proposed Legislative Amendment**

1. I propose that there should be an amendment to S.67ZBB of the Act by the insertion of a subclause (5A) as follows:

*“****(5A) Without limiting subparagraph (2), the court must consider whether orders should be made under s.117 of the Act.”***

1. Thus, in proceedings where there is allegations of child abuse or family violence, the Court then must consider whether the circumstances of the case warrant a cost order being made against a party, taking into account a range of factors including the conduct of the party.
2. In my submission, the aforementioned variation to S.67ZBB of the Act, would be in keeping with the Terms of Reference to ensure an outcome in a timely manner with minimal cost and the least amount of stress to the litigants. Further, any party continuing a matter with little or no prospects of obtaining the Orders they seek would need to consider that if they enlivened or prolonged proceedings at further cost to the other party, they stood a very real prospect of a costs order being made against them.
3. Additionally, such change would improve public confidence in the Family Law system and produce a better outcome for children that were the victims of abuse or family violence on the basis that the non -offending party would be expending less money on family law litigation and potentially be in receipt of a Costs Order in their favour.

**SUBMISSIONS RE PROPOSED LEGISLATIVE AMENDMENT**

1. In support of this proposed amendment to the *Family Law Act*, I have acted in Family Law matters with the following background:
	* + 1. **Case 1** - In mid-2008 I took instructions in a parenting matter where the father was ordered to have supervised time with his children on the basis that he had allegedly sexually abused a child to an earlier relationship, and possibly one of the subject children. Despite an Interim Application for such supervised time to cease pending the final Hearing, the Court determined that the risk of harm to the children in continuing with supervised contact was outweighed by the potential harm to the children if such contact ceased and then at trial, orders were made for the father to spend time with the children. This hearing was subsequent to the father pleading guilty to wilfully committing an indecent act within the presence of a child under the age of 16 years in a different State. This child of the father’s had made disclosures particularising the allegations and given evidence in the father’s Trial.

The matter continued to trial with the mother seeking orders for the father to have no time with the children and the father maintaining an Application to spend equal unsupervised time with the children.

Approximately four months later, during a five-day Final Hearing, the father consented to Final Orders whereby he was to spend no time with the children. Prior to the Final Hearing, the Independent Children’s Lawyer had indicated that she did not support the mother’s position for the father to spend no time with the children.

My client was privately funded and, financially assisted through her parents’ superannuation fund monies, incurred legal costs and outlays in excess of $200,000.00. The material in respect to the child of a previous relationship potentially being abused had been before the Court since early in the proceedings and the matter had been put in abeyance pending the outcome of the criminal proceedings in respect to this child. Further, the initial Judge at the first hearing had made comments to the parties in terms of “father’s do not generally abuse their own children”.

In my submission, had there been a mandatory clause for the Court to consider a Costs Order, the father (and those financially supporting him and his litigation) may have elected not to proceed with a Final Hearing at a far earlier stage, or entered into Consent Orders of a similar nature to the Final Orders, given that his Application stood little or no prospects of success on the basis of his criminal conviction.

* + - 1. **Case 2** - My client was the father of a young child wherein the mother and her partner were charged in respect to use of methamphetamines. Despite voluminous Department of Child Safety materials evidencing the use of illegal drugs by the mother and mental health issues and abuse of the subject child and a half sibling, the matter continued through the Family Court system for a period of approximately 12 months before Final Orders were reached at a Final Hearing. In this instance, I estimate that my client spent in excess of $80,000.00. In my opinion, the costs incurred by my client and the costs to the public purse could have been significantly reduced in the event that the mother had from the beginning been forced to consider the prospect of a Costs Order being made against her. Although the mother in this instance did not herself have the funds to pay such Costs Order, her extended family (who were responsible for the payment of her legal fees) may also have taken the serious possability of a Costs Order being made into account such that my client’s costs were kept to a minimum.
			2. **Case 3** – My client had, at her own expense, brought Hague Convention proceedings to return the children of the proceedings to Australia. Despite the father having no communication whatsoever with the children for several years, he then brought an application to set aside Orders and sought regular time and communication with the children. In this instance, my client spent in excess of $150,000.00 and several years defending her position such that the children were not put at risk, noting in this instance, there had been allegations of the father utilising electronic equipment for the downloading of pornographic material.

Again, the client may have avoided incurring substantial legal costs and outlays were there a mandatory consideration for the Court to consider a Costs Order against the father, noting in this instance the father had substantial funds to pay such Order in his own right.

**CONCLUSION**

Whilst acknowledging the current judicial discretion to consider making a Costs Order pursuant to S.117 of the Act, I consider that it would make a significant difference if there were to be a mandatory provision for the Court to consider making such Order in matters indicating child abuse and/or family violence.

It could be raised that such amendment to S.67ZBB may in fact increase the number of litigants continuing to a final Hearing to avoid the making of Costs Orders against them. However, it is my submission that the potential deterrent of a Costs Order outweighs this risk.

Further, while keeping in mind the right of the litigant to be afforded natural justice by pursuing a claim, the precursor to this presumption is that a case must have merit. It is also my submission that if there are sufficient findings or evidence before the Court that a party is likely to be unsuccessful in obtaining the final Orders they seek, then such party must turn their mind to a potential Costs Order if they pursue such a case with strong prospects of being wholly unsuccessful. It is thus quite possible that public commissions and legal services such as Legal Aid and Community Legal Centres may also need to take this amendment into account as a further factor in determining eligibility for grants of aid and/or legal assistance.



Rosemary Grace Davies

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