FAMILYLAWPRACTITIONERS
Association of Tasmania Inc.

AUSTRALIAN LAW REFORM COMMISSION

FAMILY LAW REVIEW

FAMILY LAW PRACTITIONERS ASSOCIATION TASMANIA – RESPONSE

The Family Law Practitioner's Association of Tasmania (FLPAT) adopts in most part the recommendations of the Family Law Section of the Law Council of Australia.

FLPAT makes the following submissions in relation to some of the questions raised by the review.

Question 1 – What should be the role and objectives of modern Family Law System?

It is FLPAT's submission that the Family Law Act already contains the 'tools' that should be retained for any New Family Law System and it is the application of those tools that is important.

The FLS make particular reference to sections 69ZQ, ZR and ZX and the wide powers already available to a judicial officer in proceedings, whether that be a property or child related proceeding.

FLPAT endorse those submissions and in addition submit that whether and how these provisions are applied, are the key to the children and parties experience of the process and the outcomes for the parties.

Whether and how they are applied, are dependent on a number of factors that include, but are not limited to:

(a) The time that the Judicial Officer has to consider these provisions and cater the operation of the provisions to each particular case;
(b) The willingness of the Judicial Officer to take a 'hands on' approach;

(c) The knowledge and willingness of the advocate (lawyer or self-represented party) to bring the relevant provisions to the attention of the Judicial Officer and make meaningful submissions as to how they apply to each particular case.

Rather than funding dramatic changes to a “new Family Law System”, funding should be focused on ensuring that Judicial Officers and Legal Practitioners who work in the area are interested in the existing objectives and principles and capable of applying these provisions to the facts of a case, to achieve the best outcome for the parties and children.

Further, feedback and critique of Judicial Officers and Legal Practitioners willingness and ability to apply the provisions could enhance the quality of the application.

Question 3 - In what way could access to information about family law and family law related services, including family violence services, be improved?

A particular issue faced in Tasmania has been the depletion of the number of family lawyers in-house at the Legal Aid Commission of Tasmania. Those lawyers provided a valuable contribution to allow access to information to community based organisations through presentations and other more informal means.

Greater funding to quality lawyers at the various Legal Aid Commissions has an immeasurable benefit to the community generally and also the legal community.

As an alternate to in-house Legal Aid Commission Lawyers, private lawyers could be separately funded (by way of tender) to provide educational services to the community and assistance to other legal practitioners.

This question is further addressed in response to other questions posed.

Question 5 - How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

It is submitted that a recognised Aboriginal organisation or a representative of such an organisation should have a right to be heard where a child is Aboriginal or Torres Strait Islander.

A provision similar to that is contained in the Children Young Persons and Their Families Act 1997 (Tas) and provides children an opportunity to retain their connection with their community, even in the absence of a connection with one of their biological parents.

Question 6 - How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities.

It is submitted that a representative from a resource centre or organisation linked with the linguistic background or culture of a party, should be provided with an opportunity to provide submissions as to particular factors that may impact the case management of a case.

Family Consultants should be funded to obtain input from the resource centre or organisation lined with the linguistic background and/or cultural of a party, prior to conducting any interviews with parties. Alternatively, resource handbooks should be developed for consideration by the Family Consultants, the legal practitioners and the Judicial Officers providing insight into the nuances of that person's linguistic background or culture that could be relevant to the party's participation and presentation in the proceedings.

Question 7 - How can the accessibility of the family law system be improved for people with disabilities?

It is submitted that a whole range of disabilities must be catered for. Many parties present with disabilities, including learning disabilities, psychosocial disabilities and other disabilities recognised under the National Disability Insurance Scheme. Parties can often present with undiagnosed disabilities, particularly those who have been the victims of Family Violence. VicHealth determined that domestic violence was the leading risk factor contributing to death, disability and illness in Victorian women aged

15 to 44 years.[1] ("Domestic, family and sexual violence in Australia: an overview of the issues" 14 October 2014 Janet Phillips, Social Policy Section and Penny Vandenbroek, Statistics and Mapping Section)

The first step is identifying the disability; the second is understanding the particular needs of the person with the disability and the third is understanding how that person may present differently compared to a person who does not suffer from a disability, or the disability suffered by that person.

The process should support the person with a disability to achieve the best outcome, whether that be in property or for the child in child related proceedings.

A disability, particularly a psychosocial or intellectual disability, can be considered to be a factor often lending favour to the other parent or party as it suggests that the person not suffering from the disability can provide better care for a child.

It is submitted that funding and guidance must be provided to develop input from specialists who have expertise in the relevant disability, to family consultants; judicial officers and legal practitioners to assist in the three step process identified above.

Question 8 - How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

The submissions of the FLS are adopted with the additional comment that the use of the terms "Husband" and "Wife", even where applicable, should be lost. A Party is a party, regardless of their gender or marital status. It is submitted that each party should be referred to by their names. To avoid the need for a title i.e. Mr, Mrs or Miss, it is suggested that parties could be referred to in the Court precincts by only their first or surname, or simply as Applicant or Respondent.

[1] "Domestic, family and sexual violence in Australia: an overview of the issues"14 October 2014 Janet Phillips, Social Policy Section and Penny Vandenbroek, Statistics and Mapping Section

Question 9 - How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

The FLS's submissions are adopted. Whilst there are some areas with internet connection issues, most areas have phone coverage and/or internet access and whatever medium that the person has available to them, such as Skype for example, should be utilised to provide accessibility.

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 client's resolving family disputes?

The comments made in response to questions 6 and 7 are referred to and the comments of the FLS adopted.

Question 13 – What improvements could be made to the physical design of the Family Courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

The concerns regarding the adequacy of some regional Court buildings is highlighted by the state of the Launceston Registry. The facilities in Launceston are completely inadequate, and it is submitted, pose a significant risk to not only clients, but also to Court staff, lawyers and judicial officers.

The Family Court/Federal Circuit Court is located Level 3, ANZ Building, Cnr Brisbane and George Street, Launceston. There is only 1 access up to the Court via a lift which is very slow moving. All personnel, including Judges, lawyers, clients and Court staff must use that lift to come up to the Court. Most people use it to leave the Court (there is a separate stairwell but it is a long staircase and not suitable for anyone that suffers from any medical condition or disability).

Judicial Officers often complain about the difficulty of moving up and down in a lift with litigants. Lawyers are often moving up and down in the lift with parties to which they are opposed.

The Court also does not have any tele-communication facilities that would enable the use of a safe room and therefore participants alleging family violence must be situated in the Court with the alleged perpetrator.

To make matters worse, the actual seating facilities outside the Court room have parties in close proximity. There is one break out room and it is usually occupied.

If there was a violent incident in the Court it will be very difficult for security staff to contain any damage and it is likely that people would be unable to exit the building in a safe fashion.

In short, the facilities in Launceston do not meet any of the standards of a modern Court room, particularly in relation to Family Law matters and, if anything, add to the risk to all parties, Court staff and Judicial Officers involved in Family Court matters. There needs to be funding to build a purpose built Family Court facility in the Launceston area.

Question 16 – What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?

FLPAT adopts the recommendations of the Family Law Section, save for the recommendation that the definition of "meaningful relationship" be extended to include reference to "Aboriginal and Torres Strait Islander children or children from culturally and linguistic diverse backgrounds, their family, clan group and extended family kinship systems".

FLPAT submits that the appropriate amendment, if any, to be made is to extend the reference to "and all extended members of any family including grandparents and significant others involved in the child's life".

Such an addition would encapsulate the reality for many children in Australia who have relationships with their grandparents and others. With both parents usually working

and grandparents are often relied upon as unpaid child cares and the result is the development of deep, meaningful relationships with their grandchildren.

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?

Again, FLPAT adopts the recommendations of the Family Law Section.

The Family Law Section does refers to improvement of the Financial Statement. FLPAT submits that the current Financial Statement is an unnecessary complicated document and does in any way mirror the information that is usually required, particularly if a matter proceeds to a trial.

The document should be a simplified document that sets out the assets and liabilities of the parties with their full value prescribed so far as that party is concerned. The document then need only otherwise refer to the parties' income and financial resources and if the party is applying for spousal maintenance there will need to be a detailed list of expenses.

It is submitted that such a document may lead to parties reaching agreement about the extent of an asset pool earlier and may help create one document that can then assist through the process of conferencing and mediation prior to the trial as opposed to such a document being drafted closer to the point of conference and/or trial. A simplified document is also likely to reduce parties' costs.

Question 43 - How should concerns about professional practices that exacerbate conflict be addressed?

It is submitted that concerns around professional practices could be addressed through a more informal and anonymous complaints process to the Legal Profession Board, or equivalent.

Whilst the submissions of the FLS are supported and it is the majority of solicitors that act appropriately and there are recourses through Legal Professional Bodies for inappropriate behaviour, the difficulties with this approach are:

(a) The damage has already occurred if the complaint is found;
(b) The parties and/or solicitors are often reluctant to institute a complaint given their litigation fatigue and/or simply wishing to put an end to the conflict;
(c) The Process of investigating a complaint is lengthy;
(d) The outcome may not properly address the future behaviour of the solicitor and is punitive in nature.

Legal Practitioners are subject to many pressures from their client to present the client's case in a certain way. Further, Legal Practitioners may form a habit of presenting a case in a particular way and lose sight of the impact of their language, for example on a party or other solicitor.

If Legal Practitioners or parties could submit a 'referral' regarding conduct or communications to the Legal Profession Board, and that referral was simply actioned upon receipt of 1 or a number of referrals, the Legal Profession Board could then view a sample of correspondence of that solicitor.

If that correspondence was not the subject of a formal complaint, but without hearing, found to offend the Rules of Conduct, the Legal Profession Board could then provide education to the Legal Practitioner regarding the conduct/language and impact of that conduct.

It is submitted that this approach would provide quicker accountability and ensure that future conduct was more appropriate.

The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) (adopted but yet to commence in Tasmania) provide importantly in Rule 34, rules around dealings with other persons, as extracted below. Given the often emotional context of a family law matter, the dealings can often reflect that emotional context these are particularly applicable in family law matters and a referral for conduct contrary to these provisions would be particularly useful in improving the conduct of a solicitor during a party's case.

"34 Dealing other persons

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person,

34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied, or

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

34.2 In the conduct or promotion of a solicitor's practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought."

Question 44 - What approaches are needed to promote wellbeing of family law system professionals and judicial officers?

The Submissions of the FLS are adopted and in addition the following is submitted:

(a) Respectful communication is vitally important in high conflict cases;

(b) Appreciation of time pressures and respect of judicial officers and family law system professionals need to attend commitments outside the legal system, including recreational and parenting commitments, reduced pressure on practitioners;

(c) Rules are suggested to be developed around the use of electronic communication (emails). There appears to be a culture developing whereby it is expected that a legal practitioner will receive an email instantly, that is despite having court; client and other commitments. The expectation puts direct pressure of legal practitioners to read, consider and advise the client on the correspondence and indirect pressure of their clients who are also expected to consider the advice and provide instantaneous instructions.

FPLAT thanks the ALRC for the opportunity to provide this submission and welcomes any feedback.

MARCUS TURNBULL – Chair

FAMILY LAW PRACTIONERS ASSOCIATION OF TASMANIA