



7 May 2018

Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

via email: familylaw@alrc.gov.au

Dear Ms Wynn

Review of the Family Law System Issues Paper

1. I refer to the to Issues Paper (“the Issues Paper”) released for consultation by the Australian Law Reform Commission (ALRC) on 14 March 2018. The Issues Paper is the first consultation document released by the ALRC as part of its Review of the Family Law System.
2. The Law Society of South Australia (“the Society”) is a constituent body of the Law Council of Australia. The Society has been provided with a draft submission from the Family Law Section (FLS) of the Law Council of Australia in relation to the Issues Paper.
3. The Society supports the FLS submission and makes the following additional comments below in relation to questions raised in the Issues Paper, including further and more specific examples from the profession in South Australia.

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

4. The FLS submission notes Judge Sexton’s Indigenous List in the Federal Court as well as a similar list which has commenced in Adelaide by Judge Kelly. The Society submits that such lists of Aboriginal matters should be connected to models such as the Murri or Koori Court, or what is referred to in South Australia as the Nunga Court.
5. The Society also submits that resources must be allocated to ASTI organisations such as the Aboriginal Legal Rights Movement (ALRM) in South Australia and initiatives such as Judge Kelly’s Aboriginal List, to improve access for ATSI families to the family law system.

6. The Society notes the South Australian Child Protection System Royal Commission Report of August 2016. The first recommendation of the Hon Margaret Nyland was to establish a protocol to govern eligibility for a grant of legal aid to carers, where the child's best interests would be better or more appropriately secured by obtaining Family Court orders, rather than by proceedings in the Youth Court. The Recommendation also noted that funding be provided to the Legal Services Commission and quarantined for this specific purpose. Consideration could be given for such funding to be extended to organisations such as the ALRM who deal specifically with ATSI clients in these matters.

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?

7. Further to the comments made by the FLS in relation to this question, the Society is informed by its Members who practise in the family law jurisdiction in South Australia that often clients engage lawyers to obtain some preliminary advice to assist them to negotiate directly with their former partner. That client then often returns, having reached agreement (or near to agreement) for assistance to finalise the agreement into the necessary binding documents. Thus, highlighting the value in clients obtaining specific and directed legal advice in the early stages following separation, to assist them to reach a prompt resolution.
8. It has been reported by clients to practitioners, that being able to obtain this advice at an early stage in their matter has resulted in a more directed, focussed and productive negotiation and resolution and as such, has assisted the parties to utilise more informal dispute resolution options within the family law system.
9. The Society notes that practitioners in the family law jurisdiction have also reported the unfortunate situation where a party attends to obtain advice about an agreement that has already been finalised (either by way of direct discussion and negotiation with their partner or by some form of mediation) and the agreement reached is well out of the anticipated range that the party could expect to have achieved if they had been better informed.
10. This has been observed with both property settlement and children's matters. For example, a party who agrees to a property settlement on a 50/50 basis (this is an often reported misconception that such division is "normal" or "standard"), in circumstances where that party could expect to receive a greater percentage of the asset pool as a result of factors such as contribution or future needs. In children's matters, there is a misconception that "50/50 access", or an equal time arrangement is the "norm", when in fact in practice there are many factors which would speak

against such an arrangement such as the age and needs of the children, logistical issues and issues relating to parental capacity.

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?

11. The Society considers that full and frank disclosure and each party's obligation to make such disclosure in a timely and efficient manner to be a significant and important point which is often not given enough weight.
12. Many practitioners have reported being forced to issue proceedings on behalf of their client as the result of one party failing to provide disclosure to the other and for the sole purpose to obtain discovery. A failure to provide disclosure can have a significant impact upon the progress of a matter and create significant (and unnecessary) delay and can often further marginalise a disadvantaged party. For example, practitioners report that it is common for a party to attend to obtain advice with little or minimal knowledge about the party's financial affairs. This may be as a result of an element of financial control in the relationship or may simply be a product of naturally assumed or aligned roles within the relationship where one party has managed and controlled the finances and the other has had little involvement and therefore the knowledge of the financial situation.
13. In such circumstances, in order for the solicitor instructed to provide advice to that party, disclosure is essential and relied heavily upon as without such disclosure, details in relation to the asset pool often remain unknown. Similarly, if steps need to be taken to preserve assets to avoid a party's claim being prejudiced, unless the assets and their current status are known, an assessment as to the urgency as to such steps cannot be made. Therefore, one party has the potential to be further marginalised.
14. The act of having to issue proceedings (in a matter which otherwise should be capable of negotiation or at least attempted negotiation) solely for the purpose of obtaining discovery is not an efficient use of Court resources.
15. The profession also reports instances of proceedings being issued where there has been no attempt to request discovery, which again, is bringing the matter into the Court system unnecessarily (or at least prematurely).
16. The Society supports the position of the FLS that the requirement of full and frank disclosure be a statutory provision; and further, the ramifications and consequences for failing to do so be more significant.

17. The Society suggests that where proceedings are required to be issued as a result of failure to disclose (or it being one of the significant issues giving rise to instituting proceedings) this is brought to the Court's attention at the outset.

Family Violence and Property Settlement

18. The Society notes that no final position was reached by the FLS in respect of amendment to the *Family Law Act 1975* (Cth) to account for family violence in relation to property division orders.
19. The Society considers that such amendment is not necessary. This is not, in any way to be seen to detract from the significance and importance of this factor, however, the Society is of the view that the current provisions enable efficient consideration of this issue.

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

20. Further to the submissions made by the FLS, the Society considers that the concept of "triaging" of matters ought to occur at an early stage, with matters triaged either by their complexity, or in property settlement only matters, by the size of the asset pool.
21. In respect of property settlement matters, the Society notes that not all high net worth matters will be complex and similarly, not all small asset pool matters will be simple. Notwithstanding this, however, there is a need to ensure those with small asset pools are provided with an expedited process.
22. Similarly, those parties with less complex matters ought to be offered a more streamlined system, using a more basic framework – which is sufficient to serve their needs and will facilitate the movement of their matter through the system faster. For a matter that is relatively simple, it does not seem necessary (nor is it an appropriate use of Court resources) to insist that such a matter follow the same processes as a more complex matter.

Question 33: How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?

23. The Society is aware that Child Protection may send cases to the family law courts where there are child protection concerns. There have been suggestions that child protection and family law be combined within the one jurisdiction. While some consideration could be given to such a proposal (in circumstances, however, where a detailed exploration of the manner in which this may be achieved would first be

required), in the meantime, there is a strong need for a better flow of information between the two jurisdictions to occur.

24. The Society is informed that the provision of information from government agencies/departments and police, in relation to parents and children before the Court, is the cause of significant delays. These delays could be addressed by a more streamlined and transparent flow of child protection information between State and Federal jurisdictions.
25. Furthermore, the Society suggests that there needs to be greater sharing of and access to, records held interstate by the various child protection agencies. The Society is aware of a relevant example where a practitioner was involved in a matter relating to the care of a young child. Child protection records held in South Australia did not indicate any significant matters or concerns relating to the father and his capacity to care for the child, and the mother was not aware of any concerns. The father, however, had a history of involvement with the relevant child protection agency in another state and had a child removed from his care. It was fortunate that the Judge hearing the matter in South Australia recognised the name of the father as a result of being familiar with the name from previous proceedings interstate and thus alerted the relevant parties to the same.
26. Additionally, the Society notes that presently in South Australia, that where child protection concerns exist as to the capacity of both parents to care for children, there is a need for State Child Protection Authorities to intervene where proceedings are commenced in relation to children's matters in the Federal Circuit Court or Family Court. Such intervention should not necessarily have to result in fresh proceedings being commenced in the Youth Court at this stage, as this can cause further delay and expense.

Question 34: How can children's experiences of participation in court processes be improved?

27. The Society notes that the FLS has made the suggestion that the Family Consultant's role be expanded to be the family's first point of contact with the court, to remain actively involved in the matter until its conclusion, and to be able to check in with children independently throughout the duration of the proceedings.
28. Consideration could also be given to the appointment of Independent Children's Lawyers (ICL's) in all matters involving children's issues (akin to Child Protection jurisdiction where children are represented in all matters before the Court). This could assist children to have a greater understanding of the processes in which they are involved and a point of contact who is not aligned with either their mother or father (or whomever may be litigating matters relating to their care).

Question 35: What changes are needed to ensure that children are informed about the outcome of court processes that affect them?

29. The Society supports the FLS's suggestion that in cases where children have already met with a Family Consultant, report writer or have an ICL, one of those people should be required to explain Orders, the outcome of the proceedings and answer questions.
30. The Society considers that in most cases, the most appropriate person to explain consent orders to children would be the ICL. The Society suggests that ICL's should not be automatically discharged as they are currently in the majority of cases that resolve with Consent Orders. Instead, a provision should be included to facilitate ICL's meeting with and informing the children of the outcome of the case before they are discharged so as to assist the parties to implement the Orders and to assist the children with any transition phase and/or questions they may have with respect to the operation of the Orders.

Question 36: What mechanisms are best adapted to ensure children's views are heard in court proceedings?

31. The Society supports the position of the FLS that children themselves should not be required to attend court proceedings but should continue to be involved in matters by way of their involvement in the Family Assessment process.
32. In addition, the Society considers there should also be a greater awareness of and training given to Family Assessors and ICLs in relation to consideration of religious beliefs and cultural practices. Alternatively, or in addition, Family Assessors should be able to consult with cultural consultants in the different matters they are dealing with to fully understand the cultural impact or considerations upon children of these practices.

Question 38: Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

33. The Society strongly supports the views of the FLS in respect to the risks in involving children in decision making and dispute resolution processes. The Society is informed by its Members who practice in this jurisdiction, of instances where children have experienced harm or suffering as retaliation by their parents for the views they have expressed. There is also a significant likelihood of emotional trauma or psychological harm being occasioned to children in being required to be involved or to make decisions in relation to what are extrinsically adult decisions and involve adult concepts.

34. The Society also considers there is a need to take into account the impact of a child's increased involvement in the process in circumstances where ultimately, the Orders made by consent or determined by a Judge, do not follow their reported preference. For example, on the face of it, it may be appealing to increase a child's involvement, however, ultimately the child is placed at a more risk where they are faced with an outcome they do not want – and in circumstances where they have made it very clear that this is not a desired outcome.

Question 39: What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?

35. The Society agrees with the views of the FLS in relation to question 39 and reiterates the comments made with respect to consideration of cultural issues as noted in question 36. The Society highlights the need for information to be provided to children at the commencement of the litigation or mediation process about the process itself and what it involves.

Question 40: How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

36. The Society considers that there would be considerable benefit for the voices of children who have experienced the family law process to be heard and for a proper study to be undertaken of the ages of the children, their demographic, length of the hearing process and recommendations for improvement be conducted by the Commonwealth. Their views are equally as important (if not more important) than the adults experiences of the system.

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

37. The Society supports the comments provided by the FLS with respect to lawyers practising in the family law jurisdiction. The Society is informed by Members, that many of them receive positive feedback from their clients in relation to the work that they have undertaken for them, notwithstanding that the client may not be ultimately happy with the process or the system or, at times, the result.

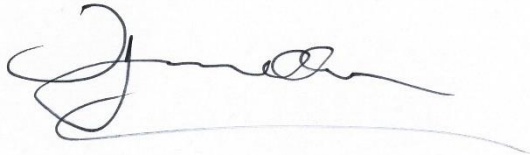
General comments

38. The Society considers that any measures that can be taken to shorten proceedings and/or reduce the adversarial nature of proceedings would be in the best interests of children.

39. Such measures could include an early identification on the key issue requiring a finding of fact, for example where there are allegations of sexual abuse, drug addiction or mental health issues, which may present obstacles to the parties in reaching an agreement on parenting arrangements. There could be a short (half- to one-day) hearing on that one issue, with parties at liberty to file one further affidavit (restricted in length) plus the affidavits of any professional witnesses. After that mini-trial there could be lawyer-assisted FDR, with the parties and lawyers to use best endeavours to settle or at least narrow the scope of issues prior to trial. If there is no agreement on substantive issues, parties should draft an agreement for trial directions.
40. The Society notes the prevalence of drug related issues in the family law jurisdiction. Drug issues or allegations in family law matters may be better addressed if courts were to offer a drug testing unit to litigants at an affordable rate. The Society is informed by its Members, that drug issues are prevalent in Family Court proceedings, and that a drug testing station within the Court precinct or nearby, would help to resolve these issues at an earlier stage in proceedings.

I trust these comments are of assistance. We would be pleased to provide further comment or assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tim Mellor', with a long horizontal flourish extending to the right.

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PRESIDENT

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