

Review of the Family Law System

**Professor Robyn Carroll
University of Western Australia Law School**

November 2018

Submissions and Comments on Discussion Paper 86

I commend the ALRC for its work so far in this review of the family law system. It is challenging to review the overall system as a whole and at the same time address the detail of many parts of the system and the law within a complex state and federal legislative framework. This is compounded by the existence in key instances of highly discretionary decision making powers.

My view overall is that some aspects of the law need to be reformed but that the need for major changes to the law is not necessary or is at least not a priority compared to the need for the system to be made more affordable and accessible to the public. One of the challenges of rewriting the Family Law Act (FLA) is deciding who it is written for, the public or legal advisers and judicial officers. Except where there is a clear need to reform the legislation I support retaining the Act as a concise and logically structured piece of legislation that confers rights (few) and responsibilities (many) and judicial powers (often discretionary). The more 'guides to application' of the law are included the more they might work to complicate the decision-making pathways and fetter the discretion of judicial officers and these would not be positive outcomes. It is difficult to make detailed submissions in the absence of draft revised provisions - these will be better made at a later time. Generally, if there are to be guides to the public as 'consumers' of services in the family law system these should be in other material, not the Act.

My submissions and comments that follow are directed at topics 2-12 in the Discussion Paper. Where I have a specific submission I have referred to a specific proposal. Where I have not referred to a specific proposal or question I either have no comment to offer or do not disagree with the proposal.

2. Education, Awareness and Information

I support all the proposals that are aimed at providing clear, consistent and legally sound information about the family law system to all Australians. Existing state, territory and national existing networks and pathway organisations should be built upon to provide support to existing resources, avoid duplication and ensure that local variations in the relevant law (eg WA) are made clear.

3. Simpler and Clearer Legislation

I support the proposals to simplify the structure and language of the FLA and other subsequent legislation (Proposal 3-1) and the court information and forms (Proposal 3-1).

The current statutory language should be retained wherever possible unless it has been shown to be unsatisfactory in its terms or to have an uncertain meaning. For example, the words 'just and

equitable' in s79(2) FLA should not be replaced even if additional provisions are introduced as considerations in determining what is 'just and equitable'.

There is a tension between making the Family Law Act a one stop go-to Act while making it shorter and more approachable, especially for non-lawyers. If provisions including the definition of parentage and presumptions and other sections are removed it might make it more difficult for people to find the provisions they seek. If it is clear in the FLA where the definition of 'parent' and the presumptions of parentage are located this will work.

Proposal 3-1.

If parentage for the purposes of Commonwealth law is removed to separate legislation will the parentage testing provisions concerning the powers of the Family Court to make orders be retained in the Family Law Act? It seems to me that they need to remain in the FLA.

Proposal 3-3.

I do not support this proposal because I consider that safety of a child is integral to a determination of what is in a child's best interests. I agree that it is necessary to avoid conflicting 'primary considerations' as was the case in the FLA until 2012. Rather than to suggest that 'safety' is something additional to or different from best interests and in order to ensure that safety of children is always a key consideration I recommend the Act make it clear, consistent with proposal 3-4 but in a section anticipated by Proposal 3-5, that orders made for parenting arrangements must take into consideration the need for a child not to be exposed to abuse or family violence or impaired safety.

If this does not meet the concern that other considerations might override safety then this should be stated as a primary consideration or in terms similar to the current s60CC(2A).

If there is also a legislative requirement for a child's carer's safety to be taken into account this might raise a constitutional question about what jurisdiction can be conferred on a court under the FLA given that it would be a law for the protection of carer's (and indirectly, a child). Query whether there would be a sufficient connection with the power and the marriage or divorce power for this to be a statutory consideration. It is one thing for the proposed Objects set out in Proposal 3-4 (which I support) to refer to this and for it to be related to a child's safety. I flag as a potential issue a power conferred on the court to make orders that protect a person other than the child who is the subject of the orders. I have not researched this point.

Proposal 3-5

There is a clear and compelling case for simplification of the legislative pathway for decision making on parenting orders. I support this proposal.

Re the views of a child, I would retain the wording of the current s60CC(3)(a), because the court will need to exercise a discretion as to how much weight to attach to their views and the case law built up on this point is relevant. The important change needed in the legislation is to provide the means for a child to exercise a choice to participate more directly in the proceedings, as proposed in Chapter 7. Having participated (if they so choose) with appropriate representation and support, a

court will still need to weight the child's evidence and the views they express against all other relevant evidence and considerations.

I would include here reference to Indigenous children or cross reference to proposed specific provisions, ie Proposal 3-6.

Proposal 3-7

I do not see the need for the term 'parental responsibility' to be replaced. Unlike some areas of Part VII which appear to elevate the status of parents over other carers and people in a child's life who have parental responsibility, the concept of 'parental' responsibility embodies a legal and social notion of parental duties and responsibilities recognised by the law which is not necessarily captured by reference to 'decision making responsibility'. Parental responsibility can be carried by and reside in non-parents. If other proposed changes are made to the legislation to remove the reference to a meaningful relationship with 'both parents' and to de-emphasise the significance of legal parenthood to decision making about what orders will be in the best interests of a child, there should be no need to interfere with the legal concept of 'parental responsibility'.

The Act could say 'in determining what arrangements ... a person with parental responsibility must consider ...

I acknowledge that the words 'parental responsibility' reinforces a concept of family based on the parent-child dyad that is not applicable to all family groups, especially Indigenous Australians. I submit however that the proposed 'decision maker' does not avoid this issue. Proposal 9-8 recognises the need for a more inclusive definition of 'family member' for this reason and I support that proposal. If necessary the definition of 'parental responsibility' in s61B and/or the terms of s61C could be amended to make it clearer that it parental responsibility resides in parents while noting that orders can be made that confer this responsibility on another person including another family member (as defined in s41AB).

Proposal 3-8

I support this 'rule' established by the Family Court in *Rice v Asplund* being given legislative status.

Proposal 3-10

Based on my knowledge of the case law interpretation and application by the family court of the property provisions in the FLA and consistent with the ALRC's conclusion in Ch 3 I support the retention of a discretionary approach to property matters. The Family Court has made clear that there are 'steps' that need to be applied under the legislation but that it is not a formulaic approach to decision making. One of the stated aims of the review process is to propose ways to simplify the FLA. It is possible that 'codifying' the case law in legislation will not assist the court's to exercise what remains a discretionary exercise of power and I am not convinced that this is need as part of the legislation. It is important that there is clear and accessible information about the law. I do consider there is a need to review the considerations that are relevant to contributions and future need factors in decision making on financial matters (division of property and spousal maintenance), in particular to recognise the impact of family violence on financial matters.

Proposal 3-11

I support this proposal with one qualification. In keeping with the concerns expressed by the Full Court majority in *Re Kennon* about opening ‘floodgates’ the word ‘any’ on the second dot point in 3-11 should be removed. I agree with the ALRC conclusion that this is an area of law where further development of family violence as a factor in financial matters is unlikely and legislative reform to allow for more just and equitable outcomes where family violence has financial impact is needed. The legislation will need to be carefully formulated to address the concerns embodied in the Kennon approach while ensuring that the threshold and evidentiary burden of bringing family violence forward as a consideration is not too high for the reform to be effective.

See also the submission made by the Research Team of a Project recently completed in Western Australia of which I was a member.

Proposal 3—12

I support this. In particular I note the need for updated research on spousal maintenance.

Question 3-3

In my submission the financial agreement provisions should be retained. It is a significant platform on which the FLA and the family law system rests that parties to marital and de facto relationship disputes are encouraged to enter agreements that address their interest and those of their children. In my view it would be a retrograde step to legislate to reduce the availability and certainty of financial agreements, including pre-nuptial agreements. This would also deprive couples in de facto relationships of the ability to ‘opt out’ of a property regime which was an integral part of the rationale for applying the same law to de facto couples as married couples. I refer the Commission to page 112-113 of my attached article ‘Family Law, Involuntarily Separated Couples and their Property’ (2015) 33 *Law in Context* 87 – 122.

I favour the proposal for amendments (if necessary) to increase any certainty about when financial agreements are binding.

Alternatively, I see merit in developing an amendment that provided for ‘BFAs to be set aside on the basis of a ‘general hardship’ test’ as proposed in the DP, in order to meet the concerns that financial agreements can result in serious injustice to one party at a future time. I can also see that this will make these agreements less attractive because of the lack of certainty that they will be upheld, particularly as post-separation agreements. The rationale for this ground for setting an agreement aside applies with most force to pre-nuptial and pre-de facto relationship agreements and agreements made while the couple are still in their relationship and I see merit in confining its operation to them. Section 90K already provides grounds for setting an agreement aside. On

the other hand, if a ‘general hardship’ test were introduced for all financial agreements it would be valuable to consider the operation of s79A of the FLA and whether any of the provisions there should be adopted, especially 79A(1)(a) and (d).

Proposal 3-18 and 3-19

I support these proposals

4. Getting Advice and Support

I support the proposal for Families Hubs. It will be essential for funding to be provided to enable the Hubs to provide the proposed services in a timely way. It is important that the Family Relationship Services, Families Hubs and CRCs are co-ordinated and rationalised.

5. Dispute Resolution

Proposal 5-1

If the guidance provided by regulation 25 is moved to the FLA it needs to be because there is a legal power to be exercised in the FLA. I do not support legislation as providing 'guidance' in a general way. In this case, the FLA would confer a power on a FDRP to terminate a mediation and set out the considerations to be taken into account in exercising this power.

Proposal 5-2

I support this proposal

Proposal 5-3

This is a significant proposal and I am broadly in support of it.

In addition to the proposed exceptions there needs to be an exception where the applicant is applying for an order with the consent of all the parties to the proceedings as in s60I(9)(a)(i).

In drafting the exception, attention needs to be given to making it clear that the imbalance of power relates to the parties' ability to negotiate in their own interests; that non-disclosure refers to material non-disclosure, and allegations of fraud relate to the proposed proceedings.

Question 5-1

I support retention of the requirement for financial proceedings to be commenced within a specified times. There may be merit in extending the length of time but the time limit would need to not be much longer than at present to be effective as an incentive to settle financial matters within a reasonable time from separation.

Proposal 5-6

I support this proposal. It might be clearer and in keeping with section 79 to refer to those items listed as being a non-exhaustive list and by dot point under headings of 'property' (second dot point) 'financial resources' (first and third dot points); 'superannuation' (sui generis for FLA purpose?) and 'liabilities')

Proposal 5-7

I have co-authored an article, Kopsen and Carroll, 'The Importance of Full and Frank Disclosure in Family Law Financial Proceedings and the Many Consequences of Non-Disclosure', (2017) 45(1) Federal Law Review, 1-29 which discusses the legal consequences of non-disclosure in family law

financial proceedings. In the article we set out the procedural, evidential and outcome consequences of non-disclosure under the current law and attach a copy to support this submission.

From our research there appears to be no shortage of legal consequences that can be used to respond to non-disclosure. More important to consider are how to detect non-disclosure and ensure there is compliance in FDR and court proceedings.

The proposed wording of the proposed provision in 5-7 appears to need attention. The first dot point says 'impose a consequence, including...' The next two dot points list other consequences. The section should state that the court can (a), (b), (c), (d). My point is that these are all 'consequences' of non-disclosure. I submit it would be better framed as ways (inclusive) in which the court can take non-disclosure into account in making findings and orders.

If these duties are set out in the Act and made enforceable in FDR some of the concerns about non-disclosure will be addressed. I hear from practitioners that demands for 'over-disclosure' are also an issue in family court proceedings. It is important that parties be protected from being pushed into having to make unnecessary disclosure as a way of delaying and protracting proceedings and adding stress and expense. The legislation must make it clear that 'materiality' is a key aspect of the duty of disclosure.

Question 5-2

Without looking into this point independently, the use of civil penalties does not seem to be appropriate for parties who are natural persons and conducting proceedings in their own right as individuals.

Penalties for criminal non-disclosure require criminal proceedings. If the non-disclosure amounts to fraud there are already criminal provisions that apply under state or federal law.

For this reason I would say that these penalties should not be provided for in the FLA unless the court is given specific criminal jurisdiction in relation to non-disclosure offences.

Proposal 5-8

See comments in 5-7

Proposal 5-9, 5-10,5-11

I support these proposals.

See also the submission made by the Research Team of a Project recently completed in Western Australia of which I was a member.

6. Reshaping the Adjudication Landscape

Proposal 6-1

I see merit in this proposal as a process reform designed to improve justice, safety and efficiency outcomes for parties to family law disputes. I expect the family court could develop these lists without legislative reform.

I do not propose to comment on them in any detail because I do not have the necessary expertise of court processes. I have two more general comments. First, this proposal should be considered as part of a revised court structure proposal, as for example, is currently before the Federal Parliament. Second, the introduction of mandatory pre-filing FDR on property matters might impact on/reduce the need for a small property claims process and could be deferred or regarded as less of a priority than a specialist FV list and Indigenous list.

Proposals 6-9

I support this proposal. It should apply to parties to consent orders as well.

Proposals 6-10 - 6-12.

I support these proposals.

7. Children in the Family Law System

I support the proposals that will support a child's right to express their views about parenting arrangements in FDR and court proceedings where they choose to do so. The law already provides that their views must be taken into account in contested proceedings.

The proposals for a Children's advocate and independent representative have much merit. The lack of funding for ICL's in the past has been a significant brake on their ability to offer this service to more children and families and it is vital to ensure that changes to increase supported and direct participation by children are available and effective.

Proposals 7-3 and 7-4

I support these proposals in essence. There has been considerable research on this aspect of the family law system in Australia and I do not propose to make detailed submissions.

8. Reducing Harm

Proposal 8-3.

I support this proposal. It needs to be clear that the definition is for the purposes of FLA provisions but that the behaviour can relate to misuse of other proceedings.

9. Additional Legislative Issues

Proposals 9-1 – 9.5

I support these proposals.

I am a former Senior Sessional Member of the WA State Administrative Tribunal (2005-2017). In that capacity I have observed there to be a lack of understanding among family court judicial officers about the law and procedures for appointments of guardians and administrators under state law and among tribunal members about the appointment of case guardians under the Family Law Rules. There is considerable scope for overlap and confusion in this area.

It will benefit parties to family law proceedings for there to be clear provisions in the FLA for the appointment of a litigation representative. Information should be developed to explain how this interacts with state law appointments which may or may not provide for the conduct of litigation. The proposal is focussed mostly on a party who may need a litigation representative. There is also a clear need for a process by which the other party(s) to the proceedings can apply for the appointment of a litigation representative for a party who has a disability. This is particularly important where a party with a disability does not consider themselves to be under a disability and they are a self-represented litigant. As I understand the situation the State is responsible for funding legal representation in these cases but there is no clear source of funding or process to achieve this.

The legislation will also need to make clear that there are some proceedings that are personal to a party to a marriage that cannot be brought by another person including a litigation representative once the party concerned no longer has capacity to give instructions, in particular divorce based on 12 months separation. I refer the Commission to page 93 of my attached article 'Family Law, Involuntarily Separated Couples and their Property' (2015) 33 Law in Context 87 – 122. This limitation does not apply to all family law proceedings.

Proposal 9-6 and 9-7

I agree with these proposals.

10. A Skilled and Supported Workforce

There is a need to ensure that members of the various professional groups working in the family law system have relevant training and can demonstrate core competencies. The training and accreditation requirements for lawyers and family dispute practitioners and other professionals need to be developed in close consultation with the professional groups to avoid duplication with other accrediting bodies and over-regulation of professionals working in the system.

Proposal 10-3

To 'an understanding of family violence' I would add 'and safety concerns and needs'.

Proposal 10-5

I support this proposal. See also the submission made by the Research Team of a Project recently completed in Western Australia of which I was a member.

11. Information Sharing

There is a clear need for changes to state and territory legislation and process to allow for information sharing between jurisdictions

The Family Court of WA, which operates within a framework of both state and federal legislation, provides a good example for the Commission of how this information sharing can work.

12. System Oversight and Reform Evaluation

I support the proposals in this chapter. There is a need for independent monitoring of the performance of the family law system, including the court system, and the other functions identified for a body of this kind.

In particular I support Proposals 12-6 and 12-7 to ensure that future decisions about the family law system are informed by research.