SUBMISSIONS IN RESPONSE TO FAMILY LAW DISCUSSION PAPER (DP86)

From

The Hon Mary Finn, Member of the Advisory Committee.

CHAPTERS 2,4,6,7 and 12.

While the initiatives proposed in these chapters , notably, . The Education and Awareness Campaign, . The Family Hubs and expanded Family Advocacy and Support Services, . The Children’s Advocate and Children’s Advisory Board, . Registrar and Family Consultant Teams ; Family Violence lists; and a Post Order

Parenting Support Service, and

. Family Law Commission,

are for the most part worthy of support, recommendations for them will lack credibility without some recognition of their significant resource implications. Even if the ALRC does not have the capacity to cost such proposals, there should at least be express recognition of the resource issue, and also I would suggest, a strong recommendation that such resources are not provided at the expense of the already overstretched budgets of the Courts.

CHAPTER 3.

Proposal 3-1

While I have some reservations about the feasibility of some of these proposals, I do strongly support the proposal for a separate Commonwealth Parentage Act . But such an Act would need to drafted with a close eye to achieving consistency with all State parentage laws and also to recognising the changes in practices and attitudes relating to matters such as artificial conception, surrogacy etc over the years since the present provisions were introduced into the Family Law Act (FLA).

While the removal of apparently duplicated provisions in the FLA is to be encouraged it needs to be remembered that some duplication has been necessary in order to recognise the varying constitutional bases underpinning various provisions in the Act .

Proposal 3-3.

I strongly oppose changing the principle of “best interests” to “safety and best interests “.

The former concept must include the latter and any attempt to give separate expression to the latter from the former will only result in confusion and unnecessary debate .

Rather “safety”should be the first criterion in the revised, shortened list of criteria for determining “best interests”(under Proposal 3-5).

Proposal 3-4.

Although the current legislative drafting fashion may require objects and principles provisions in an act, if the aim is, as it should be ,to simplify the law concerning family breakdown, then such provisions should be removed from the FLA.

If such provisions use identical concepts to those used in the operative provisions of the Act, they are unnecessary verbiage. If they introduce arguably additional concepts to the operative provisions, they can lead to confusion and unnecessary debate.

Proposal 3-5.

I strongly agree with the proposal for simplified criteria for determining “best interests”.

However as foreshadowed in discussing Proposal 3-3 , I suggest “safety” be the first criterion.

Proposal 3-7 and Question 3-1 .

I would have thought that “parental responsibility “ is an easily understood term and that to change it will only lead to more confusion and debate.

I am somewhat at a loss to understand the reference to the need to have regard to the individual circumstances of a particular child as this in my view has been the focus of all parenting decisions under the FLA to date .

However if what is really intended by this suggestion is to raise the issues of the presumption of equal shared parental responsibility and the requirement to consider equal or substantial and significant time in cases where the presumption applies, then I would submit that these provisions have caused great community confusion and made the decision making process unduly complicated and time consuming.

If parents cannot agree which of them is to make decisions concerning their child and/or the time the child is to spend with each of them, then the Act should simply provide that the Court decide such issues on the basis of what is in the best interests of the particular child.

Proposal 3-8.

This proposal seems to do no more than state the existing , long standing law except perhaps to introduce a formal “leave” requirement. However it needs to be clarified whether a separate initial hearing for such leave is intended, and if so the arguments for and against such a hearing should be examined especially from the point of view of court resources.

Proposal 3-3

Binding financial agreements have been yet another cause of confusion and cost in the jurisdiction. Accordingly I support both of the two last dot points in the question, being apparently the reintroduction of what were known as s86 and s87 deeds, although it should also be provided that s86 deeds be given greater weight than they formerly were given.

Proposal 3-18.

I agree that there is a need for separate criteria for spousal maintenance than those which apply to property division. The previous work of the ALRC in its matrimonial property report in the mid 1980’s might be of assistance on this point.

Question 3-4.

I cannot see how the matters that would need to be taken into account for an award of spousal maintenance,most of which ( and particularly family violence ) require fact finding, could ever be reduced to the necessary formula for purposes of an administrative assessment of such maintenance.

Chapter 5.

Proposal 5-1.

I see absolutely no need to extend the limitation periods for the commencement (without leave) of financial proceedings. Parties need finality and certainty as quickly as possible.

Proposals 5-6 and 5-7 .

I see no good reasons for further lengthening the FLA ( as much of Chapter 5 would seem to do ) by inserting these proposed provisions given the well established existing law and practice.

Chapter 9.

Question 9-1.

Save where there maybe an issue of State criminal law, or where there is disagreement between parents or between parents and doctors, I see no role for courts or tribunals in authorising medical procedures for children . In my observation where the courts have been required to authorise such a procedure , it has largely been an exercise in “rubber stamping” what the parties and doctors want but at great expense for the parties.

Chapter 11.

While the proposals for information sharing can generally be supported, it needs to be remembered that any information from any source provided to a Judge or Registrar who is determining a case, must be provided to all parties in the case ( save in the most exceptional circumstances) .

There is also an issue as to whether the proposals in this chapter are necessarily consistent with proposals earlier in Chapter 8 for the protection of confidential information.

Chapter 12.

Proposal 12-11.

I support in principle these proposals for clarifying amendments to s121 although I query if there is an intended connection between the second last dot point in Proposal 12-11 and Question 12-1 and can only suggest that the matters raised in that dot point and the question would require much more thorough consideration than can be given in the current ALRC inquiry .

Question 12-2.

Any proposal that a Commonwealth Judicial Commission should be concerned only with judicial officers exercising family law jurisdiction should be strongly resisted. Such a proposal would only serve to differentiate further the family law courts and system from the mainstream legal system , and indeed it might be said further“demonise” the family courts.

Mary Finn.

Sent from my iPad