



FAMILY COURT OF WESTERN AUSTRALIA

**REVIEW OF THE FAMILY LAW SYSTEM
BY THE AUSTRALIAN LAW REFORM COMMISSION**

**SUBMISSION BY THE
FAMILY COURT OF WESTERN AUSTRALIA**

November 2018

Introduction

1. The Family Court of Western Australia (“FCWA”) welcomes the opportunity to comment on certain aspects of the discussion paper: “Review of the Family Law System”, released by the Australian Law Reform Commission on 2 October 2018.
2. The discussion paper is wide ranging. FCWA proposes to comment only in relation to those proposals where input from a specialist, integrated Family Court might be of most assistance to the Commission. For obvious reasons, FCWA will not comment publicly on any proposal as to the detail of amendments to legislation, which its judicial officers might later be called upon to interpret.
3. Additionally, it must be recognised that a number of the proposals are appropriately aspirational, and could not sensibly be considered for implementation without a clear policy decision on the part of government and a firm commitment to the provision of significantly increased resources. The policy considerations associated with the allocation of the presently limited resources, or even modestly increased resources, between the initiatives reflected in those aspirational proposals and existing services (both community and court based) are complex and beyond the scope of this response.
4. A number of the proposals are directed to promoting in the community a better understanding of family law, whether through education initiatives or other means. FCWA is supportive of the philosophy behind those proposals.
5. For ease of reference, the proposals in respect of which FCWA offers specific comment are reproduced in full.

Proposal 3-1

6. *The Family Law Act 1975 (Cth) and its subordinate legislation should be comprehensively redrafted with the aim of simplification and assisting readability, by:*
 - a. *simplifying provisions to the greatest extent possible;*
 - b. *restructuring legislation to assist readability, for example by placing the most important substantive provisions as early as possible;*
 - c. *redrafting the Act, Regulations and Rules in ordinary English, by modernising*

language, and as far as possible removing terms that are unlikely to be understood by general readers, such as legal Latin, archaisms, and unnecessarily technical terms;

- d. user testing key provisions for reader comprehension during the drafting process, for example, through focus groups, to ensure that the legislation is understood as intended;*
- e. removing or rationalising overlapping or duplicative provisions as far as possible;*
- f. removing provisions establishing the Family Court of Australia and the Australian Institute of Family Studies to separate legislation;*
- g. removing provisions defining parentage for the purposes of Commonwealth law to separate legislation; and*
- h. considering what provisions should be contained in subordinate legislation rather than the Act.*

7. FCWA supports the principle that the Act and subordinate legislation would benefit from comprehensive redrafting aimed at simplification, logical structure and clarity. The various amendments to the Act over the years have resulted in an unwieldy and difficult-to-navigate piece of legislation. It is particularly problematic in circumstances where a significant proportion of separating parties are without the benefit of legal advice or representation. The various academic and other commentaries on Part VII of the Act provide but one example.
8. Of course, in any exercise of comprehensive redrafting, great care must be taken to ensure that the clarity provided by established jurisprudence is enhanced and reinforced, rather than lost.
9. It must also be recognised that many issues in family law are complex and that, in addition, family law disputes often intersect with, and involve consideration of, other areas of law. Where complex issues are involved, simple expression of the principles applicable to their resolution can be difficult.
10. There is also an underlying policy consideration worthy of debate. Much of the complexity in the present legislation (particularly in relation to parenting matters) originates from a policy preference for legislative prescription over the exercise of judicial discretion. That apparent

preference is not confined to family law. In a recent speech entitled “*The Judicialisation of Values*”, Chief Justice Allsop of the Federal Court of Australia drew attention to what he described as “deconstruction and particularism” in the name of “certainty and completeness” plaguing Commonwealth commercial legislation, but achieving only a “false certainty”. His Honour noted that “attempts to define whole concepts concerning human experiential relationships are generally doomed”.

11. Again, the development over the years of those parts of the Family Law Act prescribing the approach to be taken in determining parenting cases is illustrative, and worthy of consideration against what must be the central question: whether better results for children are being achieved by virtue of that development.

Proposal 3-2

12. *Family law court forms should be comprehensively reviewed to improve usability, including through:*
 - a. *only gathering information that is absolutely required, and simplifying how information is gathered (eg through use of check-boxes);*
 - b. *using smart forms, to pre-populate information from previously completed forms (such as name and address), ask contextual questions based on previous answers, and provide contextual help within the form;*
 - c. *using real-time help functions, such as a live-chat functionality, and links to audio-visual help;*
 - d. *providing collaborative functions in circumstances where forms require information from both parties to allow them both to easily enter information;*
 - e. *ensuring that all forms are drafted in ordinary English and where possible providing alternative forms in Easy English to assist litigants with limited literacy or English skills;*
 - f. *providing a paper form for use by individuals without access to technology; and*
 - g. *providing a single set of forms for all courts exercising jurisdiction under the Family Law Act 1975 (Cth).*

13. FCWA generally supports the philosophy behind the initiatives designed to improve the usability of court forms as reflected in this proposal. It also supports the necessary information systems and technologies to support this, including the maintenance and ongoing development of a shared platform for access to digital family law court services across Australia, including a common case management system and entry portal.
14. That said, care must be taken to ensure that such improvements, for example, the use of smart forms, are adequately resourced, not only in the initial development stages, but on an ongoing basis to deal with any changes necessitated by further amendments to the legislation. The ongoing delays to the necessary amendments to the only currently existing Family Court smart form, the Application for Divorce, to take into account the same-sex marriage amendments, highlights this issue.
15. FCWA also cautions against the blanket acceptance that usability is necessarily improved by the adoption of a single set of forms for all courts exercising family law jurisdiction. For example, some of the great strengths of FCWA as a specialist, integrated, state Family Court has been the ability to:
 - a. Work effectively and cooperatively with other state government agencies to improve outcomes for families involved in Family Court proceedings and their children. For example, in 2014 FCWA implemented the use of a new Form 4 Notice of Abuse which is very different from the Form 4 Notice used outside of Western Australia. The new Form 4 Notice was developed after extensive input from the Department for Communities, which is the agency in Western Australia tasked with the responsibility for responding to the Notices, and with the express purpose of better assisting the Department to identify relevant sources of information to enable it to respond promptly and comprehensively to the matters raised in the Notices.
 - b. Promptly respond to issues and introduce systemic improvements, including by the use of special purpose forms. For example, in 2012 FCWA implemented the use of a specific "Case Information Affidavit" in all parenting cases. The affidavit is required to be filed at the commencement of all parenting proceedings and in part acts as a self-assessment tool for parties to use in identifying risks, including family violence, substance misuse and mental health issues. It also acts as an early risk assessment tool for judicial officers and family consultants.

Proposals 3-4 and 3-5

16. *Proposals 3–4: The objects and principles underlying Part VII of the Family Law Act 1975 (Cth) set out in s 60B should be amended to assist the interpretation of the provisions governing parenting arrangements as follows:*
- a. arrangements for children should be designed to advance the child’s safety and best interests;*
 - b. arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;*
 - c. children should be supported to maintain relationships with parents and other people who are significant in their lives where maintaining a relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict;*
 - d. decisions about children should support their human rights as set out in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities; and*
 - e. decisions about the care of an Aboriginal or Torres Strait Islander child should support the child’s right to maintain and develop the child’s cultural identity, including the right to:*
 - i. maintain a connection with family, community, culture and country; and*
 - ii. have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child’s age and developmental level and the child’s views, and to develop a positive appreciation of that culture.*
17. *Proposal 3-5: The guidance in the Family Law Act 1975 (Cth) for determining the arrangements that best promote the child’s safety and best interests (currently set out mainly in s 60CC), should be simplified to provide that the following matters must be considered:*
- a. any relevant views expressed by the child;*
 - b. whether particular arrangements are safe for the child and the child’s carers, including safety from family violence or abuse;*
 - c. the developmental, psychological and emotional needs of the child;*

- d. *the capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child;*
 - e. *the benefit to a child of being able to maintain relationships that are significant to them, including relationships with their parents, where it is safe to do so; and*
 - f. *anything else that is relevant to the particular circumstances of the child.*
18. Consistently with what is set out above, FCWA supports the principle behind this proposal: that Part VII should be simplified both in the interests of clarity and in recognition of the broad exercise of discretion inherent in determining what orders are in a child's best interests.
19. As earlier noted, FCWA does not consider it appropriate to otherwise comment publicly on the specific provisions proposed.

Proposal 3-8

20. *The Family Law Act 1975 (Cth) should be amended to explicitly state that, where there is already a final parenting order in force, parties must seek leave to apply for a new parenting order, and that in considering whether to allow a new application, consideration should be given to whether:*
- a. *there has been a change of circumstances that, in the opinion of the court, is significant; and*
 - b. *it is safe and in the best interests of the child for the order to be reconsidered.*
21. FCWA notes that this proposal essentially seeks to codify the principle first espoused in *Rice v Asplund* (1979) FLC 90-725 and to impose a requirement for the proposed applicant to obtain leave, placing the onus on that person rather than requiring the proposed respondent to object by raising the principle.
22. FCWA observes that implementation of this proposal might be of assistance in ensuring that the relevant principles are readily accessible by reference to the legislation, particularly for self-represented litigants. The imposition of a leave requirement will also ensure that the principle is actively considered at an early stage.

Proposal 3-10

23. *The provisions for property division in the Family Law Act 1975 (Cth) should be amended to more clearly articulate the process used by the courts for determining the division of property.*
24. The observations already made at Proposals 3-1, 3-4 and 3-5 also apply to this proposal.

Proposal 4-1

25. *The Australian Government should work with state and territory governments to establish community-based Families Hubs that will provide separating families and their children with a visible entry point for accessing a range of legal and support services. These Hubs should be designed to:*
 - a. identify the person's safety, support and advice needs and those of their children;*
 - b. assist clients to develop plans to address their safety, support and advice needs and those of their children;*
 - c. connect clients with relevant services; and*
 - d. coordinate the client's engagement with multiple services.*
26. FCWA supports the philosophy behind initiatives designed to help people to access services and reach agreements, as reflected in this and following proposals.
27. That said, care must be taken to avoid duplication of services and to ensure that all services are adequately resourced. Only in those circumstances will access to the services assist parties to reach resolution more quickly. In the absence of adequate resources, any requirement to access services can have the opposite effect, imposing additional delays and barriers.
28. FCWA also expresses concern at the potential significant impact on high-risk families of any diversion of resources that might be suggested to support what are otherwise worthy initiatives.

Proposal 5-3

29. *The Family Law Act 1975 (Cth) should be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters. There should be a limited range of exceptions to this requirement, including:*
- a. urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day to day needs;*
 - b. the complexity of the asset pool, including circumstances involving third party interests (apart from superannuation trustees);*
 - c. where there is an imbalance of power, including as a result of family violence;*
 - d. where there are reasonable grounds to believe non-disclosure may be occurring;*
 - e. where one party has attempted to delay or frustrate the resolution of the matter; and*
 - f. where there are allegations of fraud.*
30. FCWA does not propose to comment on this proposal, other than to note the existing requirements of the pre-action procedures contained in the Family Law Rules.
31. The comments above in relation to Proposal 4–1, as to the issue of resources and the potential impact of imposing a requirement to access services in the absence of adequate resources, is also critical to any proper consideration of this proposal.

Proposal 5-6

32. *The Family Law Act 1975 (Cth) should set out the duties of parties involved in family dispute resolution or court proceedings for property and financial matters to provide early, full and continuing disclosure of all information relevant to the case. For parties involved in family dispute resolution or court proceedings, disclosure duties should apply to:*
- a. earnings, including those paid or assigned to another party;*
 - b. vested or contingent interests in property, including that which is owned by a legal entity that is fully or partially owned or partially controlled by a party;*
 - c. income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;*

- d. *superannuation interests; and*
- e. *liabilities and contingent liabilities.*

33. The proposal appropriately recognises the importance of full and continuing disclosure of relevant documents and information in financial cases. As is clearly understood, in very many cases which come before the court there is a distinct “information imbalance” between the parties, inevitably to the disadvantage of the weaker party unless properly addressed.
34. While it would be inappropriate to comment publicly on the specifics of proposed drafting, FCWA supports the concept of articulating and reinforcing the existing duties of parties in the legislation.

Proposal 6-1

35. *The family courts should establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.*
36. FCWA is supportive of differential case management at the earliest appropriate stage in court proceedings. That is reflected in our existing processes.
37. In parenting cases, FCWA already has an effective triage process in place, as follows:
- a. The use of a specialist list, known as the Child Related Proceedings List ("CRP List") as the first return date for almost all new parenting cases. The CRP Lists are conducted by FCWA's specialist Family Law Magistrates, who have the assistance and active participation of a Family Consultant in every CRP List.
 - b. The requirement that all parties file the Case Information Affidavit, when commencing parenting proceedings. As noted in our observations regarding Proposal 3-2, the Case Information Affidavit acts as a self-assessment tool for parties to identify risk issues. It is also an early risk assessment tool for the specialist Family Law Magistrates and Family Consultants in the CRP List.
 - c. Through arrangements facilitated by the Western Australian Department of Justice, Family Consultants are able to immediately access the database of the Magistrates Court of Western Australia, enabling access to information about violence restraining orders, criminal convictions and pending charges. Family Consultants

are able to provide this information directly to the specialist Family Law Magistrates, parties and their representatives in the CRP List.

- d. Through an information sharing arrangement with the Department for Communities and Legal Aid Western Australia, the Family Court is able to quickly access information from the Department for Communities (and share information with the Department and Legal Aid) about children the subject of Family Court proceedings in certain circumstances. The information sharing arrangement is greatly enhanced by the co-location at FCWA of a senior officer from the Department.
- e. In cases where significant risk issues are identified, parties and their representatives attend at Case Assessment Conferences conducted by Family Consultants. In some cases where the Department for Communities already have an involvement with the family, representatives from the Department are also invited, and regularly do attend, the Case Assessment Conferences.
- f. The streaming of parenting cases to either the docket of the specialist Family Law Magistrate who conducted the CRP List for ongoing individual case management; or in complex matters, for individual case management by a judge. For example, this may include those cases where: (1) potentially severe security / risk concerns to parties and/or their children are identified; or (2) the Department for Communities elects to bring care and protection proceedings under the *Children and Community Services Act 2004* (WA) in FCWA in relation to children.
- g. The use of other processes within FCWA, and arrangements with other Western Australian agencies, such as the Western Australian Police, to ensure access to relevant information concerning parties who are involved in Family Court proceedings and their children; particularly in relation to matters with potentially severe security / risk concerns.

38. Those arrangements reflect Proposal 6–2.

39. They reflect also the concerns sought to be addressed by Proposals 6–3 and 6–7 in relation to a specialist list for the hearing of high-risk family violence matters. Those matters are already individually managed in FCWA, including as far as practicable, to a prompt final determination. Appropriate judicial and family consultant resources are allocated, and security arrangements are carefully monitored. Arrangements are regularly also made for

hearings to proceed with one or both parties participating by telephone or video link, rather than by personal attendance.

40. Without publicly commenting on the specifics of any proposed amendments to legislation, FCWA is supportive of initiatives designed to enable the quick and cost efficient resolution of matters involving smaller property pools.

Proposal 6-12

41. *The Australian Government should ensure that all family court premises, including circuit locations and state and territory court buildings that are used for family law matters, are safe for attendees, including ensuring the availability and suitability of:*
- a. waiting areas and rooms for co-located service providers, including the extent to which waiting areas can accommodate large family groups;*
 - b. safe waiting areas and rooms for court attendees who have concerns for their safety while they are at court;*
 - c. private interview rooms;*
 - d. multiple entrances and exits;*
 - e. child-friendly spaces and waiting rooms;*
 - f. security staffing and equipment;*
 - g. multi-lingual and multi-format signage;*
 - h. remote witness facilities for witnesses to give evidence off site and from court-based interview rooms; and*
 - i. facilities accessible for people with disability.*
42. FCWA strongly supports this proposal. The accessibility of courts, and the safety of those attending them, is fundamental to both access to justice, and its proper administration.

Proposal 7-12

43. *Guidance should be developed to assist judicial officers where children seek to meet with them or otherwise participate in proceedings. This guidance should cover matters including how views expressed by children in any such meeting should be communicated to other parties to the proceeding.*
44. FCWA does not propose to comment on the underlying policy decision to be taken about children's participation in court proceedings. If, however, the policy decision is taken to enable children to express their views in court proceedings by meeting with a decision maker, or directly appearing in court, FCWA would support the provision of appropriate assistance and training for existing judicial officers.
45. The making of such a decision would also clearly reinforce the importance of the retention in the Family Law Act of s 22, and its extension to apply to all judicial officers hearing family law matters.

Proposal 9-1

46. *The Family Law Act 1975 (Cth) should include a supported decision making framework for people with disability to recognise they have the right to make choices for themselves. The provisions should be in a form consistent with the following recommendations of the ALRC Report 124, Equality, Capacity and Disability in Commonwealth Laws:*
 - a. *Recommendations 3–1 to 3–4 on National Decision Making Principles and Guidelines; and*
 - b. *Recommendations 4–3 to 4–5 on the appointment, recognition, functions and duties of a 'supporter'.*
47. FCWA supports the provision of additional services to support the decision-making of persons who suffer from a disability, but who still have legal capacity to make decisions in their own best interests.
48. However, FCWA would be concerned if this proposal or those following it were to be interpreted as in any way removing existing protections for persons who simply do not have that capacity. The law has always provided protection for those persons, by empowering appropriate people to make decisions on their behalf, while paying due regard to their wishes

and views. It is essential that those protections remain available, and that the difficult distinction between persons whose capacity might be diminished in some respect, and those who simply do not have the capacity to make decisions in their own best interests, continues to be drawn.

Proposal 12-11

49. *Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the Family Law Act 1975 (Cth) should be maintained, with the following amendments:*

- a. s 121 should be redrafted to make the obligations it imposes easier to understand;*
- b. an explicit exemption to the restriction on publication or dissemination of accounts of proceedings should be provided for providing accounts of family law proceedings to professional regulators, and for use of accounts by professional regulators in connection with their regulatory functions;*
- c. an avoidance of doubt provision should be inserted to clarify that government agencies, family law services, service providers for children, and family violence service providers are not parts of the 'public' for the purposes of the provision;*
- d. the offence of publication or dissemination of accounts of proceedings should only apply to public communications, and legislative provisions should clarify that the offence does not apply to private communications; and*
- e. to ensure public confidence in family law decision making, an obligation should be placed on any courts exercising family law jurisdiction, other than courts of summary jurisdiction, to publish anonymised reports of reasons for decision for final orders.*

50. The comments above in relation to other proposals seeking to promote clarity and simplification in the legislation apply also to this proposal.

Question 12-2

51. *Should a Judicial Commission be established to cover at least Commonwealth judicial officers exercising jurisdiction under the Family Law Act 1975 (Cth)? If so, what should the functions of the Commission be?*

52. FCWA has already expressed its support for the proposed establishment of a judicial commission in Western Australia. Consistently with that, it would support the proposed establishment of a federal judicial commission.
53. If such a commission is to be established, however, its purview should not be restricted to judicial officers exercising jurisdiction under the Family Law legislation, as the question might be misinterpreted to suggest. In making that observation, FCWA acknowledges that the question is worded with an eye to the parameters of the present terms of reference.

Conclusion

54. Thank you again for the opportunity to comment publicly on the discussion paper, and for enabling the participation of one of our judges on the advisory committee.