**Submission to the Australian Law Reform Commission’s Review of the Family Law System**

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I welcome the Federal Government’s ongoing concern regarding how Australia’s family law system can be improved, and its referral of this Review to the Australian Law Reform Commission.

This brief submission relates to the Discussion Paper and does not repeat points made in my earlier submission on the Issues Paper, with Professor Jenny Morgan and Lisa Sarmas. I have also restricted my submission to areas of key concern to me that are within my main areas of research expertise.

My thoughts are as follows.

**Proposals 3-2, 4-2:** Given the ‘digital divide’ that exists in Australia, internet-based options for assistance, including with family court forms, should not be to the cost of face-to-face and telephone assistance. My recent research with Associate Professor Bruce Smyth exploring use and utility of family law resources available on smartphones from a ‘consumer’ perspective, focusing on apps, reinforces this point and also suggests a gap between what is available online and what is known about and used by separating parents (Bruce Smyth and Belinda Fehlberg, ‘Australian Post-Separation Parenting on the Smartphone: What’s ‘App-ening?’, forthcoming, (2019) 41:1 *Journal of Social Welfare and Family Law*).

**Proposal 3-3:** I appreciate the reasoning behind the proposal to amend the paramountcy principle so that it refers to the child’s ‘safety and best interests’ rather than ‘best interests’, but am concerned that ‘safe’ and ‘safety’ would need to be defined in a manner that captured the range of potential harms to children (physical, sexual, emotional, and financial) while also not opening the door to misuse. More generally, the utility of this proposal, and **Proposals 3-4 and 3-5**, are likely to be limited without also repealing the presumption of equal shared parental responsibility (Family Law Act 1975 (Cth) (FLA) s 61DA) and the linked requirement for courts proposing to make such orders to also consider making orders for shared time (FLA s 65DAA).

**Proposal 3-7:** Amending ‘parental responsibility’ to ‘decision making responsibility’ would require re-consideration of the very broad definition of ‘parental responsibility’ in FLA s 61B.

**Proposals 3-11, 3-18:** I agree that greater attention should be given in financial settlements to the relevance of family violence. I suggest further consideration be given to the possibility of using the accrued jurisdiction to join a claim for damages to a financial claim. This possibility was considered in a session titled ‘Revisiting Kennon: Financial Remedies for Family Violence’ at the Family Law Section’s conference in Melbourne two years ago in papers by Timothy North SC and Brian Knox SC. It has the advantage of dealing with family violence head-on and for what it is.

**Proposal 3-12 to 3-17:** I support these proposals. New research on property and financial matters after separation is a necessary precursor to any fundamental change to the FLA’s current discretionary approach for property and maintenance matters. As the ALRC observes, there is an absence of up-to-date empirical research data on the discretion’s operation, although also the consistent empirical research finding that women, particularly mothers with dependent children, experience significant economic disadvantage post-separation (Belinda Fehlberg and Lisa Sarmas, ‘Australian Family Property Law: ‘Just and equitable’ Outcomes?’ (2018) 32 *Australian Journal of Family Law* 81). The allocation of debt on relationship breakdown is a very serious concern for many that is inadequately dealt with by law and process as they stand. Superannuation is an increasingly important personal asset, yet for non-member spouses and de facto partners accessing a share of their ex-partner’s fund on relationship separation requires specialist assistance, as well as court orders or a financial agreement, placing superannuation splitting beyond the reach of many, encouraging unjust and inequitable outcomes that are contrary to FLA ss 79 and 90SM.

**Question 3-3:** I have opposed pre-nuptial binding financial agreements since they were first proposed in 1999. My reasoning, as documented in submissions and academic writing, has not changed (eg Belinda Fehlberg and Bruce Smyth, ‘Binding financial agreements: will they help?’, (1999) 53 *Family Matters* 55, <https://aifs.gov.au/sites/default/files/fm53bf.pdf>). My preference is removal of the ability to make binding financial agreements. At the least, perhaps the ALRC would consider amendment along the lines that financial agreements will be unenforceable if they do not provide adequately for events that have occurred and that were reasonable foreseeable at the time of entry into the agreement (e.g. one party reducing her income earning capacity because of the birth and care of children of the relationship).

**Proposal 3-18:** Perhaps consideration might be given to having the same FLA provisions apply to both property and maintenance, like England and Wales? This approach would have the advantage of simplifying the legislation, raising the profile of maintenance, and increasing the likelihood that maintenance would be considered and ordered. It is an approach suggested by Professor Patrick Parkinson back in 2000: Patrick Parkinson, ‘Unfinished Business: Reforming the Law of Property Division’ (2000) 14(4) *Australian Family Lawyer* 1.

**Question 3-4:** In addition to my suggestion in relation to Proposal 3-18, I would favour increasing the pool of registrars available to hear and quickly determine interim maintenance applications, along with increasing access to free or means tested legal services for parties to these proceedings so that registrars have access to relevant information when determining applications.

**Proposals 4-1 to 4-4:** It is unclear to me how the work of the proposed Families Hubs would overlap or interact with the work of Family Relationship Centres. Also, adequate resourcing, including access to free or means tested legal services and other professional services, is a key concern here (and in relation to many other proposals made in the Discussion Paper). While the ALRC’s proposed creation of Families Hubs and the expansion of the current Family Advocacy and Support Service (FASS) (**Proposals 4-4 to 4-8**) would include legal assistance, the legal assistance aspects of these proposals seem a bit under-developed (e.g. the FASS proposal suggests that legal aid commissions or community legal services provide the legal assistance services to FASS, but these organisations are already under-resourced).

**Proposals 5-3 to 5-5:** Some years ago Bruce Smyth, Kim Fraser and I expressed concern about the introduction of a pre-filing family dispute resolution requirement in the absence of appropriate resourcing of services to provide this: Belinda Fehlberg, Bruce Smyth and Kim Fraser, ‘Pre-filing Family Dispute Resolution for Financial Disputes: Putting the Cart Before the Horse’, *Journal of Family Studies* 16, 2010, 197-218. Those concerns remain current.

**Proposals 6-1 to 6-12:** While I am supportive of these proposals, the federal government’s proposed merger of the Family Court with the Federal Circuit Court, which will fundamentally alter the ‘adjudication landscape’, makes it difficult to engage with them in any concrete way. The merger proposal involves reduced specialisation with no suggestion of additional resourcing. In contrast, the ALRC’s proposals would require significant adequate resourcing of courts and associated services, including legal aid.