

ALRC - Review of the Family Law System

Submission by Jacqueline Campbell

Terms of Reference

1. On 27 September 2017, the then Attorney-General George Brandis announced a review of the Family Law Act 1975 (FLA) and stated that it was "the first comprehensive review of the FLA since its commencement in 1976". He announced 15 Terms of Reference, including a catch all Term of Reference of "any other matters related to these Terms of Reference".
2. Interestingly, there is no express reference to child support - which is a fundamental part of family law and continues to impact on families and children for many years after the parents have resolved their property disputes. There is also no express mention of the structure of the Family Law Courts which has been long recognised as problematic. The proposed restructure of the Family Court and the Federal Circuit Court is aimed at "increasing efficiencies and reducing delays" (para 1 of the Explanatory Memorandum to the Federal Circuit and Family Court of Australia Bill 2018) which addresses the first Term of Reference.
3. The proposed restructure is also relevant to specific Terms of Reference, such as the appealing of decisions and whether the adversarial court system is the best way to support the safety of families and resolve matters in the best interests of children.
4. The ALRC in its Issues Paper released in March 2018 recognised these two deficiencies and also matters of State and Territory responsibility and the child protection system. It said (at para 5):

"However, as these issues are so closely related to and frequently interact with the family law system, concerns about the intersections and cooperation between these systems are matters that the ALRC will consider in the course of this Inquiry."
5. Unfortunately the ALRC did not consider or make proposals about the proposed court restructure or child support at all in its Discussion Paper. In my view, these omissions are serious and should be rectified in the Final Report.

Simpler and clearer legislation

6. The proposals to restructure the FLA and re-number it are sensible (Proposal 3-1), although the changeover will be painful for legal professionals and others, particularly when referring to judgments delivered before the change. One example of the complexity of the numbering is that there are approximately 120 sections commencing with s 90 and numerous subsections of these, beginning with s 90 and ending with s 90XZH. Section 90 covers a broad range of financial matters, stamp duty, orders and injunctions binding third parties, financial agreements, de facto relationships and superannuation interests. A significant proportion of the FLA is squashed into s 90. There are also over 25 s 60's covering parenting and child maintenance.

7. There is arguably a greater need to simplify the child support legislation than the FLA. The regime is complex and is covered by two pieces of legislation plus more than one set of regulations. Parties are even more likely to be unrepresented than when dealing with the FLA, and legal practitioners find the child support legislation and scheme overly complex.
8. Whilst increasing the readability of the FLA for clients is an admirable objective (part of Proposal 3-1), it could have the unintended consequence of changing the law and needs to be done carefully, if it is to be done at all.
9. Placing parts of the legislative regime in a greater number of legislative instruments than already exist and forcing clients, legal professionals and others to refer more frequently to other legislative instruments, arguably makes the law less accessible, than it currently is. Is there evidence that clients frequently try to access the law through reading the legislation? Even if they do, hiving off parts of the FLA does not necessarily make the law more accessible. There are arguably parts of the subordinate legislation which should be in the FLA - such as the reasons for the exemption from a s 60I certificate and other matters relating to the certificates, which are in the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*. Making the law more difficult to locate is likely to be a consequence of the greater use of subordinate legislation.
10. Re-writing the parentage provisions in consultation with the States and Territories is an excellent idea - to ensure consistency of the definition of a parent throughout Australia, fill in gaps created by changes in society and technology, and create one comprehensive piece of legislation which applies for all purposes throughout Australia. To achieve this will, though, require a high degree of co-operation between the States, Territories and the Commonwealth, probably a referral of powers by the States and Territories and consideration as to whether and how the States and Territories can still retain jurisdiction with respect to surrogacy, registration of births and artificial reproduction procedures. It will be an ambitious and challenging undertaking if it proceeds.

Parenting arrangements

11. The proposal to reform the paramount interest principle (Proposal 3-3) and the objects and principles (Proposal 3-4) could have unintended consequences. Family violence must already be considered in determining the arrangements which are in the best interests of a child. There are two primary considerations (s 60CC(2)) as well as additional considerations (s 60CC(3)) which are:
 - "(a) The benefits to the child of having a meaningful relationship with both the child's parents; and
 - (b) The need to protect the child from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence".

12. Family violence is also considered expressly or implicitly in some of the additional considerations (e.g. s 66C(3)(f), (i), (j), (k) and (l)).
13. The ALRC (at para 3.42) posits that the proposal "may not significantly affect the reasoning that should be applied in deciding litigated disputes". The intention is to send a "strong message" to families of "the centrality of safety to a child's best interests". The unintended consequences which may occur include:
 - Courts may interpret the legislative changes as intending to effect change in meaning and outcomes. Why else change s 60CC when family violence is already given considerable importance?
 - The importance of a child having a meaningful relationship with both parents is likely to be interpreted as less important than it was before the change. There are, of course, families where the degree or nature of family violence means that a "meaningful relationship" between a parent and child is impossible. However, there are many cases where a "meaningful relationship" is possible and indeed desirable.
 - Prioritising family violence over a meaningful relationship with a child may produce new generations of children who develop mental health and other problems because they lack the sense of belonging and identity which arises from knowing both parents, albeit flawed parents.
 - Without any research statistics about how many clients actually read the FLA or what understanding clients have of the existing structure of s 60CC, the proposed change may not be necessary and may not have the intended effect.
14. The shorter version of s 60CC (Proposal 3-5) will avoid the necessity for parties (and judges) to feel obliged to address all of the existing s 60CC factors, thereby reducing legal costs. The ALRC discussed a simpler pathway for determining parenting disputes (paras 3.36-3.37) but did not make a specific recommendation to do so. Professor Chisholm's proposals which were published in "Re-writing Part VII of the Family Law Act: A Modest Proposal" (2015) 24(3) Australian Family Lawyer 17 is footnoted, but unfortunately were not discussed in detail. This omission should be addressed in the Final Report.

Property division

15. The ALRC considered research was required on outcomes for parties with respect to spousal maintenance, property and financial matters and the economic wellbeing of families after separation. Again, child support was not mentioned, but presumably this needs to be included. If there is insufficient research to make substantive proposals for an overhaul of the property and

maintenance provisions of the FLA at this time, it seems sensible to defer any tinkering with the FLA until this research has been done.

16. Professor Belinda Fehlberg and Ms Lisa Sarmas of the University of Melbourne, in their thought provoking submission to the ALRC, supported retention of the discretionary framework, but proposed that different factors be considered:
- the housing requirements of dependent children;
 - the material and economic security of the parties;
 - whether adjustments should be made as compensation for relationship-based loss; and
 - equal division of any surplus (para 3.104).

Further research would enable these and other options to be considered in more depth.

17. Making it easier for parties to argue that an alteration of property interests take into account past family violence than occurs currently under the principle in *Kennon & Kennon* (1997) FLC 92-757 (Proposal 3-11) may have some merit, but may increase litigation rather than reduce it, which is contrary to the objectives of the review.
18. The proposal to work with the financial sector to develop standard superannuation splitting orders is well overdue (Proposal 3-17). This will not only make it easier for unrepresented parties to have superannuation splitting orders, but will also make legal costs cheaper for represented parties. Each fund has its own preferred wording but there are usually no substantive differences. At least in relation to accumulation funds, which are the majority of superannuation funds, the differences in preferred orders relate more to differences in legal advice given to the funds and the funds' personal preferences rather than any real difference in the needs or practical operation of the funds.

Financial agreements

19. Clearly, financial agreements are problematic and reform should be considered. It is probably correct to say that the original policy objectives of financial agreements are not being met. Abolishing financial agreements altogether would, though, be a major change. It is unfortunate that the ALRC, while seeking answers to the questions it posed about the future of financial agreements, did not devote more than three pages to the topic and give more detail about the submissions it received, so that more detailed and helpful responses could have been made to the Discussion Paper to advance the discussion.

Spousal maintenance

20. Redrafting the spousal maintenance provisions to more clearly set out for readers the process for assessing spousal maintenance and remove the cross-reference between property orders and spousal maintenance is proposed at paragraph 3.168, but this is not a definite proposal. This seems to be a sensible suggestion, although it would make the FLA longer, not shorter, which is inconsistent with Proposal 3-1.
21. The Discussion Paper did not deal with child support. The ALRC made recommendations about spousal maintenance but it managed to do this without making reference to the changes in the child support formula which have reduced the amount payable, and how these changes have impacted on the financial circumstances of primary caregivers and the capacity of primary income earners to pay spousal maintenance. The ALRC recognised that there was clear evidence that family breakdown leads to financial hardship from which women take longer to recover than men, but ignored any reference to child support in this. Child support is clearly relevant and consideration should be given to increasing child support rather than increasing the frequency of spousal maintenance orders. As child support is based on a formula, there is not the problem of legal costs which are associated with obtaining a spousal maintenance order.

Getting advice and support

22. The proposals may be "best practice", but they require significant expenditure by the Federal Government and State and Territory Governments. Such expenditure is likely to be difficult to achieve in the current climate. To achieve them, the likelihood is that the Federal Government will pull more money out of the family law courts.

Dispute resolution

23. The proposals are mostly sensible and practical, and the costs involved for the Federal Government are not significant, so they may actually happen.
24. The introduction of compulsory FDR for property and financial matters is, however, difficult to reconcile with protecting the interests of victims of family violence. The ALRC acknowledges this difficulty and proposes a broader list of exceptions than apply in parenting matters to address possible adverse consequences. In practice though, anecdotally in parenting matters victims of family violence are often intimidated and pressured by their partners into using the FDR procedure before issuing parenting proceedings, even if they are within an exception. The prospects of this occurring in financial matters has the potential to be greater.
25. The problems are exacerbated by the difficulty of reconciling compulsory FDR with the genuine steps statement. How they fit together is not adequately explained in the Discussion Paper.

Reshaping the adjudication landscape

26. A simplified small property claims list is a practical proposal. As the ALRC identified, the implementation of this will need to look at, for example:
- How to deal with small property pools with complex legal issues.
 - Large property pools with simple legal issues.
 - Differing property values across Australia.
 - How to provide for these changes in the simplification of the FLA.
 - Increased role for Registrars.
 - Streamlined case management (paras 6.17-6.20).
27. The Discussion Paper seems to be largely directed to the conduct of trials in small property claims (e.g. discretion in relation to the rules of evidence and case outlines) so much more work needs to be done on the practicalities of the procedure, particularly for those matters that don't reach trial.
28. The major problem with Proposals 6-1 and 6-2 arises from the high percentage of cases in the family courts which involve allegations of family violence. The ALRC acknowledges this, but suggests that a triage process will be able to sort out which cases should be in the Family Violence List. In many cases where family violence is alleged, the allegations are denied. Whether or not there was family violence and the degree of it may only be resolved at trial or, if the case settles before trial, it may never be resolved.
29. Proposals 6-1 and 6-2 also suggest that initial and ongoing triage does not currently occur. This is incorrect. It does occur, particularly in the Family Court and, to the extent possible within a docket list system, it occurs in the Federal Circuit Court system. Greater triage requires greater resources, and directing resources to ongoing assessment requires even greater resources than initial triage. The Family Law Courts have, for many years, successfully held "blitzes" and the recent conferences conducted in the Family Court with Registrars and Family Consultants resulted in the settlement of many parenting cases.
30. The ALRC's proposals mostly require additional funding from the Federal Government to the Family Law Courts (and for State and Territory Governments to make physical upgrades to courts where family violence applications are heard) which, in the current environment, appears unlikely to be achieved. Even re-designing the Federal Court staffing and security entrances will be expensive. The federal law courts buildings in the three major cities should be prioritised over the circuit and State and Territory courts because of the larger numbers, but it may be that the second entrance should be staffed from, say, 9.00am to 11.00am. It might be more achievable to staff it at the busiest time only. The stated objective of the courts' restructure Bills is to create

efficiencies and resolve more cases. The Federal Government has not indicated a desire to allocate more funds and other resources to the family law system, in fact to the contrary.

Children in the family law system

31. Funding for Legal Aid bodies to provide separate legal representation for children is already tight. The ALRC is proposing that all children involved in family law proceedings be supported by children's advocates (Proposal 7-8) as well as some children having separate legal representatives (Proposal 7-10). Funding for this proposal seems unlikely.
32. The idea that judges speak directly to children (Proposal 7-12) seems unlikely to be embraced by judges themselves, who prefer to rely on the reports of family consultants who are experienced and trained in speaking with children. There may be problems if the child says something to a judge but wants to be kept confidential. There are also general evidentiary and due process problems. The ALRC recognises these problems but believes they can be overcome. The practices of other jurisdictions in presenting the views of children to courts are discussed by the ALRC, but the reason for the rejection of these other options in favour of a child being able to, at the child's election, speak to the judge when the child expresses a desire to do so is not fully explained (Paragraph 7.98).

Reducing harm

33. The "protected confidences" proposal is probably one of the most controversial proposals in the Discussion Paper. The common law and the *Evidence Act 1995* (Cth) provide only limited grounds for privilege in relation to documents and other evidence. The ALRC's proposal is modelled on s 126B *Evidence Act 1995* (NSW), but this is primarily used in criminal proceedings to protect the notes of professionals who the victim has consulted from being produced in criminal proceedings. The risks and benefits of such a provision in proceedings relating to the welfare of children is not as clear cut. In a criminal proceeding the notes of a victim's counsellor are arguably of little importance unless the counsellor has given a report and the defendant seeks to challenge the extent of the impact of the crime on the victim. That is very different from the wide ranging nature of notes of professionals in family law proceedings which may reveal discrepancies relevant to the best interests of children in historical accounts and facts asserted by one party and challenge the conclusions reached by a counsellor who may be a "cheerleader" for one of the parties, not having had the opportunity to hear the other party's version of events and assess the other party.
34. Whilst at Question 8-4, the ALRC asked what, if any, changes should be made to the court's powers to apportion costs under s 117 FLA, the only proposals by the ALRC are to make clearer the court's powers to make costs orders where there has been intentional non-disclosure and to take into account a failure to make a genuine effort to resolve a matter in good faith prior to the

institution of proceedings. The former power already exists in s 117(2A)(c) which requires the court to "have regard to ... the conduct of the parties to the proceedings" so it is not a radical change. The latter would be a greater change but is common in other courts, such as in the Federal Court. It is a pre-litigation procedure and therefore does not address the common practice of parties failing to take genuine steps to resolve a dispute once proceedings have commenced and the parties are in possession of greater knowledge of the overall case including the other parties' financial circumstances and the strengths and weaknesses of each other's cases. There was, some years ago, a requirement that after a conciliation conference each party exchange offers of settlement. Perhaps that should be re-introduced?

Additional legislative issues

35. The lack of ready availability of people able and willing to act as case guardians or litigation guardians is a significant barrier for access to justice by parties who lack the capacity to conduct their own litigation. The proposal to work with State the Territory governments to facilitate the appointment of litigation representatives is essential to address this gap (Proposal 9-5).
36. In part, the implementation of this will be assisted by a provision in *the Civil Law and Justice Legislation Amendment Act 2018* (Cth) (referred to as a Bill in the Discussion Paper, but it has now been passed), which inserts a provision into the FLA to prohibit courts from making an order for costs against a guardian unless the court is satisfied that an act or omission of the guardian is unreasonable or has unreasonably delayed the proceedings.

A skilled and supported workforce

37. The proposal that when appointing federal judicial officers exercising family law jurisdiction consideration be given to their knowledge, experience an aptitude in relation to family violence is at odds with the current *Federal Circuit Court Act 1999* and the proposed *Family Court and Federal Circuit Court Bill 2018* which do not include a requirement for family law expertise, let alone family violence expertise, for judges of the Family Court and Federal Circuit Court (Division 2) (the current Federal Circuit Court), or for the proposed Family Law Division of the Federal Court which will hear appeals.
38. The ALRC noted that, although judicial training is offered by the National Judicial College of Australia and the Family Court of Australia, judicial officers cannot be compelled to attend or participate in training following their appointment to the bench, because of the principle of judicial independence (para 10.60). Their expertise and experience before appointment is therefore vital.
39. The ALRC recommended that the FLA be reworded to focus on competencies rather than personality (para 10.62), but is silent about judges appointed under the *Federal Circuit Court Act* although Proposal 10-8 suggests that all judges exercising FLA jurisdiction should have family

violence expertise. Questions 10-5 and 10-5 ask whether changes should be made to the criteria for appointing federal judicial officers and what changes should be made. All judges in the Federal Circuit Court who deal with family law matters and, if the family law courts restructure bills are passed, all judges who deal with family law matters in both Divisions of the Federal Circuit Court and Family Court and of the Family Law Division of the Federal Court, should meet the criteria currently in s 22(2)(b) FLA as well as the proposed family violence criteria.

Information sharing

40. States and Territories currently differ in their attitudes to information sharing. New South Wales allows information to be exchanged between Child Protection and Family Violence Courts with the prescribed bodies, and Federal and Family Law Courts are prescribed bodies for the purpose of this legislation (para 11.20). By contrast, Victoria imposes penalties for the unlawful sharing of Children's Court clinic reports (para 11.23).
41. The difficult question of privacy, if publication is allowed to a larger number of organisations under s 121, is not sufficiently addressed in the Discussion Paper (Question 12-1).
42. Question 11-1 raised the question of which databases might be shared or sought about persons involved in family law proceedings, but more work needs to be done in weighing up the privacy of individuals and the extent to which information should be shared and how it is shared.

System oversight and reform evaluation

43. Proposal 12-2 is intended to apply to legal practitioners. How this would interact with the regulation of legal practitioners by the various States and Territories, and particularly for young practitioners, who are not eligible to seek accreditation as a family law specialist is not known. The ALRC says at para 12.24:

"It is not anticipated that these new accreditation requirements would simply duplicate the regulatory role that another professional body may already have for a particular professional. Rather, by structuring the accreditation requirements around the core competencies identified specifically for family law service providers in the workforce capability plan ... it is expected that a significant number of the attributes and behaviours to be regulated by the Family Law Commission would be quite distinct from those regulated by other professional bodies."

44. The ALRC asks whether there should be a judicial commission established to cover at least Commonwealth judicial officers exercising FLA jurisdiction and, if so, what the functions of the Commission should be. The intention is to enable a different process for complaints, other than complaints to the heads of jurisdiction, with greater transparency and independence, so as to improve public confidence in judicial officers exercising family law jurisdiction. There would be constitutional constraints, but the ALRC considers it timely to consider establishing one (Question 12-2).

45. In the current climate where there have been attacks on the family law judiciary by the Attorney-General and heads of jurisdiction, the question needs to be asked whether establishing a judicial commission solely for the family law judiciary would be seen as a further attack on the competence of those judges. If a judicial commission is to be established, it should cover other federal judges as well.

What did the ALRC miss?

46. The Discussion Paper was not the "comprehensive review" promised by the Federal Government in its Terms of Reference. The Discussion Paper is over 350 pages long and deals with issues relating to family violence at length, making many proposals to improve the court's processes for victims of family violence. The need for a comprehensive review of family violence in the family law system was clearly necessary, but the ALRC's task was broader than this. Disappointingly, the ALRC has missed an opportunity which may not arise again for many years, to undertake a comprehensive review of the whole of the family law system. The proposed court restructure was not one of its Terms of Reference and the discussion paper does not deal with it head on but touches on issues related to the structure of the courts in passing.
47. Important areas of family law which were not dealt with comprehensively or at all, but need attention include:
- Child support which has become an overly complex scheme both in legislative terms and procedures for altering assessments.
 - The rights of trustees in bankruptcy vs the rights of creditors (particularly where there is a bankruptcy) to intervene in FLA proceedings, e.g. *Grainger & Bloomfield* (2015) FLC 93-677. For example, the definition of "creditor" in s 75(2)(ha) appears not to encompass the trustee in bankruptcy.
 - Aligning the property and maintenance provisions which relate to married couples more closely to those that relate to de facto couples. They are similar, but not precisely the same.
 - Does the definition of a de facto relationship need review?
 - Which court procedures work best? For example, there is no comparison of the experience of parties whose first court date is a case assessment conference in the Family Court or a listing in open court with other cases in either of the Family Law Courts.
 - Divorce procedures and requirements.
 - The involvement of third parties.

- Adult child maintenance, which like spousal maintenance, is probably under-utilised, and would benefit from a similar revamping of procedures as is proposed for spousal maintenance.

Conclusion

48. The ALRC Discussion Paper raises many practical proposals (although whether these could be funded and how they could be funded without further cut-backs to resourcing of the Family Law Courts is an unanswered question), and asks some useful questions. The fact that it is not the "comprehensive review" promised, is disappointing. The complete omission of child support and the failure to expressly address the structure of the Family Law Courts are major gaps.

An earlier version of this submission was first published on Wolters-Kluwer LawChat on 25 October 2018.