Swaab

SUBMISSIONS TO

AUSTRALIAN LAW

REFORM COMMISSION

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We provide the following submissions with respect to the review of the Family Law system:

1 That the Federal Circuit and Family Court of Australia Bill 2018 and the Federal Circuit and Family Court of Australia (Consequential Amendments and transitional provisions) Bill 2018 ("the bills") be delayed until such time as there has been proper consultation with the legal profession and other interest groups, such delay be until 1 February 2019. There has not been sufficient time provided to the legal profession or interest groups to properly digest the Australian Law Reform Commission's review on the Family Law system and provide appropriate and considered submissions.

2 The Federal Circuit Court and Family Court of Australia be merged and be the preferred Court to determine Family Law matters in Australia. Local Courts to be provided with jurisdiction to hear urgent matters on an interim basis and consider consent orders filed by parties with respect to the division of property and children's matters.

3 That there be an increase in funding directed to the Family Court of Australia (to include the Federal Circuit Court) to increase resources within the Court.

4 That the Judges and Registrars of the Family Court have a sufficient level of expertise in Family Law to be in a position to appropriately deal with matters which come before them and that there be ongoing training requirements for Registrars, Judicial Registrars and Judges of the Family Court of Australia.

5 That there be a return to the hierarchy which included Judicial Registrars being Senior Registrars with appropriate Family Law expertise to deal with Family Law matters including urgent spousal maintenance, small property matters being property matters under $2,000,000 and interim children's matters. Such decisions to be binding and subject to an appeal to a single Judge of the Family Court (as per the current provision for appeal from a Federal Circuit Judge to a Family Court Judge) There to be no administrative assessment of spousal maintenance.

6 Registrars preside over all directions hearings and callovers in the Family Court. Judges are to determine final matters and hear interim matters which contain complexity or require a judicial determination. These to include injunctions, interim property distributions or distribution of monies for legal costs, spousal maintenance claims referred by the Judicial Registrar, etc.

7 Greater use of telephone mentions and technology within the Court. Technology could be used to obtain hearing dates in a similar manner as an Application for Divorce is currently being listed before the Court. That is, if both parties agree to a date and that date is available, then the matter will be listed on that date.

8 Conciliation Conference to be appointed and be optional rather than mandatory. This would also be the same for Mediation prior to final hearing. In the event that it is determined that a Conciliation Conference is to be mandatory, then a Conciliation Conference is to be listed by the Court and in the event the matter does not proceed on the first day listed, then the matter proceed to the next stage without a Conciliation Conference date. Further costs orders should be awarded in circumstances where one party is clearly at fault for the Conciliation Conference not proceeding.

9 The Costs section of the Family Law Act 1975 (Cth) ("the Family Law Act") be overhauled and updated. Cost penalties should be made for non-compliance with Orders in a similar manner as the District and Supreme Courts. Cost penalties for non-disclosure should be made regularly and should be sufficient to be a deterrent.

10 That matters be allocated a final hearing date within 18 months of the commencement of the proceedings.

11 That the existing provision with respect to frivolous, vexatious or abuse of process be reviewed to permit the Court greater ability to determine whether to accept an interim application after there has been repeat applications before the Court.

12 Electronic production under subpoena be permitted and there should be a removal of the limit to the number of subpoena issued for those who are legally represented. For non-represented persons, they should still be required to obtain the leave of the Court to obtain subpoena as a way for the Court to monitor the relevance or otherwise of the subpoena.

13 The best interests of the child continue to be of the paramount consideration for the Court and we agree to the submissions made by the Australian Law Reform Commission with respect to including the safety of the child and the child's carer into that consideration. There should be a simplification of Section 60CC factors but the issue as to whether a party maintains the child of the relationship should remain an important factor for consideration by a Court when assessing what are the child's best interests.

14 The role of the Independent Children's Lawyer ("ICL") should be expanded to incorporate some of the proposals suggested for the child advocate and that the ICL be required to meet with the child/children. There would be no need for the role of a child advocate in the event that the ICL's role was expanded in this manner.

15 There is a considerable risk of providing children with a greater role and voice in Family Law proceedings in circumstances where the child can be manipulated by either or both of the parents and children do not always have the requisite maturity and insight to determine what is in their own best interests. Such contention is contrary to the recommendations of many senior psychiatrists and therapists and there is a real risk of contamination of children's evidence.

16 There is no necessity for a Family Law Commission or Judicial Commission and there is no reason why legal practitioners or judicial officers who practice in this very difficult and emotional area of law should be held to a different standard to any other lawyer or Judge in this country.

17 There is already a comprehensive accreditation system to be passed by lawyers if they wish to be considered accredited specialists. There is a danger of merging the barrier between the judiciary and the legislature when suggesting a Judicial Commission.. The Judges appointed to the Court should be able to adjudicate in accordance with the law (both legislation and case law) which makes it even more important to ensure that the Judges appointed to the Family Court have sufficient experience and expertise to be able to fulfil the role.

18 With respect to the superannuation splitting orders, the suggestion by the Australian Law Reform Commission that there be standard orders and that these be easier to access and implement is supported. There is no support for an early release of superannuation in circumstances where the party to whom the monies are likely to be released will be the more vulnerable. It is likely that this is the person who will not continue to earn the same level of superannuation into the future as the other party and it is that person who will be most affected during retirement in the event they do not have superannuation.

19 There should be no change to the existing Binding Financial Agreement provisions of the Family Law Act. There is sufficient discretion for the Court to determine these cases. There needs to be some degree of certainty for persons who are entering into these agreements.

20 There is a danger that the suggested Family Hubs will further disadvantage vulnerable parties. There will be a person attempting to obtain a settlement for children and property which could result in the more vulnerable of the two parties agreeing to a settlement which is not in their or the children's interests. Further, such an agreement may not be just and equitable having regard to the facts of a particular marriage. It is important that persons within the system have adequate access to independent legal advice during the process.

21 That property division provisions of the Family Law Act be amended to include specific reference to family violence, namely that in making orders for a property settlement the Court consider family violence and afford allegations of family violence the same weight as in parenting matters. The legislation as it currently stands recognises the impact that family violence has on parenting arrangements but fails to recognise that it may also impact on the parties' financial settlement.

22 There is no necessity for the establishment of Family Hubs. There are already a number of community legal centres and community groups to assist persons during a marriage breakdown. The real problem for these community services is there has been inadequate funding to provide such assistance. It is suggested that the funding which would be directed to a Family Hub be directed to the family relationship centres, community legal groups and community centres. There should be a clear division between the parties' legal interests and the practical and emotional needs of the parties during a marriage breakdown. The legal issues which are not agreed between the parties should be directed to the Family Court of Australia for judicial determination while, at the same time, there should be available community support for the practical and emotional issues that a person often faces during the time of a marriage breakdown. The community legal centres and community groups should be independent from the Government and, therefore, not as easily influenced by changing government policies.

23 The real issue which has resulted in the current state of the Family Law system is a chronic underfunding of that system as our population has increased and the number of Judges has decreased. There are insufficient Judges and Courts to deal with the level of family breakdowns which has resulted in the 7% of people who seek the assistance of the Courts being unable to be accommodated. The chronic underfunding of the Family Law system has resulted in prolonged timeframes in progressing to final hearing leaving families in crisis for unacceptable periods of time.

Submissions prepared on behalf of :

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