Lander & Rogers
Lawyers

Submissions to Australian Law Reform Commission

Dated 13 November 2018

Made in response to the Discussion Paper dated 2 October 2018 – Review of the Family Law System

- **PROPOSAL 3.1 – Redrafting the Family Law Act and subordinate legislation with the aim of simplification and assisting readability.**

  Lander & Rogers supports the proposal to redraft the Act, with particular reference to the following factors:

  - The process of judicial consideration which arises from section 79(4) of the Act, in relation to property matters, is not clearly reflected in that section. It is submitted that a self-represented party (to either negotiations or proceedings) would have little chance of understanding how section 79(4) of the Act is likely to be implemented by the courts.

  - There is unhelpful and confusing quasi-duplication in the Act with respect to property division between married persons (section 79) and de facto partners (section 90SM).

  - It is notable that the current provisions of the Act with regards to spousal maintenance, give no real indication to self-represented parties as to for how long any spousal maintenance order is likely to operate. Whilst judicial discretion in this area is important, the drafting of legally obscure provisions does little to assist parties who are without the benefit of legal advice, and arguably impedes the settlement of many cases which would be likely to proceed in the proposed 'small property claims' process.

  - The provisions of the Act which give rise to the process of judicial consideration in connection with the making of a parenting order, as described in *Goode's case*, are difficult to clearly elucidate from the Act. They are of a complexity which is likely to cause confusion and possibly disagreement for parties who do not have the benefit of legal advice. This may have the effect of making parenting disputes more difficult to resolve, without the benefit of legal advice.

  - There is a potential benefit to further simplification of the de facto property provisions in relation to geographical and temporal requirements. It is notable that de facto parties may accrue rights in equity or in law, in a relationship of less than two years.

  However, we should also be mindful of the benefit of preserving existing jurisprudence, with relation to the core property and parenting provisions of the Act. The use of new key terms (for

example, to replace 'contributions') should be approached in a measured and considered fashion.

- **PROPOSAL 3.2 – Review of family law court forms**

  Lander & Rogers supports the proposal to review the family law court forms, with particular reference to the following:

  - The 'Financial Statement' form is a source of considerable confusion for parties, particularly insofar as each party is required to list only their own assets (and the value of their discreet interest in such assets).

    In our experience, practitioners invariably compile their own asset tables for use in court and in negotiations, rather than using the respective Financial Statements.

    A simpler form in the manner of a 'Balance Sheet', in which all the parties' assets are listed and where particulars of ownership can be stated, would be easier for parties to use. That said, the use of section / row headings in the Financial Statement may prompt specific disclosure where a blank 'asset table' may not (eg, insurance policies, or assets disposed of in the last 12 months) and that aspect of the Financial Statement should be retained.

  - The Application for Consent Orders form can cause considerable expense (and likely confusion for self-represented parties) insofar as it requires a statement of 'current' assets and liabilities to be reconciled mathematically with a separate (but not identical) table of 'post-orders' assets and liabilities. Whilst the utility of this comparison is not in issue, there may be benefit to parties of having a 'smart form' which is capable of asking questions concerning the division of assets, and auto-completing the latter table. In lieu of a 'smart form', the two tables should have identical rows, and both tables should be presented in a simple and neat format.

- **Proposal 3.5 – Simplification of section 60CC of the Act.**

  The proposed simplification of section 60CC is supported, with express provision made that the matters for consideration, as listed in the Discussion Paper, are not stated in any order of importance.

  It is further submitted that the 'presumption' which operates in connection with equal shared parental responsibility, and also the consequential mandatory judicial considerations in connection with time to be spent with each parent, are both unnecessarily complex and cause confusion to parties.

- **Question 3.1 – how to address confusion regarding the scope of parental responsibility?**

  It is submitted that:

  - The definition (for whatever term chosen) should clearly delineate between decisions concerning a child's long term care welfare and development, and decisions in relation to day-to-day parenting issues, the latter being the remit of the parent with whom the children is living / spending time.

- The definition should include illustrative, but non-binding, examples of what types of decisions are, or are not, within the remit of parental responsibility (or any replacement term).

- It is suggested that orders should be crafted with specific issues in mind as relevant to each matter. For example, dietary issues may be the subject of controversy in a case where a child has purported, but undiagnosed, food intolerances.

- **Question 3.2 – should the court's power under the Family Law Act be enlarged to as to enable it to order the early release of superannuation?**

  Whilst there is appreciable policy benefit in permitting parties to obtain a portion of superannuation funds as non-superannuation assets in order to address the financial detriment often resulting from a separation, we submit that wider consultation should take place, including with ASFA. Some issues of complexity which arise are set out below.

  - In light of the fact that superannuation entitlements are given tax-preferential treatment, what are (and what should be) the taxation implications of early release as proposed?

  - Is it appropriate that the family law courts be empowered to make such orders, or is this power better placed with superannuation trustees under hardship provisions (with according amendments to the SIS Act and/or SIS Rules)? In that respect:
    - Superannuation complaints can presently be dealt with through the Superannuation Complaints Tribunal / Financial Complaints Authority, and beyond that through the Federal Court.
    - Superannuation funds presently deal with hardship applications.

  - Limits and guidelines would need to be considered and formulated, with respect to what proportion or amount of superannuation could be accessed, and in what circumstances.

  - The economic impacts upon parties of any such measures are complex.

- **Question 3.3 – financial agreements.**

  With reference to the specific proposals outlined in the Discussion Paper, comment is made as follows:

  - It is submitted that there presently is sufficient certainty as to when financial agreements are binding. A considerable proportion of jurisprudence relating to the setting aside of financial agreements touches upon legal concepts which relate to contracts. By way of comparison, there is a comparative degree of uncertainty in any commercial contract as to whether or not it will be voided or read down by a court – but that is not said to seriously compromise the utility of contracts as a broad legal mechanism.

    It should not be considered beyond the expertise of family lawyers, to provide whatever common law advice and expertise may be required in the case of a particular financial agreement.

- The definitions of 'family violence' which are adopted in various legislative instruments are very broad, and appropriately so. However, the effect of a wide definition is that 'family violence' may be constituted from actions which do not necessarily cause fear or harm.

  To employ the occurrence of family violence as a trigger to set-aside financial agreements may necessitate judicial consideration of the 'degree' of family violence or the level of harm caused by it, in any particular case. That, in itself, may not be a desired outcome of any such legislative change.

  Furthermore, creating family violence as a trigger for the setting aside of a financial agreement, may give rise to a financial incentive to make such allegations.

- Any requirement for a court to approve a financial agreement would necessitate guidelines for the court to use in assessing whether or not to approve any particular agreement. It would be impracticable for any such guidelines to mirror or to be made with reference to those provision of the Act which provide for property division or maintenance – the task of projecting the outcome of a financial agreement at an indeterminate point in the future, is imprecise.

  On a related issue, what is the responsibility (or liability) of the court if an agreement is approved but subsequently set aside, for example, for a drafting or other technical deficiency?

- It is submitted that parties should continue to have the legal right to contract out of the property provisions of the Act. Additional legislative provisions widening the scope of when a financial agreement may be set aside, creates further uncertainty as to when such agreements are binding.

- Should Parliament wish to consider fettering the operation of 'prenuptial' style financial agreements, consideration may be given to creating 'terminating events' (akin to the child support legislation). For example, agreements may lapse after 10 years. Of course, any such legislative provision would create a financial incentive or impediment (as the case may be) to some parties to separate before the expiration period.

  If instead we seek to protect the financially vulnerable when entering into financial agreements, such protection is already afforded by section 90F with respect to a party's ability to 'contract out' of future claims to spousal maintenance, and by section 90K(1)(d) with respect to the care of children.

- **Question 3.4 - spousal maintenance.**

  With regards to the proposal to provide for an administrative assessment of spousal maintenance, it is noteworthy that the process of administrative assessment of child support is overly complex and provides a high degree of confusion and dissatisfaction for self-represented parties.

  The issue of administratively assessing spousal maintenance also gives rise to questions of review, departure and appeals. It also brings to the fore, the policy consideration as to for how long a spousal maintenance order/assessment should continue, and to what extent (if any) a party's capital (versus income) should be applied to maintain the other party, in circumstances where a property settlement is likely to have been effected between the parties.

- **Question 5.1 – should we eliminate the requirement to obtain leave if 2 years post de-facto relationship or 12 months post divorce?**

  The process of obtaining leave constitutes an additional expense for those parties who are, or may be, out of time. The issue becomes more pronounced when there is a dispute as to when separation took place.

  The requirement for leave can be used tactically to provide a measure of finality with regards to spousal maintenance, when a property settlement has already been finalised. For a party considering making a spousal maintenance claim 'out of time' the additional expense of a leave application may present a significant financial barrier.

  However, parties have some legitimate claim to certainty after the passage of significant time following a relationship breakdown, as do future relationship partner who may be impacted upon by a claim under the Act. Furthermore, parties should not be encouraged to sit on their rights for an inordinate amount of time.

- **Proposal 5.6 – duties of disclosure**

  In addition to those specific disclosure issues listed in the Discussion Paper, it is suggested that the following additions be made:

  - financial resources and sources of potential income or property;
  - sources of all income and/or receipt of property from the period since 12 months prior to separation; and
  - disposal of any property or property interest of any nature since 12 months prior to separation.

- **Question 5.2 – criminal / civil penalties for non-disclosure**

  Lander & Rogers support steps to strengthen the court's powers in relation to non-disclosure and related evidentiary offences, which in our opinion constitute a frequent and serious abuse of court process.

  - It is appropriate to support the disclosure duties in the Act with civil and criminal penalties for non-disclosure.
  - Any such support would necessitate a consideration of the degree of non-disclosure – for example, a party's innocent failure to declare an old bank account with a nominal balance should not give rise to civil or criminal penalties. That is a matter of different character and effect, than say the deliberate attempt to hide assets of value and the knowing giving of false evidence.
  - In practice, a non-disclosure case may be decided against the non-disclosing party without the court necessarily making a finding of fact as to the existence of a particular asset, as such cases often involve a dearth of available evidence on the subject of the alleged non-disclosure.

For example, we refer to the discussion of the High Court of Australia in *Chang v Su* [2002] HCA Trans 446, in which Callinan J stated "*It does not matter what the principle might be said to be, a court has to do the best it can. It does the best it can, having regard to the evidence that is adduced and if the parties are not frank then naturally there is going to be a measure of imprecision about any findings that the court can make*".

It is submitted that the inability of the court to make a specific finding of fact as to a non-disclosed asset (as opposed to a judicial finding that a party has deliberately failed to make full disclosure, or has given false evidence) should not be a bar to civil or criminal penalties.

Conversely, any stringency in a test for criminal and/or civil penalties to be applied for non-disclosure, should not inadvertently serve to raise the 'evidentiary bar' in relation to family law cases in which non-disclosure is alleged. To do so would be to disadvantage the innocent party.

- It is further suggested (with reference to question 8.4) that section 117 of the Act make specific reference to:
  - non-disclosure;
  - the destruction of evidence; and
  - the giving of false evidence.