**Submission – ALRC Review of the Family Law System:**

**Discussion Paper 86 - Published 2 October 2018**

**Introduction**

1. Permitting public submissions to the ALRC review of the Family Law system is a critical and appreciated step in the process.
2. My observations have seen that the current legislation and procedures fail to achieve;
   1. the truth, the whole truth and nothing but the truth
   2. that all parties are properly represented, and
   3. justice for all litigants.
3. Though reviewing all sections my primary focus and submission has been to overcome the following matters, which I have observed over a number of years of Court appearances;
   1. Unnecessarily prolonged divorce proceedings.
   2. Loss of a party’s life-long savings through excessive, unnecessary legal costs and Court Hearings.
   3. Unchallenged perjurious statements including fraud and non-provision of full discovery
   4. Unfounded facts, misinterpretation of the Family Law Act and practice leading to threatening and abusive legal representation with impunity
   5. Section 75(2) Health Factors not assessed or considered.
   6. Section 79(4) Factors not assessed or considered.
   7. Final Order process and lengthy costly appeal process.

**Education, Awareness and Information**

1. Proposal 2-1

At times of stress, parties may not be capable of absorbing documents let

alone legally framed documents.

Use of Family Court services (via multiple access methods) to assist self-

litigants and advice those being represented is critical to ensure parties

are appropriately represented. Advice regarding such areas as family

dynamics and services, essential pre-Court and Court processes and

forms (tailored for given scenarios), fast-tracking, Court Registrar duties

and simplified appeal processes, should be freely available.

To this end, standard Court processes (given case scenario such as property only

akin to the Magellan list) should be defined and documented.

Self-representation must be encouraged or at very least considered and

welcome by the Court and include in the information pack

Legal practitioners must have a legal obligation to provide information packs (either

hard-copy or electronically) to all parties at no charge.

For self-litigants this information pack should be provided directly by the

Court administration on application.

Information package should include summarised non-legally framed information

targeted to case scenarios (e.g. infant Children, asset pool) with use made of

technology as expressed in paragraph 19 herein. Information including

essential processes (e.g. discovery), documents (e.g. financial statement), mediation

alternatives and Court options (affidavit, conciliation, interim and final hearings)

and simplified Court process applicability.

Inclusion and maintaining a schedule of current Court costs including

application, hearings, trail, forms, conciliation, etc. would be informative.

**Simpler and Clearer Legislation**

1. Proposal 3-1

More precise legislation would reduce ambiguity for self-representation,

reduce ambit claims and counter claims and focus legal practitioners on

administering the law rather than encouraging prolonged representation.

Legal Practitioners are obliged to follow with penalties for any breaches of

duty.

The inclusion of formulas for such aspects as asset distribution (based on the parties

circumstances) would provide ground rules which can be adjusted by the Court.

Such provisions can be separated from the Act, included in schedules or at the very

least as part of the information package.

1. Proposal 3-2

In line with preceding proposals, mandatory forms must be outlined and specific

circumstance forms need to be explained.

Applicable predefined forms (such as Affidavit) should be accompanied with

explanatory notes. Further examples can form part of the information pack.

1. Question 3-1

If the parties are not in agreement as to what matters then each child should be

provided independent counsel or mentor to safeguard their wellbeing. The cost

of child representation must be borne by the parents/guardians equally or as agreed

or directed.

Mediated agreement of responsibilities for child safety should take priority over all

Court matters and addressed under the supervision of one Court.

Whilst age dependent, the child’s needs and wants should be considered

directly as well as child’s principle contacts (such as school and doctor)

should form part of Court submission (incorporated into the triage framework).

1. Proposal 3-10

Use of a “calculator” as part of information pack to provide ballpark figure.

Rules in associated schedules per each class of asset.

Legislate that legal practitioners or advisers

1. Are only able to provide property distribution estimates based on Court calculator
2. Are not able to provide unsolicited inflated estimates of the division percentage

of property

Inheritance defined and incorporate factors;

1. Amount as proportion of total assets
2. Time since inheritance provided
3. Whether inheritance remained in tact
4. Inheritance of both parties (i.e. both in or both out)
5. Maintenance being received by each party by third parties such as parents.

Limit Interim property distribution unless;

1. Full discovery is provided and agreed by all parties
2. Provision of Financial Statement Itemising Part N which is agreed by all parties
3. Accompaniment by Affidavit with proof of hardship

Ability of each party to continue with or attain a job rather than reliance on the

other party’s income of assets. This especially when;

a) children are living independently or are over eighteen

b) all parties have access to liquid funds

Strict legislation to control all parties’ expenditure is critical even to the extent of

hiding assets 6 months prior to a party seeking divorce (with decisive penalties for

breach). Also, as related to essential expenditure during divorce process.

1. Proposal 3-11

It has been my observation that Sections 75(2) and 79(4) are valued highly

by legal practitioners and devalued by mediators, conciliators and the Court

even with legitimate medical assessment and evidence.

To provide guidelines to all concerned with specific rules developed for the

Impact of these clauses on the Courts determinations.

1. Proposals 3-13, 3-15 and Question 3-2

All parties, without Superannuation or Taxation penalties, should be

permitted to withdraw an amount up to their then contribution or,

depending on age and other circumstances, the balance of the fund.

There should be the ability for a party to release superannuation funds, having

regard to liquid assets held, income, expected divorce proceedings timeframe,

accumulated legal, Court and costs and essential spending. This should

provide a reasonable standard of living (equal for all parties), avoid interest

penalties or loss on assets which are realised prematurely.

1. Proposal 3-18

Essential household expenditure when separated under one roof, must be

equally shared (irrespective of the property title holder) or as assessed by the

Court. This will overcome unnecessary wastage by one party.

**Getting Advice and Support**

1. Advice

Currently no community legal centre offers legal services in regard to Family Court

matters (but merely point the client to the web site or accredited solicitors). Litigants

need to be assured that any advice provided confirms with Family Court legislation

and processes and thus should be provided by a Court service desk.

**Dispute Resolution**

1. Proposal 5-2

Family dispute resolution provider should be obliged to provide precise Family Court legislation and legal framework rather than their opinion. Also, use of a standard dispute resolution form provided under affidavit (for Conciliation conference only) would assist reaching agreement.

Parties have had prior opportunities to resolve their disputes prior to Court application with Mediation conference and other activities not disclosed to the Court.

Once parties are referred to Conciliation conference, given it is under the auspices of Court proceedings, documents should be open to the Court for transparency.

Submissions to this conference should be under Affidavit which would avoid misrepresentation of facts, provide the Court with the disputed issues and property distribution calculations. If the family matter has reached a stage that it requires Court hearing then it would be safe to assume that one or other of the parties does not believe that they are getting a just outcome. This approach would see more accurate facts placed on the table and reduce the potential for manipulation by party’s representative.

Conciliation form in a pre-defined standard form (which can be scanned) and includes chronology of facts, assets, claim (percentage or otherwise), section 75(2) factors, section 79(4) factors, other factors such as child minding, expenditure, orders sought, response to other party’s conciliation form and major matters in dispute to be resolved at conciliation.

1. Proposal 5-6

The Financial Statement should serve as the instrument for party disclosure during pre-Court process but expanded in all cases to include details of expenses and asset transfers. This would reduce delays and temptation to avoid disclosure as made under Affidavit.

As pointed out in below paragraph 19 (technology) scanning documents and

electronic comparison should be undertaken and irregularities questioned by the

Court at hearing.

1. Question 5-2

Failure to or false disclosers, made under Affidavit should form part of Court

deliberations in penalties (defined) in the distribution of assets

(maximum penalty can be defined).

This should also be the case if parties discover anomalies post final orders and an

appeal is instigated.

**Reshaping the Adjudication Landscape**

1. Proposals 6.1 and 6.2

Triage proceedings should be accompanied by parties pre-defined forms and

Affidavits which include summary of status of parenting matters, property

matters, major disputes and negotiation outcomes.

Court directions must take into consideration the length of time, adverse

party impact and accrued legal expenses that have taken place prior to Court

Application (separation date to form part of application form).

1. Proposal 6.5

Legislation to oblige legal representatives to provide litigants (at no

cost) with information and advice regarding simplified Court

procedures.

Such matters as listed could be submitted by the parties as part of

standard Court forms.

1. Standardisation of approaches

Though limited, Family Court resources need to be engaged to review

Affidavits and detect anomalies of sworn facts. Technology outlined in

paragraph 19 below would significantly reduce this effort.

Standard hearing regime should form part of reshaping the adjudication

landscape. Variance to the standard regime would be assessed and directed

by the Court based on Application Triage or directions hearing.

The Application hearing with its mandatory prescribed forms (e.g. dispute differences,

parenting matters, property matters, discovery issues, priority indicia and other

outstanding matters) thus becomes the critical determination of urgency, children care

needs, habitation and part asset distribution, assessment of litigant’s orders sought.

Part asset distribution, if sought by a party, should encompass (and part of information pack) a maximum percentage (set by the Court) of total distributable assets.

Assessment of interim and final property distribution should consider the same standard of living for all parties irrespective or prior life-style given the asset split which in most cases would reduce parties’ standard of living.

Application hearing’s timeframe provision flow onto the next hearing process with objectives to seek explanation of issues stopping progress, Court assessment of Affidavits, financial statement, statement of proposals, review Court order compliance and in circumstances order conciliation hearing.

Given Court defined Orders and timetable, next major milestone hearing objective is to assess progress of Orders (or ordered conciliation conference if not already ordered), via review of statements provided by litigants (on prescribed form) which the Court can assess and direct.

Encourage litigants to contribute to Court hearings to provide in their own words, the critical matters in dispute (as part of first private hearing and certainly prior to final orders hearing). This can be in the form of a prescribed form completed by parties alone which includes summarised information of disputes regarding parenting, discovery, asset pool, share of joint expenditure. Or party direct representation in Court hearing (if party willing to do so).

**Additional Legislative Issues**

1. Use of Technology

Use of interactive web site (include series of direction questions) to provide litigants

with legal framework, rights and responsibilities, forms, options, etc. is critical.

Access to technology based within the Court complex for parties to complete

forms would in conjunction with Court service desk advisers would expedite

completion of Court acceptable information.

Electronic OCR technology developed to scan standardised pre-defined

forms (such as Financial Statement) in order to file and perform automated

electronic response comparisons of disputing parties’ submission.

This scanning and checking facility will provide more accurate claims, reduce

Court resources to assess submissions and focus Court proceedings on

disputed matters.

1. Court Costs

Typically, Court costs should not be the full responsibility of the applicant as it does

not discourage Respondent(s) from continuing Court appearances and

fosters a sense of frustration on the part of the Applicant. Subject to Court

assessment a percentage of Court costs should be awarded based on asset

distribution percentage unless the litigants have agreed otherwise.

1. Affidavits

If not so legislated, non-response to an Affidavit item should be seen

as “no comment” and not prejudice a party. These extended counter

Affidavits responses should be minimised and form part of solicitor’s

guidelines.

1. Notice of Withdrawal as Lawyer

Rules for the resignation as client lawyer must be tightened in order to;

* 1. Reduce the already stressful situation litigants find themselves in
  2. Reduce lawyers taking advantage of a) above, especially in dealing with

payment where litigant has paid significant costs already and has limited

disposable funds.

Unless agreed in writing by the client, Withdrawal Notices must be;

1. delivered directed to all clients via registered mail or hand delivered at the current client’s address
2. provide four weeks notice if no Court hearing schedule within the that period month (in order to find solicitor and handover previous dealings)
3. provide six weeks notice if Court hearing scheduled within that period (in the aim of reducing Court delays).
4. with an assurance that all documentation, be released to the client or the client’s legal representative irrespective that there are legal fees owning.
5. with an assurance that no caveat will be placed on property for outstanding legal fees (this has been known to happen)
6. if requested by the client or the client’s representatives that a handover is provided at the standard hourly rate previously charged by the solicitor
7. Sections 79(4) and 75(2) Factors

It appears that section 79(4) factors are not considered by arbitrators (with some

stating that there is no adjustment for do-gooders). If this is standard practice then this

section should be repelled or clause added limiting its significance to property

distribution.

Section 75(2) factors has been dismissed by the Court at various hearings and

Arbitration though presented with an insurmountable amount of evidence from

specialists. If this is standard practice then this section should be repelled or clause

added limiting its significance regarding property distribution.

1. Appeals Process

Must be simplified as litigants are on occasion (due to fatigue, stress, etc)

coerced to sign-off final orders without the right to present their view-point in front

of a Judge (who merely signs orders in chambers).

The process of triage an appeal application by the parties (using standardised form

which includes litigant reasons for appeal which may include factors not

previously discovered) would;

* 1. reduce appeal duration
  2. reduce appeal costs, and
  3. may lead to a just compromise by all parties.

There also needs to be documented a defined period which parties can appeal post

final orders and the grounds upon an appeal is granted.

1. Other matters

If custom, mandatory party attendance at Court be removed for health and other

significant factors.

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