



CPSU (PSU Group)

Submission:

Review of the Family Law System

November 2018

The Community and Public Sector Union ('CPSU') welcomes the opportunity to make a submission in response to the Australian Law Reform Commission's Review of the Family Law System: Discussion Paper.

The CPSU represents employees of the Federal Courts and advocates for the important work they undertake. The CPSU is committed to working with Government, the Courts and community groups to secure adequate funding for the Courts and services that support users of the Courts.

Employees of the Federal Court, employed in the Family Court of Australia and the Federal Circuit Court of Australia (hereafter 'the Courts') are dedicated professionals, committed to serving the community through the Courts working in an emotionally, and sometimes physically, volatile environment. They value the contribution they make to our community and have a strong sense of professional identity. The proper functioning of the Courts and their family law functions rely on the work of these staff.

Courts' staff have considerable experience and professional expertise on the day to day function of the family law system. Most are long term employees, specialised in their area of service.

This submission is informed by the views of our delegates and members and addresses a range of proposals and questions asked in the Discussion Paper. Proposals and questions are addressed under the relevant section from the Discussion Paper.

Education, awareness and information

Members were strongly supportive of the Australian Government developing a national education and awareness campaign to enhance community understanding of the family law system.

Simpler and clearer legislation

Members were supportive of reviewing and redrafting the *Family Law Act 1975* (Cth) (hereafter "the Act") to simplify and improve readability. One member commented that it would be helpful for parents, stating "*some concepts regarding parenting should be broken down to give parents more realistic and understandable ideas.*"

Getting advice and support

Members had several suggestions as to how confusion about what matters require consultation between parents could be resolved. This included triage early in the process, add specific links to websites with FAQs, a national hotline with family law specialists available to answer basic legal questions and a clear guide of possible co-parenting issues that need to be consulted about, including in the preparation of orders.

Nearly nine in ten members were supportive of amendments to increase certainty about when financial agreements, such as pre-nuptials, are binding, noting the growing concerns that it is difficult to predict the circumstances that may lead to a binding financial agreement being set aside. Three in five supported amendments to broaden the scope of setting aside an agreement where it is unjust to enforce the agreement.

Other proposals did not get majority support. For example, only two in five supported replacing existing provisions about financial agreements with an ability to make court-approved agreements. One member

explained their opposition stating that *“there needs to be a certain process where people can enter into a binding agreement outside the Court system.”*

Less than a third supported removing the ability to make binding pre-nuptial financial agreements from family law legislation and preserving the operation of any existing valid agreements. A member explained their opposition stating, *“where informed and properly advised people reach an agreement, such an agreement should be capable of enforcement at a later time, providing it remains equitable to do so. However, an agreement should not be completely voided for one issue alone but varied to avoid the unfairness whilst preserving the original intent.”*

All respondents supported the greater use of Registrars to consider urgent applications for interim spousal maintenance, however, a majority did not support consideration being given to the administrative assessment of spousal maintenance, similar to what is done currently for child support.

Dispute resolution

Members had some comments and raised issues about the proposal to establish Family Hubs as an entry point for accessing a range of legal and support services. One member noted that there had been discussions about such a hub for many years and it does not work. They suggested strengthening Family Law Pathway Networks and building relationships between existing providers. Another stated that hubs would need Federal Court employees who understood the system and processes and would only work if legal advice is not means tested. There were also concerns based on previous attempts where the sharing of information did not occur.

Reshaping the adjudication landscape

Over four in five supported requiring parties to attempt family dispute resolution prior to lodging a court application for property and financial matters with a limited range of exceptions. There was also general support for:

- Specifying a court must not hear an application for orders in relation to property and financial matters unless the parties have lodged a genuine steps statement at the time of filing the application. If a party has not made a genuine effort to resolve a matter in good faith, courts may take this into account when determining how costs of litigation should be apportioned;
- Amending the Family Law Act to include a requirement that family dispute resolution providers in property and financial matters should be required to provide a certificate to the parties where the issues in dispute have not been resolved; and
- Specifying that if a court finds a party has intentionally failed to provide full, frank and timely disclosure, it may impose a consequence, take the party's non-disclosure into account, stay or dismiss all or part of a party's case or take it into account when determining how the financial pool is to be divided.

Members were not supportive of limiting proceedings in property and financial matters to those instigated within twelve months of divorce or two years of separation or setting out that disclosure duties be supported by civil or criminal penalties for non-disclosure.

Three in five members agreed there is a need to review the process for showing that the legal requirement to attempt a family dispute resolution prior to lodging a court application for parenting orders has been satisfied and that the process is aligned with the process proposed for property and financial matters.

Other proposals supported by CPSU members working in the Federal Circuit Court and the Family Court included:

- Greater evidentiary legal requirements to demonstrate there has been attempted family dispute resolution for matters relating to property, finances and parenting orders;
- Establishing a triage process to ensure matters are directed to appropriate alternative dispute resolution processes and specialist pathways within court as needed. The triage process would involve combining the expertise of the Court's Registrars and Family Consultants to ensure initial and ongoing risk and needs assessment and case management;
- A simplified court process for matters involving smaller property pools and case management protocols developed; and
- Establishing a specialist list for the hearing of high risk family violence matters in each registry.

One proposal that was not supported by a majority was court pathways that include a simplified small property claims process, as well as specialist family violence and Indigenous lists. One member commented that *"it must be remembered that sometimes the legal issues involved in "small" property pools can be as complex as larger pools."* Another stated that *"Registrars should be involved in smaller property pools - they make an award, only binding by consent. If one party does not agree to the award and insists upon a judicial determination and that determination is essentially the same as the Registrar's award, costs/penalties shall follow (even where neither party is represented)."*

Children in the family law system

Members stated that historical proven instances of family violence should be part of criteria to establish eligibility for the family violence list.

Regarding a less adversarial decision-making process for children's matters, one suggestion was early therapeutic intervention which seeks to assist parties to resolve and move forward with parenting arrangements.

Three quarters of members supported the development of a post-order parenting support service to be developed to assist parties implementing and managing parenting orders. One member commented it may assist to reduce families' ongoing exposure to the Courts, for example, by reducing contravention applications.

Reducing harm

Members were asked about the strengths and limitations of the present family violence definition. Comments were mixed. Some commented the definitions are quite broad and hard to define. Others, however, consider the subjective test was useful to allow more nuanced understandings and definitions of family violence.

Additional legislative issues

Members were divided on whether the requirement for proceedings to have been instituted 'frequently' be removed from provisions setting out courts powers to address vexatious litigation. Only half supported it.

A skilled and supported workforce

Members were supportive of Family Courts developing practice notes explaining the duties that litigation representatives have to the person they represent to the court.

Members were strongly of the view that family law experience and knowledge of how property and financial issues are to be determined under the Act should be requirements for family dispute resolution practitioners. Members also felt that family law experience should be part of the criteria for the appointment of federal judicial officers exercising family law jurisdiction.

Members commented on the Commission's proposal that in appropriate matters involving the care, welfare and development of a child, judges should consider appointing an assessor with expert knowledge in relation to the child's particular needs to assist in the hearing and determination of the matter. Members are of the view these assessors should be directly employed by the Court.

Information sharing

Three quarters of members did not support a national information sharing framework including health records. Similarly, there was not support for records to be shared with family relationship services and parenting order program services. Problems with previous attempts to agree on information sharing for Magellan cases were flagged.

System oversight and reform evaluation

There were mixed views about an independent Family Law Commission with no majority in favour or opposed.

There was, however, strong support for privacy provisions in the Act to be amended explicitly to apply to parties who disseminate identifying information about family law proceedings on social media or other internet-based media and two thirds supported a Judicial Commission to be established to cover at least Commonwealth judicial officers exercising jurisdiction under the Act.