

Response to the ALRC Review of the Family Law System Discussion Paper October 2018

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1. Gadens Overview

Gadens is a leading, independent top 10 Australian law firm with 95 partners and over 700 staff across offices in Adelaide, Brisbane, Melbourne and Sydney. We regularly undertake highly complex and day to day transactional legal matters for a wide range of clients, including major Australian and multinational organisations. The firm also has long standing experience in family and relationship law as part of its private client services.

With a history dating back to 1847, our aim is to help our clients achieve their objectives – providing an outstanding client experience for every client, every time. This is underpinned by our focus on understanding our clients, their needs and expectations and building meaningful, long-term relationships. Our core values are the firm's foundation and reflect the essence and character of the firm – they define how we interact with one another and our clients.

Based upon our many years' experience helping clients with the issues that arise upon family breakdown, we are pleased to make this submission to the ALRC on matters that we consider to be most important to a review of the family law system.

2. Gadens Family & Relationship Law

Our team in Melbourne and Sydney specialise in family and relationship law, and provides a comprehensive, highly personalised service in relation to all aspects of family law including divorce, parenting, property / financial and related issues for married and de facto partners including same sex marriages and relationships.

Our team includes Accredited Specialists in Family Law, Children's Law and Dispute Resolution, as well as qualified mediators, collaborative lawyers and Independent Children's Lawyers. In many instances our family lawyers have decades of experience in the practice of family law.

Our family lawyers are members of the Family Law Section of the Law Council of Australia and the Law Institute of Victoria or the Law Society of New South Wales. Many of our family lawyers are also members of the Association of Family & Conciliation Courts (AFCC). Our lawyers volunteer their time to the activities or committee work of the above professional associations and others.

The scope of our family law work is very broad.

Our team has particular expertise in complex parenting and complex property matters, and the settlement of all types of cases through negotiation, mediation and collaborative processes. Our clients include people that work and have significant assets overseas, adding further complexity to the resolution of property and parenting arrangements after family breakdown.

Families take many forms these days, therefore the process options and solutions required must also vary. We understand that litigation is time consuming, expensive and usually an option of last resort. We consider and promote alternative dispute resolution at an early stage where appropriate. Building a supportive team around our clients, when required, is one of our strengths. We work closely with other experts in complementary fields including counsellors, psychologists, valuers, financial planners and accountants to maximise the decision-making of our clients and their future wellbeing. Our team also includes experienced property law practitioners, who assist with all manner of complex as well as more routine property related issues.

3. Introduction

As stated above, we welcome the opportunity to respond to the ALRC Review of the Family Law System Discussion Paper.

Given the breadth of the Review, we have necessarily confined our responses to matters involving our collective experience and observations over many years of practice.

4. Definitions & Abbreviations

The Act	<i>Family Law Act 1975</i> (Cth)
ALRC	Australian Law Reform Commission
Court	The Family Court of Australia and the Federal Circuit Court of Australia
FDR	Family Dispute Resolution

5. Simpler and Clearer Legislation

We support the amendment of the Act and its subordinate legislation to simplify and assist readability and to modernise the language used.

We would caution however against removal of terms such as 'affidavit' and 'subpoena' with terms such as 'witness statement' and an 'order to produce documents'. The latter is particularly likely to cause confusion amongst parties to Court proceedings, who may be (or become) subject to an order for "discovery" or the production of their own financial and other relevant documents, and

third parties not involved in the Court proceedings who are entirely independent of the applicant and respondent to those Court proceedings and may be subject to subpoena.

In addition to advising parties to Court proceedings, our practice also includes advising third parties to Court proceedings, such as Banks, Accountants, Company Directors, and Trustees, who may be served with a subpoena to give evidence or for the production of documents (or both).

In our experience, a subpoena and the general appreciation of the obligations it creates on the recipient, are widely known and understood in the corporate community. The Courts have also done excellent work to produce information brochures for the recipients of subpoenas, explaining obligations, so as to ensure compliance.

Given it is third parties to Court proceedings who are required to produce documents or attend court on subpoena, there seems little advantage to changing the language which is already widely understood and replacing it with a new and foreign concept, which would then require re-education, especially if the change is only to occur in the family law court system, without all the other Federal and State and Territory courts following suit.

6. Replacing the term 'parental responsibility'

In addition to advising parents (and grandparents) on the meaning of "parental responsibility", our practice includes advising many private schools in Victoria and early child-care providers in New South Wales, Victoria and elsewhere.

We are often consulted by school principals, school counsellors and others about the meaning of "sole parental responsibility" or "equal shared parental responsibility" found in Parenting Plans or Court orders which parents have provided to the pre-school or school for inclusion in the child's file.

Issues often arise for schools when parents are in conflict about:

- enrolment applications and the payment of private school fees and costs;
- whether a child should engage in school counselling services; and
- whether a child can participate in a school event, such as a particular sporting activity which coincides with time the child spends with each parent.

It is our experience that similar interpretation issues can arise for a child's treating medical practitioner and for psychologists, especially where one parent unilaterally seeks to engage a psychologist or counsellor for a child.

Amending the term 'parental responsibility' with a more easily understood term, such as 'decision making responsibility' would assist in the interpretation and implementation of Court orders, by the parents and others, such as schools, treating medical and allied professionals.

7. Applying for new orders about children

The Act should be amended by the addition of a provision that explicitly states that where there is already a final parenting order in force that, other than for proposed new consent orders, a party or parties must seek leave to apply for a new parenting order as a preliminary step in the proceeding. The amendments would specify that the Court may grant leave or dismiss the application for leave dependent upon the evidence adduced in support of the leave application showing that there has been a substantial or significant change in the circumstances affecting the child/ren or any of the parties to the existing order which may affect the Court's consideration of the best interests of the child/ren (under the existing orders and under the proposed orders sought by the party seeking the grant of leave.)

- The current position is covered by case law, the seminal authority being *Rice v Asplund* (1979) FLC 90-725.
- Legal practitioners experienced in family law are aware that when applying for a new parenting order in circumstances where final parenting orders already exist, an initial hearing may be required to determine whether the "threshold issue" established by *Rice v Asplund* has been satisfied. In other words, has there been a significant or substantial change in the circumstances of the child or either party to justify the Court revisiting the issues between the parties and the best interests of the child? The "test in *Rice and Asplund*", as it is commonly known, is based on the public policy rationale that there needs to be an end to litigation involving children, and the justice system should not be used or misused to enable parenting issues to be ventilated or re-agitated on a recurring basis.
- Codifying the *Rice v Asplund* test would clarify the operation of Part VII of the Act because the test is invisible upon a reading of the legislation (given that it arises under case law). Codification of what is a perfectly sensible public policy rationale would make the process of applying for new parenting orders more accessible to parties, particularly self-represented litigants. An explanatory note or examples below the new provisions could be inserted for the benefit of self-represented litigants and parties more generally.
- When codifying the test in *Rice v Asplund*, care would be taken with the drafting such that the existing case law can be read alongside the new provision and support its interpretation and application in practice.

8. Superannuation Splitting

From our clients' experience where superannuation splitting Orders are sought or where we are drafting proposed superannuation splits in a Superannuation Agreement under Section 90MH or 90MHA of the Act, the lack of consistency between the various superannuation funds as to their respective preferred superannuation splitting Orders or provisions in Superannuation Agreements sometimes means the proposed wording of Orders / Agreements is initially rejected, causing

delays in the intended super split being effected, as well as additional cost of correspondence back and forth with the superannuation fund in question as to their preferred wording.

Some but not all funds require the inclusion of the parties' full names and dates of birth or a superannuation member number within the specific superannuation splitting order, even though the parties are identified elsewhere in the orders and the member number details would be readily known to the fund or incorporated in service documents.

Even where amendments are not required by the super fund trustee, additional cost and delay is incurred in the provision of draft orders / agreements by way of procedural fairness to the trustee(s).

We support Proposal 3.16 that the Attorney-General's Department work with superannuation funds to develop a uniform / standard splitting order or provision for Superannuation Agreements, as this would streamline the process, as would 'deemed procedural fairness'. This uniformity of splitting order or provision could also possibly make super splitting a more attractive option for separated parties to consider, particularly in smaller asset pool cases where parties cannot afford and should all the more wish to avoid incurring legal costs, as well as delays in liaising back and forth with super fund trustees, with respect to an intended super split.

9. Early release of superannuation where there is hardship

We would similarly support Proposal 3.13 that the Attorney-General's Department work with the financial sector to establish protocols regarding financial hardship post-relationship breakdown.

In answer to Question 3.2, we would support provision being made for early release of superannuation to assist a party experiencing hardship as a result of separation.

Certainly financial hardship can be suffered by those parties who may have superannuation entitlements and in some case significant superannuation entitlements, but do not otherwise meet current criteria for 'hardship' to access their super.

In our experience, there are also some matters where the main assets for division are one party's business which is their sole source of income and thus their livelihood, as well as the means by which that party may afford to meet ongoing child support obligations to the parties' children. Therefore such business may be an asset a party is most reluctant to liquidate via a sale in order to fund the other party's property settlement entitlements on separation, and otherwise in these cases there may be no other assets other than significant superannuation standing in one or both parties' names but the party who would receive the bulk of the superannuation by way of property division in their favour may be a long way off attaining the age of 60 years.

In these types of cases, if a party could access superannuation funds earlier than the present superannuation law allows, it may permit the party retaining all or most of the superannuation available for division to purchase a home for themselves and their children. In turn this may also avoid a forced sale of the other party's business which would allow them the ability to meet their own needs and provide for the children's continued financial support.

Access to superannuation funds may also address a parties' interim and urgent maintenance needs, where the other party does not have the capacity to meet that need either from their own income or from assets under their control. Reform in this area may obviate or reduce dependence on social security entitlements.

10. Reforms to Section 109J of the *Income Tax Assessment Act 1936*

We would also propose that there be a reform of the provisions of Section 109J of the *Income Tax Assessment Act 1936* (or that there at least be a new Taxation Office Ruling to replace Ruling TR 2014/5 that pertains to matrimonial property proceedings and payments of money or transfers of property by a private company to a shareholder or their associate), so that an additional category of distribution of retained profits held by a private company to a shareholder or associate of a shareholder could be made, without such distribution being deemed a taxable dividend, as is presently the case under Ruling TR 2014/5 – namely where the retained profits of a private company are paid to spouse or de facto spouse as part of that spouse's property or financial settlement pursuant to an Order or Financial Agreement under the Act, as a result of relationship breakdown.

We appreciate that such reform would need an amendment to the revenue law rather than the Act alone. However we submit that such reforms are necessary to avoid hardship to both parties in cases where, but for the relationship breakdown, there would be no need nor any intention to distribute retained profits held by a privately owned company to a shareholder or associate of a shareholder.

From our clients' experiences, some cases may involve significant sums of money that over the years have accumulated within a company through which one of the spouses operates their business. Hardship would and does result for some of these parties where the only way that often very significant tax can be paid, which on the current law results from the payment to a shareholder or associate spouse being deemed a taxable dividend, is for the sale of the company and the business it operates. Thus further hardship can occur in those cases where the company itself or the business it operates has little value other than the funds it holds and can only be paid to a shareholder to pay out to their spouse as a taxable dividend.

There is also in our view a need to reform the Act to remove the inequity that can arise in some situations where on current case law principles, divisions of assets on relationship breakdown are made on a pre-tax assessment of value of the assets of the parties, but the tax liability attaching to an asset that is not proposed to be disposed of as part of the settlement between separated parties or very soon after but which is to be retained by one of the parties, is not taken into account in arriving at what the true, net of liabilities value of the assets of the parties to be divided between them.

This is particularly so when in the experience of many of our clients, the party who is taking on the whole of the liability for the tax on an asset (including retained earnings of a private company), albeit payable at some future time, is also the party who bears the often significant risks of continuing to operate a business with the risks that most business operations involve, compared with the known, safer assets that their spouse may retain and free from those future tax burdens.

The advantages that a party who retains a business subject to those future contingent tax liabilities might have by way of the continued income stream that is able to be derived from their business, does not always balance out the inequity that results later when those taxes become payable.

11. Financial Agreements

In answer to the parts of Question 3.3 posed with respect to Financial Agreements, we consider the approach that ought to be taken to Financial Agreements is that the legislation should provide for greater certainty around such Agreements.

We however consider that there is no need to legislate to further broaden the scope to set aside Financial Agreements in circumstances where the Act as well as the numerous contractual principles that also apply to such Agreements and the body of case law applicable to them, all already cover the grounds which would support Financial Agreements being set aside.

Nor in our view would there be any added benefit in legislating for an ability to make Court approved Financial Agreements, as parties to such Agreements can already have Consent Orders made by the Courts (albeit for any provision other than to contract out of spousal support entitlements for all time).

The idea of an application to the Court for approval of Financial Agreements would also add unnecessarily to the cost of entering into such Agreements and impose an additional burden on the Court system.

Further, parties at the outset, during or after a relationship, should have the right to agree to whatever provisions they may wish to agree upon, without their agreement or agreements over

time (if more than one is made) requiring Court approval, providing the existing safeguards remain in place for entering into such Agreements so that they may be enforced.

In our practice, we see an increasing number of clients who wish to enter into Financial Agreements, including prior to entry into a relationship. The existence of such Agreements once properly entered into not only allows parties to such Agreements the freedom to determine their own financial affairs on relationship breakdown but they can also provide certainty and comfort of outcome to both parties, as well as avoid costly and time consuming litigation. We would therefore oppose a change which removes the ability of parties to enter into Financial Agreements before the commencement of a marriage or de facto relationship.

12. FDR Certificates

We agree that it is desirable to have the Act require that any party wishing to issue property division or financial proceedings should first be able to establish that they have taken all reasonable steps to resolve the issues in question by agreement with the other party and after proper disclosure has been made to the other party such that the other party could reasonably have entertained any proposal for settlement by a "fully informed agreement".

We however disagree that the legislation ought to require that a party wishing to institute property or financial proceedings must first have issued to them a Certificate by an FDR service provider, as per Proposal 5.5.

In our experience with the vast majority of our clients, genuine attempts are made to resolve matters by agreement through one or more of a variety of dispute resolution processes before court proceedings are initiated.

The introduction of mandatory FDR in July 2006 was a commendable initiative because FDR could readily be regarded as the most efficacious and dominant dispute resolution method for parenting disputes. However, the logic which favoured family mediation (retitled as FDR) in parenting matters does not however apply to financial cases because of the enormous variability in the financial circumstances across families, and this includes differences between spouses in relation to knowledge and control of finances and the potential for profound power imbalances. In short, a "cut and paste" replication of the parenting FDR model to financial cases would be a retrograde step, and a "genuine steps" model prior to litigation, with appropriate exceptions (eg, in cases of urgency, family violence, risk of abuse, lack of financial knowledge and lack of disclosure) is to be preferred.

The vast majority of cases involving property division and other financial matters are successfully resolved by parties getting together with their respective lawyers, or via their accountant, financial

planner or other trusted advisor with the benefit of legal advice to inform such discussions, or through a private mediation (where the mediator jointly chosen by the parties is probably not a qualified FDR practitioner but likely to be a nationally accredited mediator (a NMAS mediator), or through the process known as Collaborative Family Law where there may be no FDR qualified practitioner facilitating the discussions which instead, take place between the parties and their collaboratively trained lawyers.

To require parties who have made genuine attempts via the above means to resolve their matter, to go through a prescribed, formal FDR process with a registered FDR provider before they can issue proceedings in their property or financial dispute, would add a further and unnecessary layer of cost and delay to the parties. Regrettably, the adoption of such an approach may favour the financially stronger party and paradoxically lessen opportunity for early settlement, arbitration or judicial determination.

Further, many existing FDR service providers are not trained lawyers and as such, we would be concerned that if formal FDR with these service providers were mandatory before issuing property or financial proceedings, the requisite skills to spot financial and legal issues pertaining to such matters, do not exist, to the potential detriment of one or both of the parties involved in such dispute resolution.

13. Full and frank disclosure

While we take no issue with what is *already* contained in the Family Law Rules 2004 pertaining to the duty of disclosure being formally incorporated into the Act to set out the duties of parties in property and financial matters regarding full and frank and early disclosure, in our experience the obligations as to what is to be disclosed are already very clearly set out in the Rules, it is just that the sanctions for the non-compliance with those obligations are either not sufficiently enforced or the approach to non-disclosure may not be consistent across judicial officers and Registrars.

The real need for legislative reform in our view is to amend the Act to make clearer the process by which such disclosure is required to take place in given situations, inclusive of both financial and parenting proceedings. For example, at present, while any experienced family lawyer already should know and ought clearly advise their client about the duty of disclosure and all that it entails, there is a lack of clarity that allows some parties to fail to disclose, or delay disclosure, and thus gain a tactical advantage (sometimes perceived rather than actual) around the process by which disclosure is to be made. This lack of clarity can be around whether discovery of documents is a process that ought take place by exchange between the parties or not, who pays for the production of documents on discovery, where the documents are held for example, by the parties' accountant, whether it is sufficient disclosure to allow the other party to inspect what are often a huge category

of documents, or whether there is a positive obligation to provide copies to the other side and if so, at whose cost?

14. Reshaping the Adjudication Landscape

We wholly support the Court establishing a triage process to ensure appropriate alternate dispute resolution and specialist lists as needed, as per Proposal 6.1. There is a risk however of formalised triage processes being over-engineered with the consequence of adding delay or stifling the creation of efficiencies in the system. Over the years we have observed many Registrars and Judges (and Judicial-Registrars before their abolition) that are masterful at triaging the cases before them; good triage is usually dependent upon professional judgement and experience and it cannot be expected to be driven by para-professionals and administrative assistants.

We strongly support the creation of a simplified process for small property pools as per Proposal 6.4.

15. Post-order parenting support services

We support the provision of additional post-order support services to assist parties to implement parenting orders and to manage their parenting relationship, particularly in high conflict families involving acrimonious proceedings. Such support would go a long way towards ensuring that the child's best interests are supported whether the orders are made by consent between parents or following a contested final hearing.

The former Chief Justice of the Family Court of Australia, the Honourable Diana Bryant AO QC has noted in her submission to the ALRC, the provision of post-order support services "*is lacking and has been for many years.*"

The Courts have the power under Section 65L of the Act to order Family Consultants to supervise or assist in compliance with parenting orders. In our experience, such orders have generally not been made for 15 years or more as a consequence of the Court's limited resources to provide these services, which in turn has necessitated a change in the role of the Family Consultant, which is now largely confined to the preparation of risk assessments and reports pursuant to Section 11F and 62G of the Act.

In our experience, many families who have had their parenting cases determined by a judge, as well as many families who have been able to settle their proceedings by consent, prior to a contested final hearing, would benefit from the support of a professional to navigate the implementation of parenting orders, which requires a shift from the dominance of the conflict to a

new understanding between parents where their communication and behaviours are focussed on the emotional and physical needs of their children.

In our opinion post-order support services would likely lead to improved communication between parents and ideally, to the establishment (or re-establishment) of trust relationships.

Post-order support services would likely lead to a reduction in contravention and enforcement applications, thereby reducing the strain on the Courts to determine those applications which would in turn allow for the reallocation of precious resources.

Post-order support services may also reduce untimely, ill-conceived or frivolous new Applications for Final Orders, which do not meet the test in *Rice v Asplund*, as detailed above.

16. A Skilled Workforce

We oppose Proposal 10.5 that FDR practitioners should conduct any FDR in property and financial matters unless they were qualified and experienced lawyers who are practising or at least have practiced in family law.

The resolution of property and financial disputes requires a specialised skillset well known to experienced family lawyers which includes but is not limited to taking into account legal issues and consequences of any proposal for settlement of such matters.

17. Minimum standards for private family report writers

In our practice, private Family Reports may be commissioned by parents in the course of Court contested parenting proceedings or in the course of out of court negotiations, as part of an alternative dispute resolution process.

At heart, the Family Report is intended to provide parents (and the Court) with impartial and independent observations about the child, the parents and the dynamics with the family system and consequential recommendations about children's living arrangements, including with whom a child will live and the time and communication arrangements with the other parent.

Private Family Reports may also be commissioned in relation to matters involving questions of parental responsibility, choice of school, relocation and similarly vexed issues.

Private family reports can be prepared by social workers, psychologists and psychiatrists. As a consequence, the manner, style and content of a private family report is reflective of the writer's training, which in turn can lead to an inconsistency of approach and style. Formalisation of

standards and the establishment of a simple yet effective accreditation process for family report writers is worthy of consideration.

In our experience, there is much emphasis on lawyers understanding social science (and rightly so), but generally less emphasis on private family report writers understanding family law. In addition to relevant graduate and post-graduate academic qualifications and on-going professional development in those fields, it is recommended that private family report experts should have training in:

- Part VII of the FLA, including the objects and principles underlying those provisions and how the Court determines what is in a child's best interests;
- Court processes and procedure;
- rules of evidence, giving evidence in court and being cross-examined; and
- forensic procedure.

18. Section 121 and Social Media

The proliferation of social media and the increased use of social media by substantial numbers of adults (and children) across Australia has resulted in social media being used as a vehicle to express conflict, hostility and highly sensitive and prejudicial allegations especially in parenting disputes.

In the case of *Lackey & Mae* [2013] FMCAfam 284, Judge Neville noted:

An unfortunate and increasing feature of modern litigation, particularly but not exclusively in family law, is the use of 'social media'. While it can be used for good, often it is used as a weapon, either by one or both of the parties, and or by their respective supporters. For example, it seems often to be the case that people will put on such media (particularly but not only Facebook) comments that I suspect they would not say directly to the person against or about whom such remarks are directed. In this regard, such remarks are, in my view, a form of cyber-bullying. Often, they are very cowardly, because those who 'post' such derogatory, cruel and nasty comments (regularly peppered with disgusting language and equally vile photographs) appear to feel a degree of immunity; they think they are beyond the purview or accountability of the law, and that they need not take any responsibility for their remarks. They inhabit the cyber-sphere and operate as 'Facebook rangers' who 'hit and run' with their petty and malicious commentary, and seem to gloat (or be encouraged) by the online audience that waits to join the ghoulish, jeering crowd in the nether-world of cyber-space.

In a response to the media coverage of a Hague Child Abduction Convention case regarding children who the Family Court of Australia ordered to be returned to Italy, their country of habitual residence, the then Chief Justice of the Family Court, Diana Bryant issued a statement to the ABC's *Media Watch* on 12 October 2012 which reads in part:

As most Australian media outlets know, Section 121 of the Family Law Act restricts publication of court proceedings that identify parties and witnesses involved in family law. The publishing restrictions are in place for the very purpose of protecting children whose parents are involved in family law disputes.

The provisions of section 121 of the Act titled "Restriction on publication of court proceedings" were written at a time when newspapers, radio and television were the dominant forms of media and the wording of section 121(1) reflects that history.

As the then Chief Justice noted, whilst most Australian media outlets know publication of court proceedings that identify parties and witnesses involved in family law, it is not readily apparent to a layperson reading section 121 of the Act that references on social media to a party going through a divorce or separation process may be in breach of the section (and punishable by imprisonment for up to one year).

Section 121 of the Act is drafted in terms that are complicated and confusing; partly by their length, their focus on commercial media and the social media revolution as described above. An amended s 121 of the Act would aim for simplicity and clarity.

In seeking to simplify the Act and ensuring it addresses contemporary family law issues, the inclusion of a reference to social media and other internet-based platforms is appropriate.

At present, a breach of section 121 of the Act is punishable by imprisonment for up to one year. A range of alternative punishments is worthy of consideration so that there may be a range of graduated sentences according to the objective and subjective circumstances associated with a breach of the section.