

Submissions to Australian Law Reform Commission

Issues Paper 48 – Review of the Family Law System

Lander & Rogers welcomes the opportunity to make submissions to the Australian Law Reform Commission with respect to Issues Paper 48 dated March 2018 (**ALRC Issues Paper**) which is entitled Review of the Family Law System. In particular, these submissions address some of the 47 questions (**Questions**) set out in the terms of reference to the Issues Paper.

In making these submissions, a response is made in relation to only those Questions which we view as of particular relevance for our comment, in light of our particular experience as family law solicitors.

In that respect, solicitors in general are uniquely placed amongst family law practitioners to have insight into family law matters as they affect the parties, on an ongoing basis throughout the court process, but also prior to and following after the parties engaging in litigation or alternative dispute resolution.

To an extent, comment in these submissions is based upon the anecdotal experience of lawyers at our firm. In that respect, it is acknowledged that our collective experience and insight may be different from that of other family law practitioners. To elaborate, the collective experience of the Lander & Rogers solicitors is primarily (but not exclusively) focussed upon the handling of private client matters in connection with both property and parenting disputes in Melbourne and Sydney, in addition to a large involvement in connection with various pro-bono programs.

In making these submissions, we have referred to the Family Court and the Federal Circuit Court (in exercise of its jurisdiction under the *Family Law Act 1975*) as the "family law courts".

Submissions are made herein in express response to various of the questions which constitute the Terms of Reference, and in particular:

- Question 8, concerning family law issues affecting the LGBTIQ community.
- Question 10, concerning the costs to parties of family law disputes.
- Question 14, concerning parenting disputes.
- Question 17, concerning property matters.
- Question 22, concerning small property matters.
- Question 25, concerning abuse of process.
- Question 29, concerning problem solving decision making.
- Question 30, concerning family inclusive decision making.

Question 8 – How can the accessibility of the family law system be improved for lesbian, gay, transgender, intersex and queer (LGBTIQ) people?

- 8.1. Members of the GLBTIQ community may have specific call to use artificial insemination and surrogacy, when starting a family.
- 8.2. The *Family Law Act* sets out various rebuttable presumptions of parentage, including:
 - 8.2.1. Section 60H, which operates in relation to children born as a result of artificial conception procedures. Section 60H(1)(d) specifically excludes donors of genetic material in circumstances where the birth mother is married to or in a de facto relationship with another person. By this mechanism, protection is given to sperm donors from claims for liability of child support.
 - 8.2.2. Section 60HB, which operates in relation to surrogate children and states that if an order is made under the law of a State or Territory to the effect that a child is the child of one or more persons or each of one or more persons is a parent of a child, then for the purposes of the *Family Law Act* the child is "*a child of each of those persons*".
- 8.3. Section 61C hold that "*parental responsibility*" for a child rests with that child's "*parents*", absent of any court order. The term "*parent*" is not defined for the exclusive purpose of this section.
- 8.4. The family law courts can make a declaration of parentage pursuant to section 69VA of the *Family Law Act*.
- 8.5. In certain cases, the issue of parentage has been contested by donors of genetic material. For example:
 - 8.5.1. In *Re Patrick* (2002) 28 Fam LR 579, a known sperm donor to a birth mother and her same-sex de facto partner sought parenting orders in relation to the child. He was held not to be a "parent" of the child for the purpose of the *Family Law Act*, but could proceed as a person concerned with the care, welfare or development of the child pursuant to section 65C.
 - 8.5.2. In *Re Mark* (2003) 31 Fam LR 162, a man who donated his sperm pursuant to a surrogacy agreement in the USA was declared by the Family Court to be that child's parent.
 - 8.5.3. In *Groth & Banks* [2013] FamCA 430, a man and woman who agreed to have a child together and to raise the child as separated parents, underwent IVF using sperm donation by the man. The man could not be presumed to be a parent, as the child was born as a result of artificial conception whilst the parties were not in a de facto relationship. The Family Court made a declaration that the man was a parent of the child.
- 8.6. There is persistent ambiguity as to the rights of respective persons involved in artificial insemination and surrogacy. Legal reform to clarify those rights would assist parties contemplating such conception arrangements.

8.7. Furthermore, absent a court declaration of parentage, the uncertainty regarding a person's status as a parent for the purpose of later determining parental responsibility pursuant to section 61C of the *Family Law Act*, may impact upon cases in relation to alleged improper removal or retention of a child outside of the Commonwealth of Australia, under both:

8.7.1. the *Convention on the Civil Aspects of International Child Abduction* (commonly known as "Hague Convention cases"); and

8.7.2. the test of jurisdictional threshold ascribed in section 111CD of the *Family Law Act*.

Question 10 – What changes can be made to the family law system, including to the provision of legal services and private reports, to reduce the costs to clients of resolving family law disputes?

10.1. At the outset, it is acknowledged that the cost associated with the resolution of family law disputes can:

10.1.1. in some instances, have an effect of financially impoverishing one or both parties to a family law dispute¹; and

10.1.2. in other instances, create an imbalance of bargaining position between parties to a dispute, such that the financially vulnerable party may be exposed to pressure to settle a case on unfavourable terms².

10.2. The range of financial circumstances of parties to family law disputes is exceptionally wide. Accordingly, the relationship between legal costs and their financial effect on families is neither uniform nor linear.

10.3. It is acknowledged that, as indicated in the *SPLA Family Violence Report* referenced in the ALRC Issues Paper³, legal costs in family law disputes can amount to over \$100,000. However, the financial impact upon a wealthy individual of legal costs of \$100,000 is objectively less, than that of legal costs of \$25,000 to an impecunious party.

10.4. Reference is made to the *Australian Institute of Family Studies Report* referred in the ALRC Issues Paper⁴, in which it is described that the median annual income figures for separated families, 12 months after separation, is \$55,000 for fathers and \$33,800 for mothers. Such figures illustrate the depth of challenge in providing a resolution of family law disputes for such parties whilst minimising the total cost of that process.

10.5. Whilst all parties to family law disputes benefit from a reduction in the costs of resolving that dispute, an inquiry into the issue of family law costs is best focussed on questions of affordability and proportionality. This is relevant when considering, for example, whether to cap the upper cost of private family reports, or to increase funding for court-provided family reports pursuant to section 11F of the *Family Law Act*.

¹ ALRC Issues Paper, paragraph 102.

² *Ibid*, paragraph 103.

³ *Ibid*, paragraph 103.

⁴ *Ibid*, paragraph 104.

- 10.6. It is our experience that the hourly charge-out rate of a solicitor is not singly determinative of the amount legal costs incurred, because other factors such as efficiency will influence the end costs outcome for the client.
- 10.7. More broadly, it is our experience that the most effective means of reducing the cost to clients in resolving a family law dispute, is by the timely and efficient achievement of a resolution. Whilst that statement may appear wide and general, it is also reflective of the diverse nature of family law disputes and of the resolution processes available. A more detailed inquiry into how to reduce legal costs is perhaps best commenced with some analysis of what factors are most likely to increase a party's legal costs.

High rate of settlement of family law matters

- 10.8. Whilst the inability to settle a legal dispute will of course increase each party's legal costs, statistics published by the Family Court⁵ indicate that the court process strongly encourages settlement.
- 10.9. Statistics published by the Family Court indicate that in the Family Court, of the 20,741 total applications filed in 2016/2017, applications for final orders (as opposed to consent orders indicating a settlement) numbered 6,822⁶ or approximately 32.9% of all applications filed.
- 10.10. Of the cases which did not settle and which progressed to contested proceedings in the Family Court:
- 10.10.1. 24% settled prior to the first court hearing / conference.
 - 10.10.2. A further 32% settled before pre-trial conferencing, leaving only 44% of cases issued still on foot.
 - 10.10.3. A further 8% settled prior to receiving a trial docket, leaving only 36% of cases issued to proceed further.
 - 10.10.4. Prior to trial, a further 11% of cases settled, leaving only 25% of cases issues proceeding to trial.
 - 10.10.5. Only 15% of cases issued reached final judgment.
- 10.11. The above statistics speak to the efforts of family law practitioners and court staff, and also to the effectiveness of various methods of dispute resolution which are commonly employed in family law disputes.
- 10.12. At face value, these statistics suggest that the main problem in limiting parties' costs is not simply that family law disputes do not settle and need adjudication.
- 10.13. However, we must also be mindful of when the 85% of parties who are able to settle their dispute, are able to do so. Clearly, the 36% of cases which reach the later stages of proceedings at which trial preparation costs are more likely to be incurred, will have a

⁵ Family Court 2016/2017 Annual Report.

⁶ *Ibid.*

significant increase in their legal costs even if they do manage to reach agreement prior to judgement.

Factors which influence a person's costs of resolving a family law dispute

- 10.14. To obtain better insight into how to better reduce costs to parties, consideration is given herein to those factors which increase parties' costs.
- 10.15. It is our anecdotal experience that the primary factors which can increase a party's legal costs and disbursements, are as set out below.
- 10.15.1. The complexity (legal or factual) of a matter will influence how much time needs to be spent by lawyers and associated experts (such as child psychologists or accountants) in the preparation of a case for dispute resolution and/or trial. The issue of complexity is discussed separately in these submissions at paragraph 10.16 and following.
- 10.15.2. Court delays have a compounding effect upon parties' legal costs. The issue of delay is discussed separately in these submissions at paragraph 10.24 and following.
- 10.15.3. The behaviour of one or both parties to a legal dispute can impact heavily upon the amount of time lawyers need to dedicate to a particular matter, and can also cause delay in the resolution of disputes. The manner in which a party's behavior can influence their legal costs include:
- 10.15.3.1. the duration and frequency of telephone attendances, conferences and written communications by a client with his or her solicitor;
- 10.15.3.2. the nature and frequency of instructions from a client to communicate with the other party or their solicitor, beyond a level which is recommended by a solicitor;
- 10.15.3.3. a party's willingness (whether or not reasonable) to settle a dispute; and
- 10.15.3.4. a party's compliance, or lack thereof, with court rules, directions and orders.

The issue of complexity

- 10.16. All else being equal, a complex case will be more expensive to resolve, than a simple case. However, it is also pertinent to note that the process of 'simplifying' family law cases may, if not undertaken with care, risk injustice.
- 10.17. As discussed broadly in the ALRC Issues Paper, drafting complexity within key provisions of the *Family Law Act* may impede the settlement of a family law matter. However, it does not otherwise *necessarily* flow that drafting complexity in, for example, the parenting provisions (section 60CC) or the property division provisions (section 79) of the *Family Law Act*, will heavily impact upon parties' costs in comparison to other factors discussed herein. Issues in relation to the *Family Law Act* are discussed in these submissions at in relation to Questions 14 and 17.

- 10.18. Drafting complexity aside, family law proceedings may also involve consideration of a wide range of laws, and are not often restricted to a discreet set of facts. To illustrate:
- 10.19. It is not uncommon for family law property disputes to necessitate consideration of:
- 10.19.1. laws in relation to companies, trusts, taxation issues, contracts, real property, social security, employment, bankruptcy, insolvency, estate and probate, or compensation in its various common law and legislative forms; and
- 10.19.2. issues in relation to the valuation of real property and businesses.
- 10.20. It is similarly common for family law parenting disputes to necessitate a consideration of:
- 10.20.1. laws in respect to child welfare and crime;
- 10.20.2. issues in relation to paediatric development, child psychology, family violence and adult behavioural psychology.
- 10.21. The wide range of relevant issues in many family law cases may necessitate the involvement of expert witnesses, increase the range of issues in dispute, contribute to systemic court delays, and increase parties' costs.
- 10.22. Whilst codification and simplification may go some way towards 'streamlining' the existing legal process, there are limits to what can, and should, be done.
- 10.22.1. Parenting disputes should not be adjudicated exclusive of expert input into issues of relevance to the best interests of a child.
- 10.22.2. In property matters it is not clear that even the most aggressive simplification of the law in a manner such as the implementation of a system of "community of property", would in fact obviate the need for expert input into issues such as valuation or taxation, or to the identification of the "matrimonial property pool".
- 10.23. In our submission, attempts to reduce the complexity of family law disputes carry a risk of injustice whilst not offering a clear means of significantly reducing costs.

The issue of delay

- 10.24. Parties to family law disputes often settle matters between them with minimal or no legal assistance. For those who cannot reach agreement, various methods of alternative dispute resolution (both involving lawyers and not involving lawyers) are available, some at no or reduced cost to the parties. Beyond that, arbitration is also available to parties, if somewhat rare in its present adoption by legal practitioners.
- 10.25. In light of the raft of settlement avenues open to parties, it is then perhaps counter-intuitive that delay in the resolution of family law disputes could have such an effect of parties' legal costs. However, the court statistics demonstrate that a significant percentage of disputes settle at the 'back end' of the dispute resolution process.

- 10.26. Further, it is our anecdotal experience that delays in the family law courts flow beyond the court system, because they inform those not in the court system of their ‘fall-back’ options.
- 10.27. Analysis of settlement statistics suggests that parties who are unable to settle their dispute without reverting to court proceedings, are more likely to settle at the middle or later stages of proceedings. In our experience, there can be challenges to maintaining momentum in settlement discussions, against the backdrop of court delays.
- 10.28. Conversely, a court system in which proceedings progress swiftly from the first court date to the final trial, will assist to increase efficiencies in family law dispute resolution generally, and maintain pressure on parties and their lawyers to advance settlement discussions.
- 10.29. Court delays may also give rise to interim issues which need to be adjudicated, adding to parties' expense. Notwithstanding that proceedings are on foot, people often continue to make ordinary decisions and take ordinary actions as time moves on - those actions may then give rise to legal issues which need interim adjudication. For example:
- 10.29.1. In parenting matters, a delay of 18 months or longer to trial may give rise to interim issues in relation to the graduation of or changes to parenting routines over time, the maturing of infant children, or the children’s schooling. More broadly, family reports and other expert reports may be obtained to assist the court in resolving interim parenting issues at the outset of proceedings, but then require updating in the lead up to a subsequent trial.
- 10.29.2. In property matters, court delays may necessitate interim applications being made at various junctures with regards to interim financial support. Parties also face a disincentive to obtain expert reports for the purpose of assisting a mediation or other form of alternative dispute resolution, if they also face the prospect of needing to pay for an updated report prior to a final trial.
- 10.30. Statistics published by the Federal Circuit Court indicate that in 2016/2017⁷, indicate that applications for final orders were filed in 17,791 cases, whereas interim applications were filed in 22,050 cases. Similar statistics were gathered in the preceding financial year. Whilst acknowledging that in any financial year the interim applications and the final orders applications may not correlate to the same batch of cases, and also that many applications for final orders are coupled with an interim application (the First Return Date being an opportunity to conduct an interim defended hearing), approximately 4,259 more interim applications (almost a quarter more) were filed than proceedings were issued.
- 10.31. A similar story can be told from the equivalent Family Court statistics⁸ - 2,748 final order applications were filed in 2016/2017, versus 3,469 interim applications.
- 10.32. It is of further note that in the Family Court, a proceeding in which there is an extant interim application will progress more slowly towards a final trial. Whilst that system of case progression may be justified for other reasons, one effect is that intractable family law disputes may become more delayed in their resolution.

⁷ Federal Circuit Court 2016/2017 Annual Report.

⁸ Family Court 2016/2017 Annual Report.

- 10.33. It is our experience that many interim issues which are presently ventilated before the family law courts could be dealt with on a final basis, if court delays were significantly reduced.
- 10.34. Parties to a dispute are arguably more motivated to settle their matter at an early stage if a final trial is listed in the short term, whereas the prospect of a final trial at a date unknown, in perhaps 18 to 24 months' time, provides little external pressure to negotiate where parties are (or perhaps only one party is) otherwise disinclined to do so.
- 10.35. The existence or exacerbation of financial imbalance between parties, with flow-on effects as to their respective bargaining positions, may also be remedied to some extent by the quick passage of proceedings towards a final trial date.
- 10.36. Delays may also increase client costs in a linear manner, with regards to the volume of client attendances and the amount of correspondence exchanged between parties or their representatives.
- 10.37. Furthermore, court delays increase parental frustration and community disenchantment with the justice system. It is uncertain if this contributes in any manner towards non-compliance with court orders.
- 10.38. In our submission, the reduction of delays in the court system would be an effective way of reducing parties' legal costs.
- 10.39. We wish to be clear that in making the above comments, criticism is in no way levelled towards the judicial and other staff of the family law courts. Rather, Lander & Rogers echoes recent calls by the Law Council of Australia for increased funding to be allocated towards the courts to address shortfalls in judicial appointments.

Specific suggestions in ALRC Issues Paper

- 10.40. The ALRC Issues paper notes a recommendation of the SPLA committee, to develop "*a fee schedule to regulate the costs of family reports and other expert witnesses*"⁹. With regards to this suggestion, in our submission:
- 10.40.1. The 'capping' of the upper limit of fee ranges for expert reports may be of little practical benefit to parties with limited financial resources.
- 10.40.2. The setting of a tiered 'fee schedule' carries the risk of causing a 'flight' of psychologists and other experts away from the family law sphere of work, at all levels of price-point, and should only be considered after careful consultation with relevant expert bodies.
- 10.40.3. Presently, the cost of obtaining an expert report, be that from a child psychologist or valuation expert, varies widely between the 'low end' and the 'high end'. It is common for lawyers to agree upon a specific expert with reference to factors including the likely expense and the financial circumstances of their respective clients.

⁹ ALRC Issues Paper, paragraph 105.

- 10.40.4. The need to update expert reports as proceedings progress towards a trial, significantly adds to parties' legal costs.
- 10.41. The ALRC Issues paper notes the Productivity Commission's suggestion of a low-cost family dispute resolution service¹⁰, with regards to which:
- 10.41.1. The availability of low-cost family law dispute resolution through Family Relationship Centers appears to have reduced the amount of family law parenting disputes which pass through the family law courts.
- 10.41.2. The offering of non-legal family dispute resolution services in relation to property matters must be approached with caution, because even 'small cases' in the property sphere may involve difficult considerations such as taxation or Centrelink issues, or the legal release from liability for debts.
- 10.41.3. The creation / refinement of appropriately resourced low-cost dispute resolution services (both outside and within the court system) may nonetheless be helpful to resolve family law disputes with minimal cost and disruption to parties.
- 10.42. The ALRC Issues paper notes the Productivity Commission's suggestion of simplifying the law in relation to property matters¹¹, in relation to which:
- 10.42.1. It is uncertain to what degree a simplification of, for example, the property division sections of the *Family Law Act* (primarily section 79) would reduce legal costs.
- 10.42.2. However, it is arguable that the discretionary nature of the property and parenting provisions of the *Family Law Act* may increase legal costs, insofar as parties and their advisors are limited in their ability to precisely project outcomes of litigation against which to address offers of settlement.
- 10.42.3. Nonetheless, we must also consider the potential injustice to parties in both the property and the parenting sphere, in the event of a significant diminution of judicial discretion over such matters. This issue is discussed further in relation to Question 17.
- 10.43. The ALRC Issues paper notes the Productivity Commission's discussion of 'unbundling' of legal services, with regards to which:
- 10.43.1. 'Unbundled' legal assistance can be provided to clients presently, although in our experience it provides a somewhat compromised degree of legal service, and is rarely sought by parties.
- 10.43.2. The unbundling of legal services may carry with it a higher degree of risk of serious compromise to a case, with the attendant need to clarify issues of potential liability if we seek a serious take-up of the offering of unbundled legal services by the legal profession.
- 10.43.3. The community can only benefit from increased awareness as to an individual's options with regards to seeking legal assistance.

¹⁰ ALRC Issues Paper, paragraph 107.

¹¹ *Ibid.*

Conclusion

- 10.44. It is respectfully suggested that the focus of efforts to reduce the costs to parties to a matrimonial dispute are concentrated towards:
- 10.44.1. Promoting the adoption of various methods of alternative dispute resolution.
 - 10.44.2. Building upon existing efforts to assign proceedings in the family law court system to different 'judicial streams' as appropriate to their level of complexity.
 - 10.44.3. Increasing funding for judicial appointments, as the most effective way of reducing the current court delays.

Question 14 – What changes to the provisions in Part VII of the *Family Law Act* can be made to produce the best outcomes for children?

- 14.1. It is submitted that the present legislative framework contains important elements in relation to the adjudication of parenting matters which should be retained, and which provide for the following:
- 14.1.1. Parenting matters are to be determined with the children's best interests as the paramount consideration.
 - 14.1.2. The protection of children from harm, abuse or neglect is one of the primary considerations in determining a child's best interests.
 - 14.1.3. Aside the risk of harm, abuse or neglect, the benefit to children of having a meaningful relationship with both parents is another primary consideration.
 - 14.1.4. A wide range of other relevant factors is also required to be considered in relation to determining a child's best interests.
- 14.2. With regard to the 2006 reforms to Part VII of the *Family Law Act*:
- 14.2.1. There continues to be a high degree of community misapprehension that the *Family Law Act* has a 'presumption' of 'shared care', as opposed to mandating that in specific circumstances a judge must consider whether an 'equal time' arrangement is in a child's best interests. The prevalence of any disconnect between the expectations of the community (or sections of the community) and the operation of legislation should itself be of concern.
 - 14.2.2. Whilst there is no express provision in the legislation to reflect the different nuance of considerations often applied to infant children in family law

disputes, the court may take the child's age, development and considerations of attachment under section 60CC(g) or (m).

14.2.3. The framework of judicial consideration described in *Goode & Goode* is certainly complex in its nature, however from a costs point of view it does not necessarily increase a party's legal costs:

14.2.3.1. A 'checklist' of considerations concerning a child's best interests was present in the preceding legislation (former section 65E) and is otherwise a valuable guide to practitioners as to what evidence should be led in parenting cases - in the absence of a checklist, it is likely that good practice would dictate that those same issues be addressed in evidence, at the same cost to the client.

14.2.3.2. The somewhat circular nature of judicial consideration of the child's best interests in the framework described in *Goode & Goode* does not necessitate additional evidence, or markedly increase trial times.

14.3. More generally, the adverse consequences of court delay are of particular relevance to parenting cases, because:

14.3.1. Child protection issues and allegations of harm or risk of harm can be compounded:

14.3.1.1. The difficulty of making judicial findings of fact at an interim level means that, on one hand a parent who is accused of harming a child may be deprived of time with that child for an extended period, whilst on the other hand a parent who holds concerns for a child's welfare whilst in the care of the other parent may feel frustrated in not being able to properly ventilate those concerns in a timely manner.

14.3.1.2. It is arguable that some parents are not forced to properly contemplate their problematic behavior, or the risks of an adverse legal outcome on parenting matters, until immediately prior to a final trial.

14.3.1.3. It is acknowledged that the Family Court Magellan List for cases involving allegations of serious child abuse, makes valuable steps towards addressing the issue of delay in the more serious parenting cases.

14.3.2. Parenting routines which are agreed to or mandated at the outset of proceedings may be more difficult to displace after a period of 2 or more years, depending upon the particular circumstances of a family. This may also give rise to a perceived need to seek to change parenting arrangements prior to the final hearing, by making a further interim application.

14.4. The recent legislative steps towards introducing a Parenting Management Hearings pilot in the Parramatta Registry, to deal with less complex parenting matters, highlight some interesting tensions between the need for due process in decision making, and the benefits of 'fast tracking' parenting matters of a less complex nature. Whilst any pilot program will of course give rise to valuable data in respect of how effectively and

efficiently such a system runs, we share the concerns raised by the Law Council of Australia¹², and particularly with regard to:

- 14.4.1. The constitutional questions arising out of the purported assignment of administrative powers in relation to judicial decisions to be made under the *Family Law Act*.
- 14.4.2. The creation of a third / fourth tier of decision making in relation to parenting matters.
- 14.4.3. The creation of an additional tier of appeal in relation to parenting matters.
- 14.4.4. The inability of parties to be legally represented, save for with leave, before a Parenting Management Hearing.
- 14.4.5. The risk, when parties are self-represented, of parents cross-examining each other in the context of the past occurrence of family violence.
- 14.4.6. The difficulty in assessing what is, and what is not, a less complex parenting matter - particularly in the absence of legal representation.
- 14.4.7. The possibility that a Parent Management Hearing Panel may be staffed by one member only, with that member's expertise not necessarily being legal in nature - noting that appeals from a decision of the Panel are based on errors of law.
- 14.4.8. The present judicial system in relation to parenting matters rests upon the decision being made by a qualified lawyer, with expert assistance from qualified child psychologists and other experts. It is unclear, when pairing the lawyers and psychologists together on a Panel, what place expert reports will have in the system, and how for example children's wishes are to be ascertained.
- 14.4.9. Difficulties which arise with regards to parties giving consent to participate in the Parenting Management Hearings, and also with regards to any party who wishes to withdraw such consent.
- 14.4.10. It is suggested that the possible creation of Parenting Management Hearings should not detract from the need to better resource the existing court structures, and thereby reduce the prejudicial delay in resolving many parenting disputes.

¹² Law Council of Australia submissions to the Senate Legal and Constitutional Affairs Committee dated 7 February 2018.

Question 17 – What changes can be made to the provisions of the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

- 17.1. The various sections (cited herein in connection with parties to marriages and parties to de facto relationships, respectively) of the *Family Law Act* which are cited in the ALRC Issues Paper to govern the division of property¹³, and which are the subject of these submissions, are as follows:
- 17.1.1. Sections 78 / 90SL, which empower the court to make declarations with regards to the interest of the parties in property;
 - 17.1.2. Sections 79 / 90SM, which empower the court, inter alia, to alter the parties' interests in property; and
 - 17.1.3. Sections 90AE and 90TA, which give the court wide but fettered power to make orders binding upon and affecting the substantive interests of third parties.
- 17.2. Of the above referenced sections, it is section 79 / 90SM that is perhaps the least clear, insofar as it expresses broad concepts such as "contributions", does not illustrate clear steps of judicial reasoning, and confers a wide discretion upon judicial officers.
- 17.3. Conversely, whilst in many fields of legislation a premium is placed upon clarity and predictability, there is sound reason to maintain a high degree of judicial discretion in the field of family law, which governs a wide range of individuals and family circumstances.
- 17.4. Whilst s79 / 90SM may be somewhat opaque, that is not to say that members of the public are completely uninformed as to the operation of the property settlement divisions of the *Family Law Act*.
- 17.4.1. In our experience, there is some degree of common knowledge as to how property settlements are determined by the law – perhaps a byproduct of the high "divorce rate" in our community is a broad social communication of relevant legal issues.
 - 17.4.2. Whilst it cannot be said that members of the public have an in-depth knowledge of the "five step test" described by the High Court of Australia in *Stanford v Stanford*, when proposing to make wholesale changes to that legislative scheme we should also consider to what degree the general community has known of and perhaps relied upon those laws in organizing their property and making financial decisions. That issue may also inform the degree of community acceptance, or otherwise, of any significant changes to the property division laws.
- 17.5. With the above in mind, we provide brief comment below as to the various suggested alternative systems of property division as described in the ALRC Issues Paper.

¹³ ALRC Issues Paper, paragraphs 146 to 148

A system of community of property

- 17.6. There would be vastly different outcomes between the current system of family law property division, and that which would occur in a system of “community of property” whereby property acquired before or after a relationship belongs to the party who acquired it, but property acquired during the relationship is presumed to be jointly owned. For example:
- 17.6.1. Under a simple system of community of property, if a Husband owned a house (now worth \$2million) prior to a marriage, and in the subsequent 20 years of marriage, the Husband and Wife acquired a holiday house worth \$50,000 and also had 3 children now of school age and who live under the Wife’s primary care, the Wife *may* only receive entitlements of \$25,000¹⁴.
- 17.6.2. In the same case decided under the present system of property division pursuant to the *Family Law Act*, the Husband’s “initial contributions” of owning the house would be taken into account (at a weight depending on factors such as the net equity in that property at that time, and the length of the relationship) but would also be balanced against factors such as any disparity in the parties’ earning capacity and the Wife’s care of 3 children of the marriage. In the same case, the Wife would certainly receive a greater share if the matrimonial assets under the *Family Law Act*, than she would under a simple community of property approach.
- 17.7. Whilst there are obvious benefits to a legislative test that is both clear and free of complexity, these factors do not always equate to a test which affords justice to parties.
- 17.8. In any event, the introduction of a community of property test into the *Family Law Act* would not be certain to increase the clarity or simplicity of the property division scheme.
- 17.8.1. Several aspects of a community of property regime may be handled differently. For example, in the case of a property owned at the commencement of a relationship, how do we factor in any liability encumbering that property, and what if the other party helped to pay down that loan during the relationship?
- 17.8.2. The more 'tweaks' that are made to a community of property system, the more it may begin to resemble our current system of matrimonial property division, with its relative complexity, discretion and unpredictability.
- 17.8.3. A community of property approach would not be immune from the need to consider issues of value, taxation implications, and other ancillary issues and laws.

¹⁴ On the basis that no consideration is given to the degree to which the Husband's house was encumbered, at the commencement of the relationship.

A system of presumed equal sharing of property

- 17.9. The Productivity Commission¹⁵ and the Australian Law Reform Commission¹⁶ have each made suggestion of investigation into a system of presumed equal sharing of "relationship property", in accordance with the model adopted in the New Zealand *Property (Relationships) Act 1976*.
- 17.10. In brief comment, it would appear that this system of property division is not free from complexity and ambiguity, in the following respects:
- 17.10.1. What is, and what is not, "relationship property" as opposed to "separate property" may be the subject of legal dispute which necessitates the giving of detailed evidence with regards to historical factors.
- 17.10.2. Issues of valuation, taxation, trust law, and other associated laws may still be relevant to the legal inquiry into the division of property.
- 17.11. A stark distinction also exists between the New Zealand and the Australian laws in relation to property division, insofar as the former contains no consideration of the parties' future needs in a manner approximating that of section 75(2) of the *Family Law Act*.

A system of presumed equality of contributions

- 17.12. The Family Law Council has previously opined in respect to a proposed system of presumed equality of contributions (but not presumed equal sharing of matrimonial assets) :
- "...It appeals to the intuitive sense that where both parties have made contributions over a long marriage, and where, as is now clearly the law, there is no assumption that some kinds of contributions (eg financial) are inherently more valuable than others (eg child care and homemaking), they should be considered to have made equal contributions. And it removes, or at least eases, the difficult, complex and arguably impossible task of comparing contributions of different kinds over a substantial period."¹⁷*
- 17.13. The particular circumstances in which such a presumption may be displaced, are suggested in the same report at paragraph 13.18, and include:
- 17.13.1. pre-relationship assets;
- 17.13.2. inherited or gifted assets;
- 17.13.3. post-separation factors such as care of children or the benefit of living in the former family home; and
- 17.13.4. family violence during the relationship.
- 17.14. Any legislative presumption of equal contributions would maintain a high degree of judicial discretion, both through the factors which may displace such presumption, and also to the incorporation of section 75(2) / 90SF in the court's consideration.

¹⁵ *Access to Justice Arrangements* (Inquiry Report No 72, vol 2, 2014) rec 24.4.

¹⁶ *Matrimonial Property, Report No 39* (1987) rec 7.

¹⁷ Submission on the Discussion Paper - Property and Family Law : Options for Change (1999) paragraph 8.7

- 17.15. A system of presumed equality of contributions with defined issues to displace that presumption, and the continued adoption of s75(2) / 90SF, may help to reduce parties' legal costs.

Codification of the "Kennan" principles

- 17.16. There is presently a wide range of judicial discretion in a property case as to what weight, if any, to give to findings as to the occurrence of family violence during a relationship, when making an assessment of each party's contributions.
- 17.17. Should Parliament deem it appropriate to mandate that family violence issues be judicially considered when assessing each party's contributions pursuant to section 79 / 90SM, then codification may assist in clarifying the issue for practitioners and parties.
- 17.18. However, some care should be taken with regards to any such proposed legislative amendment, which may have unintended consequences in regards to costs, as explored below.
- 17.18.1. It is presumed that in any codification of the "Kennan" principles, the severity of an action or of its subjective effect upon a victim, will be relevant to the degree of weight attributed to the family violence when assessing each party's contributions.
- 17.18.2. The definition of 'family violence' as contained in section 4AB of the *Family Law Act* is wide in nature, and justifiably so. Accordingly, there are a wide range of actions which may fall within that definition, irrespective of severity.
- 17.18.3. Concerns have been expressed to the Australian Law Reform Commission¹⁸ that the current definition of family violence is too narrow, and specifically that it excludes both abuse of process, and psychological abuse. Criticism is not made herein in relation to those expressed concerns.
- 17.18.4. Further concerns have been expressed to the Australian Law Reform Commission¹⁹ that the current definition of family violence is too restrictive in comparison to state and territory family violence legislation insofar as it incorporates the necessary elements of control, coercion or fear. Criticism is not made herein in relation to those expressed concerns.
- 17.18.5. The courts can expect to experience an increase in allegations of some type of family violence, at varying degrees of severity, if the issue is expressly made relevant to property cases as well as parenting cases, and more so if the definition is further widened.
- 17.18.6. By virtue of the nature of such allegations, and their effect upon a party's property settlement entitlements, we can expect that many parties who are accused of perpetrating family violence will defend those allegations.
- 17.18.7. Some flow-on effects of this may be:

¹⁸ ALRC Issues Paper, paragraph 132.

¹⁹ *Ibid.*

- 17.18.7.1. Parties to family law property disputes will have additional legal and factual issues in dispute, which must be overcome if they are to reach a settlement.
- 17.18.7.2. Due to the nature of the historical evidence which may need to be led in relation to many such allegations, parties' legal costs would be increased and in some cases, to a significant degree.
- 17.18.7.3. This issue is of particular concern in cases involving modest asset pools, wherein the issue of affordability and proportionality of legal costs is at its most potent.

Question 22 How can current dispute resolution processes be modified to provide effective low cost options for resolving small property matters?

- 22.1. In relation to the 'one pathway for all' approach taken in relation to both 'small property matters' and also large or complex property cases, we share concerns raised²⁰ at the limited availability of low-cost and less formal dispute resolution avenues for smaller matters.
- 22.2. The efficiency with which the legal system can deal with 'small cost' property matters will influence the costs to the parties of such disputes (with reference to paragraph 10.24 and following hereof).
- 22.3. At the outset, it appears that the identification of the demographic and type of matters that fall within the criteria of "*small property matters*" needs to be identified. In our anecdotal experience, small property matters are generally those that fit within many if not all of the following criteria:
 - 22.3.1. The parties are of low income or are of one income earner families;
 - 22.3.2. There is often a child or children of the relationship or marriage;
 - 22.3.3. The main assets of the parties may be Superannuation entitlements, which may not be immediately available for the parties to access.
 - 22.3.4. In other cases, the main assets may be and/or the net equity of a primary residence and / or depreciating assets such as motor vehicles or caravans;
 - 22.3.5. Where there is real property, it is often heavily encumbered and often with interest only payments being made. The net equity of the home is therefore largely due to the fluctuation of the property market as opposed to a reduction of the home loan;
 - 22.3.6. Neither party may be able to afford to retain the primary residence without the income or borrowing capacity of the other.

²⁰ *Ibid*, paragraph 173

- 22.3.7. It is even more likely that the non-income earning party is unable to retain the home however they may require the resolution of the property matter before being able to afford to rent alternative accommodation. Therefore there may be risks of homelessness;
- 22.3.8. There is often significant personal liabilities such as credit card debts and personal loans;
- 22.3.9. There also may be finance over motor vehicles of which the liability is often more than the resale value of the motor vehicle;
- 22.3.10. There are often family violence issues, including financial abuse particularly by the primary or sole income earner;
- 22.3.11. There may also be language and / or cultural barriers and / or barriers due to disability and / or mental health which affect the parties or either of them, particularly the non-income earning party, accessing legal assistance or justice.
- 22.3.12. Parties do not often have property matters alone. They often have other legal or social issues in which they require external assistance such as:
 - 22.3.12.1. Parenting issues;
 - 22.3.12.2. Family violence issues and Intervention Order Application issues;
 - 22.3.12.3. Child support issues;
 - 22.3.12.4. Immigration issues (where one or more parties are not Australian citizens and may be reliant on the other with respect to their eligibility to stay in the country);
 - 22.3.12.5. Centrelink issues; and
 - 22.3.12.6. Counselling needs.
- 22.4. The complexity of the above factors presents a challenge in defining a 'small property matter' for the purpose of any gate-keeping provisions which may be inserted in the Family Law Act or associated regulations.
- 22.5. In our anecdotal experience, small property pools can be the most difficult matters to resolve for the following reasons:
 - 22.5.1. There is a higher likelihood that corresponding party is self-represented and has not been able to access appropriate legal advice;
 - 22.5.2. There is a higher likelihood that matters require external assistance, being the court system or alternative dispute resolution to resolve matters as opposed to being dealt with privately or by way of negotiation between the parties. This is general due to:
 - 22.5.2.1. The high significance of family violence including financial violence and control within our communities;

- 22.5.2.2. The lack of understanding as to how the *Family Law Act* operates - for example , the belief in some communities that homemaking and parental responsibilities are not equivalent to paid employment in terms of matrimonial contributions.
- 22.5.2.3. There is generally insufficient net property available for division and therefore these matters are more likely to be hard fought by the parties due to their perceived need for a greater share of the matrimonial asset pool;
- 22.5.3. There is a higher likelihood that parties are from a one income earner family which creates inequality with respect to financial power;
- 22.5.4. There is often a lack of financial resources to properly obtain relevant financial disclosure, particularly with respect to a party that has more financial control of the assets;
- 22.5.5. The smaller the asset pool, the quicker the assets may be dissipated by the parties, particularly in circumstances where one party is the primary or sole financial controller;
- 22.5.6. There is often a difficulty in severing the property matter from any contemporaneous parenting matter (which is generally pertinent to the outcome of the property matter), child support matter or Intervention Order application proceedings.
- 22.6. In our anecdotal experience, the major issues impacting small property matters using the current dispute resolution processes are:
 - 22.6.1. The lack of free legal assistance and / or advice with respect to property matters;
 - 22.6.2. The lack of free mediation services with respect to resolving property matters without issuing an application to court;
 - 22.6.3. The need for experienced personnel that understand the complexities of family law and family violence and the intersection between the two when dealing with property matters;
 - 22.6.4. The cost attached to the filing of subpoenas and the production of requested documents from the subpoenaed parties;
 - 22.6.5. The cost attached to any Information Request Form to a Superannuation Fund;
 - 22.6.6. The inability to obtain information as to which Financial Institutions and / or Superannuation Fund a party holds accounts with;
 - 22.6.7. Delays of the court system, specifically:
 - 22.6.7.1. the delay and lack of resources of the Court to hear interim applications, such as part property settlements and / or maintenance applications; and

- 22.6.7.2. the delay in obtaining a final hearing date.
- 22.6.8. Small property matters are placed in the queue with all other matters listed before the Federal Circuit Court of Australia.
- 22.6.9. Delays of the court system causes further costs for client and allows opportunistic parties to use 'burning off' tactics (as dealt with at paragraph 25.4.5 hereof).
- 22.6.10. The difficulties faced by self-represented parties to understand the rules of evidence and produce relevant evidence in accordance with those rules;
- 22.6.11. The difficulties faced by parties to providing evidence of family violence pursuant to the rules of evidence;
- 22.6.12. The difficulty and cost of tracing alleged dissipated funds and / or property;
- 22.6.13. The lack of penalties or resources of the Court to hear interim issues such as parties failing to provide full and frank disclosure, breaching Orders, failing to attend hearings and / or destroying evidence.

Recommended modifications to the current dispute resolution processes to reduce cost and delay

- 22.7. Australian Government to increase funding to Federal Circuit Court of Australia and Family Court of Australia, to increase the number of Judges and Registrars available to manage the demanding caseload.
- 22.8. Victorian Government to increase funding to Legal Aid to broaden availability of funding to clients with small property matters.
- 22.9. Australian Government in consultation with the Federal Circuit Court of Australia and Family Court of Australia, to implement a Small Claims List in the Federal Circuit Court list with simplified procedural and evidentiary requirements²¹.
- 22.10. Establish eligibility criteria for a Small Claims List for resolution of property disputes of between \$20,000 and \$400,000 and in consideration of the matters raised at paragraph 22.6 hereof.
- 22.11. Consideration may also be given to how to simplify the process of evidence, given the difficulties which many self-represented parties face in drafting affidavits. For example, in relation to matrimonial disputes, at the outset of proceedings a prescribed form could be completed by the parties with assistance of court staff, to describe:
- 22.11.1. The commencement and conclusion date of the relationship, date of marriage and details of each child relevant to the proceedings;
- 22.11.2. The current assets, liabilities, financial resources and superannuation entitlements of the parties;
- 22.11.3. Those assets liabilities, financial resources and superannuation entitlements in each party's name at the commencement of the relationship;

²¹ Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* rec 1.

- 22.11.4. An outline of each party's other contributions pursuant to section 79(4) of the *Family Law Act*;
 - 22.11.5. An outline of each party's financial circumstances and other issues arising pursuant to section 75(2) of the *Family Law Act*.
- 22.12. Victorian Government in consultation with Victoria Legal Aid to implement Arbitration process charged on a graduated scale according to income for resolution of property disputes of between \$20,000 and \$400,000²² similar to the Legal Aid Queensland²³ model as follows:
- 22.12.1. Legal Aid fund solicitors for each party;
 - 22.12.2. Parties exchange financial statement in accordance with Rules;
 - 22.12.3. Each party request and exchange relevant financial documents within certain time frame;
- 22.13. Small matter arbitration also provides a potentially useful tool for resolving small property matters. For example, a system of small claims arbitration could be implemented with features including the following:
- 22.13.1. Where any party fails to provide any requested disclosure the matter is brought before the Arbitrator via a phone conference and the Arbitrator be provided powers to make an award as to any necessary Subpoenas to be issued with the cost to be borne by the non-producing party;
 - 22.13.2. Each party then submit to the Arbitrator an Affidavit, Application and Case Outline;
 - 22.13.3. The Arbitrator be granted powers to make an award for any valuation and / or expert reports including medical reports or Psychological Assessments necessary to be funded by Legal Aid;
 - 22.13.4. The parties via their solicitors be provided 1 hour to make submissions via telephone to the Arbitrator;
 - 22.13.5. The parties to be provided 2 weeks to settle the matter after which time the Arbitrator will begin to write his judgment and make an award;
 - 22.13.6. The costs of the Arbitration shall be a small percentage of the asset pool available for division or a cap fee, which is lesser. If the Arbitrator is required to make a finding then there should be a small additional fee to be paid by the parties.
- 22.14. Government to increase funding to Victoria Legal Aid to fund the Arbitration model as set out above.

²² Australian Law Reform Commission *Review of the Family System*, pg 55 para 175; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) box 24.7

²³ Australian Law Reform Commission *Review of the Family System*, pg 55 para 175; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) box 24.7

- 22.15. Establish eligibility criteria and appropriateness for matters listed for Arbitration. The appropriateness of Arbitration for a matter will need to be considered particularly in circumstances where there are:
- 22.15.1. Urgent interim matters such as the dissipation of assets, urgent maintenance / need for access to funds by a party;
 - 22.15.2. Significant family violence allegations have been made;
 - 22.15.3. Contemporaneous proceedings are on foot that are inextricable to the parties' property matter such as high conflict parenting matters or change of residence applications;
 - 22.15.4. There are language, cultural and or disability barriers that may affect either parties' ability to participate in such a process.
- 22.16. In any arbitration model, it is important to reduce the scope of inter-party debate with regards to the rules and other mechanics of the arbitration. To assist, a comprehensive set of model arbitration rules could be annexed to the Family Court Rules and Federal Circuit Court Rules.
- 22.17. Australian Government in consultation with the Federal Circuit Court of Australia and Family Court of Australia to increase interim case management of the Small Claims List to allow Registrars to check and enforce compliance, in particular with financial disclosure and encourage costs orders against the non-producing party²⁴.
- 22.18. Australian Government legislate powers of the Federal Circuit Court of Australia and Family Court of Australia to issue subpoena and make costs orders against the non-producing party.
- 22.19. Consent orders to be made on the basis of a simplified application form or statement of agreed facts, to reduce the expense of completing the currently used Application for Consent Orders form.
- 22.20. A specific provision in the Family Law Act, empowering the family law courts to make greater adjustments under s79(a) or s90SM of the Act in circumstances where a party has failed to provide full and frank financial disclosure, might assist in obtaining compliance from parties. It is noted that the family law courts presently have the power to take such actions in circumstances where the court is satisfied that one party is not disclosing the entirety of their property to the court.

²⁴ Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving Economic Equality in the Family Law System* rec 4 a.

Question 25 – How should the family law system address misuse of process as a form of abuse in family law matters?

- 25.1. Misuse of process, including but not limited to non-compliance with orders and directions, has a deleterious effect upon the resolution of family law matters, with the effect of increasing parties' costs, causing delays in proceedings, and often increasing the stresses associated with litigation.
- 25.2. Amongst the court's tools with which to regulate parties' behavior during proceedings, the ability to make an adverse costs order is amongst the most powerful. It is then unsurprising that calls are made to increase the regularity of costs orders, by those who practice in an area of law in which compliance with orders and directions is an ongoing issue.
- 25.3. Section 117(1) of the Act appropriately states that unless otherwise ordered, each party bears its own costs. Section 117(2A) of the Act sets out various factors for the court to consider in relation to whether to make a costs order against any party, and includes issues such as parties' behavior during the course of litigation, the success or otherwise of applications, and the parties' respective financial circumstances.
- 25.4. Discussion of the practicalities of costs orders is set out below.
 - 25.4.1. It is often difficult to say that a party has, using the language of the Act, been "*wholly unsuccessful*" in any application. Family law matters are not often discreet in their factual and/or legal nature, even with regards to interim applications. It is common for interim orders to be sought in relation to a number of issues, and then met with a response which seeks a number of orders on a different set of issues.
 - 25.4.2. Offers to settle and 'Calderbank letters' may at times have particular relevance in relation to a costs argument, but at other times the proper consideration of an offer to settle is objectively impracticable because of outstanding financial disclosure or valuations. If, for example, there is a lack of clarity concerning the composition or value of the matrimonial asset pool, a party to proceedings may not be able to accurately quantify the likely range of outcomes of the proceedings against which to reference any settlement offer.
 - 25.4.3. The court presently has power, pursuant to section 117 of the Act, to make costs orders against recalcitrant or non-complying parties. Consideration may be given to strengthening those provisions, to require the court to "consider" making a costs order in the event of a finding of non-compliance (including financial non-disclosure).
 - 25.4.4. With regards to the above, consideration should be given to the following issues:
 - 25.4.4.1.1. The non-compliance of some parties is more deliberate or calculated than that of others.
 - 25.4.4.1.2. The non-compliance of some parties is more prejudicial than that of others.
 - 25.4.5. Using the power to make an adverse costs order is perhaps less effective in relation to the practice of "burning off", by making ongoing interim

applications and appeals which are designed to cause expense and delay. Each individual application or appeal within such a process (or perceived process) may not be devoid of all legal merit, or otherwise be the appropriate subject of a costs order. The abuse of process in “burning off” may instead lie with the amount or frequency of interim applications filed, and it may therefore be the case that a series of orders are made to reserve each party’s costs of numerous interim proceedings, in anticipation of a costs order being sought by the aggrieved party at the final trial. A settlement reached between parties prior to a final judgement may, or may not, take into account one or both party’s legal expenditure.

- 25.4.6. The above discussion is also relevant to any proposals to expand the courts' powers to summarily dismiss interim applications, if satisfied that such applications constitute an abuse of process or have no reasonable prospect of success²⁵. Specific reference is made to the legislative amendments proposed in the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* (Exposure draft provisions)²⁶. We support efforts to increase the ability of the courts to regulate unmeritorious applications and abuses of process.
- 25.5. The suggestion that appeals of interim decisions should proceed only with leave of the court and/or only questions of law²⁷, attracts some natural interest, due to the inevitable expense flowing from appeals. The associated compromise of parties’ existing legislative rights to interim appeal, may be mitigated in some instances by a corresponding reduction of court delays.

Question 29 – Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

- 29.1. Problems frequently encountered in relation to parenting matters before the family law courts, including compliance issues, raise questions about the appropriateness of a single-event model of civil litigation for parenting disputes, as discussed in the Issues Paper²⁸.
- 29.2. In complex parenting matters, the benefits of integrated support services, and of co-ordination between different jurisdictions, were recently discussed at length by the Law Council of Australia in the report *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*²⁹. There is obvious benefit to increased co-ordination between various courts, and also various support services.
- 29.3. The provisions of Division 12A of Part VII of the *Family Law Act*, and the Less Adversarial Trial case management framework appear to be seldom adopted by parties³⁰, and there are suggestions that the approach is overly protracted³¹.

²⁵ ALRC Issues Paper, paragraph 194.

²⁶ Section 12.

²⁷ ALRC Issues Paper, paragraph 195.

²⁸ ALRC Issues Paper, paragraph 212.

²⁹ Refer recommendations 1 to 6.

³⁰ ALRC Issues Paper, paragraph 216.

³¹ *Ibid*, paragraph 218.

- 29.4. Constitutional difficulties emanating from federal judicial officers engaging in work that is not ancillary or incidental to their judicial power, are acknowledged.
- 29.5. A hybrid model, which links the reportable monitoring of compliance and the parties' engagement of services to either registrars of the court or to external services, may provide significant improvement upon the limitations of the current litigation model.

Question 30 – Should family inclusive decision-making be incorporated into the family law system? How could this be done?

- 30.1. The use of family inclusive decision making in indigenous communities has evident benefits. The adoption of this process in the context of cases involving family violence has been posited, with note that families are often intrinsically involved in the support of victims of family violence.
- 30.2. Whilst family inclusive decision making models may on one hand add a layer of additional voices into an already complex resolution process, in our experience as solicitors it is often the case that family members have input into their resolution, in manners that range from attending at court with their sibling/child, attending at conference with solicitors and counsel, or simply providing input, support and advice 'over the kitchen table' at home.
- 30.3. Whilst this informal / ancillary family input often contributes to the resolution of a matter, and also to the parties' perceptions of the merits of a resolution outcome, further consideration is warranted into how family involvement in ADR may be formally increased, with consent of the parties.

Lander & Rogers

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