C/O The Executive Director
Australian Law Reform Commission
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3 May 2018

Dear Professor Rhoades

The Australian Bar Association (ABA) is the peak body representing nearly 6000 barristers throughout Australia. Established in 1963, the ABA is committed to serving our members, improving our profession, and promoting the rule of law and the effective administration of justice.

The ABA appreciates the opportunity to respond to the Australian Law Reform Commission Issues Paper (the Issues Paper) as part of its review of the family law system.

A draft of the submission by the Family Law Section of the Law Council of Australia (LCA) was shared with the ABA and we support the LCA responses as viewed.

In addition, the ABA provides the following barrister-specific observations, prepared by our Family Law Committee and approved by the ABA Executive. Given the ABA supports the LCA submission, this ABA submission only addresses four topics:

1. Case management;
2. Costs orders;
3. Family consultants;
4. Use of the terms 'adversarial' and 'inquisitorial'.

Yours sincerely

Noel Hutley SC
President

ABA response to the ALRC Review of the Family Law System Issues Paper
May 2018

SECTION ONE: CASE MANAGEMENT

1. This section addresses a number of the questions posed, for example, but not limited to Question 20 of the Issues Paper: "*What changes to Court processes could be made to facilitate the timely and cost-effective resolution of Family Law disputes*". This is a question that has been considered and addressed many times before. Any comprehensive response to this question must involve discussion of the *family law system*, the history of the system, and include the structure of the court system and case management. A number of the questions in the Issues Paper relate to changes that could be made to the *family law system*.

2. Subsequent to January 1976 the Family Court struggled with identifying appropriate court processes that would facilitate the timely and cost effective resolution of family law disputes; there were criticisms.[1] From 1976 until the Children's Cases Program in 2004 the Family Court introduced a number of significant changes to its procedures, ranging from the introduction (and subsequent removal) of pleadings, the introduction and development of case management guidelines, differential case management, the special management of complex cases and trial management of child abuse cases.[2]

3. Prior to 2004 the Family Court undertook significant periodic reviews of court processes and ways of facilitating the timely and cost-effective resolution of family law disputes. A number of reports were produced.[3] Research for these reports included consultations with judges, members of the legal profession, court staff and various organisations. From time to time, external consultants were engaged.[4]

4. In the Foreword to the July 2000 *Future Directions Report,* the then Chief Justice wrote:

> The Family Court continues to lead the way in many areas of case management, judicial administration, integrated dispute resolution, judicial education and programs that target services to sections of the community with special needs.

[1] For example, see Practical Evidence, Mr Justice PW Young, *Affidavits* (1992) ALJ 163 and 298.

[2] For a summary of Family Court procedural reforms see *Finding a Better Way,* Family Court of Australia, April 2007 by Margaret Harrison at pp 18-24.

[3] Report of the Committee on Standardisation of Practices and Procedures, July 1985; first Report of the Simplification of Procedures Committee, November 1993; second Report of the Simplification of Procedures Committee, May 1994; report of the Evaluation of Simplified Procedures Committee, August 1997; report of the Future Directions Committee, July 2000; and Every Picture Tells a Story report, December 2003.

[4] For example, Professor Ian Scott, Justice Martin Moynihan of the Supreme Court of Queensland, and Mr Tony Lansdell of KPMG were consultants to the Future Directions Committee.

The Chief Justice also observed that the Family Court stood "*as the envy of most international family law jurisdictions*".[5]

5. The following was said of the Case Management System in the Family Court July 2000 *Future Directions Report*:

> Over more than 24 years and through a number of iterations, the Family Court has developed a sophisticated case management system that has largely met the needs of the Court and its clients.
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> …
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> The present system of differential case management involves case management by category – by type of relief (summary, interim, cause of action) and by estimated potential hearing time. It is similar to the systems that have developed in North American Courts and more recently, through the Lord Woolf reforms in the English Courts. The system has considerable advantages over the first generation of case management systems because in a high-volume Court it is not possible to give individual judicial attention to every case. Differential case management permits large numbers of cases to receive attention (the number, type and timing of events) referable to the needs and characteristics of similar cases.
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> …
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> The importance of the work of the Family Court to Australian families the resource constraints on the Court and the commitment of judges and staff to the professional delivery of accessible, high quality and timely services, call for the exploration of every possible improvement [6]

6. Since 2000, the family law system has changed significantly. The Federal Circuit Court of Australia ("FCC") (formerly known as the Federal Magistrates Court of Australia, "FMC") was established on 23 December 1999 as a result of Royal Assent of the *Federal Magistrates Act 1999 (Cth)*. Its first judicial officers were appointed in 2000; the first applications were filed on 23 June 2000 and the Court's first sittings were conducted on 3 July 2000. The Court was created to deal with the increasing workload of the Federal Court of Australia and the Family Court by hearing less complex cases. Now, the FCC deals with nearly 80 per cent of all family law matters filed in the federal courts.

7. Unfortunately, the FMC and then the FCC did not adopt many of the experiences and achievements of the Family Court. For example, unlike in the Family Court, the FMC then FCC requires the filing of an affidavit contemporaneously with the filing of an Initiating Application[7] and thus there is sequential, as opposed to contemporaneous, filing of affidavits of the parties. The pre-action procedures set out in a Schedule to the Act only apply in the Family Court but not the FCC and there is no equivalent in the FCC Rules. Further, the FMC/FCC has not embraced the Children's Cases Programme.[8] The

[5] Family Court of Australia, Future Directions Report, July 2000, p.2.
[6] Family Court of Australia, Future Directions Report, July 2000, pp.29-30.
[7] Rule 4.05 Federal Circuit Court Rules.
[8] Prof Patrick Parkinson AM in an address *Can There Ever Be Affordable Family Law?,* Current Legal Issues Seminar, Supreme Court of Queensland, Brisbane, 9th May 2017, referred to the Children's Cases Program as a great initiative and observed that it was never embraced by the Federal Magistrates Court "*which took over more and more of the basic trial load in cases where that program was likely to be most efficacious.*"

FMC/FCC also has a docket system of case management, whereas the Family Court does not (at least in the way it operates in the FCC).[9]

8. Consideration of Court processes in relation to the resolution of family law disputes must involve extensive consultation with judges, lawyers, stakeholders and others, as well as research and the professional consideration of case management and the application and management of judicial time. Professor Patrick Parkinson has observed that an "*area for reform is in relation to trial processes and that the family law system, once in the vanguard of innovation in civil justice, has now fallen behind best practice ..*".[10] In 1999 Sir Anthony Mason said: "*There must be a dedicated commitment to case management and a will to achieve the benefits which it can bring*".[11] He also observed: "*There is a need for continuous data collection and monitoring of Court performance. Without continuous data collection and monitoring of performance the Courts cannot meet legitimate demands as and when they may arise*." [12]

9. The models of case management used in both courts, particularly in the FCC, feature multiple court events such as mentions, directions hearings and more mentions. This presents particular problems for parties whose legal costs are increased by multiple Court events. If a court events adds value to a matter by determining substantive matters, or progresses a matter to finalisation, then that court event adds value to the parties and puts them further along the path of resolution. However, simple mentions of the matter, does not. Multiple court events may be necessary in complex matters but not for the majority of matters that are dealt with in the FCC.

10. Further, when a party to proceedings files an Initiating Application, in the FCC, and that Application also seeks interim orders, there is uncertainty (due to different listing practices) as to whether or not that interim application will be determined on its first return date. That said, the ABA does not argue that each application must be determined on its first return date. Rather, what we urge is certainty: that is, each litigant should know whether or not their application for interim orders will be listed for determination on the first return date, or some later date. Certainty saves costs – if it is known in advance that the application is to be heard on the first return, then Counsel can be engaged, and the matter prepared accordingly. If it is not to be heard on the first return, the client saves the costs of engaging counsel and preparation for hearing until it counts.

11. With those two matters in mind (value added court events and the first return uncertainty), the following is a discussion of a process of triage as a possible solution, particularly in the FCC.

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[9] The Federal Court of Australia has a docket system of case management. However, the case load of Federal Court judges and Federal Circuit Court judges cannot be compared. As well, there are issues with the docket system: see *Judicial Case Management and the Problem of Costs*, Chief Justice Allsop AO, 9 September 2014.
[10] Ibid, *Can There Ever Be Affordable Family Law?.* Parkinson made some constructive recommendations in relation to s. 37M of the *Federal Court of Australia Act 1976* (Cth) and s.56 of the *Civil Procedure Act 2005* (NSW).
[11] Sir Anthony Mason, *The Future of Adversarial Justice* (Paper presented at the 17th Annual Australian Institute of Judicial Administration Conference, Adelaide, 7 August 1999).
[12] Ibid

12. The Family Court of Australia had, and has, a gatekeeper model where a determination is made (usually by a Registrar) as to how matters would be dealt with. For example, what case management track should a matter be allocated to; should the matter be listed for final hearing and directions made to enable that to happen, should the matter be allocated to a judge for case management, should the matter be allocated to an ADR process, are there interim and/or procedural issues that have to be dealt with. The Family Court does, and will continue, to hear and determine the most complex family law cases. The FCC will continue to hear and determine at least 80 per cent of family law cases and thus the "triage" or gatekeeper model is entirely appropriate for that body of cases, which vary in complexity. There are some FCC cases where there may be a need for multiple court events. However, for the majority of FCC cases there has to be a model that seeks to avoid multiple court attendances. One of the difficulties that delay causes is more interventions and thus multiple events. For this reason, there also has to be adequate resourcing of the Courts.

13. For the FCC, an appropriately qualified person, ideally a Registrar of the Court, should assess the matter when filed, and determine whether it needs urgent attention, or an interim hearing in due course, or if only final orders are sought, then directions for trial. The Registrar would ensure that the application is allocated to the appropriate first return hearing and marked as to whether it was listed for interim hearing on a specific date, or not. The Registrar's decision would then be communicated to the parties by Order and they would have the certainty of knowing what their first court event would be.

14. At present, parties find themselves in the situation where they attend Court in the FCC believing (or, if properly advised, hoping) that their application will be heard and, not wanting to take a chance, engage Counsel.

15. A FCC triage process would also have the added effect that a properly qualified person could determine:
    a) the urgency of the application; and
    b) whether the application ought be listed for a hearing as opposed to a directions hearing or mention.

16. The use of Registrars to triage cases at different points through the court process could also be used to ensure that there is compliance with the Court's directions so as to avoid the costs of adjournments. Indeed, one of the difficulties occasioned by the provisions of s.117 of the *Family Law Act* as presently drafted is that it is unusual for a party to receive their costs thrown away from an adjournment. This type of situation could be addressed by a Registrar with appropriate power.

17. Chief Justice Allsop has said that case management need not be carried out by a judge and that "*Registrars or other court staff may provide the necessary form of supervision*".[13] The ABA agrees with that general proposition.

[13] Ibid, *Judicial Case Management and the Problem of Costs*,

IN SUMMARY: Case management remains crucial to the effectiveness of the family law system; the ALRC should consider the benefits of Registrars conducting a triage process for assessing the urgency of cases and providing certainty as to the form of the first return.

SECTION TWO: COSTS ORDERS

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17. Costs orders too can be a tool of case management, however, the *Family Law Act* starts with the proposition that each party pays their own. The reasons for that are well-known and have long endured. That said, as previously recommended by the ALRC (ALRC Report 75: *Costs Shifting – Who Pays for Litigation* (published 20 October 1995)), new costs provisions ought be introduced to replace the existing provisions of section 117 of *Family Law Act 1975* (Cth), with a view to enhancing the court's control of proceedings (see recommendation 18). The recommendation has not resulted in such an amendment being made.

18. The ABA sees that disciplinary and case management costs orders strengthen and emphasise a court's control of proceedings, and in turn encourages parties and their legal representatives to focus on the resolution of disputes in a prompt and affordable manner. These kinds of costs orders also assist in correcting the current costs regime where the "innocent" or compliant party has to pay their own legal costs caused by or visited upon them due to the non-compliance of the other side.

19. Consideration ought be given to the amendment of section 117 to introduce provisions supportive of the court making costs orders against parties who have:
    a) not complied with rules of court or court directions;
    b) not been ready to proceed when required; or
    c) improperly or unnecessarily caused another party to incur legal costs.

20. The ABA would support the introduction of such provisions in addition to, rather than in substitution of, the currently existing cost provisions in s117.

21. Furthermore, in line with the conclusions of the *Family Court of Australia – Future Directions Committee Report* released in July 2000, the ABA would support amendments to the existing legislation which place an onus upon a defaulting party to establish why:
    a) costs (incurred as a result of the default) should not be payable; and
    b) any costs awarded should not be ordered on an indemnity basis.

IN SUMMARY: The ABA supports amendments to the Act which would provide for courts making costs orders where the conduct of parties interrupts proceedings or unnecessarily causes another party to incur legal costs.

SECTION THREE: FAMILY CONSULTANTS

22. The Issues Paper makes many references to the use of Family Consultants. In that regard, the ABA supports the LCA submission about the importance of these experts to assist the parties and the Court about parenting matters. Save for urgent matters (eg a child abduction or unilateral relocation) or where a *Rice & Asplund* issue is asserted, it would be ideal and informative if parties saw this Consultant at the first return, and then at subsequent hearings.

23. However, it is imperative that the Consultants assist the parties to understand that child focused parenting orders vary by virtue of a child's age; for example, social science research indicates that very young children will benefit from frequent, but short time with the non-residential parent. If a Consultant explained age appropriate parenting arrangements, this may assist parties to shift away from a focus on what they perceive are their adult parenting "rights" (e.g. "I have a right to equal time") and to instead focus on the developmental needs of the children. In doing so, a Consultant will of course take into account the facts and circumstances of the family.

24. The Consultants can then, in turn, give expert evidence to the court about what is age appropriate for the children but in the context of that family's individual needs and situation.

IN SUMMARY: The ABA sees a further role for Family Consultants in advising families and courts on age appropriate parenting arrangements which focus on the developmental needs of children whilst taking into account the facts and circumstances of individual families.

SECTION FOUR: ADVERSARIAL vs INQUISITORIAL

25. This part of the ABA's submission relates to the various questions and discussion which refer to the adversarial system in the resolution of family law disputes, and various possible alternatives, modifications or adjuncts to that system. The ABA supports the observations made by the LCA with respect to the ALRC's use of the terms adversarial and inquisitorial, and the inference arising from the Issues Paper that the former is flawed, but the latter is not.

26. The Family Court and FMC and FCC appropriately adopted a less adversarial approach to the determination of parenting cases and this has been supported and encouraged by various commentators and adopted in other countries.[14] However, what must be retained

[14] See for example, the Singapore courts' adoption of the FCA LAT model.

is the availability to the Australian community of access to an outcome by judicial adjudication and not by tribunals.

27. The questions in the Issues Paper which consider these issues are as follows:

a) At paragraph 36, the ALRC asks about: *"the appropriateness of adversarial processes, and the ethics of adversarial practices, in a system concerned with the wellbeing of children"*.

b) The ALRC also asks *"what processes, including alternative dispute resolution models and less adversarial decision-making approaches, might be used to assist families with complex needs."* (para 166).

c) At para 177 the ALRC notes that *"recent reports have pointed to client concerns about the adversarial nature of court processes and its potential impact on parties who have experienced family violence and abuse";* reference is made to stakeholder views that *"the adversarial approach 'mirrors the dynamic of abusive relationships'"* and that *"engagement with court processes can re-traumatise people who have experienced family violence."*

d) Most relevantly, Question 29 for the ALRC is *"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"*. In the Issues Paper, this question is linked to the Terms of Reference for the ALRC, and particularly *"whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children, and the opportunities for less adversarial resolution of parenting and property disputes."* There is discussion of Question 20 at paragraphs 211-221 of the Issues Paper.

28. The ABA urges the ALRC to consider the speech given by the Hon Sir Anthony Mason AC KBE at the 17th Annual Australian Institute of Judicial Administration Conference, in Adelaide in 1999.[15] Sir Anthony does not write about family law specifically, but many of the issues about which he does write are also identified by the ALRC in this inquiry.[16]

29. As Sir Anthony (and others) noted, "adversarial justice" is an expression often used in opposition to the inquisitorial system. That however is a false dichotomy, where there

[15] The text of that speech was published in the NSW Bar Association News and is available here: www.austlii.edu.au/au/journals/NSWBarAssocNews/1999/4.pdf

[16] The ABA also refers the Commission to resources such as: G.L Davies, *A Blueprint for Reform*, Australian Legal Convention, September 27, 1995; Justice David Ipp, *Reforms to the Adversarial Process in Civil Litigation*, 1995, Sydney, the Australian Law Journal; G.L Davies, *Justice in the Twenty First Century* (2000) 10 Journal of Judicial Administration 50; G.L Davies, *Fairness in a Predominately Adversarial System*, Conference, *Beyond the Adversarial System*, Brisbane, July 10, 1997; Chief Justice Alistair Nicholson AO RFD, *Children and Young People: The Law and Human Right*s, The Sixteenth Sir Richard Blackburn lecture, 14 May 2002, The Law Society of the Australian Capital Territory; Narelle Bedford and Robin Creylee *Inquisitorial processes in Australian Tribunals,* 2006 Australian Institute of Judicial Administration; Helen Stacy, Michael Lavarch, *Beyond the Adversarial System,* the Federation Press 1999; and Michael King, Arie Freiberg, Becky Batagol & Ross Hyams, *Non-Adversarial Justice,*2nd Ed, The Federation Press; Charles Sampford, Sophie Blencowe, Suzanne Condlln, *Educating Lawyers for a Less Adversarial System* The Federation Press 1999.

is, as Sir Anthony noted some time ago, *a degree of commonality and convergence between the two systems"*.

30. Separately, the existence of judicial discretion in family law is seen by some as part of "the problem", because it supposedly contributes to uncertainty and unpredictability; this is not actually true if judicial discretion is properly understood. Rather, discretion means the judge arrives at an outcome which takes each family's unique and individual facts into account within the relevant legislative pathway for property and /or for parenting.

31. Similarly, care should be taken not to understate the importance of judicial adjudication of disputes, including the role it plays in establishing precedent (or the "shadow" of the law within which parties "bargain" in other dispute resolution processes), and in expressing positions on issues of public importance (for example, the unacceptability of family violence).

32. While the costs of the system (both for individuals and for government) is a major impetus for the Inquiry, the Commission will need to be sure, based on detailed modelling, that any suggested reform will reduce those costs. Certainly, a more inquisitorial approach will require more court resources, including more judges, who will need more court rooms and more staff. It is difficult to see how an inquisitorial system will cost any less than the current system, and would likely cost more, and certainly more to the Commonwealth.

IN SUMMARY: The ABA urges the ALRC to not simply assume that an inquisitorial system of justice would be more efficient and/or produce a superior system of justice in the family law context. This thinking should not be uncritically accepted. Similarly, the assumption that an inquisitorial system would create better outcomes is untested and may well be without foundation.

We thank you for the opportunity to make these observations and are available to discuss these matters with the Commission. Please contact either of the people below should you require.

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