Australian Bar Association

The ABA acknowledges the relationship between the land on which it and its members work and the First Nations' peoples of Australia

12 December 2019

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Dear Sir

AUSTRALIAN BAR ASSOCIATION SUBMISSION TO THE JOINT SELECT COMMITTEE ON AUSTRALIA'S FAMILY LAW SYSTEM

The Australian Bar Association (ABA)

1. The ABA is the national voice of the independent Bars of the States and Territories of Australia. It represents about 6,000 barristers nationally.

2. Established in 1963, one of the ABA's strategic priorities is to provide expert input on legal policy and law reform issues.

3. The ABA welcomes the opportunity to make a submission to the Joint Select Committee on Australia's Family Law System. The ABA has a history of contributing to inquiries concerning family law issues.

4. The functioning of the Family Law System is of acute interest and importance to Australians as it impacts on almost everyone directly or indirectly at some point in time.

Introduction

5. Before addressing each of the terms of reference, the following overall observations as to Australia's family law system are made. They may also be seen to fall under Term of Reference (k).

6. The Terms of Reference cannot be approached in the abstract. They must be understood in the context of the practical challenges facing the family law system, its users and, most importantly, children.

7. The ABA considers that the following tangible matters, at the least but not exclusively, would immediately assist and benefit the Australian family law system:

   7.1 proper resourcing in a framework which recognises that, while there are very significant benefits to the private resolution of family law disputes, prompt judicial determination promotes, overall, the resolution of all disputes (including children's best interests, safety, empowerment of the vulnerable, the promotion of human rights, justice and fairness);

   7.2 the implementation of harmonised rules and forms between the Family Court of Australia and the Federal Circuit Court; which the ABA notes (with support) that the Chief Justice/Chief Judge and a committee of Judges from both Courts, together with others, are undertaking;

   7.3 simplification of Part VII of the *Family Law Act*, which deals with children. Through a succession of amendments, it now takes 42 separate steps to determine what is in a child's best interests. In turn, to cover each of these steps and to address the relevant considerations each requires makes for longer affidavits, longer cross-examination, longer submissions, longer judgment writing time and longer judgments: i.e., more time, more resources and more money. A simplified Part VII would go a long way to reducing the time, resources and money spent on each of these matters and would make the system

far easier to understand and navigate. It would not detract from decision making which is in children's best interests;

8. Further, for this Joint Select Committee to be fully effective (and indeed for the Parliament in this area to be so,) MPs ought have training in what constitutes family violence and abuse. Given most constituents' contact with a politician is via their electorate staff, those staff too ought have an understanding of the nuance and subtlety that is family violence and abuse. The Report from the Victorian Royal Commission into Family Violence and the Queensland Report, "Not Now, Not Ever" are both excellent documents and resources, and we commend these to the Committee.

Term of Reference (a)

a.	ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems, and family and domestic violence jurisdictions, including:
(i)	the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders, and
(ii)	the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings;

9. The Courts already have a range of resources and avenues provided to them with respect to State and Territory child protection and family violence matters, these include:

9.1 Notices of Risk which must be filed in all parenting matters by each parent and party[1] - these Notices put squarely before the court whether any party has any concerns that a child is at risk of abuse, neglect, abuse or violence, or is in a household where family violence may exist;[2]

9.2 the requirement to file copies of family violence orders in parenting proceedings;

[1] NB: in Family Court of Western Australia, the Notice is only required where risk is alleged
[2] and, in West Australia, cause the Department of Communities to write to the Court about its dealings with those parents

9.3 the availability of s.69ZW Orders, which can require the provision of information held by child protection authorities to the Courts making parenting decisions;

9.4 the availability of s.91B Orders, wherein the Court may request the intervention in the proceedings of an officer of a State, of a Territory or of the Commonwealth, being the officer who is responsible for the administration of the laws of the State or Territory in which the proceedings are being heard that relate to child welfare. When such a request is met, the child welfare officer (in reality, the proper officer of the Department of Child Safety, or however so named in each jurisdiction) becomes a party with all the rights, duties and liabilities of a party;

9.5 the capacity to request a file from other Courts making decisions in such matters, and to admit into evidence in parenting decisions, transcripts and findings made in child protection and family violence proceedings;

9.6 the National Family Violence Bench Book: a resource which assists in "the education and training of judicial officers so as to promote best practice and improve consistency in judicial decision-making and court experiences for victims in cases involving domestic and family violence across Australia."[3]

9.7 the Courts' joint Family Violence Best Practice Principles.

10. That said, and as to ToR (a)(i), with child protection and domestic violence being principally in the jurisdiction of the States and Territories, it is difficult to see how the Commonwealth could affect significant law reform in these areas.

11. As to ToR (a)(ii), the presence of any domestic violence orders, apprehended violence orders, protection orders, family violence orders or intervention orders (different names

[3] https://dfvbenchbook.aija.org.au/purpose-and-limitations/

in different jurisdictions), are just one piece of evidence in family law proceedings; that is, they should be (and are) considered but are not determinative.

12. If it is suggested that the existence of such orders determines the family law outcome, then such a view is, respectfully, wrong. Parenting proceedings involve (as stated) an unwieldly 42 different steps, with family violence featuring in few of the 42. Further, property proceedings only concern family violence where a party can make out that relevant family violence occurred, and, importantly, that the family violence made that party's contributions more onerous, or impacted on a party's capacity to make contributions or has resulted in ongoing impairment to health or earning capacity.

13. There can however be a problem where the existence of a family violence order causes a Judge to act cautiously on an interim basis. Such caution is appropriate until allegations can be tested through cross-examination at a final hearing. The difficulty arises because delays in the courts mean that the cautious approach stays in place until the evidence can be tested much later at trial.

Term of Reference (b)

b. the appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders;

14. All courts in all jurisdictions, not just family law courts, strive to obtain "truthful and complete evidence". A point of our (the) adversarial system is to test the evidence presented by a party. There is no basis for asserting that the giving of untruthful evidence is any more common in the family law jurisdiction than in any other. Inevitably one person's experience and "narrative" of a relationship will be different from that of the other party to that relationship- that does not mean that either is giving untruthful evidence (even though it may seem like that to the other person).

15. The *Family Law Act* and the Rules of both Courts contain mechanisms to compel disclosure. State and Federal criminal law contain penalties for perjury. The tools to control the provision of evidence already exist.

16. We accept that non-compliance with Orders and a lack of meaningful consequences is, unfortunately, a feature of family law (and of other litigious jurisdictions in Australia). While, this is a matter for the Judges, and the ABA would support the more frequent making of costs orders against non-complying parties and the allocation of greater resources to allow the more prompt and efficient listing of enforcement applications.

Term of Reference (c)

> c. beyond the proposed merger of the Family Court and the Federal Circuit Court any other reform that may be needed to the family law and the current structure of the Family Court and the Federal Circuit Court;

17. With respect, the ABA suggests that the Committee ought take a holistic approach and not exclude the merger as this term suggests: it is suggested that Term of Reference (k) provides an avenue for its exploration.

18. Separately, it is suggested with respect that the Committee ought consider the various inquiries and reviews of the family law system, starting with the Productivity Commission's "Access to Justice Arrangements Report" in 2014 (Inquiry Report No 72, 2014) and culminating in the recent ALRC Report of March 2019: ALRC Report 135 "Family Law for the Future – an Inquiry into the Family Law System".

Term of Reference (d)

> d. the financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning 'disappointment fees', and:

(i)	capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters, and
(ii)	any mechanisms to improve the timely, efficient and effective resolution of property disputes in family law proceedings;

19. Some of the expenses in family law arise out of:

19.1 the unnecessary complexity of some parts of the Act (see comments on Part VII above); and critically

19.2 the lack of court resources: for example,

19.2.1 if parties and their legal representatives attend at Court three different times for a trial, but are turned away each time because no judge is available to hear the matter, that lack of resourcing increases the costs to the parties, not only through legal fees, but by the updating affidavits that are often then required along with updated expert reports including business valuations and family reports;

19.2.2 if a judge is hearing a matter, but also has to squeeze in several interim hearings at the start of each morning because no other judge is available (or all are equally busy), then the trial runs over to additional days, or goes part heard with the parties then having the expense of coming back months later, often with updating evidence, paying for a transcript of the earlier days (which are expensive themselves), and resuming the trial;

19.2.3 or, if a judicial officer has 50 matters in his or her list all set down for 9.30am a party may pay his or her lawyer to wait for hours until the matter can be reached.

20. The charging of cancellation fees is:

20.1 not regularly done by barristers in the family law system, or in any other area of litigation in Australia;

20.2 done by some barristers in some Australian jurisdictions in family law and non-family law matters.

20.3 like all barrister's conduct, subject to the ethical rules and conventions under each states Bar Rules, such that the charging of unnecessary, extravagant or excessive fees, of any description, may amount to unsatisfactory professional conduct or professional misconduct.

21. There is no uniformity of practice in this respect between the Australian States and Territories in family law and non-family law matters.

22. For barristers in those jurisdictions where cancellation fees are sometimes rendered, it is to be noted that they have been agreed in a retainer agreement before they are charged. That is, a retainer agreement or costs agreement will have been provided in draft by the barrister to the solicitor and the ultimate client to consider. In that way, the client does have a choice, and can seek to retain alternative counsel on different terms. To support the client's choice in those jurisdictions, the ABA would support cancellation fees having to be expressly brought to the attention of the client and explained to them as part of the client's decision as to whether to enter into that retainer agreement with a barrister or not.

23. The justification in those jurisdictions where cancellation fees are sometimes rendered is that a barrister is a "sole trader" who will have reserved days or weeks of their calendar for the matter. That means they have not been able to take other work for those days or weeks. If the matter settles late or the trial otherwise does not go ahead, then they are quite possibly left without court work (and so remuneration) for those "reserved days or weeks".

24. That said, the ABA is aware that whilst such fees may be a term of some of the contracts, their actual imposition is more often the exception than the rule.

25. It is already part of a barrister's professional and ethical duties to have regard to proportionality and like considerations in making forensic decisions. The barrister is not to be a mere "mouthpiece" for a client. Having said that, solicitors and barristers, while they may advise their clients not to pursue certain litigation options, may nonetheless be required, ethically and professionally, to follow their instructions (even though they have advised to the contrary).

Term of Reference (e)

> e. the effectiveness of the delivery of family law support services and family dispute resolution processes;

26. The ABA would welcome the return to family law support services co-located at family law courts and the possibility of in-house dispute resolution as an alternative or adjunct to court filing. Having well qualified court personnel to assist parties to avoid judicial determination is safe and appropriate.

Term of Reference (f)

> f. the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;

27. It is undeniable that the quick and just resolution of family law matters promotes the health, safety and well-being of both children and families. In making that statement the ABA assumes that those involved in the resolution are experienced and appropriately trained.

28. Separately, the ABA acknowledges that the break-up of families and family court litigation can impact profoundly upon litigants and their children.

29. Under-resourcing of the system has negative impacts on the health, safety and wellbeing of children and families involved in proceedings. It is not uncommon that, as a result of delays in the system, children have to see several experts for assessments,

or see the same expert a number of times for updated assessments. This may be in addition to an Independent Children's Lawyer and counsellors/therapists. The limited of availability of court-funded experts early in proceedings makes it less likely that matters will settle on terms that are consistent with children's best interests. All of this can constitute "systems abuse" of children. Delays in having matters determined inevitably create greater stress for everyone.

30. That said, it should be borne in mind that only a fraction of proceedings are litigated to a trial, a fact that reflects the emphasis in the practice of the Court and family law practitioners, on encouraging litigants to reach agreement. It is mandatory that parties attend pre-filing dispute resolution in child-related proceedings and legal practitioners are obliged to provide clients with information about alternatives to litigating. In child-related proceedings, Family Consultants are available to advise and assist litigants and where it is warranted, children are independently represented.

31. Legal proceedings (of all kinds) are stressful for participants and that is especially so for contested family law proceedings.

32. Certain statistics are robust and reliable: For example, one woman a week, and one man a month is killed by a current or former partner.[4]

33. While certain statements have been made about male suicide as a result of Family Court proceedings, such claims are not supported by evidence. Indeed, there are no reliable statistics linking Family Court proceedings and suicide.

[4] On average, 1 woman a week and 1 man a month is killed by a current or former partner. (https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-in-australia-2018/contents/summary). One in 6 Australian women and 1 in 16 men have been subjected, since the age of 15, to physical and/or sexual violence by a current or previous cohabiting partner. (https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-in-australia-2018/contents/summary)

34. Suicide causation factors are complex, and separation is a major life stressor which may cause depression and result in suicide; thus the link may more reliably be between separation (rather than family law or the family law courts) and suicide.

35. Regrettably, there is no known effective screening tool for suicide.

36. The statistics from, for example, the Qld Death Review Board 2017-18 report (chapter 2 p 27) reveal:

    36.1 intimate partner homicide victims are more likely to be females (4:1) with males the predominant homicide offender;

    36.2 in 2017-18 there were 40 apparent suicides in Queensland identified as family violence related; a male to female ratio of 4:1 males to women was identified;

    36.3 in 3/4 of the cases the male was identified as the perpetrator of violence;

    36.4 one half of homicides involved children as deceased;

    36.5 the presence of mental health issues was more pronounced among family homicide offenders as opposed to intimate partner homicide offenders;

    36.6 a total of 33 homicide-suicide events have occurred in Queensland since 2006 involving 40 homicide deceased and 33 suicide deceased. The majority of homicide victims was female with the offender/ suicide victim being male. The level of contact with support services in this group was low;

    36.7 for female perpetrators of homicide involving a male deceased where there was a record of family violence, in 62.6% of cases the male was identified as the perpetrator of violence;

    36.8 where the homicide features a male victim, most involved a former abusive spouse killing their primary victim’s new spouse;

36.9 from 1 July 2015 to 30 June 2018, there have been 120 apparent domestic and family violence suicides recorded in Queensland. This includes 29 apparent suicides in 2015-16; 51 apparent suicides in 2016-17; and 40 apparent suicides in 2017-18. A male to female ratio of 4:1 was recorded across this period, which is reflective of general suicide trends, in which a greater proportion of men die by suicide than women. Similarly, most apparent suicide victims were identified as the perpetrator of domestic and family violence within the index relationship;

36.10 there was a peak in apparent suicides in the 35 to 44 year age group (Figure 9), which is consistent with general age trends in suicide;

36.11 a history of mental health issues, either formally diagnosed or in the opinion of family and friends, was prevalent in over two-thirds of cases (68.3%). A recorded history of hospitalisation through Emergency Examination Orders (EEO) or Emergency Examination Authorities (EEA) was a feature in 30.8% of cases. A prior history of suicide ideation (70.8%) and suicide attempts (48.3%) was also prominent. Further, a history of problematic substance use was recorded in 67.5% of apparent suicides, with substance use recorded at the time of the death in 53 cases (44.2%);

36.12 actual (55.0%) and pending (14.2%) separation was a feature in the majority of apparent suicides in this reporting period.

37. The ABA welcomes an inquiry into how the health and wellbeing of children and families can be better supported during proceedings. The provision of dispute resolution and other services, particularly a properly funded Legal Aid Commission, are indispensable to that outcome. Moreover, it is indispensable to that aim that the Courts are adequately resourced so that matters can be resolved (if needs be), on their merits,

by an experienced judicial officer, within a reasonable time of the proceedings being commenced.

Term of Reference (g)

g. any issues arising for grandparent carers in family law matters and family law court proceedings;

38. The Act specifically provides for grandparents in many provisions, for example:

38.1 section 65G: Special conditions for making parenting orders about whom a child lives with or the allocation of parental responsibility by consent in favour of non-parent – and specifies grandparents;

38.2 section 65C: Who may apply for a parenting order - (ba) a grandparent of the child;

38.3 section 60CC(3)(b): requires consideration of the nature of the relationship of the child with each of the child's parents; and other persons, including any grandparent or other relative of the child;

38.4 section 69C(c): setting out a raft of different proceedings in which grandparents are specified as having standing to apply;

38.5 section 66F(1)(ba): re grandparents applying for maintenance for a child;

38.6 section 67K: grandparents too can apply for location orders;

38.7 section 67T: grandparents too can apply for recovery orders;

38.8 section 63C and 64B: grandparents can be included in a parenting plan;

38.9 section 13C: grandparents can be included in family counselling, family dispute resolution and other family services;

38.10 section 60B(b): children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people

significant to their care, welfare and development, such as grandparents and other relatives;

38.11 section 4: relative of a child includes a grandparent (amongst others)

39. Accordingly, it is difficult to conceive of what further, if anything, could be done in this respect.

Term of Reference (h)

h. any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners;

40. The ALRC has already considered this and made recommendations re same. It is hoped this Committee will consider those recommendations.

Term of Reference (i)

i. any improvements to the interaction between the family law system and the child support system;

41. The two Child Support Acts take child support primarily out of the family law court system, and into an administrative process.

42. As an administrative decision-making scheme, the members of the ABA have little to do with the child support system and are thus unable to make specific comment. However, some issues do arise, including:

42.1 the relationship between child support obligations and spousal maintenance obligations and which prevails;

42.2 the limited jurisdictional scope for parenting orders to impose obligations to make payments which might otherwise be characterised as child support payments (parenting orders and child support are separate jurisdictions and cannot be intermingled unless both jurisdictions have actually been enlivened);

42.3 the relationship between financial obligations in parenting orders and decision-making about changes of assessment; for example, if a parenting order requires a parent to pay for travel to spend time with them, there is uncertainty about how that is treated in the change of assessment process.

43. The ABA understands these issues do not cause a great deal of difficulty.

Term of Reference (j)

j. the potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes; and

44. There is no need for a consideration of "potential use". Binding Financial Agreements (BFAs) were introduced, via Part VIIIA of the Act for married couples in 2000 and, via Part VIIIAB for de facto couples in 2009.

45. Insofar as their enforceability is concerned, provided the BFAs comply with the statutory requirements and there are no vitiating factors, they are already enforceable.

Term of Reference (k)

k. any related matters.

46. We refer you to our preliminary observations above and urge the Committee to take up those issues under this Term.

Further assistance

47. The ABA would welcome the opportunity, if it would be of assistance to the Committee, to appear at any public hearing or provide further information.

Kind regards

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