LEADERSHIP IN FAMILY LAW

17 December 2019

Joint Select Committee on Australia's Family Law System
PO Box 6100
Parliament House
Canberra ACT 2600

RE: SUBMISSION BY FAMILY LAW PRACTITIONERS' ASSOCIATION OF QUEENSLAND JOINT SELECT COMMITTEE ON AUSTRALIA'S FAMILY LAW SYSTEM

Dear Chairperson,

This Submission is made by the Family Law Practitioners' Association of Queensland (FLPA), an organisation with approx. 900 members from the legal profession (solicitors and barristers) and allied professions (psychiatrists, psychologists, social workers and social scientists), established to achieve the core objective of the continuing education of its members in relation to family law issues.

FLPA offers the following submissions as to the matters raised in the Terms of Reference:-

Matter a.

FLPA is supportive of efforts to increase and improve information sharing between the family law system and state and territory child protection systems and family and domestic violence jurisdictions.

That said, it is not clear how the inquiry intends to address "ongoing issues" or 'improve' the "process, and evidential and legal standards/onuses of proof" in domestic violence matters, which fall under state and territory legislation.

Similarly, it is considered by FLPA that there *is* requisite "visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings".

Section 60CC(3)(j) and 60CC(3)(k) of the Act requires that the family law courts consider family violence involving the child or a member of the child's family, and if a family violence order applies, or has applied, to the child or a member of the child's family—any relevant inferences that can be drawn from the order, taking into account certain matters.

Section 69ZX(3) permits the family law courts to receive into evidence a transcript of evidence in any other proceedings and draw any conclusions of fact from that transcript that it thinks proper, and adopt any recommendation, finding, decision or judgment made in such proceedings. The discretion (i.e. "may") is of critical importance.

Matter b.

In any litigation, there is the risk that a party will provide false evidence with a view to misdirecting the decision maker. Family law is no different.

Like all Courts, judicial officers in the Family Courts have inherent powers in respect of the proceedings they are determining, including the power to issue a charge that a litigant is in contempt of court for swearing a false oath or otherwise misleading the Court, or referring them to the Director of Public Prosecutions for consideration as to a criminal prosecution for perjury and related criminal offences. The Act, and the Rules of Court, meanwhile establish duties (e.g. of full and frank disclosure) which litigants must abide, and enable any finding as to failure in compliance to be followed by more generous findings in favour of the innocent party (at discretion of the judicial officer). The Act has always reposed in a Judge the ability to order costs. These powers have existed since the enaction of the Family Law Act. Further, in financial proceedings, non-compliance by a litigant with duties enables a judicial officer to adopt a robust approach when completing the Section 79/Section 90SM decision-making pathway. These powers need not, it is submitted, be augmented.

Implicit in bringing of this matter within the scope of examination of the Inquiry is that this Committee intends to consider whether any finding as to the giving of false evidence, or a failure to comply with duties, ought reflect in the Court's judgment. As indicated above, the Full Court of the Family Court has already made clear that there can be a direct correlation between a litigant's conduct, and the ultimate property settlement outcome – the requirement that any Order be just and equitable is congruent with the weighing of the degree of truthfulness of a litigant, and their compliance with duties (a trial Judge being entitled to robustly assess the pool of property and Section 75(2)/Section 90SF(3) factors). In parenting cases, however, the dynamic is *different* – the Court is tasked with making orders which achieve a child's best interest. That a child has a parent who is prepared to mislead a Court is not directly relevant to the parenting arrangements which ought be implemented for that child. The reality is that the needs of a child may mean that even a parent who has, for example, perjured themselves, ought to continue to provide for those needs.

If the proposition of the Committee is ultimately that the conduct of a parent in litigation ought automatically be reflected in parenting outcomes, and have compulsorily imposed direct impact on orders that a Court would have made *but for* that conduct, then it is submitted that this would be to elevate the punitive effect of proceedings, and ameliorate the stated objective of Section 60B (to achieve the best interests of children), and cannot be countenanced.

Matter c.

FLPA has made submissions to successive Attorneys-General on this subject. Its position has been, and remains, constant – irrespective of any amalgamation to achieve resource sharing, the sheer volume of cases awaiting judicial determination, and entering the system each day, is such that the benefit achieved by cost-saving measures will be fleeting unless more judicial officers are appointed to hear and determine cases (both at interim, and trial, level). Reform of the Courts, it is submitted, cannot be productive of superior outcomes for users of the Court when the existing resourcing issue (which now has a legacy approaching a decade) remains unaddressed.

Matter d.

It is respectfully submitted that this matter connects the extent of a property pool (in financial proceedings) with legal cost. The relationship is not so simplistically identified. The actual variable in legal cost is not the quantum of property available for distribution between the parties, but the complexity of the legal issues at large in the individual case.

Modest asset pools very often present as 'simple' cases. That descriptor is deceptive, however, where the extent of the asset pool is caused by financial challenges - such matters shift the focus from the property outcome in dollar or percentage terms, and enliven far more nuanced matters – valuation of minority interests; management of tax liabilities; equitable rights and claims; assignment of debts; release from guarantees and other security; management of assets which cannot be liquidated; dealing with bankruptcy property; the intersection with rights of third parties (family companies, family trusts, arm's length third party lenders). Aspects of this nature require advice and the design of careful strategy, making them, in reality, more complex than outcomes in much larger estates.

Caution is flagged that examination of outcomes cannot merely occur by reference to ratio that legal costs bear to the quantum of the asset pool, as that overlooks the following reality – legal cost is a factor of complexity, not asset pool size.

To impose a ceiling on legal costs in modest asset pools is to deprive parties of the ability to take advice on matters which have tangible and unique 'value' to *them* (being released from indebtedness; having a debt incorporated within the bankrupt estate of a spouse; receiving an indemnity in respect of an uncrystallised tax debt), but which do not translate to an immediate dollar outcome.

Disappointment fees charged by counsel are a factor of litigants preparing for a trial, only to be turned away from Court, their matter unheard. Adjustments in resourcing of the Courts (that is, ensuring that there are sufficient judicial officers to hear and determine the cases listed before the Court) is the means of ensuring that litigants to not have (an otherwise entirely avoidable) duplication of costs.

Matter e.

Family dispute resolution processes see the resolution of many matters. It is a critical component of any such processes, that those practitioners (FDRPs) assisting parties towards resolution are specialised in their field. While existing requirements include an obligation on FDRPs to undertake at least 24 hours of education, training or professional development in family dispute resolution in every two year period, FLPA would support the introduction of continuing compulsory legal education for FDRPs (particularly those offering government funded, non-legally assisted services) in respect of the developing case law and legislation.

Many of our members pride themselves on their ability to assist their clients in managing the early resolution of their disputes, without recourse to the Courts.

Matter f.

In financial cases, the safety of litigants is ensured if applicants for priority relief (e.g. orders as to occupation of a residence, urgent spousal maintenance) can have applications heard and determined within short periods of time after separation (or after a need arising).

In parenting proceedings, the safety of children is achieved if issues affecting welfare can be brought before the Court, and determined, at short notice.

The mental health of litigants in all categories of case can be managed if cases are heard and determined, and judgments issued, in reasonable periods of time given the issues at large in the case.

At the risk of repetition, these objectives can only be achieved if the Court is properly resourced. The evidence as to case backlogs, and the case load of existing judicial officers, points to the same conclusion – additional resources are required to be allocated for the appointment of more judges.

Matter g.

Grandparents have had, and continue to have, standing to seek parenting orders in respect of children. Biological parents are given no primacy in the consideration of the best interests of a child. It is submitted that this is not an area of the Act requiring any priority attention.

Matter h.

Judicial officers have the ability to refer the legal practitioners appearing before them (who are officers of the Court) to their professional bodies for discipline in relation to professional standards issues (e.g. State Law Societies and Legal Services Commissions) and, where appropriate, make costs orders against a legal practitioner personally. Non-legal professionals who are associated with the family law litigation process are almost invariably members of professional bodies with a disciplinary arm – they too, can be made amenable to professional standards examinations upon the complaint of a party to the litigation. Almost invariably, those bodies have continuing education requirements which members are monitored and enforced. Where the Court is already confronted with resourcing challenges, it is submitted that any duplication of such oversight and education functions should be deprioritised.

Judicial officers are already willing to explore avenues to improve the performance and monitoring of the profession in ways beyond this. A recent example is found in the decision of *Luu & Kaa* [2019] FamCAFC 194, with the Full Court stating "*Legal practitioners in family law matters must expect scrutiny of their fees by the Court*" and restricting the fees able to be charged by a practitioner for the preparation of an Affidavit.

Matter i.

The Child Support (Assessment) Act and Child Support (Regulation and Collection) Act specify a pathway for the issue of child support outcomes, and their review. That pathway is designed such that it largely falls outside the realm of the Family Courts, and is dealt with initially at an administrative level and thereafter within a Tribunal, a forum in which parents typically self-act. That is an appropriate outcome when the scope of dispute between parents is limited to child support.

When those parties are otherwise already before the Court (e.g. in relation to financial issues), better outcomes can be achieved for parents if all 'live' matters are heard and determined in one Court, by one judicial officer. For child support disputes to be amalgamated with other existing proceedings, particularly where there is common evidentiary subject matter (e.g. concerning income), has the potential to deliver better outcomes for users of the Courts, and represent a better use of their time resources (provided that the pace at which matters in the Family Courts is superior to that of existing pathways via the AAT). The existing child support legislation enables this to occur, as was intended by the legislature at the time of the introduced changes, and attempts to avoid the scenario where "*the one family would have to fight two battles arising out of exactly the same factual situation before two different tribunals at the same time*": *McGuiness & Cowie* [2002] FamCA 461.

Matter j.

Part VIIIA of the Act has now been in force for nearly 2 decades. While it is a part of the legislation which has been amended, the passage of time has seen the growth in the jurisprudence as to the enforcement (or setting aside) and implementation of Financial Agreements. Practitioners can have reference to the decisions of the Court as to the interpretation of the Act, and the application of the law to unique situations, when drafting and advising on Financial Agreements. Where Financial Agreements are not binding unless accompanied by independent legal advice; they can be scrutinised by a Court before orders as to enforcement of terms are made; and where a Court can bind parties to an Agreement despite technical drafting issues; they offer a greater degree of protection to spouses than commercial contracts. The review of this part of the Act is not, it is submitted, an area of priority.

Yours faithfully

Dan Bottrell
FLPA Vice President