

SUBMISSION ON THE 2017 EXPOSURE DRAFT FAMILY LAW ACT AMENDMENT

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We apologise for the lateness of this submission but offer the following comments on certain aspects of the draft bill.

SHORT FORM JUDGMENTS

The proposed section provides:

69ZL Short form reasons for decisions relating to interim parenting orders

A court may give reasons in short form for a decision it makes in relation to an interim parenting order.

As in all such cases, the task is to try to predict its consequences, good or ill, and assess whether there would be a net benefit.

Would the provision have beneficial effects?

The proposed 69ZL would not change the law – as the Public Consultation Paper makes clear, the courts already have such a power. Indeed, there is no statutory or other requirement relating to the length or form of judgments. The purpose of a judgment is to set out reasons for a decision, and those reasons have to be sufficient to explain and justify the decision. The work of appeal courts is typically to rule on whether the judgment provides adequate reasons for the decision.

Judgments in parenting cases need to be somewhat detailed, essentially for two reasons.

The first and main reason is that the determination of a child's best interests depends on a wide range of factual matters. The extent of these matters varies from case to case. In some cases, the parties agree on some of the facts, and this enables the court to determine those

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facts without needing to set out a lot of evidence. And the relevant factual matters are more extensive in some cases than in others. Sometimes the parties agree on significant issues, and this too can reduce the size of a judgment. This applies equally to final and interim judgments.

Typically, the amount of evidence is much greater in final hearings than in interim proceedings, where cross-examination is typically not permitted, and where the evidence is often less extensive than at the final hearing. But under the current form of the legislation, with interim proceedings as much as final proceedings, the judgment needs to deal with the issues and evidence and explain why the proposed orders are in the children's best interests.

The second reason is that the current legislation requires the court to engage in a complex analysis. The complexity of the provisions, and the need for judgments to examine each of the various criteria laid down in the Act, is essentially the same for final and interim judgments, although there is provision made for a judge not to apply the presumption of equal shared parental responsibility in interim parenting proceedings.

The complexity of Part VII has been the subject of many adverse comments. A recent analysis by Judge Riethmuller was ironically titled "*Deciding Parenting Cases under Part VII- 42 easy steps*". In our view there is a strong case for simplifying the provisions relating to determining the child's best interests. We are glad to see in the Public Consultation Paper that the Government agrees with the Family Law Council's recommendation that Part VII of the Family Law Act be comprehensively reviewed with a view to identifying improvements to support more expeditious decision-making in matters involving at risk children. Simplifying Part VII should help to achieve the objective of the proposed 69ZL.

The Public Consultation Paper quotes the following passage from a report of the Family Law Council:

...it is not the practice of state and territory children's courts to provide written judgments in all matters. Where a written judgment is supplied, it is usually less detailed than are judgments of the family law courts in interim matters. Allowing

children's courts and magistrates courts to provide family law interim decisions in short form will support an efficient use of a judicial officer's time and help to ensure that family law work does not lead to hearing delays in these courts.

The proposed section 69ZL, however, is not limited to decisions by children's courts and magistrates courts, as the Family Law Council seemed to envisage.

Considering, first, the decisions of the Federal Circuit Court and the Family Court of Australia, we doubt that providing for short form judgments will be effective, because in our view the content of judgments reflects the complexity of the facts and of the law and because there is nothing in the present legislation that prevents the courts from delivering anything that might be called a short form judgment. The adequacy of a judgment is a matter of substance, not form. There is provision for short form judgments on appeal, and here the provision does have efficacy. An appeal court may say in a few lines, for example, that the decision from which appeal is brought is a discretionary one and that the grounds for appeal do not present any justification for appellate interference. The trial judge cannot risk such brevity.

Might such a provision nevertheless lead to shorter and more succinct judgments?

Judges no doubt vary in style, and some judges write more succinctly than others. However, the difference can be overstated. Reading through a sample of parenting judgments, one finds a very common pattern, in which the court reviews the evidence, including expert evidence, makes findings of fact, and sets out why the proposed orders are seen to be in the child's best interests. No doubt it would be possible to omit or shorten some portions of some judgments, but overall we suggest that it would not be easy to make the judgments significantly shorter without running the risk of a successful appeal on the ground of insufficient reasons.

Even if s 69ZL were to stimulate judges to deliver shorter judgments, we do not think this would be likely to reduce the actual time the courts spend preparing the judgments. Crafting a short succinct judgment takes significant time. Many judges, especially in interim decisions, find it efficient to deliver oral judgments at the close of the hearing or very shortly afterwards, and then edit them later for publication. In general, we suspect that producing a shorter more succinct judgment would be likely to take more time rather than less time.

For those reasons, we think it is unlikely that a provision such as 69ZL would reduce the time the Federal Circuit Court and the Family Court of Australia spend on preparing interim judgments in children's cases.

Would it assist the children's courts and magistrates' courts? We are less familiar with these judgments, but we would make the following observations. First, the current practice of delivering short judgments has developed in a context where the relevant law has been much less intricate than Part VII of the Family Law Act, and in which the extent of factual issues, the amount of evidence, and the extent of legal argument are all, we believe, generally less complex than in interim parenting cases. Second, in the case of these courts appeals are by way of rehearing, so the appeal court, deciding the case afresh, is less concerned with the reasoning of the first instance decision.

We therefore doubt that the provision would enable these courts to deliver parenting judgments of an abbreviated kind without running the risk of being overruled on appeal. As we have said above, the necessary contents of a judgment reflect that complexity of the legal and factual material to be covered, and the complexity of the substantive law. The proposed amendment would not reduce that complexity.

Would the provision have detrimental effects?

We think that the provision could well have detrimental effects. Firstly, it might be confusing, if taken to mean that in some way judgments do not need to provide reasons of the kind that appeal courts have considered necessary to justify the decisions. Secondly, although this is not intended, it might suggest, by implication, that there is some restriction on 'short form' judgments in other than interim cases.²

Is there a better solution?

We agree with the intent of the provision, that there should be scope for interim judgments to be much shorter. This may encourage state courts to exercise Part VII jurisdiction. We think this would be better achieved by amendments along the following lines:

Amend s.60CC(1) to read as follows:

“(1) Subject to subsections (5) and (6), in determining what is in the child's best

² We do not think this problem arises from the provision for short form judgments in relation to appeals (ss 94(2A) and 94AAA(7)) since these provisions are limited to specific types of judgments.

interests, the court must consider the matters set out in subsections (2) and (3).”

Insert new subsection (6):

“(6) When the court is considering whether to make an interim order, the court need only consider the matters in subsection (2) and such factors in subsection (3) as appear to be of particular relevance to the making of the interim order.”

Renumber old subsection (6) as (7).

Amend s.61DA(3) to read as follows:

“(3) When the court is making an interim order, the presumption does not apply.”

Amend s 65DAA by adding new subsection (8):

“Interim orders

(8) This section does not apply to the making of interim parenting orders.

Conclusion

In our view these changes will reduce the length of judgments that are needed in interim cases and the time taken to prepare such judgments. By making s.61DA and s 65DAA apply only to final orders, the court will be not be required to consider each of the various matters specified, but will free to consider making orders for equal or substantial and significant time where the evidence and argument makes it appropriate to do so in the circumstances of interim hearing.

INCREASING THE POWER OF THE COURT TO DISMISS UNMERITORIOUS CLAIMS

We can deal with this topic shortly. We are inclined to support such a power. However, there is no need to limit its application to family violence cases. Unmeritorious claims and responses can occur in all kinds of cases. We note that the section itself does not limit the section in that way, and we would therefore suggest removing the reference to family violence from the heading. Similarly, the relevant passage in the Explanatory Memorandum should be expressed in general terms, although it might give an example of the use of such a

provision in relation to domestic violence cases.