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Dr Natasha Molt
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By email: [redacted]

Dear Dr Molt

Australian Law Reform Commission ('ALRC') – Final Report of the Inquiry into the Family Law System ('Final Report')

The Law Institute of Victoria ('**LIV**') welcomes the opportunity to comment on the Family Law Section ('**FLS**') of the Law Council of Australia's ('**LCA**') analysis of the ALRC Final Report.

The LIV supports and agrees with the LCA's analysis of the 60 Recommendations made in the ALRC Final Report, and the position adopted by the FLS in respect of same. The LIV highlights concerns in particular about the following Recommendations, which seek a significant departure from the current legislation and practice, and the unwelcome consequences which may follow:

Recommendation 12

1. The LIV agrees that the *Family Law Act 1975* (Cth) ('**the Act**') should not be amended to include a presumption of equality of contributions. The LIV notes thats this presumption does not align with the current case law on special contributions and other cases where contributions are not equal. Following the High Court case of *Mallet*,[1] the Courts have employed a discretionary approach to the assessment or evaluation of contributions. Consideration should be given to the unintended consequences that the ALRC's recommendations may have if this discretionary approach is departed from.

2. For example, where a party has contributed by way of 'extraordinary skill' a minority of case law has acknowledged these special contributions. [2] Moreover, for cases involving short relationships without children, where the parties have kept their assets separate and have not pooled their finances, the current approach of the Courts may lead to no adjustment of property.[3] The LIV is concerned that the ALRC's approach, in its present form, may produce an unfair outcome in such cases.

[1] *Mallet* (1984) 156 CLR 605
[2] *Ferraro and Ferraro (1993) FLC 92-335; JEL v DDF (Lynch v Fitzpatrick) (2001) FLC 93-075*
[3] *Stanford* (2012) HCA 52

Recommendation 13

3. The LIV acknowledges that there may be some advantages when considering valuations at the date of separation. For example, it may limit arguments about 'addbacks' for post separation expenditure and may be appropriate in cases where there is a short period between separation and the final determination of property division.

4. However, when several years have passed since the separation, as is often the case, obtaining retrospective valuations may become an issue. There may also be significant fluctuations in the market value of property and shares following the date of separation. In such circumstances, the backdating of valuations may result in unfair outcomes. The LIV consequently agrees that the proposed amendments will likely lead to rigorous debate and more litigation over the precise date of separation.

5. The LIV also notes that the implementation of recommendation 13 would exclude assets acquired post-separation, including inheritances. The Full Court has been inconsistent in its treatment of such contributions.[4] In light of this, recommendation 13 must be considered carefully for consistency. For example, if in one case, an inheritance is received after the date of separation, will the outcome be vastly different from a circumstance where it is received just before separation?

Recommendation 16

6. The LIV acknowledges that as a general principle, the even splitting of superannuation assets accumulated during a relationship may appear fair. However, complications may arise out of such an amendment. It is unclear whether superannuation is to be excluded from the contributions assessment process and/or the future needs adjustment process.

7. If superannuation assets accumulated during a relationship are to be evenly split between the parties, the LIV queries whether:

    a. This will mean that super accumulated pre-relationship or post-relationship is not valued and cannot be split?

        Or

    b. Will it be valued and simply taken into account as a future needs factor?

Recommendation 19

8. The LIV notes that recommendation 19 appears to replace the principles arising from *Kennon v Kennon,*[5] enabling a party to claim compensation in damages for both physical and psychiatric injury and any consequent economic loss arising from family violence.

9. The LIV notes that many property cases involving family violence do not meet the requirements of *Kennon*. The application of *Kennon* requires a course of violent conduct by one party towards the other during the relationship which is proven to have had a significant adverse impact upon the party's contributions to the relationship or to have made their contributions significantly more

[4] See, eg, the differing approaches in *Bonnici v Bonnici* (1992) FLC 92-272 and *Bishop v Bishop* [2013] FamCAFC 138
[5] *Kennon v Kennon* (1997) FLC 92-575

arduous. These factors were recognised by the Full Court to only arise in exceptional circumstances.

10. The LIV is concerned that if not carefully drafted, the introduction of a statutory tort of family violence may unduly lengthen trials. As such, the LIV recommends that any such amendment be cautiously considered so as to ensure that parties do not incur significant costs when trying to prove their case.

The LIV welcomes any further opportunity to provide feedback to the LCA regarding reforms to Australia's family law system. If you would like to discuss any of the matters raised in this letter, please contact Senior Law for the Family Law Section, Paul Snow at familylawsection@liv.asn.au or on (03) 9607 9353.

Yours Sincerely

Stuart Webb
President
Law Institute of Victoria