THE LAW SOCIETY
OF NEW SOUTH WALES

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19 October 2022

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: john.farrell@lawcouncil.asn.au; nathan.macdonald@lawcouncil.asn.au

Dear Dr Popple,

Federal Circuit and Family Court of Australia Central Practice Direction

In our submission to the Law Council dated 9 August 2021, the Law Society suggested a number of changes to the Draft Central Practice Direction (**CPD**). We note many of these were taken forward by the Law Council and incorporated into the current CPD, and we thank the Law Council for its advocacy in this regard.

However, our members report that, after a year of operation, the CPD has given rise to several practice issues, both within the CPD itself, and as it relates to the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (**Rules**). We understand the Law Council may have an opportunity to advocate to the Court on certain key aspects of family law practice, and appreciate the opportunity to feed into this process. This letter is informed by our Family Law Committee.

Providing a copy of the CPD
Paragraph 1.8 of the CPD requires practitioners to provide a copy of the CPD to their clients prior to filing proceedings, and to unrepresented parties at the earliest opportunity.

We appreciate the intent of this provision is to ensure parties understand their obligations and the Court's approach to case management. However, the experience of our members is that providing a summary of the relevant content in the CPD is often more effective than providing the CPD itself, particularly if English is not the party's first language or there are literacy concerns.

We suggest amending paragraph 1.8 to allow practitioners to provide a summary of the CPD to parties. It may be necessary for the Court to prepare an authorised summary of the CPD for parties, which is published in English and in community languages.

'Genuine' and 'genuinely'
The words 'genuine' and 'genuinely' feature many times throughout the CPD (and throughout the Rules) as a qualifier of the obligations conferred on parties and their representatives.

We note the Rules introduce the requirement, when initiating proceedings, to file a Genuine Steps Certificate attesting that they have taken genuine steps to resolve the dispute. The CPD

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also refers in several places to making a genuine attempt to resolve the dispute. We appreciate these requirements give expression to the overarching purpose of the Rules[1] and the CPD[2] of facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. To that extent, we consider the requirements appropriate, particularly in their application to matters involving self-represented litigants.

In our view, however, other uses in the CPD of the words 'genuine' are unhelpful and potentially confusing. For example, paragraph 1.4 requires the parties to avoid unnecessary process-driven costs and unjustified use of court resources by "pressing only issues of genuine significance". We appreciate the intent of this requirement is to limit the issues in dispute. However, it is unclear whose point of view is relevant, that is, whether the requirement applies to issues of 'genuine significance' in the view of the *asserting party* or in the view of the *Court*. In either case, the assessment of 'genuine significance' has a subjective element. We suggest the word 'genuine' in this context be clarified or deleted.

Another example is the use of the phrase 'genuinely in dispute' in paragraphs 1.4, 3.12 and 3.13. Paragraph 1.4 provides that "at all stages in the proceedings, parties must avoid filing evidence that is unnecessarily lengthy or only of limited relevance to the issues genuinely in dispute." Again, we suggest the word 'genuinely' in this context is unnecessary and unhelpful. If a party regards a matter as in dispute, it may properly be included in their claim. The word 'genuinely' imports uncertainty as to whether one or both parties need to regard the matter as in dispute.

'Importance' of issues in dispute

Paragraph 3.4 provides that the objectives of the Rules and CPD include "the resolution of disputes at a cost and by a process that is proportionate to the importance and complexity of the issues in dispute". In our experience, an assessment of an issue's importance will depend heavily on which party's point of view is being considered. We suggest deleting the reference to 'importance'.

Pre-action requirements

Paragraph 4.1(a) requires the parties in all cases to comply with the pre-action procedures set out in Schedule 1 of the Rules. These procedures include participating in pre-action dispute resolution conducted by an external dispute resolution service.[3] In the experience of our members, in many cases a private settlement conference which only involves the parties and their legal representatives is an equally effective method of narrowing the issues in dispute. Consideration could be given to providing in the CPD that the conduct of a settlement conference satisfies the requirement to participate in pre-action dispute resolution.

Listing of final hearing

Paragraph 5.3(f) provides that a final hearing will be listed within 12 months of the date of filing, "subject to the parties complying with relevant orders and directions". Our members report that delays in the availability of expert reports, valuations and other evidence, due to factors beyond the parties' control, will often result in the parties being unable to meet that timeframe. We suggest the benchmark of listing within 12 months of filing should also be subject to the availability of expert evidence.

Dispute Resolution

Paragraph 5.26 requires the parties to take part in Dispute Resolution within five months of the date of commencement of a proceeding, unless exceptional circumstances exist. We understand that in practice, Judicial Registrars are only directing the parties to Dispute

[1] Rule 1.04.
[2] Paragraph 3.4.
[3] Schedule 1 Pt1 Item 3; Pt 2 Item 3.

Resolution after all valuations have been filed. In our experience, this occurs more than five months after commencement *on average*. On that basis, in practice the time limit of five months is unworkable.

Additionally, we suggest it would assist in resolving disputes if the parties were able to schedule Dispute Resolution when the Dispute Resolution practitioner of their choice is available. This would allow practitioners to exercise their judgment in choosing the mediator or arbitrator who is best suited to the circumstances of the matter.

We suggest these issues could be addressed by amending the paragraph so that Dispute Resolution occurs within five months of commencement *where practicable*.

Material provided prior to mediation or Family Dispute Resolution (FDR)
Paragraph 5.37 provides an extensive list of materials required to be provided at least seven days prior to a mediation or private FDR. However, practitioners, including mediators, report that often many of these materials are unnecessary and irrelevant to the dispute, and the requirement of providing them simply increases the costs of preparation for the parties and the mediator. In some cases, a confidential case outline will be sufficient to inform the mediator about the issues in dispute. In our view, it should be a matter for the mediator to determine what materials they will require, and when, based on a preliminary briefing about the matter.

Standard Trial Directions
We reiterate the concern expressed in our 2021 submission regarding the Standard Trial Directions set out in Annexure A of the CPD. These require the Applicant's affidavits, the Respondent's affidavits and the Applicant's affidavits in reply to be filed no later than 21, 14 and 7 days, respectively, before the trial date.

We suggest the risk of having to vacate the trial date would be minimised if the Applicant and Respondent exchanged affidavits simultaneously, with each then having the right to file an affidavit in reply, addressing only the other's evidence that was not addressed previously. This would allow more time to respond before the trial date to any unforeseen issues or evidence arising from the affidavits. Alternatively, a greater gap should be allowed between the filing dates. We suggest the filing dates should be 42, 21 and 14 days respectively before trial.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

Joanne van der Plaat
President