Women's Legal Services Australia

Family Law Amendment Bill 2024

Senate Legal and Constitutional Affairs Legislation Committee

11 October 2024

Acknowledgements

We acknowledge the Traditional Owners of Country, recognise their continuing connection to land, water, and community, and pay respect to Elders past and present.

We acknowledge the victim-survivors of domestic, family, and sexual violence who we work with and their voices and experiences which inform our advocacy for justice, equality, and safety for women.

About Women's Legal Services Australia

Women's Legal Services Australia (**WLSA**) is the national peak body for 13 specialist Women's Legal Services in each state and territory across Australia, including two First Nations Women's Legal Services. We provide a national voice for Women's Legal Services to influence policy and law reform, and advocate to increase access to gender-specialist, integrated legal services for women.

About Women's Legal Services

Women's Legal Services provide high quality free legal services for women, including legal advice and representation, support services and financial counselling, community legal education, training for professionals, and engage in advocacy for policy and law reform. Some Women's Legal Services have operated for more than 40 years.

WLSA members include:

- Women's Legal Service Victoria
- Women's Legal Service Tasmania
- Women's Legal Service NSW
- Women's Legal Service WA
- Women's Legal Service SA
- Women's Legal Service Queensland
- North Queensland Women's Legal Service
- First Nations Women's Legal Service Queensland
- Women's Legal Centre ACT
- Wirringa Baiya Aboriginal Women's Legal Centre NSW
- Top End Women's Legal Service
- Central Australian Women's Legal Service
- Katherine Women's Information and Legal Service

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Women's Legal Services Australia

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Introduction

1. We welcome the opportunity to provide a submission to the Senate Inquiry into the Family Law Amendment Bill 2024.

2. Women's Legal Services assist over 25,000 women per year across the country, and we see first-hand the impact of family violence on women's economic wellbeing, housing security, and health, which is often exacerbated by the unfair or unjust distribution of property post-separation. Women who access our services often tell us they are fearful of seeking the property they are entitled to post-separation due to possible repercussions by their former partner, including escalating violence and seeking unrealistic parenting orders as a means of intimidation and retaliation. In turn, this increases the risk of financial insecurity for women and children post separation and impacts opportunities for themselves and their children to recover from violence.

3. Similarly, we know women often do not leave violent relationships because of the economic impacts, they are often forced to choose between violence or poverty, and reform to the Family Law Act to improve the property decision-making process can contribute to addressing this. Making family violence a specific consideration in property disputes is an important step towards creating a family law system that better supports victim-survivors of family violence to leave violent relationships and to recover safely with their children. Reform to the Family Law Act can significantly enhance women's economic wellbeing by ensuring that family violence is a factor taken into consideration in property settlements, both the impact on contributions to the asset pool and the current and future needs of victim-survivors.

4. WLSA has developed the following principles which should guide decision-makers in any reforms to the family law system:

   i) Ensuring safety for children and adult victim-survivors who are predominantly women by putting safety and risk at the centre of all practice and decision-making.

   ii) Promoting accessibility and engagement, including addressing issues of cultural competency and accessibility for Aboriginal and Torres Strait Islander, culturally and linguistically diverse and LGBTQIA+ people and communities and people with a disability, reducing delay, and availability of legal assistance.

   iii) Fairness and recognition of diversity, including acknowledging and responding to structural inequalities and bias in the family law system.

5. While welcoming the proposed reforms in the Bill and providing recommendations for these reforms to be strengthened, these reforms must be underpinned by proper resourcing of the family law system. More work is required to ensure all professionals within the family law system are family violence informed, trauma-informed, culturally safe, child rights focused, disability aware and LGBTIQA+ aware. This requires regular access to meaningful training developed and delivered by subject matter and lived-experience experts that is regularly independently evaluated for its effectiveness, including evidence of improvements in the practice of professionals working in the family law system.

6. There must also be more funding particularly for Independent Children's Lawyers, several Indigenous Liaison Officers in each family court registry and greater access to family violence-informed, culturally safe legal assistance services by ensuring such services are appropriately funded. It is also important to properly resource the front end of the family law system as a way of preventing and limiting systems abuse. This includes through greater access to family

violence informed, trauma informed, culturally safe, child focused, lawyer-assisted family dispute resolution and early judicial determination of family violence.

7. Women's Legal Services are on the frontlines assisting women engaging in the family law system and the majority of our clients have experienced or are still experiencing family violence. This means that we have unique insights into the impact of the family law system on women experiencing family violence. Women's Legal Services need more funding to assist women to navigate the family law system, and we need additional resources to be able to share the experiences of our clients and professionals engaged in the family law system to make the case for change.

8. Please note: This submission refers to the sections in the Family Law Act 1975 (Cth) (FLA) and the Family Law Amendment Bill 2024 (the Bill) relating to married couples. WLSA's feedback on the Bill and our recommendations are intended to extend to the equivalent sections for de facto couples as well.

Recommendations

Schedule 1:

- Provide guidance as to how the just and equitable requirement should be applied to ensure the Courts prioritise preventing homelessness and poverty, particularly for victim-survivors of family violence.
- Include specific examples of what amounts to the effect of family violence on contributions in the legislation.
- Expand s79 to exclude compensation awards arising from family violence from being considered in property settlement proceedings.
- Include reference to "material and economic security for the parties" in s79(5)(f) and s75(2)(c).
- The principles in s102NE should require the courts to prioritise both "provision of appropriate housing for children" as well as "the parties' material and economic security".
- Amend s79(4) to also include wastage as a consideration in relation to contributions.
- List examples of wastage in the legislation.
- Clarify that any consideration of wastage as a factor in property settlements does not limit the Court's ability to consider other approaches to dealing with wastage in property settlement proceedings, such as addbacks.
- Provisions concerning companion animals in the FLA and family violence legislation should be consistent in allowing victim-survivors to address the care and safety of their pets in either jurisdiction without precluding their ability to have related issues addressed in the other.
- The definition of companion animal in s4(1) should be amended to clarify that animals with mixed purposes may be covered by the FLA.
- The sale of companion animals should be a last resort, and the court should be empowered to consider alternatives to selling the companion animals before making such an order.
- The court should be empowered to make interim orders in relation to the ownership and/or care of a companion animal.

- Increase funding for legal assistance services to ensure people experiencing financial disadvantage who are engaged in property proceedings have access to legal representation.
- Division 4 of Schedule 1, Part 2 should be amended to provide that the less adversarial approach applies to all proceedings unless the parties agree or the court orders.
- Amend s71B(2) and s71B(6) to provide the powers the court must exercise, not may exercise.

Schedule 2:

- Engage in extensive consultation prior to establishing the Children's Contact Services regulatory scheme, and prescribe how the regulatory scheme must improve Children's Contact Services.
- Increase funding for Children's Contact Services, particularly in rural, regional and remote communities.

Schedule 3:

- The requirement for the court to declare that it is satisfied that proper arrangements have been made for the care, welfare and development of children be removed from section 55A of the Act.
- The requirement for the parties to attend counselling prior to making an application for divorce for a marriage that is less than two years duration be removed from section 44(1B) of the Act.
- The divorce case management process be reviewed to ensure access to justice for court users including:
- Removal of the requirement to file all divorce applications via the Commonwealth Court Portal.
- Providing access to computers and printers in all court registries.
- Introducing grounds for waiver of the court filing fee for divorce.
- Simplifying the court process and legislation regarding the requirements to prove an overseas marriage and prove service.
- Amend s67N(8)(b) to ensure that it only covers a person with a relevant connection to the child.
- The definition of protected confidence should be widened to confirm that not only the counselling records, for example file notes, associated with counselling are considered protected counselling records, but also any other document produced because of that professional relationship, for example, correspondence or a medical certificate.
- The definition of professional service should be expanded to include all counselling services in relation to sexual assault or family and domestic violence and this should not only be limited to the interpretation of a 'specialist service'.
- The person seeking to rely on the records should be required to seek leave to seek that any counselling records be disclosed or adduced.
- The provisions should include a positive obligation on the court to raise the protected confidence provisions with the confider.
- The circumstances when a confider consents to the release of records should be expanded to include:
- circumstances where the confider consents to part of a document being disclosed and
- set out that the confider has had the opportunity to seek legal advice.

- The provisions should be strengthened to confirm that leave must be granted to copy protected confidences and that such leave will only be granted in exceptional circumstances.
- Women's Legal Services should receive funding to develop and provide training in each state and territory regarding recording counselling records in a trauma-informed manner.

Schedule 4:

- Section 114UB(3)(b) be amended to ensure Women's Legal Services clients are protected. The costs provisions should apply to clients of all legal assistance providers, including Legal Aid Commissions, Community Legal Centres, Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services.

Schedule 1, Part 1 – Property framework

Codifying the property decision-making principles

9. In WLSA's submissions to the Australian Law Reform Commission (**ALRC**) inquiry into the family law system, we recommended that the FLA should be amended to make it clear how property settlement entitlements of parties are determined. It will assist parties to understand their financial entitlements in family law if the multi-stepped process which is used, by and large by family law professionals and the courts to explain the process, is captured in the Act itself.

10. Overall, attempts to clarify how decisions are made are particularly helpful for self-represented people, given the small percentage of matters that make it to court and have judicial oversight. For similar reasons, WLSA is also supportive of the removal of the cross-referencing to spousal maintenance provisions when considering the current and future circumstances of parties. Again, this will assist self-represented people.

Just and equitable

11. WLSA has previously advocated for the FLA to make clear that the paramount principle is a just and equitable outcome.

12. It is also important to ensure the just and equitable requirement is not a codification of the Stanford decision.[1] The Stanford decision has negatively impacted Women's Legal Service clients. For example, Courts have relied on the Stanford decision to determine that women are not entitled to any of the asset pool because it would not be just and equitable as they did not make significant contributions. This has resulted in women losing their home and being left in desperate financial situations.

13. To address this issue, the Court should be required to consider whether it would be just and equitable to force a woman into homelessness in circumstances where she has no finances or economic security. Where there has been family violence, it should be made clear that it may be just and equitable for the victim-survivor to receive all of the available property, particularly if the house is required to safely house the victim-survivor and children. This could be achieved through providing guidance in the legislation regarding what should be considered by the court as just and equitable.

14. We provide the below case studies to demonstrate the experiences of Women's Legal Service clients.

[1] *Stanford v Stanford [2012] HCA 52.*

Case Study – Impacts of the Stanford decision on an older woman

A Women's Legal Service provided family law assistance to a woman who was 74 years old. She was in a relationship with the other party for 20 years. She did not make any financial contributions to the marriage and contributed a small amount of housework – the other party contributed all assets and all financial contributions. Women's Legal Service argued she should receive a portion of the assets in the property settlement so she would not become homeless. The other party relied on the Stanford decision to argue it would not be just and equitable for the woman to receive any assets because she did not make any significant contributions to the asset pool. The Women's Legal Service commenced proceedings given the other party's intractable position. The parties attended mediation and the other party raised the Stanford decision again which delayed progress towards achieving a settlement. The woman died prior to achieving a settlement, and her representative did not wish to continue proceedings.

Case Study – Impacts of the Stanford decision on a migrant woman

A Women's Legal Service provided family law assistance to a woman who had migrated to Australia. She was in a relationship with the other party for 6 years. She was unable to work because she had to care for her children and could not afford childcare. She did not make any financial contributions, but she did engage in housework. The other party relied on the Stanford decision to argue it would not be just and equitable for the woman to receive any assets because she did not make any significant contributions to the asset pool. Accordingly, the parties were unable to achieve early resolution of the matter through negotiation and were forced to commence litigation.

Recommendation

- Provide guidance as to how the just and equitable requirement should be applied to ensure the Courts prioritise preventing homelessness and poverty, particularly for victim-survivors of family violence.

Consideration of the effect of family violence on contributions and current and future

circumstances

15. WLSA has long advocated for family violence to be a specific consideration that the Court must consider when assessing the property entitlements of parties. We strongly welcome the introduction of family violence as a new factor for consideration when making orders in property settlement proceedings, both in relation to assessment of contributions, and current and future circumstances.

16. Importantly, this will contribute to greater community understanding of the relevance of family violence to property settlement proceedings, and the impacts that family violence can have on a parties' contributions and current and future needs. It will also likely increase the number of legal practitioners and self-represented litigants who provide evidence of family violence to the court so that it can be given appropriate consideration.

17. In the experience of Women's Legal Services, many of our clients remain in violent situations as they do not have the means to move out of the home or engage a private solicitor, and do not understand how family violence may be considered by the Court. For First Nations women this experience is often heightened.

18. For women from culturally and linguistically diverse backgrounds, this can be exacerbated by experiences of social isolation due to migration and threats relating to visa cancellation. Perpetrators of domestic and family violence may prevent their partner from studying to learn English or obtaining qualifications. Women who have entered Australia on certain partner visas may not have access to social security payments, Medicare, or childcare subsidies. This can force women into low paid positions where they are barely able to cover their day to day living expenses.

19. In our experience, many women report the experience of domestic and family violence as a prohibitive factor to returning to gainful employment and continue to experience poverty upon separation. It is well understood that women often retain caring duties of young children and that this has a significant impact on their employment, income and superannuation for the rest of their working years.

Subjected or exposed to family violence

20. We are pleased the Bill adopts recommendations made in our submission[2] to the Attorney-General's Department on the Exposure Draft of the Family Law Amendment Bill (No.2) 2023 (**the Exposure Draft**), including referring to family violence to which parties are subjected 'or exposed'. This recognises that there is a range of family violence conduct which may impact on a person's ability to make contributions, or impact on their current or future circumstances, but which they are not necessarily 'subjected' to. For example, Women's Legal Services have assisted clients who have been exposed to abuse of their children by the other party and this has impacted their contributions and the current and future circumstances due to the ongoing effects of trauma.

21. The use of the term 'exposed' broadens the range of conduct that is captured and is also consistent with terminology used to describe family violence in the parenting provisions. There are benefits in having a consistent approach to family violence in both types of family law matters, including providing increased clarity for parties, legal practitioners, and self-represented litigants.

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[2] *Women's Legal Services Australia, Submission to the Attorney-General's Department, Exposure Draft of the Family Law Amendment Bill (No.2) 2023, <Exposure Draft of the Family Law Amendment Bill (No.2) 2023 – Women's Legal Services Australia (wlsa.org.au)>*

Contributions

22. At present, Kennon[3] is the primary decision relied on in support of the argument that in determining the contributions of the parties, the Court must take into account the effect of family violence on a party's contributions.

23. WLSA has long advocated for reform as to how family violence is considered in family law property cases and pivotal to our advocacy has been concerns with the approach of courts to Kennon and the consequences of simply codifying it into law. The issue with Kennon in practice is that:

    a. Kennon made it clear that an adjustment would only apply in 'exceptional' circumstances and to a 'relatively narrow band of cases.'

    b. The onus placed on the applicant alleging domestic and family violence is significant and it can often be difficult to prove, especially when the victim-survivor is already trying to recover from the trauma of the violence and ongoing trauma being triggered from the family law proceedings;

    c. The applicant must demonstrate the family violence has had a significant adverse impact upon their contributions or made their contributions significantly more arduous than they ought to have been. Presenting well-researched and nuanced legal arguments pertaining to what is 'significant' or 'more arduous' is a significant barrier for victim-survivors and self-represented parties. In our experience, this often results in domestic and family violence being overlooked in property settlement matters;

    d. In our experience, victim-survivors are often 'able' to continue making contributions and in some cases, they are forced to make greater contributions, whilst still being affected by domestic and family violence;

    e. The result when Kennon is established is only a small adjustment of 5-10%. This outcome is often not enough to outweigh the further trauma and harm the applicant must go through to allege family violence and fails to appropriately reflect the impacts of domestic and family violence;

    f. Academic analysis suggests that legal practitioners often do not raise Kennon and self-represented litigants are unlikely to be aware of it.[4]

24. An example which illustrates the type of matter where such reform may make a significant and meaningful difference to the life of a family violence victim-survivor is below.

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[3] *Marriage of Kennon (1997) 22 Fam LR 1.*
[4] *Young, Warden and Easteal (2014) 'The Kennon 'Factor': Issues of Indeterminacy and Floodgates', 28(1) Australian Journal of Family Law 1-28.*

Case Study – WLSA's submission to the ALRC Inquiry into the Family Law System (Discussion Paper) – November 2018

Both parties were in their late seventies at the time of the family court proceedings. The husband perpetrated family violence against the wife over fifty years of marriage. The husband was eventually charged and faced criminal proceedings. It had taken the wife many years of counselling to get to a stage where she could speak about what had happened to her without being afraid of the husband's response and reprisal.

Nearly 20 years after their separation and informal property settlement, the husband commenced family court proceedings to seek orders for the sale of the house the wife lived in and which she had understood was to be hers from their informal property settlement (despite the house remaining in their joint names as neither wished to pay to have the names removed). The wife was also living and caring for her adult dependent son who had special needs and who relied on her for his daily care and residence.

The proceedings to date focused on the contributions of the parties. The husband had not disclosed the family violence. The wife was unrepresented after her legal aid grant expired. She had disclosed some family violence but was too traumatised by the proceedings that had commenced so long after their separation, the fear of becoming homeless in her seventies and that her husband was still able to inflict harm so many years later. She was unable to disclose the violence she experienced in sufficient detail for the Court to flag a Kennon argument.

From the wife's perspective, she struggled to understand how it was 'just and equitable' that a man who abused her and her children for so much of their lives was able to sell the house she lived in and leave her and her adult dependent child homeless while he continued to work and was financially supported by his current partner.

There were arguments she could have used to assist her case but she lacked the knowledge and competency to run a complicated equitable interest argument herself without legal representation (which she couldn't afford as she relied solely on the old age pension). She felt that engaging in the proceedings was traumatic enough and made her feel she was being victimised all over again.

25. We also provide the below example from a decision where Kennon was not raised by a self-represented litigant who was a victim-survivor of serious assaults.

Case law example - Hutton & Hutton [2007] FamCA 1701

The self-represented wife in this case made claims of serious assaults which were denied completely by the husband. While she did not argue Kennon, Carter J noted its relevance, he said "It appeared to me that the wife's allegations, although not clearly, if at all, articulated as such, might fall within the decision of the Full Court in Kennon . . .". Unfortunately, the wife did not lead evidence which supported her claims of violence and so it was not accepted by the court.

26. The principles arising from Kennon have evolved over time and expanded to encompass a greater number of factual circumstances.[5] We support the proposed wording of s79(4)(ca) in the Bill which appropriately accounts for this.

27. While Kennon made it clear that an adjustment would only apply in 'exceptional' circumstances and to a 'relatively narrow band of cases', the evolution of the principles arising from Kennon over time and the consequential expansion to encompass a greater number of factual circumstances, should be reflected in legislation. For example:

- The Full Court in *S & S*[6] approved the trial judge's conclusion that an adjustment could be made despite the family violence not being of an exceptional nature.
- In the 2005 decision of *Stevens & Stevens*,[7] the Full Court was faced with a factual matrix in which the wife suffered verbal and physical abuse from the husband approximately once every six months during almost the entirety of their 16-year relationship. In considering the concept of a "course of conduct", the Full Court held at [65] that*: "The term 'course of conduct' is a broad one. We do not think that conduct must necessarily be frequent to constitute a course of conduct though a degree of repetition is obviously required . . ."*
- In the 2012 decision of *Baranski & Baranski*[8] the Full Court extended the historic requirement that the family violence must have occurred during a marriage. Specifically, the Full Court concluded that post-separation family violence may also be relevant.[9]

28. Legal practitioners and self-represented parties who are not aware of the evolution of principles arising from Kennon cannot put forward the necessary arguments to strengthen their case. The legislative change now being proposed will hopefully circumvent this issue and make clear that an adjustment due to family violence can be applied broadly and not just to exceptional circumstances or a narrow band of cases.

Examples of the effect of family violence on contributions

29. WLSA has previously recommended the Bill include specific examples of the effect of family violence on contributions to increase awareness and understanding of the issue, to provide guidance to the court and parties as to how the provision may be utilised in practice, and to provide further clarity for self-represented litigants.

30. In our submission on the Exposure Draft, WLSA recommended the legislation should include examples of what amounts to the effect of family violence on contributions, similar to how s4AB

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[5] *Will Stidston and Elizabeth Mathews, 'Adjusting for Violence' (2018) Law Institute Journal 32-35, 34.*
[6] *[2003] FamCA 905.*
[7] *(2005) FLC 93-246 at 80,043.*
[8] *(2012) 259 FLR 122.*
[9] *Will Stidston and Elizabeth Mathews, 'Adjusting for Violence' (2018)* Law Institute Journal *32-35, 34.*

of the FLA provides examples of what may constitute exposure of a child to violence.[10] Suggested examples include:

- A party who has experienced family violence that has had the effect of causing physical and/or psychological injuries which have limited her ability to work during the relationship and post-separation;
- A party who has experienced family violence that has diminished her confidence, and resulted in many years of earning less than what she would otherwise have earned during the relationship;
- A party who has experienced family violence that has had the effect of causing physical and/or psychological injuries which have limited her ability to perform parenting and homemaking duties;
- A party who has been coercively controlled by the other party, limiting her access to the children and ability to make parenting contributions.

Recommendation

- Include specific examples of what amounts to the effect of family violence on contributions in the legislation.

Considerations relating to current and future circumstances

31. WLSA welcomes the new requirement in the Bill that the court is to take into account the effect of family violence on current and future circumstances. This will ensure the court can take into consideration any ongoing impacts of violence on the victim-survivor and ensure that the parties and children of the relationship have economic and housing security post-separation. The court will be able to consider future expenses relating to family violence, especially medical and counselling expenses, and the long-term physical consequences of exposure to trauma from the family violence which can lead to significant health issues and a shortened life span.

32. Women's Legal Services regularly assist women who have experienced violence and abuse that limits their ability to earn an income and care for their children during the relationship (contributions) and also limits their ability to work in the future due to injuries (future needs).

[10] Patricia Easteal, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and Floodgates (Australia)' (2014) 28(1) *Australian Journal of Family Law* 1, 26.

Case study – impact of family violence on contributions and current and future circumstances

The parties had been in a relationship for a short duration ahead of falling pregnant. Prior to the pregnancy, both parties worked and contributed equally to the household's finances. The parties' relationship was characterised by family violence. In the final months of the mother's pregnancy, she was forced to cease work to attend to her medical needs.

Following their child's birth, the mother became the primary caregiver. Unfortunately, the father's family violence increased following the child's birth, including family violence against the mother while holding the child. The mother was referred to her local women's legal service through her local health centre after a presentation, and with support, created a safety plan for the child and mother to leave the relationship and seek refuge.

Two years post-separation, the mother remains the child's primary caregiver, with the father spending supervised time on a bi-monthly basis. As a result of the family violence, the mother is seeking support for psychological injuries and coupled with her primary care, is unable to seek employment. The father continues to perpetrate family violence against the mother, including withholding child support contributions.

The mother's local Women's Legal Service continues to assist her in both parenting and property matters.

Culpability/fault

33. The proposed amendments appropriately recognise the impacts of family violence in property settlement matters. In requiring the court to consider the impact of the behaviour, the provisions focus on accountability of the perpetrator, and the effects of family violence on the victim-survivor, rather than culpability or fault. The court will be required to make a finding about family violence, as it already is required to do in both property and parenting matters.

34. The family courts are already required to hear evidence and undertake a fact-finding exercise when issues of family violence are raised, either in property or parenting matters. For parenting matters, the court needs to assess the risk of harm to a child in circumstances where family violence has been raised by a party to the proceedings. In property, issues around family violence may be raised pursuant to principles established in Kennon. Data from the court indicates that 80 per cent of parenting matters involve family violence.[11] Hearing and adjudicating evidence of family violence is not a new exercise for the Federal Circuit and Family Court of Australia (**FCFCoA**).

Spousal maintenance

35. We are pleased the Bill adopts recommendations made in our submission on the Exposure Draft, including our recommendation that family violence should be a consideration in spousal maintenance applications. Family violence is highly relevant to spousal maintenance

[11] *Federal Circuit and Family Court of Australia, Media Release: Federal Circuit and Family Court of Australia launches major family law reform to improve safety and support for children and families, (5 December 2022), p. 2.*

applications in the same way that it is relevant to consideration of current and future circumstances in property settlement applications.

Quarantining compensation awards and claims arising from family violence

36. The Explanatory Memorandum states that the Bill will "codify aspects of the common law and will provide greater clarity on the face of the law to support users, including vulnerable users, of the Family Law Act...these provisions may serve as a useful guide for resolving property disputes outside of the family law courts".[12] Despite this, there are important common law principles that have not been included in the Bill and their inclusion is critical to ensure that the law is clear for vulnerable users and to guide resolving property disputes outside of the court.

37. At present, the case law provides that awards of compensation may be considered as a financial resource of that party when determining a property settlement.[13] This means that it is possible that an award of compensation given to one party in recognition of the violence perpetrated by the other party, can be taken into account and applied as an adjustment to favour the perpetrator.

38. Whilst a victim-survivor can argue that this award should be excluded, for these provisions to 'serve as a useful guide for resolving property disputes outside of the family law courts' the Bill should make it clear that these awards are excluded. A party should not financially benefit from family violence they have perpetrated, and there must be a clear message sent to the community that this behaviour will not be tolerated.

39. In our experience, many family violence victim-survivors who receive assistance from legal assistance services are also eligible for claims for compensation arising from the injuries they sustained in relation to violence perpetrated by the other party, including psychological harm. Depending on which state or territory, these government schemes may be known as victims of crime compensation schemes or criminal injury compensation schemes.

40. In many jurisdictions across Australia compensation can be refused if the perpetrator may benefit. Specifically excluding compensation awards where the parties are the same as those in family law property settlement proceedings may assist victim-survivors in obtaining successful compensation awards as it would clarify that the perpetrator will not benefit from the compensation award by reason of any concurrent or future family law property settlement proceedings.

Recommendation

- Expand s79 to exclude compensation awards arising from family violence from being considered in property settlement proceedings.

Bench Book

41. The new property decision-making framework will be a significant legislative change. For this reason, some guidance, for example by way of a Bench Book, should be developed to provide guidance for parties, legal practitioners, other professionals working in the family law system, and the court, about evidentiary procedures and other procedural directions.

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[12] *See paras 3-4, Explanatory Memorandum, Family Law Amendment Bill 2024 (Cth).*
[13] *Aleksovski [1996] FamCA 111*

Consideration of 'economic or financial abuse', including 'dowry abuse'

42. WLSA supports the proposed amendments to establish a new contributions factor for the effect of economic and financial abuse. While economic and financial abuse is a prevalent form of family violence, a separate contributions factor will ensure economic and financial abuse is given appropriate consideration by the Courts, and provides clarity to parties, legal professionals and self-represented litigants that it will be considered.

43. We are also supportive of the efforts to fully capture and make clear the many types and forms of economic or financial abuse through the list of examples.

44. We are pleased the Bill recognises 'unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or the family member's child (including at a time when the family member is entirely or predominantly dependent on the person for financial support' at s4AB(2A)(b). The Explanatory Memorandum explicitly states 'this could include the persistent non-payment of child support' at para 19. WLSA has advocated for recognition of the non-payment of child support as a form of economic abuse, and for amendments to the FLA to recognise this.[14]

Dowry abuse

45. We are also pleased the Bill recognises 'dowry abuse' as a form of economic or financial abuse.

46. Women's Legal Services regularly assist women on temporary visas experiencing violence who have been subjected or exposed to dowry abuse, which often plays a significant role within the context of their family law and family violence matters, and often hinders a woman's ability to leave a violent relationship in a variety of ways. For example, women and their extended families may have gone into significant debt to pay the additional dowry expenses demanded by the husband and his family. This debt can be crippling and means that there is often no available money for other necessary expenses during the period of separation for legal representation and relocating costs.

47. In addition to the changes in this Bill, further reforms to the migration system are needed to better respond to dowry abuse and the significant impacts it has on victim-survivors, as well as increased access to legal and support services.

Housing and economic security

48. WLSA supports the proposed sections relating to current and future circumstances (s79(5)(f)) and spousal maintenance (s75(2)(c)) to include consideration of the provision of appropriate housing for children. WLSA advocated for this change to the FLA in our submission on the Exposure Draft.

49. We also previously advocated for the FLA to better address the economic disadvantage faced by victim-survivors of family and domestic violence, particularly the risks of homelessness and poverty. In our submission on the Exposure Draft, we recommended that when assessing current and future circumstances, the Courts should consider the need to avoid parties becoming homeless where they have no financial or economic security, particularly where they are victim-survivors of family violence. We also highlighted the recommendations of academic

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[14] *Women's Legal Services Australia, 'Non-Payment of Child Support as Economic Abuse of Women and Children: A Literature Review' (May 2024) <* *New report reveals how Australia's child support system facilitates economic abuse of women – Women's Legal Services Australia (wlsa.org.au)*>

experts that the FLA should require consideration of “material and economic well-being" as a factor to address this issue. [15]

50. Empirical research finds women, particularly mothers with dependent children, experience significant economic disadvantage post-separation.[16] This point was acknowledged by the ALRC in 2019. A report by Dr Anne Summers also highlights the interconnected nature of domestic and family violence and poverty.[17]

Recommendation

- Include reference to “material and economic security for the parties” in s79(5)(f) and s75(2)(c).
- The principles in s102NE should require the courts to prioritise both "provision of appropriate housing for children” as well as “the parties’ material and economic security”.

Wastage

51. WLSA welcomes the inclusion of wastage in the Bill as a consideration relating to current and future circumstances at s79(4). We are pleased the provision refers to wastage of property that is caused intentionally or recklessly, consistent with the principle set out in the case of Kowaliw.[18]

52. However, in our view wastage should also be listed as a consideration relating to contributions. This was included in the Exposure Draft and supported by WLSA. Wastage concerns the dealings of one party in reducing or diminishing the asset pool and cannot appropriately be dealt with only at step 3 when considering current and future circumstances, as such dealings relate to *prior* actions taken by one party, and its impact on the asset pool. We therefore propose that wastage also be dealt with at step 2 (contributions factor).

53. In the case of *Kowaliw* Justice Baker commented:

> *“…if a party has either by deliberate act or by economic recklessness reduced the value of the assets available for distribution then the economic consequences which flow therefrom including the relevant burden to the other party are directly relevant to a consideration of the respective contributions contemplated by sec. 79(4).”*

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[15] *Belinda Fehlberg and Lisa Sarmas, ‘Australian family property law: ‘Just and equitable outcomes?’ (2018) 32 Australian Journal of Family Law 81.*

[16] *Belinda Fehlberg and Lisa Sarmas, ‘Australian family property law: ‘Just and equitable outcomes?’ (2018) 32* Australian Journal of Family Law *81.*

[17] *Dr Anne Summers (2022). The Choice: Violence or Poverty. University of Technology Sydney. [https://doi.org/10.26195/3s1r-4977].*

[18] *Kowaliw & Kowaliw (1981) FLC 91-092.*

54. Wastage is currently dealt with under current s 75(2)(o) – "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account." We note this is distinct to "current and future circumstances," the section of the FLA in which the Bill proposes to include wastage. The FLA as it currently stands, links s 75(2) to s 79(4), the section dealing with contributions. Accordingly, WLSA submits that it was likely not the intention of the Kowaliw case for wastage to be dealt with as only a current and future needs factor, but to also deal with it under s 79(4).

55. Further, along with adding wastage as a contributions factor, the Bill should also provide additional guidance to clarify how the court should proceed if there is a finding of wastage – whether the court should consider the effect of wastage on the value of the asset pool, or as a negative contribution by the wasteful party (or should offset any contribution made by the wasteful party). Providing more direction as to how the court should apply this provision would be helpful for self-represented litigants and legal practitioners, particularly when matters are being negotiated without the court's oversight.

56. In the experience of Women's Legal Services, it is not uncommon, particularly at the time of separation, for the other party to unilaterally spend joint funds on holidays, vehicles and/or excessive spending. This can often leave our clients with no access to funds and confusion regarding their legal options when there is no or a minimal asset pool remaining.

57. We also previously recommended that examples should be included in the legislation to clarify the meaning of wastage, including the examples outlined in the Attorney-Geneal's Department's Consultation Paper[19] in relation to the Exposure Draft as well as additional examples:

- Where a party has reduced the value of the parties' assets, including through reckless or negligent conduct
- Excessive gambling
- Undermining the profitability of a business or investment (such as intentionally damaging good will and reputation)
- Selling or transferring marital assets without proper reason or consent from the other party
- Diversion of income
- Making high-risk investments.

Recommendation

- Amend s79(4) to **also** include wastage as a consideration in relation to contributions.
- List examples of wastage in the legislation.

Addbacks

58. While we note that wastage is not listed as a contributions factor, we are recommending that it is included. If it is included, any consideration of wastage as a contributions factor should not

[19] *Attorney-General's Department, Consultation Paper – Family Law Amendment Bill (No.2) 2023 (September 2023)* <Consultation paper - Family Law Amendment Bill (No. 2) 2023 (ag.gov.au)>

limited the Court's ability to consider other approaches to dealing with wastage in property settlement proceedings, such as addbacks.

59. An 'addback' refers to a financial adjustment made to a property settlement calculation, where the court adds back certain assets or financial contributions that were wasted, dissipated, improperly dealt with by one of the parties, or received for the benefit of one party. It can occur in circumstances where the asset would have been in the property pool if not for the actions of the party who dealt with the asset.

60. The court has been somewhat reluctant in recent years to grant addbacks for the waste or loss of assets. However, the court has wide discretionary powers and addbacks have been ordered on some occasions to allow for just and equitable property settlements and are considered on a case-by-case basis. For example, the court still tends to add back monies where joint monies or assets are distributed to one party to the detriment of the other, such as for legal fees, or where one party prematurely distributed matrimonial assets.

61. WLSA is concerned that the proposed provision regarding wastage may limit a party's ability to raise loss and wastage in the context of an argument for an 'addback'.

62. In the case of wastage, an "addback" approach is more advantageous to the non-wasteful party, as the wasted money would be considered as funds already received by the wasteful party. This would result in the entire wasted amount being accounted for in the property settlement, as opposed to a discretionary adjustment based on the wasteful party's negative contribution.

63. The wastage provision in the Bill, proposed to be included in the "current and future circumstances" provisions of the FLA, should not limit the court's ability to add the wasted money back into the asset pool in appropriate circumstances, and for the wasted money to be considered as funds already received by the wasteful party.

Recommendation

- Clarify that any consideration of wastage as a factor in property settlements does not limit the Court's ability to consider other approaches to dealing with wastage in property settlement proceedings, such as addbacks.

Considerations relating to companion animals

64. WLSA is very supportive of specific provisions relating to companion animals being included in the FLA with clear guidance provided as to how companion animals are to be treated by the Court in a property settlement. WLSA agrees with the comments made in the Explanatory Memorandum that:

- The amendments will recognise the unique character of family pets as valued members of many Australian families; and
- Family violence is relevant to making decisions about the ownership of the family pet following relationship breakdown (at page 31).

65. In relation to these clauses regarding companion animals, WLSA endorses the submission of Lucy's Project,[20] a national charity that aims to improve the safety and wellbeing of people and animals impacted by domestic, family, and sexual violence. WLSA also makes the following additional points in relation to the clauses on companion animals contained in the Bill:

Companion animals in Family Violence Courts

66. We note the need for victim-survivors of family violence to be able to address issues concerning their pets within state and territory family violence courts if they are not otherwise involved in family law proceedings. As raised in our submission to the Inquiry into Family Violence Orders[21], requiring victim-survivors to navigate both the family violence and family law courts creates unnecessary complexity and delays, particularly when urgent protective measures for pets and victim-survivors may be required.

67. We remain supportive of the amendments to state and territory-based legislation as raised in our submission to the above Inquiry, to allow victim-survivors to address the care and safety of companion animals within Family Violence Court proceedings, where no separate family law matter exists.

68. For avoidance of doubt, we reiterate our support of the inclusion of provisions related to companion animals in the FLA to ensure they are properly considered when a relationship breaks down and family law proceedings are underway and/or are required in any event.

69. We recommend that the provisions concerning companion animals in the FLA and family violence legislation be consistent in allowing victim-survivors to address the care and safety of their pets in either jurisdiction without precluding their ability to have related issues addressed in the other. Specifically:

- Victim-survivors should be permitted to seek orders regarding companion animals in Family Violence Courts, ensuring that urgent protective measures can be obtained locally and efficiently; and
- The framework should explicitly state that the ability to address companion animal issues in Family Violence Courts does not affect or limit the ability to raise related concerns in the FCFCoA when appropriate.

70. This dual approach will streamline the legal process for victim-survivors, reducing complexity and cost and ensuring timely resolutions for both the safety of pets and the needs of those affected by family violence.

Recommendation

- Provisions concerning companion animals in the FLA and family violence legislation should be consistent in allowing victim-survivors to address the care and safety of their pets in either jurisdiction without precluding their ability to have related issues addressed in the other.

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[20] *Lucy's Project, Submission 8 to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Family Law Amendment Bill 2024.*

[21] *Women's Legal Services Australia, Submission to the Inquiry into Family Violence Orders (July 2024)* < Sub69-Womens-Legal-Services-Australia.pdf (wlsa.org.au)>

Definition of companion animals

71. The Explanatory Memorandum notes at paragraph 7:

> "An animal might be kept for companionship purposes, and for other purposes. For example, a sheepdog might be used as part of a family business to herd sheep on the family farm, and might also be a source of companionship for a family member. It is for the family law courts to determine if the animal is a type of animal within the meaning of paragraphs (a) to (d) of the new definition, and if so, it cannot be a companion animal for the purposes of the Family Law Act. Animals that have a high economic value and are not used for companionship would be dealt with by the family law courts in the same way as any other type of property in the property pool."

72. WLSA suggests that the definition of companion animal in proposed section 4(1) be amended to clarify that animals with mixed purposes, (e.g., an animal that provides companionship but also assists with limited agricultural tasks), may be covered by the FLA. This will make it clear that the court has discretion to categorise animals with hybrid roles, as companion animals.

73. Suggested wording is below (**additions in bold**):

> 4(1) **Companion animal** means an animal kept by the parties to a marriage or either of them, or the parties to a de facto relationship or either of them, primarily for the purpose of companionship**, including animals that may also serve supplementary roles such as emotional support, therapy, or recreational activities**. This definition does not include:
>
> (a) an assistance animal within the meaning of the Disability Discrimination Act 1992; or
>
> (b) an animal primarily kept as part of a business; or
>
> (c) an animal primarily kept for agricultural purposes; or
>
> (d) an animal primarily kept for use in laboratory tests or experiments.

Recommendation

- The definition of companion animal in s4(1) should be amended to clarify that animals with mixed purposes may be covered by the FLA.

Sale of companion animals to be a last resort

74. New s79(6) of the Bill states that the courts can only make an order that only one party to the marriage or only one party to the proceedings owns the companion animal, or an order that the companion animal be sold. The provision explicitly states that the court cannot make any other kind of order with respect to ownership of the companion animal.

75. WLSA submits that sale of companion animals should be a last resort, and the court should be empowered to consider alternatives to selling the companion animals before making such an order, such as orders for the party/ies to surrender the animal or transfer the animal to a family member or trusted friend.

76. As noted in the submission by Lucy's Project, a 2022 national survey of 1724 Australians asked people what options they would consider if they could not look after their pets anymore. 59%

indicated they would give them to a family member, 40% would give them to a friend, 20% would give them to a charity, 15% would send them to a shelter, and only 8% would sell them.

77. We recommend s79(6) be amended to **(additions in bold**):

Considerations relating to companion animals

(6) In property settlement proceedings, so far as they are with respect to property that is a companion animal, the court may order:

a. that only one party to the marriage, or only one person who has been joined as a party to the proceedings, is to have ownership of the companion animal; or

b. that the companion animal be surrendered or transferred to a designated safe place, such as a family member, trusted friend, registered animal rescue organisation, provided that such organisation or individual consents to the arrangement; or

c. that the companion animal be placed in temporary care with an appropriate organisation or individual, with the consent of that organisation or individual, until a long-term arrangement is agreed upon or ordered by the court.

78. We note that courts have the power to make orders binding the parties to take certain steps to surrender the animal as proposed above, as well as transferring ownership of the animal, as it does in relation to other property.

Recommendation

- The sale of companion animals should be a last resort, and the court should be empowered to consider alternatives to selling the companion animals before making such an order.

Interim Orders about companion animals

79. Section 79(6) of the Bill outlines the orders the courts may make in respect of ownership of a companion animal in property settlement proceedings. However, it is unclear whether the paragraph allows the court to make an order pending finalisation of the proceedings.

80. It can take years for proceedings to progress to a Final Hearing in the FCFCoA, particularly if there is other property to be divided. If the court is unable to make interim orders regarding companion animals, the delay may undermine the claimant's position or lead to unsafe outcomes for the parties' and the animal's welfare.

81. WLSA recommends that the paragraph be clarified to state that the court also has the power to make interim orders in relation to companion animals. This will allow the court to make orders such as that proposed in the preceding paragraphs relating to the animal being placed in temporary care.

Recommendation

- The court should be empowered to make interim orders in relation to the ownership and/or care of a companion animal.

Schedule 1, Part 2 – Principles for conducting property or other non-child-related proceedings

Principles for conducting child-related proceedings and property or certain other proceedings

82. The Bill includes proposed sections 102ND to 102NN that provides the less adversarial approach apply to all matters, including financial proceedings. The current position is that these provisions only apply in parenting proceedings. WLSA agrees with the proposed approach to establish a less adversarial trial processes for property or other non-child-related proceedings. We also agree with the scope of proceedings proposed to be within the meaning of property or other non-child-related proceedings.

83. This Bill includes changes to the rules of evidence in property proceedings. This is an essential component of these reforms. If the proposed reforms are implemented there will be a greater need for the court to make findings of fact with respect to family violence in property proceedings as well as parenting proceedings. It is important to have a consistent approach across parenting and property matters as to how family violence is dealt with and as such there needs to be a consistent approach to how that evidence is dealt with, including consistency as to the rules of evidence.

84. In the experience of Women's Legal Services, the FCFCoA is already well equipped to deal with allegations of family violence as it has been dealing with these issues within parenting proceedings since the court was established. Even where the *Evidence Act 1995* (Cth) (Evidence Act) has not been strictly applied, it is still overwhelmingly difficult for victim-survivors to establish they have been the victims of family violence. It is our experience that the court scrupulously examines the evidence of family violence and places limited or no weight on evidence that would not be admissible under the Evidence Act.

85. The less adversarial trial approach however must be supported by greater and more equitable access to legal representation in family law proceedings, which see victim-survivors being exposed to ongoing violence and abuse. Even where adjustments are made to make proceedings more informal, clients of Women's Legal Services overwhelmingly find it very difficult to participate in family law proceedings and this is particularly apparent in property proceedings.

86. Under the proposal, the court will continue to have discretion to weigh up and exclude evidence. In a large asset pool matter, it is likely that the parties would be legally represented and continue to place the best evidence before the court to support their case. The strict application of rules of evidence in property matters overwhelmingly disadvantages self-represented parties who do not have the ability or means to present evidence in accordance with the Evidence Act.

87. By its nature, family law impacts a significant proportion of the community, yet legal representation in family law matters remains prohibitively expensive. Further, Legal Aid has strict guidelines for what matters it will fund and Community Legal Centres such as Women's Legal Services have limited resources and can represent people experiencing financial disadvantage in only a small number of proceedings, despite demand for legal assistance.

Recommendation

- Increase funding for legal assistance services to ensure people experiencing financial disadvantage who are engaged in property proceedings have access to legal representation.

Consent in relation to the less adversarial trial process

88. Section 102NA of the Bill states the Division applies if the parties' consent or the court orders that the Division applies. This is a significant change of position from the Exposure Draft where the issue of consent was not provided for.

89. WLSA does not support this change as it will likely disadvantage victim-survivors in financial proceedings where there is often already a significant power imbalance. Perpetrators of violence use the court system to commit further abuse towards victim-survivors and it is our submission that this section could be misused in this way. In particular, we are concerned the perpetrator will intentionally refuse to consent to application of this Division as a tactic to delay proceedings and distress the victim-survivor.

90. Whilst we note that the Court can Order that the relevant Division can apply regardless of consent, it is our submission that the removal of the automatic operation of the less adversarial proceedings provisions will lead to further complexity and argument for these matters which is something that, on our submission, goes directly against the purpose and point of these amendments to the Act.

91. We know that a high number of women are required to self-represented in financial proceedings due to limited grants of Legal Aid available in property settlement matters. Community Legal Centres like Women's Legal Services often do not have the resources to represent women in property matters as are required to focus on high-risk domestic violence and parenting matters.

92. It is also important to be very clear about the reality of a provision that involves consent in a domestic violence context. It is very unlikely that a perpetrator will consent to an Order that makes anything easier for the victim-survivor – especially if that consent would be to the operation of a Division that might make it easier for the victim-survivor to prove the perpetrator's violence and to have that taken into account as part of the property division.

93. Therefore, in essence, the way that we envisage the relevant provision operating under the Bill as it is currently drafted is that there will be no consent or it will be rarely provided and, rather, this will turn into a technical argument at the beginning of property division proceedings, causing unnecessary delay, cost and distress.

94. A less adversarial approach to proceedings does not mean that the rules of evidence, the Rules of the Court and other procedural matters are completely disregarded. Rather, it allows the Court to prioritise the fundamental objectives of the enquiry without having to compromise same due to a strict requirement to meet the rules of evidence and or other applicable Rules or procedures. Parties will still be required to put the best evidence before the court. Applying

this Division to financial proceedings does not mean that legal practitioners will be permitted to avoid compliance with their obligations to the court and to ensure that proper valuations and documents are put before the court.

95. This division is crucial to ensure that victim-survivors who are often required to self-represent can place evidence before the court regarding the impact that domestic violence has had on them. This evidence may not be strictly in accordance with the rules of evidence but can be considered and weighed up by the court when determining the matter.

96. It is also important to note that if the provision as drafted in the Bill is enacted into law, the first material filed by the parties will need to strictly comply with the rules of evidence. In family law matters, this initial material filed by the parties (be it an Initiating Application or Response) is usually very important in the context of the resolution of a matter. It will then be up to the court to consider making an order that the less adversarial approach be taken in the matter going forward. This creates an additional confusion and complexity to what is already an incredibly complex process.

97. In our submission, if the intention is for the Division to not apply in particular cases, the sections should be reversed to provide that the less adversarial approach will apply unless the parties consent or the court orders. This will overcome the issue of the parties' initial evidence potentially being subject to different rules of evidence and a perpetrator withholding consent to control. This will also provide the court with discretion to order that the approach does not apply if it is not appropriate.

98. It is our position that this would assist in achieving the objective of these reforms, namely the simplification of the law around property settlement (particularly noting that this for self-represented litigants) and, further, making it easier for arguments around family violence to be considered in the context of property settlement. Insisting that the strict rules of evidence apply unless the parties' consent or the court orders, involves an additional level of argument and complexity that we submit is inconsistent with the objectives.

Recommendation

- Division 4 of Schedule 1, Part 2 should be amended to provide that the less adversarial approach applies to all proceedings unless the parties agree or the court orders.

Schedule 1, Part 3 – Duty of disclosure and arbitration

99. While WLSA is supportive of codifying the existing duty of disclosure in financial proceedings, in our view it does not go far enough to ensure orders are complied with.

100. An increased emphasis on a party's duty of disclosure should also include increased attention on non-compliance with the duty and the consequences that flow as a result. In the experience of Women's Legal Services, perpetrators of domestic and family violence refuse to disclose relevant documents as a tactic to intentionally delay the proceedings. This causes significant distress and cost, particularly in circumstances where there is already a history of violence between the parties. Some victim-survivors will walk away from financial proceedings due to

the perpetrator refusing to disclose relevant financial records or using tactics such as disclosing only parts of documents.

101. We provide the below case study to highlight the non-compliance with the duty of disclosure by perpetrators, and the lack of consequence and accountability for such non-compliance, and its impact on victim-survivors.

Case Study - Impact of non-compliance with the duty of disclosure on victim-survivors

Jill and Henry were married for eight years, and they had one child together. They purchased one property together during their marriage, which was the home they lived in. Henry perpetrated serious family violence against Jill. After one particular assault, Henry was charged with domestic violence offences and police applied for an Apprehended Personal Violence Order for Jill's protection. Jill left the home following separation, and Henry remained living in the home, refusing to sell the home or pay out Jill.

Henry refused to mediate or provide disclosure, so Jill commenced property proceedings in May 2022, after the Federal Circuit and Family Court of Australia merger and following release of the new Central Practice Direction. The Court made Orders requiring the parties to provide financial disclosure and listed the matter for Conciliation Conference.

Prior to the Conciliation Conference, Henry filed some documents but did not provide full financial disclosure and asserted a number of unsubstantiated liabilities. The Court noted Henry was in apparent breach of the disclosure orders, however no consequences flowed, and the matter remained listed for Conciliation Conference.

Henry remained self-represented at the Conciliation Conference, and the matter did not settle. The Court made further Orders for the parties to provide financial disclosure, and noted there were allegations by each party that the other had not provided full financial disclosure, although Jill had provided ongoing disclosure.

When the matter was next before the Court, Jill was granted leave to issue up to 15 subpoenas to confirm Henry's financial position given he had still not provided financial disclosure. Jill was required to issue subpoenas to several banks and third parties but was unable to confirm the liabilities Henry asserted and his other financial interests.

Following this the matter was set down for Final Hearing. Given the history of family violence and as Henry was self-represented, the Court was required to make an Order pursuant to section 102NA banning cross-examination between the parties and thereby facilitating Henry being eligible for legal representation leading up to and at the Final Hearing.

The matter eventually settled the day before the Final Hearing, following Henry obtaining legal representation pursuant to section 102NA. Henry had not provided complete financial disclosure to Jill at any point during the proceedings.

Jill's solicitor requested financial disclosure on ten different occasions over a period of 18 months prior to the settlement. The duty of disclosure became onerous on Jill who provided ongoing financial disclosure to Henry throughout the proceedings. As the proceedings dragged on, the situation became increasingly stressful for Jill and the lack of consequence and accountability for Henry's non-compliance was disheartening..

102. We recommend the legislation go further to make clear the consequences of non-compliance, by amending section 71B(2) and (6) from “may be exercised” to “must be exercised.”

Recommendation

- Amend s71B(2) and s71B(6) to provide the powers the court **must** exercise, not may exercise.

Schedule 2 – Children’s contact services

103. WLSA welcomes the introduction of provisions to regulate child contact services. The Act does not currently define or prescribe any standards or requirements for Children’s Contact Services (**CCS**).

104. The Bill provides that there will be Accreditation Rules that may provide for the accreditation of persons and entities as CCS practitioners and CCS businesses. We are concerned the Rules setting out the requirements for ongoing accreditation for CCS practitioners and CCS business have not yet been drafted. Discretionary language is used to describe what may be included in the regulations. It is therefore difficult to assess their effectiveness or to know how the regulations would be effectively enforced.

105. CCSs provide an important and necessary function within the family law system to facilitate child-centric full and partial supervised contact services and handovers. CCS are intended to provide a safe setting for children and families where risks are present with impartial oversight and monitoring.

106. CCCs frequently come into contact with families who have highly complex parenting matters where there may be multiple risk factors present, including risks of being subjected or exposed to sexual, domestic and family violence, child sexual abuse, mental health issues, and/or alcohol and other substance abuse issues. Providing contact services requires high-level skills and expertise on a number of issues, including:

- Family and domestic violence;
- Responding to risk;
- Understanding child abuse (including child sexual abuse) and neglect;
- Understanding grooming behaviours of child sex offenders;
- Childhood development;
- Substance abuse issues;
- Mental health issues and disorders;
- Diversity and cultural competency;
- Safety screening and assessment;
- Ascertaining whether individuals are suitable to work with children;
- Report writing practice and procedure;

- Trauma informed practice; and
- Ability to work with clients and children with complex needs and issues.

107. Staff and services that are not appropriately trained and qualified will not be able to effectively provide a safe, impartial environment, respond to challenging, unsafe or violent behaviours, recognise damaging psychological impacts on children being required to spend time with a person they may fear or has previously abused them, or to identify subtle demonstrations of abuse between adults or towards children.

108. The observance, monitoring and reporting function that CCCs play can be used as vital evidence in family law proceedings and is usually given weight by the Court. It is imperative that this is conducted by highly trained, competent and experienced professionals. CCCs ought to have effective oversight of their practices, with accountability mechanisms that are transparent for quality assurance purposes and to ensure public confidence.

109. In the experience of Women's Legal Services, there can be a significant range in safety and quality of current services that provide for the supervision and oversight of contact with children and at handovers. This can vastly impact on the safety of the service and the contact or reporting notes that are developed. Women's Legal Services have assisted clients whose children have been injured or exposed to further family violence during supervised visits in circumstances where the contact service was unregulated and should have done more to protect the child from exposure to risk.

110. The legislation should therefore be reframed to ensure that it prescribes what the regulatory scheme *must* deal with to improve CCSs.

111. While we are strongly of the position that CCSs must have appropriate regulation and ongoing accreditation of CCS, it is imperative this does not limit the availability of these essential services and significant funding will need to be provided by the Government to ensure that there are enough accredited CCS. In the experience of Women's Legal Services, there is already a significant shortage of CCS which leads either to concerningly long wait times (at times up to six months) or circumstances where, notwithstanding serious risk, the courts and/or parties choose to forgo the need for professional supervision as it is simply practically not possible. This can lead to children and victim-survivors being exposed to unacceptable risk. These resourcing concerns are even more apparent in rural and remote communities.

Recommendation

- Engage in extensive consultation prior to establishing the Children's Contact Services regulatory scheme, and prescribe how the regulatory scheme must improve Children's Contact Services.
- Increase funding for Children's Contact Services, particularly in rural, regional and remote communities.

Schedule 3, Part 1 – Attending family dispute resolution before applying for Part VII order

112. WLSA supports the proposed changes enabling the Court to determine whether an exemption to the mandatory family dispute resolution requirements under section 60I applies prior to accepting filing of a Part VII (Children) application.

113. We are also pleased there is an opportunity for review where a delegate has exercised the power of the court under section 60I(8A). Review provisions allow for greater consistency in decision-making.

Schedule 3, Part 2 – Attendance at divorce proceedings

114. WLSA is supportive of the Bill removing the requirement to attend a divorce hearing if there are children under the age of 18, however the Bill does not go far enough and further reform is necessary to ensure that vulnerable court users can easily apply for divorce.

The requirement to consider the parenting arrangements

115. The Act currently provides that a divorce order does not take effect unless the court has declared that it is satisfied that proper arrangements have been made for the care, welfare and development of children.[22]

116. The Bill appears to highlight this requirement including a note at the end of s98A(2A) that:

> If there are children of the marriage who are under 18, a divorce order cannot take effect until the court declares under section 55A that it is satisfied that proper arrangements in all the circumstances have been made for the care, welfare and development of the children, or that there are circumstances by reason of which the divorce should take effect regardless (see paragraph 55A(1)(b)).

117. In our submission, the requirement to consider the arrangements for children in divorce proceedings should be removed.

118. The purpose of a divorce is the legal end the marriage after the irretrievable breakdown of the marriage. It is not the purpose of a divorce to consider the sufficiency of parenting arrangements. The inclusion of this wording with respect to divorce is confusing and, in our experience, causes victim-survivors to believe they must come to an agreement regarding the parenting arrangements before applying for divorce. This can result in women negotiating or entering into parenting agreements that are unsafe and/or not in the children's best interests.

119. Parenting arrangements are already appropriately dealt with under Part 7 of the FLA. We submit that the focus of the divorce application should be on the dissolution of the marriage, not on the parenting or property arrangements. The FLA does not provide that the court should be satisfied the property settlement is just and equitable when considering a divorce application. We submit the same approach should be taken with parenting matters. There is also a general lack of

[22] *Section 55A,* FLA

understanding regarding the level of detail to be included in the divorce application and what is a 'proper arrangement'.

Requirement to attend counselling

120. The Act currently states that if the parties have been married for less than two years, the parties must attend counselling before applying for divorce and file with their application, a certificate 'stating that the parties have considered reconciliation' (s44). Whilst there is a requirement for the court to waive this requirement in special circumstances, this provision causes distress to victim-survivors, places them in positions which expose them to increased risk and poses an onerous obligation on parties, especially victim-survivors of family violence. It is also inconsistent with the right of a person to decide whether they wish to be in a marriage.

Case management changes

121. The divorce process is currently complicated and expensive for most self-represented and culturally and linguistically diverse litigants. In our experience, clients find it difficult to complete divorce applications without legal assistance. When they do not receive legal assistance, the applications are often requisitioned for deficiencies and/or for failing to meet service rules. In practice, many clients have difficulties including but not limited to:

Commonwealth Court Portal

122. Currently, parties are required to file divorce applications via the Commonwealth Court Portal. In practice, this means that many vulnerable court users cannot apply for a divorce without legal representation. This includes parties who are:

- In prison
- Do not have access to a computer or internet. This issue is exacerbated for parties living in rural, regional and remote areas
- Have low levels of literacy and computer literacy
- Are culturally and linguistically diverse.

123. To address this barrier, the requirement to file a Divorce Application via the Commonwealth Court Portal should be removed. Parties should be permitted to file paper applications and court users should be provided with access to computers, printers and Justices of the Peace for witnessing documents at FCFCoA and state and territory court registries.

Access to interpreters

124. The court does not provide litigants with access to interpreters at divorce hearings. In our experience, this often results in clients with culturally and linguistically diverse backgrounds electing not to participate in the hearing or not understanding the directions imposed on them by the court at the hearing. This can result in adjournments and delays or applications being dismissed after the party has paid the court filing fee.

Court filing fee

125. The current filing fee for an application for divorce is $1,100. A reduced fee can be sought if both parties are eligible but there is no ability to apply for a fee waiver. In our experience, our clients are often eligible for a reduced fee due to their financial circumstances, but the other

party is not and that party will often refuse to contribute to the filing fee to control and commit systems abuse against the woman.

Complexity of the process

126. The current process, particularly with regards to proving the marriage and service, is difficult for self-represented parties. This includes:

- The requirement to obtain a copy of their marriage certificate if they are no longer in possession of same, especially when married outside of Australia.
- Understanding that additional documents may need to be uploaded to prove jurisdiction by way of visas and proof of signature.
- Lack of knowledge that the court may contact them via email to address any deficiencies with their application prior to the hearing or to request that they attend the hearing in person.
- Understanding service rules and how to engage process servers.
- Meeting additional evidence requirements in circumstances where parties were married less than 2 years and separated under the one roof.
- Completing an application in a proceeding and supporting affidavit when service cannot be effected.

127. As an example, many of our clients are incapable of completing an application in a proceeding and affidavits seeking orders for substituted or dispensation of service without legal assistance. When service cannot be effected by post or in person, the court places an onerous burden on applicants to explain all steps taken to locate the respondent before consideration will be given to making an order for substituted service or dispensing with the need for service. Many of our clients are unable to make simple inquiries to locate the respondent (for example an electoral roll search) and have no contact family violence orders in place. They have little knowledge of the whereabouts of the other party or continuing ties to the other party.

128. In our experience, parties are often required to place further evidence before the court as proof of signature. This is a complex and onerous process and confusing for self-represented parties.

Recommendations

- The requirement for the court to declare that it is satisfied that proper arrangements have been made for the care, welfare and development of children be removed from section 55A of the Act.
- The requirement for the parties to attend counselling prior to making an application for divorce for a marriage that is less than two years duration be removed from section 44(1B) of the Act.
- The divorce case management process be reviewed to ensure access to justice for court users including:
    a) Removal of the requirement to file all divorce applications via the Commonwealth Court Portal.
    b) Providing access to computers and printers in all court registries.
    c) Introducing grounds for waiver of the court filing fee for divorce.
    d) Simplifying the court process and legislation regarding the requirements to prove an overseas marriage and prove service.

Schedule 3, Part 3 – Commonwealth information orders

129. WLSA supports the proposed amendments to section 67N in the Bill to clarify the operation of Commonwealth Information Orders, in particular regarding the provision of violence related information.

130. However, as there is increasing recognition within the family law system that family structures can be varied and vast, we are concerned that the provisions at proposed section 67N(9)(b) and the expanded definition of persons who are related to a child for the purposes of paragraph 67NA(1) may capture a large number of people who may have little or nothing to do with the child or the proceedings before the Court. These provisions should be limited to people who have a connection to the child the court considers relevant.

Recommendation

- Amend s67N(8)(b) to ensure that it only covers a person with a relevant connection to the child.

Schedule 3, Part 5 – Protecting sensitive information

131. We support the protection of sensitive records in family law proceedings; there is public interest in encouraging people to access counselling and other support to help in their recovery and knowing those records and processes will be confidential.

132. While there may be many reasons why a victim-survivor may not want the perpetrator to know the impact the perpetrator's behaviour has had on them, there are circumstances when a person's protected confidences will need to be adduced into evidence and are relevant in determining risk. We agree that the paramount consideration in determining whether such evidence should be adducedis the best interests of the child.

133. We do however make recommendations for further reform which will ensure greater safeguards and transparency around protected confidences and these recommendations are consistent with the policy intent of the provisions.

134. Women's Legal Services have experience with advising and representing victim-survivors about the sexual assault counselling privilege in the States and Territories, including via the new sexual assault legal services pilots in Victoria, WA and ACT. WLSA's position has been informed by our experience in those jurisdictions and the experiences of our clients who are often victim-survivors of domestic, family and sexual violence.

Current practice

135. The current subpoena process in the FCFCoA is set out in Part 6.5 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* and provides:

- A legally represented party can file up to five subpoena without leave of the court and there is no restriction on the number of subpoena filed by an Independent Children's Lawyer.
- The subpoena form is filed via the Registry and then served on the parties and the subpoenaed entity.
- A party can object to the production, inspection or copying of the records produced if they are irrelevant, privileged or too broad.
- If the records requested are medical records, the party who is the subject of the medical records can provide written notice to the court seeking to review the records to determine if they will object.
- If no objection is filed, the issuing party files a Notice of Request to Inspect Form and all parties can inspect the records at court. The records can also be copied unless they arechild welfare, medical, criminal or police records.
- If a party wishes to rely on the records in the proceedings, that party must refer the court to the relevant record during a hearing.
- A solicitor is permitted to disclose the contents or give a copy of the document to their client.

136. In our experience, objections to subpoena are rarely filed due to victim-survivors having difficulty accessing free legal advice and representation and understanding they have the right to object.

The Bill

137. The Bill provides that the communication made by one person to another person "in the course of a relationship" in which one of the persons (the confidant) is acting in a professional capacity to provide a professional service to the protected confider, in circumstances where it is expressed or inferred that the confidant is under an obligation not to disclose.

138. A professional service is defined in the Bill under s102BB as a health service for physical or psychological health; and specialist service in relation to sexual assault or family violence. It is our view that the definition of a protected confidence is too narrow.

139. Protected counselling communication in the *Evidence Act 1977 (Qld)* includes:

> …oral or written communication made in confidence…by a counsellor to or about a counselled person to further the counselling process.[23]

140. A protected confidence in the *Criminal Procedure Act 1986 (NSW)* has a broad definition and includes:

> Communication made in confidence to or about the counselled person, or made in confidence about the counselled person, by a counsellor or a parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process.[24]

141. It is our view that the definition in the Bill should be widened to confirm that not only the counselling records, for example file notes associated with counselling are considered protected counselling records, but also any other document produced in connection with that professional relationship, including for example, correspondence or a medical certificate.

142. It is also our view that the definition of professional service should be expanded to include all counselling services in relation to sexual assault or family and domestic violence and this should not only be limited to the interpretation of a 'specialist service'.

Producing and adducing the records: ss120BC and 120BD

143. The Bill then sets out how these records may be produced and then adduced. In particular:

a) Production: Section 102BD provides that if a subpoena to produce a document is filed or a document is required to produced under the Family Law Act or Rules of Court, the court *may* on its own initiative or on application, direct that a document or part of a document not be produced, inspected or copied, if the court finds the disclosure requirement would disclose a protected confidence or the contents of a document recording or relating to a protected confidence.

b) Adducing: Section 102BC provides that if the records have been produced, the court the court *may* on its own initiative or on application, direct that a document or part of a document not be adduced, if the court finds the disclosure requirement would disclose a protected confidence or the contents of a document recording or relating to a protected confidence.

144. The Bill provides that the court *may* give direction regarding the evidence, document or part of document if is satisfied that harm would or might be caused to the confider or a child to whom the proceedings relate, if the evidence was adduced, produced, inspected or copied. The best interests of the child will also be the paramount consideration if the proceeding is a parenting matter.

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[23] *s14A(1)(b) Evidence Act 1977 (Qld)*
[24] *s296 Criminal Procedure Act 1986 (NSW)*

145. When making that direction, the court *must* have regard to a list of non-exhaustive matters including the probative value and importance of the evidence and the public interest in preserving the confidentiality of protected confidences, pursuant to section 102BE(4).

146. In practice this means that leave of the court is not required prior to filing a subpoena. Unless the court provides a direction upon its own initiative, it will be up to a party, likely the confidant or confider, to file a court application and seek that the records are not produced or adduced. This will require the confidant or confider to know they have this right and then exercise that right prior to the other party inspecting the records. In our experience that victim-survivors already struggle with navigating the FCFCoA process and forms, particularly without the benefit of free legal advice and representation.

147. The introduction of the sexual assault counselling privilege provisions in the states and territories included additional funding for the establishment of advice and representation services. For example, Legal Aid Queensland and Women's Legal Services Queensland provide the Counselling Notes Protect Program.

148. Our submission on the initial Exposure Draft of the Family Law Amendment Bill 2023 (February 2023) [25] strongly supported the onus being on the person seeking to admit the evidence to seek leave. However, we are deeply concerned that the Bill introduced to Parliament is different to the initial Exposure Draft provisions and no longer contains a requirement that a party seek leave before issuing a subpoena, placing the onus on the protected confider to make an application to prevent the disclosure.

149. Having the onus on the person seeking to rely on the information would be a trigger for the confider to be aware of the issue and seek legal advice. If the Bill passes as currently drafted, the confider will be unlikely to know of their right to seek an objection or other direction.

150. If the onus is not reversed, another option available is to amend the Bill to include a positive obligation on the court to raise the issue with the confider. This could be drafted in a similar way to s299 of the Criminal Procedure Act 1986 (NSW) which provides:

> *If it appears to a court that a witness, party or protected confider may have grounds for making an application under this Division or objecting to the production of a document or the adducing of evidence, the court must satisfy itself (or if there is a jury, in the absence of the jury) that the person is aware of the relevant provisions of this Division and has been given a reasonable opportunity to seek legal advice.*

151. In our view, including a notice on the court form and the production of a factsheet does not go far enough to ensure that victim-survivors are aware of their right to object. This also does not account for court users who have low literacy or other accessibility barriers.

152. It is critical that the victim-survivors therapeutic relationship with their counsellor be maintained. In our experience, it is not uncommon for women to cease attending on their counsellor when they become aware the records may be subpoenaed in the criminal proceedings.

153. In our experience, some counsellors limit what information they record in their notes out of fear of the records being subpoenaed and this can impact on the quality of the therapeutic process. Outside of protected confidences, the court can obtain relevant information regarding the child's best interests from the party's evidence, the police and child safety under the *Family*

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[25] *Women's Legal Services Australia, Submission – Exposure Draft of the Family Law Amendment Bill 2023 (February 2023)* <*Women's Legal Services Australia response to the Exposure Draft Family Law Amendment Bill 2023 (wlsa.org.au)*>

Law Amendment (Information Sharing) Act 2023, subpoena to other relevant agencies and the family report processes.

Harm to a child

154. The Bill provides that the court *may* give direction regarding the evidence, document or part of a document if is satisfied that harm would or might be caused to the confider or a child to whom the proceedings relate, if the evidence was adduced, produced, inspected or copied. In our view this section should be amended to include other children in the family, for example, children from previous relationships who may be harmed if the records are produced or adduced.

Consent by protected confider

155. A trauma-informed response requires victim-survivors have agency over the admission of their records. However, it is important this decision is made with informed consent and that a party has capacity and access to specialist legal advice prior to making this decision.

156. The Bill provides that an adult confider can consent to the production or adducing of protected confidences if consent is in writing and witnessed by an independent person who 18 years of age or over.

157. It is our view that this definition should be expanded to include circumstances where the confider consents to part of a document being disclosed and set out that the confider has had the opportunity to seek legal advice.

158. This could be modelled on section 14I of the *Evidence Act 1977 (Qld*) and include:

a) In s102BF(b), 'or part of a document being produced, inspected or copied'; and

b) At the end of s102FB(c), 'and the consent must expressly state the counselled person:

i. Consents to the evidence being adduced or document, or part of a document, being disclosed, produced, inspected or copied; and

ii. Has had the opportunity to seek legal advice about giving the consent'.

Copying protected confidences

159. Whilst s102BD states that the court may direct that a document or part of a document not be copied, it is our position that the wording should be strengthened to confirm that leave must be granted to copy protected confidences and that such leave will only be granted in exceptional circumstances.

160. It is noted that leave must be granted for copying of child welfare, medical, police and criminal records under rule 6.37 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*.

Case Management and other changes

161. Further reform and changes to case management processes are also required to ensure parties and interested persons are aware of their rights to object and for the appropriate records to be provided.

Proposed new practice - return of the Subpoena list

162. This recommendation is predicated on the premise that there must be better and earlier safeguards and transparency when it comes to protected confidences. Once a perpetrator has access to the records, the damage is already done, even in circumstances where it is not allowed into evidence.

163. Where a subpoena is sought in relation to documents that may contain a protected confidence, we recommend that the production of documents is considered in a Return of Subpoena list operated by a Judicial Registrar. All hospital, medical and counselling records and sexual, domestic and family violence related records should be captured by this list. Other records will generally continue to be issued as they currently are, without a requirement to be listed in the Return of Subpoena list.

164. We recommend however that there be exceptions to the above which will enable subpoena relating to non-protected confidences records to be listed in the Return of Subpoena list, for example, when a party is concerned that their new contact details or location is disclosed in the records, and they seek redaction of this information prior to other parties having access.

165. It would also provide an option for Judicial Registrar to determine whether records contain a protected confidence where there is a dispute on this question. At the beginning of the first Return of Subpoena listing for each subpoena, we recommend the Judicial Registrar be required to inform all parties they have a right to object to inspection, copy access and adducing evidence on the grounds of protected confidence privilege, explain what this means, and stand the matter down to enable a party to access legal advice if they are unrepresented.

166. The party who is the subject of the relevant document may claim protected confidence privilege or seek leave to inspect the documents first to check to determine whether they need to claim protected confidence privilege. If there is a claim of protected confidence privilege, the Judicial Registrar should inspect the document for the purpose of determining whether the claim is valid pursuant to s102BD of the Bill.

Updating court forms

167. *Subpoena form*

168. We note the subpoena form outlines the process to object to production, inspection or copying of documents. We propose an amendment to the subpoena form to provide information about how to seek orders to redact contact details and location of a party, children and other witnesses.

169. *Notice of Request to Inspect*

170. The Notice of objection – subpoena form could be amended to provide a range of reasons for objecting with a tick a box for each. Protected confidences and redacting contact details and location should be included in the list. This, along with an accompanying plain language information sheet would assist self-represented litigants.

Training for the making of records

171. There is an important role for critical analysis of the records themselves. Records that are not family violence informed and trauma-informed can be victim-blaming, damaging to the adult victim-survivor and have the potential to result in decisions which are not in the best interests of the child and difficult to correct.

172. For example, in some WLSA members' experience, some medical experts who lack expertise in identifying and responding to complex trauma and family violence informed practice may label an adult victim-survivor with borderline personality disorder or as bi-polar, labels that are

used against adult victim-survivors to challenge their parenting capacity and perpetuate coercive control dynamics. In contrast, when workers with expertise in family violence informed and trauma-informed practice, including specialist sexual, domestic and family violence and abuse workers, engage with the same individuals, they may identify complex trauma and post-traumatic stress in the context of evidence of sexual, domestic and family violence and abuse.

173. The label given to an adult-survivor can significantly influence the way that person is treated in family law proceedings with respect to an assessment of their parenting capacity or the division of property in recognition of domestic violence. While we acknowledge submissions can be made about the weight that should be given to different pieces of evidence, in the circumstances outlined above, this requires an understanding of family violence informed and trauma-informed practice. While a lawyer may raise such objections and this may affect the weight the judicial officer gives to the evidence, what happens where a person is self-represented?

174. In addition to requiring everyone in the family law system to meet competencies in relation to being family violence informed, trauma-informed, culturally safe, disability aware and LGBTIQA+ aware, any reform seeking to ensure the safety of children and adult victim-survivors needs to ensure there is better understanding about how to make records. WLSA members, including Women's Legal Service NSW and Women's Legal Service Queensland provide training to services on making records. With additional funding, WLSA and our member services would be well placed to develop and deliver training on this across Australia.

Recommendation

- The definition of protected confidence should be widened to confirm that not only the counselling records, for example file notes, associated with counselling are considered protected counselling records, but also any other document produced because of that professional relationship, for example, correspondence or a medical certificate.
- The definition of professional service should be expanded to include all counselling services in relation to sexual assault or family and domestic violence and this should not only be limited to the interpretation of a 'specialist service'.
- The person seeking to rely on the records should be required to seek leave to seek that any counselling records be disclosed or adduced.
- The provisions should include a positive obligation on the court to raise the protected confidence provisions with the confider.
- The circumstances when a confider consents to the release of records should be expanded to include:
  a) circumstances where the confider consents to part of a document being disclosed and
  b) set out that the confider has had the opportunity to seek legal advice.
- The provisions should be strengthened to confirm that leave must be granted to copy protected confidences and that such leave will only be granted in exceptional circumstances.
- Women's Legal Services should receive funding to develop and provide training in each state and territory regarding recording counselling records in a trauma-informed manner.

Schedule 4, Part 1 – Costs orders

175. WLSA is supportive of the costs provisions being contained in the one place and supports the proposal to incorporate the costs provisions in the rules into the Act.

176. The Bill provides that when making a costs order, the court must consider 'whether any party to the proceeding is receiving assistance by way of legal aid in respect of the proceeding, and if so, the terms of the grant of the assistance to that party'.

177. In our previous submission we raised concerns that the Exposure Draft did not extend the costs provisions to cover the legal assistance provided by Community Legal Centres, including Women's Legal Services. We are disappointed that the Bill has not adopted our recommendation in this regard because it means the Court will not be required to consider whether our clients are receiving legal assistance and this will expose our clients to the potential for costs orders to be made against them.

178. It is our position that Community Legal Centres, including Women's Legal Services, are distinct from Legal Aid Commissions which provide 'legal aid'. Our services do not fit within the definition of 'legal aid' and therefore our clients would not receive the benefits of these provisions.

179. Historically the FCFCoA has recognised the vulnerability of our clients. Currently clients who are represented by Community Legal Centres (including Women's Legal Services) are eligible for numerous fee waivers including filing fees and subpoena fees. They are also eligible for reduced filing fees with respect to Divorce applications. The proposed amendment in the Bill is inconsistent with the well-established recognition by the court of the financial vulnerabilities of our clients and afforded them under other provisions in the Act

180. It is also important to note that Women's Legal Services see clients in circumstances where women are not able to access assistance through Legal Aid Commissions (for various reasons) and/or where women prefer to access gender specialist services. This is particularly relevant for vulnerable clients who are often also victim survivors of family violence.

Recommendation

- Section 114UB (3)(b) be amended to ensure Women's Legal Services clients are protected. The costs provisions should apply to clients of all legal assistance providers, including Legal Aid Commissions, Community Legal Centres, Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services.

Schedule 5 – Review of amendments

181. We are pleased the Bill requires the Minister to arrange for a review of the operation of this Bill. The review of the amendments made by the Bill must start within 3 years of commencement and be completed within 12 months of the day the review starts. The Minister must table copies of the report in each House of the Parliament within 15 sitting days of that House after completion of the report. These review provisions will be consistent with the review provisions in the Family Law Amendment Bill 2023.