

10 November 2023

**DRAFT RESPONSE TO FAMILY LAW
AMENDMENT BILL (No. 2) 2023 CONSULTATION PAPER**

The ACT Bar Association (“ACT BA”) welcomes the opportunity to respond to the exposure draft of the Family Law Amendment Bill (No.2) 2023 and the accompanying consultation paper released by the Department on 3 July 2023.

The ACT BA is generally supportive of the majority of the proposed amendments to the *Family Law Act 1975* (“FLA”) and further is supportive of the intended consequences of the provisions but does not agree that all the provisions, as currently drafted, will meet those intended consequences.

This response does not address specifically the consultation questions as time limitations have not enabled an in depth analysis of the proposed provisions. Rather, this response is limited to endorsing broad support to proposed measures where indicated and addressing specific matters of concern to the ACT BA. If a specific issue is not addressed then the ACT BA does not have a view about that issue.

SCHEDULE 1 :PROPERTY REFORMS

Property Framework

1. The Act BA is generally supportive of proposed reforms to the property framework provisions. All references to the proposed changes to section 79 should be read as also applying to the proposed changes to section 90SM.

2. The ACT BA notes that the impact of the inclusion of specific reference to family violence in property proceedings will likely have an impact on the Attorney General's s102NA cross examination scheme.
3. The ACT BA is concerned through the wording of draft section 79(2)(a) that in "identifying liabilities in respect of, any property that is the property of the parties of the marriage or either of them", liabilities that might be relevant to the Court's determination but not connected to identifiable property is excluded from consideration. This would appear to be an unnecessary and unintended limitation.
4. The ACT BA notes that although "wastage" is included draft section 79(4)(cc), there is no definition of "wastage" provided. Wastage is currently a factual contest that impacts upon the Court's determination of the net assets available for distribution. To include the effect of 'wastage' as relevant to the Court's consideration of contributions, without clear definition or other statutory guidance, risks double counting.
5. It is the clear intention of the draft bill to assist parties in their negotiations for out-of-court settlements as well as lawyers and judges dealing with litigated matters. The ACT BA is concerned that the inclusion of s79(4)(cc) [and 79(5)(a)] could have the unintended consequence of higher conflict for victims of family violence, resulting in greater risk to their safety.
6. The ACT BA is concerned about an unintended consequence of proposed section 79(5)(a). By directing the court to specifically consider the current and future impact on a victim of family violence, there is a strong risk of comparison of harm that could add further trauma to victims. It is unlikely that the amendments to the legislation intend to send a message to a victim of family violence that their experience is less worthy of recognition than another victim.

7. Instead, the ACT BA suggests that the wording of sections 79(4)(ca) – (cd) provides sufficient direction to the court to acknowledge the impact of family violence. The direct circumstances of the victim and any impact on earning capacity can properly be considered at proposed section 79(5)(l) together with the broad discretion of s79(5)(s) allowing the weighing of the impact of violence upon the ultimate result.

Principles for conducting property or other non-child related proceedings

8. The ACT BA recognises and is generally supportive of the statutory safeguards under sections 69ZN and 69ZX being extended to the property divisions where allegations or findings of family violence are present.
9. The ACT BA is however concerned that the proposed section 102NK goes beyond the stated intent of providing safeguards in circumstances of family violence and would instead unnecessarily remove important aspects of the *Evidence Act 1995* from the entirety of all property proceedings.
10. The *Evidence Act 1995* provisions, and particularly those concerning opinion and hearsay, play a fundamental role in property proceedings where there are often differences of opinion concerning values of property, effect of improvements on values, future appreciation of investments/superannuation and the like. The application of the *Evidence Act 1995* provisions relating to hearsay and opinion evidence is important for consideration of evidence of such matter where expert evidence is often required or indeed essential.
11. Legal and equitable interests in property must be properly proven, and the *Evidence Act 1995* should apply to those determinations. If a different evidentiary standard applies in the Federal Circuit and Family Court of Australia, to that applied in the Supreme Courts of each State and Territory or in the Federal Court, there is a risk that property matters involving

intergenerational wealth, third parties or equitable issues such as unconscionable conduct, undue influence or coercion will be pushed to other Courts by interested third parties unwilling to risk involvement without proper evidentiary protections. Where the Court must make findings of fact as to the existence of assets, contributions and future needs, the quality of the evidence improves the quality of the decision.

12. As an alternative to what is proposed at section 102NK, the ACT BA would suggest that consideration be given to inserting a provision that gives the court a discretionary ability not to apply any or all provisions of the *Evidence Act 1995* where allegations or findings of family violence are present. This would achieve the same result as that sought by the proposed section 102NK but would safeguard against possible unintended consequences of wholesale removal of fundamentally important *Evidence Act 1995* provisions to all property matters.

Duty of disclosure and arbitration

13. The ACT BA is broadly supportive of the proposed provisions concerning duty of disclosure and arbitration contained within the Exposure draft.
14. The ACT BA queries whether the proposed amendments would still allow for judicial discretion to waive the duty of disclosure until a particular point in proceedings, for example in s79A cases or s44 out of time applications.

SCHEDULE 2: CHILDREN'S CONTACT SERVICES.

15. The ACT BA is generally supportive of the proposed amendments concerning Children's Contact Services.
16. The ACT BA does have concern that the wording of draft sections 10KE and 10KF could have the unintended consequence of preventing the court from being provided with evidence to

confirm whether a parent has undertaken an intake procedure for a contact service. Establishing whether a parent has followed through with recommendations, or indeed orders, to undertake an intake procedure for a contact service is regularly a matter in issue in children's proceedings.

17. The wording of draft section 10KF that anything said "in the course of a CSS intake procedure", together with the draft section 10KE definitions of an "entrusted person" as including any person employed by a CSS business, and a CSS intake procedure as including "interview, questionnaire or other procedure" would seemingly prevent any information at all about the process being provided to the court, including a simple confirmation of whether a parent has undertaken or commenced an intake process for a CSS as recommended or ordered.

SCHEDULE 3: CASE MANAGEMENT AND PROCEDURE

17. The ACT BA broadly supports the proposed provisions relating to family dispute resolution and attendance at divorce hearings.
18. The ACT BA supports inclusion of a provision enabling the court to obtain information concerning family violence from Commonwealth Agencies as well as the wording generally of the proposed provisions.
19. However, the ACT BA is concerned that placing the proposed draft section 67N provisions within the existing section 67N is problematic and may result in unintended complications and limitations.
20. Section 67N(2), which is not proposed to be amended, limits the application and ordering of a Commonwealth Information Order (CIO) to circumstances where "*the court is satisfied that information about the child's location is likely to be contained in, or to come into, the records of the Department or Commonwealth instrumentality concerned*". This would appear to restrict the circumstances where a CIO can issue for information pertaining to violence as

provided in the draft section 67N provisions only to where the location of a child is not known. It does not appear to be the intention of the proposed provisions to limit the provision of information to circumstance where the location of the child is in issue.

21. The ACT BA would respectfully suggest that the draft section 67N provisions would be better placed in an entirely separate section to the existing section 67N and indeed, outside of Division 8 Subdivision C altogether. The draft provisions may be better included within Division 12 Subdivision D.
22. The ACT BA broadly supports the proposed amendments to section 69GA.

SCHEDULE 4: GENERAL PROVISIONS

Costs orders

23. The ACT BA is broadly supportive of the proposed amendments to Costs. There are some technical concerns about specific draft provisions.
24. Draft order 114UB(1) has a reference to section 70NFB(1) as an exception to the general provision of section 114UB(1). For clarity and ease of reference, the draft order could include section 70NFB(2)(g) and (h) as they contain the actual reference to the making of an order for costs.
25. It appears that there may be an error in draft order 114UB(4). Currently, an **application** for costs is to be brought within 28 days of a final order being made. The section as drafted appears to impose a deadline on judicial officers by requiring an **order** for costs to be made within 28 days of final orders, with no reference to when an application to ground the further order would be made. This is problematic if the intention is to allow judicial officers to make more costs orders of their own motion, as once final orders are made, in the absence of an application, the Court is functus.

Clarification of inadmissibility provisions

26. The ACT BA has no issue with and no comment concerning the draft provisions in this area.

We also welcome the opportunity to discuss these matters further.

Yours faithfully,



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Family Law Committee Chair



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