

Fitzroy Legal Service

Feedback on the Exposure Draft of the Family Law Amendment Bill (No.2) 2023 (the Exposure Draft)

To the Attorney-General's Department
17 November 2023

Fitzroy Legal Service acknowledges that our offices are located on the stolen lands of the Wurundjeri and other Peoples of the Kulin Nation whose sovereignty was never ceded. We pay our respects to their Elders past and present.

Acknowledgement

We are grateful to our clients, colleagues and communities for trusting us with their stories, and we honour the many victim survivors of gender-based violence we work closely with. The case examples in this submission are drawn from the work of Fitzroy Legal Service. All identifying details have been changed or omitted.

About Fitzroy Legal Service

Fitzroy Legal Service (FLS) has worked with the Victorian community since 1972 to achieve access to justice and more equitable legal outcomes. FLS provides legal information, advice, casework, and representation in the areas of civil law, family violence, family law and criminal law, with a specific focus on working with communities who are disproportionately negatively impacted by law and policy, and those who face systemic barriers to accessing justice due to poverty, discrimination, family violence, trauma, drug use, disability, contact with the criminal justice system and incarceration.

In 2019 we merged with the Darebin Community Legal Centre and now operate from four offices across Fitzroy, Reservoir, the Neighbourhood Justice Centre in Collingwood and the Pride Centre in St Kilda. We also deliver legal services through a range of outreaches including alcohol and other drug services, needle and syringe programs and the Medically Supervised Injecting Room, specialist youth, mental health and LGBTIQ+ services and five family law and family violence Health Justice Partnerships across Yarra and Darebin. We provide duty lawyer services at the Neighbourhood Justice Centre in Collingwood and the Heidelberg Magistrates' Court's Specialist Family Violence Court.

FLS also operates a Night Service on weekday evenings, which provides free legal advice regarding a range of issues including employment, family law, tenancy, debts and infringements.

About our Feedback

FLS welcomes the opportunity to provide feedback on the Family Law Amendment Bill (No 2.) 2023 (*“the Exposure Draft”*).

FLS’s expertise is derived from our experience as a provider of free and affordable legal services with a substantive family law and family violence practice. We are uniquely placed to provide commentary on this consultation, arising from our expertise working with victim survivors of family violence and other forms of gender-based violence, as well as with people who engage in or use gender-based violence, including family violence.

We primarily act for victim survivors of family violence, who are predominantly women and gender diverse people, many of whom come from migrant or culturally and linguistically diverse backgrounds. We regularly provide family law advice and conduct casework for both property and parenting matters. FLS is one of the few community legal centres that provides advice and casework on family law property matters. However, our resources are limited, and we can only assist a small portion of community members who are seeking legal assistance and cannot afford to engage a private family lawyer.

FLS does not seek to respond to each question posed in the consultation paper, but rather to provide commentary and feedback on questions to which we have a specific response or recommendation as to how the Exposure Draft could be strengthened.

FLS RESPONSE TO REQUEST FOR FEEDBACK

SCHEDULE 1: Property Reforms

Codifying the property decision-making principles

QUESTIONS 1 Does the proposed structure of the property decision-making principles achieve a clearer legislative framework for property settlement?

QUESTION 2 If not, please expand on what changes you think are required and why.

FLS agrees that the proposed structure of the property decision-making principles achieves a clearer legislative framework for property settlements.

FLS agrees that the removal of section 79(4)(e) of the *Family Law Act 1975* ('FLA') which cross-references spousal maintenance factors (contained in s75 of the FLA) will make it easier for self-represented litigants to navigate the factors the Federal Circuit and Family Court of Australia ('the Court') shall take into account when considering orders in property proceedings.

A substantial proportion of FLS's clients face barriers to accessing justice due to having low English proficiency, limited language and literacy skills, limited technological literacy and limited knowledge of the law or ability to interpret legislation. The proposed structure of the property decision-making principles means that the principles are clearer and easier to interpret.

Just and Equitable Overarching Requirement

QUESTION 3 Do you agree with the proposed framing of the just and equitable requirement as an overarching consideration through the decision-making steps?

FLS agrees with the proposed framing of the just and equitable requirement as an overarching consideration through the decision-making steps.

Effect of Family Violence

QUESTIONS 5 Do the proposed amendments achieve an appropriate balance in allowing the court to consider the relevance and economic impact of family violence as part of a family law property matter, without requiring the court to focus on issues of culpability or fault?

QUESTION 6 Do you agree with the proposed drafting, which requires the court to consider the effect of family violence to which one party has subjected the other?

FLS broadly supports the effect of family violence being included as a factor to be considered by the Court when determining a family law property settlement.

FLS regularly works with victim-survivors who have had their ability to earn an income or contribute to the home limited by the effect of family violence. Many victim-survivors have been unable to work or have had to leave the workforce for extended periods of time or cease studying due to their ex-partner's conduct and/or the mental and physical injuries they have sustained. Victim-survivors may also have ongoing expenses which flow from the effects of family violence, including medical bills and/or counselling. These expenses may be for the clients themselves but also for any children to the relationship who may have been exposed to the family violence. This will often leave victim-survivors of family violence in a financially precarious situation post-separation.

In situations where the family violence has been in the form of financial abuse, the victim-survivor may be unaware of the financial position of the parties and what they may be entitled to in a property settlement. FLS regularly represents clients who are of the incorrect belief that they have no right to a property settlement for such reasons as the property being in the other party's name.

At present, the principle from *Kennon*¹ is the authority which a Court will look to when considering family violence as a factor affecting a party's contributions:

*"where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79."*²

This principle is only applied when a causal link can be established between the perpetrator's behaviour and the victim-survivor's contributions.³ This is a high threshold for the principle to be

¹ *Marriage of Kennon* (1997) 22 Fam LR 1.

² *Marriage of Kennon* (1997) FLC 92-757 at 84, 294.

³ *Jarrett & Jarrett* [2009] FMCAfam 55.

applied. In addition, self-represented litigants may not be aware of the principles' existence and may not have the knowledge or resources to be able to apply the principle to their case.

It is FLS's view that the amendment proposed would make it clear that the Court can consider the effect of family violence on a party's contributions, including expenses which flow from the effects of family violence.

However, the effect of family violence cannot be assessed without a finding of fact from the Court, or another relevant jurisdiction, that family violence has been perpetrated by one party to the proceedings, onto the other party. The wording of the proposed paragraphs 79(4)(ca) and (cb) and 79(5)(a) indicate that the court will need to determine whether family violence has occurred, in order to take into consideration the effect the family violence has had on one party, due to conduct of another party.

Proving that family violence has occurred can be very difficult and can cause ongoing trauma for victim-survivors. Family violence often occurs within the privacy of the family home, where there are no witnesses. Physical forms of violence are difficult to prove without medical evidence, or police records. Non-physical forms of family violence are extremely difficult to prove as evidence may be limited to the evidence of the victim-survivor.

It is recommended that the provision include the standard of proof required for the Court to take effects of family violence conduct into consideration. For instance, would a Family Violence Intervention Order (or equivalent Orders in States other than Victoria) from a Magistrates' Court be sufficient to establish family violence has occurred? Would such an order be sufficient even in circumstances where the Family Violence Intervention Order has been agreed to without admission? In the absence of a Family Violence Intervention Order, recognising that not all victims-survivors seek or obtain a Family Violence Intervention Order, what evidence would need to be provided and to what satisfaction?

If a Family Violence Intervention Order is sufficient to establish that family violence has occurred, this may result in increased contested Family Violence Intervention Order proceedings in the Magistrates' Court, which could in turn lead to risks to victim-survivors.

Another potential unintended consequence of this proposed amendment is that the parties may focus on whether family violence has occurred. This could increase animosity between parties and lessen the likelihood of matters being resolved by consent.

Furthermore, there is a risk of increased unmeritorious allegations of family violence due to the potential for a financial advantage in property proceedings. This could enable further economic abuse through the court system if not adequately identified early in the proceedings. It is recommended that all decision-makers be trained and well versed in the nuances of family violence.

Despite the risks, FLS welcomes this requirement for the Court to consider the impacts that family violence has on victim-survivors during a relationship and post-separation as family violence has a significant impact on a party's circumstances.

Recommendation 1

Include in the legislation what standard of proof is required to take family violence conduct into consideration and what evidence may be accepted in order to be satisfy this standard.

Recommendation 2

Provide training for all decision-makers to adequately identify and understand the nuances associated with family violence conduct.

New contribution factors

QUESTION 7 Do you agree with the proposed amendment to establish a new contributions factor for the effect of economic and financial abuse?

FLS agrees and supports the proposed amendment to establish a new contributions factor for the effect of economic and financial abuse. FLS has extensive experience assisting clients in property settlement matters where economic and financial abuse has occurred. While economic and financial abuse fall under the definition of family violence, it is important that this form of family violence is considered carefully by the Court in property matters. The most common forms of financial and economic abuse are:

- One party controlling all of the finances and denying the other access to their money, instead giving them a small allowance to live on;
- One party withholding information about their finances;
- One party preventing the other party from working and earning their own income; and
- One party coercing the other to sign documents that create a financial liability.

FLS's experience is that this kind of conduct is not widely understood to be a form of family violence

by members of the community. FLS recommends that examples of economically and financially abusive conduct be listed in the provisions of the FLA in order to assist legal practitioners as well as self-represented litigants better understand this form of family violence.

Recommendation 3

Include in the legislation common examples of financial and economic abuse.

QUESTION 8 Do you agree with the proposed amendments to establish new separate contributions factors for wastage and debt?

Debt

FLS broadly agrees with the proposed amendments to establish a new separate contributions factor for wastage and debt. FLS holds some concerns for the consequences of these new separate contribution factors, particularly due to the ambiguity of the wording *“any debts incurred by either of the parties to the marriage, or both of them.”*

FLS often sees our clients incurring debt to benefit the family, for example to pay for school fees and groceries. This can be due to being cut off from receiving financial support from their former partner and being forced to go into debt to care for their children. FLS has also assisted clients where debts have been incurred due to financial abuse, such as the perpetrator using a credit card that is in the sole name of the victim-survivor.

The current drafting of the legislation may result in unintended consequences and could potentially be misused against victim-survivors of family violence if they have incurred debts for the purpose of purchasing reasonable living expenses and/or if the debt has been incurred by the other party in the victim-survivor’s name. FLS recommends that the proposed provision under s79(4)(cd) should include more details on how the Court should consider a debt, namely:

- When the debt was incurred;
- Why the debt was incurred;
- Whom the debt was incurred by; and
- Whether the debt was incurred with the consent of the other party.

CASE STUDY 1

FLS assisted a client who was a victim-survivor of family violence in a parenting dispute. Over the course of the proceedings, the client disclosed that the other party had asked her to take a credit card out in her name for the purpose of purchasing household items such as groceries. The other party was not able to obtain a credit card in their name, due to past debts. Our client did not use the credit card regularly. The other party kept the credit card and our client trusted that the other party was only using it for joint expenses. At the end of the relationship, the client became aware that there was a debt of approximately \$ [REDACTED] attached to this credit card that was in the sole name of our client.

Wastage

FLS broadly agrees that inclusion of wastage in the FLA will simplify family law property proceedings and enable self-represented litigants to navigate the system. However, FLS is concerned that the wording of the proposed amendment may be interpreted as lower than the current common law test for wastage. At common law, wastage is where one party reduces the value of the parties' property through a course of conduct designed to reduce the value of the matrimonial assets. FLS recommends the Act should reflect the common law test in *Kowali*:⁴

"where one of the parties embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets, or where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value".

Recommendation 4

Provide further guidance in the legislation about what debts are to be taken into consideration and in what circumstances.

Recommendation 5

Include the current common law test for what constitutes wastage.

⁴ *Kowaliw & Kowaliw* (1981) FLC 91-092.

SCHEDULE 2: Children’s Contact Services

FLS is supportive of the amendments under schedule 2 which would enhance the operation of Child Contact Services (‘CCS’). CCSs are essential to the Family Law system, enabling children to spend time safely with a parent or family member, where risk factors are present. It is FLS’s experience that quality of the service, expertise and safety can differ greatly between providers. FLS clients have raised concerns about behaviour of CCS workers, including:

- A supervisor giving one party their personal opinion on the party’s family law matter, without legal or expert basis; and
- Perceived bias present in CCS reports on parents’ interactions with children.

FLS notes that the requirements for accreditation for CCS centres and workers has not yet been published, however FLS recommends that CCS workers need to be well versed in issues of family violence, parenting, child interactions, and that there should be strict requirements for regular training for all CCS workers.

Furthermore, it is FLS’s experience that CCS services are in high demand. Some FLS clients have experienced very long waiting periods to access these services. Further funding for low-cost or government funded CCSs should be provided to ensure that the accreditation process does not disrupt the availability of this essential service to the community or the family law system.

Recommendation 6

Provide additional funding for low-cost and/or government run Child Contact Services.

SCHEDULE 3: Case Management and Procedure

Attending family dispute resolution before applying for Part VII Order

QUESTION 22 Do you have any comments on the drafting of the proposed amendments to section 60I, or are there any unintended consequences that may result from the amendments proposed?

QUESTION 23 Do you have any views on the inclusion of a further provision allowing review of pre-filing decisions in the FCFCOA Act?

FLS is supportive of the proposed amendments to section 60I for the parties to show that they meet exemption criteria prior to the Court accepting their application for filing.

Furthermore, FLS recommends that the Court should apply a similar approach to matters where an application to vary final parenting Orders is being made. FLS welcomes the Family Law Amendment

experienced an exacerbation of [REDACTED] In addition, the other party's material contained a swathe of disparaging remarks, threats, and allegations toward our client. Our client carried the onus of having to show Court why the matter should not proceed, rather than placing the positive duty, prior to the commencement of proceedings, on the other party to say why the circumstances have changed.

Recommendation 7

FLS recommends that the proposed requirement for a threshold hearing when an exemption to s60I has been sought should also occur where an application is filed seeking to vary final parenting orders. The Applicant would need to satisfy the court that a substantial change in circumstances has occurred prior the Court accepting the application.

Amending the requirement to attend divorce hearings in person and delegations.

QUESTION 24 Do you have any comments on the proposed amendments for divorce hearings?

FLS agrees and supports the proposed amendments to section 98A under Part 2 of Schedule 3 of the exposure draft. FLS assists many clients with divorce applications through the FLS Divorce Clinic initiative. Many of our Divorce Clinic clients are victim-survivors of family violence and the majority of our clients are sole applicants. Often our clients have children with their ex-spouses and are therefore required to attend the divorce hearing via telephone. This requirement can be confronting for some clients who have experienced violence perpetrated by the other party and can be further complicated by low English proficiency and limited technological literacy.

FLS agrees that the decision as to whether the parties must attend a hearing should be at the Court's discretion and that this would likely reduce the amount of matters where attendances are required. This would assist the parties and also reduce the use of court time.

Furthermore, FLS recommends the repeal of section 55A and the requirement that if there are children under the age of 18 of the marriage, then the court needs to be satisfied that proper arrangements are in place for their care, welfare and development. FLS views the requirement under section 55A as an unnecessary barrier to an application for a divorce order. This section is a remnant of an era where parenting and divorce matters were treated within the same matter by the Court. Divorce and parenting are now separate issues under the FLA. Continuing with this requirement under the FLA creates a further barrier to those seeking to legally end their marriage. Providing details in relation to parenting matters within a divorce application process can be a retraumatising

event which is unnecessary, particularly to victim-survivors of family violence. If a child is not spending time with the other party, there are mechanisms available to that party to seek time through mediation and initiating applications.

CASE STUDY 3

FLS had a client through the Divorce Clinic who had an amicable relationship with her ex-partner and had a verbal agreement about their child's spend time arrangement. The child was [REDACTED] years old. This was explained in Question 28 of the divorce application. The court then requested a further affidavit detailing the arrangement. This was very distressing and confusing to our client. Our client was particularly concerned that she may have had to pay an additional fee, on top of the current fee for divorce. FLS had to arrange a further appointment at our Divorce Clinic to assist the client in preparing the affidavit.

CASE STUDY 4

FLS assisted a client who was applying for a divorce where there had been a long history of family violence. During the application process, our client had to provide detail about why their spouse was not spending time with the children of the marriage. The information was traumatising for our client to relay and was likely antagonistic for the Respondent to read once the Divorce Application was served on them. The information had no relevance to the irrevocable breakdown of their marriage.

Recommendation 8

FLS recommends that section 55A of FLA be repealed.

SCHEDULE 4: General Provisions

Protected Confidences

QUESTION 35 Should there be additional safeguards in the Family Law Act to prevent initial access to protected confidences and how would this be balanced with procedural fairness requirements?

QUESTION 36 Are the discretionary powers of the court in Part 6.5 of the Family Law Rules sufficient to protect confidential information, and if so what could be done to ensure

litigants are aware of these powers? For example, is the advice in the 'Subpoena – Family Law' form adequate regarding the process to object to producing subpoena material?

FLS supports the idea that there should be additional safeguards in the FLA to prevent initial access to protected confidences. Often medical, and mental health or allied health files are subpoenaed, which may result in a violation of privacy, expose very intimate details about somebody's life, gender, identity, lifestyle or relationships, or give rise to further risk to victim survivors of family violence.

FLS recommends that the risk of harm to a party should be included as a ground for objection to a subpoena.

FLS recommends that there should be an appropriate threshold test where the party seeking to issue the subpoena needs to show that the subpoena information is relevant to an issue in dispute between the parties, and that the likely probative value of the information would outweigh any risk of harm which would come to the other party if their confidential information is accessed. This would likely limit the vexatious issuing of subpoenas and fishing exercises, as well as limit the harm that can occur when one party accesses another party's confidential information.

Given the amount of self-represented litigants, it may be beneficial to use more accessible, plain language in these provisions, and improve court forms, to ensure there is no misunderstanding as to what can and cannot be subpoenaed. FLS's experience is where a party is self-represented, substantial amounts of irrelevant material is often subpoenaed.

CASE STUDY 5

FLS assisted a client who was the Respondent ██████ in a parenting matter that was being litigated in the Federal Circuit and Family Court of Australia. An Independent Children's Lawyer had been appointed in the matter. Our client and the children had been subjected to family violence at the hands of the ██████ throughout the relationship and after separation. Our client had engaged in counselling with a specialist ██████ for approximately ██████ In the course of the proceedings, the Independent Children's Lawyer subpoenaed our client's ██████ counselling records. Our client had shared vary intimate, personal, and confidential information with ██████ counsellor and ██████ was distressed at the prospect of the other party having access to the material. Our client assessed that the release of the records to the Applicant ██████ placed ██████ at increased risk of further family violence. Our client sought to inspect the records prior to their release pursuant to rule 6.38.

A clear framework for our client to object to the other party inspecting the material on the basis that it put [REDACTED] and the children at increased risk of harm would have been beneficial to our client in this matter.

Recommendation 9

Include risk of harm as a ground for objection to a subpoena. This can be weighed against the probative value of the evidence.

Recommendation 10

Simplify court forms and use more accessible, plain language in these provisions.

Thank you for the opportunity to provide feedback into this consultation.

For more information please contact:

