Women's Legal Services Australia

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

Attorney-General's Department

21 November 2023

Acknowledgement

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 with whom we work and whose voices inform our advocacy to increase access to justice, equality, and safety for women.

About Women's Legal Services Australia (WLSA)

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 aim to end gender-based violence and abuse, and achieve justice, safety, and equality for women by:

- Providing a national voice for Women's Legal Services to advocate for policy and law reform;
- Leading excellence and innovation in the design and delivery of gender-specialist, integrated legal services for women; and
- Creating collaborative, shared spaces for Women's Legal Services to learn from each other and grow.

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.

Women's Legal Services 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

Women's Legal Services have specialist expertise in assisting victim-survivors of gender-based violence and abuse. We provide holistic and trauma-informed assistance, including access to social workers, financial counsellors, and trauma counsellors to enhance women's safety.

Contact us

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Endorsements

This submission is endorsed by all 13 Women's Legal Services, as well as:

- Community Legal Centres Australia
- Equality Rights Alliance
- National Women's Safety Alliance
- Single Mother Families Australia
- Council of Single Mothers and their Children
- Economic Abuse Reference Group
- WESNET
- Full Stop
- Safe + Equal
- Federation of Community Legal Centres Victoria
- Women's Information and Referral Exchange
- InTouch Multicultural Centre Against Family Violence
- Safe Steps Family Violence Response Centre
- Hume Riverina Community Legal Service
- WEstjustice
- Ballarat & Grampians Community Legal Service
- Melbourne City Mission
- North Queensland Domestic Violence Resource Service
- Palm Island Community Justice Group
- Yemaya Women's Support Service
- Domestic Violence NSW
- Aboriginal Women's Advisory Network NSW
- Women's Health NSW
- Centre for Women's Economic Safety
- YWCA Canberra
- Toora Women Inc
- Domestic Violence Crisis Service
- Zahra Foundation Australia
- Anglicare WA
- Financial Counsellors' Association of Western Australia
- SCALES Community Legal Centre
- Ruah Community Services
- Ruah Legal Services
- Parkerville Children and Youth Care

Introduction

We welcome the opportunity to provide feedback on the Exposure Draft of the Family Law Amendment Bill (No.2) 2023.

Women's Legal Services assist over 25,000 women per year 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, including escalating violence, and this means they do not have the financial resources to appropriately care for themselves or their children and to recover from violence.

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.

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

1. 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.
2. 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.
3. Fairness and recognition of diversity, including acknowledging and responding to structural inequalities and bias in the family law system.

While welcoming the proposed reforms in the Exposure Draft and providing recommendations for these reforms to be strengthened, we also reiterate the importance of properly resourcing 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.

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. 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.

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.

Recommendations

- 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.
- Amend sections 79(4)(ca) and 79(5)(a) to include family violence to which parties are subjected 'or exposed'.
- Include specific examples of what amounts to the effect of family violence on contributions.
- Amend section 75(2) to provide that family violence is a consideration in spousal maintenance applications.
- Amend the FLA to specifically exclude compensation awards and claims arising from family violence between the parties from being considered in the assessment of property settlement entitlements.
- Develop a Bench Book to provide guidance for legal practitioners and the Court, including guidelines relating to evidentiary procedures and other procedural directions.
- The new contributions factor for the effect of economic and financial abuse should direct to section 4AB (definition of family violence).
- Insert additional examples of economic and financial abuse at section 4AB.
- Provide guidance to clarify the effect of economic and financial abuse on determining contributions.
- Include a definition of wastage consistent with the *Kowaliw* principle and list examples of wastage.
- Provide guidance to clarify how the Court will deal with a finding of wastage.
- Amend section 79(4)(cc) to clarify that the new separate contributions factor for wastage does not limit the Court's ability to consider other approaches to dealing with wastage in property settlement proceedings.
- Amend section 79(4)(cd) to clarify how the Court should approach debts.
- Include the effects of economic or financial abuse and wastage in the list of factors for assessing current and future circumstances.
- Insert new factors for assessing current and future circumstances to better address economic disadvantaged experienced by victim-survivors of family violence, including "provision of suitable housing for dependent children" as well as "material and economic security".
- Insert an additional principle at section 102NE to require the Court to prioritise "provision of suitable housing for dependent children" as well as "material and economic security".
- Increase funding for legal assistance services to ensure disadvantaged people engaged in property proceedings have access to legal representation.
- Establish a regulatory scheme for government funded and private Children's Contact Services based on extensive consultation 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.
- Amend section 60I to provide for review of a decision made under section 60I(7) to not accept filing of an application for a Part VII order.
- Remove from section 55A the requirement for a Court to be satisfied that arrangements have been made for the care of children under 18.
- Remove from section 44(1B) the requirement for parties to obtain counselling prior to making an application for divorce for a marriage that is less than 2 years duration.
- Amend section 67N(8)(b) to ensure that it only covers a person with a relevant connection to the child.
- Amend section 67NA(1) to include kinship relationships for Aboriginal and Torres Strait Islander families.
- Expand the costs protections to all clients of Community Legal Centres and remove the references to a means test.
- Amend the inadmissibility provisions to include a presumption against the admissibility of records of family counselling, family dispute resolution, risk screening and post-separation parenting programs. This presumption may be rebutted if the desirability of the evidence outweighs the harm of the

disclosure.

- The amendments should commence as soon as possible after the legislation is passed.
- Insert a requirement that review of the amendments must start within 3 years of commencement and be completed within 12 months of the day the review starts.

Schedule 1, Part 1: Property framework

Note: Sections in the *Family Law Act 1975* (Cth) (FLA) and the Exposure Draft of the Family Law Amendment Bill (No.2) (Exposure Draft) referred to below are the sections relating to married couples. WLSA's feedback on the Exposure Draft and our recommendations are intended to extend to the equivalent sections for de facto couples as well.

Codifying the property decision-making principles

Question 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?

The property decision-making process is confusing for people engaged in the family law system. In the experience of Women's Legal Services, it is particularly confusing for our clients when they receive legal advice which aims to explain how the Court currently determines property settlement entitlements, including words to the effect of:

- Apart from identifying the assets and financial resources, there is no requirement for the Court to follow the steps in any particular order;
- While the Court usually expresses their opinion in terms of a percentage, there is no legal requirement for this to happen. It can be in dollar figures; and
- The Court can only make orders altering the interests of parties when it finds it is just and equitable to do so, and when making the orders it will also have regard as to whether the proposed orders are just and equitable.

The level of understanding of family law case law to understand how property settlement entitlements are calculated means it takes many years of specialising in family law to provide comprehensive proper advice to clients. This increases costs to parties in obtaining such specialist advice and also makes it difficult for legal assistance services to practice in this area, particularly given legal assistance services tend to offer services in more than one practice area. Most Community Legal Centres across Australia do not provide assistance with family law property disputes for this reason.

It is the experience of Women's Legal Services that women often enter into agreements for less than they are entitled to due to not understanding how property settlements are determined. This is exacerbated when women are experiencing or have experienced family violence and are fearful of negotiating an agreement due to possible repercussions, including escalating violence.

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 clearer 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.

We previously recommended that this should include the following steps in the following order:

1. Identifying the assets, liabilities and financial resources (including superannuation);
2. Assessing contributions to property (noting the three main types of contributions with none being provided greater weight than others);
3. Considering whether there should be an adjustment to the contributions-based assessment having regard to s75(2) factors;
4. Assessing whether it is just and equitable to make any order altering the interests of parties in property and if so, whether the proposed orders effect a just and equitable outcome.

WLSA is supportive of the structure proposed in new s79(2) in the Exposure Draft as it clearly articulates the decision-making steps for property settlements in the FLA. This is particularly helpful for self-represented people, given the small percentage of matters that make it to court and have judicial oversight.

However, we note that the court is not required to consider the principles in proposed s79(2) of the Exposure Draft in "any particular sequence", and this lack of certainty may create confusion about the decision-making process, particularly for self-represented litigants.

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

Question 3: Do you agree with the proposed framing of the just and equitable requirement as an overarching consideration through the decision-making steps?
Question 4: If not, please expand on what changes you think are required and why?

WLSA agrees with the proposed framing of the just and equitable requirement as an overarching consideration through the decision-making steps. WLSA has previously advocated for the FLA to make clear that the paramount principle is a just and equitable outcome.

However, it is 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.

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 [redacted] years old. She was in a relationship with the other party for [redacted] 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. [redacted]

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 [redacted] 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.

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

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. In circumstances 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 their children. This could be achieved through providing guidance in the legislation regarding what should be considered by the court as just and equitable.

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.

Effect of family violence

Question 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 to the other?

WLSA has long advocated for family violence to be a specific consideration that the Court must take into account 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.

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.

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.

For women from culturally and linguistically diverse backgrounds, this can be exacerbated by experiences of social isolation due to migration. 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.

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.

The Court should also have the power to make orders which ensure that no party financially benefits from the family violence they have perpetrated. This should be extended so that any awards of compensation received by a victim-survivor for family violence perpetrated by the other party should be excluded from being taken into account, including as an adjustment factor, when determining the property settlement entitlements of the parties to a relationship. This is discussed further below under the sub-heading: "Quarantining compensation awards and claims arising from family violence".

Subjected or exposed to family violence

The Exposure Draft refers to parties being 'subjected' to family violence, both in relation to assessment of contributions and current and future circumstances. 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.

The use of the term 'exposed' would broaden the range of conduct that is captured, and would also be 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.

Recommendation:

- Amend sections 79(4)(ca) and 79(5)(a) to include family violence to which parties are subjected 'or exposed'.

Contributions

At present, *Kennon*[2] 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.

The issue with *Kennon* in practice is that:

- The onus placed on the applicant alleging 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;
- 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 violence being overlooked in property settlement matters;
- 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;
- 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 is a pivotal reason why WLSA has advocated for reform as to how family violence is considered in family law property cases.
- Academic analysis suggests that legal practitioners often do not raise Kennon and self-represented litigants are unlikely to be aware of it.[3]

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.

[2] Marriage of Kennon (1997) 22 Fam LR 1.

[3] 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 (Discussion Paper) - November 2018

Both parties were in their late [redacted] at the time of the family court proceedings. The husband perpetrated family violence against the wife over [redacted] 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 [redacted] 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 [redacted] 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 [redacted] 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 [redacted] 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 [redacted] 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.

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.

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

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

[4] Will Stidston and Elizabeth Mathews, 'Adjusting for Violence' (2018) *Law Institute Journal* 32-35, 34.

- The Full Court in *S & S*[5] 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*,[6] 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*[7] 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.[8]

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

The legislation should include examples of what amounts to the effect of family violence on contributions, similar to how s4AB of the FLA provides examples of what may constitute exposure of a child to violence.[9]

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.

Considerations relating to current and future circumstances

WLSA welcomes the new requirement in the Exposure Draft 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

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

a shortened life span.

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

> ***Case study – impact of family violence on contributions and current and future circumstances***
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> 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.
>
> [redacted] years post-separation, the mother remains the child's primary caregiver, with the father spending supervised time on a [redacted] basis. As a result of the family violence, the mother is seeking support for [redacted] 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.
>
> [redacted]

Culpability/fault

The proposed amendments recognise the impacts of family violence in property settlement matters, without requiring the court to focus on issues of culpability or fault, which is appropriate. 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.

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[10]. Hearing and adjudicating evidence of family violence is not a new exercise for the Federal Circuit and Family Court of Australia (FCFCoA).

Spousal maintenance

WLSA considers that family violence is highly relevant to spousal maintenance applications in the same way that it is relevant to consideration of current and future circumstances in property settlement applications. This should be explicitly recognised in the legislation.

[10] 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.

There is no proposal in the Exposure Draft for s75(2) to be amended to include the effect of family violence. We query if this is an oversight given that proposed new s79(5) otherwise is a duplicate of s75(2), save for the subsection about family violence.

Recommendation:

- Amend section 75(2) to provide that family violence is a consideration in spousal maintenance applications.

Quarantining compensation awards and claims arising from family violence

Many family violence victim-survivors who receive assistance from legal assistance services also have claims for compensation arising from the injuries they sustained from 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.

At present, an award of compensation received by one party may be taken into account as a financial resource of that party and could be used (depending on the facts of the case) as grounds for an adjustment being made in favour of the party who did not receive the award (but who in a family violence matter may have been the perpetrator of violence for which compensation was provided).

WLSA considers that the FLA should also be amended to specifically exclude compensation awards and claims arising from family violence between the parties from being considered in the assessment of the parties' property settlement entitlements.

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:

- Amend the FLA to specifically exclude compensation awards and claims arising from family violence between the parties from being considered in the assessment of property settlement entitlements.

Bench Book

The new property decision-making framework will be a significant legislative change. For this reason, a Bench Book should be developed to provide guidance for legal practitioners and the court, including guidelines relating to evidentiary procedures and other procedural directions.

Recommendation:

- Develop a Bench Book to provide guidance for legal practitioners and the Court, including guidelines relating to evidentiary procedures and other procedural directions.

New contribution factors

Question 7: Do you agree with the proposed amendments to establish a new contributions factor for the effect of economic and financial abuse?
Question 8: Do you agree with the proposed amendments to establish new separate contributions factors for wastage and debt?

Economic and financial abuse

WLSA agrees with 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.

Additional examples of economic and financial should be inserted into the FLA to provide guidance. While s4AB of the FLA includes examples of economic and financial abuse, it does not cover the range of situations in which economic and financial abuse arises. For example, it does not cover the situations where a party:

a. Accrues debt in the name of the other party
b. Uses joint debt to continue to perpetrate violence
c. Denies access to bank accounts, forces the transfer or deposit of income into an account in the other party's name and/or the provision of a nominal 'allowance'
d. Forces the other to apply for single parenting payments despite being in a relationship and retaining those payments and then threatening to report the victim-survivor to Centrelink upon separation.

Women living with disability often face unique additional challenges including the abuse and/or control of carers allowance and threats of, or actual, withholding of care.

The Consultation Paper acknowledges that the term 'economic and financial abuse' is intended to capture a broad range of conduct, and then includes examples, such as controlling or denying access to money, finances, or information about money and finances, and undermining a party's earning potential e.g. by limiting their employment, education or training, however these are not included in the proposed amendments.

There are a range of examples of economic and financial abuse included in state and territory legislation, and similar examples could be incorporated into s4AB if the FLA, including:

- s 6 of the *Family Violence Protection Act 2008* (VIC) and s 12 of the *Domestic and Family Violence Protection Act 2012* (QLD):
    - *coercing a person to relinquish control over assets and income;*
    - *removing or keeping a family member's property without permission, or threatening to do so;*
    - *disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse;*
    - *without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses;*
    - *preventing a person from seeking or keeping employment;*
    - *coercing a person to claim social security payments; coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person;*
    - *coercing a person to sign a contract for the purchase of goods or services;*
    - *coercing a person to sign a contract for the provision of finance, a loan or credit;*
    - *coercing a person to sign a contract of guarantee;*
    - *coercing a person to sign any legal document for the establishment or operation of a business.*
- s 8 of the *Family Violence Act 2016* (ACT):
    - *stopping the family member from having access to money to meet normal living expenses*
    - *requiring the family member to transfer or hand over control of assets or income*
    - *stopping the family member from trying to get employment*
    - *forcing the family member to sign a legal document such as a power of attorney, loan, guarantee*
    - *forcing the family member to claim social security payments.*

It is also unclear what the effect of economic and financial abuse will be on determining contributions – it could be considered as a negative contribution, or it could affect the party's ability to make contributions. It would be useful to clarify this in the legislation.

Recommendations:

- The new contributions factor for the effect of economic and financial abuse should direct to section 4AB (definition of family violence).
- Insert additional examples of economic and financial abuse at section 4AB.
- Provide guidance to clarify the effect of economic and financial abuse on determining contributions.

Wastage

WLSA supports the intention of proposed s79(4)(cc) to codify the *Kowaliw*[11] principle regarding wastage, however we are concerned that the legislative drafting does not achieve this objective.

The *Kowaliw* principle sets out two circumstances where the general approach to financial losses being shared can be departed from:

a. where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets, or
b. 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.[12]

The definition of wastage in the Exposure Draft is vague and broad. It should be amended to specifically reflect the *Kowaliw* principle, for example: "Where one of the parties has 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."

Examples should also be included in the legislation to clarify the meaning of wastage, including the examples outlined in the Consultation Paper 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.

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.

Additional guidance is also needed to clarify how the court should proceed if there is a finding of wastage. It is unclear whether the intention is that 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). The comment at p13 of the Consultation Paper that "*it would capture circumstances where a party has made a financial contribution which has wasted, rather than increased, the value of the*

[11] Kowaliw & Kowaliw (1981) FLC 91-092.
[12] *Kowaliw & Kowaliw* (1981) FLC 91-092 at 10.

property pool" indicates that it is the intention that negative contributions be considered 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.

Recommendation:

- Include a definition of wastage consistent with the *Kowaliw* principle and list examples of wastage.
- Provide guidance to clarify how the Court will deal with a finding of wastage.

Addbacks

WLSA is concerned that the proposed provision may limit the court's ability to consider the use of loss and wastage to argue for an 'addback'. 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.

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.

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.

The wastage provision in the Exposure Draft, proposed to be included in the "contributions" 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:

- Amend section 79(4)(cc) to clarify that the new separate contributions factor for wastage does not limit the Court's ability to consider other approaches to dealing with wastage in property settlement proceedings.

Debt

WLSA supports debt being explicitly included in s79(4)(cd) as a consideration to be taken into account by the court when determining contributions in a property settlement. However, the legislation should clarify the meaning of 'debts incurred', and how the court is to deal with the debt to clarify when and how debts are to be considered. This would assist parties and legal professionals to navigate property settlements, particularly where they are doing so outside of the court process.

We support debts being considered in accordance with the approach outlined in the Consultation Paper, however the proposed wording of the provision does not capture this accurately. Page 13 of the Consultation Paper states "*The proposed amendments would enable the court to consider any debts incurred by either of the parties to the relationship or both of them, as a negative financial contribution to the property pool,*

consistent with the current approach in case law" and "*Including debt as an explicit factor in the contributions assessment is intended to recognise that debt can create specific and ongoing challenges for the party who did not incur the debt, or who may have incurred legal liability for the debt."* The Consultation Paper also highlights that some debt is incurred for a positive purpose (such as to obtain a house of a car for the benefit of the parties). It appears the proposed provision is intended to *"capture debt incurred for the benefit of one party only (for example, loans, gambling debts, taxation liabilities)."*

The current drafting of the provision may result in unintended consequences such as misuse of the provision by perpetrators of family violence.

Proposed s79(4)(cd) should be amended to specify that in considering debts, the court consider:

- Debts incurred for the benefit of one party only;
- Debts incurred directly or indirectly by one party on behalf of the other;
- Debts that resulted in the reduction or minimisation of any of the property of the parties;
- That the court can consider unreasonable debts incurred (directly or indirectly) by one party; should be considered a "negative" contribution by that party (or should offset any contribution made by that party) and/or that party should take responsibility for the debt;
- That in exercising its discretion, the court's considerations include how and when the debt was incurred, who incurred the debt and who it is owed to, and whether it was incurred with the awareness and/or consent of the other party.

Recommendation:

- Amend section 79(4)(cd) to clarify how the Court should approach debts.

Financial disclosure

We also support including debt as an express separate factor on the basis that it will assist with financial disclosure. Women's Legal Services regularly assist women who have experienced problems with non-disclosure of the other party's financial circumstances. For example, two-thirds of the women assisted by Women's Legal Service Victoria through their Small Claims, Large Battles project experienced these problems. The current processes available to parties for finding information if a person fails to comply with disclosure obligations are costly and are not guaranteed to be successful.

Additional factors for considering current and future circumstances

Economic and financial abuse and wastage

Economic and financial abuse and wastage should also be included in the list of factors concerning current and future circumstances, noting that these can have long-standing consequences for victim-survivors and significantly impact their future needs.

The relevance of wastage to current and future considerations has been recognised by the Courts. For example, in the Kowaliw decision[13], Baker J stated: "Conduct of the kind referred to in para. (a) and (b) [where there has been wastage] above having economic consequences is clearly in my view relevant under sec. 75(2)(o) to applications for settlement of property instituted under the provisions of sec. 79."

Recommendation:

- Include the effects of economic or financial abuse and wastage in the list of factors for assessing current and future circumstances.

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

Prioritising housing and economic security

WLSA supports efforts to better address the impact of family and domestic violence in property settlements through legislative reform. However, additional measures are needed to better address the economic disadvantage faced by victim survivors of family and domestic violence, particularly the risks of homelessness and poverty.

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, as well as the need to provide suitable housing for dependent children and young people. Academics suggest including "provision of suitable housing for dependent children" and "material and economic well-being" as factors for consideration to address this issue.[14]

Empirical research finds women, particularly mothers with dependent children, experience significant economic disadvantage post-separation.[15] This point was acknowledged by the Australian Law Reform Commission (ALRC) in 2019.[16] A report by Dr Anne Summers also highlights the interconnected nature of domestic and family violence and poverty.[17]

We note in considering the current and future needs of the parties, current s75(2)(l) of the FLA (and proposed s 79(5)(n) of the Exposure Draft) requires decision-makers to consider "the need to protect a party who wishes to continue that party's role as a parent."[18] However, this is just one of many matters taken into account when considering the parties' current and future circumstances. Based on a search of case law that refers to current s75(2)(l), it is unclear how frequently decision-makers consider this factor.

The FLA does not clarify how much weight should be given to various current and future circumstances, or how a conflict between opposing considerations should be resolved. These decisions are left to the Court's discretion.

Additionally, the principles in proposed s 102NE of the Exposure Draft should require the courts to prioritise "provision of suitable housing for dependent children" as well as "the parties' material and economic security".

Recommendations:

- Insert new factors for assessing current and future circumstances to better address economic disadvantaged experienced by victim-survivors of family violence, including "provision of suitable housing for dependent children" as well as "material and economic security".
- Insert an additional principle at section 102NE to require the Court to prioritise "provision of suitable housing for dependent children" as well as "material and economic security".

[14] Belinda Fehlberg and Lisa Sarmas, 'Australian family property law: 'Just and equitable outcomes?' (2018) 32 *Australian Journal of Family Law* 81.
[15] 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] FLA s 75(2)(l)

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

Question 9: Do you agree with the proposed approach to establish less adversarial trial process for property or other non-child related proceedings?
Question 10: If not, please expand on what you do not agree with and why. What would you propose instead?
Question 11: Do you agree with the scope of the proceedings proposed to be within the meaning of "property or other non-child-related proceedings'?
Question 12: If not, please expand on what you do not agree with and why. Should any specific types of proceedings under the Family Law Act be excluded?

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.

We understand that this proposal will include 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.

If the *Evidence Act 1995* (Cth) (Evidence Act) were to apply in property proceedings and not apply in parenting proceedings, this would create confusion whereby different findings of fact relating to family violence are being made within different proceedings of the same court. It would also lead to parts of an affidavit being admissible in the parenting proceedings and not the property proceedings. This is likely to be a significant obstacle to the proposed legislation achieving its intended purpose of making the FLA accessible, safer, and simpler to use.

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 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.

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.

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.

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 disadvantage in only a small number of proceedings, despite demand for legal assistance.

Recommendation:

- Increase funding for legal assistance services to ensure disadvantaged people engaged in property proceedings have access to legal representation.

Schedule 1, Part 3: Duty of disclosure and arbitration

Question 13: Do the amendments achieve a desirable balance between what is provided for in the Family Law Act and the Family Law Rules?
Question 14: If not, please expand on what changes you would propose and why?

WLSA supports codification of the existing duty of disclosure in financial proceedings into the FLA. The 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 financial proceedings, non-compliance with disclosure obligations can cause of significant delays and distress, particularly in circumstances where there is already a history of violence between the parties.

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

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

[redacted] refused to mediate or provide disclosure, so [redacted] commenced property proceedings in [redacted], [redacted] and [redacted] The Court made Orders requiring the parties to provide financial disclosure and listed the matter for Conciliation Conference.

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

[redacted] 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 [redacted] had provided ongoing disclosure.

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

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

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

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

Schedule 2: Children's contact services

Question 18: Does the definition of Children's Contact Service (CCS) (proposed new section 10KB) sufficiently capture the nature of CCS, while excluding services that should not be covered by later regulation?
Question 19: Does the definition of CCS intake procedure effectively define screening practices for the purpose of applying confidentiality and inadmissibility provision?
Question 20: Will the proposed penalty provisions be effective in preventing children's contact services being offered without accreditation?
Question 21: Are there more effective alternatives to the penalty provisions proposed?

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).

The Exposure Draft 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 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.

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.

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.

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.

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.

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.

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

We are concerned that the proposed definition for a CCS in the Exposure Draft only accounts for contact between a child and a member of the child's family. There may be circumstances where contact between a child and a person who is not a member of a child's family needs to be supervised within the family law context (for example, where there may have been a putative father and through the course of proceedings it is discovered he is not the biological father but has still been involved in the child's life and therefore parenting orders may be made for time along with time for the putative father's family members). We would support a definition that is more expansive to include contact services that are provided for contact between a child and someone who may not be a member of a child's family.

Similar to our concerns in relation to the definition of a CCS, we are also concerned that the definition of CCS intake procedure only covers intake procedures with a child or a member of a child's family. WLSA would support a more expansive definition to ensure the intake procedure definition would also cover someone who is not a member of a child's family but may still have supervised contact with a child.

The penalties within the penalty provisions require the Accreditation Rules to provide for the accreditation of CCS businesses and practitioners. Without the Accreditation Rules having been developed, it is difficult to assess the effectiveness of the penalty provisions in the Exposure Draft. These provisions are contingent upon the Accreditation Rules being developed.

While we are supportive of appropriate regulation and accreditation of CCS it is also important to ensure that 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.

Recommendations:

- Establish a regulatory scheme for government funded and private Children's Contact Services based on extensive consultation 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: Case management and procedure

Part 1: Attending family dispute resolution before applying 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?

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.

However, there should be an opportunity to review decisions made under s60I(7) of the Exposure Draft to ensure applications are not unduly or unsafely rejected by the Court. Review provisions allow for greater consistency in decision-making. There should also be a short timeframe for review in matters where risk or urgency is asserted.

Recommendations:

- Amend section 60I to provide for review of a decision made under section 60I(7) to not accept filing of an application for a Part VII order.

Part 2: Attendance at divorce proceedings

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

WLSA supports, in principle, the proposed changes to amend the requirement to attend divorce hearings in person if there are children of the marriage under the age of 18 at the time of the divorce application, unless attendance is requested by the court.

In our experience, clients are often traumatised and experience further anxiety at the prospect of having to attend a hearing, even by telephone. Women's Legal Services have experienced respondents filing a Response and/or attending the hearing for the purpose of having contact with the applicant.

WLSA supports measures that reduce barriers for our clients in seeking relief from the Court. This is particularly important in relation to divorce as a divorce can only be granted by the Court and is a matter that cannot be resolved by way of agreement between the parties.

Under the proposed amendments, the court continues to hold discretion as to whether the application should be determined with the parties present. We are however concerned regarding the intention to highlight the requirement for the court to consider proper arrangements for children of the marriage when making a divorce order.

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.

In our experience, there is often community confusion that this means the parenting arrangements must be finalised prior to divorce. This can result in women negotiating or entering into parenting agreements that are unsafe and/or not in the children's best interests.

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

Under the FLA, divorce proceedings can be adjourned to enable a report to be obtained from a child court expert to satisfy the court whether proper arrangements have been made. In our experience, it is not common practice to refer parties to attend with a child court expert for the purposes of obtaining a report. We are concerned that if the requirement for the court to consider proper requirements is highlighted, there may be an increase in requests for reports. We anticipate this will:

a. Place an additional burden and expense on the parties, especially if the court does not agree to fund the report;
b. Cause significant delays in the proceeding due to wait times for child court expert interviews and report production;
c. Subject women and children victims to their perpetrator during the interview process.

Recommendation:

- Remove from section 55A the requirement for a Court to be satisfied that arrangements have been made for the care of children under 18.

While we understand that the proposed amendments relate only to the above, we would like to take this opportunity to raise other issues regarding the divorce application process for consideration that impede access to justice in the form of obtaining a divorce order.

Counselling requirements

The requirement for parties to obtain counselling prior to making an application for divorce for marriages of less than 2 years duration (with narrow exemptions). It is our view that this poses an onerous obligation on parties, especially victim survivors of family violence. This requirement is inconsistent with the right of a person to decide whether they wish to be in a marriage relationship or not and can increase trauma for victim survivors.

Recommendation:

- Remove from section 44(1B) the requirement for parties to obtain counselling prior to making an application for divorce for a marriage that is less than 2 years duration.

Divorce processes

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:

- Access to legal assistance.
- Access to interpreters. 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.

- Obtaining a copy of their marriage certificate if they are no longer in possession of same, especially when married outside of Australia.
- Basic navigation of the Commonwealth Courts Portal.
- Understanding that additional documents may need to be uploaded to prove jurisdiction, for example, visas.
- 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.
- The costs associated with applications for divorce, including the filing fee, translation fees and service fees. The court does not currently offer a waiver of the divorce application fee and the reduced fee is prohibitive for applicants in financial hardship.

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.

The above processes pose barriers to all applicants; however, the barriers increase significantly for culturally and linguistically diverse applicants and increase the risk of trauma applicants who are victim survivors.

To assist with these barriers, we recommend that self-represented parties be provided with access to computers, relevant documents and a court support helpline.

Part 3: Commonwealth Information Orders

Question 25: Do you have any comments about the proposed amendments to clarify section 67N?
Question 26: Do you have any comments in relation to the categories of family members proposed to be included in subsection 67N(8)?
Question 27: Do you have any views about including kinship relationships in subsection 67N(8)?

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

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(8)(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 section 67N(8)(b) to ensure that it only covers a person with a relevant connection to the child.

Kinship relationships for Aboriginal and Torres Strait families

We note the Consultation Paper states the Government is considering an inclusion of kinship relationships for Aboriginal and Torres Strait Islander families at section 67N(8). It is Women's Legal Services experience that the family law system has largely focused on the nuclear family and has not adequately recognised Aboriginal and Torres Strait Islander family structures and child rearing practices or that multiple people may have an important role in raising an Aboriginal and Torres Strait Islander child. We welcomed the changes to the definition of a 'relative' under the *Family Law Amendment Bill 2023* to better recognise the unique kinship systems within Aboriginal and Torres Strait Islander families.

WLSA is concerned about the consequences that would flow from including kinship relationships in the expanded definition of persons who are related to a child for the purposes of paragraph 67N(8)(b) as defined at section 67NA(1) of the Exposure Draft. If the definition was expanded to include kinship relationships for Aboriginal and Torres Strait families, it would mean that Commonwealth Information Orders could apply to a significant number of people who form part of a child's broad and expansive kinship network but may have little or nothing to do with the on-going care and welfare of the child.

An expanded definition for the purposes of a Commonwealth Information Order is likely to be overly broad and would be difficult to comply with and may not be relevant to the child or the proceedings before the Court. It may also bring evidence before the Court that may be largely irrelevant and may cause unnecessary delay in proceedings. For this reason, our support for the inclusion of kinship relationships in the expanded category of persons under subsection 67N(8) would be contingent upon an amendment to section 67N(8)(b) as it is currently drafted in the Exposure Draft as recommended above.

Recommendation:

- Amend section 67NA(1) to include kinship relationships for Aboriginal and Torres Strait Islander families.

Schedule 4: General Provisions

Part 1: Costs orders

Question 29: Are there likely to be any unintended or adverse consequences from incorporating aspects of the Family Law Rules into legislation? If so, outline what these could be?
Question 30: Are there any means-tested legal service providers that would not be captured by the new definition of "means-tested legal aid"?
Question 31: Are there any unintended consequences from the introduction of the new term " means-tested legal aid'? If yes please outline what these consequences would be.

WLSA is supportive of the costs provisions being contained in the one place and support the proposal to incorporate the costs provisions in the rules into the legislation.

We do not support the amendments which propose costs protections only for those parties who are represented by a 'means tested legal aid' service. We are concerned that this will exclude clients represented by Community Legal Centres, including Women's Legal Services. It is important to recognise that Legal Aid and Community Legal Centres are different types of legal assistance service providers, and the terminology of 'legal aid' can be confusing for legal professionals and the community. Similarly, the terminology of 'means test' has a different meaning for Legal Aid than it does for Community Legal Centres.

Women's Legal Services provide assistance to a range of women, many who are experiencing economic or financial disadvantage, but we also provide assistance to women who are vulnerable for many other reasons,

including complexity of family violence, risk of homelessness, or other factors including that they would uniquely benefit from our trauma-informed, integrated practice model. Similarly, many Community Legal Centres do not have a specific means test and will take on new clients on a case-by-case basis. Referring to a 'means test' in the legislation specifically excludes many clients of Women's Legal Services.

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 Exposure Draft is inconsistent with the well-established recognition by the court of the vulnerabilities of our clients.

If our clients were subject to these costs provisions and if they were to be denied the exemptions from court fees it is very likely that our clients could not participate in the legal process at all as the costs risks would be extremely prohibitive to our clients' participation.

The Exposure Draft should be amended so the proposed costs protections apply to all clients who are represented by Community Legal Centres regardless of a means test. There are legislated definitions of Community Legal Centres which could be replicated, such as the definition of "community legal service" in Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic).

Recommendation:

- Expand the costs protections to all clients of Community Legal Centres and remove the references to a means test.

Part 2: Clarification of inadmissibility provisions

Question 32: do you have any concerns with the proposed amendments, including the new exemption to the inadmissibility of evidence for coronial proceedings?
Question 33: If yes, please expand on what your concerns are and why.

WLSA does not support the proposed amendments regarding the inadmissibility of family counselling, family dispute resolution, risk screening and post-separation parenting programs. These provisions are too broad and not in the public interest.

While we believe generally in the policy intent that people should be able to participate freely in these circumstances, there may be cases that involve serious risk or serious incidents of family and domestic violence or sexual assault, including admissions of offences, that should be disclosed and it is not in the public interest for there to be an absolute privilege against the admissibility of this evidence, with only narrow exceptions.

There should be a presumption against the admissibility of this material, however the admissibility of the evidence should be at the discretion of the Court and if the harm of disclosure does not outweigh the desirability of the evidence, this material should be disclosed to the Court. This would be consistent with other professional privileges such as the Professional Confidential Relationship Privilege.

We note the proposed amendments in the Exposure Draft are intended to clarify the Commonwealth's intent that evidence of anything said in these confidential contexts is inadmissible before any court, with the exception of coronial inquiries or inquests. WLSA agrees that coronial inquiries or inquests should be excluded.

Recommendation:

- Amend the inadmissibility provisions to include a presumption against the admissibility of records of family counselling, family dispute resolution, risk screening and post-separation parenting

programs. This presumption may be rebutted if the desirability of the evidence outweighs the harm of the disclosure.

Commencement and review

Question 34: based on the draft commencement and application provisions, when should the proposed amendments commence?

Commencement

The amendments should commence as soon as possible after the legislation is passed. The amendments aim to improve the family law system so it is 'more accessible, safer, simpler to use, and delivers justice and fairness for all Australian families'.[19] Each family ought to have the benefit of the amended legislation as soon as possible. The legislation should apply to all proceedings, whether filed with the Court or filed after the commencement date, with the exception of those matters that have had a part-heard final Hearing and/ or are awaiting on a reserved judgement.

There will need to be systems in place to enable those parties who have had matters already been listed for final hearing to provide further evidence, submissions and brief supplementary reports that address legislative changes.

Review

WLSA strongly recommends review mechanisms within the legislation to ensure the proposed changes are effective, fit-for-purpose and achieving their intended objectives.

We recommend that review of the amendments made by the Bill start within 3 years of commencement and be completed within 12 months of the day the review starts. These review provisions would be consistent with the review provisions in the Family Law Amendment Bill 2023 which recently passed Parliament.

Recommendations:

- The amendments should commence as soon as possible after the legislation is passed.
- Insert a requirement that review of the amendments must start within 3 years of commencement and be completed within 12 months of the day the review starts.

Protecting sensitive information in family law matters

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?
Question 37: Are there any other legislative or non-legislative approaches you would propose to ensure protected confidences are access and used appropriately in family law proceedings?

WLSA supports the protection of sensitive records in family law proceedings. It is important to respect

[19] *Family Law Amendment Bill (No.2) 2023 Consultation Paper,* (September 2023), p3.

people's privacy and to give victim-survivors agency in decisions about whether their sensitive records are admissible in family law proceedings. There is public interest in encouraging people to access counselling and other supports to help in their recovery and there are benefits to people knowing those records and processes will be confidential, particularly victim-survivors of family, domestic, and sexual violence.

We also acknowledge there are circumstances when a person's protected confidences should be adduced into evidence and are relevant in determining risk of violence or abuse. The paramount consideration in determining whether such evidence should be adduced should be the best interests of the child. There should also be consideration of whether the sensitive records belong to a victim-survivor of family, domestic, or sexual violence, and whether they consent to the records being shared with the court or the perpetrator.

Additional factors should be considered in making a decision about admitting evidence of a protected confidence in proposed section 99(7) that balance harm with the value of the evidence, including:

- whether the person has consented to their sensitive records being adduced into evidence
- whether the sensitive records belong to a victim-survivor of family, domestic, or sexual violence
- probative value of the evidence
- importance of the evidence
- availability of other evidence
- the likely effect of adducing the evidence, including the likelihood and nature and extent of harm to the protected confident and child/children to whom the proceedings relate
- the means available to the court to limit the harm
- whether the substance of evidence had already been disclosed by the person who made the protected communication or any other person
- the public interest in preserving confidentiality of the protected confidence

WLSA makes recommendations for further reform in our submission on the Exposure Draft of the Family Law Amendment Bill 2023 which will ensure greater safeguards and transparency around protected confidences. It is also vitally important for people to have access to legal advice and representation with respect to protected confidences.