

10 November 2023

Attorney-General's Department

Via Email: FamilyLawAmendmentBillNo2@ag.gov.au

Dear Secretary,

Re: Submission on the Exposure Draft – Family Law Amendment Bill (No. 2) 2023

Caxton Legal Centre Inc (Caxton) welcomes the opportunity to provide a submission on the exposure draft of the Bill.

Background

Caxton Legal Centre is Queensland's oldest community legal centre providing legal advice and social work supports to disadvantaged clients including those experiencing domestic and family violence.

To prepare this submission, we have drawn from the experience of our lawyers and social workers who provide services to clients through a number of our programs relevant to this Bill:

- Family Law Duty Lawyer – court based legal advice provided five days per week at the Brisbane Registry of the Federal Circuit Court and Family Court of Australia.
- Family and Advocacy Support Service – court based legal advice, social work supports and mental health supports for persons affected by domestic and family violence five days per week at the Brisbane Registry of the Federal Circuit Court and Family Court of Australia.
- Family Law and Domestic Violence Advice and Casework program – day time and evening advices and casework. Our evening advices are delivered by volunteer lawyers.
- Domestic Violence Duty Lawyer – court based legal advice for Respondents in the Specialist Domestic Violence Courts, Brisbane Magistrates Court.
- Seniors Legal and Support Service – legal and social work supports for older persons who are experiencing or at risk of experiencing elder abuse, including domestic and family violence incorporating Health Justice Partnerships with hospitals and community health services

Clients who access our services are either court users or people who do not qualify for legal aid and cannot afford private legal services.

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?

We anticipate that the proposed structure will make it easier for self-represented litigants to understand and interpret the legislation. In particular, it will allow legal practitioners who provide discrete advices to self-represented litigants to offer a simpler and more straightforward explanation of the property settlement framework.

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?

We agree that inclusion of the just and equitable requirement as an overarching consideration will create clearer messaging around the requirement for what our clients commonly understand as a requirement for “fairness” and “a fair outcome” for those involved in property settlement disputes. It also makes it clearer that the starting point is the status quo (the arrangements the parties put into place) unless it is fair to make an order which adjusts that. This will become extremely relevant in cases involving older couples separated by illness. With our ageing population and the significant intergenerational wealth transfer to occur in the next 20-30 years, these couples, with equal bargaining power, may have put in place long term arrangements that third parties (usually adult children) might be seeking to adjust for the sake of inheritance protection. It will be interesting to watch how the jurisprudence develops over time to make provision for aged care costs out of the parties’ property.

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?

We submit that the wording of the proposed amendments needs to be amended to create better balance, as detailed in our response to Question 6 below. We respectfully submit that the language used in the drafting under Schedule 1, Part 1 does not strike an appropriate balance. Using language that inadvertently minimises the seriousness and impacts of domestic and family violence is not a suitable mechanism to ensure the court is not required to focus on culpability or fault. This could instead be better achieved by a notation clarifying that the court is not required to determine fault.

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

We do not agree with the proposed drafting. Respectfully, we submit that the word “effect” should be replaced with the phrase “short or long-term effects” to more accurately reflect the realities of the impact of family violence. Using just the word “effect” on its own inadvertently minimises the gravity of family violence.

We also do not support the language/wording used in relation to a party being “subjected” to family violence. This is not language that is commonly used by domestic and family violence practitioners or by victim survivors of domestic and family violence. We suggest that more appropriate language would be “perpetrated family violence against the other party” which is most common verb used (including in the National Family Violence Bench Book) in the sector. We also suggest it should include family violence perpetrated against a child of the parties which can have a compounding impact on one parent’s ability to make recognised contributions.

A possible re-draft of section 79(4)(ca) (and the correlating de facto couples provisions) could be:

The short or long-term effects of any family violence perpetrated by one party of the marriage against the other and/or to a child of the marriage, on the ability of a party to the marriage to make the kind of contributions referred to in paragraphs (a), (b) and (c)

New contributions factors

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

We support a new contributions factor for the effect of economic and financial abuse, however, in line with our response to Question 6 herein, we propose a re-drafting of the relevant sections using this language:

“The short or long-term effects of any economic or financial abuse perpetrated by one party against the other party and/or a child of the marriage”.

Considering that it is intended that a broad range of factors be captured by “*economic or financial abuse*” it would be beneficial to include, by way of notation, a non-exhaustive list of examples of economic or financial abuse to aid both legal practitioners who are less well-versed in identifying economic or financial abuse (especially as part of coercively controlling behaviours), as well as to enhance understanding for self-represented litigants.

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

We agree with the proposed amendments to establish separate contributions factors for wastage and debt.

Question 9 – Do you agree with the proposed approach to establish less adversarial trial processes for property or other non-child related proceedings?

We agree with the proposed approach of placing the relevant provisions for conducting property or other non-child-related proceedings under a new division. However, we submit that subsection 69ZM(2)(b) should clarify that the intention of the subsection is that parties engaged in non-child-related-proceedings who were previously parties to child-related-proceedings, may still have their proceedings conducted under Division XI. We suggest that this could be clarified by adding another notation that confirms that parties who had previous child-related-proceedings may have their matters conducted under this section at the court’s discretion if appropriate. Examples of what these circumstances might be could be added to the notation. These examples could include:

- *Proceedings will not be conducted under this Division where previous child-related-proceedings are no longer relevant to the current dispute due to the amount of time lapsed*
- *Proceedings may be conducted under this Division where the child-related-proceedings were recently finalised*

Question 11 – Do you agree with the scope of proceedings proposed to be within the meaning of ‘property or other non-child-related proceedings?’

We agree with the proposed scope for property or other non-child-related proceedings which will assist the court to appropriately expedite proceedings relating to contempt or proceedings involving vexatious litigants which are likely to have already involved prior protracted proceedings.

Through our Family Advocacy and Support Service and family law duty lawyer service, it is not uncommon for us to assist self-represented litigants who have not filed any material for the entire duration of the court proceedings. By the time they have reached our service and are receiving advice

for the first time, they are sometimes already being threatened with contempt proceedings. These parties have barely coped with the substantive proceedings and are not in a position to cope well with further court proceedings (whether due to mental health issues, or other reasons). In this context the opportunity for a less adversarial trial could be beneficial for all parties – both the self-represented litigant who is not coping well or at all with the requirements of the legal process and is now subject to contempt proceedings, as well as the other represented party who has cooperated with all required steps throughout the proceedings and is frustrated by the lack of action by the other party. In this context both parties are often desperate for proceedings to resolve as expeditiously as possible.

Question 18 – Does the definition of Children’s Contact Service (CCS) (proposed new section 10KB) sufficiently capture the nature of a CCS, while excluding services that should not be covered by later regulation?

The definition does capture the nature of a CCS, but could be detailed further to reflect that Children’s Contact Services are also used to supervise time spent by the child with multiple members of a family, for example, both a parent and sibling/s of the child/ren.

Question 19 – Does the definition of CCS intake procedure effectively define screening practices for the purposes of applying confidentiality and inadmissibility protections?

Screening practices are effectively defined for the purposes of applying confidentiality and inadmissibility provisions. It may be worth adding either an explanatory notation or a brief subsection to indicate that communications other than those which occur during the intake processes are not confidential.

We routinely advise clients who present with various concerns around the use of a contact centre. Some examples of their concerns include that they are uncomfortable with their interactions with their child/ren being observed, or that they are concerned that the other parent will manipulate CSS staff to collude or side with them. Some of our clients obtain some level of reassurance around their concerns once they receive advice that utilising a CCS will result in an independent observer having the capacity to report (and cease) any inappropriate behaviour during contact or changeover. In that regard, it may be worth explicitly noting that communications other than those made during the intake process are admissible.

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?

The proposed amendments are logical and create clear messaging to deter prospective litigants who are considering prematurely initiating proceedings. However, possible unintended consequences could arise where self-represented litigants with genuine issues that fall under the exemptions file inadequately drafted material due to an inability to correctly complete the documentation or an inability to adequately particularise concerns (for example, concerns in relation to risk of child abuse or risk of family violence), creating the potential for otherwise eligible applications not being accepted by the court for filing and thereby causing undue delay in possibly emergent matters.

We note that this potential risk can be mitigated by registry staff referring clients whose applications are not accepted for filing to the Family Advocacy Support Service (FASS) for assistance. To some degree and at certain registries this may already be happening - in Brisbane registry staff are aware that FASS staff are on-site and available to assist on demand. A FASS lawyer can assist and assess whether an exemption from filing a section 60i certificate applies and assist with the drafting of the relevant documents as appropriate.

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

We broadly support a possible amendment to allow affected persons to seek a review of a decision made by a registrar to reject filing of their application and note that such a process would need to accommodate a quick response and turn around to ensure urgent matters are not unduly delayed. As noted in our response to Question 22, there is a part to play for FASS lawyers in assisting unrepresented litigants in these circumstances. We respectfully submit that provision for making a request for an exemption before a Judge could have the unintended effect of protracting proceedings unnecessarily.

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

We support the proposed amendments and agree that there are sufficient safeguards in place regarding parenting arrangements. In our clients' experience, attendance at court is highly distressing even when they understand that the matter is procedural and/or uncontentious. These amendments will assist in alleviating our clients' anxieties by not subjecting them to unnecessary court appearances, without removing safeguards.

Question 25 – Do you have any comments about the proposed amendments to clarify section 67N?

We broadly support the widening of information that can be obtained via a Commonwealth Information Order under the proposed amendments to include violence related information. We note that if that violence related information is obtained in the absence of information about the location of the child, this has the potential to cause the parent seeking the information great distress. In that regard, we respectfully submit that the amendments should provide some clarity around what would happen next once violence related information is obtained and/or how the next steps in the process could be expedited in light of the information obtained.

This submission was prepared by Colette Bots, Director Family, Domestic Violence, and Elder Law Practice and authorised by Cybele Koning, CEO. [REDACTED]

Yours faithfully

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Colette Bots
Director, Family, Domestic Violence and Elder Law Practice
Caxton Legal Centre