

Family Law Reform
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600
familylawamendmentbillno2@ag.gov.au

17 November 2023

Dear Family Law Reform Team,

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

Introduction

National Legal Aid (NLA), representing the directors (CEOs) of the eight Australian state and territory legal aid commissions (LACs), welcomes the opportunity to participate in the public consultation on the Exposure Draft Family Law Amendment Bill (No. 2) 2023 (the Exposure Draft).

In 2022-23, LACs provided over 1.7 million legal services to people across the country.¹ These services included Grants of Legal Aid approved for legal representation in ongoing matters, Family Dispute Resolution, Family Advocacy and Support Services (FASS), family law duty lawyer services, legal advice, legal task, legal information, legal and non-legal referrals, and community and service provider legal education.

23,000 Grants of Legal Aid were for ongoing legal representation in Commonwealth family law matters and another 20,000 were in connection with state/territory laws about family violence and child protection. Nationally, around 86% of the Grants of Legal Aid for legal representation in Commonwealth family law involved family violence as an issue.² Many more family law services were delivered through the FASS, duty lawyer, and face to face, phone, and legal chat services, and through community legal education and training.

NLA's response to the questions in the Family Law Amendment Bill (No. 2) 2023 Consultation Paper follows.

¹ 2022-23 National Legal Aid Statistics <https://nla.legalaid.nsw.gov.au/nlareports/> and legal aid commissions.

² 2022 - Legal Aid Commission Commonwealth family law party file sample (matters opened in the 2021-22 financial year - total e. 800 files).

Consultation questions

Schedule 1 – Property reforms

Part 1: Property framework

Codifying the property decision-making principles

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

Yes.

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

N/A.

Just and equitable

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

Yes.

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

N/A.

Effect of family violence

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?

NLA is supportive of the inclusion in the Family Law Act of explicit provision that family violence is a factor to be taken into account in determining a property settlement, where relevant to the circumstances of the case. It is considered appropriate that the focus of the proposed amendments is the “effect” of the violence. It is also considered that there will be some focus on issues of culpability or fault as inherent in the findings that the Court will need to make about whether one party has “subjected” another party to violence.

While supported, if the proposed amendments are enacted, it is likely that there will be an increase in matters in which evidence of family violence is included and that the costs associated with matters will increase, e.g., longer affidavits and expert witness reports and expenses. Arguments about both whether the violence occurred and whether it or something or someone else’s behaviour, (e.g., that of a previous partner), produced the detrimental effect could be expected. These arguments will also likely be seen in the context of Family Dispute Resolution processes.

For LACs significant costs impacts are expected in relation to each of:

- Grants of Legal Aid to parties – Legal Aid may have made a Grant to one or both parties.
- Family Dispute Resolution – chair time and administration.

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?

Yes, please refer to the response to 5.

NLA understands that there has been a suggestion that the words “or exposed” should be included in proposed 79(4). NLA notes that in the legislation these words are currently referable to the violence to which a child has been exposed. The legislation clarifies that whilst the violence may not have been directed at the child that if the child sees, hears, or experiences it, then it is nevertheless relevant to decisions about with whom a child will live or spend time. In the instance of property proceedings, NLA considers that where violence was directed by a party to someone other than the other party but in the other party’s sight, hearing or experience, that the existing definition of family violence, would in most circumstances mean that the other party had been “subjected to family violence”. NLA is not however opposed to inclusion of the additional words as they may help to ensure that all family violence behaviour which has the effect is captured. Inclusion of the words “or exposed” may have some effect on the number of allegations made and the required evidence.

New contributions factors

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

It is considered that the definition of family violence in s.4AB of the *Family Law Act 1975* and the non-exhaustive list of examples already encompasses a wide range of behaviours including those which would be considered “economic or financial abuse”. It is suggested that it might be timely to review the examples of family violence in the legislation.

Proposed 79(4)(cb) appears to us to potentially duplicate proposed 79(4)(ca). If the intent is to ensure that the relevance of “economic or financial abuse” is evident, then it is suggested that this could be achieved by inserting the words “including economic or financial abuse” in 79(4)(ca) and deleting 79(4)(cb).

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

Yes.

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

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

10. If not, please expand on what you do not agree with and why. What would you propose instead?

The approach has the benefits of consistency with the Courts having active discretion about whether the rules of evidence are to apply. Some property proceedings will be very adversarial, be about assets of substantial and disputed value, involve matters of significant complexity and may involve third parties. In such matters it will likely be appropriate that the rules of evidence should apply.

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

Yes.

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?

N/A.

Part 3: Duty of disclosure and arbitration

13. Do the amendments achieve a desirable balance between what is provided for in the Family Law Act and the Family Law Rules?

Yes.

14. If not, please expand on what changes you would propose and why.

N/A.

15. Do the definitions of ‘property and financial matters’ in proposed subsections 71B(7) and 90RI(7) capture all matters when financial information and documents should be disclosed? If not, what should be changed and why?

Yes.

Removing the distinction between court-ordered arbitration and private arbitration

16. Do the proposed provisions achieve the intention of simplifying the list of matters that may be arbitrated?

Yes.

Empowering a court to make orders about the conduct of arbitration on application by an arbitrator

17. Do you have any concerns with the proposed arbitration amendments, including with empowering a court to terminate arbitrations when there is a change in circumstances?

NLA is supportive of the proposed arbitration amendments.

Legal Aid Queensland has operated a successful Arbitration Program since 2001 which includes the ability to terminate arbitration as appropriate.

Schedule 2 – Children’s contact services

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?

Yes.

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

Yes.

20. Will the proposed penalty provisions be effective in preventing children’s contact services being offered without accreditation?

21. Are there more effective alternatives to the penalty provisions proposed?

The proposed penalty provisions are considered appropriate for supporting compliance but their effectiveness will need to be monitored and reviewed. Monitoring and review should identify whether consideration needs to be given to alternative penalties.

Schedule 3 – Case management and procedure

Part 1: Attending family dispute resolution before applying for Part VII order

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?

A decision not to accept an application may cause or compound significant stress, noting that a parent and children may already be experiencing the effects of family violence. The key concern is that matters are managed swiftly and appropriately so that risk issues are addressed, particularly in urgent circumstances, both at initial decision and in any review process.

The reason for any decision not to accept an application should be explained and where parties are self-represented a (preferably warm) referral to a legal service provider who can assist should be made. FASS staff, particularly when located at the Court, may be able to assist.

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

Pre-filing decisions not to accept an application ought to be subject to timely review. If reasons for non-acceptance are clear, and practical assistance to either seek an exemption or attempt Family Dispute Resolution is readily available to the applicant then, it should reduce/eliminate the need for the formal review processes to be activated.

Part 2: Amending the requirement to attend divorce hearings in person and delegations

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

The proposed amendments are supported.

Part 3: Commonwealth Information Orders

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

Amendments which will help to ensure safety are supported.

26. Do you have any comments in relation to the categories of family members proposed to be included in subsection 67N(8)?

The categories of family members appear appropriate.

27. Do you have views about including kinship relationships in subsection 67N(8)?

It appears to us that this would be an appropriate inclusion given the focus is safety, however, Aboriginal Community Controlled organisations who provide services in relation to family law and family violence are considered best placed to address the question of inclusion of kinship relationships in legislation.

Part 4: Operation of section 69GA

28. Do you have any concerns about the proposed amendments to clarify the operation of section 69GA?

No.

Schedule 4 – General provisions

Part 1: Costs orders

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 would be.

Whilst not anticipating adverse consequences from incorporating aspects of the Rules into legislation, NLA has concerns about aspects of the proposed amendments to the costs provisions in relation to ICLs:

- The proposed amendments would continue a problem about which LACs have expressed concern for years³ i.e., 114UD(2) provides if “(a) a party to the proceedings **has** received assistance by way of means-tested legal aid in respect of the proceedings;” ...the court must not make a costs order against that party in relation to the costs of the independent children’s lawyer.” Family law proceedings can be lengthy, and LACs have experience of parties who have been in receipt of Legal Aid but whose circumstances have changed during proceedings, such that they are no longer in receipt of Legal Aid and are in a position to contribute to the cost of the ICL. The proposed provision would continue to prevent contribution by such a party to the cost of the ICL and the costs would need to be borne by the LAC from limited funding provided by Government and which is needed for other purposes. NLA suggests instead the words “a party to the proceedings is in receipt of means tested legal aid..”
- NLA is concerned to see reference to ICLs being funded by organisations or entities other than the LACs. ICLs are appointed (and therefore funded) by LACs and only if they are on a LAC Panel with the LAC Panel being the mechanism for ensuring training obligations and practice standards are met. NLA has been working with the Court’s Children’s Committee in delivering professional development through the NLA/all LACs ICL website and portal, with it being intended that registration on the ICL portal/website

³ E.g. National Legal Aid submission to the Australian Law Reform Commission’s Review of the Family Law System Discussion Paper 86, 03/12/2018, 64.

be a national condition of panel membership, and a way of further supporting and monitoring quality.

30. Are there any means-tested legal service providers that would not be captured by the new definition of 'means-tested legal aid'?

NLA considers that the definition covers Legal Aid Commissions.

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.

None anticipated.

Part 2: Clarification of inadmissibility provisions

32. Do you have any concerns with the proposed amendments, including the new exemption to the inadmissibility of evidence for coronial proceedings?

33. If yes, please expand on what your concerns are and why.

No.

Overarching Question for Schedules 1-4:

34. Based on the draft commencement and application provisions, when should the proposed amendments commence?

6 months after Royal Assent.

Protecting sensitive information in family law matters ('protected confidences')

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?

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?

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

NLA suggests safeguards should include:

- Consultation with providers in the States which have developed 'protected confidences' schemes to inform consideration of an analogous framework being developed in the family law context, including the consideration of the time and administrative burden involved in the process.
- Ensuring the definition/test of what is a 'protected confidence' is clear to Court users and subpoena recipients.
- Subpoena form and supporting educational materials to be reviewed, e.g., for clarity, placement of the notice of the right to object, and appropriate examples of reasons for objection in the context of protected confidences.
- Improved awareness of existing provisions including amongst legal and other professionals working in family law.
- Funding to enable the subjects of the 'protected confidences' to access legal advice and assistance about the production of the material in question. Funding to enable relaxation of Legal Aid Commission means testing so that more financially disadvantaged court users who are unable to afford a lawyer are able to be legally represented.

Conclusion

Thank you for the opportunity to provide this submission.

Please do not hesitate to contact us if you require any further information.

Yours sincerely,



Louise Glanville
Chair