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CONSULTATION ON EXPOSURE DRAFT – FAMILY LAW AMENDMENT BILL (NO. 2) 2023

Thank you for the opportunity to comment on the Family Law Amendment Bill (No. 2) 2023. Relationships Australia welcomes the significant reforms which the Government is undertaking to support families to separate safely, and with children's best interests as the paramount consideration.

The work of Relationships Australia

We are an Australian federation of community-based, not-for-profit organisations with no religious affiliations. Our services are for all members of the community, regardless of religious belief, age, gender, sexual orientation, lifestyle choices, cultural background or economic circumstances. At over 100 locations (and more than 90 outreach locations), Relationships Australia provides 329 unique services, including counselling, dispute resolution, children's services, services for victims and perpetrators of family violence, and relationship and professional education. We serve around 150,000 clients each year.

We aim to support all people in Australia to live with positive and respectful relationships, and believe that people have the capacity to change how they relate to others. Through our programs, we work with people to enhance within families, whether or not the family is together, with friends and colleagues, and across communities. Relationships Australia believes that violence, coercion, control and inequality are unacceptable. We respect the rights of all people, in all their diversity, to live life fully within their families and communities with dignity and safety, and to enjoy healthy relationships.

Relationships Australia is committed to:

- ensuring that social and financial disadvantage is not a barrier to accessing services
- geographic equity in service provision, including by working in rural and remote areas, recognising that there are fewer resources available to people in these areas, and that they live with pressures, complexities and uncertainties not experienced by those living in cities and regional centres
- collaborating with other local and peak body organisations to deliver a spectrum of prevention, early and tertiary intervention programs with older people, men, women, young people and children. We recognise that a complex suite of supports (for example, legal services, drug and alcohol services, family support programs, mental health services, gambling services, and public housing) is often needed by people engaging with our services, and
- contributing our practice insights and skills to better inform research, policy development, and service provision.

Framing principles of this submission

Principle 1 - Commitment to human rights

Relationships Australia contextualises its services, research and advocacy within imperatives to strengthen connections between people, scaffolded by a robust commitment to human rights. Relationships Australia recognises the indivisibility and universality of human rights and the inherent and equal freedom and dignity of all. Enjoyment by individuals of their full human rights is underpinned by access to mechanisms to prevent breaches of their human rights and mechanisms to remediate breaches when they occur.

Our commitment to human rights necessarily includes a commitment to respecting epistemologies beyond conventional Western ways of being, thinking and doing. Of acute importance is a commitment to respecting epistemologies and experiences of Aboriginal and Torres Strait Islander people as foundational to, *inter alia*, policy and programme development and service delivery.

Principle 2 – The best interests of the child are paramount

Consistent with Principle 1, and with the policy intent underpinning both existing legislation and proposed amendments, Relationships Australia is committed to ensuring that the paramountcy of children's best interests, in all domains, is honoured and upheld. This includes, but is not limited to, ensuring that children's voices and children's developmental needs and safety are centred in all systems and processes with which they engage.

Principle 3 – Reforms should enhance accessibility: simplification, transparency, fragmentation, cost, and geographic equity

Relationships Australia is committed to promoting accessibility of its services, and advocating for accessibility, including by:

- reducing fragmentation and, where it is unavoidable, removing the burden of navigating systems from those whom they are intended to serve and support
- reducing complexity of the law and its supporting processes, to benefit not only those families who require a judicial disposition of their matters, but also families who will 'bargain in the shadow of the law'
- ensuring high quality and evidence-based service delivery, accompanied by robust accountability mechanisms, and
- reducing barriers to access arising from financial or economic disadvantage, as well as other positionalities and circumstances that create barriers to accessing services (including by promoting geographic equity).

Summary of responses and recommendations

Question	Response	Summary of accompanying recommendation/s (where applicable)
1	Yes	
2		Clarify relevant dates and timeframes
3	Agree in principle	Agree with expressing framework through principles, not steps Explicitly provide for paramountcy of children's best interests, where applicable, in relation to disputes about property Clarify how 'just and equitable' principle is to be applied: to each of other principles, or globally Consider requiring consideration of current and future needs before contributions Provide for public education and professional training to support successful implementation Provide additional support for legally-assisted FDR, including in property matters
4	In principle support	Support making the Act more DFV-informed Note potential for safety risks and suggest potential mitigations Note that DFV pervades service provision under the FRSP
5	In principle support	Welcome structured guidance while providing for flexibility Support focus on the effects of DFV Note risks of inadvertently encouraging unfounded DFV allegations Consider enhanced resourcing of the Family Violence and Cross-Examination of Parties Scheme With the family law courts – develop guidance Amend s 75 so that DFV can be taken into account in spousal maintenance claims Provide for workforce upskilling in DFV, coercive control, and correctly identifying the person most in need of protection (to mitigate risks to safety and risks of unfounded allegations) Use DOORS for all Part VIII and VIIIAB matters

		In collaboration with Treasury - enable victim/survivors to access employee superannuation contributions
6	In principle support	Mitigate risks of system professionals, system users and the general community misunderstanding the amendments as re-introducing fault Note potential for safety risks and suggest potential mitigations Provide for workforce upskilling in DFV, coercive control, and correctly identifying the person most in need of protection (to mitigate risks to safety and risks of unfounded allegations)
7	Yes	
8	Yes	Refer to 'gambling harm' or 'harmful gambling', rather than using stigmatising language Allow excessive legal fees to be considered as a form of wastage
9	Support	
10		Note potential for LAT procedures to fall into disuse when family law courts are not sufficiently resourced Recommend statutory review of use and effectiveness of LAT procedures in relation to property matters Recommend mandatory pre-filing FDR
11	In principle support	
12	In principle support	
13	Support	Develop guidance and training for FDRPs and lawyers Extend PPP500
14		Support for litigation guardians Encourage supported decision-making Note drivers of non-compliance
15	Nil response	
16	Yes	

17	Support proposed amendment	
18	In principle support	Support accreditation for providers that do not receive government funding Recommend clarification of 'intake processes' to reflect the multi-disciplinary, dynamic and continuing nature of assessment of suitability for service Recommend broader definition of service users, to more accurately reflect the range of people in respect of whom courts make orders for use of CCS
19		Clarify breadth of definition
20		Recommend that magnitude of penalties better reflect the sensitivity and risk profile of services, and align with penalty arrangements for like Commonwealth regulatory frameworks
21	Nil response	
22	In principle support	Clarify that amendments would not apply to consent orders Extend mandatory pre-filing FDR to property matters
23		Decisions to reject should be reviewable, and parties resourced to make informed decisions as to whether to seek review
24	Support	
25	In principle support	Clarify operation in respect of young people, aged 15-17, who have left home
26	Support	
27	In principle support	Subject to consultation with First Nations communities
28	Support	
29	Support	
30	Nil response	
31	Nil response	
32	In principle support	Clarify how safety concerns will be dealt with in the context of coronial inquiries
33	Nil response	

34		Allow time for education and training
35	Support	Recommend that leave of the court be required for both self-represented parties and parties who have legal representation
36		Support 'front end' measures to deter unmeritorious or unduly wide subpoenae and relieve service providers from the financial and time impost of responding to such subpoenae
37		Clients would be assisted by simplification of admissibility and confidentiality provisions

SCHEDULE 1 PROPERTY REFORMS

Part 1: Property framework

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

Yes. Relationships Australia advocated, in its submissions to the ALRC and JSC inquiries, for simplification of the structure, language and accessibility of provisions applying to decisions about property interests. Accordingly, Relationships Australia welcomes the co-location of related provisions, the reduced reliance on complex cross-referencing, and the reflection in the Act of decision-making principles grounded in established jurisprudence.

Improved clarity of structure, concepts and language will assist all users to make informed decisions, whether or not they file an application, seek professional assistance, or simply agree between themselves without assistance.

We acknowledge that the proposed changes will have different effects in Western Australia, subject to further referrals of power.

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

Some federation members support the date of agreement or settlement as the relevant date for valuation (including with respect to superannuation), on the grounds that at this time it is possible to have a far more detailed understanding of the parties' circumstances.

More broadly, we hear from our clients that they are confused by different timeframes applying in respect of dates of valuations for married couples and *de facto* couples. This may be a fruitful area for education and awareness campaigns to maximise successful implementation of these amendments.

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?

Subject to the comments below, Relationships Australia considers it appropriate to require the court to make a positive determination about whether it is just and equitable to make an order altering interests, and that it is appropriate to frame it as an overarching consideration for the purposes of matters dealt with pursuant to Parts VIII and VIIIAB.

We have two reservations.

First, the application of the 'just and equitable' principle should never derogate from the paramountcy of children's best interests, where that is relevant. We **recommend** that the Bill makes this explicit in Parts VIII and VIIIAB. We further **recommend** that the Bill provide that current and future needs must be taken into account *before* contributions and that, where there are dependent children, the best interests of the children should be paramount. Our practitioners report that many couples, caught up in considering property and finances, focus on contributions that they have made, and do not turn their mind to children's best interests (including future needs) in the context of resolving property matters. Explicit inclusion of the best interests of children as the paramount principle (where applicable) could assist in ensuring that children's best interests remain front of mind, not only for parents, but also service providers, who should continue to attend to children's needs as their parents and caregivers work through property matters. Children may have ongoing, or renewed, needs for support and counselling. The Act needs to be explicitly child-centric throughout, not just in relation to matters falling under Part VII.

Second, we consider it would be helpful for the Bill to be clear on whether the 'just and equitable' principle is to be applied to each of the other principles or to the outcome reached following consideration of the other principles. To emphasise its overarching character, perhaps this principle could more helpfully be included as a standalone provision, rather than as the final paragraph in the relevant subsection. Alternatively, the Bill could provide for this principle to be applied in a two step process: first, in considering whether any order for adjustment is appropriate and, second, when considering if a proposed order in its entirety is just and equitable.

Relationships Australia **also supports** framing the proposed clarifications as 'principles' rather than 'steps', although we note that the Consultation Paper itself sometimes refers to 'steps', rather than 'principles'. A principle-based approach could well help separating families to manage their own financial and property division, as well as assisting FDRPs, mediators, arbitrators and lawyers.

Sequencing the principles

We acknowledge that the intention is to be non-prescriptive about the order in which the principles are to be considered, and thus afford flexibility. In practice, however, contributions are often considered first, and to the detriment of women. There is ample analysis of the jurisprudence demonstrating this, as well as a substantial body of literature showing that women (especially women with dependent

children) experience greater financial and economic distress after separation, and for longer periods.[1] One of our member organisations suggested that a potential response could be to provide that future needs considerations should be accorded equal or greater weight than past or current contributions.

We **recommend** that the Government plan for extensive public education and professional training to support the effectiveness of the proposed changes.

Relationships Australia **recommends** that Government providing more support for legally-assisted FDR for all clients, including clients with 'property only' matters, and will be putting this view to the review of the FRSP.

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

Relationships Australia **supports** amendments to make the Act more DFV-informed. We welcome amendments to enable the effects of DFV to be taken into account in considering current and future needs, as well as contributions. However, our practitioners have expressed concern that, without comprehensive risk screening, safety planning and other supporting services, these amendments may exacerbate risks. Our practitioners have also expressed concerns that, at least until jurisprudence begins to emerge, there will be considerable uncertainty among parties and their advisors (including lawyers and FDRPs), adding to the stressors – and potentially costs - experienced by separating families. As one practitioner suggested:

> This is potentially the most important and difficult part of the proposed changes, as we [FDRPs] are not in the position to gather evidence. It could give clients a sense they need to push their views harder and raise expectations of what they are entitled to – has the potential to expose/lessen neutrality of FDRP's. An area of concern is the enormous wait list of FDV services especially for men….The implications of this on property will make it harder for the FDRP to navigate the proposed division in circumstances where only one party acknowledges FDV. Is there a time frame/limit? That is, if FDV occurred towards the end of the relationship/leading up

[1] Including: Smyth, B., & Weston, R. (2000). Financial living standards after divorce: A recent snapshot (Research Paper No. 23). Melbourne: Australian Institute of Family Studies; Broadway, B, Kalb, G, and Maheswaran, D. (2022) *From Partnered to Single: Financial Security Over a Lifetime*. Melbourne Institute: Applied Economic & Social Research, The University of Melbourne; de Vaus, D., Gray, M., Qu, L., & Stanton, D. (2007). The consequences of divorce for financial living standards in later life (Research Paper No. 38). Melbourne: Australian Institute of Family Studies; de Vaus, D., Gray, M., Qu, L., & Stanton, D. (2015). The economic consequences of divorce in six OECD countries (Research Report No. 31). Melbourne: Australian Institute of Family Studies; Easteal, P., Young, L., & Carline, A. (2018). Domestic violence, property and family law in Australia. International Journal of Law, Policy and The Family, 32, 204–229. doi:10.1093/lawfam/eby005; Fehlberg, B. & Millward, C. (2014). Family violence and financial outcomes after parental separation. In Hayes, A. & Higgins, D. (Eds.) Families, policy and the law: Selected essays on contemporary issues for Australia (1 ed., pp. 235-243) Australian Institute of Family Studies; Gray, M., de Vaus, D., Qu, L., & Stanton, D. (2010). Divorce and the wellbeing of older Australians (Research Paper No. 46). Melbourne: Australian Institute of Family Studies; Warren, D, Low Income and Poverty Dynamics - Implications for Child Outcomes. Social Policy Research Paper Number 47 (2017). Available at https://www.dss.gov.au/publications-articles/research-publications/social-policy-research-paper-series/social-policyresearch-paper-number-47-low-income-and-poverty-dynamics-implications-for-child-outcomes.

> to separation or throughout the relationship – does this influence the difference in what a person will become entitled to?

These concerns illustrate a fundamental tension that arises in a discretionary system; on balance, however, we consider that a discretionary system remains warranted.

Finally, we note that these proposed amendments emphasise the significance of DFV in the Family Relationship Services Program; this is a point we will also be making in the context of the current review of that Program. As currently framed and administered, the FRSP presumes a sharp binary between family relationship services and DFV services which is, in practice, illusory and exacerbates the administrative siloes and fragmentation in ways that pose serious safety risks for children and their families. As recently observed by the National Children's Commissioner

> …systems are not designed to meet people's needs. Siloes are designed to meet the administrative requirements of government.[2]

We respectfully agree with the Commissioner. The FRSP has, throughout its existence, been founded on and entrenched siloes that do not reflect the needs and experiences of separating families, including the appalling prevalence of family violence and child maltreatment.

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?

Benefits of the proposed approach

Relationships Australia **supports, in principle,** proposals to require the family law courts (and those families who do not use the courts, but rely on normative standards set by Parliament and the courts) to take family violence into account in ascertaining contributions and current and future needs. These amendments would be statutory acknowledgement of what frontline family relationships service providers have always understood – family violence is highly prevalent among FRSP clients, so that it is necessarily core business for our specialist practitioners.

The approach presented in the Exposure Draft is likely to be more accessible than the current *Kennon* approach. The proposed changes acknowledge the extensive evidence demonstrating the serious adverse economic impacts of family violence,[3] and are consistent with the importance accorded to recovery from DFV in the *National Plan to End Violence Against Women and Children 2022-2032*. Further, initiatives to better align the Family Law Act with broader social and economic policies, strategies and initiatives contribute to reducing harmful system fragmentation.

The proposed approach offers the courts, parties and their advisors structured guidance, while allowing crucial flexibility in responding to heterogenous family situations, and particularly if children will be

[2] Speaking in *Health Justice Conversations: How collaboration can support families and children at risk of removal*, 2 November 2023.
[3] See, eg, Broadway et al, 2022.

affected by property division. Indeed, the absence of flexibility would seriously undermine the capacity of courts and parties to ensure paramountcy of the best interests of children.

Relationships Australia considers that the proposed amendments, with the focus on effect of DFV, uphold the foundational 'no fault' basis of the Act. We welcome the attention paid to economic, financial and systems abuse.

It is important to acknowledge, however, that the proposed amendments are not risk free.

Risks of the proposed approach

It is probable that the proposed amendments may encourage perpetrators to make unfounded 'cross claims' of family violence. This is already a not uncommon occurrence, and the proposed changes lend additional urgency to work to equip *all* justice system professionals with the knowledge necessary to accurately identify the person most in need of protection and the primary aggressor across all types of abuse.

If the amendments are passed and the family law courts required to consider the effect of family violence on contributions and current and future needs, it is reasonable also to anticipate greater demand on the Family Violence and Cross-Examination of Parties Scheme. We **recommend** that consideration be given to increasing the appropriations for that Scheme, to support DFV and trauma-informed practices.

When the amendments take effect, FDRPs will advise families that the family law courts are required to take the effects of DFV into account when making orders about property interests. We **recommend** that the Government, in conjunction with the family law courts, to develop guidance as to what would be considered, for the purposes of the proposed amendments, sufficient proof of family violence. We are also concerned that the absence of statutory guidance may inadvertently encourage spurious family violence claims by perpetrators of coercive control.

Spousal maintenance

We **recommend** that section 75 be amended, consistent with the amendments for alteration of property interests, so that the effect of family violence must be considered in relation to applications for spousal maintenance. Spousal maintenance applications may take place at another time from the property maintenance case, and DFV may be disclosed in relation to that matter, even if it was not in the property proceedings.

Workforce development

The inclusion of family violence as a relevant consideration for applications under Parts VIII and VIIIAB will also require upskilling among professionals who have not previously needed to have family violence front of mind, as well as adaptations to court processes to screen for risk and appropriately manage high risk cases, as is done in respect of applications under Part VII. We **recommend** that the Government plan for workforce training to support this upskilling.

We further **recommend** that the Court consider using DOORS for all matters under Parts VII and VIII (noting its successful use in the Lighthouse Project). There is already a tailored DOORS that can be provided in matters involving property issues only. However, where there are disputes about property, and there are children living in each household, we **recommend** the use of the DOORS that is currently used in Part VII matters, because the safety of the whole family should still be understood irrespective of the dispute at hand.

Access to perpetrators' employee superannuation contributions – complementary recommendation

Finally, we draw to the Department's attention recommendations that we made in our submission, dated 7 February 2023, to Treasury about proposals that would allow victim survivors of domestic and family violence offences to:

- be awarded an amount from their perpetrator's 'additional' contributions for the purposes of satisfying unpaid compensation orders, as proposed in Treasury's 2018 consultation, and
- submit a superannuation information request to the appropriate court which could then request that the ATO discloses specific information regarding the offender's or their spouse's superannuation accounts.

A copy of the submission can be accessed at https://relationships.org.au/research/#advocacy

We **recommend** that these proposals be progressed to support the effectiveness of amendments of the Family Law Act.

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?

Overall, we **support** the proposed drafting. Including the effect of family violence as a consideration in relation to past contributions and future needs recognises the powerful and lasting impact that family violence can have on a person's financial history and future income and resources.

Our members have, however, raised concerns about unintended consequences. Most importantly, there is concern that making an adjustment in favour of one party will, despite the intention of the Bill, be perceived as re-introducing elements of fault. It will be necessary for Government to be on the front foot in preventing such a perception taking hold in the community through appropriate explanatory materials readily accessible online, at service provision premises, the courts and other touch points. We have seen, with the now-repealed statutory presumption of shared parental responsibility, how vulnerable family law legislation is to mythologisation; there is a risk that these amendments will, unless there is an upfront investment to prevent it, generate their own dangerous mythology.

As mentioned in response to Question 5, our members have expressed concern about what evidence will be accepted as establishing the fact of family violence; for example, the existence of a conviction, the contents of a Notice of Risk, affidavit or subpoenae evidence, noting that the standard of proof in the family law courts is lower than that in the criminal courts. There was also concern expressed that introduction of these measures might discourage perpetrators to submit to consent or no admission protective orders, which would have adverse consequences for victim survivors of DFV. To mitigate

risks of unintended consequences (particularly those which carry safety risks), the Bill should be as explicit as possible about what evidence the courts can consider and what standard of proof is to be applied.

There is concern that reliance on AVOs and similar protective orders may give rise to incorrect assumptions about who is the person most in need of protection. Our members have stressed the need for courts and legal representatives to be DFV-informed about systems abuse and coercive control behaviours that can be used to depict a victim survivor as a perpetrator. The proposed amendments underline the imperative, put forward by Relationships Australia in other family law reform and family violence submissions, that lawyers be required to undertake substantive initial and regular refresher trainer in the nature, prevalence and effect of domestic and family violence. Further, there may be increased demand by legal representatives (and self-represented litigants) seeking access to FDR and pre-FDR records to interrogate claims of family violence and its effects.

We **recommend** that Government support successful implementation of the amendments by increasing the availability of legally-assisted FDR to allow parties to make informed proposals. We further **recommend**. that the Australian Government work with state and territory legal profession regulators to ensure that lawyers who encounter matters raising domestic and family violence, and coercive control, are sufficiently knowledgeable to respond appropriately. Such training should be mandatory.

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?

Yes. This is consistent with evidence of the multi-faceted and often long-term impacts of economic and financial abuse. Inclusion of this factor reinforces the importance of this sub-type of abuse in relation to property matters, especially in the absence of other 'evidence' such as intervention orders, evidence of physical harm. In our experience, economic and financial abuse are strong indicators of coercive control in relationships where physical harm has not occurred, and can also be concurrent with emotional and psychological abuse.

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

Yes. This is consistent with evidence of the multi-faceted and often long-term impacts of economic and financial abuse. Wastage and debt are often relevant to FDR negotiations, but legal advice has often not yielded clarity as to whether and how a court would consider these circumstances. This uncertainty has led to families ending up in litigation who, had the Act clearly specified wastage and debt as proposed, might have been able to reach an agreement without court intervention.

We **recommend** that Government refer to 'gambling harms' or 'harmful gambling', rather than 'excessive gambling', as is used in the Consultation Paper, which is a pejorative and stigmatising expression that may deter help-seeking. Referring to 'gambling harms' or 'harmful gambling' is consistent with language being used elsewhere across Government (eg classification policy, restrictions on gambling advertising and on online gambling).

We further **recommend** that the Bill be refined by allowing the Court to take into account excessive lawyers' fees (relative to the property pool) as a form of wastage.

We consider that the approach taken achieves a balance between prescription and discretion.

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?

Relationships Australia **supports** proposals to minimise adversarial characteristics of the current family law system, while again noting the innate unsuitability of the family law system to promote child development and co-parenting. Successive governments have made repeated – and thus far, unsuccessful - attempts, over decades, to 'modify' what is seen as the 'family law system' to more safely accommodate emerging understanding of, *inter alia*:

- the harms inflicted on children, and their parents, by processes that institutionalise parental conflict
- the status of children as rights bearers
- the experience of children as primary victim survivors of DFV, and
- the long-term effects of trauma and the importance that systems be trauma-informed and DFV informed.

As noted in previous submissions, where there are children of the parties, a proceeding which is ostensibly about property only can drag parents back to conflictual dynamics, including where they have been peacefully co-parenting under the terms of a formal parenting agreement (or no agreement at all).

Relationships Australia **supports** the principles set out at p 17 of the Consultation Paper.

Relationships Australia **supports** the emphasis on safeguarding parties against family violence, and the recognition that family violence is a critical issue even in proceedings that are not child-related proceedings. Family violence has a high prevalence among our FRSP clients, and we offer a range of services and tools to empower families to address that, and to safely and effectively co-parent. Failing to address safety issues in families precludes effective delivery of therapeutic services that support long-term outcomes relating to child development and wellbeing, as well as the safety and well-being of all family members. Introducing Less Adversarial Trial processes to applications relating to property interests will, as mentioned in our previous responses, require the family law courts to have in place appropriate risk screening and triage to adequately uphold the safety of court users.

We also **support** the proposal that the provisions be used either on the Court's own initiative or on application by a party, which will promote the broadest use of the principles, and reliance on a discretion-based approach.

We **agree** that the use of less adversarial trial mechanisms under Part XI should not be subject to a consent requirement. Relationships Australia agrees that the provisions establishing LAT processes for property and other non-child-related proceedings should be located in a separate Division.

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

The mechanisms in Part VII Division 12A (from which the proposed amendments are adapted) are known to fall periodically into disuse, particularly when the family law courts are facing high workloads with diminished resources. Recent measures (eg the Central Practice Direction and increased funding) offer hope that the courts are in a better position to manage their workloads, including by applying less adversarial measures to the conduct of proceedings.

Relationships Australia therefore **recommends** that the use of less adversarial trial processes for property and other non-child-related proceedings be monitored and subject to statutory review, to ensure that they are achieving the fullest possible benefit for parties.

Further, the introduction of mandatory pre-filing for Part VII matters has been highly successful in normalising parents managing their own post-separation parenting arrangements. Relationships Australia therefore further **recommends** the introduction of mandatory pre-filing for non-child-related proceedings.

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

Yes, subject to the response to Question 12.

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?

Relationships Australia agrees with the scope of proceedings on the basis that the Court will be able to exercise discretion on a case by case basis. We would not, for example, consider it appropriate that well-resourced and legally-supported media organisations would have the benefit of less adversarial trial provisions in proceedings relating to contempt or alleged breaches of section 121 of the Act.

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?

Relationships Australia **supports** an explicit obligation of full disclosure. Centring full disclosure will help FDRPs to impress on clients that they can experience adverse outcomes if a court finds that they have not fulfilled their obligations. The proposed amendment reflects the importance of disclosure to reaching appropriate outcomes (whether through court order or by agreement), and also helps users of the Act in navigating the requirements to which they are subject. We **recommend** also that the obligation to disclose be framed explicitly as an ongoing obligation, requiring parties to disclose changes to financial circumstances (eg inheritances, gifts, winnings and work payouts) throughout proceedings.

We **support** the proposed duties to be imposed on FDRPs and lawyers to inform parties about the duty and the consequences of non-compliance, and to encourage compliance. We **recommend** publication by the Attorney-General's Department of fact sheets and internal training by service providers to ensure that FDRPs and lawyers are aware of their obligations.

We note that non-disclosure of income/assets accrued through participation in the cash economy is a significant issue in the family law and child support contexts. Reliance on taxable income can also lead to artificially low child support assessments that do not reflect the true financial position of the payer parent. We are aware of payee clients of our members who, because of non-disclosure or under-disclosure of money received through the cash economy, receive under $10 per month.

We **support** the application of the duty to financial, property and superannuation matters.

As a more general comment, Relationships Australia **recommends** extension of the scope of the PPP500 pilot, noting current and projected increases in property values.

Relationships Australia notes the references, in the Consultation Paper, to facilitative dispute resolution, as well as to mediation and Family Dispute Resolution. We would welcome consistency of language and, where terms not defined in the Act are used, clarification of the intended definitions. For the avoidance of doubt, Relationships Australia **recommends** that the Act and any explanatory guidance or associated materials should refer to FDR and FDRPs, to ensure that clients are served by practitioners with appropriate specialist expertise (rather than, for example, someone with a broad mediation background who may not be familiar with family law).

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

With respect to the application of the duty to litigation guardians, Relationships Australia considers that the objectives of the amendments would be furthered if it were possible to confer on litigation guardians the rights to access the information to which the person subject to the guardianship arrangements would themselves have access, but for the reason for appointing a litigation guardian. We appreciate that this might involve amendment of other legislation. Accordingly, we **recommend** that the Government consider how to confer such rights of access on litigation guardians, noting too that the analysis in the Consultation Paper further underlines the urgent need for reform to laws relating to powers of attorney and to provisions for supported decision-making. We support the recommendations, in relation to supported decision-making, made by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (see Volume 6 of the Final Report).

In relation to courts' powers in relation to non-compliance, we **support** the proposed inclusion of notes to draw the attention of courts, parties and their advisors to the duties to disclose. We do, however, entertain some doubts as to whether that will prove sufficient to encourage improved compliance. It is our view that non-compliance is not driven by a lack of awareness of obligations or gaps in the courts' powers to require compliance. Rather, non-compliance emerges from expectations that there will be no or little real consequences of non-compliance. Relationships Australia recognises that change in this regard needs to be court-led to be effective and durable. In the absence of action of this kind from the family law courts, then imposition of the proposed duty on lawyers and FDRPs will not necessarily achieve the intended policy objective of encouraging disclosure.

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.

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

Yes.

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?

No.

Relationships Australia **supports** the proposal to empower courts to terminate arbitrations, subject to a court finding that there has been a change in circumstances. This will also give family law courts greater scope to ensure that arbitrations are not being misused, including as part of systems abuse.

We also **support** allowing arbitrators to apply to the family law courts for directions about the conduct of an arbitration.

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?

Consistent with previous submissions relating to CCS, Relationships Australia **recommends** that accreditation and any other new oversight framework should be directed to providers who operate a CCS but would not otherwise be subject to independent oversight as a matter of law. CCS which are Government funded are sufficiently regulated through contractual provisions, as amply demonstrated by services that have, despite years of grave under-funding, delivered safe and effective services to families in high risk circumstances.

Further, we **support**:

- restrictions so that the family law courts can only order families to attend either a government-funded CCS or an accredited CCS
- extension of the principles of confidentiality and admissibility of communications to communications which occur during CCS intake processes (see below for more detailed consideration), and
- imposition of duties on government-funded and accredited CCS to disclose suspicions of child abuse or other maltreatment of a child, and to advise families that children's best interests are the paramount consideration, provided that these obligations remain triggered by 'reasonable grounds to suspect' (see section 67ZB of the Act).

Relationships Australia **recommends** that the Bill clarify more precisely what 'intake processes' are to be included. In practice, CCS intake processes can be staged and can involve more than one worker, from more than one programme element within the service. Our members would be most grateful for greater clarity as to what elements of CCS processes are intended to receive the protection of non-admissibility. Currently, the Exposure Draft seems to mirror the language used to protect FDR and counselling processes – which itself has yielded confusing jurisprudence - but is less clear as to the elements that are intended to receive protection. One suggestion has been that the definition expressly accommodate 'one or more activities', including interviews, surveys, procedures, and assessment sessions. Any and all of these may be completed in the course of preparing for service delivery (or a decision to decline service). At Relationships Australia New South Wales, for example, intake usually involves registration, assessment and DOORS before a decision is made as to whether to offer CCS services; we have included below some state-specific snapshots to provide greater context.

We would also be grateful for clarification as to whether the intake definition extends to clinical discussions between CCS workers? Does it extend to client phone calls and emails and ongoing assessments as part of determining suitability of CCS service and progression through stages of service? In day to day operations, CCS workers consider intake to include all information gathering during an interview and assessment processes to determine safety and suitability. Safety and suitably are continually evaluated while a CCS is working with a family. If all of this information is admissible, clients may be placed at undue additional risk. It is acknowledged that families supply risk information themselves to the courts. However, CCS risk information is built upon throughout the client journey and continual assessment of risk is imperative to keeping families safe during service delivery, and beyond.

We **recommend** that the Act more clearly identify the point at which CCS intake process becomes admissible.

Our members have asked whether these amendments presage different approaches to counselling and FDR admissibility requirements? For example, to support the safe and effective delivery of CCS services, family members may participate in reunification under the FARS program. Reunification counselling can be integral to support children moving safely and successfully through the intake process.

Relationships Australia New South Wales snapshot

Relationships Australia New South Wales has advised that they consider their intake processes for CCS to include, at a minimum:

- registration by both parties
- an assessment process for all parties, and
- an orientation of children which includes the Lives With Parent.

At each stage, valuable information is sourced from a number of people, including:

- living with and spending time with parents
- Independent Children's Lawyers
- New South Wales government agencies including police, the Department of Health, and the Department of Communities and Justice.

It has been the practice of Relationships Australia New South Wales to comply with subpoenae requests and produce all information collected through all stages of the 'Intake' process. There is important information which outlines why we have proceeded with service or declined service; for example, concerns of the child, non-compliance with Service Agreements, trauma-related responses of the Lives With Parent, and upcoming criminal matters which may result in incarceration.

Relationships Australia South Australia snapshot

Relationships Australia South Australia has also noted that some organisations do intake with children separate from intake with adults. RASA uses Kids DOORS and provides children orientation to the CCS. Accordingly, it is recommended that intake definitions should acknowledge and include separate intakes with children that should also be afforded confidentiality, subject to normal reporting requirements.

Relationships Australia Queensland snapshot

The Adult Intake process with fulfills several purposes, including:

- information gathering – family history, emergency contacts, details of court proceedings, types of service needed
- risk screening and mitigation – completion of client questionnaire and subsequent exploration of risk domains and associated safety planning if required
- child focused questioning to:
    - identify the children's needs
    - understand the children's attitudes from the adults' perspective
    - understand the children's experience of separation
    - explore parental capacity to see children's perspective, and
- identiying current circumstances and goal setting for future and begin collaborative work to move toward goals.

Each function is integral in the assessment of readiness for service and shapes the way in which service delivery is designed to meet respond to families' unique circumstances.

The Child intake and Orientation Session addresses different functions:

- risk screening and mitigation with and on behalf of the children
- introducing children to the physical space and staff
- exploring children's concept of supervised contact or change overs
- exploring children's willingness to engage with the service (including attachment focused observations around separating from lived with parents/caregivers)
- identifying children's current circumstances and goals in children's own words, and
- providing developmentally appropriate explanations of the service and other family law processes, if appropriate.

Child intake and orientation is central to developing children's informed consent to participate in the service, thus upholding children's rights under the Convention on the Rights of the Child. Intake includes particular consideration of children's attachment needs and may involve multiple orientation appointments to enable children to feel safe when separating from their primary care-givers.

Proposal for a broader definition of 'family' for the purposes of the CCS accreditation provisions

Some of our members have also suggested that, in the context of Children's Contact Services, the definitions of 'member of the family' and 'relative' in subsections 4(1), 4(1AB) and 4(1AC), may be inadequate. Orders can (and are) made to enable supervised contact between children and a range of people with whom they have a meaningful relationship; not only people who fall within the definitions in section 4. This reflects the fact that the Act is intended to accord paramountcy to children's best interests, and necessitates a degree of flexibility to ensure that children in separating families are supported to retain the full breadth of relationships that are meaningful to them. We **recommend**, therefore, that paragraph 10KB(1)(a) be amended to reflect this.

We **recommend** that Government consults further with providers on a suitable definition of 'intake' for the purposes of the Act.

We look forward to working with Government, including through the CCS Accreditation Advisory Group, as it designs the proposed accreditation scheme.

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

Our members have queried whether 'interview, questionnaire or procedure' (in proposed subclause 10KE(2)) is sufficient to cover the DOORS screening tool.

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

The effectiveness of the proposed penalty provisions will depend on whether they are enforced in practice, and whether providers are permitted to build the cost of fines into their business models, by simply passing it onto clients. Further, the penalties may not be sufficient to act as an effective deterrent. We **recommend** that penalties be set at levels which reflect the sensitivity and risk profile of Children's Contact Services; in particular, for bodies corporate. Penalties that can be imposed under the *National Disability Insurance Scheme Act 2013* (Cth), might serve as an appropriate starting point for considering the level at which penalties should be set under the accreditation scheme.

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

Nil response.

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?

Relationships Australia welcomes reforms to encourage use of FDR, and we support mechanisms to encourage people to engage in FDR earlier rather than later. FDRPs are highly trained professionals who

offer specialist expertise in dispute resolution, child focussed and child inclusive practice, as well as expertise in trauma-informed practice, DFV-informed practice and culturally safe practice. The earlier that people engage in FDR, the less entrenched they can become in conflictual and combative dynamics that undermine safe and effective co-parenting or, where there are no children, dynamics that can lead to ongoing perpetration of abuse including financial and economic abuse, technology-facilitated abuse and systems abuse. Other benefits of early and genuine engagement with FDR include lowering financial costs to families and to government.

The proposed amendments should contribute to reducing the significant numbers of applications that are filed where the party has not attempted to resolve their issue in FDR first and is unlikely to meet the available exemptions. This loophole has been thoroughly exploited by parties and lawyers, unnecessarily protracting matters, incurring expenses and burdening the family law courts.

We **recommend** that the Bill make clear that the amendments do not apply to filing a consent order.

The amendments are, however, likely to increase the demand by clients and their lawyers for FDRPs to issue s60I certificates without genuine engagement in the FDR process, shopping for certificates at multiple FDR services, or providing incorrect Party B details.

Our members say they will expect an increase in the number of clients

> ringing to say 'my lawyer says I need a s60I' etc and complaints when these cannot be simply issued based only on their request or side of the story. The exceptions are clearly available for some clients but the process to seek an exception has long been seen as less desirable than just getting a s60I issued.

Extension of mandatory pre-filing FDR to property matters

Relationships Australia **recommends** mandating a pre-filing certificate process for property matters. While the section 60I process is not without its flaws, a pre-filing process for Part VII matters has been extremely successful in saving many families the expense, stress and delays of litigation. While the consequent increase on demand will require increased funding for FRCs, this will be more than offset by savings made by reducing demand on far more expensive tertiary services, such as courts, as well as the long-term savings in our social, economic, health and social welfare systems that are delivered to society by FRC services which build families' capacities in safe communication and problem-solving.

If Government implements mandatory pre-filing FDR for property matters, and pursues this proposed amendment, we **recommend** that this proposal apply also to property matters, so that the family law courts can reject applications for property orders when FDR requirements are not complied with (subject to available exemptions).

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

Access to the courts is a fundamental human right which should only be abrogated from in exceptional circumstances. We do not consider that such circumstances apply in this instance and **recommend** that

decisions to reject an application be reviewable. However, parties will need to receive information and advice on the availability of review, and their chances of success, and we **recommend** that appropriate resources, such as fact sheets, be developed.

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?

Relationships Australia supports amendments to relieve parties from obligations to attend court in person.

Part 3: Commonwealth Information Orders

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

Relationships Australia supports amendments to clarify that, even if a Commonwealth department or agency does not have location information about a child subject to a CIO, it should still be required to provide information about actual or threatened violence against the child, a parent of the child or a person who resides with the child. Such an amendment furthers the objective of promoting a safer family law system by promoting the development of a more comprehensive understanding of the circumstances in a family; it is particularly important in the context of blended families.

Concern has been expressed about the application of the proposed amendments to young persons aged 15 and over, who may have run away, or be homeless. Will services need the consent of young persons in such circumstances before disclosing?

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

Relationships Australia **supports** amendments to broaden the categories of family members proposed to be included in subsection 67N(8). The objective of a safer family law system is furthered by affording the family law courts the clearest and most comprehensive possible understanding of risk in the family dynamic.

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

Relationships Australia **supports** Government's efforts to expand the view of family and community in accordance with First Nations culture, and encourages Government to consult further with those communities to ensure that this important consideration is given full and proper expression in the Act.

Part 4: Operation of section 69GA

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

Relationships Australia **supports** the proposed amendments, and encourages greater use of them by State and Territory courts, to minimise the effects on families of fragmentation of the family law, family violence and child protection systems.

Following the expiration of the Northern Territory pilot, we would welcome opportunities to work with the Government to identify further opportunities to lower barriers to State and Territory courts exercising jurisdiction under Part VII of the Act. We consider this to be valuable in continuing to reduce families' experiences of fragmented systems.

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.

Relationships Australia **supports** amendments that promote ease of access and use of the family law system, including by self-represented litigants. Including provisions in the Act, rather than the Rules, assists users. We acknowledge the key disadvantage is that locating matters in the Act makes amendments, when necessary, more difficult and time-consuming. We do not consider, in this instance, that this disadvantage outweighs the likely benefits to users.

Relationships Australia **supports** proposals to clarify that legal aid commissions can seek financial contribution towards the cost of ICLs and that family law courts can make such orders, subject to a financial hardship exception.

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

Nil response.

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.

Nil response.

Other matters relating to costs

Relationships Australia is concerned that proposed clause 114UE of the Exposure Draft (p 63 of the ED) confers a kind of limited Crown immunity from costs that is inequitable to other partes. It would have the effect that a Court finds against the body, after litigation in respect of which the applicant has

incurred costs, but the applicant is unable to have the benefit of a costs order unless a very high threshold is met.

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?

Relationships Australia **supports** the proposed amendments, subject to clarification as to how the exemption in respect of coronial proceedings is intended to work. If it is the case that information can be disclosed in a coronial hearing that is open to the public, how will safety concerns be dealt with? Our members spend significant resources in responding to subpoenae, issued in children's, local and district courts, for privileged records.

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

Nil response.

OVERARCHING QUESTION FOR SCHEDULES 1-4

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

Relationships Australia makes no specific recommendation in response to this question, but would urge the necessity of having in place, before commencement, necessary public education and awareness materials, as well as training materials for professionals. Further, sufficient time should be allowed to enable users of the family law system to be across the amendments, and able to confidently use and advise on them. Failure to allow such time may result in unintended consequences that pose safety risks.

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?

Our members expend substantial resources responding to subpoenae. We **support** amendments that would require the leave of the court for a legally-represented party to issue a subpoena that relates to 'protected confidence' records (self-represented parties must already seek leave of the court: rule 6.27(1) of the Family Law Rules). Relationships Australia would also **recommend** that such a provision in the Act should be of general application (ie both represented and self-represented parties would be covered by the provision in the Act, rather than having the requirements spread over two instruments, depending on whether a party is legally or self-represented).

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?

In practice, the option to object is inherently *ex post facto*. Our services will still face subpoenae filed for fishing expeditions, with the associated imposts of time and cost borne by our members who must file the objection and attend court. We support reforms to the 'front end' that clarify what communications are excluded communications and that filter out subpoenae issued for tactical reasons, including as part of systems abuse conduct.

Relationships Australia National Office has also been advised by members that

> The current ability for named parties to request copies of subpoenaed information is also of concern. In many cases [we must] file an objection to other parties seeking/seeing access to the notes to protect parties, increasing the resources in responding to a subpoena. The increase in Independent Childrens Lawyers being appointed by the courts to represent children's interests is a positive step but [we suspect] this will increase the number of subpoenas, and the need to object to parents requesting a subpoena copy to ensure child safety.

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?

Our members have indicated that the complexity of admissibility and confidentiality provisions can be a source of confusion for clients and service providers, leading to inadvertent (as well as intentional) improper disclosures. Costs for clients would be reduced by having clear, intelligible rules that are accessible to all service users.

CONCLUSION

Thank you again for the opportunity to make this submission. [redacted]

Kind regards

[redacted]

Nick Tebbey
National Executive Officer

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