frsa Family & Relationship Services Australia

Providing Leadership, Linking Services, Supporting Relationships

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SUBMISSION

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

ATTORNEY-GENERAL'S DEPARTMENT

[redacted]

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ABOUT FRSA

As the national peak body for family and relationship services, FRSA has a critical leadership role in representing our extensive network of Member Organisations to support their interests and the children, families and communities they serve across Australia. FRSA plays a significant national role in building and analysing the knowledge and evidence base relating to child and family wellbeing, safety and resilience. We undertake research and work with government and non-government stakeholders to inform policy and shape systemic change.

Our vision

An Australia where children, families and communities are safe strong and thriving.

About our members

FRSA has 160 members, with 135 members in a direct service delivery role.[1] The range of services provided includes:

Family Law Services (funded by the Attorney-General's Department):

- Family Relationship Centres
- Family Dispute Resolution
- Family Law Counselling
- Parenting Orders Program
- Supporting Children after Separation
- Children's Contact Services
- Family Relationship Advice Line

Family and children services (funded by the Department of Social Services):

- Communities for Children Facilitating Partner
- Children and Parenting Support
- Family and Relationship Services:
    - Family and Relationship Services
    - Specialised Family Violence Services
- Adult Specialist Support:
    - Find and Connect
    - Forced Adoption Support Services
- Reconnect
- Family Mental Health Support Services.

[1] FRSA's full members deliver family and relationship services. FRSA's associate, individual and honorary members hold policy, research and professional expertise in family law, family and relationships services and related social services.

INTRODUCTION

FRSA welcomes the opportunity to contribute to this consultation.

Our submission is informed by:

- an Advisory Group comprised of FRSA members
- submissions to related inquiries
- the experience and wisdom of FRSA members, many of whom have been providing services to Australian children and families, for over 60 years.

OUR FEEDBACK

FRSA supports the Government's commitment to making the family law system safer and simple for separating families and we welcome this second tranche of legislative reform.

As outlined through the course of our submission, the proposed amendments raise a number of uncertainties. While this consultation process is designed to iron out as many uncertainties and avoid as many unintended consequences as possible, the legislation may not work in the way its drafting has intended. Of greatest concern to us is that amendments may inadvertently afford new opportunities for the perpetration of systems abuse.

As a peak body representing providers of family law services, we are also acutely aware that the court deals with only a minority of cases and many separating couples work out their arrangements through family dispute resolution, or with legal advice or simply on their own. What will the implications of the amendments be for those outside the court system as well as for those in it?

FRSA therefore recommends that the Government commit to monitoring the impact of the changes over time through the full family law system. This would involve not only quantitative data, but also qualitative data obtained from the experience of separating couples including, in particular, victims survivors of family violence, Family Dispute Resolution Practitioners, relationship counsellors, and legal and judicial officers.

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

On balance, FRSA supports Australia's discretionary approach to family law property division which goes some way to acknowledging the diversity of families and family structures in contemporary Australia and allows for the specific circumstances of each family to be considered in the decision-making process.

However, we see benefit in, and support, co-location of the property decision-making principles. Co-location of the principles will provide greater clarity for lawyers, family dispute resolution practitioners, the courts and for those seeking resolution of property matters following relationship breakdown. The clearer the legislation is about the analytical process taken to determining property division, the easier it is for parties to a dispute to assess what they personally consider to be fair with what will be considered just and equitable at law.

The consultation paper frames the decision-making process as a set of 'principles' rather than 'steps' to be undertaken in a particular order. While FRSA supports the proposed approach, we do feel that, on its own, stating the principles do not have to be approached "in any particular sequence" (ss 79(2)) may not greatly impact what happens in practice. Specifically, we are concerned that 'current and future needs' may be given less emphasis than contributions. As property law scholars, Belinda Fehlberg and Lisa Sarmas, have argued, the current legislation 'encourages contributions to property to be considered first', which is reflected in jurisprudence showing that "judgments most commonly involve consideration of contributions before needs". [2] Fehlberg and Sarmas query whether just and equitable outcomes really are being achieved, noting that empirical research shows that post-separation, women and particularly women with dependent children experience greater economic disadvantage. Consequently they suggest legislative amendment that places greater priority on the economic security and housing requirements of parties and their dependent children.[3]

To further encourage an adequate focus on future circumstances, and in line with Fehlberg's and Sarmas' argument, FRSA's view is that reference to economic security of parties and their dependent children and, in particular, reference to the best interests of children should be elevated to the decision-making principles.

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

FRSA supports the proposed framing of the just and equitable requirements as an overarching consideration.

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?**
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?**

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[2] Fehlberg, Belinda & Sarmas, Lisa (2018), 'Australian family property law: 'Just and equitable' outcomes?', 32 Australian Journal of Family Law, 32, p. 85.

[3] Fehlberg, Belinda & Sarmas, Lisa (2018), 'Australian family property law: 'Just and equitable' outcomes?', 32 Australian Journal of Family Law, 32, pp 105-6.

FRSA supports inclusion of 'the effects of family violence' as a factor to be taken into account in assessing contributions and current and future circumstances in determining a property settlement.

However, FRSA Members are concerned about how the proposed amendments will be operationalised.

FRSA Members raised the following questions:

- What evidence will be required to establish the fact of family violence – for example, a conviction? A family violence order?
- How will a court quantify and make adjustments to account for the effect of violence on a party's capacity to contribute, or impact on their future circumstances to make it just and equitable? We are not suggesting here that this should be prescribed, which would undermine the discretionary approach to matters under Part VIII. Rather, we observe that the uncertainty around how a court will quantify and make adjustments may impact the likelihood of victim survivors making use of this provision.

FRSA Members also noted that Family law works on the balance of probabilities, and this is the standard applied in all manner of important decisions about whose evidence is to be preferred. However, people may regard a finding about family violence as being a quasi-criminal finding, and some may assume the standard of proof is beyond reasonable doubt. FRSA can see value in the legislation specifying that the standard is balance of probabilities.

Re-traumatization

FRSA Members emphasized that to minimize the risk of re-traumatizing victim survivors it is important that:

- There is clear guidance on the evidence the court will require to establish the fact of family violence
- The court adopts a trauma-informed approach to property (and parenting) matters.

This second point will be particularly important when the legislation first comes into effect, noting the uncertainty for clients as cases first come to be decided under the new provisions.

Misidentification of perpetrators

Misidentification of perpetrators of family violence is a well-documented issue, resulting in family violence orders being made that protect the perpetrator and not the victim survivor, along with cross orders in circumstances when the victim survivor uses violence in response to abuse. FRSA Members observed that it will be important for the court to "look behind" family violence orders if they are to serve an evidentiary purpose within the context of property matters.

Members further noted that there may be unintended consequences of the legislative amendments:

- potential increase in vexatious applications for family violence orders for the purpose of leveraging for a more favourable outcome in property settlements
- potential increase in contested family violence orders as perpetrators may be less likely to agree to orders without admissions
- could unintentionally contribute to further systems abuse of the victim-survivor.

To minimize the risks identified above, it is critical that there is awareness and understanding, across the family law and law enforcement systems, of the nuances and characteristics of family violence.

In the FRSA Membership, family violence training is seen as an integral part of Family Dispute Resolution Practitioners' tool kit. Over five years ago, FRSA surveyed members who provide family law services on their experiences of responding to family and domestic violence in family law contexts. The survey found that most respondents (75%) reported that violence was present in 60-80% of cases at the point of intake. Since this time, Members have anecdotally reported an increase in the numbers of people presenting with family and domestic violence issues.

FRSA Members incorporate comprehensive policies, processes and procedures for identifying violence and for ensuring that the safety needs of clients who are affected by family and domestic violence are identified and met. Despite our sector working daily with clients affected by family violence and connecting those clients to specialist supports when needed, the artificial distinction between the specialist family violence sector and the family and relationship services sector, which is compounded by the State-Commonwealth division of responsibilities, continues. This means family violence training is not viewed, from a funder's perspective, as a core requirement for the Family Relationship Services Program in meeting client needs. In recent times, FRSA Members have had requests to direct underspends to family violence training challenged and, in some cases, rejected. This needs to change.

Understanding family violence and adopting a trauma informed approach to working with victim survivors must become a core feature across the family law system if we are to give legislative reform full and positive effect. It is encouraging to see the Commonwealth government investing in family violence in the family court system with the introduction of family violence training and the Lighthouse approach. We would like to see investment in training extended to the community based FDR and legal assistance sectors, and a requirement for family law practitioners and lawyers in the private sector to undertake family violence training.

As a final point we note that the Family Law Information Sharing legislation recently passed by Parliament, which will ensure that courts have fuller access to the picture of family safety risk, will mean there is less burden placed on victim survivors (where correctly identified) to retell their story.

FRSA recommends that:

- all family law professionals are adequately trained to identify and understand family violence and its impacts on family members, including patterns of coercive control and the potential for legal systems abuse.
    - Government invests in training for community FDR and legal services
    - amendments should not come into force until training has been rolled out.
- Risk screening using Family DOORS Triage is made mandatory in the court system, noting that DOORS is a universal screening tool – that is, it has been designed to be used with all clients of services using the tool. We note that community based family law services take a universal approach to intake screening and assessment, using a range of tools.

While outside the remit of the Government, FRSA hopes to see improvements in training and education for police and state-based courts/legal professionals and the introduction of alternative policing and investigation models to help address the misidentification of family violence perpetrators.[4]

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?**

FRSA supports this amendment.

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

FRSA supports this amendment.

Excessive legal fees

We take this opportunity to note that a problem area for wastage – particularly in property matters – is excessive lawyers' fees as was canvassed in the ALRC review[5] and the most recent Parliamentary inquiry into the Family Law System.[6] FRSA acknowledges there can be a number of factors contributing to the cost of family law matters. Further, some of the recommendations, such as unbundling of legal services, proposed in the aforementioned reviews fall within the remit of the states and territories. Notwithstanding these challenges, we encourage Government to advance solutions to remedy the issue of excessive fees as a matter of priority.

Gambling harms

In consultation with Members the use of language around gambling was drawn to our attention. The consultation paper refers to 'excessive gambling' (p. 13) as an example of wastage. We agree. However, in discussion with Members, FRSA committed to using more neutral language about gambling that recognizes

[4] See for example recommendations in Nancarrow et al (2020), *Accurately identifying the "person most in need of protection" in domestic and family violence law* – Research Report, Issue 23, ANROWS.
[5] 5 ALRC (March 2019), Family Law for the Future – An Inquiry into the Family Law System: Final Report, ALRC Report 135, p. 331.
[6] Joint Select Committee on Australia's Family Law System (October 2020), Improvements in family law proceedings: Interim report, p. 42 & Chapter 5.

gambling as a public health issue (and not an individual moral failing) and encourages help-seeking behaviour. We have therefore opted to use the term gambling harms / gambling-related harms and encourage the Department to do the same. We further note that a focus on 'gambling harms' will encourage a greater focus on each separating couple's context, whereas 'excessive gambling' lends itself to the question of what could be considered 'excessive', potentially dissociated from context.

The situation in WA

We note that proposed amendments impacting de facto couples will not apply in Western Australia where de facto couples are covered by the Family Court Act 1997 (WA). We trust that in due course consideration will be given in that jurisdiction to harmonize the state legislation with federal legislation to ensure a consistent approach to separating married couples and separating de facto couples across the country.

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?**

FRSA encourages reforms that seek to establish less adversarial pathways for family law matters and we agree with the proposed approach. We do note, however, that the less adversarial trial provisions for child-related proceedings periodically fall into disuse. As noted in the ALRC report, the Less Adversarial Trial process is rarely used despite the positive impacts of this process. This has been attributed, in part, to insufficient resourcing (including a scarcity of family consultants) and time.[7] Therefore, we anticipate that the proposed provisions will only be used if the court feels it is sufficiently resourced.

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

No comment.

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?**
14. **If not, please expand on what changes you would propose and why.**
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?**
16. **Do the proposed provisions achieve the intention of simplifying the list of matters that may be arbitrated?**

[7] ALRC (March 2019), Family Law for the Future – An Inquiry into the Family Law System: Final Report, ALRC Report 135, p. 191.

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?**

FRSA supports strengthening the visibility of disclosure obligations and consequences for breaches by the proposed inclusion of disclosure requirements in the Act. We do note, however, that lack of consequences for non-disclosure is likely as much of a driver for non-disclosure than lack of awareness that the disclosure obligations exist.

FRSA further supports the proposed amendment requiring legal practitioners and FDRPs to inform about disclosure duties and potential consequences for breaches.

Non-disclosure or under-disclosure of finances is not only an issue in the courts but remains a considerable issue within the FDR/mediation context. This can result in pushing parties to litigation or vulnerable parties reaching an agreement that is neither just nor equitable. Hopefully, the requirement on practitioners to inform about disclosure obligations will encourage full disclosure within the context of FDR. Notwithstanding this, FRSA believes that further consideration of levers that could be used to facilitate timely and full disclosure in the FDR context is warranted.

SCHEDULE 2 – CHILDREN'S CONTACT SERVICES

The proposed amendments allow for an accreditation scheme to be established at the organizational level and the individual level, without prescribing the approach. The Department's intention is to hold further consultation to determine an accreditation model, including whether it will be applied at an individual or organisational level, or both.

Notwithstanding this, we take this opportunity to reiterate FRSA's position that an accreditation scheme should be established at the service level (and not individual professional level). That is, the responsibility and risk associated with providing a CCS service is vested in the organisation/business rather than being vested in individuals working within a CCS. It would need to be a requirement of a service-based accreditation system that it incorporates human resource standards that outline staff training and qualification requirements.

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?**

Definition of CCS – 10KB

Children's Contact Services may be used to facilitate contact between a child and a 'significant other' in the child's life. Therefore, we propose that the definition is expanded to reflect this. For example:

10KB (1)(a):

> *facilitate contact between a child and a member of the child's family* ***or significant other person to the child*** *with whom the child is not living;*

Child welfare clients

FRSA recognizes that the Commonwealth Government does not have jurisdiction over child protection/child welfare matters and therefore cannot extend accreditation to services provided on the basis of child welfare interventions. We note that there may be Children's Contact Service providers offering services to families within the child protection system as well as the family law system. It is reasonable to anticipate that setting accreditation standards for CCS providers within the context of family law will have positive benefits for all service users, regardless of their referral pathway. However, families within the child protection system will not have access to the accreditation scheme's complaints process.

Ideally, service users should be able to expect the same standard of service delivery regardless of their referral pathway or location, or the funding source underpinning a service. We recommend that the Commonwealth, as a minimum, ensures that relative state/territory counterparts are kept abreast of accreditation developments. This may pave the way for further consideration of service quality and consistency in those jurisdictions.

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

We understand through communication with the Department that the rationale for extending the principles of confidentiality and admissibility of communications to communications that occur during CCS intake is to enable services and families to have open conversations about the particular circumstances and needs of the family during the intake process and support safety planning and nuanced service provision.

At the same time, it is important that relevant information can be shared with the court to ensure that the best interests and safety of the child/children are able to be considered in further deliberations. Balance is required.

The definition of a CCS intake procedure (10 KE(2))as currently framed is too open-ended. CCS providers' intake procedures vary and what is considered part of the intake process may not be the same across providers. We therefore propose that the definition is narrowed to precisely specify what is included in the CCS intake procedure for the purposes of confidentiality. Given the variation in intake procedures, we suggest that the Department establishes a small working group of CCS providers and ACCSA representatives to refine the definition.

An important consideration in narrowing the definition is the issue of safety risk. Aspects of an intake procedure that may cause harm to a party if disclosed to the other party, for example, a safety plan, should remain inadmissible.

The Department may wish to consider the option of reserving the definition for the accreditation model itself, where a minimum requirement for an intake procedure is captured in the accreditation standards.

Thus 10KE(2) would be framed along the following lines:

A CCS intake procedure is ~~any interview, questionnaire or other procedure~~ ***the required minimum intake procedure as defined under the accreditation standards*** *that is conducted:…*

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?**

FRSA supports the inclusion of civil penalties in the Act. The consultation paper does not, however, provide a rationale for the proposed maximum number of penalty units against the prescribed offences. What are the proposed maximum penalty units for comparable industries? How effective have the penalties been in deterring non-compliance?

We leave it to those with regulatory expertise to determine if the penalty provisions are adequate. However, we do note that a cursory scan of penalty provisions in other domains suggests the proposed maximum penalty units may be somewhat low – particularly for body corporates.

We point, for example, to some of the civil penalty provisions of the NDIS Act:

- *Providing supports under a participant's plan where the NDIS rules require the person to be registered but the person is not so registered. (maximum 250 penalty units for an individual and 1250 penalty units for a corporation)*
- *Registered NDIS provider breaches a condition of registration. (maximum 250 penalty units for an individual and 1250 penalty units for a corporation)*
- *Former registered NDIS provider fails to comply with requirement to retain records. (maximum 60 penalty units for an individual and 300 penalty units for a corporation).*[8]

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?**

FRSA supports the proposed amendments.

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

FRSA agrees that there should be a further amendment to the FCFCOA Act to allow affected persons to seek a review of pre-filing decisions. It will be important that people are able to seek legal advice/guidance as to whether to seek a review or accept the decision.

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

[8] NDIS Quality and Safeguards Commission (January 2022), *Civil Penalties Policy V1.0, Appendix A.*

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

FRSA supports the proposed amendments.

Part 3: Commonwealth Information Orders

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

FRSA supports the proposed amendments.

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

FRSA supports the proposed amendments.

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

FRSA supports inclusion of kinship relationships in the expanded category of persons under subsection 67N(8). We defer to First Nations stakeholders on the appropriate drafting of the provision.

Part 4: Operation of section 69GA

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

No comment.

SCHEDULE 4 – GENERAL PROVISIONS

Part 1: Cost 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.**
30. **Are there any means-tested legal service providers that would not be captured by the new definition of 'means-tested legal aid'?**
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.**

FRSA supports the incorporation of aspects of the Family Law Rules, and co-location of related provisions in the Act.

Part 2: Clarifying 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.**

FRSA supports the proposed amendments, which clarify that the admissibility provisions under the Act are intended to apply to any court proceedings. FRSA members welcomed this change noting that the current ambiguity is periodically tested, requiring them to engage lawyers to object to information that has been provided in one court for use in another.

OVERARCHING QUESTIONS FOR SCHEDULES 1-4

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

As noted in response to Schedule 1, Part 1, it is FRSA's view that family violence training, funded by Government, must be rolled out to family law professionals prior to family violence related amendments commencing. Our Members have clearly stated the importance of getting the operationalisation of these amendments right. A sound understanding of family violence, including coercive control, systems abuse and misidentification of perpetrators across the family law system will be integral to ensuring the provisions work in the interests of, and do not retraumatise, victim survivors of family violence.

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?

FRSA considers that there should be additional safeguards in the Act to prevent initial access to protected confidences. The need for the best available evidence must be balanced by the need to protect clients from harm. That harm may take the following forms:

- the unwanted disclosure of personal and sensitive information to a potentially abusive ex-partner
- eroding trust and confidence in the therapeutic relationship
- discouraging help-seeking.[9]

We agree with submissions to the Department's consultation on Family Law Amendment Bill no. 1 Exposure Draft, that argue that measures to protect a person's confidential communications need to focus on the forensic as well as evidentiary stage of litigation to minimize harm.[10]

Our view is that the party should be required to seek leave when the subpoena is issued. FRSA Members also noted that it would be of benefit to place conditions around the information being sought. It was explained that they often get 'blanket' requests asking for all notes on multiple family members, who may be receiving services across multiple programs.

We are also of the view that further consideration should be given to protecting the therapeutic relationship between children/young people and those supporting them. For example, Dr Juliet Behrens and Professor Belinda Fehlberg have suggested the following:

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[9] Taffe, Stephen, Chair Health Law Committee, Law Institute of Victoria (11 August 2023), Proof Committee Hansard: Legal and Constitutional Affairs Legislation Committee, Family Law Amendment Bill 2023, p. 3.

[10] See for example Family Law Council's submission (p. 27), Federation of Community Legal Centres (Vic), submission, p 14 and National Legal Aid, submission, p. 13.

One process could be that only an Independent Children's Lawyer would be able to inspect such material and then to seek leave for the parties or their legal representatives to inspect depending on the content of the material and perhaps the child/young person's views.[11]

Behrens' and Fehlberg's suggestion would, of course, have resource implications for an already under-resourced and over-burdened cohort of professionals. At the same time, there may be other options for providing additional protection for the therapeutic relationship between children/young people and those helping them. FRSA encourages the Department to explore this further.

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?

FRSA understands that the view of some is that:

a) 'ensuring the court has access to all available information should outweigh the interests of individuals in keeping information confidential'
b) 'If the existing powers are underutilized this could be remedied by providing better information to self-represented litigants about the capacity to object to the admissibility of evidence'.[12]

FRSA does not agree. Evidence would suggest that despite the powers available to protect confidential information, perpetrators are routinely misusing the evidence gathering process, and victim survivors are being advised not to, or choose not to, seek therapeutic supports for fear of their records being subpoenaed. We are not confident that distribution of fact sheets for self-represented litigants/litigants will make much of a dent in this trend. We note, in particular, the heightened vulnerability and trauma of victim survivors that can impede their capacity to act and make decisions in their best interests.

Cases in which there are family violence concerns in the court are very high. FRSA's firm view is that safety must take priority and all attempts should be made to ensure that the law does not inadvertently cause harm. The capacity to minimize harm by introducing additional safeguards to prevent initial access to protected confidences, outweighs the risk of important evidence not being brought to light.

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?

No further comment.

[11] Behrens J. & Fehlberg B. (2023), *Family Law Amendment Bill (2023) Exposure Draft* -submission, p. 6.
[12] See for example, Law Council of Australia (2023), *Family Law Amendment Bill (2023) Exposure Draft* – submission, pp 40-41.

CONCLUSION

FRSA would be happy to discuss with the Department any aspects of this submission that may benefit from further explanation.