Australian Government
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Family Law Amendment Bill (No.2) 2023 Consultation

This submission by the Family Law Council (Council) is in response to the Attorney-General's Department consultation on the Family Law Amendment Bill (No.2) 2023 (the Bill). This submission primarily focuses upon those areas that overlap with the Council's terms of reference endorsed by the Attorney-General on 13 September 2022.

The Council advises and makes recommendations to the Attorney-General about:

(1) the workings of the Family Law Act and other legislation relating to family law;
(2) the working of legal aid in relation to family law; and
(3) any other matters relating to family law.

The Council's membership includes judges of the Federal Circuit and Family Court of Australia (FCFCOA) (Division 1) and (Division 2), and experts from a range of professional backgrounds, including lawyers, family dispute resolution practitioners, family counsellors, academics, and public officials.

The Council's Secretariat can be contacted if any additional clarification is required on the matters raised in this submission via familylawcouncil@ag.gov.au.

The asset pool, *Stanford*[1] and contributions

[1] *Stanford* v *Stanford* ('*Stanford*') (2012) 247 CLR 108

1. Under the existing regime for the resolution of property disputes upon marriage or relationship breakdown, it is not clear from section 79 of the *Family Law Act 1975* (Cth) ('the *Act'*) the full extent of matters the court is to take into account and the order in which those matters might be considered.

2. Case law has evolved, which the Attorney-General now proposes to codify in schedule 1 of the amending Bill particularly with respect to *Kennon*[2] claims involving family violence, along with *Kowaliw v Kowaliw* [3] wastage claims, and the consideration of debt.

3. This process was recommended by the Australian Law Reform Commission in its report[4] and is supported by the Council, but with some recommended modifications.

4. The proposed legislation seems to clarify the effect of the judgments of the Justices of the High Court in *Stanford,*[5] by allowing the interests of the parties in property (including liabilities thereto) and, the just and equitable consideration to be taken up in any sequence, and as part of a wider inquiry as to contributions and future needs.

5. The notation with respect to sequencing appears to have been designed to overcome a perceived problem from *Stanford*[6] that the court needed to determine whether it would be 'just and equitable' to change the existing property ownership of parties **before** considering what order would sensibly follow from a determination that it would be just and equitable to make an order. However, nothing in the proposed amendments would prevent the Court from determining that question as a preliminary issue in appropriate cases.[7]

6. This is a welcomed approach.

New Family Violence Considerations

7. Schedule 1, item 3 of the Bill, clause 79(4)(ca) proposes to provide for the court to take into consideration:

> the effect of any family violence, to which one party to the marriage has subjected the other party, on the ability of a party to the marriage to make the kind of contributions referred to in paragraphs (a), (b) and (c);

8. Given its positioning in the Bill and the direct reference to contributions, this section appears to codify, in part, the *Kennon* principles. Family violence is again picked up in the future factors, particularly the proposed subclause 79(5)(a) (schedule 1, item 5).

9. The Council agrees that it is appropriate to take account of family violence in matters relating to property in some way. The proposed amendments seek to have family violence taken into account both in relation to the effect that such violence may have had on the

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[2] *Kennon* v *Kennon* ('*Kennon'*) (1997) 139 FLR 118
[3] *Kowaliw v Kowaliw* (1981) FLC 91-092
[4] Australian Law Reform Commission, *Family Law For The Future: An Inquiry Into The Family Law System* (Report No 135, March 2019) recommendation 11 and see [217-245]
[5] *Stanford* n1
[6] Ibid
[7] See for example, *Cosola & Moretto* (2023) 66 Fam LR 480 at [38]

contributions one party may otherwise have been able to make, and the effect that the family violence may have on the victim/survivor in the **future**.

10. The prospective consideration is sensible,[8] in addition to the past assessment of contributions. Both the past and future looking amendments send clear policy messages that family violence is unacceptable and can have enduring effects.

11. However, the proposed legislation simply includes family violence as a matter 'to be taken into account' without specifying or providing any guidance as to **how** it might be taken into account. For example, the *Kennon*[9] styled claims used the almost impossibly high threshold of contribution being made significantly more arduous as a measure.

12. That said, the Council is agreed that an assessment of the severity and frequency of the family violence **would not** be an appropriate way of proceeding.

13. The family violence amendments fulfill a commitment to providing justice for each individual according to his, her or their circumstances. What they do not do is to provide any degree of predictability or certainty about the extent to which a finding (or findings) of family violence will affect the division of property. This will therefore require some time for the case law to develop to provide guidance to litigants and lawyers about the likely outcome if a matter goes to court.

14. The Full Court[10] has determined that a Court may infer that significant family violence will have made a party's ability to make direct and indirect contributions significantly more arduous. However, it is also the case that an applicant seeking additional adjustment as a result of the impact of family violence may adduce evidence from a treating psychiatrist or psychologist or seek to call evidence from a mental health expert appointed by the Court or engaged on an adversarial medico-legal basis. That puts the party moving on the allegations (more often than not the wife) in a difficult position of considering whether investing in an appropriate expert, will have sufficient return to justify the costs. That can be a problem with *Kennon*[11] claims as currently formulated, and will likely continue.

15. It should also be kept in mind that affidavits may become longer and cover many allegations to enhance the prospects that the assertions about violence are able to 'be taken into account'. Affidavits refuting such allegations will necessarily expand in length too. Trials will be longer as will the Reasons for Judgment.

16. The review period is to be welcomed in seeking input on these issues.

Family Violence definition and economic and financial abuse

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[8] To that end, a much under-researched area concerns the impact of family violence on a the financial and employment status of victims/survivors. Consideration ought be given to funding the Australian Institute of Family Studies (AIFS) to undertake such an important project. See for example, Chapman and Taylor, Canberra: Centre for Social Research & Methods, Australian National University 'Partner violence and the financial well-being of women: HILDA research results.' (2022). This area warrants more attention.

[9] *Kennon*, above n2

[10] *Benson v Drury* (2020) 62 Fam LR 1 at [50]

[11] *Kennon*, n2

17. The Council observes that schedule 1, item 3 of the Bill, clause 79(4)(cb) proposes to provide for the court to take into consideration:

> the effect of any economic or financial abuse to which a party to the marriage has been subjected by the other party.

18. Arguably, this is already open to the court to consider with the insertion of schedule 1, item 3 of the Bill, clause 79(4)(ca) as the definition of family violence in section 4AB of the *Act* includes the examples at section 4AB(2):

> (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; and
>
> (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support.[12]

19. To remove any perception that proposed clause 79(4)(cb) would amount to 'double dipping', the Council suggests deleting clause 79(4)(cb) and amending clause 79(4)(ca) to include the text in bold to read:

> the effect of any family violence, **including the effect of any economic or financial abuse**, to which one party to the marriage has subjected the other party, on the ability of a party to the marriage to make the kind of contributions referred to in paragraphs (a), (b) and (c);[13]

20. Alternatively, clause 79(4)(cb) could be deleted and clause 79(4)(ca) could be amended to include a notation referring to the family violence definition at section 4AB of the *Act*.

Wastage and debt

21. The proposed new subclauses on wastage and debt may well have unintended consequences. Case law on these topics is clear. Schedule 1, item 3 of the Bill, sub-clause 79(4)(cc) refers to the effect of *any* wastage. That means wastage must first be established and then its effect considered. We make similar observations here as to that above with respect to 'take into account'. Schedule 1, item 3 of the Bill, sub-clause 79(4)(cd) is a completely open-ended reference to '*any* debt'.

22. Elevating any wastage and any debt to statutory inclusions will have the likely effect that one or both parties will hold a blow torch to all expenditure and all debts over the entire relationship and post-separation period.

23. Perhaps inserting the adjective 'material' before wastage and again before debt may signpost that the court will neither be conducting an audit on how the parties chose to live

[12] Sourced from the Federal Register of Legislation at 10 November 2023. For the latest information on Australian Government law please go to https://www.legislation.gov.au.
[13] Based on content from the Federal Register of Legislation at 10 November 2023. For the latest information on Australian Government law please go to https://www.legislation.gov.au.

their lives when together, nor reviewing reasonable living expenses post separation down to the last cent.

The rules of evidence – clause 102NK (Schedule 1, Item 37)

24. Property proceedings have a need for evidential rules to apply, most importantly in the area of values to be attributed to assets, liabilities and financial resources. For example, Party A asserts that a property is worth $500,000 and Party B $1,000,000 and neither wish to be put to the cost of an expert. The court is then left with partisan, opportunistic lay opinions (i.e., it will benefit one party for the higher value and the other the lower) resting on no particular basis. That puts the court in a difficult position to essentially pick one value, but in an unprincipled way.

25. Letters of instructions to valuers will also not need to be tempered by what can be proven.

26. The Council suggests that, rather than dispensing with the relevant rules of evidence unless determined otherwise, an alternative may be to reverse the current proposals – the rules apply unless it is ruled they do not. That would largely protect the veracity of and need for evidence, but empower the Court, on application or of its own motion, to dispense with specified rules of evidence in order to do justice in an appropriate case.

Protecting sensitive information - Express power to exclude evidence of protected confidences

27. The Council generally supports the suggestion of implementing measures to protect a person's confidential communications that have occurred in a therapeutic context, however, it suggests that any proposed amendments also need to consider the forensic stage of litigation. That is, the Council is concerned that the potential harmful effect of the revelation of sensitive private communication may occur at the point where parties are given access to documents produced pursuant to a subpoena.

28. An example where the potential for such harm existed was *Riemann & Riemann* [2017] FamCA 318 which considered the question of access to a child's counselling records in circumstances where the child's psychologist produced documents in compliance with a subpoena but objected to those documents being made available to the parties stating, in an accompanying letter to the Exhibits Clerk:

> I object to the inspection of these documents by any party outside of Dr [E] and the Lawyers representing each parent and I ask that the parents do not read these clinical files. I ask this on the following bases:
>
> - The documents requested are sensitive personal health records, the disclosure of which could pose a serious threat to the psychological wellbeing of the individual, which may include harm to physical or mental health.
> - Even if the potential threat to the health of the individual is not such that it could be classified as 'serious', the effect on treatment caused by the undermining of the relationship of trust between myself and the client could cause long term or irreparable harm to the wellbeing of the client and the therapeutic relationship,

possibly not just with myself as their treating psychologist but with psychologists in general.

- To disclose the information contained in these documents will conflict with my obligation under privacy legislation not to release information that would have an unreasonable impact on the privacy of a person other than the client.
- Psychology is a specialist profession. Reference to the information contained in these documents without explanation of the context in which they are written is unlikely to assist the court, or either parent and has the potential to cause a significant miscarriage of justice.[14]

29. Such concerns on the part of treating mental health professionals are entirely understandable. The concern has been addressed in other jurisdictions by the creation of a public interest privilege with respect to clinical notes concerning mental health therapy. The purpose of the privilege was described by the Supreme Court of New Jersey in the following terms:

> Courts should be mindful that, although [the psychologist-patient privilege] is modelled on the attorney-client privilege, the public policy behind the psychologist-patient privilege is in some respects even more compelling. Like the attorney-client privilege, the psychologist-patient privilege serves the functional purpose of enabling a relationship that ultimately redounds to the good of all parties and the public. The psychologist-patient privilege further serves to protect an individual's privacy interest in communications that will frequently be even more personal, potentially embarrassing, and more often readily misconstrued than those between attorney and client. Made public and taken out of context, the disclosure of notes from therapy sessions could have devastating personal consequences for the patient and his or her family, … Especially in the context of matrimonial litigation, the value of the therapist-patient relationship and of the patient's privacy is intertwined with one of the most important concerns of the courts-the safety and well-being of children and families. Therefore, only in the most compelling circumstances should the courts permit the privilege to be pierced.[15]

30. It is to be noted that the privilege, discussed in that case, applies at the point of disclosure rather than at a subsequent point where a party seeks to tender the documents as evidence in the Court proceedings.

31. To cover both situations, the Council recommends an approach that is similar to that which has been taken in New South Wales which we describe below.

32. Privileges are set out in Part 3.10 *Evidence Act 1995* (NSW) ('the *NSW Evidence Act'*). The term 'protected confidence' is defined in section 126A(1) as;

> **protected confidence** means a communication made by a person in confidence to another person (in this Division called the "**confidant**")--
>
> (a) in the course of a relationship in which the confidant was acting in a professional capacity, and

[14] *Riemann & Riemann* [2017] FamCA 318 at [23]

[15] *Kinsella v Kinsella* 696 A.2d 556, 584 (NJ, 1997) see also, *Duffy & Gomes (No.2)* (2015) 299 FLR 108 [43]-[44]

(b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

protected confider means a person who made a protected confidence.[16]

33. The protection applies at the forensic stage and also the evidentiary stage of the proceedings.

34. In respect to the forensic stage, section 131A of the *NSW Evidence Act* provides:

Application of Part to preliminary proceedings of courts

(1) If--

(a) a person is required by a disclosure requirement to give information, or to produce a document, which would result in the disclosure of a communication, a document or its contents or other information of a kind referred to in Division 1, 1A, 1C or 3, and

(b) the person objects to giving that information or providing that document,

the court must determine the objection by applying the provisions of this Part (other than sections 123 and 128) with any necessary modifications as if the objection to giving information or producing the document were an objection to the giving or adducing of evidence.

(2) In this section, **disclosure requirement** means a process or order of a court that requires the disclosure of information or a document and includes the following--

(a) a summons or subpoena to produce documents or give evidence,

(b) pre-trial discovery,

(c) non-party discovery,

(d) interrogatories,

(e) a notice to produce,

(f) a request to produce a document under Division 1 of Part 4.6.[17]

35. As noted in *Melhem v Commissioner of Police (NSW),*[18] in respect to the evidentiary stage of the proceedings section 126B of the *NSW Evidence Act* provides:

Exclusion of evidence of protected confidences

(1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose--

(a) a protected confidence, or

(b) the contents of a document recording a protected confidence, or

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[16] Sourced from the New South Wales Legislation website at 10 November 2023. For the latest information on New South Wales Government legislation please go to https://www.legislation.nsw.gov.au.
[17] Sourced from the New South Wales Legislation website at 10 November 2023. For the latest information on New South Wales Government legislation please go to https://www.legislation.nsw.gov.au.
[18] *Melhem* v *Commissioner of Police, NSW Police Force* [2016] NSWCATAD 279 (28 November 2016) at [23]-[24] read decision on NSW Caselaw.

(c) protected identity information.

(2) The court may give such a direction--

(a) on its own initiative, or

(b) on the application of the protected confider or confidant concerned (whether or not either is a party).

(3) The court must give such a direction if it is satisfied that--

(a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and

(b) the nature and extent of the harm outweighs the desirability of the evidence being given.

(4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters--

(a) the probative value of the evidence in the proceeding,

(b) the importance of the evidence in the proceeding,

(c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,

(d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,

(e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,

(f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,

(g) if the proceeding is a criminal proceeding--whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,

(h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person,

(i) the public interest in preserving the confidentiality of protected confidences,

(j) the public interest in preserving the confidentiality of protected identity information.

(5) The court must state its reasons for giving or refusing to give a direction under this section.[19]

[19] Sourced from the New South Wales Legislation website at 10 November 2023. For the latest information on New South Wales Government legislation please go to https://www.legislation.nsw.gov.au.

36. Where a dispute arises, section 133 of the *NSW Evidence Act* provides that 'the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.'

37. Significantly, the Court is required to ensure that a party is aware of their rights in respect to a protected confidence provision. In that respect, section 132 of the *NSW Evidence Act* provides:

> **Court to inform of rights to make applications and objections**
>
> If it appears to the court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision.[20]

38. In *Goldy & Goldy (No 2)* [2011] FamCA 418 at [14] it was noted that these provisions, and similar provisions found in other state and territory legislation, may apply to family law proceedings by virtue of the operation of section 79 of the *Judiciary Act 1903* (Cth). This appears to be confirmed in section 69ZX(4)(b) of the *Act*, at least in respect to New South Wales. That is because the *NSW Evidence Act* is a prescribed regulation for the purpose of Regulation 12CE of the *Family Law Regulations 1984*. In that respect section 69ZX(4)(b) of the *Act* provides that:

> the court must not direct, under a law of a State or Territory relating to professional confidential relationship privilege specified in the regulations, that evidence not be adduced if the court considers that adducing the evidence would be in the best interests of the child.[21]

39. It is the Council's view that a common procedure covering protected sensitive information should be adopted with respect to each State and Territory and not just in respect to New South Wales.

[20] Sourced from the New South Wales Legislation website at 10 November 2023. For the latest information on New South Wales Government legislation please go to https://www.legislation.nsw.gov.au.
[21] Sourced from the Federal Register of Legislation at 10 November 2023. For the latest information on Australian Government law please go to https://www.legislation.gov.au.