FEDERATION OF COMMUNITY LEGAL CENTRES VIC

Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: FamilyLawAmendmentBillNo2@ag.gov.au

Dear Attorney-General's Department,

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

We welcome the opportunity to provide feedback on the Exposure Draft of the Family Law Amendment Bill (No.2) 2023 (the **Exposure Draft**). We commend the government for its commitment to improving the family law system so that is more accessible, safer and simpler to use. We endorse Women's Legal Services Australia's (**WLSA**) submission to this consultation and highlight key recommendations below. We also support key positions set out in Victoria Legal Aid's (**VLA**) submission to this consultation as set out in our response.

To achieve meaningful reform alongside the proposed family law amendments, the family law system must be properly resourced. Family law assistance comes at a high cost which many families cannot afford. Legal advice and representation in family law matters is critical, particularly where there is family violence. Lack of access to legal representation can lead to unfair outcomes and increased safety risks for women and children. It is critical that disadvantaged and at-risk families have access to affordable, culturally safe and trauma informed legal assistance in their family law matters. Further, many of the proposed changes in the Exposure Draft will have consequential cost implications for legal assistance providers. Additional resourcing for the legal assistance sector (i.e., Community Legal Centres and Legal Aid Commissions (**LACs**)) needs to be factored in as part of the implementation of these reforms.

We highlight the need for more funding in other parts of the family law system, particularly for Independent Children's Lawyers (**ICLs**) and Indigenous Liaison Officers in each registry. There also needs to be greater access to lawyer-assisted family dispute resolution, including for family law matters involving family violence, to avoid protracted and complex litigation. It is essential that these dispute resolution processes are trauma and family violence informed and culturally safe.

In this submission, all references to sections are to the *Family Law Act 1975* (Cth) (**FLA**) unless otherwise specified. References to sections related to married parties extend to the equivalent provisions for de facto parties.

We welcome the opportunity to work with the Government on its ongoing family law reforms.

Federation of Community Legal Centres Victoria
Level 3, 225 Bourke St,
Melbourne Victoria 3000
03 9652 1501
administration@fclc.org.au
www.fclc.org.au
@CommunityLawVic

ABN 30 036 539 902 | REGISTRATION A0013713H

About the Federation

The Federation of Community Legal Centres (Vic) is the peak body for Victoria's 47 Community Legal Centres. Our members are at the forefront of helping those facing economic, cultural or social disadvantage and whose life circumstances are severely affected by their legal problem.

For over 50 years, Community Legal Centres have been part of a powerful movement for social change, reshaping how people access justice, creating stronger more equitable laws, and more accountable government and democracy. We want a community that is fair, inclusive and thriving: where every person belongs and can learn, grow, heal, participate and be heard.

Community Legal Centres in Victoria provide legal advice and representation in family law matters, particularly to families experiencing financial hardship and family violence. This includes the Family Advocacy and Support Service (**FASS**) in metropolitan and regional Federal Circuit and Family Court of Australia locations across Victoria. The FASS provides services at court for families involved in family law proceedings who are affected by family violence. Community Legal Centres also have considerable expertise in intersecting areas of law, including family violence and child protection.

Community Legal Centres work with local partners and communities to support children and families who are experiencing disadvantage and family violence. Community Legal Centres deliver a range of innovative programs, including early intervention initiatives and justice partnerships with the community, health and social sectors.

Schedule 1 – property reforms

Part 1: Property framework

Property decision-making principles

The legislation for property settlements in the FLA is complex. This makes the property settlement process difficult for parties to understand and navigate without legal representation. The challenges are particularly acute for people accessing community legal assistance who often experience high levels of disadvantage and are from non-English speaking backgrounds. We support changes to the FLA which make the property settlement provisions clearer and simpler to understand and apply. Clearer guidance is important not only for parties with court proceedings on foot, but also separating couples who rely on the property framework in the FLA as part of negotiations and dispute resolution processes.

We support the codification of the four key principles for decision making in property settlements,[1] the removal of cross-references to current and future factors in section 75(2) and the framing of the just and equitable requirement as an overarching consideration through the property settlement decision-making process.

As highlighted by VLA in its submission, to further streamline the FLA and reduce repetition, the Government may wish to consider consolidating the property settlement provisions relating to married and de facto parties into one part of the FLA (i.e., combining Part VIII and Part VIIIAB).

[1] See proposed sections 79(2) and 90SM(2), Exposure Draft.

Effect of family violence

Fair property settlements are critical to ensuring the financial security of women and children experiencing family violence following separation. Abusive partners often use coercive control to make victim survivors financially dependent on them, so they are less likely to end the relationship. This can be an insidious barrier for women wishing to leave a violent relationship. Access to fair property settlements is critical to reducing these barriers and ensuring women and children experiencing family violence are not left impoverished post-separation. Research indicates that where women choose to leave a violent relationship, as many as half of these women end up in poverty.[2]

We support the proposed changes requiring the court to consider the impact of family violence on a victim survivor's contributions and their current and future circumstances.[3] This recognises that family violence can impact a victim survivor's contributions during the relationship, such as capacity to work and/or parent children due to physical and psychological injuries or coercive controlling conduct and isolation (*contributions*). It also acknowledges that family violence can have enduring impacts on a victim survivor's circumstances, such as limiting future earning capacity, or victim survivors incurring significant health expenses due to trauma and long-term physical and psychological consequences (*future needs*). We support the focus on the *effect* of family violence to avoid consideration of fault and culpability as part of determining property divisions.

The proposed provisions refer to the effect of family violence, to which one party to the marriage or de facto relationship has *subjected* the other party.[4] In line with WLSA's submission, we suggest that the wording in the Exposure Draft is broadened so it also applies where a party has been *exposed* to family violence by the other party (i.e., the effect of any family violence, to which one party to the marriage or de facto relationship has subjected or *exposed* the other party). As highlighted by WLSA, this recognises that a victim survivor may, for example, be exposed to the abuse of her children by a violent partner which affects her contributions and current/future circumstances, but this may not be interpreted as (directly) subjecting her to family violence.

To provide additional guidance, we suggest that the legislation includes some examples of what could amount to the effect of family violence on contributions. We refer to the examples highlighted by WLSA in its submission.

The proposed changes to the property decision-making framework are significant. In line with WLSA, we recommend that a Bench Book be developed to provide guidance for legal practitioners and the court. This could include guidelines on evidentiary procedures and other procedural directions.

Effect of economic and financial abuse

We support the proposed amendment to enable the court to consider the effect of economic and financial abuse.[5] While economic and financial abuse is often a form of family violence, in line with WLSA, we support this being included as a separate factor to ensure it is given appropriate consideration by the court and for clarity for parties and legal professionals.

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[2] Summers, A. (2022). The Choice: Violence or Poverty. University of Technology Sydney, p.12. https://doi.org/10.26195/3s1r-4977

[3] See proposed sections 79(4)(ca) and 90SM(4)(ca), Exposure Draft.

[4] Ibid.

[5] See proposed sections 79(4)(cb) and 90SM(4)(cb), Exposure Draft.

We support the intention of the proposed provisions to capture a broad range of conduct, such as controlling or denying access to finances or financial information, incurring debts or fines in the other party's name and undermining a party's earning potential (e.g., limiting access to employment, training or education).[6] To provide additional guidance, we suggest that the legislation includes examples of economic and financial abuse (in addition to the examples listed in s4AB). We refer to the examples highlighted by WLSA in its submission.

Wastage and debt

We support proposed amendments to enable the court to consider the effect of any wastage by a party to the marriage or de facto relationship in relation to the property pool,[7] as well as debts incurred.[8] We support WSLA's feedback in relation to ensuring consistency with *Kowaliw;*[9] the need for additional guidance in relation to the treatment of wastage and debts and the inclusion of examples of wastage in the legislation. It is also important that the court's ability to grant 'addbacks' is not impacted by the proposed changes. For example, in circumstances where an asset has been wasted or improperly dealt with by a party and should have formed part of the property pool.

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

We support the proposal to establish less adversarial trial processes for property or other non-child related proceedings and the scope of proceedings covered by the proposed provision.[10]

We support the changes to the rules of evidence in property proceedings as part of these proposed reforms. As highlighted by WLSA, this allows for a consistent approach across parenting and property matters in relation to findings of family violence and the rules of evidence. This avoids a situation where evidence of family violence may be admissible in parenting proceedings, but not in property proceedings due to the application of the *Evidence Act 1995* (Cth) and there being differing findings of fact about family violence.

Part 3: Duty of disclosure

We support the proposal to include the duty of full and frank disclosure of relevant financial information in property matters in the FLA and associated advisory obligations on legal practitioners and family dispute resolution practitioners.[11] Full and ongoing disclosure of relevant financial information is critical to the fair and timely resolution of property matters. Non-disclosure of financial information is often used as a form of systems abuse as part of the ongoing perpetration of family

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[6] Attorney-General's Department, Family Law Amendment Bill (No.2) 2023 – Consultation Paper, September 2023, p.12.
[7] See proposed sections 79(4)(cc) and 90SM(4)(cc), Exposure Draft.
[8] See proposed sections 79(4)(cd) and 90SM(4)(cd), Exposure Draft.
[9] *Kowaliw v Kowaliw* (1981) FLC 91-092 at 10. This case provides that financial losses are generally shared other than in the following circumstances: "where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets; or where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value."
[10] See proposed Division 4, Exposure Draft.
[11] See proposed sections 71B, 90RI and 90YJA, Exposure Draft.

violence through the family law process. We support the proposed amendments identifying some of the more serious consequences that the court may apply for non-compliance.[12]

Schedule 2 – Children's contact services

We support the implementation of a regulatory scheme for government-funded and private children's contact services (**CCS**) and the introduction of penalties for non-compliance with applicable standards.[13] CCS play an important role in ensuring safe and child-focused arrangements for families requiring supervised contact or handovers often in high risk and complex circumstances. This includes family circumstances involving family violence, mental health issues and drug dependency of parents. Recognising that CCS are currently unregulated and the variance in quality in service provision, it is important that a regulatory scheme is introduced, there is mandatory compliance with requisite standards and staff at CSS are highly trained and competent. The proposed amendments enable the government to develop regulations to provide standards and requirements for CCS, but do not prescribe a specific regulatory scheme or approach. We recommend that the draft regulatory scheme be subject to public consultation once it is developed.

The proposed provisions refer to contact between a child and a member of the child's family. While this is likely to encompass the majority of supervised arrangements, there may be circumstances where supervised contact occurs between a child and a person who is not a member of the child's family (e.g., a long-term carer). In line with WLSA, we suggest that the proposed provisions clarify that member of a child's family is to be interpreted broadly. For example, section 4(1AB) recognises that member of the family can include someone who ordinarily or regularly resides or resided with another member of the family of the child.

While we support the development of a regulatory scheme for CCS, it is important that this does not lead to a decrease in available CCS. There are already significant wait times to schedule supervised contact visits at CCS in some areas. This can result in parents not seeing children for long periods of time (sometimes months) or forgoing proper supervised arrangements despite the presence of significant risk factors. It is important that there is sufficient resourcing for government-funded CCS to ensure access for families that cannot afford private CCS with the introduction of a regulatory scheme.

Schedule 3 – Case management and procedure

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

We support the proposed amendment to section 60I allowing the court to reject applications where mandatory family dispute resolution has not occurred (subject to certain exemptions).[14] We understand that this proposed change seeks to ameliorate current circumstances where a court can only deal with non-compliance once the matter commences.[15] In line with the key principles of the

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[12] Attorney-General's Department, Family Law Amendment Bill (No.2) 2023 – Consultation Paper, September 2023, p.23.
[13] See proposed Division 3A, Exposure Draft.
[14] See proposed section 60I(7), Exposure Draft.
[15] Attorney-General's Department, Family Law Amendment Bill (No.2) 2023 – Consultation Paper, September 2023, p.30.

FLA, this encourages parties to attempt to genuinely resolve matters through family dispute resolution before resorting to court proceedings (subject to certain exceptions). However, it is important that the proposed changes do not delay the listing of urgent family law matters (such as, where exceptions to family dispute resolution apply due to urgency or risk of abuse), such as urgent recovery applications.

While we support this proposed change, we consider that affected persons should be able to seek review of a decision made by a registrar to reject filing of the application, or a request for an exemption, before a judge. This ensures that parties needing to commence proceedings as a matter of priority have an opportunity to explain the reason for not attending family dispute resolution and/or the reasons they meet an exemption (if this has been rejected).

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

It is proposed that section 98A will no longer require parties to attend the divorce hearing for sole applications for divorce where there are children aged under 18 years.[16] In line with WLSA, we support the proposed changes to allow all divorce applications to be heard in the absence of the divorcing parties and their legal representatives, unless the court requests their attendance.

We highlight WLSA's concerns about the continued focus on the care arrangements for children in divorce applications. Divorce applications should focus on the dissolution of marriage, while other parts of the FLA address parenting arrangements for children.

Part 3: Commonwealth Information Orders

We support the proposed change to section 67N, including to make clear that violence related information must be provided even if a department or agency does not have location information about the child. However, as highlighted by WLSA and VLA, we are concerned about the expansion of the category of people who can be subject to a Commonwealth Information Order concerning actual or threatened violence towards a child. The expansion of the proposed provisions to any person related to a child is broad[17] and enables Commonwealth Information Orders to be applied to people who may have little or no connection to the matter. In line with WLSA, we suggest that the proposed provisions only capture people who have a connection to the child that the court considers relevant.

For the above reasons, we also concerned about the expansion of the proposed provisions to kinship relationships for Aboriginal or Torres Strait Islander families and we suggest that the Department consult with Aboriginal Community Controlled Organisations.

Schedule 4 – General provisions

Part 1: Costs orders

We support the provisions relating to costs orders being located in a single new Part XIVC of the FLA for the purpose of providing greater clarity about the court's power to order costs and to enhance litigants understanding of the cost provisions.

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[16] Ibid, p.31.
[17] See proposed section 67N(8)(b), Exposure Draft.

We understand that the proposed amendments seek to clarify the circumstances where a court can order a party to contribute to the cost of an ICL.[18] As part of this, there is a new definition of 'means-tested legal aid' in the proposed provisions. The definition includes a grant of assistance that is made by 'a community organisation established by or under Commonwealth, State or Territory law for the purpose of providing legal assistance to socially or economically disadvantaged individuals.'[19] The note under the proposed section provides that this may include, for example, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services. In considering what costs orders should be made, the court must also have regard to whether any party received assistance by way of 'means-tested legal aid' and the terms of the grant of assistance.[20]

While it appears that there is an intention to capture community legal assistance as part of 'means-tested legal aid', this needs to be made clearer. Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services are not statutory authorities like LACs and are generally not established by a Commonwealth, State or Territory law. While these community legal services do not charge clients legal fees for family law matters as they assist clients experiencing disadvantage, they may not provide formal grants of assistance/aid in the same way as LACs. In line with WSLA, we recommend that the proposed definition expressly refers to legal assistance provided by Nationally Accredited Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services.

It is important that the proposed cost protections extend to clients being assisted by Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services. Clients accessing these legal services experience social and economic disadvantage as is the case for clients accessing LACs and should be treated equally. If there are no cost protections, this will create barriers for disadvantaged clients accessing community legal assistance in family law proceedings due to the increased risk of costs orders being made against them.

Protecting sensitive information in family law matters

We support provisions to protect counselling records and other protected confidence records in family law proceedings. It is well recognised that access to counselling and therapeutic support is crucial for victim survivors of family violence as part of dealing with trauma arising from family violence. The prospect that confidential records may be subpoenaed and disclosed in family law proceedings can disrupt therapeutic relationships and be a barrier to accessing critical supports for victim survivors and their children.

As highlighted in WLSA's submission, there are circumstances where protected confidences may be relevant to the proceedings (e.g., to determine risk of family violence), but there must be appropriate safeguards in place. We support the approach of WLSA set out in its submission to this consultation and on the Exposure Draft of the Family Law Amendment Bill 2023. We also support VLA's suggestions in relation to protected confidences in its submission to this consultation.

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[18] Attorney-General's Department, Family Law Amendment Bill (No.2) 2023 – Consultation Paper, September 2023, p.35.
[19] See proposed section 114UA(a)(iii), Exposure Draft
[20] See proposed section 114UB(3)(b), Exposure Draft

Review mechanisms

In line with WSLA's submission, we recommend that there are statutory review mechanisms of the proposed legislation to determine whether it is effective, the extent to which it is achieving its objectives and any unintended consequences. We suggest that the review starts within 3 years of commencement and is completed within 12 months. This aligns with the statutory review mechanism in the Family Law Amendment Bill 2023.

We would welcome the opportunity to discuss this further or provide any additional information.

Yours sincerely,

Louisa Gibbs
Chief Executive Officer