

## Family Law Amendment Bill 2024 Senate Legal & Constitutional Affairs Committee Inquiry

### Question on notice (Public Hearing – 18 October 2024)

What is FRSA's response to the recommendations made in submissions from National Women's Safety Alliance, Fitzroy Legal, National Legal Aid, Women's Legal Services, Law Council?

### FRSA Response

FRSA limits its response to recommendations on matters also addressed in our submission or in recent submissions to other inquiries. We have elected not to comment on other recommendations.

### National Women's Safety Alliance (submission no.2)

Topic	Recommendation / Commentary	FRSA Response
	There were no specific recommendations in this submission. We direct our response to the key points made in the submission below.	
Protected Confidences	"We support the definition of professional services as outlined at 102BB and the explicit reference to a specialist service in relation to sexual assault or family violence. Trust between these service confidants and the clients who confide in them is inherent to a service's ability to deliver the most qualified and appropriate assistance."	<p>FRSA notes the explicit reference to a specialist service in relation to sexual assault or family violence. These are important inclusions in the definition. However, as outlined in Women's Legal Services' submission (see below), we agree this should be expanded to include "...all counselling services in relation to sexual assault or family and domestic violence and this should not only be limited to the interpretation of a 'specialist service'.</p> <p>FRSA further notes that the definition of professional service has not been properly tested with our sector and we are not confident that it captures all relevant services. It is unfortunate</p>



		that providers of government-funded family law services were not afforded the opportunity to review the protected confidences amendments prior to the Bill being introduced to Parliament – an opportunity that was provided to the Law Council for example. Family Law Services are embedded in a social services ethos and operate in integrated social service systems. FRSA members delivering family law services are therefore keenly aware of the complex presentations of families in the family law system and the range of therapeutic supports they may access. Relationships Australia for example, has recommended (submission 5) that the definition be broadened to include alcohol and other drug services and gambling help services.
	“In providing input into the earlier reforms to the Family Law Act (Information Sharing) Bill 2023, we urged that sexual violence counselling notes be specifically mentioned in the list of “protected materials” and treated similar to legal professional privilege” (The potential for systems abuse...)”	Support
	“Given the systemic and longstanding resource limitations of sexual violence and domestic and family violence support services, we are concerned that time-poor services and overwhelmed staff may not have the resources or skills to object to a subpoena and may, in some cases, comply with the application not knowing the exemptions that are in place. This must be considered and addressed in the implementation phase of the protected confidences legislation.”	Support
	“While there is an abundant need for the protected confidences provision, the ultimate determination between the weight of harm, such as in cases of attempted or actual homicide or sexual violence, <sup>2</sup> and the benefit of release should reside with the court, as captured at 102BE.”	Support



## Fitzroy Legal (submission no. 14)

Topic	Recommendation / Commentary	FRSA Response
Effects of family violence	<ol style="list-style-type: none"> <li>1. That the Bill include a clarification that the court will determine if family violence has occurred based on the balance of probabilities and the evidence put before it.</li> <li>2. That the Bill contain clarifying provisions over what evidence would and would not be considered as persuasive</li> <li>3. That the Bill establish a presumption in favor of any finding of fact by a state court regarding whether family violence has or has not occurred, that can only be rebutted based on the other party producing new or different evidence to the contrary</li> </ol>	<p>As noted in our submission, FRSA members similarly raised questions about what evidence will be required to establish the fact of family violence. Our members emphasised that to minimise the risk of re-traumatising victim survivors it is important that:</p> <ul style="list-style-type: none"> <li>• There is clear guidance on the evidence the court will require to establish the fact of family violence</li> <li>• The court adopts a trauma-informed approach to property (and parenting) matters.</li> </ul> <p>We are also concerned about the use of FVOs as evidence, noting the risk of misidentification of perpetrators of family violence 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.</p>
“Wastage”	<ol style="list-style-type: none"> <li>1. That the Bill include a definition of wastage that fully reflects the common law test in <i>Kowaliw</i></li> </ol>	No comment
	<ol style="list-style-type: none"> <li>2. That the Bill include examples of wastage to provide further clarity to the definition</li> </ol>	No comment
Risk of homelessness	<ol style="list-style-type: none"> <li>1. That the Bill include ‘the provision of suitable housing for dependent children’ and ‘material and economic well-being’ as additional factors for consideration under proposed section 79(5)</li> </ol>	Support
Compensation awards	<ol style="list-style-type: none"> <li>1. That the Bill explicitly exclude compensation awards and claims arising from family violence between the parties from being considered in the assessment of the parties’ property settlement entitlements.</li> </ol>	No comment



Cost protections	1. That the Bill be amended to expand costs protections to all clients of Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services	No comment
Protected Confidences	1. That the Bill introduce a threshold test whereby a party seeking to issue a subpoena to access protected confidences must show the information is relevant and the probative value of the records would outweigh any risk of harm to the party whose records are being accessed.	As noted in our submission, FRSA's view is that the legislation would be strengthened by placing the onus on the party seeking to have protected confidence records admitted as evidence, such that the party would be required to seek the leave of the court to issue a subpoena that relates to protected confidence records. 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.

## National Legal Aid (submission 20)

Topic	Recommendation / Commentary	FRSA Response
Child support	<p>1. Include withholding of child support as an example of economic or financial abuse</p> <p>Amend the Bill to include the withholding of child support as an example of economic or financial abuse, noting the intensifying ways that non-payment of child support is used to perpetuate ongoing financial control and abuse.</p>	Support
	<p>2. Amend the Bill to improve clarity and accessibility and minimise unintended implications for costs and workloads</p> <p>Amend the Bill to:</p> <ul style="list-style-type: none"> <li>- improve accessibility and clarity, particularly for self-represented litigants</li> <li>- minimise the possible effect of the legislation on case management and cost</li> <li>- focus on situations in which an objection is raised to an application for a disclosure of a protected confidence, instead of the initial application</li> </ul>	No comment



	<ul style="list-style-type: none"> <li>- allow or require the Court to advise parties of a potential protected confidence issue and /or refer them for legal advice in circumstances where one or both are self-represented.</li> </ul>	
	<p>3. Provide greater guidance and clarity on implementation</p> <p>If the Bill is not amended in accordance with Recommendation 2, ensure greater guidance and clarity on the implementation of the new provision, for example through Practice Directions and Court Rules</p>	FRSA would similarly like to see greater guidance on the implementation of the new provisions as well as information materials tailored to different audiences (separating couples, family and relationship counsellors, family dispute resolution practitioners, family lawyers, family violence specialists – as well as court professionals)
	<p>4. Include requirement for review</p> <p>Amend the Bill to include a provision to review the implementation of the amendments within the next three to five years, to ascertain the effects of the amendments on litigants and legal practitioners.</p>	<p>To help mitigate unintended consequences and ensure that the amendments are well understood and working in practice, FRSA would like to see some form of real-time monitoring of the court when the legislation comes into effect.</p> <p>We would support review of the effects of the amendments on litigants and legal practitioners but would broaden the scope to government funded family law services.</p>
	<p>5. Increased funding for Legal Aid Commissions</p> <p>Given the extensive role of LACs in providing legal assistance in family law matters, provide increased funding for LACs in response to any increase in workloads for legal representatives resulting from the Bill</p>	Support.

### Women's Legal Services (submission no. 27)

Topic	Recommendation / Commentary	FRSA Response
<p><b>Schedule 1</b></p> <p>Just &amp; Equitable</p>	Provide guidance as to how the just and equitable requirement should be applied to ensure the Courts prioritise preventing homelessness and poverty, particularly for victim-survivors of family violence.	Support



Effect of family violence	Include specific examples of what amounts to the effect of family violence on contributions in the legislation.	Support
Compensation awards	Expand s79 to exclude compensation awards arising from family violence from being considered in property settlement proceedings.	No comment
Housing & economic security	Include reference to “material and economic security for the parties” in s79(5)(f) and s75(2)(c).	No comment
	The principles in s102NE should require the courts to prioritise both “provision of appropriate housing for children” as well as “the parties’ material and economic security”.	Support
Wastage	Amend s79(4) to also include wastage as a consideration in relation to contributions.	No comment
	List examples of wastage in the legislation.	
	Clarify that any consideration of wastage as a factor in property settlements does not limit the Court’s ability to consider other approaches to dealing with wastage in property settlement proceedings, such as addbacks.	
Companion animals	Provisions concerning companion animals in the FLA and family violence legislation should be consistent in allowing victim-survivors to address the care and safety of their pets in either jurisdiction without precluding their ability to have related issues addressed in the other.	No comment
	The definition of companion animal in s4(1) should be amended to clarify that animals with mixed purposes may be covered by the FLA.	
	The sale of companion animals should be a last resort, and the court should be empowered to consider alternatives to selling the companion animals before making such an order.	
	The court should be empowered to make interim orders in relation to the ownership and/or care of a companion animal	



Principles for conducting property proceedings	Increase funding for legal assistance services to ensure people experiencing financial disadvantage who are engaged in property proceedings have access to legal representation.	<p>Support</p> <p>FRSA also recommends that funding for legal assistance is increased to provide legal assistance services to people experiencing financial disadvantage using Government funded family dispute resolution services. In particular we would like to see greater government investment in legally assisted family dispute resolution which can address some of the barriers to participation in non-adversarial dispute resolution, including power imbalances and family violence. Importantly, this reduces the number of cases going to court.</p>
Less adversarial trial process	Division 4 of Schedule 1, Part 2 should be amended to provide that the less adversarial approach applies to all proceedings unless the parties agree or the court orders.	No comment
	Amend s71B(2) and s71B(6) to provide the powers the court must exercise, not may exercise	No comment
Schedule 2	Engage in extensive consultation prior to establishing the Children's Contact Services regulatory scheme, and prescribe how the regulatory scheme must improve Children's Contact Services.	<p>FRSA supports further consultation on the regulatory scheme.</p> <p>We note that to-date, the department has undertaken consultation processes and delivered information sessions to reach this point. This included a public consultation on establishment of an accreditation scheme for CCS in 2021, focus groups with CCS providers, webinar updates for CCS providers and establishment of a CCS Advisory Group to look at possible accreditation models in 2023.</p>
	Increase funding for Children's Contact Services, particularly in rural, regional and remote communities.	<p>There are still areas without a local Children's Contact Service and CCS with extended waitlists and we would support a funding increase for CCS.</p> <p>FRSA notes that an increase in funding for existing CCS providers and funding for an additional 20 CCS were announced in the May</p>



		2021 Budget. This additional investment was greatly welcomed and has, we understand, eased waitlist pressures.
Schedule 3	The requirement for the court to declare that it is satisfied that proper arrangements have been made for the care, welfare and development of children be removed from section 55A of the Act.	No comment
	The requirement for the parties to attend counselling prior to making an application for divorce for a marriage that is less than two years duration be removed from section 44(1B) of the Act.	Support
	<p>The divorce case management process be reviewed to ensure access to justice for court users including:</p> <ul style="list-style-type: none"> <li>○ Removal of the requirement to file all divorce applications via the Commonwealth Court Portal.</li> <li>○ Providing access to computers and printers in all court registries.</li> <li>○ Introducing grounds for waiver of the court filing fee for divorce.</li> <li>○ Simplifying the court process and legislation regarding the requirements to prove an overseas marriage and prove service.</li> </ul>	No comment
CIOs	Amend s67N(8)(b) to ensure that it only covers a person with a relevant connection to the child.	No comment
Protected confidences	The definition of protected confidence should be widened to confirm that not only the counselling records, for example file notes, associated with counselling are considered protected counselling records, but also any other document produced because of that professional relationship, for example, correspondence or a medical certificate.	Support.
	The definition of professional service should be expanded to include all counselling services in relation to sexual assault or family and domestic violence and this should not only be limited to the interpretation of a 'specialist service'.	Support





	The person seeking to rely on the records should be required to seek leave to seek that any counselling records be disclosed or adduced.	FRSA supports this recommendation. As noted in our submission, and above, we consider that the onus should be on the person seeking to admit the evidence. 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.
	The provisions should include a positive obligation on the court to raise the protected confidence provisions with the confider.	If the onus is not reversed, FRSA supports this recommendation. It would provide a safeguard in an otherwise less than ideal circumstance.
	The circumstances when a confider consents to the release of records should be expanded to include: <ul style="list-style-type: none"> <li>○ circumstances where the confider consents to part of a document being disclosed and</li> <li>○ set out that the confider has had the opportunity to seek legal advice.</li> </ul>	Support.
	The provisions should be strengthened to confirm that leave must be granted to copy protected confidences and that such leave will only be granted in exceptional circumstances.	Support
	Women's Legal Services should receive funding to develop and provide training in each state and territory regarding recording counselling records in a trauma-informed manner	Support.
Schedule 4	Section 114UB(3)(b) be amended to ensure Women's Legal Services clients are protected. The costs provisions should apply to clients of all legal assistance providers, including Legal Aid Commissions, Community Legal Centres, Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services.	No comment.



## Law Council (submission no. 25)

Topic	Recommendation	FRSA Response
General comments	1: The Bill's passage must be supported by urgent additional resourcing and funding to the family law system and legal assistance sector, consistent with the recommendations in Dr Warren Mundy's National Legal Assistance Partnership ( <b>NLAP</b> ) Review Report and recognising that this Bill itself will further drive up unmet legal need.	Support
	2: Should Schedule 1 to the Bill pass, a further review of the operation of section 102NA of the Family Law Act should be conducted to support the ongoing viability of the Family Violence and Cross-Examination of Parties Scheme.	Support
Transitional arrangements	3: Upon the Bill's passage, all amendments should apply to every matter heard after a single commencement date.	No comment
Economic or financial abuse	4: Proposed subsection 4AB(2A) of the Family Law Act (at Item 3 of Schedule 1 to the Bill) should be redrafted to: <ul style="list-style-type: none"> <li>- explicitly include "consent" in subparagraph (a)(iv); and</li> <li>- clarify that paragraph (d) only relates to circumstances where there is a dowry.</li> </ul>	No comment
Companion animals	5: Further consideration should be given to the proposed provisions about companion animals with regard to the specific drafting and resourcing matters identified in this submission, and broader concerns that these changes will likely exacerbate conflict and extend proceedings.	No comment
Less adversarial trial approach	6: The drafting of Part 2 of Schedule 1 to the Bill, relating to the less adversarial trial approach for property or other non-child-related proceedings, should be reconsidered with respect to the various issues identified in this submission, including: <ul style="list-style-type: none"> <li>- limiting the automatic operation of the less adversarial trial provisions to the proceedings "to the extent that they are proceedings under Part VII";</li> <li>- providing scope for the court to order—or for the parties to agree—that the less adversarial trial provisions apply to a particular issue within a proceeding, such as family violence, as an</li> </ul>	No comment



	<p>alternative to these provisions applying to the entirety of a proceeding in an “all or nothing” approach; and</p> <ul style="list-style-type: none"> <li>- that the matters to be considered by the court—in deciding whether to have the less adversarial provisions apply or re-apply to proceedings—should be the same as the matters to be considered by the court in deciding to have such provisions not apply, and that this should be the case whether the issue is being considered for the first time, or the court is being asked to reverse an earlier decision.</li> </ul>	
Duty of financial disclosure	<p>7: In respect of the codification of the duty of financial disclosure in proposed section 90RI (inserted by Item 84 of Schedule 1 to the Bill):</p> <ul style="list-style-type: none"> <li>- proposed subsection (4) should be amended so that the respondent is still required to produce documents that are not relevant to the contravention or contempt application; and</li> <li>- proposed subsection (8) be omitted to enhance certainty for parties. Alternatively, it should be amended to clarify what a person who has formerly had relevant documents in their possession or control is required to do to comply with their duty of disclosure if they no longer have those documents.</li> </ul>	No comment
Arbitration	<p>8: In respect of provisions relating to arbitration in Part 3 of Schedule 1 to the Bill, express references in proposed subsection 13E(1A) should be made to the costs power in existing section 117 (proposed to be section 114UB) and the injunctive power in section 114 of the Family Law Act.</p>	No comment
	<p>9: Section 13J of the Family Law Act should be amended to be consistent with the scope of the appellate jurisdiction and powers.</p>	No comment
Cost orders	<p>10: The provisions in Part 1 of Schedule 4 to the Bill, relating to costs orders, should be redrafted, including by:</p> <ul style="list-style-type: none"> <li>- omitting proposed subsection 114UB(5);</li> <li>- clarifying the interaction between proposed subsections 114UB(3) and (8); and</li> <li>- omitting proposed subsection 114UB(9) from the Bill, or, alternatively, including statutory examples to enhance clarity and limit the potential for misinterpretation.</li> </ul>	No comment.