

**25 October 2024**

Senator Nita Green  
Chair  
Senate Legal and Constitutional Affairs Legislation Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Chair

**Questions on Notice: Family Law Amendment Bill 2024**

1. The Law Council of Australia appreciates the opportunity to have appeared before the Senate Legal and Constitutional Affairs Legislation **Committee** on 18 October 2024 in response to its inquiry into the provisions of the Family Law Amendment **Bill** 2024 (Cth), and to provide input as to how Australia's family law system can continue to be improved to best promote justice for those in need of its services and protections.
2. During our appearance, the Deputy Chair of the Committee, Senator Paul Scarr, requested that we take several questions on notice. I am grateful to the Law Council's Family Law Section for its guidance in the preparation of the below responses. In the time available, we have not had an opportunity to consult our Constituent Bodies.
3. In particular, the Deputy Chair asked whether there are any "legacy issues of a more substantive nature"<sup>1</sup> with respect to the Bill that the Law Council wanted to draw to the attention of the Committee, further to our submissions to the Attorney-General's **Department** on 24 November 2023 (**November 2023 Submission**), and to the Committee on 9 October 2024.<sup>2</sup>
4. As the Chair of the Law Council's Family Law Section, Ms Di Simpson, advised the Committee at its public hearing, the Law Council is "confident that the key issues that remain of concern have been expressed" in the Law Council's 9 October 2024 submission.<sup>3</sup>

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<sup>1</sup> Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee, *Family Law Amendment Bill* ([Proof Committee Hansard](#), 18 October 2024) 44.

<sup>2</sup> Ibid 43-44.

<sup>3</sup> Ibid 44.

5. We noted in our submission of 9 October 2024, at [8], that many of the matters raised in our November 2023 submission were:

*... not insurmountable, and could be addressed either by revised drafting or through an alternative policy approach, in addition to additional resourcing of the family law system and legal assistance sector.*<sup>4</sup>

6. However, in recognition of the Deputy Chair's interest in the extensive consultation and stakeholder input that has occurred in developing the Bill—including with and from the Law Council—we provide the following additional context and information.

New factor—"The effect of any family violence"

7. In our November 2023 submission to the Department in response to an exposure draft of the Bill, we raised a range of practical concerns about the proposed new factor requiring courts to consider "the effect of any family violence" in property settlements.<sup>5</sup>
8. We reiterated some of these key concerns, specifically about the direct and indirect resourcing implications of Part 1 of Schedule 1 to the Bill, in our earlier submission to the Committee.<sup>6</sup>
9. Under ***Kennon & Kennon***,<sup>7</sup> the court must consider the financial consequences of family violence when making an assessment of contributions, where there has been a course of violent conduct that has had a "discernible impact" on the victim-survivor, and the victim-survivor's contributions to the relationship have been made "significantly more arduous" as a result of the conduct.<sup>8</sup>
10. However, proposed subparagraphs 79(4)(ca) and 90SM(4)(ca) appear to be more expansive than the *Kennon* principle. The current drafting is broad and, consequently, may give rise to substantial uncertainty for litigants. Specifically, as Ms Simpson, emphasised during our appearance before the Committee,<sup>9</sup> the proposed amendments represent a departure from existing jurisprudence and, consequently, may expand the circumstances whereby an adjustment can be made for a party affected by family violence.
11. The phrase, "the effect of any family violence", is likely to set a standard that does not expressly take into consideration the "discernible impact" of family violence on the victim-survivor, or require a course of conduct that has made "significantly more arduous" the contributions of the victim-survivor. As such, the proposed subparagraphs do not reflect the existing case law principles under *Kennon*.
12. We remain concerned that, while these proposed changes to the Family Law Act are well-intended, they could result in lengthier and more expensive family law litigation. On the current draft, the effect of *any* family violence is to be taken into account. Family violence is already a factor in more than 80 per cent of matters filed in the courts.<sup>10</sup> While all family violence is to be abhorred, the proposed expansive approach may lead to a desensitised response. This may lead to the casualisation of family violence, with

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<sup>4</sup> Law Council of Australia, *Exposure Draft: Family Law Amendment Bill (No. 2) 2023* ([Submission](#) to the Attorney-General's Department, 24 November 2023) 7.

<sup>5</sup> *Ibid* 26-31.

<sup>6</sup> Law Council of Australia, *Family Law Amendment Bill 2024* ([Submission 25](#) to the Senate Legal and Constitutional Affairs Legislation Committee, 9 October 2024) 15-17.

<sup>7</sup> (1997) FLC 92-757.

<sup>8</sup> *Kennon & Kennon* (1997) FLC 92-757.

<sup>9</sup> Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee, *Family Law Amendment Bill* ([Proof Committee Hansard](#), 18 October 2024) 48-50.

<sup>10</sup> Federal Circuit and Family Court of Australia (Divisions 1 and 2), [Annual Reports 2022-23](#), 14, Table 2.2(a)

the courts not addressing family violence appropriately, or, worse, minimising its impact upon a victim-survivor (or leading to shorthand summaries, about “usual” family violence allegations that inadvertently minimise the actual experience of victim-survivors).

13. Further, we had previously noted in our November 2023 Submission that the following evidential challenges may arise:

*135. While the new provisions do not focus directly on the culpability, or fault, of the alleged perpetrator, in applying these provisions, the court will need to make a finding that family violence occurred. Such a finding will draw on evidence led by the party alleging the abuse, and, to that extent, the culpability or fault of the alleged perpetrator will necessarily be in issue.*

*136. Consideration should be given to the evidential requirements associated with the proposed amendments. The Law Council understands that many Kennon claims fail as a result of the lack of admissible evidence that establishes the impact of family violence on contributions. It is unclear how the proposed amendments intend to mitigate these challenges—there needs to be some evidentiary nexus between the conduct complained of, and the capacity (or effort expended) to make relevant contributions.*

*137. The Law Council further notes that many family violence cases are historical, and may not have been reported at the time. This means they can be difficult to prove to the requisite Evidence Act 1995 (Cth) standard without supporting evidence (i.e., medical records, criminal charges or convictions).*

*138. The Law Council is of the strong view that any amendments should be designed in a manner that accounts for these evidential obstacles, rather than merely attempting to replicate the Kennon principle in legislation.<sup>11</sup>*

14. It is clear that this remains a balancing exercise. These changes are intended to lead to positive outcomes for victim-survivors of family violence, but the anticipated framework will create new challenges that the Committee should be cognisant of.
15. Regardless of the final form that Part 1 of Schedule 1 to the Bill takes, it is critical that the Bill be accompanied by sufficient sector-wide resourcing, to ensure that these reforms will achieve their intended purpose, and that victim-survivors of family violence can receive adequate legal advice, and representation, in property settlement matters.

#### Companion animals

16. The Deputy Chair asked for our views on evidence provided at the Committee's hearing by Lucy's Project Ltd in response to the concerns raised in our submission about the provisions relating to companion animals potentially inadvertently increasing the complexity and duration of property proceedings.<sup>12</sup>

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<sup>11</sup> Law Council of Australia, *Exposure Draft: Family Law Amendment Bill (No. 2) 2023* ([Submission](#) to the Attorney-General's Department, 24 November 2023) 30.

<sup>12</sup> Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee, *Family Law Amendment Bill* ([Proof Committee Hansard](#), 18 October 2024) 47.

17. At the hearing, Ms Monique Dam, representing Lucy's Project Ltd, provided the following evidence:

*... we would recommend in the alternative that, perhaps, family law courts be required to consider a smaller number of factors, those factors being: any family violence to which one party has subjected or exposed the other party, any child of a party or any other child in the household; any history of actual or threatened cruelty or abuse by a party towards the companion animal or any other animal; and any attachment by a party or a child of a party or any other child in the household to the companion animal. This would potentially expose some of the other considerations that have been proposed in the bill. One of those considerations, for instance, relates to who has paid for the care and maintenance of the animal ...*

*So, if there is a concern that the courts have to consider a longer list of considerations and that that may increase the complexity, then our recommendation would be for there to be a shorter list of considerations but that those considerations are very much focused on a history of family violence, animal cruelty and abuse, and the attachment of a party or child to the companion animal.<sup>13</sup>*

18. In our submission to the Committee, we recommended that further consideration should be given to the proposed provisions about companion animals, with regard to the specific drafting and resourcing matters identified in our submission, and broader concerns that these changes will likely exacerbate conflict and extend proceedings.<sup>14</sup>
19. We also acknowledged in our submission that this proposed reform resulted from advocacy by service-provider stakeholders, who had raised the treatment of companion animals as a matter they considered, in their experience, was of substantial importance to victim-survivors of family violence.<sup>15</sup> Those stakeholders are best placed to speak to the experiences of their clients and the need that they foresee these reforms would address.
20. We respectfully submit that Ms Dam's suggestion would not address the majority of our concerns with the proposed companion animal provisions in the Bill. Whilst reducing the list of considerations in proposed subsection 79(7) would reduce somewhat the potential complexity arising from these amendments, Ms Dam's suggested changes would not prevent the likely frequent and lengthy disputes about the ownership of animals that will arise, should the Bill pass. We remain concerned that this will place further time and costs pressures on parties, as well as on the legal assistance sector.<sup>16</sup>
21. We refer to Recommendations 1 and 2 of our submission to the Committee,<sup>17</sup> that:
- 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 Review Report, recognising that this Bill itself will further drive up unmet legal need; and

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<sup>13</sup> Ibid 16-17.

<sup>14</sup> Law Council of Australia, *Family Law Amendment Bill 2024* ([Submission 25](#) to the Senate Legal and Constitutional Affairs Legislation Committee, 9 October 2024) 20.

<sup>15</sup> Ibid 18.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid 11-13.

- 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.

#### Response to submissions made to the Committee

22. The Deputy Chair requested that we provide our views on the recommendations made by Women's Legal Services Australia (**WLSA**) and the Fitzroy Legal Service.<sup>18</sup>
23. In the time available, we have not had sufficient opportunity to engage with each recommendation in detail, nor consult our membership about the Law Council's likely position on each recommendation. Nonetheless, we make some general comments below.
24. On their face, the following recommendations in the WLSA submission are not inconsistent with existing Law Council positions:
  - The court should be empowered to make interim orders in relation to the ownership and/or care of a companion animal,<sup>19</sup> if the provisions in the Bill relating to companion animals are to remain.
  - Increase funding for legal assistance services to ensure people experiencing financial disadvantage who are engaged in property proceedings have access to legal representation.<sup>20</sup>
  - Engage in extensive consultation prior to establishing the Children's Contact Services (**CCS**) regulatory scheme, and prescribe how the regulatory scheme must improve CCS.<sup>21</sup>
  - Increase funding for CCS, particularly in rural, regional and remote communities.<sup>22</sup>
  - Section 114UB(3)(b) should 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.<sup>23</sup>
25. Similarly, the Fitzroy Legal Service's submission that the Bill be amended to expand costs protections to all clients of Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services are not inconsistent with existing Law Council positions.<sup>24</sup>

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<sup>18</sup> Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee, *Family Law Amendment Bill* ([Proof Committee Hansard](#), 18 October 2024) 48.

<sup>19</sup> Women's Legal Services Australia, *Family Law Amendment Bill 2024* ([Submission 27](#) to the Senate Legal and Constitutional Affairs Legislation Committee, 11 October 2024) 24.

<sup>20</sup> *Ibid* 25.

<sup>21</sup> *Ibid* 30.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid* 42.

<sup>24</sup> Fitzroy Legal Service, *Inquiry into Family Law Amendment Bill 2024* ([Submission 14](#) to the Senate Legal and Constitutional Affairs Legislation Committee, October 2024) 8.

### *Protected confidences*

26. We remain cognisant of concerns within the legal profession regarding the efficacy of existing safeguards and exemptions that are intended to ensure that subpoenas for health information, including therapeutic records, are not misused in family law proceedings, particularly in circumstances involving allegations of family violence.
27. In their submissions, both the Fitzroy Legal Service and WLSA made recommendations to amend Part 5 of Schedule 1 to the Bill, to provide additional protections to limit access to evidence of protected confidences.
28. Whilst we maintain the strong view that material that would assist the court to make an order in the best interests of the child ought to be available, we simultaneously recognise that the risk of harm to a person is significant when their private health information is subject to a subpoena in a 'fishing expedition' where that information might not have substantial probative value to a fact in issue. We also recognise the value in seeking to preserve the therapeutic relationship between a patient and a health service provider and acknowledge that policy settings that discourage people from accessing counselling and other mental health supports are not in the public interest.
29. This is clearly a complex issue giving rise to various considerations and tensions, evidenced by the fact that we have previously received a range of views on this matter from our Constituent Bodies and Family Law Section.<sup>25</sup> We particularly acknowledge that the Law Institute of Victoria holds strong views on this issue, and has provided submissions directly to the Committee about it.
30. We, therefore, commend the Government and the Department for reconsidering the amendments that were initially proposed in the exposure draft of the Family Law Amendment Bill 2023,<sup>26</sup> and engaging in further consultations with stakeholders about these changes. As Ms Simpson noted during our appearance before the Committee,<sup>27</sup> this iterative process has assisted in ensuring that an appropriate balance is struck between the probative value of the material and the need to protect against further harms for victim-survivors of family violence and prevent the facilitation of systems abuse.
31. As a first principle, the Law Council strongly supports measures to ensure that the best interests of the child remain the paramount consideration in the course of parenting proceedings under the Family Law Act. This includes enabling the court to have access to all relevant information to assist it to make an informed determination that is in the best interests of the child, subject to appropriate safeguards. Other considerations must be subservient to this paramount principle.
32. In practice, highly sensitive records can have considerable relevance to the court in making decisions that are in the child's best interests. The contents of records from medical practitioners, psychologists and counsellors—and what is omitted from them—can be highly relevant in parenting proceedings. It is also recognised that the production of those documents can cause apprehension and distress for a party who is subject to a subpoena process during family law proceedings.

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<sup>25</sup> See Law Council of Australia, *Exposure Draft of the Family Law Amendment Bill 2023* ([Submission](#) to the Attorney-General's Department, 16 March 2023) 40-43; *Family Law Amendment Bill 2023* ([Submission](#) to the Senate Legal and Constitutional Affairs Legislation Committee, 3 July 2023) 57-60; *Exposure Draft: Family Law Amendment Bill (No. 2) 2023* ([Submission](#) to the Attorney-General's Department, 24 November 2023) 71-85.

<sup>26</sup> See Attorney-General's Department, *Consultation: Family Law Amendment Bill 2023* ([Web Page](#), 2023).

<sup>27</sup> Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee, *Family Law Amendment Bill* ([Proof Committee Hansard](#), 18 October 2024) 44-45.



33. On balance, we are supportive of the approach to protected confidences that has been proposed in the Bill. In our view, preventing the adducing or disclosure of evidence of protected confidences in the manner proposed in new Division 1B of Part XI of the Family Law Act will more effectively prevent the harms that the amendments aim to address, in contrast to an evidentiary exclusion alone, while ensuring that the best interests of children can remain the focus.
34. The approach proposed in the Bill requires an application to be made by the person seeking to exclude the evidence. We submit that this is appropriate. We do not agree with any recommendations to shift the onus back onto the person who seeks the production of documents to seek leave of the court, as was originally proposed in the exposure draft of the Family Law Amendment Bill 2023.
35. However, we appreciate some tensions remain and we do not oppose further refinements to Part 5 of Schedule 1 to the Bill, provided that these changes do not introduce additional impediments to the court receiving this information. For example, we consider WLSA's recommendation, that the definition of "professional service" in proposed section 102BB be expanded, to be sensible.

#### *Compensation awards and claims arising from family violence*

36. The Deputy Chair asked our views in response to evidence provided to the Committee that, under the federal family law system, it is possible that an award of compensation, given to one party in recognition of the family violence perpetrated by the other party, will be considered as part of the property pool and could (arguably) be subject to adjustment between the parties.<sup>28</sup>
37. We note the recommendation of WLSA to expand section 79 of the Family Law Act to expressly exclude compensation awards arising from family violence from being considered in property settlement proceedings.<sup>29</sup> We also note that the Fitzroy Legal Service has made a similar recommendation.<sup>30</sup>
38. We acknowledge the underlying intention of these recommendations. As Ms Simpson observed during the Law Council's appearance, these are the sorts of matters that can be—and are—addressed by the courts under the existing discretionary, "just and equitable" framework within the Family Law Act.<sup>31</sup> For example, while the courts are reluctant to exclude particular property from adjustment, differing contributions will be recognised and the broad discretion available to the courts will ensure "perverse outcomes"<sup>32</sup> don't occur. The Department provided similar evidence to the Committee during the hearing.<sup>33</sup>
39. It is not clear whether the proposed carve-out would be limited to receipt of compensation under statutory schemes or would include personal injury damages. Further consideration of these principles ought to occur with a wider opportunity for consultation.

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<sup>28</sup> Ibid 45.

<sup>29</sup> Women's Legal Services Australia, *Family Law Amendment Bill 2024* ([Submission 27](#) to the Senate Legal and Constitutional Affairs Legislation Committee, 11 October 2024) 16.

<sup>30</sup> Fitzroy Legal Service, *Inquiry into Family Law Amendment Bill 2024* ([Submission 14](#) to the Senate Legal and Constitutional Affairs Legislation Committee, October 2024) 7.

<sup>31</sup> Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee, *Family Law Amendment Bill* ([Proof Committee Hansard](#), 18 October 2024) 45.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid 53.

**Contact**

If the Law Council can be of any further assistance to the Committee in the course of its inquiry, please contact Ms Natalie Cooper, Senior Policy Lawyer, on

Yours sincerely

**Greg McIntyre SC**  
**President**