

25 October 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee

By email: legcon.sen@aph.gov.au

Family Law Amendment Bill 2024

Question on Notice following Committee Hearing on 18 October 2024

We refer to the Committee Hearing held on 18 October 2024 and the Question on Notice put by Senator Scarr, inviting Relationships Australia to comment on the recommendations made in a number of other submissions to this inquiry.

Having now had the opportunity to review those submissions, we set out below a table containing the relevant recommendations and an indication of Relationships Australia's responses to those recommendations.

In reviewing the submissions, we did note that the government appears to have afforded multiple additional opportunities to review and comment on exposure drafts of this legislation to a number of entities, including the Law Council of Australia and National Legal Aid. This occurred notwithstanding the close of the initial public consultation process, and appears to have included an opportunity to respond to the proposed amendments regarding "protected confidences" in Schedule 3.

It is regrettable that the providers who will need to operationalise and implement the proposed provisions were not afforded similar opportunities. This has led to concerns about safe operationalisation only being raised in an unreasonably short time frame, preventing proper consideration about how protections can be implemented in ways that do not further endanger our clients.

While we accept that the legal profession's views on these amendments are insightful, it is not lawyers who are most affected by these provisions (given the well-established doctrine of legal professional privilege already applies) but rather these provisions directly impact providers of therapeutic and psycho-social services throughout the family law system, their operations and resources, and the safety of their clients.

For this reason, Relationships Australia re-states recommendation 27 of our original submission, and calls on government to engage in swift but meaningful consultation on this important reform before it is passed into legislation. It would be unconscionable for Parliament to rush to pass ill-considered amendments of the Family Law Act which may further endanger women and children already at risk, when there is an opportunity to delay introduction pending consideration by service providers, in partnership with Government, to develop measures to

mitigate such risks. This is a particularly salient consideration given the increased prevalence, in 2024, of lethal gender-based violence. Our comments below about the protected confidence amendments are to be read subject to this concern.

Relationships Australia (RA) response to Recommendations made in other submissions

Topic	Recommendation / Commentary	RA Response
National Women's Safety Alliance		
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."	Support, subject to further consultation about the protected confidence provisions, and to extension to explicitly include Alcohol and Other Drug services and Gambling Help Services, as noted in our submission and oral evidence.
	<p>"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...")</p> <p>"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."</p>	Support, subject to preceding comments about protected confidences. Further, as canvassed in our submission, Relationships Australia organisations must already spend significant time and money in responding to subpoenae. Historically, this has not been taken into account in funding appropriations. As the onus continues to be on clients and service providers to object to disclosure and admissibility, this funding shortfall should be remedied in future funding arrangements.
	<p>"While we support the objective of the protected confidences amendments, the complexity of systems abuses, and in particular how professional services can also be subjected to this abuse, must be kept in view."</p> <p>...</p>	Relationships Australia supports better protections for protected confidences. However, as noted above, the Bill as introduced poses significant potential safety risks to victim survivors of DFV, and

	“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, ² and the benefit of release should reside with the court, as captured at 102BE.”	premature introduction may create and exacerbate safety risks.
Fitzroy Legal		
Effect of DFV	<i>We support the proposed changes requiring the court to consider the effect of family violence on a victim/survivor's contributions and their current and future circumstances” (p3)</i>	Support
	<i>We support the focus on the ‘effect’ of family violence in so far as it does not require the court to consider issues of fault and culpability as part of determining property divisions (p3)</i>	Support, subject to including ‘economic’ before ‘effect’, as occurs in the EM and as canvassed in our previous submission to the Committee
	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.	See our submission (pp7-9) in which we canvas the views of RA in relation to this matter.
	2. That the Bill contain clarifying provisions over what evidence would and would not be considered as persuasive	As above
	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	Support
“Wastage”	1. That the Bill include a definition of wastage that fully reflects the common law test in Kowaliw	Support, subject to our recommendation that excessive legal fees be explicitly included as an example of wastage, to fortify other provisions intended to deter this kind of systems abuse where costs are run up to exhaust and oppress the other party.
	2. That the Bill include examples of wastage to provide further clarity to the definition	Support; see above
Section 79(5)	1. That the Bill include ‘the provision of suitable housing for dependent children’	Support

	and 'material and economic well-being' as additional factors for consideration under proposed section 79(5)	
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.	Support in principle
National Legal Aid		
	1. Include withholding of child support as an example of economic or financial abuse 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.	Support. Our practitioners report this as a serious persistent issue.
	2. Amend the Bill to improve clarity and accessibility and minimise unintended implications for costs and workloads Amend the Bill to: <ul style="list-style-type: none"> - improve accessibility and clarity, particularly for self-represented litigants - minimise the possible effect of the legislation on case management and cost - focus on situations in which an objection is raised to an application for a disclosure of a protected confidence, instead of the initial application - 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. 	Support in principle, subject to the comments made in our submission regarding protected confidences and, in particular, Recommendation 27.
	3. Provide greater guidance and clarity on implementation 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	As above.
	4. Include requirement for review 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.	Support, subject to including a wider scope of review that is broader than "litigants and legal practitioners" and include providers of therapeutic and psycho-social services throughout

	the family law system (noting that the majority of families do not use the courts).
5. Increased funding for Legal Aid Commissions 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	Support in principle; please see earlier response about the need for funding of FRSP providers to address the active roles that we have been, and will need to, undertake to support victim survivors to make applications (unless the onus is placed on the party seeking disclosure/admission into evidence.)

Women's Legal Services

Schedule 1	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
	Include specific examples of what amounts to the effect of family violence on contributions in the legislation.	Support
	Expand s79 to exclude compensation awards arising from family violence from being considered in property settlement proceedings.	Support
	Include reference to "material and economic security for the parties" in s79(5)(f) and s75(2)(c).	Support
	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
	Amend s79(4) to also include wastage as a consideration in relation to contributions.	Support
	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.	Support
	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.	
	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	
	Increase funding for legal assistance services to ensure people experiencing financial disadvantage who are engaged in property proceedings have access to legal representation.	Support
	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.	Support, subject to consideration being given to the risk that a party might be coerced to agree not to apply the LAT provisions.
	Amend s71B(2) and s71B(6) to provide the powers the court must exercise, not may exercise	Support
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.	Support
	Increase funding for Children's Contact Services, particularly in rural, regional and remote communities.	Support
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.	Nil response.
	The requirement for the parties to attend counselling prior to making an application for divorce for a marriage that is less than two	Support

	years duration be removed from section 44(1B) of the Act.	
	<p>The divorce case management process be reviewed to ensure access to justice for court users including:</p> <ul style="list-style-type: none"> ○ Removal of the requirement to file all divorce applications via the Commonwealth Court Portal. ○ Providing access to computers and printers in all court registries. ○ Introducing grounds for waiver of the court filing fee for divorce. <p>Simplifying the court process and legislation regarding the requirements to prove an overseas marriage and prove service.</p>	Support, noting evidence of ongoing digital exclusion among priority cohorts.
	Amend s67N(8)(b) to ensure that it only covers a person with a relevant connection to the child.	Nil response
	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, subject to the comments made in our submission, and reiterated above, regarding protected confidences.
	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'.	
	The person seeking to rely on the records should be required to seek leave to seek that any counselling records be disclosed or adduced.	
	The provisions should include a positive obligation on the court to raise the protected confidence provisions with the confider.	
	The circumstances when a confider consents to the release of records should be expanded to include:	

	<ul style="list-style-type: none"> ○ circumstances where the confider consents to part of a document being disclosed and set out that the confider has had the opportunity to seek legal advice. 	
	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.	
	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	
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.	Support in principle.
Law Council of Australia		
	Recommendation 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 (NLAP) Review Report and recognising that this Bill itself will further drive up unmet legal need.	Support in principle, subject to additional resourcing of FRSP providers, noting that there is already substantial unmet need, and that the amendments are likely to further drive up unmet need for these services, as well as for legal services.
	Recommendation 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
	Recommendation 3: Upon the Bill's passage, all amendments should apply to every matter heard after a single commencement date.	Do not support; see our comments in relation to the protected confidences provisions.
	Recommendation 4: Proposed subsection 4AB(2A) of the Family Law Act (at Item 3 of Schedule 1 to the Bill) should be redrafted to:	Support.

<ul style="list-style-type: none"> - explicitly include “consent” in subparagraph (a)(iv); and - clarify that paragraph (d) only relates to circumstances where there is a dowry. 	
<p>Recommendation 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.</p>	<p>We refer to our submission and our oral evidence.</p>
<p>Recommendation 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:</p> <ul style="list-style-type: none"> - limiting the automatic operation of the less adversarial trial provisions to the proceedings “to the extent that they are proceedings under Part VII”; 	<p>Do not support</p>
<ul style="list-style-type: none"> - 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 alternative to these provisions applying to the entirety of a proceeding in an “all or nothing” approach; and 	<p>Support in principle</p>
<ul style="list-style-type: none"> - 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. 	<p>Support, in the interests of clarity and usability.</p>
<p>Recommendation 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"> - 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 	<p>Support</p>

<ul style="list-style-type: none"> - 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. 	
Recommendation 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.	Support.
Recommendation 9: Section 13J of the Family Law Act should be amended to be consistent with the scope of the appellate jurisdiction and powers.	Support.
Recommendation 10: The provisions in Part 1 of Schedule 4 to the Bill, relating to costs orders, should be redrafted, including by: <ul style="list-style-type: none"> - omitting proposed subsection 114UB(5); - clarifying the interaction between proposed subsections 114UB(3) and (8); and - omitting proposed subsection 114UB(9) from the Bill, or, alternatively, including statutory examples to enhance clarity and limit the potential for misinterpretation. 	Nil response.

Conclusion

We again thank you for the opportunity to engage with this Inquiry, and would be happy to discuss further the contents of this response if this would be of assistance. I can be contacted directly at . Alternatively, you can contact Dr Susan Cochrane, National Policy Manager, by email at

Yours sincerely

Nick Tebbey
National Executive Officer