Aboriginal
Legal
Rights
Movement

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Submission to:
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3 October 2024

Inquiry into the Family Law Amendment Bill 2024

About Aboriginal Legal Rights Movement

Aboriginal Legal Rights Movement (ALRM) is a South Australian independent Aboriginal community controlled organisation governed by an Aboriginal Board. ALRM is a law practice for the purposes of the Legal Practitioners Act of South Australia and this Submission is very much informed by the work of our various law practices.

Submission:

Aboriginal Legal Rights Movement has made prior submissions in relation to previous amendments and reviews of the Family Law Act 1975 (the Act). We make short submissions in relation to the Family Law Amendment Bill 2024 (the Bill) for the Committee's consideration as follows:

1. Property Reforms (Bill Schedule 1)

1.1 Family Violence (Bill Schedule 1 – Property Framework Part 1)

The Bill proposes to include considerations of effects of family violence in property matters for both married and de facto parties through the amendment or insertion of proposed ss75(2)(aa), 79(4)(c), 79(5), 90SF(3)(a), 90SM(4)(a)(c) and 90SM(5).

The proposed amendments will mean the effects of family violence are taken into account both in consideration of parties' contributions to the property as well as in consideration of the parties' future needs. Whilst concerns have been raised at the risk of the impact of family violence being doubled in the overall property settlement, ALRM considers that the effect of violence on both contributions and future needs is reflective of the reality of the impact of family violence.

Our ALRM lawyers are experienced in working with parties who both experience and perpetrate family violence. It is a complex issue, particularly for Aboriginal people who are impacted by colonisation, dispossession and the ongoing trauma effects. Family violence has a deep and ongoing impact including on physical, mental, psychological, spiritual and cultural health. It causes loss of self-belief and self-esteem and precipitates self-medication through alcohol and drugs. All of these consequences of family violence impact on our clients ability to contribute financially and non-financially during and after a relationship and on their future needs. We have confidence the Court will be able to take family violence into account in both contributions and future needs without doubling the effects, as they are two distinct spheres.

The Bill broadens the test for taking family violence into account in property matters well beyond the current law in Kennon & Kennon (1997) FLC 92-757. We refer to the ALRC report which documents that there have been infrequent adjustments made under the Kennon principle.[1] This in itself suggests the need for the broadening of the test for inclusion of family violence as a factor to be considered given the statistics documenting violence to women and in particular Aboriginal and Torres Strait Islander women.

There are some practical issues that the inclusion of the consideration of the effect of family violence on property matters will bring that must be taken into broader account. Where children and property matters are both issues for a family, it is often the case that our clients will concentrate on one matter (usually children's matters as most pressing) and then later on property matters. Whether both children's and property matters are being dealt with separately or property matters are being solely considered, these changes will have impacts including:

a. All parties will have to turn their minds to any family violence in applications, hearings and settlement relating to property. Whilst this may empower those who have been victims of violence by having the impact of family violence recognised and taken into account, the very recalling and confronting of it in such a public way will also likely re-traumatise them;
b. In raising issues of family violence in property proceedings there will be fear of further family violence being perpetrated;

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[1] ALRC, Family Law for the Future: An Inquiry into the Family Law System (ALRC Report 135, 2019) 240-45, [7.101]-[7.124]

c. There will be evidentiary issues that are not currently required in property proceedings;
d. There is likely to be less willingness to settle property matters if there needs to be an admission of family violence.

These issues will need further consideration and care as court forms/ procedures are developed.

The impact of these issues will be felt by legal service providers and courts, both of whom will need further resourcing for:

a. the gathering of evidence of family violence or to refute allegations made;
b. protection from further violence;
c. emotional/ psychological and mental health support services in what will be a traumatic and potentially dangerous time.

1.2 Principles for Conducting Proceedings (Bill Schedule 1, Part 2)

The Bill repeals Division 12A of Part VII of the Act (Principles for Conducting Child Related Proceedings) and replaces with Part XI - Division 4 (Principles for conducting child-related proceedings and property or certain other proceedings).

The principles themselves are not changed.

The principles for conducting proceedings in a way that will safeguard the parties to the proceedings against family violence (principle 3) and the requirement for as little formality and legal technicality as possible (Principle 5) are welcomed.

However, ALRM are concerned that by proposed s102NE(2), Principle 1 (considering impact of proceedings on the child) and Principle 3 (as relates to children – i.e. conducting proceedings in a way that will safeguard the child from abuse, neglect or family violence) are not applicable to non-child related proceedings. We submit that if there are children within the family, those children should be protected and considered, no matter if the proceedings are directly about them or about other issues related to property or other matters which are not directly about them. This is a missed opportunity for directing the court to keep children's best interests in focus, though not paramount.

ALRM raises the issue that Aboriginal and Torres Strait Islanders have been subject to systemic powerlessness in Family Law proceedings and that this should be taken into account in the conduct of proceedings. We submit that the Bill incorporate a further Principle, perhaps through the safeguarding principle in s102NE(5):

Principle (5) (c) the parties Aboriginal and Torres Strait Islander culture.

The Proposed s102NH of the Bill sets out general duties arising from the other amendments. These include the requirement to ask each party whether they consider a party has been or is at risk of being subject to family violence (Bill – proposed section 102NH(1)(a)). As set out earlier, this will bring with it both risk to safety and further trauma to parties having experienced family violence. This must be taken into account and provision made for additional resources in security, legal services and non-legal support services.

The Bill requires courts to ask parties about risk of children being exposed to abuse, neglect or family violence in child related proceedings (Bill – proposed section 102NH(1)(b)). ALRM

considers this should extend to all proceedings, risk to children is relevant in any proceedings before the Court where there are children within the family.

Proposed Section 102NJ enables a court to determine any issue any time in both child related and non-child related proceedings. Whilst this is currently legislated for in child related proceedings, there are times when parties are caught off guard when the Court decides to determine an issue the party is not ready to make submissions on. This can be difficult for our clients who are Aboriginal people both suffering intergenerational and current trauma as well as the impacts of navigating a court and legal system where they face ongoing systemic powerlessness and lack of cultural safety.

Where our clients are before the Courts' Specialist Indigenous Lists, this is managed in a more culturally sensitive way. Not all Aboriginal families have matters heard in these Lists or have appearances before going into them and their needs should be taken into account.

We submit there needs to be safeguards to protect from the difficulties caused to parties where they are taken off guard by early determination of matters, such as by the inclusion of a new section such as:

> *102NJ (4) The Court will ensure natural justice, procedural fairness and will take into account the impact of culture, especially Aboriginal and Torres Strait Islander cultures and any trauma a party is suffering before determining whether to make findings, determinations or orders in accordance with subsection 102NJ(1).*

2. Children's Contact Services (Schedule 2)

ALRM overall considers that regulation of Children's Contact Services (CCS) and law regulating the provision of information sharing with the CCS is needed. The issue is ensuring that it is not overly onerous on these necessary services while balancing protection to children, families and the community.

ACCOs are best placed to provide a culturally safe and appropriate contact service for Aboriginal children and their families. ALRM have had experience of clients feeling uncomfortable, culturally unsafe and in fact being refused at CCS. There are contact services that employ Aboriginal people and where this is the case, they should be the first point of contact as well as ongoing supervisor/ case worker for the families.

ALRM notes that there is no specific mention of Aboriginal Community Controlled Organisations (ACCOs) within the proposed Part II, Division 3A.

This may require further consideration by the Senate Inquiry to ensure that Closing the Gap priority reforms and targets are met for Aboriginal children and their families who are subject to Family Law proceedings and to the use of CCS.

3. Case Management and Procedure (Bill Schedule 3)

The Bill repeals and substitutes proposed subsection 60I(7). Proposed subsection 60I(7)(b) enables the court to grant an exemption to the filing of the certificate, exemptions are set out in subsection 60I(9).

ALRM has concerns that the exemptions set out in subsection 60I(9) do not go far enough in protecting Aboriginal children's rights to their culture.

In our experience, there are parents or carers of Aboriginal children who refuse the Aboriginal parent to spend any time or spend sufficient time with their child and then avoid or delay family dispute resolution. The family dispute resolution services for people on low incomes have long waiting lists. When the parent seeking the service gets through the waiting list the service then writes to the other parent/ carer and allows time to respond, after responding meetings are made which the other parent/ carer may not attend. This can add months of delay to a parent being able to obtain their certificate and then apply to the Court for their child to live with or spend time with them. In that time, the parent with the child has the advantage of building status quo with the child. At the same time, the child does not have connection with their Aboriginal family, community and country or their language and culture.

This causes harm to Aboriginal children. ALRM submits the exemptions in subsection 60I(9) should be extended to include:

> *(v) there would be a risk to the child of being denied connection with their Aboriginal or Torres Strait Islander family, community, culture or country if there were to be a delay in an applying for the order.*

4. Operation of Section 69GA (Prescribed Courts) – Bill Schedule 4

ALRM makes the point that we have advocated for the Specialist Indigenous Lists which enable support to Aboriginal and Torres Strait Islander families in a number of Federal Circuit and Family Court of Australia registries to be incorporated into legislation. These are valuable but subject to the will of the specific court registry and the judiciary to continue them.

ALRM seeks the inquiry consider this important issue and support the Specialist Indigenous Lists incorporation into the legislation.

5. Protection Sensitive Information (Bill Part 5)

ALRM understands the need for this protection.

ALRM notes that the protection specifically applies to sexual assault and family violence counselling as well as to health (proposed s102BB(1)).

Our clients are also exposed to intergenerational and ongoing trauma from the ongoing impacts of colonisation, dispossession and stolen generation as well as physical, emotional and psychological abuse whilst in care. The protection in s102BB(1) should extend to counselling for these and related issues.

6. Costs orders (Bill Schedule 4 – General provisions – Part 1 Costs Orders

The Current Act and proposed Bill both set out what the court must have regard to in making costs orders (Bill proposed section 114UB(3)) and in relation to the Costs of an Independent Children's Lawyer (Bill proposed section 114UC(2)).

In both situations the court looks to the provision of 'legal aid' to the party. Whilst this is understood in other legislation to incorporate assistance from services such as Aboriginal and Torres Strait Islander Legal Services/ Community Legal Services, this does at times need explanation to a court and it would be helpful if the Bill could be explicit so that the term 'legal aid' is expanded to 'a legal aid scheme or service under the National Legal Assistance Partnership or its successor.'

ALRM thanks the Committee for considering our submission.

Chris Larkin

CEO – Aboriginal Legal Rights Movement