frsa Family & Relationship Services Australia

Providing Leadership, Linking Services, Supporting Relationships

3-4/36 Thesiger Ct, Deakin ACT 2600
PO Box 326, Deakin West ACT 2600
T 02 6162 1811

E policy@frsa.org.au
ABN 38 124 321 080
www.frsa.org.au

SUBMISSION

4 October 2024

Inquiry into the Family Law Amendment Bill 2024

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

Contact:
Jackie Brady
Executive Director
Family & Relationship Services Australia

CONTENTS

ABOUT FRSA **2**
Our vision 2
About our members 2
INTRODUCTION **3**
OUR FEEDBACK **3**
SCHEDULE 1 – PROPERTY REFORMS 3
SCHEDULE 2 – CHILDREN'S CONTACT SERVICES 7
SCHEDULE 3 – CASE MANAGEMENT AND PROCEDURE 8
CONCLUSION **10**

ABOUT FRSA

As the national peak body for family and relationship services, FRSA has a critical leadership role in representing our extensive network of Member Organisations to support their interests and the children, families and communities they serve across Australia. FRSA plays a significant national role in building and analysing the knowledge and evidence base relating to child and family wellbeing, safety and resilience. We undertake research and work with government and non-government stakeholders to inform policy and shape systemic change.

Our vision

An Australia where children, families and communities are safe strong and thriving.

About our members

FRSA has 160 members, with 135 members in a direct service delivery role.[1] The range of services provided includes:

Family Law Services (funded by the Attorney-General's Department):

- Family Relationship Centres
- Family Dispute Resolution
- Family Law Counselling
- Parenting Orders Program
- Supporting Children after Separation
- Children's Contact Services
- Family Relationship Advice Line

Family and children services (funded by the Department of Social Services):

- Communities for Children Facilitating Partner
- Children and Parenting Support
- Family and Relationship Services:
    - Family and Relationship Services
    - Specialised Family Violence Services
- Adult Specialist Support:
    - Find and Connect
    - Forced Adoption Support Services
- Reconnect
- Family Mental Health Support Services.

[1] FRSA's full members deliver family and relationship services. FRSA's associate, individual and honorary members hold policy, research and professional expertise in family law, family and relationships services and related social services.

INTRODUCTION

FRSA welcomes the opportunity to contribute to this consultation.

Our submission is informed by:

- submissions to related inquiries, including our submission on the exposure draft of this Bill, which was based on consultation with FRSA members
- the experience and wisdom of FRSA members, many of whom have been providing services to Australian children and families, for over 60 years.

OUR FEEDBACK

FRSA supports the Government's commitment to making the family law system safer and simpler for separating families and we welcome this second tranche of legislative reform.

In 2023, we provided a submission to the Attorney-General's Department on the exposure draft of this current Bill. In that submission we noted that the proposed amendments raise some uncertainties and noted that the legislation may not work in the way its drafting has intended. Of greatest concern to us is that amendments may inadvertently afford new opportunities for the perpetration of systems abuse.

We note that Schedule 5 of the Bill provides for a statutory review of the operation of the amendments after three years. This is an important and welcome addition. However, to help mitigate unintended consequences and ensure that the amendments are well understood and working in practice, FRSA recommends that some form of real-time monitoring of the court is undertaken when the legislation comes into effect.

As a peak body representing providers of family law services, we are also acutely aware that the court deals with only a minority of cases and many separating couples work out their property matters through family dispute resolution, or with legal advice or simply on their own. It will be important that guidance and information materials about the changes are developed and targeted to different audiences across the family law system (separating couples, family and relationship counsellors, family dispute resolution practitioners, family lawyers, family violence specialists – as well as court professionals).

We limit commentary in the remainder of this submission to providing further detail on our concerns about unintended consequences, as well as reflecting briefly on some changes between the exposure draft and this Bill.

SCHEDULE 1 – PROPERTY REFORMS

PART 1

Family violence considerations

As noted in our 2023 submission, FRSA supports inclusion of 'the effects of family violence' as a factor to be taken into account in assessing contributions and current and future circumstances in determining a property settlement.

However, FRSA Members are concerned about how the proposed amendments will be operationalised.

FRSA Members raised the following questions:

- What evidence will be required to establish the fact of family violence – for example, a conviction? A family violence order? We point the committee to the Parliamentary Library's Bills Digest No. 13, which provides a summary of evidential challenges outlined in submissions to the Exposure Draft consultation.[2]
- How will a court quantify and make adjustments to account for the effect of violence on a party's capacity to contribute, or impact on their future circumstances to make it just and equitable?

In relation to the second question raised by our members, we would not suggest this be prescribed, noting that it would undermine Australia's discretionary approach to property division. Rather, we observe that the uncertainty around how a court will quantify and make adjustments may impact the likelihood of victim survivors making use of this provision.

Re-traumatisation

FRSA Members emphasised that to minimise the risk of re-traumatising victim survivors it is important that:

- There is clear guidance on the evidence the court will require to establish the fact of family violence
- The court adopts a trauma-informed approach to property (and parenting) matters.

This second point will be particularly important when the legislation first comes into effect, noting the uncertainty for clients as cases first come to be decided under the new provisions.

Misidentification of perpetrators

Misidentification of perpetrators of family violence is a well-documented issue, 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.[3] FRSA Members observed that it will be important for the court to "look behind" family violence orders if they are to serve an evidentiary purpose within the context of property matters.

Members further noted that there may be unintended consequences of the legislative amendments:

---

[2] Parliamentary Library (2024-25), *Bills Digest No. 13*, pp. 8-9.

[3] Given the gendered nature of domestic and family violence it is generally women who are misidentified by police as the perpetrator and there is a greater risk of being misidentified for certain cohorts of women – Aboriginal women, migrant and refugee women, criminalised women and LGBTIQ+ people. See in the Victorian context for example: Family Violence Reform Implementation Monitor (December 2021), Monitoring Victoria's family violence reforms: Accurate identification of the predominant aggressor.

- potential increase in vexatious applications for family violence orders for the purpose of leveraging for a more favourable outcome in property settlements[4]
- potential increase in contested family violence orders as perpetrators may be less likely to agree to orders without admissions
- could unintentionally contribute to further systems abuse of the victim-survivor.

To minimise the risks identified above, it is critical that there is awareness and understanding across the family law and law enforcement systems of the nuances and characteristics of family violence. Therefore, we would like to see strengthened training across the family law system. Our evolving understanding of coercive control and the evolving nature of technology-facilitated abuse and systems abuse means that professional development must be ongoing. It is encouraging to see the Commonwealth government investing in better understanding family violence in the family court system with the introduction of family violence training for court professionals.

In the FRSA Membership, family violence training is seen as an integral part of Family Dispute Resolution Practitioners' tool kit. Over five years ago, FRSA surveyed members who provide family law services on their experiences of responding to family and domestic violence in family law contexts. The survey found that most respondents (75%) reported that violence was present in 60-80% of cases at the point of intake. Since this time, Members have anecdotally reported an increase in the numbers of people presenting with family and domestic violence issues.

FRSA Members incorporate comprehensive policies, processes and procedures for identifying violence and for ensuring that the safety needs of clients who are affected by family and domestic violence are identified and met. Despite our sector working daily with clients affected by family violence and connecting those clients to specialist supports when needed, the unhelpful sharp distinction between the specialist family violence sector and the family and relationship services sector, which is compounded by the State-Commonwealth division of responsibilities, continues. This means family violence training is not viewed, from a funder's perspective, as a core requirement for the Family Relationship Services Program in meeting client needs, placing pressure on existing program budgets and at times requiring service providers to justify their spending on family violence training to the funding body.

We also consider it essential that mandatory screening and assessment for family violence risk is undertaken in the court context. The court recently introduced the Lighthouse approach to screen for and manage risk relating to family violence, mental health, drug and alcohol misuse and child abuse and neglect. The Lighthouse approach uses the Family DOORS Triage risk screen – one of several evidence-informed risk screening tools used in the broader family law and family relationship services sector. While Family DOORS is a universal risk screening tool, it is not currently universally applied in the family court context. All parties filing an

[4] See also, *Bills Digest No. 13*, p. 9.

eligible Initiating Application or Response are invited to complete the DOORS screen, but their participation is voluntary. As occurs for family law services, our view is that safety risk should be screened and managed for all matters in family law proceedings and therefore the screening process should be mandatory.

As a final point we note that the Family Law Information Sharing legislation, which came into effect in early May this year, will ensure that courts have fuller access to the picture of family safety risk, meaning there is less burden placed on victim survivors (where correctly identified) to retell their story.

FRSA recommends that:

- all family law professionals are adequately trained to identify and understand family violence and its impacts on family members, including patterns of coercive control and the potential for legal systems abuse.
    - Government invests in training for community FDR and legal services
    - Legislative amendments should not come into force until training has been rolled out.
- Risk screening using Family DOORS Triage is made mandatory in the court system, noting that DOORS is ordinarily used as a universal screening tool – that is, it has been designed to be used with all clients of services using the tool. We note that community based family law services take a universal approach to intake screening and assessment, using a range of evidence-informed tools.

While outside the remit of the Commonwealth Government, FRSA hopes to see improvements in training and education for police and state-based courts/legal professionals and the introduction of alternative policing and investigation models to help address the misidentification of family violence perpetrators.[5]

Current and future circumstances – housing needs of children

FRSA supports the explicit inclusion in this iteration of the proposed legislation of 'housing needs for children' (79 (5)(e) and 90SM(5)(d)) in consideration of current and future circumstances. This strengthens current provisions requiring the family law courts to consider the extent to which parents care for children.

Considerations relating to companion animals

FRSA supports in-principle the inclusion of new provisions relating to companion animals (pets), which provides the court with factors to consider, including family violence, when making decisions about custody of pets. As noted by the Attorney-General when the Bill was introduced to Parliament "pets are too often used and abused in cycles of family violence".

We reserve technical drafting considerations for those with the requisite expertise.

[5] See for example recommendations in Nancarrow et al (2020), *Accurately identifying the "person most in need of protection" in domestic and family violence law* – Research Report, Issue 23, ANROWS.

Amendments impacting de facto couples and the situation in WA

We note that proposed amendments impacting de facto couples will not apply in Western Australia where de facto couples are covered by the Family Court Act 1997 (WA). We trust that in due course consideration will be given in that jurisdiction to harmonise the state legislation with federal legislation to ensure a consistent approach to separating married couples and separating de facto couples across the country.

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

As noted in our submission on the exposure draft, FRSA encourages reforms that seek to establish less adversarial pathways for family law matters and we agree with the proposed approach. We do note, however, that the less adversarial trial provisions for child-related proceedings periodically fall into disuse. As noted in the ALRC report, the Less Adversarial Trial process is rarely used despite the positive impacts of this process. This has been attributed, in part, to insufficient resourcing (including a scarcity of family consultants) and time.[6] Therefore, we anticipate that the proposed provisions will only be used if the court feels it is sufficiently resourced.

PART 3: Duty of disclosure and arbitration

FRSA supports strengthening the visibility of disclosure obligations and consequences for breaches by the proposed inclusion of disclosure requirements in the Act. We do note, however, that lack of consequences for non-disclosure is likely as much of a driver for non-disclosure than lack of awareness that the disclosure obligations exist.

FRSA further supports the proposed amendment requiring legal practitioners and FDRPs to inform about disclosure duties and potential consequences for breaches. It will be important, however, that legal practitioners and FDRPs are provided with sufficient information and training to ensure they understand their obligations.

Non-disclosure or under-disclosure of finances is not only an issue in the courts but remains a considerable issue within the FDR/mediation context. This can result in pushing parties to litigation or vulnerable parties reaching an agreement that is neither just nor equitable. Hopefully, the requirement on practitioners to inform about disclosure obligations will encourage full disclosure within the context of FDR. Notwithstanding this, FRSA believes that further consideration of levers that could be used to facilitate timely and full disclosure in the FDR context is warranted.

SCHEDULE 2 – CHILDREN'S CONTACT SERVICES

The proposed amendments allow for an accreditation scheme to be established at the organisational level and the individual level, without prescribing the approach. We understand that further consultation will be undertaken to determine an accreditation model, including whether it will be applied at an

[6] ALRC (March 2019), Family Law for the Future – An Inquiry into the Family Law System: Final Report, ALRC Report 135, p. 191.

individual or organisational level, or both. This will be captured in the accreditation rules.

We take this opportunity to reiterate FRSA's position that an accreditation scheme should be established at the service level (and not individual professional level). That is, the responsibility and risk associated with providing a CCS service is vested in the organisation/business rather than being vested in individuals working within a CCS. It would need to be a requirement of a service-based accreditation system that the standards incorporate human resource requirements that include staff training and qualifications.

Child welfare clients

FRSA recognises that the Commonwealth Government does not have jurisdiction over child protection/child welfare matters and therefore cannot extend accreditation to services provided on the basis of child welfare interventions. We note that there may be Children's Contact Service providers offering services to families within the child protection system as well as the family law system. It is reasonable to anticipate that setting accreditation standards for CCS providers within the context of family law will have positive benefits for all service users, regardless of their referral pathway. However, families within the child protection system will not have access to the accreditation scheme's complaints process.

Ideally, service users should be able to expect the same standard of service delivery regardless of their referral pathway or location, or the funding source underpinning a service. We recommend that the Commonwealth, as a minimum, ensures that relative state/territory counterparts are kept abreast of accreditation developments. This may pave the way for further consideration of service quality and consistency in those jurisdictions.

CSS intake and admissibility – S10KE & S10KF

FRSA considers that changes in the proposed amendments from the exposure draft to this Bill around admissibility of communications during intake provide a better balance between ensuring that information gathered during intake is not disclosed if disclosing the information could compromise client safety, while enabling relevant information to be shared with the court to ensure that the best interests and safety of the child/children are able to be considered in further deliberations.

Civil penalty provisions

FRSA supports the inclusion of civil penalties in the Act. We further support the increased maximum penalty units in this Bill, compared to the Exposure draft, which we hope will be sufficient to deter non-compliance.

SCHEDULE 3 – CASE MANAGEMENT AND PROCEDURE

Part 5: Protected confidences

FRSA agrees, in-principle, that the Family Law Act should include additional safeguards to help prevent sensitive information (protected confidences) being adduced in family law proceedings if its introduction is likely to cause harm to a party.

However, we consider that further consultation is required before introducing changes. S102BB *Definition of professional services* warrants further consultation to provide greater clarity around what services are included under the definition and in what circumstances.

Protecting clients from harm

We consider that the need for the best available evidence must be balanced by the need to protect clients from harm. That harm may take the following forms:

- the unwanted disclosure of personal and sensitive information to a potentially abusive ex-partner
- eroding trust and confidence in the therapeutic relationship
- discouraging help-seeking.[7]

We further agree with submissions to the Department's consultation on Family Law Amendment Bill no. 1 Exposure Draft, which argue that measures to protect a person's confidential communications need to focus on the forensic as well as evidentiary stage of litigation to minimise harm.[8]

The Bill provides for the courts to make directions that evidence is not adduced in family law proceedings. It further provides the courts with the power to direct that a document or parts of a document is not produced, inspected or copied.

Our 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.

Cases in which there are family violence concerns in the court are very high. FRSA's firm view is that safety must take priority, and all attempts should be made to ensure that the law does not inadvertently cause harm. Placing the onus on the party seeking disclosure of protected confidence materials would provide an additional safeguard for vulnerable parties, which we believe outweighs the risk of important evidence not being brought to light.

FRSA Members have further noted that it would be of benefit to place conditions around the information being sought. It was explained that they often get 'blanket' requests asking for all notes on multiple family members, who may be receiving services across multiple programs.

[7] Taffe, Stephen, Chair Health Law Committee, Law Institute of Victoria (11 August 2023), Proof Committee Hansard: Legal and Constitutional Affairs Legislation Committee, Family Law Amendment Bill 2023, p. 3.
[8] See for example: Family Law Council's submission (p. 27), Federation of Community Legal Centres (Vic), submission, p 14 and National Legal Aid, submission, p. 13.

Children and Young people

We are also of the view that further consideration should be given to protecting the therapeutic relationship between children/young people and those supporting them. Children and young people should have the confidence to express their concerns, feelings and wishes in a therapeutic setting without the risk of that information being shared, without their permission, with a parent, potentially negatively impacting the parent-child relationship. To balance this risk for the child with procedural fairness, Dr Juliet Behrens and Professor Belinda Fehlberg have suggested the following:

One process could be that only an Independent Children's Lawyer would be able to inspect such material and then to seek leave for the parties or their legal representatives to inspect depending on the content of the material and perhaps the child/young person's views.[9]

Behrens' and Fehlberg's suggestion would, of course, have resource implications for an already under-resourced and over-burdened cohort of professionals. At the same time, there may be other options for providing additional protection for the therapeutic relationship between children/young people and those helping them. We encourage further exploration of such options.

CONCLUSION

FRSA would be happy to discuss with the Committee any aspects of this submission that may benefit from further explanation.

[9] Behrens J. & Fehlberg B. (2023), *Family Law Amendment Bill (2023) Exposure Draft* -submission, p. 6. And see also, UnitingCare Queensland, *Exposure Draft: Family Law Amendment Bill (No. 2) 2023*, submission.