

Family Law Amendment Bill 2024

Submission to the Senate Legal and Constitutional Affairs

Legislation Committee

October 2024



National Legal Aid

Acknowledgement of country

National Legal Aid acknowledges Traditional Owners of Country throughout Australia and recognises the continuing connection to lands, waters and communities.

We pay our respects to Aboriginal and Torres Strait Islander cultures, and to Elders both past and present.

Contents

- About National Legal Aid
- Recommendations
- Submission

© 2023 National Legal Aid. Reproduction without express written permission is prohibited.

www.nationallegalaid.org

About National Legal Aid

National Legal Aid (NLA), representing the directors of the eight Australian State and Territory Legal Aid Commissions (LACs), welcomes this opportunity to provide our views on this inquiry into the *Family Law Amendment Bill 2024*.

LACs are the largest providers in the country of family law, family violence and child protection legal services. These services include ongoing legal representation in court proceedings, duty lawyer, dispute resolution, legal advice and legal tasks, social support services, and information and warm/referrals to other organisations where appropriate.

LACs provide a range of specialist programs such as the Commonwealth Government's Family Violence and Cross-Examination of Parties Scheme, Family Advocacy and Support Services based at the family law courts and other relevant courts¹, Independent Children's Lawyers (ICLs), and Domestic Violence Units. LACs also deliver community legal education and training (activities and resources) to community service providers and to the community generally about family law, family violence and child protection.

In 2022-23, LACs provided over 1.7 million legal services to people across the country². These services included Grants of Legal Aid approved for legal representation in ongoing matters, Family Dispute Resolution, Family Advocacy and Support Services (FASS), family law duty lawyer services, legal advice, legal task, legal information, legal and non-legal referrals, and community and service provider legal education.

23,000 Grants of Legal Aid were for ongoing legal representation in Commonwealth family law matters and another 20,000 were in connection with state/territory laws about family violence and child protection. Nationally, around 86% of the Grants of Legal Aid for legal representation in Commonwealth family law involved family violence as an issue³. Many more family law services were delivered through the FASS, duty lawyer, and face to face, phone, and legal chat services, and through community legal education and training.

LACs provide critical legal assistance to victim-survivors of domestic and family violence. More than 86% of grants of aid for family law matters involve a risk of domestic and family violence. In 2022-23 Legal Aid Commissions (LACs) delivered 130,239 family law services including more than 32,000 grants of aid for family law matters³. A further 20,000 grants of aid were also delivered in State/Territory based family violence and child protection⁴.

¹ Including the Local Court of the Northern Territory domestic violence lists in Darwin, Katherine and Alice Springs.

² Internal National Legal Aid data.

³ [ABS Legal Assistance Data 2022-23](#).

⁴ Internal National Legal Aid data.

Recommendations

Recommendation 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.

Recommendation 2

Amend the Bill to improve clarity and accessibility and minimise unintended implications for costs and workloads

Amend the Bill to:

- 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

Submission

As noted in its submission on the *Exposure Draft Family Law Amendment Bill (No. 2) 2023* in November 2023, NLA supports the majority of the provisions of the *Family Law Amendment Bill 2024* (the Bill). In particular, NLA strongly supports the amendments intended to clearly signal that the family law courts will consider the economic effects of family violence in property and spousal maintenance proceedings under the *Family Law Act 1975* (the Act).

In particular, NLA supports the inclusion of a non-exhaustive list of behaviour that might constitute economic or financial abuse (the proposed 4AB(2)(2A)). It is recommended that the withholding of child support be included 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.

NLA was also given an opportunity to provide comments on the *Exposure Draft Family Law Amendment Bill (No. 1) 2024: protected confidences* in July 2024, the provisions of which have now been included in the Bill. At the time NLA noted that it is difficult to comment on the draft legislation without the broader context of the details and practicalities of how it will be implemented. NLA remains concerned about the practicalities and implications of the implementation of these amendments to the Act, particularly in relation to the possible effect of the legislation on case management and the cost impacts for parties.

NLA also remains concerned about the way in which the Bill focuses on an application to disclose a protected confidence, which requires the court to consider if a document is a protected confidence, regardless of whether an objection has been raised by a party or not. This is likely to create additional processes and administrative burdens. For example, Independent Children's Lawyers often issue subpoenas to health services, which would likely be considered protected confidences under the proposed amendments even if none of the parties raise any objections to the disclosure, and the additional consideration of such documents required is likely to be resource intensive. NLA recommends that the legislation be redrafted to instead focus on situations in which an objection is raised to an application for a disclosure of a protected confidence. In addition, consideration should be given to amending the legislation to 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, similar to the provisions in existing legislation such as s299 of the *NSW Criminal Procedure Act 1986*.

If the Bill is not amended to address these concerns, NLA strongly recommends that further guidance is provided through Practice Directions and Court Rules to ensure the process is as clear and straightforward as possible, particularly for self-represented litigants.

NLA would also recommend that the Bill include a provision to review the amendments within the next three to five years, to ascertain the effect of the amendments particularly with regard to potential increases in case management, the ability of self-represented litigants to manage court processes and cost implications for all parties. NLA would also note that any increase in workloads for legal

representatives should be reflected in increased funding for LACs, given the extensive role they play in providing legal assistance in family law matters.