Law Council
OF AUSTRALIA

Exposure Draft: Family Law Amendment Bill (No. 2) 2023

Attorney-General's Department

24 November 2023

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
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- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council is grateful to its Family Law Section for its significant input to this submission. The Family Law Section is the largest professional association for family law practitioners in Australia, with more than 3,000 members from across Australia and internationally. Since 1985, it has served the profession by positively influencing the development and practice of family law and promoting professional excellence for those engaged in the family law system.

The Law Council also acknowledges the contributions of the following Constituent Bodies in the preparation of this submission:

- The Law Institute of Victoria
- The Law Society of the Australian Capital Territory
- The Law Society of New South Wales
- The Law Society Northern Territory
- The Law Society of South Australia
- The New South Wales Bar Association
- The Queensland Law Society
- The South Australian Bar Association

Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the Attorney-General's **Department** in relation to its September 2023 Consultation Paper on the **Exposure Draft** of the Family Law Amendment Bill (No. 2) 2023.

2. We commend the Australian Government on continuing to advance reforms arising from the landmark 2019 report *Family Law for the Future: An Inquiry into the Family Law System* by the Australian Law Reform Commission (**ALRC**) and the Interim and Final Reports of the **Joint Select Committee** on Australia's Family Law System in 2020 and 2021 respectively.

3. The Law Council further acknowledges the substantial volume of work that the Department has invested in developing the Exposure Draft and Consultation Paper.

4. The Law Council has long advocated that a holistic and trauma-informed approach to family law reform is necessary to ensure the system best protects and promotes the rights of all parties. This involves considerations of three critical aspects—the law itself, court processes and resourcing—to ensure Australia's family law system meets the safety and best interests of all in need of family law assistance, including some of the most vulnerable members of our society.

5. The Law Council, with the ongoing guidance of its Family Law Section and Constituent Bodies, has consistently been an advocate for strengthening legislative and system protections for victim-survivors of family violence and increasing resourcing for the institutions, frontline service-providers and community associations that play critical roles in supporting them.[1] This includes, as the ALRC identified, ensuring that substantive family law statutes are drafted in a way that "assists both lay people and lawyers to locate and apply the law so as to facilitate the resolution of issues arising after separation as quickly and cost effectively as possible".[2]

6. The above aim is important so that all litigants, whether self-represented or represented by a lawyer, whatever their personal circumstances or the size of the property pool, are supported to understand the legal options that are available to them.

7. Further, it is critical that victim-survivors of family violence can readily understand how, and when, family violence considerations may be raised, and how these may be relevant during proceedings, including in respect of the division of property.[3] There is no doubt that family violence remains a significant and ongoing issue for the Australian community and courts, including in finance and property matters. In the 2022-23 financial year, more than four in five parenting, or parenting and

[1] See, e.g., submissions by the Law Council of Australia: to the Senate Legal and Constitutional Affairs Legislation Committee on the Family Law Amendment Bill 2023 (3 July 2023); to the Department on the Exposure Draft of the Family Law Amendment Bill 2023 (16 March 2023); the Department on the National Principles to Address Coercive Control (5 December 2022); to the Department of Social Services on developing the next National Plan to Reduce Violence against Women and their Children (13 August 2021); to the Joint Select Committee on Australia's Family Law System (20 December 2019); to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (16 July 2018).
[2] ALRC, Family Law for the Future: An Inquiry into the Family Law System (ALRC Report 135, 2019) [1.25].
[3] Ibid [1.39].

property matters, involved allegations that a party had experienced family violence (83 per cent).[4]

8. In recent years, national dialogue about coercive control, including in the context of developing the National Principles to Address Coercive Control, has supported a growing awareness of the dual risks of misidentification of victim-survivors of family violence and systems abuse. The Law Council has previously warned of the importance of safeguarding reforms against the risk of a perpetrator using the family law system as a mechanism to continue the control.[5]

9. Care must, therefore, be taken to ensure that the reforms proposed in the Exposure Draft promote safety and are not able to be misused as tools to perpetuate further violence against those the family law system seeks to protect.

10. Accordingly, the Law Council's approach to reviewing the Exposure Draft has been shaped by three inter-related considerations:

    (a) what is the best, and most just, legal policy outcome to the 'mischief' sought to be addressed by each of the respective reforms in the Exposure Draft;

    (b) how the proposed reforms will address family violence and impact on victim-survivors, both intentionally and through any unintended consequences; and

    (c) whether the proposed reforms make family law more knowable, internally consistent and readily able to be understood by litigants, legal representatives and the courts.

11. The Law Council considers that many of the areas for reform identified in the Exposure Draft have the potential to realise significant improvements for those who will interact with the family law system. However, while the Exposure Draft seeks to advance several recommendations made by the ALRC, it also proposes several substantial departures that the Law Council respectfully submits should be reconsidered.

12. On a related note, the Law Council notes that the process of simplifying legislation can have inadvertent, or unintended, impacts on established principles, due to the wealth of jurisprudence and case law that particularly informs the division of property in family law matters. Any legislative reform must be consistent with existing jurisprudence and common law principles to minimise the risks of an increase in disputes and the time it takes to resolve disputes within the family law system. This is a key consideration, given the breadth of relevance of these laws to the general public and the discretionary nature of the relief available in the *Family Law Act 1975* (Cth) (**the Act**).

13. There are some aspects of the Exposure Draft where a range of views have been expressed within the legal profession, particularly in relation to Schedules 1 and 3, and the questions in the Consultation Paper relating to protected confidences. To the extent that a contrary view has been received, this submission sets that range of views out for the Department's consideration.

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[4] Federal Circuit and Family Court of Australia (Divisions 1 and 2), Annual Reports 2022-23, 14, Table 2.2(a).
[5] Law Council of Australia, National Principles to Address Coercive Control (Submission to Attorney-General's Department, 5 December 2022) 9 [29(a)].

14. Further, as outlined in this submission, the Law Council has received expressions of concern from its Family Law Section and Constituent Bodies that several aspects of the proposed reforms will not achieve their policy intention as currently drafted, and may give rise to adverse unintended consequences. These concerns primarily relate to:

- amendments to the property decision-making framework, including the new contributions factors of the effect of family violence, financial and economic abuse, debt and wastage (Schedule 1, Part 1);
- the proposed approach to establish less adversarial trial processes for property or other non-child-related proceedings (Schedule 1, Part 2);
- amendments to section 60I relating to attending family dispute resolution before applying for a Part VII (Schedule 3, Part 1); and
- amendments to the inadmissibility provisions in the Act (Schedule 4, Part 2).

15. Nonetheless, many of the concerns raised in this submission are not insurmountable, and could be addressed either by revised drafting or through an alternative policy approach.

16. The Law Council, including representatives from its Family Law Section, would welcome the opportunity to meet and confer with the Department to discuss any matters arising from this submission. The Law Council would be pleased to partner in revising the drafting of the Exposure Draft to address its potential risks and shortcomings, as identified below.

17. The Law Council thanks the Department for its ongoing engagement on these important matters, and looks forward to continuing to collaborate with the Australian Government to progress meaningful reform for the benefit of Australian families and victim-survivors of domestic and family violence.

Responses to Consultation Questions

Schedule 1: Property reforms[6]

18. One of the stated aims of the Exposure Draft is to improve the family law system "so that it is accessible, safer, simpler to use, and delivers justice and fairness for all Australian families" and ensure that separating couples can better understand the decision-making framework used in family law to resolve their property and financial matters confidently and safely.[7]

19. One of the methods the Exposure Draft uses to try to achieve this is to "align the decision-making principles for property settlement in sections 79 and 90SM" of the Act "with existing case law with the aim of assisting separating parties, legal representatives and the courts to better understand and apply these principles".[8]

20. Section 79 of Part VIII of the Act applies to married couples and section 90SM of Division 2 of Part VIIIAB applies to de facto couples.

[6] Parts of this section were first published by Jacky Campbell, Forte Family Lawyers, in "Is 'fault' back? Proposed property reforms to the *Family Law Act 1975* (Cth)" (2023, Family Law Practice Area - CCHiKnow Connect, Wolters Kluwer).
[7] Attorney-General's Department, Family Law Amendment Bill (No. 2) 2023 (Consultation Paper, September 2023) 3.
[8] Ibid 6.

21. The Law Council agrees that the property settlement framework should be made clearer, and that incorporating principles from the common law into the Act will make it more accessible to parties, their legal representatives and the courts. However, the Law Council is concerned that the Exposure Draft does not sufficiently achieve the objectives set out in the Consultation Paper, nor does the Exposure Draft give sufficient guidance to parties, including self-represented litigants, their legal representatives or the courts.

22. This is undoubtedly a complex area. While the Law Council considers that some reform is desirable, its Family Law Section and Constituent Bodies have identified that there is a risk that the proposed property reforms, as drafted, will have unintended and undesirable consequences, such as:

- increased uncertainty in the law as to the property settlement process;
- increased litigation;
- higher legal costs for parties in need of the courts' assistance;
- more extensive cross-examination of parties, leading to increased court delays and longer trials; and
- increased difficulty in settling cases, prior to trial.

23. In addition, the courts already have a wide discretion under sections 79 and 90SM of the Act. The Law Council is concerned that the new contributions factors, as currently proposed in the Exposure Draft, will increase the emphasis on wastage, family violence and debts, without requiring a nexus between the conduct and the capacity and/or effort to make relevant contributions.

24. The proposed new contributions factors, and current and future considerations, have not been drafted with regard to the limitations that exist for these factors under the case law. The Law Council is conscious of the subsequent possibility of inconsistency in decision-making in this regard. There is also a considerable risk that parties will perceive that allegations of fault will increase (or decrease) their property entitlements.

Part 1: Property framework

Background: The current property settlement process

25. Before responding to the specific consultation questions on Part 1, Schedule 1 of the Exposure Draft, this section (prepared by the Law Council's Family Law Section) provides key contextual information about the current property settlement process in Australia.

26. There has been—and remains—debate in the courts and by commentators as to whether there is a pathway for decision making in property settlement matters as set out in the current provisions of the Act, and what that pathway is.

27. Prior to *Hickey & Hickey and the Attorney-General for the Commonwealth of Australia (Intervenor)*,[9] it was generally accepted that the property settlement process consisted of three steps.[10] However, *Hickey* and several other cases added

[9] (2003) FLC 93-143.
[10] *Mallet v Mallet* (1984) FLC 91-507, (Gibbs CJ).

a fourth step—courts are required to ask whether it was just and equitable to make the proposed property settlement order.[11]

28. The four steps stated in *Hickey* were:

    (a) identification and valuation of the property of the parties, or either of them;

    (b) having regard to the matters in paragraphs 79(4)(a), (b), and (c) of the Act, identification and assessment of the "contributions" of the parties;

    (c) having regard to the matters in paragraphs 79(4)(d), (e), (f), and (g) of the Act (the other factors), including the matters in subsection 75(2), identification and assessment of the "other factors"; and

    (d) determination as to whether the result arrived at was then "just and equitable".

29. Until the decision of the High Court of Australia in *Stanford v Stanford*,[12] the majority of applications for property settlement pursuant to section 79 were determined by applying this four-step approach. This four-step approach was not, however, mandatory.[13]

30. Although the Act appears to be clear as to what must be done with respect to the contributions listed in subsection 79(4)—namely identify and assess them—there has been considerable debate as to how this is to be done. One of the early and most important cases to consider the subsection 79(4) exercise was the decision of the High Court in *Mallet v Mallet* where Mason J said (emphasis added):[14]

> *The section contemplates that an order will not be made unless the court is satisfied that it is just and equitable to make the order (s 79(2)), after taking into account the factors mentioned in (a) to (e) of s 79(4). The requirement that the court "shall take into account" these factors imposes a duty on the court to evaluate them. Thus, the court must in a given case evaluate the respective contributions of husband and wife under pars.(a) and (b) of sub-s.(4), difficult though that may be in some cases. In undertaking this task it is open to the court to conclude on the materials before it that the indirect contribution of one party as homemaker or parent is equal to the financial contributions made to the acquisition of the matrimonial home on the footing that that party's efforts as homemaker and parent have enabled the other to earn an income by means of which the home was acquired and financed during the marriage. To sustain this conclusion the materials before the Court will need to show an equality of contribution - that the efforts of the wife in her role were the equal of the husband in his.*

31. In *Mallet,* Gibbs CJ further observed:[15]

[11] See, eg, R*ussell* v *Russell* (1999) FLC 92-877; *JEL & DDF* (2001) FLC 93-075; *Phillips & Phillips* (2002) FLC 93-104.
[12] [2012] HCA 52.
[13] See, eg, *Norman & Norman* [2010] FamCAFC 66.
[14] *Mallet v Mallet* (1984) FLC 91-507, 79, 120 (Mason J).
[15] Ibid, 79, 111 (Gibbs CJ).

> *It is proper, and indeed often necessary, for the Family Court, in dealing with the circumstances of a particular case, to discuss the weight which it considers should be given, in that case, to one factor rather than another…. It is necessary for the court, in each case, after having had regard to the matters which the Act requires it to consider, to do what is just and equitable in all the circumstances of the particular case.*

32. In another important High Court case, Mason and Deane JJ said in *Norbis v Norbis* that:[16]

> *The Family Court has rightly criticised the practice of giving over-zealous attention to the ascertainment of the parties' contributions, and we take this opportunity of expressing our unqualified agreement with that criticism, noting at the same time that the ascertainment of the parties' financial contributions necessarily entails reference to particular assets in the manner already indicated.*

33. As a result of the High Court decision in *Mallet,* and as has been reinforced in later cases, in a proceeding under section 79, the court must assess the various contributions that each party has made under paragraphs 79(4)(a), (b), and (c). The court must then give the contributions such weight as it considers appropriate in the circumstances. There is no starting point of equality.

34. This theme of weighing up *all* of the contributions—but not considering each contribution in an individual or mathematical way—is consistent with the current approach to the subsection 79(4) task. For example, in *Wallis & Manning*, the Full Court of the **Family Court** of Australia (as it was then known) said:[17]

> *The essential s 79(4) task is for trial Judges [to] weigh and assess the contributions of all kinds and from all sources made by each of the parties throughout the period of their cohabitation.*

35. More recently, the identification and assessment of contributions has been described as a task that must be undertaken "holistically".[18]

- In the 7th edition of the text *Family Law*, the authors observed that a holistic assessment reflects that homemaker contributions, and other indirect and non-financial contributions, are not able to be given a relative value within the relationship.[19]
- The authors also said that what has been described as a 'scoreboard approach' was disapproved by the Full Court in *Dickons & Dickons*, and that the importance of a holistic approach was reaffirmed by the Full Court of the Federal Circuit and Family Court of Australia (**FCFCOA**) in *Vinci & Adamo.*[20]
- As all contributions must be weighed collectively, it is an error to segment, or compartmentalise, the various contributions and weigh one against the remainder.[21]
- In *Aldrin & Celona,*[22] the Full Court of the FCFCOA affirmed that the assessment of contributions is almost inherently incapable of precise

[16] *Norbis v Norbis* (1986) FLC 91-712, [17] (Mason and Deane JJ).
[17] *Wallis & Manning* (2017) FLC 93-759, [15]; citing *Aleksovski v Aleksovski* (1996) FLC 92-705, 83,437, 83,443; quoted in *Dickons v Dickons* (2012) 50 FamLR 244, [20].
[18] *Jabour & Jabour* (2019) FLC 93-898; *Benson & Drury* (2020) FLC 93-998.
[19] G Riethmuller and R Smith*, Family Law* (7th Ed, Thomson Reuters) [26,410], 800.
[20] (2021) FedCFamC1A 53.
[21] Riethmuller and Smith, above n 19, [26,390] 797.
[22] (2021) FedCFamC1A 16.

calculation and the process must be undertaken holistically. However, the Full Court said (emphasis added):[23]

> *The exercise to be undertaken by a trial judge in altering property interests is a broad adjustive one which, although it requires careful evaluation of the evidence, and appropriate assessment of contributions, is not to be equated with an accounting audit.*

36. By adopting the holistic approach, there is a risk that the court will not do what it is required to do, namely, identify and assess the contributions. It is not sufficient if the court merely observes that it has taken into account the countless or extremely great in number ("myriad" is a frequently used word) of contributions. It is a misunderstanding of the task.

37. Identifying and assessing the contributions is not the prohibited "mathematical approach". A "mathematical approach" involves adopting an accounting approach to determining what weight to give to a particular contribution, and each contribution is identified and assigned a separate percentage or dollar value. This is not permissible, and it is for this reason that the weight given to a particular contribution, such as an initial contribution or an adjustment for family violence under *Kennon & Kennon* is currently difficult to isolate.[24] If the court does so, it may amount to an appealable error.

38. There is nothing in sections 79 or 90SM requiring that contributions be assessed in percentage terms, but it is common practice. For example, one party may be assessed as having contribution-based entitlements of 40 per cent and the other party of 60 per cent. If this common practice is adopted, assessing contributions under subsections 79(4) or 90SM(4) also involves, as the Full Court of the Family Court in *Brodie & Brodie* said:[25]

> *considering the transposition from evaluation of actual contributions to determination of a monetary sum (or impliedly a sum represented by a percentage of assets).*[26]

39. The Full Court of the Family Court quoted Coleman J in *Steinbrenner & Steinbrenner,*[27] who was hearing an appeal from a Federal Magistrate. His Honour said at [234]:[28]

> *Given that the evaluation of contribution based entitlements inevitably moves from qualitative evaluation of contributions to a quantitative reflection of such evaluation, there will inevitably be a 'leap' from words to figures. That is the nature of the exercise of discretion, whether it be in the assessment of contributions in the matrimonial cause, assessment of damages in a personal injuries case, or determination of compensation in a land resumption case. In some cases, the 'leap' is so great, and so unheralded by the discussion which precedes it as to render the reasoning process defective.*

40. By way of illustration, in *Wallis & Manning*, the Full Court of the Family Court allowed the wife's appeal against the trial judge's orders which were based on an assessment of her contributions as 30 per cent, in circumstances where the parties

[23] Ibid [13].
[24] (1997) FLC 92-757 ("***Kennon"***).
[25] [2009] FamCAFC 6 ("***Brodie"***).
[26] CCH *Australian Family Law & Practice* (Wolters Kluwer), 37-007.
[27] [2008] FamCAFC 193.
[28] Quoted in *Brodie*, [90]; CCH, n 26.

had a 27 year marriage and three adult children. The husband's father had made gifts of farming land to the parties early in the marriage. The Full Court assessed the wife's contributions as 42.5 per cent.

41. After considering contributions, the court turns to consider the matters in paragraphs 79(4)(d)–(g) (or 90SM(4)(d)–(g)), which is the third step of *Hickey.* These matters are:

> *(d) the effect of any proposed order upon the earning capacity of either party to the marriage; and*
>
> *(e) the matters referred to in subsection 75(2) so far as they are relevant; and*
>
> *(f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and*
>
> *(g) any child support under the* Child Support (Assessment) Act 1989 *that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.*

These are often (incorrectly) abbreviated to the short-hand term "the s 75(2) factors".

42. The Full Court in *Collins & Collins* outlined the general approach that the court should take when considering the subsection 75(2) factors:[29]

> *A trial Judge will no doubt consider the relevance or otherwise of the task at hand of the various matters referred to in s 79(4) including, by reference, s 75(2) in determining to make any and, if so, what order and in that task would disregard matters which are not relevant to that responsibility. The weight to be attached in a particular case to those matters is very much a matter for the trial Judge … The legislature has chosen to set out a diverse range of matters for consideration and the Court is obliged to take those into account when they are relevant to the facts of the particular case.*

43. In *Clauson & Clauson*, the Full Court of the Family Court said that it was important to convert the percentage adjustment reached under subsection 75(2), which is the usual method of assessing the adjustment to dollar terms to see the "real impact".[30]

44. Using the above-mentioned case of *Wallis & Manning* again by way of illustration, the trial judge had given the wife a further 10 per cent for the paragraph 79(4)(d) to (g) factors, including subsection 75(2) factors, resulting in a 40/60 per cent division of the property in favour of the husband. On appeal, the wife received 50 per cent, made up of 42.5 per cent for contributions and a further 7.5 per cent for paragraph 79(4)(d) to (g) factors, including subsection 75(2) factors.

45. Assessing the subsection 75(2) adjustment in dollar terms, without looking at a percentage adjustment first, is rare.[31] In *Varnham & Moses*, the Full Court of the Family Court considered it to be "well settled that the primary judge was obliged to

[29] (1990) FLC 92-149, 78,043–5.
[30] (1995) FLC 92-595, 81,911.
[31] CCH, *Australian Family Law & Practice* (Wolters Kluwer) 37-523. See, eg, *Wallis & Manning* (2017) FLC 93-759.

analyse the effect of any further adjustment for [subsection] 75(2) factors in real money terms".[32]

Effect of *Stanford*

46. The High Court plurality in *Stanford* emphasised that there must be a jurisdictional basis to interfere with the legal and equitable interests of parties. The High Court plurality said that the first of three fundamental propositions follows from the text of paragraph 79(1)(a):[33]

> *First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property.*

47. This first fundamental proposition has two components:

- identify the existing legal and equitable interests of the parties in the property of the parties; and
- determine whether it is just and equitable to alter those interests.

48. The Full Court of the Family Court has rejected the use of the terms "step" and "threshold" to describe the consideration of "just and equitable" under the current s 79(2). There is a debate as to whether the court is required to establish that it is just and equitable to alter the legal and equitable interests of the parties before embarking on the rest of the section 79 process.

49. The approach taken by the High Court in *Stanford* arguably supported a five-step process with current subsections 79(2) and 90SM(2) to be considered at the outset, and then possibly again at the end. However, the High Court did not expressly comment on the stepped approach. The overriding message from the High Court was that the legislative scheme must be followed.

Uncertainties with the current property settlement process

50. There was considerable disruption to the jurisprudence following *Stanford*. Some uncertainties remain for parties, their legal practitioners and the courts. The Law Council supports carefully considered reform of section 79 to address these uncertainties, with the objective of not creating new and further uncertainties.

51. The uncertainties which arose in the jurisprudence following *Stanford* included:

(a) Whether the just and equitable question requires an express determination or finding of the court to this effect, or if this can be implied:

(i) The High Court plurality said in *Stanford* that:

> *First, it is necessary… The question posed by s 79(2) is thus whether, having regard to those existing interests, the court is satisfied that it is just and equitable to make a property settlement order.*[34]

[32] (2021) FLC 94-007, [60].
[33] *Stanford* [37].
[34] *Stanford* [37].

(ii) In *Hearne & Hearne*,[35] Justice Strickland (with whom Ryan J agreed, and Austin J agreed on this point) rejected the proposition put on behalf of the husband that "unless a finding is made as to whether it is just and equitable to alter property interests, the court has no power to make such an order". Justice Strickland quoted extensively from *Stanford* but then relied on *Chapman & Chapman* for the proposition that:

> *there need not be an express finding that the hurdle of s 79(2) has been overcome; it can be by necessary implication from the totality of the trial judge's reasons for judgment.*[36]

(b) Whether the court can take into account the liabilities, financial resources and "notional property" when identifying the property of the parties.[37]

(c) Whether the subsection 79(4) factors (and subsection 75(2) factors) are relevant to the just and equitable question:

(i) The High Court plurality said in *Stanford*:

> *…The question posed by subsection 79(2) is thus whether, having regard to those existing interests, the court is satisfied that it is just and equitable to make a property settlement order.*[38]

(ii) Chief Justice Bryant then stated in *Bevan & Bevan*:[39]

> *that it is not a requirement to take account of the matters in s 79(4) when considering the question of whether it is just and equitable to make any order under s 79(2). But as long as they are seen as separate and not conflated, the factors in s 79(4) have the potential to inform the decision under s 79(2), along with all other relevant considerations.*

(iii) Chief Justice Bryant further stated in *Chapman & Chapman*:[40]

> *that it would be inappropriate to limit the wide discretion conferred by s 79(2) by requiring the court to* ***ignore*** *the matters referred to s 79(4) FLA … because the matters … would be likely to embrace much of the factual substratum on which any exercise of discretion would be based".*

(iv) The Full Court of the FCFCOA said in *Cosola* & *Moretto*:[41]

> *Insofar as the plurality in Chapman purported … to lay down principle, it may be that they have impermissibly extended what the High Court said (or more accurately, what it did not say) in Stanford.*

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[35] [2015] FamCAFC 178.
[36] Ibid [71] (Strickland J), citing *Chapman & Chapman* (2014) FLC 93-592, [22].
[37] See *Bevan & Bevan* (2013) FLC 93-545, [79]; *Layton & Layton* [2014] FamCAFC 126, [38].
[38] *Stanford* [37].
[39] (2013) FLC 93-545, [9].
[40] (2014) FLC 93-592,[5].
[41] (2023) FLC 94-143, [43].

The issue of whether considering s 79(4) (or s 90SM(4)) under the just and equitable requirement appears to remain an open question.

(d) Whether the just and equitable principle "permeates" the section 79 process, or is a separate consideration.[42]

(e) Whether the just and equitable question must be determined before proceeding with the rest of the section 79 exercise, or if it can be done later.

(f) Whether the particular orders proposed to be made by the court must be just and equitable (i.e., whether "just and equitable" can, or must, be looked at again at the end of the process, even if it has already been examined once).

- The proper approach to section 79 was considered in *Halstron & Halstron*.[43] The Full Court said the primary judge correctly determined that it was just and equitable to alter the parties' property interests under s 79(2). The court accepted the "preferred" approach to s 79 set out in *Hickey*.
- See also cases such as *Hearne & Hearne,* where the trial judge considered just and equitable as a fourth step and was not criticised by the Full Court for doing so.[44]

52. In light of the above, it is not clear how proposed subsections 79(2) and 90SM(2) are intended to improve the existing law, or resolve these uncertainties. In fact, there appears to be a risk that the changes in the Exposure Draft will increase, rather than reduce, uncertainty.

Codifying the property decision-making principles

Questions 1 and 2: Does the proposed structure of the property decision-making principles achieve a clearer legislative framework for property settlement? If not, please expand on what changes you think are required and why.

53. Existing paragraph 79(1)(a) of the Act refers to "the property of the parties to the marriage or either of them", and provides that the court may make such order as it considers appropriate "altering the interests of the parties to the marriage in the property".

54. "Property" is defined in subsection 4(1) of the Act in relation to the parties to a marriage, or either of them, as "property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion…".

55. The Exposure Draft lists four principles that aim to guide the property settlement process under the Act. These are contained in the proposed subsections 79(2) and 90SM(2). The Consultation Paper explains that the term "principles", rather than "steps" or "pathway", is deliberately used to "emphasise that the principles do not

[42] See *Martin & Newton* (2011) FLC 93-490; *Hearne & Hearne* [2015] FamCAFC 178.
[43] (2022) FLC 94-086.
[44] [2015] FamCAFC 178.

need to be approached in any particular order",[45] as confirmed in the note to the proposed subsection 79(2) and 90SM(2).

56. The Law Council agrees with the Department's statement in the Consultation Paper that:[46]

> *At present, Parts VIII and VIIIAB of the Family Law Act do not clearly prescribe the process the court takes to determine a just and equitable property division. The court's approach in determining a property settlement is underpinned by case law and a multi-step framework within the Family Law Act, informally referred to as the decision-making steps.*

57. The Law Council notes that the intention of the principles is, as set out in the Consultation Paper:[47]

> *"to clarify on the face of the Family Law Act the decision-making principles that a court considers in determining a property division. This is to assist users, legal representatives, the dispute resolution sector and the courts to better understand and apply the property decision-making framework, and provide more certainty to those using the Family Law Act as guidance for settling their own property matters.*

58. The Law Council further notes that the Exposure Draft emphasises proposed subsection 79(2), as it summarises the matters to be considered under section 79. However, section 79 requires that the court, when altering the interests of the parties in property under subsection 79(1), "may make such order as it considers appropriate". It is, therefore, unclear how proposed subsection 79(2) will co-exist with existing subsection 79(1) of the Act. The Law Council would welcome clarification from the Department in this respect.

59. The Law Council's Constituent Bodies broadly agree that the proposed structure of the property decision-making principles achieves a clearer and simpler legislative framework within the Act for property matters. For example, the Law Institute of Victoria (**LIV**), the Law Society of New South Wales (**NSW Law Society**) and Queensland Law Society (**QLS**) are of the view that paragraphs 79(2)(a)-(d) provide a sensible approach to determining property and financial arrangements and support the collation of the relevant principles in the Act into one legislative provision, removing the current need to cross-refer between provisions.

60. However, some Constituent Bodies, including the Law Society of the Australian Capital Territory (**ACT Law Society**) and QLS, consider that the changes must not reduce the broad discretion the Act currently provides for the court to determine a matter, based on the particular circumstances of the parties. Other Constituent Bodies, including the South Australian Bar Association (**SA Bar**), have recommended that there should be greater adherence in the Exposure Draft to what was decided in *Stanford*.

61. The Law Council's Family Law Section, in addition to the NSW Law Society, the Law Society of South Australia (**SA Law Society**) and the SA Bar, considers that the notation at the end of proposed subsections 79(2) and 90SM(2) appears to contradict the stated intention of the subsection by expressly stating that the principles can be dealt with in any order. For example, it is illogical to have the

[45] Attorney-General's Department, Family Law Amendment Bill (No. 2) 2023 (Consultation Paper, September 2023) 9.
[46] Ibid 8.
[47] Ibid 8-9.

option of starting the section 79 or 90SM process by looking at contributions or current and future considerations, before determining the property interests of the parties to be altered and to which contributions must be assessed.

62. More broadly, the Law Council's Family Law Section is concerned that the proposed drafting of "principles", rather than "steps", will make the property settlement process more complicated, confusing, and expensive for parties, compared to the current law, and will not achieve the objectives of the Exposure Draft. These concerns, among others, are elaborated on in the section below.

63. The ALRC Report recommended that the Act should:

> *Specify the steps that a court will take when considering whether to make an order to alter the interests of the parties to the relationship in any property. (Recommendation 11)*

64. In correspondence provided to the Department on 30 July 2019, providing views on each of the ALRC recommendations, the Law Council's Family Law Section supported clarification of the property settlement legislative pathway, subject to the specific wording of any proposed amendment. The Family Law Section also noted the impact any such changes may have on the jurisprudence developed following the decision of the High Court in *Stanford*. These concerns remain.

Further Family Law Section views

Proposed property settlement pathway

65. The Law Council's Family Law Section (referred hereafter as the Family Law Section) does not agree that the structure of property decision-making "principles", as proposed in the Exposure Draft, achieves a clearer legislative framework for property settlement. The Family Law Section considers it preferable that the full property settlement pathway (or steps) are set out in the Act, noting that these are, as the Exposure Draft has identified, two separate questions.

66. Proposed subsection 79(2) does not provide a pathway to enable legal practitioners to advise their clients as to the process that a court should take in determining a property settlement. In circumstances where the proposed amendments will make much of the existing case law otiose, irrelevant or at least require it to be re-considered, providing a pathway in the legislation is even more desirable in order to increase certainty for parties.

67. The Family Law Section notes that the proposed subsections 79(2) and 90SM(2) in the Exposure Draft only set out a list of four "principles", without providing a "pathway". Determining a property settlement under section 79 (or section 90SM) is an exercise of judicial discretion. A clear legislative pathway will provide reassurance for parties, legal practitioners and the court as to a consistency of approach, without unduly fettering the judicial discretion.

68. The Family Law Section therefore considers it is preferable for amendments to be made to the Act to clarify the matters outlined above, and cautions that the proposed amendments create new uncertainties and do not solve the existing ones.

69. The Family Law Section is of the view that the law would be more accessible for parties (including self-represented parties), and the costs of litigation reduced, if the pathway to determine a property settlement was set out in sections 79 and 90SM with specificity, so as to remove any uncertainties. There are likely to be

considerable uncertainties created by the proposed amendments, and therefore considerable litigation to resolve them.

Liabilities

70. The Family Law Section observes that proposed paragraph 79(2)(a) seems to be an attempt to codify the first step of the four-step *Hickey* process, outlined above, but with the express inclusion of "liabilities" as well as property:

> *In making orders under this section, the court … is to identify the existing legal and equitable rights and interests in, and liabilities in respect of, any property that is the property of the parties to the marriage or either of them...*[48]

71. The definition of "property" in subsection 4(1) of the Act does not expressly include liabilities, financial resources, superannuation and property not within the definition of subsection 4(1) (e.g. add-backs of funds spent on legal costs and notional or wasted property). However, these are considered, where applicable, in the property settlement process as follows:

(a) Financial resources are referred to in paragraph 75(2)(b).

(b) Superannuation is referred to in paragraph 75(2)(f), but in most cases, superannuation is now dealt with under Part VIIIB of the Act, rather than in Parts VIII or VIIIAB.

- Superannuation not within Part VIIIB includes overseas superannuation, certain pension streams and superannuation which is not being split;

(c) Liabilities are often dealt with in determining the net property available to the parties,[49] whilst debts are also referred in several sections of the Act in different contexts, including paragraph 75(2)(ha) and section 106B.

- Part VIIIAA, which deals with orders and injunctions affecting third parties, refers to debts or liabilities owed to a third party and debts owed by parties to a marriage or de facto relationship.
- Part VIIIAA refers expressly to "liabilities" and "debts", in addition to "property", without the distinction being explained or made clear. It is strongly arguable that the term "property" in the current section 79 does not include debts or liabilities, as elsewhere in the Act, these terms are listed in addition to "property".
- Section 90AD expressly provides that a debt is "property" for the purpose of paragraph 114(1)(e) of the Act.
- Although the terms "debts and "liabilities" are both used in the Act, neither term is defined. The Family Law Section appreciates that these terms may have different meanings, depending upon the context. It is appropriate for the term "debt", for example, to be used in the context of creditors and trustees in bankruptcy (see paragraph 75(2)(ha)). The proposed paragraphs 79(4)(d) and 79(5)(k) refer to "debts" but the proposed paragraph 79(2)(a) refers to "liabilities". The reason for this distinction is unclear.

[48] Exposure Draft, Sch 1, Pt 1, Div 1, cl 2.
[49] See, eg, *Prince & Prince* (1984) FLC 91-501.

72. It is common practice for courts and legal practitioners applying section 79 to draw up a balance sheet of the property, liabilities, superannuation and financial resources of the parties, so as to have a clear picture of the financial circumstances of the parties and the effect of any property settlement order sought or proposed.

73. This "balance sheet" is based on the affidavits and financial statements filed by the parties. The financial statement is a mandatory form, required to be completed by the parties when filing an application or response seeking property settlement orders. This form requires parties to identify and give estimated values for property, liabilities, superannuation and financial resources.

74. In *Stanford,* the High Court did not refer to liabilities. This led to there being some early debate as to whether liabilities were a legal and equitable interest,[50] and how they otherwise fitted into the section 79 process. However, the Family Law Section observes that there no longer seems to be a debate about this, and in appropriate cases,[51] debts will be deducted when calculating the net property to be adjusted between the parties. The logical support for this approach is that whether altering interests in property or not is just and equitable will depend, in part, on the capacity of a party to enjoy the benefits of that property which is affected by existing and, potentially, future liabilities.

75. The Family Law Section supports clarification that "liabilities" should be identified in the section 79 process but is of the view that the proposed paragraph 79(2)(a) could have unintended consequences, and further complicate the law.

76. In addition, the Act must be clear as to what is meant when reference is made to "debts" and "liabilities", and what the distinction is between these terms. The Family Law Section suggests that respective definitions in the Act would be useful, and emphasises the importance of consistently using such defined terms throughout the legislation to promote statutory coherence.

77. One commentator has suggested that the reference to liabilities in the proposed paragraph 79(2)(a) is limited to liabilities attached to property, and does not relate to unsecured liabilities.[52] The Law Council would appreciate clarification from the Department on this point. However, if this interpretation is correct, the Family Law Section considers this could have the unintended consequences of:

- leaving a party who is personally liable for the unsecured debt having the onus of seeking that the debt be adjusted (usually in percentage rather than dollar terms so a dollar-for-dollar adjustment may not occur) under paragraph 79(4)(cd) as a contribution factor or paragraphs 79(5)(k) and (s) as a current and future consideration; and
- leaving the court with no ability to adjust joint unsecured liabilities as between the parties.

78. Whether that is the intention of the Australian Government, or whether the courts will interpret paragraph 79(2)(a) in that way, the Family Law Section supports redrafting the proposed paragraph 79(2)(a) to reduce the potential for confusion.

79. From the perspective of the Family Law Section, there seems to be no logical reason to only have liabilities related to property (arguably a wider scope than

[50] See, eg, *Layton & Layton* [2014] FamCAFC 126.
[51] See, eg, *Chorn & Hopkins* (2004) FLC 93-204.
[52] See Patrick Parkinson AM, "Tinkering with Part VIII: the Family Law Amendment Bill (No 2) 2023 – Exposure Draft", Paper for Watts McCray/AFL, October 2023.

secured liabilities) considered when determining the property pool, with personal or unsecured liabilities left to be considered under only paragraphs 79(4)(cd) and 90SM(4)(cd) and/or paragraphs 79(5)(k) and (t) and 90SM(5)(k) and (t).

80. The Family Law Section considers there is an argument that either, or both, of subsection 79(1) or paragraph 79(2)(a) should confirm the relevance of financial resources, superannuation and property which would have been otherwise available to the parties, but is not within the definition of property in subsection 4(1) (such as funds spent on legal fees). These should be identified, but probably not valued. It is then clear that they may be considered by the court in determining how the property interests will be altered.

81. If it is for the benefit of self-represented parties that the proposed paragraph 79(2)(a) requires liabilities to be identified (although liabilities are not referred to in subsection 79(1)), then identification of financial resources may also need to be expressly listed in paragraph 79(2)(a) and/or subsection 79(1).

82. Interests in financial resources are not able to be altered under subsection 79(1) as they are not "property" of the parties, but they are referred to in existing paragraph 75(2)(b), and are listed in balance sheets tendered to the court and the parties' financial statements filed with the court.

83. Identifying all relevant interests in paragraph 79(2)(a) may lead to greater clarity for the parties. However, it may also lead to confusion as:

- A common financial resource is an interest as a beneficiary of discretionary trust. This type of interest may be difficult or impossible as well as expensive to value;[53]
- Financial resources may best be dealt with as a factor under paragraph 75(2)(b) without quantifying their value;
- Interests in financial resources cannot usually be dealt with by the court, but they may impact on how the interests in property are altered;
- Superannuation is dealt with under Part VIIIB not Parts VIII or Division 2 of Part VIIIAB, and is not dealt with as property in all circumstances;
- Express reference to property not otherwise within subsection 4(1) may open the flood gates to claims for "notional property" to be considered although they can be considered under paragraph 79(5)(s) and the proposed paragraph 79(4)(cc).

84. The Family Law Section proposes that consideration be given to an alternative wording of the first principle of the proposed decision-making framework, at paragraph 79(2)(a), as follows:

> *(a) identify and value the existing legal and equitable rights and interests in property and liabilities of the parties to the marriage or either of them and identify any financial resources of the parties to the marriage or either of them; …*

85. Similarly, the LIV considers that paragraph 79(2)(a)) should be amended so that it refers to the "legal and equitable rights, interests, and liabilities, of the parties to property and financial resources", in accordance with the established case law.[54]

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[53] See, eg, *Kennon v Spry* (2008) FLC 93-388; *Woodcock & Woodcock (No 2)* [2022] FedCFamC1F 173.
[54] *Hall & Hall* [2016] HCA 23; *De Angelis & De Angelis* [1999] FamCA 1609; *Harris & Dewell and Anor* [2018] FamCAFC 94; *Gould & Gould* (1996) FLC 92-657; *JEL and DDF* [2000] FamCA 1353.

Expanded contributions and subsection 75(2) factors

86. The Exposure Draft adds new considerations to the lists of matters that a court must take into account under the existing s 75(2) and s 79(4) (subsections 90SF(3) and 90SM(4)). The Family Law Section notes that this is contrary to the second part of Recommendation 11 of the ALRC Report, namely to:

> *simplify the list of matters that a court may take into account when considering whether to make an order to alter the interests of the parties to the relationship in any property.*

87. The proposed contributions factors are:

> *(ca) the effect of any family violence, to which one party to the marriage has subjected the other party, on the ability of a party to the marriage to make the kind of contributions referred to in paragraphs (a), (b) and (c); and*
>
> *(cb) the effect of any economic or financial abuse to which a party to the marriage has been subjected by the other party; and*
>
> *(cc) the effect of any wastage, by a party to the marriage, of property or financial resources of either of the parties to the marriage or both of them; and*
>
> *(cd) any debts incurred by either of the parties to the marriage or both of them …*

88. The matters raised in paragraphs 79(4)(f) and (g) are also referred to in subsection 75(2) (and proposed subsection 79(5)) so there is some duplication, which ideally would be examined in any further consideration of section 79. The duplication is:

s 79(4)(e)	All of s 79(5)
s 79(4)(f)	s 79(5)(d)
s 79(4)(g)	s 79(5)(r)

89. The Family Law Section considers that paragraph 79(4)(e), which incorporates subsection 75(2), has no relevance in the proposed amendments due to the wording of the proposed s 79(5), and could be removed. In addition, paragraph 79(4)(d) is not really a contributions factor, and might be better incorporated into subsection 79(5).

90. Where similar provisions arise in multiple parts of the property settlement process, there is a risk of double counting a factor, which is not permissible, as it can be unfair and distort the effect of one factor. This is likely to lead to increased litigation as the consideration of one factor twice may be justified in quite nuanced circumstances.

- An example of where it was unjustified was *Mayhew & Fairweather*;[55] where a notional asset was considered as both a contribution factor under subsections 79(4) and 75(2).

[55] [2022] FedCFamC1A 53.

- Similarly, in *Preston & Preston*, a superannuation pension in the payment phase was counted erroneously by the trial judge as both a capitalised asset in the property pool and as an income stream under subsection 75(2).[56]

91. Past expansion of the subsection 75(2) factors has had the unfortunate consequence of moving paragraph 75(2)(o)[57]—and paragraph 90SF(3)(r)—from being the final factor to be considered to being higher up the list, potentially impacting its meaning. Paragraphs 75(2)(o) and 90SF(3)(r) are not true "catch-all" clauses. Rather, the *ejusdem generis* rule is applied to narrow the interpretation of paragraphs 75(2)(o) and 90SF(3)(r) to only cover matters similar to those already listed.[58]

92. The meaning and effect of paragraph 75(2)(o) was discussed by the Full Court of the Family Court in *Beck & Beck (No. 2)*:[59]

> *Specific matters are referred to in para. (a) to (m) of s 75(2) and then in para. (o) the Court is given a discretion to bring in for consideration any other financial matters if the justice of the case so requires. Paragraph (o) refers in our view to any other relevant financial matters not covered in para. (a) to (m).*

93. The Family Law Section prefers a simplification of factors, but is not opposed to some expansion, save that it has occurred in the context of existing overlap and also subsection 75(2) and paragraph 79(4)(e); paragraph 75(2)(na) and paragraph 79(4)(g); paragraphs 79(4)(a)-(b) and paragraph 75(2)(j), and without adequate consideration of where there will be new areas of overlap with the existing subsection 75(2) and subsection 79(4) factors.

94. The Family Law Section is, however, concerned that the removal of possible duplication requires careful consideration to avoid unintended consequences. Of note, increasing the number of contributions to be considered under subsections 79(4) and 90SM(4) and increasing the number of "current and future considerations" in subsections 79(5) and 90SM(5) will make compliance with the 10 page limit that applies for affidavits in the FCFCOA (Division 2) extremely difficult in many instances.[60]

Just and equitable

Questions 3 and 4: Do you agree with the proposed framing of the just and equitable requirement as an overarching consideration through the decision-making steps? If not, please expand on what changes you think are required and why.

95. The Law Council agrees in principle with the proposed framing of the just and equitable requirement as an overarching consideration. However, it has several

[56] (2022) FLC 94-108.
[57] 'Any fact or circumstance which, in the opinion of the court, the justice of the care requires to be taken into account'.
[58] See *Soblusky & Soblusky* (1976) FLC 90-124 and *Ferguson & Ferguson* (1978) FLC 90-500); CCH, n 26, 26-650.
[59] (1983) FLC 91-318, 78,167-8.
[60] See item 7 of Table 2.1 of the Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021.

concerns regarding the current drafting, and is of the strong view that consistency with the approach set out by the High Court in *Stanford* be maintained.

96. In particular, and as mentioned above, the Family Law Section and several Constituent Bodies have concerns with the notation at the end of proposed subsections 79(2) and 90SM(2). The inclusion of the notation implies that the court is not required to consider the 'just and equitable' step at first instance (which is what the Act presently does, and what *Stanford* suggested must occur first), but can consider it at any point.

97. If the purpose of the new amendments is to codify the principles enunciated in *Stanford*, it is unclear why this notation would be included in the Exposure Draft, which causes confusion, given it is incongruent with the entire premise of the *Stanford* principles. In this respect, the Law Council would not support any drafting that would have the effect, or even the risk, of overriding the High Court's decision in *Stanford v Stanford*.

98. Moreover, in the view of the Family Law Section, the Exposure Draft addresses, but does not resolve, the current uncertainty as to how, and when, the just and equitable principle in the current subsections 79(2) and 90SM(2) (proposed paragraphs 79(2)(a) and 90SM(2)(a)) is considered. The Exposure Draft provides that the court has flexibility about when this question is determined—at the outset, during or at the end of the decision-making process. As explained above, this does not clarify whether the just and equitable principle needs to be addressed once, or twice, or whether it should "permeate" the process.

99. The Consultation Paper states that the approach in the Exposure Draft reflects the legal principle from *Bevan & Bevan* that the just and equitable requirement in current subsection 79(2) "is not a threshold issue", and while it can be addressed at the outset in the vast majority of cases, consideration of whether it is just and equitable to make property orders "permeates the entire decision-making process".[61]

100. However, the Family Law Section advises that the Consultation Paper incorrectly states that the existing law is that, prior to making any order under the current section 79 (or section 90SM), a court must make a "positive determination" that it is just and equitable to make an order altering property interests (or a conclusion that such an order is not just and equitable).[62]

101. Unlike the Consultation Paper, as discussed above, *Stanford, Bevan* and other Full Court cases of the FCFCOA (and the Family Court), do not use the phrase "positive determination", or anything similar. Instead, the approach taken by Chief Justice Bryant and Justice Thackray in *Bevan* (at [66]) is generally followed. Their Honours cited the High Court in *Mallet v Mallet*, where Dawson J described the just and equitable consideration as the "overriding requirement",[63] and said that it is "necessary for it to be shown that the trial judge has expressly, or by clear implication, answered that question in the affirmative".[64]

102. Another difficulty that arises from *Stanford* is that although the High Court said subsection 79(2) cannot be "conflated" with subsection 79(4), courts often consider the subsection 79(4) matters in the process of determining that it is not just and

[61] (2013) FLC 93-545, [62], cited in Attorney-General's Department, Family Law Amendment Bill (No. 2) 2023 (Consultation Paper, September 2023) 10.
[62] Attorney-General's Department, Family Law Amendment Bill (No. 2) 2023 (Consultation Paper, September 2023) 10.
[63] (1984) FLC 91-507, 79,132 (Dawson J).
[64] Ibid [82].

equitable to make an order. It is also unclear whether, under the Exposure Draft, the notion from *Bevan* that the just and equitable principle "permeates" the entire process (as referred to above) remains, as the Consultation Paper attests.[65] Courts may—and the Family Law Section believes are likely to—interpret the proposed amendments differently.

103. The proposed wording of subsection 79(2) appears to be both a change in the law and a watering down of *Stanford*. Currently, subsection 79(2) is a stand-alone provision in the Act and the Family Law Section is of the strong view that it should stay that way. Diluting the just and equitable requirement to be one of the four principles in the new subsection 79(2) (at proposed paragraph 79(2)(d)) creates the risk that it will not, in accordance with the first fundamental proposition articulated by the High Court in *Stanford* be properly considered.

104. Similarly, the ACT Law Society has expressed concerns that the drafting of new subsection 79(2) may have the effect of minimising the overarching intent of the clause. To a lay person, it is unclear on the current drafting that where an order is to be made under section 79, it is also required to be just and equitable in *all of the circumstances*. The ACT Law Society also encourages consideration of making proposed paragraph 79(2)(d) a standalone provision.

105. The Family Law Section separately advises that determining whether the proposed terms of an order are "just and equitable" (the *Hickey* approach) is a different analysis than whether it is just and equitable to make any order at all (*Stanford*). Guidance would therefore be needed from the courts as to how, and when, "just and equitable" was to be considered under the proposed amendments, even if provision was sought to be made in the extrinsic materials.

106. On a drafting point, the proposed subsection 79(5) refers back to paragraph 79(2)(c), but not to the just and equitable requirement in s 79(2)(a). By contrast, the opening words of subsection 79(4) (which remain unchanged by the Exposure Draft) require the court to take into account the factors in subsection 79(4) when "considering what order (if any) should be made under this section in property settlement proceedings", which seems to reference the just and equitable requirement in paragraph 79(2)(a), rather than subsection 79(1). The Law Council considers that these provisions warrant close examination, to ensure consistency.

107. Finally, the Family Law Section is of the view that there are some cases where consideration of whether it is just and equitable to make an order should occur at the outset, as well as at the end, noting that:

- considering at the outset whether it is just and equitable to make any order at all should be done if a party requests it, or the court considers it appropriate;
- there will be other cases where the just and equitable requirement may only need to be considered at the end of the section 79 process; and
- it should be permissible (but not mandatory) to consider subsection 79(4) in determining, at the outset, whether it is just and equitable to make any order at all.

Effect of family violence

108. The Law Council considers it essential that the Act provides appropriate protections to safeguard parties to proceedings against family violence, including in property

[65] Attorney-General's Department, Family Law Amendment Bill (No. 2) 2023 (Consultation Paper, September 2023) 10.

matters. The key question is how best this can be achieved, in both the drafting of legislation and court processes, whilst remaining alert and responsive to the risks identified above of misidentifying victim-survivors and system abuse.

109. The Act currently includes important protections against family violence, such as paragraph 43(1)(ca) that provides that:

> *(1) A court exercising jurisdiction under this Act must, in the exercise of that jurisdiction, have regard to:*
>
> *…*
>
> *(ca) the need to ensure protection from family violence;*

110. The Exposure Draft seeks to make family violence relevant to the alteration of property in three further and distinct ways, namely making the effect of:

- family violence on contributions a consideration in subsection 79(4);
- economic or financial abuse a consideration in subsection 79(4); and
- family violence on current and future circumstances a consideration in subsection 79(5).

111. The Law Council, including its Family Law Section, has long supported the strengthening of legislative provisions for, and increased funding of governmental institutions and community associations supportive of, victim-survivors of family violence.[66] However, the Law Council observes that the approach proposed in the Exposure Draft is a significant departure from the ALRC's recommendation 19, which was to introduce a "statutory tort of family violence".[67]

112. The reforms relating to family violence have been proposed in the Exposure Draft, notwithstanding the commentary in the ALRC Report regarding:

- infrequent adjustments made under the *Kennon* principle;[68]
- questions as to whether the codification of the *Kennon* principle would make any meaningful difference to victim-survivors of family violence;[69]
- concerns about the evidentiary challenges;[70]
- concerns about the emotional challenges;[71] and
- that a compensatory framework represents a more principled approach.[72]

113. In recommending a tort over codification of the *Kennon* principle or other reform to address family violence in property proceedings, the ALRC commented that such an approach would:

- not permit reinstatement of the fault principle;[73]

[66] See, eg, footnote 1 above.
[67] See ALRC, Family Law for the Future: An Inquiry into the Family Law System (ALRC Report 135, 2019) 240-45, [7.101]-[7.124].
[68] Ibid [7.101].
[69] Ibid [7.105].
[70] Ibid.
[71] Ibid.
[72] Ibid [7.106].
[73] Ibid [7.107].

- permit considerations relevant to the circumstances of the victim-survivor, and not as a percentage of a pool of property;[74] and
- reduce the need for any additional proceedings in other courts.[75]

114. In correspondence provided to the Department on 30 July 2019, providing views on each ALRC recommendation, the Family Law Section submitted that if family violence were to be incorporated into section 79, it should be incorporated as a matter to be taken into account when considering the current and future circumstances of a party (as is proposed by the inclusion of new subsection 79(5)), and not as a contributions factor (as is further proposed in the amendments to subsection 79(4)).

Questions 5 and 6:

- **Do the proposed amendments achieve an appropriate balance in allowing the court to consider the relevance and economic impact of family violence as part of a family law property matter, without requiring the court to focus on issues of culpability or fault?**
- **Do you agree with the proposed drafting, which requires the court to consider the *effect* of family violence to which one party has *subjected* the other?**

115. The Law Council strongly supports the underlying intention of the proposed amendments to recognise the harmful, and often long-term impacts, of family violence on victim-survivors and to ameliorate some of the difficulties currently associated with applying *Kennon*. However, the Family Law Section and some Constituent Bodies have expressed significant practical concerns with these amendments, which warrant close consideration.

116. The QLS, NSW Law Society and New South Wales Bar Association (**NSW Bar**) do not object to the proposed mechanisms in the Exposure Draft for recognising and accounting for the economic impact of family violence in property proceedings. Over time, these amendments may support a general culture of accountability for abusive behaviour, which helps the parties psychologically to move towards resolution.

117. The NSW Bar particularly welcomes these amendments, arguing that they appropriately reflect the increased understanding of the prevalence of, and impact of, family violence in Australian marriages and de facto relationships. The NSW Bar further argues that these amendments provide a legislative platform for the recognition of the greater contributions made by a victim-survivor during the course of the relationship, because of the short, medium and long-term impacts that family violence has on those who are subjected to it.

118. However, the Family Law Section, the LIV and the SA Bar do not agree that the proposed amendments achieve an appropriate balance in allowing the court to consider the relevance and economic impact of family violence as part of a family law property matter.

119. The Law Council observes that proposed paragraph 79(4)(ca) in the Exposure Draft is likely more expansive than the present *Kennon* principle. It is not clear if that is an obvious drafting choice, and clarification from the Department on this point would be welcomed.

[74] Ibid.
[75] Ibid [7.114].

120. Outlined below are several practical concerns that have been raised with the Law Council by its Family Law Section and several of its Constituent Bodies, in relation to proposed paragraph 79(4)(ca).

Uncertainty

121. First, the proposed amendment may give rise to substantial uncertainty. As the Exposure Draft departs from the language in *Kennon*, prior jurisprudence around the *Kennon* principle will likely become redundant. Far from bringing clarity to this area of law, this will create significant uncertainty as to when claims raising matters of family violence in the context of financial proceedings should be made, and when they are likely to be successful.

122. The Family Law Section is concerned that the new jurisprudence that will need to develop will occur in a vacuum, with no guidance as to how family violence is taken into account as compared to, say, how a court weighs parenting contributions over 16 years, or an inheritance contribution of $300,000, or 18 years of income earning. That is, there is no legislative directive of how the factor is to be weighed, and whether the weight varies, depending on the monetary size of the property pool.

123. In this respect, the Exposure Draft should clarify the meaning of "effect of family violence". It is well understood that persons who are subjected to violence, or trauma, will be affected by it. However, the phrasing in proposed paragraph 79(4)(ca) does not consider the tests relating to the "discernable impact" on the victim-survivor, or the "significantly more arduous" effect on the ability of the victim-survivor to make contributions, as in *Kennon*. Moreover, the phrase "the effect" fails to ensure that fault and culpability is not the focus of the provision, contrary to Australia's no-fault family law system. Accountability, rather than culpability, should be the focus.

124. In addition, having family violence as both a "contributions" factor and "current and future circumstances" factor may lead to "double dipping". Existing jurisprudence is critical of that approach by Trial Judges.[76] In 2019, speaking in the context of family violence and matrimonial torts, the then-Chief Justice of the Family Court, the Hon Justice Alastair Nicholson, said:[77]

> *It is clear that violence may be taken into account as a s75(2) factor where it can be shown that the effects of the conduct in question have had a demonstrable effect upon the victim's capacity to earn income. Probably, it may also be taken into account as a s 75(2)(o) consideration – a "fact and circumstance which, in the opinion of the court, the justice of the case requires to be taken into account". If it is taken into account on the question of contribution it presumably should not be counted again as a s75(2) factor if it amounts to double counting.*

125. The Family Law Section, in addition to several Constituent Bodies, are of the view that the use of the existing definition of "family violence" in the Act, and applying it to

[76] On 'double dipping', see, eg, *Semperton & Semperton* [2012] FamCAFC 132 (25 August 2012), [90], [143]-[150] (May, Thackray and Ryan JJ), citing *Hayton & Bendle* [2010] FamCA 592, [193] (Murphy J); *Mayne & Mayne (No 2)* [2012] FamCAFC 90 (19 June 2012) [17]-[19] (May J); *Mayne & Mayne* [2011] FamCAFC 192 (23 September 2011) [157] (Strickland J); see also *Paciullo & Paciullo* [2020] FamCAFC 169 (20 July 2020), [21] (Strickland, Austin & O'Brien JJ); *Welch & Abney* [2016] FamCAFC 271 (22 December 2016), [62] (Murphy, Alridge & Kent JJ).

[77] Hon Justice Alastair Nicholson AO RFD, Proposed changes to property matters under the Family Law Act (Speech to the NSW Bar Association, 20 May 1999) 11-12.

financial cases, will undoubtedly mean that the issue of family violence will feature in an extraordinarily high proportion of cases:

- first, as an issue requiring factual determination by a judge as to whether the applicant/respondent proves, on the balance of probabilities, that the incident(s) occurred; and
- secondly, as a factor (if so established) in the section 79 weighing exercise, potentially with the benefit of costly and time-consuming expert evidence as to the medical and or economic effect of the family violence.

126. Further, whilst an aspect also addressed by the Exposure Draft, the general approach in section 79 proceedings where the court finds it is just and equitable to make an order altering interests in property, is to engage thereafter in a four-step process. The second and third of those steps—as currently understood in the jurisprudence following *Stanford* in the High Court—involve the making of findings as to contributions and then as to the current and future circumstances of the parties. Whilst not a universal rule, this generally involves a percentage assessment.

- Decisions such as *Jabour and Jabour* and *Benson and Drury* mean that judges must consider matters holistically, and not isolate particular contributions and/or current and future circumstance factors, and give them any specific weight.[78] To do otherwise would increase the potential for the section 79 process to give rise to injustice.
- For example, consider that the same pattern of family violence were present in two matters, but in Case A, the pool was $200,000 but in Case B, the pool was $2,000,000. If family violence is a factor that impacts the percentage finding, would the monetary effect of the same pattern of family violence mean that 10 times the monetary effect of the same actions applies in Case B, to that which applies in Case A (because the property pool is 10 times larger)?

Length and cost of proceedings

127. Second, the Law Council understands that, in the experience of family lawyers, cases in which *Kennon* issues have been litigated are typically more expensive to conduct, create greater acrimony between litigants, are harder to resolve and take longer to get to trial. The duration of the trial itself is also often extended.

128. Feedback received from the Family Law Section and several Constituent Bodies, including the LIV, QLS, NSW Law Society and SA Bar indicate that there are considerable floodgates concerns about the effect that the amendments will have, both on costs of litigation, availability of experts and the resources of the courts applying the Act because of the prevalence of family violence in society, and the proportion of matters where family violence is reported.

129. The Law Council has also received feedback that the present scheme for funding lawyers to cross-examine victims of family violence in circumstances of self-represented parties (under sections 102NA and 102NB of the Act) is a scheme already stretched to its limits in terms of resourcing. A significant increase in further funding will likely be required to accommodate the increased number of matters where the scheme will be called upon.

[78] *Mallet v Mallet* (1984) FLC 91-507, 79, 120 (Mason J).

130. In its 2021 submission to the *Review of the Ban on Direct Cross-Examination under the Family Law Act* by Robert Cornall AO and Kerri-Anne Luscombe (footnotes omitted), the Law Council cautioned that:[79]

> *on occasions there have not been funds available under the Scheme to enable a party to receive representation, notwithstanding a section 102NA order having been made. An example is found in the decision of Fraser v Lafayette [2020] FCWA 43 in which O'Brien J stated:*
>
> > *In short, I conclude that a trial in this matter cannot proceed in a manner fair to the wife if she is precluded from cross-examining the husband because the operation of s 102NA prevents her from doing so personally, and she is unable (as distinct from unwilling) to secure representation, whether through the Scheme or otherwise. That conclusion is readily reached.*
> >
> > *Indeed, there is even potential for unfairness to the husband if he is, in those circumstances, not cross examined on his evidence in chief. That is so, as the weight to be given to admissible evidence upon which the witness cannot be cross examined, through no fault of the party who would wish to cross examine, can itself potentially be diminished.*
>
> *It is critical that the Scheme is properly funded, and allocations are a result of close discussions with bodies tasked with administering the Scheme. Insufficient funding for the Scheme will mean that the courts will be unable to implement the initiative without adding to the backlog and delay of their existing caseload. It is untenable for there to be delays to trials because of a lack of funding for an unrepresented party who attracts the Scheme.*

131. Should these amendments proceed, as drafted, the Law Council is concerned that these existing pressures would be further exacerbated, and would require urgent additional resourcing and funding, including for the legal assistance sector.

132. The Law Council's Family Law Section and several of its Constituent Bodies have also expressed the following concerns:

- The length and detail in affidavits will increase significantly in presenting evidence of and/or defending family violence claims. Ordinarily, parties would be required to provide particulars of such claims. It is very unclear how this requirement will sit with the proposed move to the less adversarial trial process for non-parenting cases in Part 2, Schedule 1 of the Exposure Draft.
- Cross-examination will be more extended and arduous.
- Litigants' costs will increase at each stage of litigation, both in preparation of material and in trial costs, and with the need for more expert witnesses.

133. The matters referred to above, should they eventuate, will have a flow-on effect for the costs and resourcing of the legal assistance sector, such as legal aid commissions and community legal centres, and may lead to an increase in applications being made for protective orders (intervention orders; apprehended violence orders) in State and Territory jurisdictions.

[79] Law Council of Australia, Review of direct cross-examination ban (Submission to Mr Robert Cornall AO and Ms Kerrie-Anne Luscombe, 4 June 2021).

134. The Law Council acknowledges that current case law already allows family violence to be considered, and that evidence regarding family violence is often raised in affidavit material. It notes the view of the NSW Bar that legislating family violence in assessing each party's contribution may not have as significant an impact on issues of costs, delay, complexity and more extensive cross-examination as has previously been thought. Nonetheless, there are clearly a range of significant concerns across the Australian legal profession in relation to these amendments, that the Department—and Government—should be alive to when progressing the Exposure Draft.

Evidential challenges

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.

Immediate practical considerations

139. The Law Council has received feedback that, if section 79 is amended in the terms proposed in the Exposure Draft, several immediate practical considerations will also arise.

140. Where parties are settling a matter by consent, and proceedings are on foot, it will be necessary to inform the Registrar or Judicial Officer of the existence of a family violence factor and inform the court as to how it has been taken into account, in terms of the settlement reached.

141. Where matters are not in the court in terms of litigation, but are the subject of an Application for Consent Orders, it is unclear whether that court application form needs to be amended to include:

- specific reference to family violence;
- whether family violence is a contributions and or future needs factor; and
- how family violence has been taken into account, or at least considered, in the settlement reached.[80]

[80] See *Harris v Caladine* (1991) 172 CLR 84.

142. In the vast majority of cases that do not proceed to trial, it may be difficult for the parties to isolate, and assess, the economic impact of family violence and abuse in a nuanced way. However, it is possible that, over time, judgments may help to inform future negotiations.

143. It is also not clear at what stage of proceedings a party be required to raise the issue of family violence, and in what manner will this be done (especially given the proposed introduction of the less adversarial trial process to non-parenting matters, where the rules of evidence will be largely dispensed with). This is important, both having regard to the pre-action procedure disclosure obligations, and the question of when, and how, (if a case is started in the court) the family violence issues need to be made known and particularised.

144. The Family Law Section has queried whether the broad nature of the proposed family violence amendments (both definitionally, and as a twin section 79 factor) will adversely impact settlement rates. If so, the potential exists for these changes to increase the number of matters in the litigation stream and the length of time they are in such stream, thus placing strain on court resources and increasing the costs for litigants. Further, the Family Law Section seeks clarification on why, if these amendments are to be pursued, they are raised in the context of property settlement, but not spouse maintenance and/or child support, where arguably the effect (particularly as to the deleterious effect on income earning capacity) may be more profound.

145. Finally, the Law Council considers that increased and ongoing education for registrars and judicial officers on domestic and family violence will be required to support the application of any new provisions which require the court to consider the impact of family violence in property matters. This includes education on recognising family violence, the dynamics of family violence and how control may manifest, and the impact of additional vulnerabilities, disadvantage and trauma.

New contributions factors

The effect of economic and financial abuse

Question 7: Do you agree with the proposed amendment to establish a new contributions factor for the effect of economic and financial abuse?

146. The Law Council has previously supported the need for recognition of economic and financial abuse.[81] There remains a pressing need to address the effects of discrimination and inequality from a family law perspective, and this is particularly the case, given:

- a significant power imbalance already exists between victim-survivors and perpetrators in the context of coercive control including financial control and isolation; and
- victim-survivors in family law proceedings are often at a financial disadvantage where they have had little, or limited, access to family income and/or assets.

147. However, that recognition must be achieved in a manner that promotes consistency in legislation and in meaning, and enhances, rather than undermines, a shared awareness of what that form of abuse entails. The Law Council has previously

[81] See, eg. Law Council of Australia, National Principles to Address Coercive Control (Submission to the Attorney-General's Department, 5 December 2022);

warned that inconsistent definitions of family violence across State, Territory and Federal statutes create additional barriers for victim-survivors.[82]

148. Principle 7 of the National Principles to Address Coercive Control provides, in part, that:

> *the development and implementation of legal responses, including any specific coercive control offence, should be underpinned by the shared understanding of coercive control established by the National Principles.*[83]

149. The Family Law Section holds several concerns with this proposed amendment, as drafted, as do most of the Law Council's Constituent Bodies. The Law Council acknowledges that the NSW Law Society and SA Law Society agree with the proposed amendments.

150. The Law Council is of the view that proper construction of the amendment is required so that it is clear to both parties at the centre of matrimonial property disputes, and decision-makers, as to what the considerations are to be, and what evidence will be important to assist the matter under consideration.

151. The Law Council has received substantial feedback regarding the definitional difficulties of this amendment. The phrase "economic and financial abuse" is not currently defined in the Act. It is, however, captured under the definition of "family violence" in section 4AB, as the non-exhaustive list of behaviours that may constitute family violence include "unreasonably withholding financial support". Nonetheless, it is not clear from the Exposure Draft as to what constitutes "economic and financial abuse".

152. If the concept of "economic and financial abuse" is to be introduced into the legislation as a separate and distinct consideration, it is not clear whether there is overlap between this concept, and "family violence", in terms of coercive control. This interaction should be made plain in both the drafting of any reforms and accompanying extrinsic materials.

153. Another concern relates to the fact that there is no reference in the Exposure Draft to the effect this amendment has on contributions. The Law Council observes that the drafting of other contribution factors is more explicit in this respect.

State legislation

154. The potential for further confusion, and inconsistency, arises from the reality that variations of the phrase "economic and financial abuse" already exist in some state statutes. For example, the *Crimes Legislation Amendment (Coercive Control) Act 2023* (NSW) includes the following provision:

> **54F Meaning of "abusive behaviour"**
>
> *(1) In this Division,* ***abusive behaviour*** *means behaviour that consists of or involves—*
>
> *(a) violence or threats against, or intimidation of, a person, or*

[82] Ibid [63].
[83] Commonwealth of Australia, National Principles to Address Coercive Control in Family and Domestic Violence (2023) 27.

(b) coercion or control of the person against whom the behaviour is directed.

(2) Without limiting subsection (1), engaging in, or threatening to engage in, the following behaviour may constitute abusive behaviour—

…

behaviour that is economically or financially abusive,

Examples for paragraph (c)—

- *withholding financial support necessary for meeting the reasonable living expenses of a person, or another person living with or dependent on the person, in circumstances in which the person is dependent on the financial support to meet the person's living expenses*
- *preventing, or unreasonably restricting or regulating, a person seeking or keeping employment or having access to or control of the person's income or financial assets, including financial assets held jointly with another person*

155. Similarly, section 12 of the Domestic and Family Violence Protection Act 2012 (Qld) provides:

12 Meaning of *economic abuse*

Economic abuse *means behaviour, or a pattern of behaviour, by a person (the first person) that is coercive, deceptive or unreasonably controls another person (the second person), without the second person's consent—*

(a) in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
(b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or a child, if the second person or the child is entirely or predominantly dependent on the first person for financial support to meet those living expenses.

Examples—

- *coercing a person to relinquish control over assets and income*
- *removing or keeping a person's property without the person's consent, or threatening to do so*
- *disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse*
- *without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses*
- *preventing a person from seeking or keeping employment*
- *coercing a person to claim social security payments*
- *coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person*
- *coercing a person to sign a contract for the purchase of goods or services*

- *coercing a person to sign a contract for the provision of finance, a loan or credit*
- *coercing a person to sign a contract of guarantee*
- *coercing a person to sign any legal document for the establishment or operation of a business*

156. The National Principles to Address Coercive Control use the phrase "financial and economic abuse and exploitation" (emphasis added), providing the following examples of perpetrator behaviour:[84]

> *A perpetrator may control a victim-survivor's finances or use those finances for their own gain. They may force them to withdraw superannuation or share accounts or may take out loans or max out credit cards in the person's name. A perpetrator may also withhold child support payments or deliberately force a victim-survivor into financial debt through legal systems abuse. They may also refuse to let the person see financial information like bank statements, not allow them to be involved in household financial decision-making, or refuse their name on mortgage or recognition of asset ownership. Dowry abuse, such as violence or other harmful behaviours related to the giving of gift by one family to another before, during or after a marriage, can also be a form of financial abuse.*

157. Section 4AB of the Act currently provides as follows (emphasis added):

> *(1) For the purposes of this Act, **family violence** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful.*
> *(2) Examples of behaviour that may constitute family violence include (but are not limited to):*
> *(a) an assault; or*
> *(b) a sexual assault or other sexually abusive behaviour; or*
> *(c) stalking; or*
> *(d) repeated derogatory taunts; or*
> *(e) intentionally damaging or destroying property; or*
> *(f) intentionally causing death or injury to an animal; or*
> *(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or*
> *(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or*
> *(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or*
> *(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.*

[84] Ibid 13.

Potential difficulties

158. The Law Council observes that the definition of "family violence" in the Act already includes aspects of "economic and financial abuse" in the examples listed in paragraphs 4AB(2)(g) and (h). Concerns, and potential practical challenges, raised by Constituent Bodies, particularly in relation to this likely overlap, are as follows:

- It is unclear why a new contribution factor for the effect of economic and financial abuse is considered necessary, given that it is already captured under the definition of "family violence".
- The meaning of the phrase "economic and financial abuse" is broad, and open to misinterpretation.
- It is not uncommon for separated parties to come before a court with divergent views as to whether conduct constitutes responsible financial management, or is a form of financial control or abuse. These amendments might increase the frequency and complexity of such disputes.
- The proposed amendment appears to privilege one type of family violence (economic and financial) over others. It is queried whether this emphasis is intended, and whether it best serves separating families. In some cases, other forms of abuse (i.e., physical or sexual abuse) may be more relevant to a party's contributions.
- Codifying a specific provision for the effect of financial and economic abuse may dilute the accepted definition of "family violence' by implying that economic and financial abuse is not already covered within the definition.
- There is likely to be some confusion about how this factor should be applied in practice. For example, it is unclear whether there should be a discrete adjustment for economic and financial abuse, in addition to family violence, in the circumstances.
- There is the possibility of decision-makers falling into error in 'double-counting' family violence and economic and financial abuse, when they effectively may overlap.

Position

159. Instead of the approach adopted in the Exposure Draft, the Law Council recommends that a preferred course would be to expand the definition of "family violence" in subsection 4AB(1) to include economic and financial abuse, rather than as a separate factor. It is important that such definition is distinct from conduct which may reflect differing financial values between a couple. In this respect, the Law Council refers to its Model Definition of Family Violence, published in 2021.[85] This definition highlights that economic abuse is considered to be family violence, and provides a non-exhaustive list of examples of behaviours that constitute economic abuse.[86]

160. An expanded definition in subsection 4AB(1) would ensure that the same definition of family violence applies to all proceedings under the Act, and would increase clarity for legal practitioners and self-represented litigants navigating the family law system. Such definition would also create an opportunity to advance and cement through legislation shared understandings of this insidious behaviour.

161. In the alternative, proposed paragraphs 79(4)(cb) and 90SM(4)(cb) could be deleted from the Exposure Draft, given that the requirement to take family violence into

[85] Law Council of Australia, Model Definition of 'Family Violence' (27 November 2021).
[86] Ibid 5.

account under these paragraphs 79(4)(ca) and 90SM(4)(ca) would be sufficiently broad to encompass relevant considerations stemming from economic and financial abuse.

162. To the extent that there are any inconsistences in the language used to describe "economic and financial abuse" between:

- the Act (should it be amended);
- the National Principles to Address Coercive Control; and
- state and territory legislation that addresses family violence and/or coercive control;

extrinsic materials for any reform will be important. These materials must clarify how considerations of "economic and financial abuse" are intended to operate and interact with other statutory formulations, including existing defined terms and variations, to ensure the term is not read down, or interpreted more broadly, than intended by the Australian Parliament.

163. In light of the long-term physical, emotional, and financial consequences of family violence, the Law Council considers that family violence factors—which can be expanded to include economic and financial abuse—are best dealt with by being treated as a matter in what are the current subsection 75(2) factors in the Act. These are the "current and future circumstances" provisions of the Exposure Draft (proposed subsections 79(5) and 90SM(5)). While this path would be subject to far less challenge, given the manner in which current and future circumstances are traditionally dealt with, such approach would likely still not be immune from some of the issues referred to above.

Question 8: Do you agree with the proposed amendments to establish new contributions factors for wastage and debt?

164. The Law Council is concerned about the proposed amendments to establish new contributions factors for wastage and debt. Feedback received from the Family Law Section and the majority of its Constituent Bodies is that the amendments will introduce an undesirable and impracticable approach that is inconsistent with the common law and the current process of the court.

Wastage

165. The proposed contributions factor of the effect of wastage is intended to codify the current approach set out by Justice Baker in *Kowaliw & Kowaliw*, namely:[87]

> *As a statement of general principle. I am firmly of the view that financial loss incurred by the parties in the course of the marriage ... should be shared by them (although not necessarily equally) except in the following circumstances:*
>
> *(a) where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets; or*

[87] *Kowaliw* (1981) FLC 91-092, 76,644 (***"Kowaliw"***).

(b) where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value.

166. The High Court has not delivered a judgment confirming that wastage, or notional property, are relevant to the section 79 exercise. However, in *Chang v Su*, the High Court dismissed an application for special leave to appeal against a decision where the husband was left with only notional property being the overseas property he had failed to disclose.[88] It therefore appears that notional property is considered relevant to the section 79 exercise.

167. Currently, wastage—which, if accepted, may result in the add-back of "notional property" as a dollar figure or a percentage adjustment—is usually considered under existing paragraphs 75(2)(o) or 90SF(3)(r) of the Act, relating to spousal maintenance. The Exposure Draft proposes that wastage will, instead, be a contributions factor.

168. In cases such as *Trevi & Trevi*, the Full Court of the Family Court said that add-backs were "the exception rather than the rule".[89] Yet, the proposed amendments will make it more difficult for the courts to limit claims of wastage when the Act expressly allows them to be considered as a contributions factor, even where the nexus between the wastage and the contribution may be minor ("the effect").

169. The Law Council acknowledges that, should the proposed amendments become law, many wastage claims may not be successful. Nonetheless, proposed paragraph 79(4)(cc) does not provide any guidance as to the prospect of success in such circumstances. These claims—even if ultimately unsuccessful—will burden the court system. It follows that, if the Act itself does not provide more direction to parties, the proposed amendments are likely to lead to a significant increase in unmeritorious claims and allegations of fault, thereby increasing court delays, legal costs and conflict between parties.

170. The Law Council understands that the most common add-back of notional property that is permitted is the use of parties' funds on legal costs. This is not provided as an example of wastage in the Consultation Paper, but will presumably still be allowed under paragraph 79(4)(cc), so that the parties still bear their own costs as currently required by subsection 117(1). This is usually a simple calculation, to be made in dollar terms. However, as stated above, contributions are usually assessed in percentage terms.

171. In practice, it may be challenging to assess some wastage in dollar terms, and other wastage in percentage terms, or for wastage to be considered as a factor under the existing paragraphs 75(2)(o) and 90SF(3)(r) and also as a contributions factor. The Family Law Section considers that this proposed change will arguably broaden the court's discretion when dealing with wastage but also complicate the process. The generality of the Exposure Draft, in this respect, may lead to potentially confusing, or inconsistent, decisions.

Position

172. A range of views have been received in response to Question 8, particularly in relation to wastage:

[88] [2002] HCA Trans FLC 93-117.
[89] (2018) FLC 93-858 [28].

- The NSW Law Society does not object to the proposed amendments regarding establishing a separate contributions factor for wastage, noting the amendments will relieve the party alleging wastage of the burden of providing the particular circumstances set out in *Kowaliw*.
- Other Constituent Bodies, including the QLS and NSW Bar, consider that the amendments are unnecessary and will promote uncertainty. They recommend that proposed paragraphs 79(4)(cc) and 90SM(4)(cc) be removed from the Exposure Draft.
- The SA Bar considers that while it is commendable that the Exposure Draft seeks to provide an easy list of considerations in the Act, there is a concern that referring to wastage will invite an undue focus on allegations of what was appropriate discretionary spending during the relationship.
- The ACT Law Society considers it may be more appropriate to require broad consideration of conduct, or contributions, by a party that have had an overall negative net effect on the property of the relationship, or that have decreased the relationship property pool.

173. On balance, the Law Council supports the codification of the wastage principle in the Act, but recommends that this be done by incorporating the *Kowaliw* test into subsection 79(4) to clarify the nexus between the conduct, and the effect, of that conduct. This would mean that the proposed paragraph 79(4)(cc) would be worded as:

> *the effect of any wastage, by a party to the marriage, of property or financial resources of either of the parties to the marriage or both of them where:*
>
> > *(i) one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of the property or financial resources; or*
> >
> > *(ii) one of the parties has acted recklessly, negligently or wantonly with property or financial resources, the overall effect of which has reduced or minimised their value.*

This view is supported by the Family Law Section and the LIV, who note that this approach would provide increased certainty and predictability for parties in the family law system, while appropriately limiting the scope of the amendment to the ruling in *Kowaliw*. The NSW Bar has also expressed support for this approach, as an alternative to paragraphs 79(4)(cc) and 90SM(4)(cc) being deleted altogether.

<u>Debt</u>

174. In relation to the proposed contributions factor concerning the parties' debts (paragraphs 79(4)(cd) and 90SM(4)(cd)), the Law Council refers to the discussion above, regarding the absence of definitions of "debts" and "liabilities" in the Act, and the lack of clarity of the distinction between these terms, despite them both being used in the Act. The Law Council recommends that the terms be defined and the use of each term in the Act be considered carefully.

175. While the NSW Law Society does not object to the introduction of a new contributions factor for debt, the Family Law Section and other Constituent Bodies are not supportive. For example, the NSW Bar argues that this factor is unnecessary, given that an assessment of the parties' respective assets and liabilities occurs as part of the overall assessment of the pool of assets and liabilities

of the parties, as set out in proposed paragraphs 79(2)(a) and 90SM(2)(a). Relatedly, the QLS argues it should not be the court's role to conduct a microscopic examination of every expenditure and occurrence of debt that took place during the relationship, or post-separation.

176. On balance, the Law Council considers that debts, and their impact on section 79, are currently a subsection 79(1) question, rather than a contributions factor, and should remain so. The Law Council therefore recommends that paragraphs 79(4)(cd) and 90SM(4)(cd) be deleted from the Exposure Draft.

177. Debts should be identified when determining the property available to be altered between the parties (proposed paragraph 79(2)(a)). In *Prince & Prince*, Evatt CJ said (footnotes omitted):[90]

> *…the outcome of the wife's application will depend upon findings made by the Court as to the parties' assets and liabilities, their contributions and their respective financial resources, means and needs. It would be necessary for the Court to determine so far as is possible the value of the property held by each party. In accordance with the usual practice this would be done by deducting the value of outstanding mortgages, debts, and other liabilities …The Court may have to determine, as between the parties, the existence of a particular liability…*

178. The Law Council observes that the court already has a discretion as to whether to deal with debts as:

- reducing the net property of the parties available for adjustment between them; or
- to leave it for the party in whose name the debt is solely liable for that debt; or
- re-allocate liability for the debt under Pt VIIIAA.

179. Current paragraphs 75(2)(ha) and 90SF(3)(i) (proposed paragraphs 79(5)(k) and 90SM(5)(k)) requires the consideration of debts in a "shopping list" of factors, that are relevant to the determination of a property settlement, so far as they are relevant, by virtue of paragraph 79(4)(e). The current paragraph 75(2)(ha) (subparagraph 90SF(3)(i)) states that the court shall take into account:

> *The effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant.*

180. The proposed amendment that debts incurred by either of the parties, or both of them, can be considered as a "negative" financial contribution to the property pool (as explained in the Consultation Paper) is intended to be consistent with current case law. However, the case law is clear that "negative" financial contributions are not recognised under the Act.[91]

181. The Family Law Section has observed the likelihood that existing paragraphs 75(2)(ha) and 90SF(3)(i) will overlap with the proposed paragraphs 79(4)(cd) and 90SM(4)(cd). However, there is no clarity as to what this change will mean in practice. Debts (or liabilities) can, and should, be taken into account in the identification of "the existing legal and equitable rights and interests, and liabilities in respect of" the parties to property (proposed paragraphs s 79(2)(a)

[90] *Prince & Prince* (1984) FLC 91-501, 79,075 (Evatt CJ).
[91] See, eg, *Kennon*; *Watson & Ling* (2013) FLC 93-257, [33] (Murphy J).

and 90SM(4)(a)). As a result, debts may be relevant to a consideration of the first three principles in proposed subsections 79(2) and 90SM(2).

182. It seems possible—but not ideal—that debts (and possibly the same debts) could be considered three times. For example, a loan may have been incurred by a party to purchase speculative shares that have reduced in value, or a tax debt incurred by one party failing to lodge tax returns. That loan, or tax debt, might be considered:

- when identifying the existing legal and equitable rights and interests, and liabilities of the parties—whether it reduces the net property available for alteration, or the party who incurred it remains solely liable for it;
- in the assessment of contributions—the other party may argue that even if the loan or tax debt is in the balance sheet, it should be taken into account as a contributions factor in their favour, and against the party who incurred it; and
- in the assessment of the parties' current and future considerations, if one party is solely liable for the loan or tax debt, they can argue for an adjustment in their favour, so as to give them sufficient property that the creditor can recover the debt.

183. The Law Council is concerned that the introduction of a provision to consider debts in the assessment of contributions is not consistent with existing case law. There is no limitation on the new factor in the wording of paragraphs 79(4)(cd) and 90SM(4)(cd), and the breadth of the drafting is likely to lead to the court being required to examine, in detail, all debts incurred by the parties, during the relationship and post-separation (even if they have been repaid) if a party requests it.

184. Whether debts were properly incurred are considered, where relevant, under the existing law, through the assessment of the property to be divided between the parties pursuant to paragraphs 75(2)(ha) and s 75(2)(o), what orders to be made which are just and equitable, as well as Part VIIIAA of the Act.

185. The Family Law Section, QLS and the SA Bar have identified that proposed paragraphs 79(4)(cd) and 90SM(4)(cd) will likely result in allegations of misconduct by parties, seeking to apportion blame for spending money in a particular way, although it may have been perfectly acceptable during the course of an intact relationship. Such apportioning of blame for the incurring of various expenses and debts will distract the parties, and the court, from the holistic assessment of contributions which is required. It will also increase the length of litigation and legal costs.

186. In light of the challenges identified above, the Law Council considers that debts should not form part of the contributions assessment, so as to avoid or, at least, reduce the potential for overlap and reduce confusion. The degree to which a party should be liable to pay a particular debt can be fully considered in the identification of the legal and equitable interests of the parties in proposed subsections 79(2) and 90SM(2). Additionally, the assessment of the parties' current and future considerations provides a further opportunity to consider liability for a debt, should further consideration be needed.

Debts and trustees in bankruptcy

187. If amendments are being sought to the current and future considerations in the Act, the Law Council suggests a further amendment should be progressed, to cover debts recoverable by trustees in bankruptcy.

188. The current paragraph 75(2)(ha) was initially read by the courts so as to include the term "trustee in bankruptcy" within the term "creditors".[92] However, other parts of the Act expressly refer to "creditors" and "trustees in bankruptcy" separately. For example:

- The rights of trustees and creditors to intervene in section 79 proceedings are dealt with in separate provisions: subsections 79(10) and 79(11) respectively.
- Section 79A entitles both the trustee in bankruptcy, and the creditors, to apply to set aside section 79 property settlement orders in certain circumstances under subsections 79A(4), (5) and s 79A(6).
- Justice Rees in *Official Trustee in Bankruptcy & Galanis* said that section 79A proceedings could be between the parties to the agreement and either a creditor of one of those parties, or "a government body acting in the interests of a creditor", but not a trustee in bankruptcy.[93] This decision was upheld by the Full Court of the Family Court.[94]

189. The omission of a consideration of the claims for recovery of debts by trustees in bankruptcy appears to have been an oversight, from when the *Family Law Amendment Act 2005* (Cth) was introduced. As such, the Law Council supports the inclusion of a new subsection 79(5) factor with the following proposed wording:

> *The effect of any proposed order on the ability of a trustee in bankruptcy of a party to recover a debt of a party, so far as that effect is relevant.*

Additional comments on Part 1

Accessibility of the legislation

190. The Law Council acknowledges the focus of the ALRC Report and the Exposure Draft on simplifying the Act and making it more accessible for parties, including self-represented litigants.

191. Lawyers, clients, and self-represented litigants would benefit from clear guidelines for dealing with property matters in family law, which are often dealt with in a highly complex and emotional time for the parties.

192. To improve accessibility, the Law Council suggests that reforms to section 79 of the Act should be accompanied by the inclusion of flowcharts in the statute to demonstrate the decision-making processes they entail. Such flow charts could be similar to those used in other legislation, such as the uniform *Evidence Acts* or *Bail Act 2013* (NSW),[95] to illustrate complex statutory decision-making processes that involve multiple considerations and weighing of factors.

193. Regardless of what form the changes to section 79 ultimately take, the Law Council considers that including flowcharts in the Act may simplify, and better illustrate, the steps and sequences involved in the relevant decision-making process for court users, legal representatives and judges alike.

194. Relatedly, the Law Council notes that the amendments do not adjust the numbering of the subsections in section 79 to remedy the absence of subsection 79(3). Noting

[92] See, eg, *Trustee Of The Property Of G Lemnos, A Bankrupt & Lemnos And Anor* (2009) FLC 93-394.
[93] [2014] FamCA 832.
[94] *Official Trustee in Bankruptcy & Galanis* (2017) FLC 93-760.
[95] See, eg, *Evidence Act 1995* (Cth) Ch 3; *Bail Act 2013* (NSW) s 16.

there is an intention to re-order non-sequential provisions, and amend numbering, in Part VII of the Act, the Law Council recommends addressing this absence.

Current and future circumstances factors

Removal of cross-referencing

195. The proposed reforms remove the current cross-referencing between the spousal maintenance provisions and the property settlement provisions of the Act so that each type of claim has its own separate part in the Act. This is given effect by replicating subsection 75(2) (subsection 90SF(3)) in new subsection 79(5) (subsection 90SM(5)).

196. These changes are in accordance with the first part of Recommendation 18 of the ALRC Report, that the Act should be amended so that the spousal maintenance provisions, and provisions relating to the division of property, are dealt with separately under the legislation.[96] The Law Council supported this change in its submissions to the ALRC during its inquiry.[97]

197. The Law Council supports re-naming the current subsection 75(2) and 90SF(3) "future needs" factors into a title that can be more readily understood and reflect their full effect, namely, "current and future considerations".

198. However, the Law Council observes that the Exposure Draft includes the largely slavish copying of current subsection 75(2)—the list of factors to be considered in applications for spousal maintenance—into proposed subsections 79(5) and 90SM(5), to be considered in the determination of property settlement applications. This wholesale copying of factors appears to have occurred without sufficient regard to their relevance to the property settlement process. As a result, several of the proposed factors in the Exposure Draft sit less easily with the section 79 process than they do in the maintenance process, and there is overlap with the existing and proposed contributions factors.

199. On balance, the Law Council does not propose major deletions to subsections 79(5) and 90SM(5), as doing so may cause unintended consequences. However, the deletion of paragraphs 79(5)(p) and s 90SM(5)(p) is supported, as the case law is clear that, when making a property settlement order, the court does not take into account a proposed maintenance order.[98] Whether or not there will be an ongoing maintenance order is only considered after the court has determined what property settlement order is appropriate. The Law Council does not support a change in this approach, noting that it may reduce the property entitlements of primary carers.

200. The Law Council's recommended removal of paragraphs 79(5)(p) and 90SM(5)(p) from the Exposure Draft will ensure that maintenance orders will not impact the property entitlements of a recipient or payer. Should these paragraphs remain, they would render the making of maintenance and property orders a circular argument rather than a straight line.

201. In addition, the Law Council suggests clarification of the impact of the subsection 79(5) factors on the outcome of the proceedings. As drafted, this impact is not

[96] ALRC, Family Law for the Future: An Inquiry into the Family Law System (ALRC Report 135, 2019) 236.
[97] See Law Council of Australia, Review of the Family Law System – Issues Paper 48 (Submission to the ALRC, 7 May 2018) 11-15; Review of the Family Law System: Discussion Paper (Submission to the ALRC, 16 November 2018) 23.
[98] *Clauson & Clauson* (1995) FLC 92-595.

specified, and the Law Council is concerned that this may lead to fewer settlements, especially if the litigant is self-represented.

Drafting

202. From a drafting perspective, the Law Council is concerned about the manner in which proposed subsection 79(5) is linked to the property settlement process, as it seems to be differently linked than the subsection 79(4) factors. Whilst both are listed in similar ways in proposed subsection 79(2), the opening words of subsections 79(4) and 79(5) are different.

203. The opening words of the proposed subsection 79(5) are:

> *For the purposes of paragraph (2)(c) …*

204. By contrast, the opening words of subsection 79(4) would remain unchanged as:

> *In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account …*

205. There appears to be no obvious reason for the different wording in these two subsections. This distinction could also have unintended consequences. As a principle of statutory interpretation, words in a statute are assumed to be used consistently by drafters, and choosing to use a different word suggests an intention to change the meaning, or "sphere of operation". The Law Council cautions that courts will assume that where the legislature has used different wording in different places of an Act, that the legislature intended the two to have different meanings, otherwise equivalent language would have been used.

206. The Law Council recommends that using the same introductory words to each of subsections 79(4) and 79(5) will reduce the risk of confusion about how both provisions are considered in the section 79 process.

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

Questions 9-12:

- **Do you agree with the proposed approach to establish less adversarial trial processes for property or other non-child-related proceedings? If not, please expand on what you do not agree with and why. What would you propose instead?**
- **Do you agree with the scope of proceedings proposed to be within the meaning of 'property or other non-child-related proceedings'? If not, please expand on what you do not agree with and why. Should any specific types of proceedings under the Family Law Act be excluded?**

207. As it appears in the Exposure Draft, proposed Division 4 of Part XI of the Act introduces the less adversarial trial (**LAT**) processes for all proceedings under the Act. It adopts an inquisitional trial for all proceedings.

208. The Law Council wholeheartedly supports the principle that proceedings are to be conducted in a way that will safeguard parties to the proceedings against family violence. However, the Family Law Section and several Constituent Bodies have expressed significant concerns about the less adversarial trial approach contemplated in the Exposure Draft for property and other non-child-related proceedings. These views are set out further below. As a first step, however, the

Family Law Section has prepared the below background section for the Department's reference.

Background

209. In 2017, the House of Representatives Standing Committee on Social Policy and Legal Affairs recommended that the Act be amended to extend sections 69ZN and 69ZX, which require the court to conduct proceedings in a way which safeguards the parties against family violence in parenting matters, to apply in property division matters.[99]

210. Recommendation 20 of the ALRC Report provided that the Act be amended to extend section 69ZX (the court's general duties and powers relating to evidence) to property settlement proceedings.[100]

211. In correspondence provided to the Department on 30 July 2019, the Family Law Section did not agree with the ALRC Report's Recommendation 20 and observed that:

> *The* Family Law Amendment (Family Violence and Cross Examination of Parties) Act 2018 *(Cth) provides a Commonwealth funded scheme to ensure victims of family violence are not directly cross examined by the alleged perpetrator of that violence. The scheme applies in property proceedings as well as parenting matters and will apply to final hearings occurring after10 September 2019.*
>
> *[Section] 69ZX is part of a particular scheme in Division 12A which recognises the nature of parenting proceedings. It ought not be adopted simpliciter to financial proceedings, including ones that are intended to include tortious claims– so conceived, it is conflating the property settlement concerns with proceedings for damages and failing to recognise the different nature and consequences of each.*

212. Sections 102NA, 102NB and 102NC of the Act, dealing with cross-examination of parties where allegations of family violence are made, were inserted in the Act by the *Family Law Amendment (Family Violence and Cross Examination of Parties) Act 2018* (Cth).

Part VII, Division 12A[101]

213. Division 12A in Part VII of the Act had its origin in a consent-based pilot, the Children's Cases Programme (**CCP**) that commenced in the Sydney and Parramatta Registries on 1 March 2004.

214. The Family Court sought to develop a program that maintained the integrity of its child-focused services and mediation processes, while improving on them. The program also needed to remain within the constitutional boundaries required of a Chapter 3 Court by providing informality and flexibility of process—whilst ensuring the continuance of the requirements of fairness and objectivity—and increasing judicial control over the entirety of the trial stage of proceedings.

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[99] House of Representatives Standing Committee on Social Policy and Legal Affairs, A better family law system to support and protect those affected by Family Violence (Report, December 2017) [5.86].
[100] ALRC, Family Law for the Future: An Inquiry into the Family Law System (ALRC Report 135, 2019) 240.
[101] The following observations are extracted from the Federal Court of Australia publication, Finding a Better Way, by Margaret Harrison (April 2007).

215. The Family Court sought advice on possible issues from Dr Gavin Griffith AO KC, former Solicitor General of the Commonwealth, including on whether the proposed project was an exercise of judicial power in relation to the constitution, the *Evidence Act 1995* (Cth), the Act and the common law.

216. Dr Griffith's opinion was that, on the facts provided, the pilot scheme was constitutionally valid, and that:

- decisions would be made in accordance with the principle that the child's best interests are paramount;
- the dispensation with a large part of the rules of evidence neither of itself invalidated the exercise of judicial powers, nor was inconsistent with the broader rules of procedural and substantive fairness; and
- despite its different procedural aspects, the pilot would not change the Judge's substantive powers.

217. However, in relation to the contemporaneous management of property matters under the umbrella of the CCP, Dr Griffith advised caution, given that it was the special nature of children's proceedings that provided the historical context for, and also the legal acceptance of, a less adversarial approach. The critical difficulty with cases heard pursuant to the traditional rules of evidence was that their technical nature frequently obscured the matters that were very relevant to the best interests of the children.

218. Dr Griffith concluded that the less adversarial procedures did not compromise issues of fairness, provided that the usual requirements were maintained. These requirements were that:

- the determinations are made impartially, on the basis of all the relevant material, which the parties were able to put before the Judge without any prejudgment; and
- the parties were given an adequate opportunity to be heard.

219. Dr Griffith's opinion also referred to the similarity in nature and effect between the principle that the children's best interests are paramount, and the ancient protective *parens patriae* jurisdiction that the Family Court acquired, as a result of amendments to the Act in 1983, in the form of the welfare jurisdiction.

220. In July 2004, the Prime Minister announced his support for the continuance of the CCP. Division 12A was inserted in the Act in July 2006, mandating the less adversarial trial (**LAT**) procedures and empowering the Court to convert what had been, at most, a hybrid legal system in children's matters into an active process. The LAT procedures became mandatory in all registries for Part VII proceedings. They could also apply to matters commenced under section 79 in applications filed on or after 1 July 2006, provided that the parties to the proceedings consented.

221. One of the key characteristics of the LAT is the power given to the presiding judge to determine how the hearing is conducted, including what evidence is to be provided, and how it is to be treated. Rather than receiving the evidence considered relevant by the parties, and then weighing its relevance in value, the judge plays an active role in determining—from the start of the trial—what is required.

222. The CCP was subsequently evaluated by two external professionals. One evaluation was qualitative and the other was quantitative and they were both supportive of the process. One significant outcome of the qualitative evaluation was

that the dominant experience of parents who participated in the mainstream court process was, in some respects, significantly different, from parents who participated in the CCP. Participation in the mainstream court process further antagonised an already damaged co-parental relationship, thereby exacerbating the conflict.

Case management and conduct of proceedings

223. A variety of provisions in the legislation, the rules of court, and case management directions contain requirements and guidance relating to case management and conduct of proceedings.

224. For example, Part 6 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (**FCFCOA Act**) contains provisions that deal with the Conduct of Proceedings (sections 64 to 66) and Case Management (sections 67 to 69).

225. Subsection 67(1) of the FCFCOA Act provides that:

> *The overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes:*
>
> *(a) according to law; and*
>
> *(b) as quickly, inexpensively and efficiently as possible.*

226. Subsection 67(4) of the FCFCOA Act provides:

> *The family law practice and procedure provisions are the following, so far as they apply in relation to civil proceedings:*
>
> *(a) the Rules of Court;*
>
> *(b) any other provision made by or under this Act, or any other Act, with respect to the practice and procedure of the Federal Circuit and Family Court of Australia (Division 1).*

227. Other key sections of the FCFCOA Act provide that:

- the parties to civil proceedings in Division 1 must conduct the proceedings in a way that is consistent with the overarching purpose (subsection 68(1));
- a parties' lawyer must, in the conduct of proceedings before Division 1, on the parties' behalf take account of the duty imposed on the party and assist the party to comply with the duty (subsection 68(2));
- Division 1 or a judge may give directions about the practice and procedure to be followed in relation to a proceeding, or any part of a proceeding, before the Court (subsection 69(1)).

228. Subsection 69(2) of the FCFCOA Act provides that directions may:

> *(b) require things to be done; or*
>
> *(c) set time limits for the doing of anything or the completion of any part of the proceeding; or*
>
> *(d) limit the number of witnesses who may be called to give evidence or the number of documents that may be tendered in evidence; or*
>
> *(e) provide for submissions to be made in writing; or*

(f) limit the length of submissions whether written or oral; or

(g) waive or vary any provision of the rules in their application to the proceeding; or

(h) revoke or vary an earlier direction.

229. Further, rule 1.04 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) (**the Rules**) provides that the overarching purpose of the Rules, as provided by section 67 of the FCFCOA Act, is to facilitate the just resolution of disputes according to law and as quickly, inexpensively, and efficiently as possible.

230. Rule 1.06 provides that the court may exercise any of the powers referred to in Table 1.1[102] to manage a proceeding to achieve the overarching purpose of the Rules. The Court has specified powers as to attendance, case development and conduct of proceedings.

231. In addition, there are currently 22 Family Law Practice Directions.[103]

Position

232. The proposed Division 4 introduces the LAT case management and trial procedures currently in Part VII, Division 12A, for any proceeding under the Act that is not child related. As a starting point, the Law Council maintains its position, as previously expressed to the ALRC, that judicial fact-finding is a critical process that must be approached with care, particularly in relation to non-child-related proceedings.[104]

233. The Family Law Section opposes the introduction of the proposed Division 4 of Pt XI, as does the ACT Law Society, SA Bar, SA Law Society, and NSW Bar. They argue that while the need to safeguard parties to proceedings against family violence is critical, the adoption of an inquisitional trial will not achieve that, and is unnecessary. The Law Council has received the following feedback in this respect:

- While it is critical that proceedings are conducted in such a way to safeguard parties against family violence, the proposed amendments, particularly section 102NK, are unnecessary.
  - Paragraph 43(1)(ca) of the Act provides that a court exercising jurisdiction under the Act must have regard to "the need to ensure protection from family violence".
  - The *Family Law Amendment (Family Violence and Cross Examination of Parties) Act 2018* (Cth) has been implemented to all litigation, as from September 2019. The consequence of this legislation is that in every case which is listed for final hearing, an enquiry is made if there has been any family violence, which may give rise to the prevention of a party directly cross examining, in person, the victim-survivor of family violence.

[102] *Federal Circuit and Family Court of Australia Rules 2021* (Cth) 15-16.
[103] See Federal Circuit and Family Court of Australia, Resources: Practice Directions (Web Page, 2023).
[104] Law Council of Australia, Review of the Family Law System – Issues Paper 48 (Submission to the ALRC, 7 May 2018) [234]; Review of the Family Law System: Discussion Paper (Submission to the ALRC, 16 November 2018) 45..

- Since 1 September 2021, all FCFCOA litigation is subject to the terms of the Central Practical Direction. One of the core principles under this Direction is risk, which includes:

  > *The prioritisation of the safety of children, vulnerable parties and litigants, as well as the early and ongoing identification and appropriate handling of issues of risks, including through risk screening, such as allegations of family violence, as essential elements of all case management.*[105]

- The foundation for a LAT in a Part VII child-related proceeding is well established. Child-related proceedings are concerned with the (best) interests of the children and not the interests of the parents, even though the parents are the parties to the proceedings. However, the same reasoning does not apply to proceedings that are not child related and, specifically, Pt VIII and Pt VIIIAB proceedings.
  - The LAT process in parenting proceedings has demonstrated the utility of enabling the court, where appropriate, to interact less formally with the parties, as a way of reducing conflict between them, and to ensure that children can participate directly in the proceedings. This assists the court to focus the parties on the best interests of children.
  - Financial matters differ significantly from parenting proceedings. Considering the type and complexity of evidence adduced in financial proceedings (involving, for instance, equity, trusts, corporate structures, inheritances, compensation payments and other complex financial circumstances), the courts and parties are well served by the application the rules of evidence.
  - Non-child-related proceedings are inherently adversarial in nature, not being subject to the paramount consideration of the best interests of children.
- The proposed Division 4 goes beyond addressing a need to safeguard parties to the proceedings against family violence. Other mechanisms currently exist to safeguard parties from family violence. In light of this, the value of LAT processes should be evaluated, with consideration given to the importance of consent.

234. Irrespective of whether there are reasons for further statutory amendments to safeguard parties to proceedings against family violence, the Family Law Section also does not support expansion of the case management and trial management powers in subsection 69(2) of the FCFCOA Act and the Rules by the inclusion of the additional powers enumerated in proposed sections 102NG and 102NL.

235. The justification for the inclusion of the additional powers is to support the inquisitional trial, which is strongly opposed by the Family Law Section and several Constituent Bodies. Any necessary procedural issues should be dealt with in the relevant rules of court and case management directions and not in the Act. Further, issues may arise as to the constitutional boundaries required of a Chapter 3 Court for what would be an inquisitorial trial.

[105] Federal Circuit and Family Court of Australia, Family Law Case Management: Central Practice Direction (2021) [3.2].

236. The Law Council acknowledges that two Constituent Bodies, the LIV and QLS, do not oppose the proposed insertion of Division 4. They generally consider that the amendments reasonably appear to be mostly aimed at providing judges with greater discretion to determine how to run non-child proceedings. These Constituent Bodies also consider it sensible, as the Consultation Paper suggests, that the broadness of Division 4 is designed to capture types of proceedings that might not be sufficiently related to the breakdown of a marriage or a de facto financial cause (i.e., proceedings relating to contempt, vexatious litigants, or alleged breaches of current section 121 of the Act).[106]

237. As a general principle, the NSW Law Society does not object to making a less formal process available in non-child-related proceedings. However, the NSW Law Society considers that in such proceedings, there should be a presumption that the rules of evidence apply, given that these matters routinely consider complex evidence (i.e., involving valuations or trusts) that warrant the application of the rules of evidence. The NSW Law Society accordingly suggests that there should be a judicial discretion, not limited to exceptional circumstances, to direct that some, or all, of the rules of evidence do not apply.

238. This is a complex area with a variety of considerations. On one hand, inconsistency in terms of whether the Evidence Act applies, depending on if the proceedings relate to property or parenting matters, may lead to uncertainty and confusion for parties and the legal profession, especially where allegations of family violence are raised. There is a clear need to ensure predictability for litigants and practitioners navigating the family law system. It is also important that victim-survivors of family violence feel empowered, and supported, to participate in family law proceedings.

239. On the other hand, there are strongly held views (including by the Family Law Section) that the LAT processes, as proposed, are neither appropriate, nor necessary, for property or other non-child-related proceedings, given the necessarily adversarial nature of such matters. The rules of evidence, as prescribed by the Evidence Act, provide an important framework to judicial officers and litigants as to what evidence will be considered admissible, and why. In addition to legislative safeguards, the courts have considerable experience in taking steps to ensure that proceedings are to be conducted in a way that safeguards parties to proceedings against family violence.

240. Underscoring both perspectives is the incontrovertible need to ensure that there are robust safeguards for victim-survivors of family violence in the course of family law proceedings. It is not clear whether the LAT approach will assist in this respect. The Law Council is also concerned about the additional risks which may arise, given that these changes are proposed at the same time as it is proposed to introduce substantial changes to the section 79 process and the consideration of family violence in property matters. At a minimum, the Law Council suggests that proposed Division 4, as currently drafted, be reconsidered.

241. Regardless of whether Division 4 remains in the Exposure Draft, the Law Council emphasises that there is a critical need for greater, and more equitable, access to legal representation for victim-survivors of family violence in family law proceedings, especially property proceedings.

[106] Attorney-General's Department, Family Law Amendment Bill (No. 2) 2023 (Consultation Paper, September 2023) 19.

Part 3: Duty of disclosure and arbitration

Establish the disclosure requirements for people with financial matters

242. The Exposure Draft proposes amendments to establish a duty of disclosure in the Act, noting that the duty of disclosure is currently located only in the Rules, not in primary legislation.

243. The proposed duty under the Act would apply to separated parties who have "financial or property matters", which are defined widely in the proposed subsection 71B(7) for married couples (and subsection 90ROI(7) for de facto couples).

244. The purpose of the change is to make the disclosure obligations more prominent and visible to parties, legal practitioners and other advisers, and to facilitate early disclosure. This change is consistent with the first part of Recommendation 25 of the ALRC Report that the Act "be amended to clearly set out the disclosure obligation of the parties and the consequences for breach of those obligations".[107]

Questions 13-15:

- **Do the amendments achieve a desirable balance between what is provided for in the Family Law Act and the Family Law Rules? If not, please expand on what changes you would propose and why.**
- **Do the definitions of 'property and financial matters' in proposed subsections 71B(7) and 90RI(7) capture all matters when financial information and documents should be disclosed? If not, what should be changed and why?**

245. The Law Council and its Family Law Section supported this change in correspondence to the Department on 30 July 2019, following the release of the ALRC Report. The Law Council continues to support enshrining the duty of disclosure in primary legislation, to reflect the importance of this duty, and the significance of non-compliance.

246. Constituent Bodies have expressed the view that these amendments achieve a desirable balance, particularly when read in conjunction with the Rules. They note that full and frank disclosure can be expected to support the early resolution of property disputes.

247. Nonetheless, the Family Law Section and Constituent Bodies consider there to be potential scope for clarification and improvement in the proposed amendments to establish a duty of disclosure in the Act, as outlined below. Key concerns relate to the lack of harmonisation of the terminology and disclosure obligations in the Act and the Rules (including Schedule 1 to the Rules, relating to Pre-Action Procedures).

248. The Law Council notes that in other jurisdictions, such as the Federal Court of Australia and the Supreme Courts of New South Wales and Victoria, the details relating to the disclosure obligations are not included in the legislation, but only in the Rules. The disadvantages of including the details in the primary legislation include the risk of inconsistency, as well as inability to give effect to necessary changes as efficiently and flexibly as may be required, given the pace that technology changes.

[107] ALRC, Family Law for the Future: An Inquiry into the Family Law System (ALRC Report 135, 2019) [8.132]-[8.141].

249. More broadly, the Family Law Section would support this duty of disclosure being legislated in respect of all applications and proceedings under the Act—both property and parenting — provided that there is a carve-out for respondents in contravention and contempt proceedings. The Family Law Section is of the view that whilst the proposal to legislate a duty of disclosure for property and financial matters is commendable, the unintended consequence may be to diminish the duty of disclosure as it also applies to parenting proceedings. If that provision is to remain, thought should be given to whether the duty of disclosure, as it applies to all proceedings, should be enshrined in the Act.

Consequences of breach

250. The Law Council observes that the second part of ALRC Recommendation 25 has not been adopted in the Exposure Draft, as the consequences for a breach of the duty of disclosure have not been set out. While some of the consequences are referred to in notes to the proposed subsections 71B(2), 90RI(2) and 90YJA(2), the consequences themselves are not explicitly provided for in the Exposure Draft.

251. The Law Council does not disagree with this approach. As a general principle, great care should be taken in seeking to legislate the consequences of breaching this duty. It is critical to ensure that the drafting does not have the unintended consequence of narrowing the broad-ranging, discretionary consequences that the FCFCOA may currently impose for breaching this obligation of disclosure.

252. The notes within the Exposure Draft do not comprehensively cover the consequences of breaches of the duty of disclosure, and do not purport to do so. The Law Council observes that important consequences, that are not referred to in the notes, include the following:

- Property settlement orders may be set aside under paragraphs 79A(1)(a) or s 79N(1)(a);
- A party may not be able to rely upon a document at a hearing or trial without the other party's consent or the court's permission (Rule 6.17(1)(i));
- A party may be ordered to pay costs (Rule 6.17(1)(ii));
- Findings may be made against a party who has not abided by their duty of disclosure. The Full Court of the Family Court said in *Weir & Weir* that "the court should not be unduly cautious about making findings in favour of the innocent party" in such circumstances.[108]

253. The Law Council recommends that express advice should be sought from the Office of Parliamentary Counsel, if this has not already occurred, as to whether seeking to set out consequences for breach in legislation—even in note form—may have the effect of limiting the existing remedies available.

254. The Law Council would not support any drafting that either expressly, or inadvertently, had the effect of narrowing the consequences of breaching the duty of disclosure. Rather than adding further drafting notes, the Law Council suggests the notes be omitted, and the extrinsic materials make clear that the courts will continue to have access to the existing broad range of consequences for a breach of disclosure requirements.

[108] (1993) FLC 92-338, [33] ("***Weir***").

Imposing obligations on Family Dispute Resolution Practitioners

255. The proposed amendments also aim to ensure that parties are advised of their duties of disclosure at an early stage, by placing an obligation on Family Dispute Resolution Practitioners (**FDRPs**)—who are often not legal practitioners—and legal practitioners to explain legal obligations to parties (proposed subsections 71B(1) and s 90RI(1)).

256. The Family Law Section considers that this requirement does not seem fair to FDRPs, nor compliant with State and Territory laws prohibiting non-lawyers from giving legal advice, such as section 10 of the *Legal Profession Uniform Law* (NSW). While there are exemptions from the prohibition on engaging in legal practice in, for example, section 10 of the *Legal Profession Uniform General Rules 2015* (NSW), these do not extend to FDRPs.

257. A further problem with placing the obligation on FDRPs and legal practitioners is the obligation to advise of the consequences of a breach. As noted in the above section, the Law Council does not support the inclusion of notes in the Act setting out some of the consequences of a breach. In any event, this is not comprehensively done, and it is not possible, nor desirable, for the consequences of breaches to be set out comprehensively in the part of the legislation setting out the duty of disclosure, given that:

- there is the potential for overlap with other parts of the Act;
- some of the consequences are better set out in the Rules; and
- there is likely to be difficulty in codifying the principle in *Weir.*[109]

258. Instead, the Family Law Section suggests that the consequences of a breach could be explained in a brochure to be provided to the parties by legal practitioners and the court. In the circumstances, the legislated obligation should be on FDRPs and legal practitioners to provide "information" rather than "advice" to parties. Their role, in this respect, would be one of facilitative encouragement in ensuring parties understand the information in the brochure.

259. The Family Law Section and the LIV recommends that FDRPs and legal practitioners should be required to provide a court-issued brochure to parties, explaining the duty of disclosure in clear and simple language. This approach would be similar to the existing obligation created by Part III of the Act to provide a brochure entitled "*Marriage, Families and Separation*". The court should provide copies of the new prescribed brochure on its website and direct parties who are filing applications to the brochure. This guidance material would also ensure that the correct and consistent information is provided, and would particularly assist to support self-represented litigants in navigating their disclosure obligations.

Commencement of the duty

260. A further difficulty with the proposed amendments in the Exposure Draft is the lack of certainty as to when the duty commences. Concerns about this ambiguity have been raised by the Family Law Section, the ACT Law Society and the LIV.

261. The proposed duty of disclosure under the Act in financial and property matters will apply to married parties:

[109] Ibid.

- from the start of the proceeding, and continue until the proceeding is finalised (proposed subsection 71B(1), or subsection 90RI(1) for de facto couples);
- when the parties are "preparing to commence proceedings" (proposed s 71B(5)) (s 90RI(5) for de facto couples).

262. This contrasts with the wording used in the Rules, and with the temporal requirements for disclosure obligations more generally in other jurisdictions.

- Currently, the Pre-Action Procedures, which are in Schedule 1 to the Rules, require parties to give disclosure before starting a proceeding.[110]
- The Pre-Action Procedures seem to apply in similar circumstances to proposed subsection 71B(3) in the Exposure Draft.
- Rule 4.01 provides that "…before starting a proceeding, each prospective party to the proceedings must comply with the pre-action procedures".
- Item 4(2) of Part 1 of Schedule 1 to the Rules imposes pre-action disclosure obligations on prospective parties to financial proceedings and, in item 6(1)(b) of Part 1 of Schedule 1, on their legal representatives. Similar obligations are imposed in relation to parenting proceedings in Part 2 of Schedule 1 of the Rules.
- The general duty of disclosure in rule 6.01, the duty of disclosure of documents in rule 6.03, the duty of disclosure in parenting proceedings in rule 6.05 and the duty of disclosure in financial proceedings in rule 6.06 only apply after proceedings have commenced. This is confirmed in item 4(1) of the Pre-Action Procedures in Schedule 1 to the Rules.
- The Rules themselves say nothing about pre-action disclosure.
- Schedule 2 to the Rules imposes similar obligations on prospective parties to parenting proceedings.

263. Item 4(2) of Part 2 of Schedule 1 to the Rules requires compliance with specified disclosure obligations as "soon as practicable on learning of the dispute". The Law Council understands that, anecdotally, legal practitioners generally interpret the disclosure obligations in the Pre-Action Procedures (set out in Schedule 1 to the Rules) as arising from when the legal practitioner starts communicating with the other party, or their legal practitioner, with the objective of negotiating a settlement through correspondence, a private mediation, family dispute resolution or a round table conference.

264. If the proposed duty of disclosure, as it appears in the Exposure Draft, will not apply, then it seems unlikely that the current obligation in the Pre-Action Procedures can have broader application and apply to parties who are not "preparing to commence proceedings". For instance, the obligation appears unlikely to apply to parties who are negotiating, or taking part in other dispute resolution processes that are not court-based, in an endeavour to reach an agreement without the assistance of the court.

265. The Consultation Paper does not acknowledge that the proposed change may have the unintended effect of reducing compliance with the duty of disclosure under the Pre-Action Procedures if parties are not "preparing" to commence proceedings. The Consultation Paper also does not address the difficulty of who will assess (and when) that "preparations" are underway, and how this is defined.

[110] *Federal Circuit and Family Court of Australia Rules 2021* (Cth), Sch 1, Pt 1, Item 4.

266. The Law Council considers that the inconsistency between the application of the disclosure obligations, as proposed in the Exposure Draft, and the existing obligations in Schedule 1 of the Rules seems likely to confuse parties and their legal practitioners, and create separate (and new) areas of dispute.

267. The Law Council is also conscious that the scope of the proposed obligation may be challenged, in that it purports to cover parties who are "preparing for the proceeding" (subsections 71B(6) and 90RI(6)) and "matters that … might become the subject of proceedings" (paragraphs 71B(7)(b) and 90RI(7)(d)).

- In other jurisdictions, orders for preliminary discovery are required before an obligation to disclose arises.[111] The Supreme Courts of Victoria and New South Wales require parties seeking pre-trial preliminary discovery to provide an affidavit and show that there is a recognised legal ground rather than based on speculation. This helps establish the nexus of the pre-trial discovery to the jurisdiction of the court under the relevant legislation and court rules.
- The Exposure Draft does not require parties to file applications and affidavits to establish either the identity of a defendant or a ground of claim and the Law Council does not support this step. However, the omission of this requirement may lead to challenges to the law which could be avoided.
- Further, the NSW Law Society has identified that the phrase "might become the subject of proceedings" is broadly worded and may facilitate systems abuse, by enabling parties to object to the non-disclosure of a wide range of documents.

268. In addition, the proposed wording of sections 71B and 90RI requires a degree of subjective assessment by the parties, and their legal representatives, as to whether matters "might become the subject of proceedings". This is likely to lead to disputes between parties. The Family Law Section advises that this is a particularly difficult concept in relation to child support matters, as it is rare for these to come before the FCFCOA. Such matters are typically dealt with administratively by Services Australia, and court applications and appeals are usually heard by the Administrative Appeals Tribunal and the Federal Court of Australia. Child support matters may be captured the phrase, "might become the subject of proceedings", however unlikely it is for such an application to come before the FCFCOA.

269. The Law Council recommends that the words "*or might become*" be deleted from proposed paragraphs 71B(7)(d) and 90RI(7)(d) of the Exposure Draft. This deletion would reduce the likelihood of there being insufficient nexus between the disclosure obligations and the jurisdiction of the Act.

<u>Financial disclosure obligations should cover "relevant" documents</u>

270. The Law Council observes that the duty of disclosure in the Rules is expressed differently to what is proposed in the Exposure Draft. Rule 6.01 states that:

> *each party to a proceeding has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the proceeding, in a timely manner.*

271. The Law Council therefore proposes that the word "relevant" should be included in the disclosure obligation in proposed sections 71B and 90RI. For practising

[111] See, eg, *Uniform Civil Procedure Rules 2005* r 5.3; *Rinrim Pty Limited v Deutsche Australia Limited [2013]* NSWSC 1762*; The Age Company v Liu (2013)* 82 NSWLR 268; Supreme Court (General Civil Procedure) Rules 2015 (Vic) r 32.05; *Federal Court Rules 2011* (Cth) r 7.23.

solicitors, relevance is extremely important. When information is sought that is not relevant, or does not have any probative value to the determination, this causes undue delays to negotiations and increased costs. It is also important that the drafting makes clear to legal practitioners that there is no policy intention to return to the processes in place prior to March 2018, when significant changes to limit affidavit length and annexure requirements took effect in the family law jurisdiction.

272. For example, the duty of disclosure cannot apply unless the court has jurisdiction with respect to the proceeding. This obvious carve-out is expressly dealt with in rule 6.06(2), but is not included within the proposed amendments. The proposed wording appears to require that a party, who is the potential respondent to a de facto property dispute, has a duty to disclose their financial circumstances, even if the jurisdiction of the court has not yet been established.

273. In *Holden & Wolff,* the Full Court of the Family Court held that the trial judge erred in requiring the appellant to file an updated financial statement and provide financial disclosure before determining whether or not there was a de facto relationship under the jurisdiction of the Act.[112] The Law Council considers that it is not reasonable for parties to be required to produce documents related to their financial circumstances, when it may never be established that they were in a de facto relationship or when it may be found that they were in a de facto relationship over which there is no jurisdiction under the Act.

274. The Family Law Section recommends that proposed sections 71B and 90RI should be drafted to require disclosure of all documents which are “relevant” to a dispute between the parties under Parts VIII, VIIIA, VIIIAA, VIIIAB and VIIIB of the Act:

- to cover relevant documents not caught by the proposed wording, such as documents relevant to a jurisdictional dispute;
- so that in a jurisdictional dispute, financial documents are not required to be produced unless, and until, the jurisdictional dispute is resolved favourably to the applicant, save to the extent that they are relevant to the jurisdictional dispute;
- so that in a dispute about whether a financial agreement is binding under subsections 90G(1) o 90UJ(1), or should be set aside under subsections 90K(1) or 90UM(1), more limited disclosure obligations should apply;[113] and
- so that if a party is seeking leave to apply for a property settlement out of time, under subsections 44(3) or 44(6), the respondent’s duty of disclosure should be restricted to relevant documents.[114]

275. On balance, the Law Council supports disclosure obligations being included in the Act, but recommends this should be achieved by including an obligation to produce "relevant" disclosure, setting out the general disclosure obligations of parties, by replicating rules 6.01, 6.04 and the proposed subsections 71B(9) and 90RI(9). The remainder of the details ought to be covered by the Rules.

Other considerations

276. Consideration could also be given to setting out the financial documents required to be produced with specificity, as in rules 6.06(3), 6.06(8) and 6.06(9). It is

[112] (2014) FLC 93-621.
[113] *Fewster & Drake* (2016) FLC 93-745.
[114] *Atwill & Atwill* (1981) FLC 91-107.

acknowledged, however, that proposed subsections 71B(9) and 90RI(9) in the Exposure Draft refer to the obligations for disclosure under the Rules.

- The Law Council appreciates that some matters are more appropriately located in court rules, rather than primary legislation. However, if the disclosure provisions in the Act are to remain as detailed as the Exposure Draft proposes, then these details would help to complete the picture, and would be especially useful for self-represented litigants.

- As rule 6.06(3) was in the same terms in the now repealed *Family Law Rules 2004* (Cth), the likelihood of frequent change being required for that particular rule is relatively low.

277. There are other differences between the proposed disclosure obligation under the Act and the existing obligation under the Rules. For example, the Exposure Draft does not include a similar provision to rule 6.04. This rule sets out the *Harman* principle, which precludes a litigant from making collateral use of documents obtained through the court's compulsory processes.[115] This is an important, yet mostly unknown, rule for litigants to be alerted to, and the Law Council does not support its omission from the Act.

278. The ACT Law Society and QLS have suggested that, if the definitions of "property and financial matters" are to be retained, as proposed in subsections 71B(7) and 90RI(7), it would also be appropriate to include enforcement applications and proceedings in relation to financial orders and obligations pursuant to the applicable rules of the court. Disclosure may be relevant to the performance of a person's obligations to a financial or property order, especially where time has passed since the obligation arose, or disclosure was previously given.

279. The SA Bar has raised that proposed subsections 71B(8) and 90RI(8) creates some ambiguity in respect of the duty imposed to disclose documents "that are or have been" in the possession or control of the party. It is foreseeable that difficulty may arise if a party had an obligation to disclose a document that had been, but is no longer, in their possession. While the SA Bar acknowledges that the drafting mirrors rule 6.04(a), it considers that less ambiguity may be created if the drafting of subsections 71B(8) and 90RI(8) were amended, for example, to refer to the "legal right of possession".[116]

Removing the distinction between court-ordered arbitration and private arbitration

Question 16: Do the proposed provisions achieve the intention of simplifying the list of matters that may be arbitrated?

280. The Law Council recognises that with the increase in family law litigation, family law arbitration provides an obvious process to provide family law litigants with flexible, efficient and cost-effective resolution of their family law disputes. The Law Council supports amendments that provide greater clarity to family law arbitration and in so doing, better access to this dispute resolution process.

[115] *Harman v Secretary of State for the Home Department* [1983] 1AC 280; *Hearne v Street* (2008) 235 CLR 125.
[116] *B v B (Matrimonial Proceedings: Discovery* [1979] 1 AII ER 801, 805-807 (Dunn J).

281. The Exposure Draft proposes amendments to sections 10L and 13E of the Act to provide one consolidated list of matters that may be arbitrated, irrespective of whether arbitration is court ordered or privately arranged.

282. Subject to the matters set out below, primarily raised by its Family Law Section, the Law Council supports these amendments, as drafted. The distinction between the subject matter of court-ordered arbitrations and private family law arbitrations is unnecessary, and has always carried the potential to confuse family law arbitration litigants.

283. The Family Law Section considers that the proposed amendments appropriately identify the matters that can be referred to arbitration, save for two matters. The Family Law Section submits that express references in the proposed subsection 13A(1A) in the Exposure Draft should be made to the following powers:

- the costs power in current section 117 (proposed to be section 114UB); and
- the injunctive power (section 114).

284. Constituent Bodies also broadly consider that the proposed amendments appropriately identify the matters that can be referred to arbitration. However, the NSW Law Society suggests that, for completeness, the list should include section 106B proceedings (Transaction to defeat claims), given that section 106A proceedings (execution of instruments by order of court) are included.

Costs power

285. As it presently stands, it is not entirely clear in the Act—both in its current form and under the proposed amendments—whether arbitrators are able to deal with questions of costs arising in arbitrations. The Family Law Section submits that the express inclusion of the power to make awards with respect to costs pursuant to section 117 (proposed to be amended to section 114UB) will provide further clarity to parties in family law arbitration.

286. The Law Council agrees that it is appropriate for family law arbitrators to be able to deal with the question of costs, as such issues regularly arise as part of financial disputes between parties. It will be the arbitrator who is best placed to determine whether an award of costs is appropriate in the circumstances of the matter, it being the arbitrator who has determined the issues, and observed the conduct of the parties in the arbitration.

287. The inclusion of current section 117 and proposed section 114UB in the list of matters able to be arbitrated will add certainty to litigants contemplating, or participating in, family law arbitrations.

Injunctive power

288. Currently omitted from the definition of arbitration—in the Act in its current form, and in the Exposure Draft—is the power to make injunctive powers. Injunctive orders (both restrictive and mandatory) are frequently made in final property orders. For example, parties are often restrained from encumbering property, pending the sale of property. The Family Law Section is of the view that, while it is arguable that injunctive relief is a “matter arising” from a property proceeding, the reference to “order” in new subsection 13E(1) may mean that arbitrators are not empowered to make such injunctive relief.

289. Moreover, it seems appropriate to the Family Law Section that arbitrators be empowered to make awards that include:

- sole use and occupation injunctions;
- asset protection injunctions; and
- mandatory injunctions requiring parties to perform certain acts to give effect to the final property settlement.

Third party powers

290. The Family Law Section considered whether there ought to be express reference in the matters that may be arbitrated to the powers in the Act relating to third parties, in particular Part VIIIAA (orders and injunctions by binding third parties) and section 106B (transactions to defeat claims).

291. However, the Full Court of the FCFCOA (Division 1) in *Vida & Vida* recently held that the current definition of a private arbitration found in section 10L was sufficiently broad to include, in appropriate cases, the power contained in section 106B of the Act.[117] The existing section 10L is in similar terms to the proposed amended section 13E.

292. The Family Law Section has advised the Law Council that the proposed amendments would be broad enough to include issues relating to third parties. In those circumstances, the Law Council does not consider it necessary for there to be a further amendment to include specific reference to this power.

293. Should it be considered that express inclusion of the power would assist in mitigating the potential for confusion and doubt, the Law Council would support its inclusion.

Empowering a court to make orders about the conduct of arbitration on application by an arbitrator

Question 17: Do you have any concerns with the proposed arbitration amendments, including with empowering a court to terminate arbitrations when there is a change in circumstances?

294. The Law Council raises three concerns with respect to the proposed arbitration amendments, as follows:

- It is not expressly stated that arbitrations can only be terminated by Court order.
- Registration of awards remains discretionary.
- The review or appeal of awards remains unclear.

Termination

295. The Law Council supports the amendments providing that an arbitration, once referred by a court, ought only to be terminated by court order.

296. However, the Family Law Section and some Constituent Bodies have raised concerns regarding the drafting of proposed paragraph 13F(3)(b), which provides that the court may make orders to terminate the arbitration if the court is satisfied

[117] [2023] FedCFamC1A 175.

that a change in circumstances means that it is no longer appropriate for the proceedings, or matter, to be dealt with by arbitration.

297. The QLS suggests it may be necessary for the Exposure Draft to provide further detail about when an arbitration may be terminated, rather than merely a "change in circumstances", as currently drafted.

298. The Family Law Section considers that the proposed amendments are founded on an incorrect premise. The Consultation Paper states that:

> *Once a court has made an order by consent under section 13E, the parties are committed to the arbitration and one party cannot simply change their mind.*[118]

299. While the Family Law Section agrees with the underlying policy principle of binding parties to an arbitration process once consented to, this statement in the Consultation Paper is contrary to current authority.

300. The current state of the case law with respect of family law arbitrations is that it is open for family law litigants to withdraw their consent at any time, seemingly up until the moment the award has been delivered. In the decision of *Olsen & Rich,*[119] Wilson J held that where a party had consented to an order referring the matter to arbitration pursuant to section 13E of the Act, but then subsequently withdrew consent, such arbitration "would almost certainly be defective as an "arbitration" for the purposes of the Act".

301. Plainly, referral of a matter to arbitration, whether by court order or private agreement, requires the consent of all parties. This was made clear by the High Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*.[120] However, the Law Council considers that it is an untenable situation for parties to be enabled to unilaterally withdraw their consent, even after conducting an arbitration hearing. This provides no protection to the parties conducting the litigation, and no certainty that the arbitration process will ultimately be binding.

302. The NSW Law Society has raised similar concerns, and suggests extending proposed paragraph 13F(3)(b) by clarifying that one party withdrawing their consent to the arbitration is not, of itself, sufficient grounds to terminate the arbitration. Rather, that withdrawal should be considered as one factor relevant to determining whether it is appropriate to continue. The NSW Society argues that this change would confirm the position regarding the significance of a party's withdrawal, whether before or after the arbitration agreement has been executed.

303. On balance, the Law Council proposes that a new subsection (4) be inserted into section 13F, providing that:

> *(4) A family law arbitration cannot be terminated except:*
>
> *(a) with the consent of all parties in writing; or*
>
> *(b) as prescribed by the regulations; or*
>
> *(c) as ordered by the court pursuant to s 13F(3)(b).*

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[118] Attorney-General's Department, Family Law Amendment Bill (No. 2) 2023 (Consultation Paper, September 2023) 26.
[119] [2022] FedCFamC1F 324.
[120] [2013] HCA 5.

304. This amendment would provide certainty and give effect to the objects that are set out in the Consultation Paper, but are currently undermined by authorities, such as *Olsen & Rich*.

Registration of Awards

305. The proposed amendments to the arbitration provisions of the Act retain the court's discretion as to whether or not an arbitrator's award is to be registered with the court.

306. Current section 13H of the Act provides that (emphasis added):

> *(1) A party to an award made in section 13E arbitration or in relevant property or financial arbitration may register the award:*
>
> *(a) in the case of section 13E arbitration--in the court that ordered the arbitration; or*
>
> *(b) otherwise--in a court that has jurisdiction under this Act.*
>
> *(2) An award registered under subsection (1) has effect as if it were a decree made by that court.*

307. The use of the word "may" in section 13H provides the Court with a residual discretion as to register the award. The Family Court, in *Entezam & Devi*, quoted from a paper prepared by Professor Patrick Parkinson with respect to that discretion as follows:[121]

> *It follows that the most sensible interpretation of the right to "bring to the attention of the court any reason why the award should not be registered" is that a person may argue that an award should not be registered because one of the conditions precedent for legal validity have not been met. Examples might be:*
>
> *(a) the objecting party did not consent to the arbitration;*
>
> *(b) the 'arbitrator' is not qualified in accordance with the Regulations;*
>
> *(c) the arbitration purports to deal with matters that are outside of the scope of matters that may legally be arbitrated.*

308. The Family Law Section is of the view that the discretionary nature as to whether to register an award provides additional uncertainty to parties who have engaged in the family law arbitration process. This discretion undermines the streamlined and efficient process sought to be brought about through arbitration.

309. In this regard, Recommendation 27 of the ALRC Report recommended that the registration of arbitral awards be mandatory. The ALRC reported as follows:

> *In order to increase certainty around the status of an arbitral award, and clarify the circumstances in which an award may not be enforced by a court, the ALRC recommends that the opportunity to object to registration be removed. Concerns regarding the award should instead be the subject of an application to set aside (s 13K) or review (s 13J) the award. Implementation and enforcement of a contested award could be*

[121] [2021] FamCA 25.

stayed pending the outcome of the application to set aside or review the award. Consultations with the AIFLAM and the Family Law Section of the Law Council of Australia indicated strong support for this Recommendation.[122]

310. In correspondence to the Department on 30 July 2019, the Law Council and its Family Law Section supported this recommendation unreservedly. Consistent with this position, the Law Council submits that section 13H of the Act should be amended to provide that a court with jurisdiction under the Act must register an award on application by a party to a family law arbitration.

Appeals/Reviews of arbitration

311. Section 13J of the Act currently provides that a party to a registered award may apply for review of the award on questions of law. The term "questions of law" has been the subject of some judicial consideration in *Griffiths & Griffiths*.[123] At paragraph 12, the court held that "questions of law" were not synonymous with grounds of appeal. Rather, questions of law would need to be posed as questions in precise terms.

312. It is not clear whether "questions of law", as it currently appears in the Act, includes errors in the exercise of discretion, or are confined only to errors of law. If it is the latter, this would mean that the court's power to review awards of arbitrators is more limited than the court's power to review judicial officers on appeal. The Family Law Section is of the view that this is inappropriate, and provides a further barrier to parties adopting family law arbitration as a dispute resolution process. This uncertainty also means that, in practice, legal practitioners are disincentivised from recommending arbitration to their clients because arbitration does not have the same appeal rights.

313. The ALRC Report stated that:[124]

On balance, the ALRC recommends amending s 13J of the Family Law Act to provide for the same grounds of appeal from an arbitral award as for an appeal from a trial judgment. A court should also have the same powers and remedies available when reviewing an arbitral award as it does when hearing an appeal from a trial judgment.

314. The appellate jurisdiction and powers of the FCFCOA (Division 1) are found in sections 26 and 36 of the FCFCOA Act. The Family Law Section recommends that section 13J of the Act should be amended, to be consistent with the scope of the appellate jurisdiction and powers, to read as follows:

(1) A party to a registered award made in family law arbitration may appeal the award to:

(a) the Federal Circuit and Family Court of Australia (Division 2); or

(b) a single judge of the Family Court of a State.

Note: There may be Rules of Court providing for when, and how, an application for review of the award can be made (see paragraph 123(1)(sf)).

[122] ALRC, Family Law for the Future: An Inquiry into the Family Law System (ALRC Report 135, 2019) [9.29].
[123] [2022] FedCFamC1F 219.
[124] ALRC, Family Law for the Future: An Inquiry into the Family Law System (ALRC Report 135, 2019) [9.35].

(2) On an appeal of an award under this section, the judge or Federal Circuit and Family Court of Australia (Division 2) may:

(a) make such decrees as the judge or Federal Circuit and Family Court of Australia (Division 2) thinks appropriate, including a decree affirming, reversing or varying the award;

(b) set aside the award appealed from, in whole or in part, and remit the proceeding for further arbitration, subject to such directions as the judge or Federal Circuit and Family Court of Australia (Division 2) thinks fit.

315. The Law Council as advised by its Family Law Section considers that if the Government and the courts are eager to increase the uptake of arbitration in family law matters, then consideration should be given to adopting measures that will encourage and incentivise parties to engage in such processes.

Schedule 2: Children's Contact Services

Questions 18 and 19:

- **Does the definition of Children's Contact Service (proposed new section 10KB) sufficiently capture the nature of a CCS, while excluding services that should not be covered by later regulation?**
- **Does the definition of 'CCS intake procedure' effectively define screening practices for the purposes of applying confidentiality and inadmissibility protections?**

316. The Law Council supports the proper regulation of Children's Contact Services (**CCS**). The proposed amendments ensure that the court can only order families to attend an accredited CCS, which provides clarity to the court of this requirement.

317. The Law Council supports the proposed definitions of "CCS" and "CCS intake procedure" in the Exposure Draft. However, it notes that proposed subsections 10KB(1) and (2) make reference to CCS facilitating contact between a child and "a member of the child's family". As identified by the QLS, whilst such contact usually occurs between a child and a family member, there could be some instances where supervised contact might occur with a person *not* identified as a family member (i.e., another person who is concerned with the care, welfare or development of the child). Consideration should therefore be given as to whether these circumstances are adequately captured in the proposed amendments.

318. The Law Council also notes that the proposed amendments only establish a framework for the creation of regulations setting out the requirements for accreditation. Accordingly, the 'devil will be in the detail' when the regulations are developed and promulgated. It will be important that the Department consults with the relevant stakeholders, including CCS providers and the Australian Children's Contact Services Association, at that time.

319. By way of comment on proposed sections 10KE and 10KF as a whole, the Law Council understands that, currently, CCS intake material is used as evidence in proceedings. This can be an important source of information about risk and safety issues for the family, including the child. The exclusion of this evidence, as proposed in the Exposure Draft, could have unintended effects by limiting the information available to the court about these often-relevant issues.

Questions 20 and 21: Will the proposed penalty provisions be effective in preventing CCS being offered without accreditation? Are there more effective alternatives to the penalty provisions proposed?

320. The Law Council considers that the proposed penalty provisions should be effective in deterring non-accredited entities from providing CCS. Beyond this, the Law Council is not in a position to comment on what the minimum standards, or basic core competencies, of CCS workers should be. The regulations that prescribe what is required for accreditation should be developed with sufficient specificity, such that all those who wish to obtain accreditation are able to complete the same in a timely way, without impacting their ability to offer the service.

321. However, the Law Council notes the significant demands placed upon CCS services across Australia. There is an undersupply in the availability of CCS generally, and families can wait for significant periods of time for a service to become available. These issues, including insufficient funding for CCS and cost barriers for access, will likely be compounded by the imposition of standards, given that regulation of CCS may result in some existing centres not undertaking the accreditation process, thus reducing the number of centres providing the service.

322. While a basic framework of core competencies for staff is desirable, the key issue remains ensuring the provision of adequate resources to families in need. In this respect, care should be taken to ensure the penalty provisions do not operate as a disincentive to new or continuing service providers.

323. Consideration should be given to limiting the cost and difficulty of becoming accredited. Further, the Law Council suggests that a timeframe be prescribed for accreditation to be achieved, so that those who are currently providing a much-needed service are able to ensure that they can meet their obligations, without causing immediate restrictions to the ability to provide their services to in-need families.

324. In light of the above, the Law Council emphasises that the imposition of minimum standards will require funding to ensure such standards do not reduce service offerings or operate as a disincentive to the establishment of new services entering the market.

325. In terms of whether there are more effective alternatives to the penalty provisions proposed in the Exposure Draft, Constituent Bodies have made the following suggestions:

- A national register of accredited providers could be established, maintained and published. Information about the register should be made readily available to service users, through an online platform, to enable potential service users to identify accredited services.
- A restriction could be imposed on the court's ability to make a CCS order (including a supervised time order) where a provider is unaccredited, or an inability for evidence to be relied on by a party from an uncredited provider. This would result in the unaccredited provider being rendered unacceptable by any litigant in proceedings.

Schedule 3: Case management and procedure

Part 1: Attending family dispute resolution before applying for Part VII order

Questions 22 and 23:

- **Do you have any comments on the drafting of the proposed amendments to section 60I, or are there any unintended consequences that may result from the amendments proposed?**
- **Do you have any views on the inclusion of a further provision allowing review of pre-filing decisions in the FCFCOA Act?**

326. The Family Law Section has strong concerns about the proposed amendments to section 60I, and queries what the difficulty is that this provision is seeking to remedy. Several Constituent Bodies, including the Law Society Northern Territory (**NT Law Society**), NSW Law Society, SA Bar and LIV, have also identified several potential unintended consequences of the amendments. Other Constituent Bodies, including the SA Law Society and QLS, agree with the stricter application of section 60I.

Review of pre-filing decisions

327. The Family Law Section and the majority of Constituent Bodies are of the view that, in order to afford procedural fairness to litigants, it is necessary to allow for a review of a decision to reject an application brought under Part VII of the Act:

    - Proposed subsection 60I(7) replaces the phrase “must not hear” with “must not accept for filing”.
    - Given the potentially serious consequences that would flow from refusing to accept an application for filing, especially noting the high number of self-represented parties, and the majority of applications filed in the court involving multiple risk factors, there should be clear provisions that allow for the review of pre-filing decisions.
    - Any such provision should set out a clear process for applying for a review.
    - Any review must be expeditious. Consideration should be given to including timeframes for the filing of a review application, and the consideration of that application, in the Act or Rules.

328. The NT Law Society, however, has expressed concerns that another procedural tier (such as a review), following an attempt to file an Initiating Application, may be confusing to self-represented parties. This could cause frustration and possible disengagement with the process altogether, potentially meaning that any risk is missed.

329. The Family Law Section notes that if pre-filing decisions are reviewed by a Judicial Registrar or Senior Judicial Registrar, their decision is also capable of review. The Family Law Section suggests consideration being given to reviews of this kind being conducted by a judge or Justice of the Court. Relatedly, the SA Law Society has queried how the issue of costs will be addressed, if a party is successful in challenging such a decision.

Broader concerns

330. The Family Law Section and several Constituent Bodies have raised the following concerns and practical challenges regarding the proposed amendments to section 60I:

- There does not seem to be a clear evidential basis to support the proposed subsection 60I(7). The Law Council therefore questions its necessity.
- Most parenting proceedings involve alleged multiple risk factors.[125] This, in turn, means that many applications for parenting orders ought to be exempted from the requirement to attend family dispute resolution, by reason of paragraph 60I(9)(b) of the Act.
- Self-represented individuals, particularly those who are vulnerable (i.e., victim-survivors of family violence and/or culturally and linguistically diverse individuals) will potentially not re-engage with the family law system if their application is administratively dismissed.
- There is a risk that the amendment to subsection 60I(7) will give rise to increased litigation about whether an exception contained in subsection 60I(9) of the Act applies.
- There may be an influx of applications before the commencement of the provision, by parties who have not completing family dispute resolution, and are seeking to avoid the new stricter requirements.
- This change is likely to predominantly affect self-represented litigants, who are less familiar with drafting affidavits and other court documentation. This will lead to a potential access to justice issue, where litigants are denied the opportunity to bring matters affecting a child to the court's attention for resolution.

331. Noting that there are strong views that these amendments are problematic and unjustifiably harsh, the Law Council suggests, at a minimum, that the proposed changes to section 60I be reconsidered.

332. Should these provisions be retained in the next iteration of the Exposure Draft, the Law Council would appreciate the explicit identification in the Explanatory Memorandum of the "mischief" that these amendments are seeking to remedy. Supporting statistics from the FCFCOA, if available, could assist in this regard.

333. Should these amendments pass into law, information about applying for an exemption, as well as what to do in the case of needing to review a pre-filing decision, should be clearly articulated in an easy-to-read brochure. The provision of such guidance would increase efficiency and support self-represented litigants to determine whether an exemption under section 60I may apply.

Part 2: Amending the requirement to attend divorce hearings in person and delegations

Question 24: Do you have any comments on the proposed amendments for divorce hearings?

334. The Law Council supports the proposed amendments. The removal of the requirement to attend divorce hearings, unless attendance is explicitly requested by the court, is welcome.

335. The attendance at a divorce hearing for some litigants, and particularly those in rural, regional and remote (**RRR**) areas, or those who are not comfortable representing themselves, can be an impractical and costly practice.

[125] See Federal Circuit and Family Court of Australia (Divisions 1 and 2), Annual Reports 2022-23, 9.

336. The removal of the need for appearances for most divorce applications will also allow the court to administratively process divorce applications in a more time and cost-efficient manner, allowing resources to be better applied and allocated, assisting in the court's function. Similarly, the time that lawyers devote to divorce applications and appearances will be relieved.

337. Several Constituent Bodies have identified potential further improvements to the divorce process. These include:

- Modification of the Application for Divorce form
  - There are aspects of the form that could be improved to assist self-represented parties and reduce requisitions and adjournments.
  - The questions in Item 29 are often answered incorrectly. For instance, the question about the child's health is often answered with information about how health decisions are made, rather than information about the child's health conditions.
- Changes to the requirements for parties who have been married for less than two years
  - Subsection 44(1C) of the Act allows the court to grant leave for an application for divorce to proceed without a counselling certificate, if it is satisfied that there are special circumstances.
  - Rather than relying on this subsection, the QLS suggests that there should be an explicit exemption to the counselling certificate requirement where there has been family violence. Practitioners report that the current provisions have caused delays in applications for victim-survivors of family violence.

Part 3: Commonwealth Information Orders

Question 25: Do you have any comments about the proposed amendments to clarify section 67N?

338. The Law Council supports the proposed amendments with respect to Commonwealth Information Orders.

339. The comprehensive amendments clarify the current confusion about whether violence-related information must be provided by a Commonwealth department or agency, in the absence of location information, and whether other secrecy provisions apply.

340. The Law Council considers that the function of the court will be assisted by ensuring contemporaneous and critically relevant information held by a Commonwealth department or agency about actual or threatened violence to a child, a parent, or person whom the child lives with is disclosed. This will facilitate appropriate orders to be made in the circumstances.

341. The SA Law Society and SA Bar raise several matters for consideration:

- If it is intended that "violence" will adopt the same meaning as "family violence" as it is defined in the Act, then this should be clarified in the Exposure Draft.

- There may be some benefit to ensuring that the legislation stipulates judicial determination as to whether the information obtained is provided or released to the parties.
- There are potential implications of the provision of this information to the parties in court proceedings, which could create unnecessary complexity or raise matters that would require the parties to respond. This is particularly so, in light of the proposed broadening of the scope of the definition of “family members” in subsection 67N(8).
- There could be a range of unintended consequences of the release of the private information. This could be circumvented by clarification within the legislation that a judicial officer is required to determine the extent to which the information is released will ensure that potential unintended consequences of the release of that information are considered.

342. The Law Council supports these amendments and otherwise observes that they appear to be consistent with the tenor of amendments made to Part VII of the Act by the *Family Law Amendment Act 2023* (Cth) that places emphasis on "safety” related considerations.

343. Should these amendments become law, the Law Council emphasises the importance of Government departments and agencies receiving training in relation to the new processes, and proper resourcing, to enable them to respond to orders appropriately.

Question 26: Do you have any comments in relation to the categories of family members proposed to be included in subsection 67N(8)?

344. Extending the category of family members may also ensure that critically relevant information is received and the family dynamics better understood. This can assist in appropriate orders being made and safeguards implemented for the children subject to proceedings before the court.

345. The Law Council considers that the categories of family members proposed are appropriate. However, consideration should be given to include a spouse, de facto partner, intimate partner of a parent, adoptive parent and step-parent of the child.

Question 27: Do you have views about including kinship relationships in subsection 67N(8)?

346. The Law Council supports the broadening of the drafting of subsection 67N(8) to include kinship relationships. The provision empowers the court to make orders to produce documents in relation to a person who has a connection with a child, that may not fall under the category of persons defined.

347. The inclusion of the kinship relationship will assist the court in gaining a greater understanding of known risks to a child and their family. The Law Council acknowledges, however, that as kinship relationship can be extensive, this may require significant volumes of material being produced to the court and require an accompanying time investment.

348. Aboriginal and Torres Strait Islander peak bodies and stakeholders should be consulted regarding an appropriate definition of “kinship relationships”.

Part 4: Operation of section 69GA

Question 28: Do you have any concerns about the proposed amendments to clarify the operation of section 69GA?

349. The Law Council has no concerns about the proposed amendment, which makes clear that state or territory courts prescribed under section 69GA of the Act are expressly vested with jurisdiction under Part VII of the Act (concerning children).

350. It is appropriate to enable courts of summary jurisdiction to exercise powers under the Act where necessary, particularly in RRR areas, where access to the FCFCOA is limited.

Schedule 4: General provisions

Part 1: Costs orders

Question 29: Are there likely to be any unintended or adverse consequences from incorporating aspects of the Family Law Rules into legislation? If so, outline what these would be.

351. At a broad level, the Law Council makes the following observations:

- The court can change the Rules itself, so by incorporating aspects of the Rules into legislation, the ability for these provisions to be flexible is minimised, because legislation will need to be amended by Parliament if changes are required.
- The court has power to dispense with elements of the Rules, whereas the legislation does not allow the court its usual discretion that it has in family law.
- Family law cases are unique, and discretion is appropriate when the Court takes all matters into consideration, particularly with costs orders.

352. Constituent Bodies have identified various potential unintended consequences from incorporating aspects of the Rules into legislation, particularly with respect to the costs provisions.

- There is concern that including these provisions in legislation will not achieve the intended objective, in circumstances where there will still be several reference documents that litigants and solicitors will need to consult, including Rules, legislation and practice directions.
- It is a concern that costs against a lawyer are incorporated in the Exposure Draft in the terms described.
    - Lawyers and Counsel are required to act in a manner which is consistent with their client's case. There may be various explanations as to why the lawyer may have failed to file a document where the responsibility rests solely with their client.
    - In the interest of protecting their client's case, it is proper for that lawyer to be circumspect as to the cause of the difficulty.
    - The currently draft provisions raise the opportunity for a wedge to occur between client and representative. If the explanation for delay is solely their client's, then the only way to avoid a cost order being made against

the representative would be for that representative to provide details as to their client's failure.

- The current draft entitles the opposing party to seek an order for costs against the opposing representative.
    - In difficult and contested proceedings, opposing parties commonly allocate responsibility for the litigation on the other party's representatives.
    - As drafted, these provisions are likely to give rise to significant interlocutory applications directed to opposing solicitors. Such applications might result in the solicitors either having the clients waive their legal professional privilege to defend such applications, or could result in the solicitor withdrawing from acting.
    - It is foreseeable that applications to seek costs against opposing representatives could be weaponised, particularly in cases involving family violence and allegations of coercive control.

353. Finally, in relation to costs and proposed Part XIVC of the Act in the Exposure Draft, the Law Council considers that costs should be applied from the date on which the application is filed, not the commencement date of the proceedings as a whole.

Questions 30-31:

- **Are there any means-tested legal service providers that would not be captured by the new definition of 'means-tested legal aid'?**
- **Are there any unintended consequences from the introduction of the new term 'means-tested legal aid'? If yes, please outline what these consequences would be.**

354. The Law Council is concerned that the majority of clients represented by Community Legal Centres would be excluded, given that the amendments propose cost protections only for those parties who are represented by a "means-tested legal aid service". This terminology in Part 1 of Schedule 4 of the Exposure Draft appears to imply that clients of Legal Aid Commissions would be captured, but not clients of Community Legal Centres, including Women's Legal Services, who are often experiencing disadvantage and vulnerability.

355. The Law Council suggests that the Exposure Draft be amended to clarify that the proposed costs protection also applies to clients who are represented by Nationally Accredited Community Legal Centres.

356. The Law Council further notes that proposed paragraph 114UD(2)(a) prohibits making a costs order against a party who "has received" means-tested legal aid. Given that family law proceedings can sometimes span many years, this drafting could have the unintended consequence of preventing a costs order against a party who previously received means-tested legal aid, but is no longer eligible (e.g., because their financial circumstances have changed). This paragraph should be redrafted, to clarify that it applies to parties who "are currently receiving" means-tested legal aid.

357. In terms of the broader issue of costs, if the Act and the Rules result in costs applications and orders being made more frequently, increased funding of the legal

assistance sector will be required to support clients to make, and defend, those applications.

Part 2: Clarification of inadmissibility provisions

Questions 32 and 33: Do you have any concerns with the proposed amendments, including the new exemption to the inadmissibility of evidence for coronial proceedings? If yes, please expand on what your concerns are and why.

358. The Exposure Draft proposes to clarify the admissibility protections in sections 10E, 10J, 10V and 70NEF of the Act, relating to family counselling, family dispute resolution, risk screening and post-separation parenting programs (the **inadmissibility provisions**).

359. The Law Council supports the new exemption to the inadmissibility of evidence for coronial proceedings, as well as fire inquests. It is appropriate that the coronial courts have access to documents and materials in family law proceedings, with appropriate safeguards in place. In those circumstances, the compelling public interest in ensuring all relevant information is available to the coroner outweighs the potential negative impacts in allowing otherwise confidential material to be used for that limited purpose.

360. The Law Council appreciates that the rationale for restricting the use of such material in the course of court proceedings is that admitting such evidence might either impact ongoing therapeutic relationships, or dissuade people from frankly engaging in family counselling, alternative dispute resolution mechanisms or parenting programs. There is also potential to reveal embarrassing personal information. Nonetheless, the Law Council considers that there may be scope for a more nuanced, discretionary approach regarding the admissibility of evidence relating to family counselling, family dispute resolution, risk screening and post-separation parenting programs.

361. The Law Council's Family Law Section is concerned that the proposed inadmissibility provisions may be too broad and, therefore, not in the public interest. This is a view shared by Women's Legal Services Australia. There may be cases that involve serious risk, or serious crimes (e.g., sexual assault, family violence) that should require evidence to be disclosed in the context of criminal proceedings. A threshold question may consequently arise as to the requisite seriousness of the crime. Nonetheless, consideration should be given to providing for a presumption against the admissibility of such records, that can be rebutted if the desirability of the evidence outweighs the harm of the disclosure.

Commencement and application

Question 34: Based on the draft commencement and application provisions, when should the proposed amendments commence?

362. The Law Council considers that all amendments should commence on the same date. A single commencement date is clearer, and more straightforward to apply. Most Constituent Bodies support the amendments applying to all proceedings filed after that date, although the SA Law Society argues that the amendments should apply retrospectively.

363. The Law Council cautions that a lengthy period between assent and commencement may have the unintended consequence that, in matters where

family violence is alleged, the alleged perpetrator may be incentivised to file proceedings with undue haste, so as to avoid the operation of new section 79.

364. The nature of the proposed amendments in the Exposure Draft would likely not necessitate a lengthy lead time for significant professional and community education. However, the commencement of the provisions relating to CCS should allow sufficient time, following the release of the relevant regulations, to enable the providers to attain accreditation.

Protecting sensitive information in family law matters ('protected confidences')

Questions 35 to 37:

- **Should there be additional safeguards in the Family Law Act to prevent initial access to protected confidences and how would this be balanced with procedural fairness requirements?**
- **Are there discretionary powers of the court in Part 6.5 of the Family Law Rules sufficient to protect confidential information, and if so what could be done to ensure litigants are aware of these powers? For example, is the advice in the 'Subpoena – Family Law' form adequate regarding the process to object to producing subpoena material?**
- **Are there any other legislative or non-legislative approaches you would propose to ensure protected confidences are accessed or used appropriately in family law proceedings?**

365. The Consultation Paper seeks views to help develop an approach that protects parties' personal information, while making sure the court has all relevant evidence before it to make an appropriate decision in parenting and property settlement matters.

366. The Law Council welcomes the opportunity to contribute to this additional phase of consultation on protected confidences, as recommended by the Senate Legal and Constitutional Affairs Committee (**Senate Committee**) in July 2023.[126] It is clear that this is a complex area with several important, and potentially competing, considerations.

367. The Law Council seeks to emphasise, from the outset, that it does not have a settled view on the questions posed in the Consultation Paper regarding protected confidences. A variety of views have been received from the Family Law Section and Constituent Bodies, and these are set out below.

368. However, as a matter of first principles, 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 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.[127] Policy responses, however well intended, must not lose sight of this

[126] Senate Legal and Constitutional Affairs Committee, Family Law Amendment Bill 2023 [Provisions] (Report, August 2023) 52-53 (Recommendation 7).
[127] 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.

primary goal, which underpins much of the progressive reforms to the family law system that have occurred in the past 12 months.

369. The Law Council observes that, 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 of very high relevance in this respect, notwithstanding the resultant apprehension and distress that is often unavoidably experienced by the party who is subject to a subpoena process during family law proceedings.

370. Further, in the absence of specific data from the FCFCOA, the extent to which systems abuse is being attempted, or perpetrated, by way of seeking access to such records is unclear. The extent to which the existing legislative and procedural safeguards are not achieving their intended purpose is also unclear.

371. Without a clear evidence base for the systemic misuse of health information and therapeutic records in family law proceedings, the Law Council queries what the particular "mischief" is that the Department is seeking to address, and further queries how often such "mischief" is actually occurring in practice, noting the existence of protections within the current system.

Background

The ALRC Recommendation

372. ALRC Recommendation 37 was that the Act should be amended to provide the courts with an express statutory power to exclude evidence of protected confidences. In determining whether to exclude evidence of a protected confidences, the ALRC recommended the court must:

    (a) be satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given; and

    (b) ensure that in parenting proceedings, the best interests of the child is the paramount consideration when deciding whether to exclude evidence of protected confidences.[128]

Law Council response to the ALRC Recommendation

373. In correspondence provided to the Department on 30 July 2019, the Family Law Section expressed the view that there are already sufficient safeguards in place to ensure that evidence of a sensitive nature cannot be used inappropriately. If allegations of family violence are made, then the court must have available to it all relevant information to ensure that it is best able to test the evidence, and thus act in the best interests of the children as it is required to do so.[129]

374. In this correspondence, the Family Law Section noted that subpoenas can be objected to if they seek the production of sensitive information, and often, the court orders that information is redacted, or its distribution is limited. Nonetheless, the

[128] ALRC, Family Law for the Future: An Inquiry into the Family Law System (ALRC Report 135, 2019) 335 (Recommendation 37).
[129] See e.g., *Family Law Act 1975* (Cth) ss 60CB, 60CA.

court and legal practitioners must be able to view material, so that submissions can be made as to its probative value before sensitive evidence is excluded.

Exposure Draft – Family Law Amendment Bill 2023 (No. 1)

375. Proposed section 99 of the Exposure Draft of the Family Law Amendment **Bill** 2023, released by the Department in March 2023, addressed the issue of protected confidences. Section 99 sought to render inadmissible evidence of a protected confidence, or the contents of a document or information relating to a protected confidence, unless the court granted leave.

376. A 'protected confidence' was defined in proposed section 99 as a communication made by one person to another during a relationship, in which one of the persons is acting in a professional capacity to provide health services to the other, and in circumstances in which the professional is under an obligation not to disclose communications made to them by a protected confider.

377. In its submission to the Department on 16 March 2023, the Law Council did not accept that the proposed section 99 would have any practical effect in enhancing the already significant powers the court already has, in this regard.[130] The Law Council further noted that the proposed 'public interest' test was not recommended by the ALRC, and could have detracted from the relevance of the material to the proceedings.

378. This general position was supported by the Family Law Section and the majority of Constituent Bodies, who, while not opposing the policy intent of the changes, recommended the removal of section 99 as drafted. The Law Council acknowledges that the LIV supported the inclusion of proposed section 99, and subsequently made a submission to the Legal and Constitutional Affairs Committee to recommend that it be reinserted into the Bill.

379. Proposed section 99 was removed from the Bill upon its introduction to the House of Representatives on 29 March 2023. As noted in the Consultation Paper:

> *[Section 99] was removed from the Bill as a result of feedback that the provisions may cause intended consequences, and would not achieve the policy objective of protecting parties from harm caused by having their personal information used improperly. Specifically, stakeholders raised concerns about the definition of 'protected confidence', the scope of the protection, the practical impact on hearings, including length, costs and increased litigation, and the risk of critical information not being made available to the court and court resourcing implications*.[131]

Family Law Section views

380. The Family Law Section notes that some of the options suggested by stakeholders to address issues related to protected confidences, as set out in the Consultation Paper, include:[132]

[130] 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.
[131] Attorney-General's Department, Family Law Amendment Bill (No. 2) 2023 (Consultation Paper, September 2023) 38.
[132] Ibid.

(a) Better protections relating to the production of protected confidences:

(i) leave of the court should be required for a legally represented party to issue a subpoena that relates to 'protected confidences' records (noting existing rule 6.27(1) that a self-represented party must not request the issue of a subpoena without the permission of the court); and

(ii) section 131A of the *Evidence Act 1998* (NSW) could be used as a model of legislative protection regarding preliminary proceedings of the court.

(b) More awareness of the existing powers of the court: Some stakeholders expressed the view that the court already has sufficient discretionary powers in the Rules (including rules 6.27, 6.37, and 6.38) to protect confidential information and better awareness of these powers amongst lawyers and litigants is required.

(c) Changes to Court rules: ''Counselling records" (and other types of protected confidences records) could be included in the list of documents prohibited from being copied under rule 6.37(2)(b) (along with child welfare records, criminal records, medical records and police records').

The relevance of protected confidence material – Parenting proceedings

381. The Law Council acknowledges that the court only becomes involved when parties call upon it, when there is a dispute. The role of the court is ultimately a finder of fact.[133] Once the facts are known, then the court applies the jurisprudence.

382. In a parenting matter, when making a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.[134]

383. The FCFCOA (Division 1 and 2) **Annual Report** 2022-2023 recorded that in parenting proceedings: [135]

- 72 per cent of matters alleged that a child had been abused or was at risk of child abuse;
- 83 per cent of matters alleged that a party had experienced family violence;
- 77 per cent of matters alleged that a child had experienced family violence;
- 55 per cent of matters alleged that drug, alcohol or substance misuse by a party had caused harm to a child or posed a risk of harm to a child;
- 60 per cent of matters alleged that mental health issues of a party had caused harm to a child or posed a risk of harm to a child.

In most cases, there were allegations of multiple risk factors in parenting or parenting and property matters.[136]

[133] See NSW Bar Association, Submission in Response to the ALRC's Discussion Paper 86: Review of the Family Law System (December 2018) [94].
[134] *Family Law Act 1975* (Cth) s 60CA.
[135] Federal Circuit and Family Court of Australia (Divisions 1 and 2), Annual Reports 2022-23, 9.
[136] Ibid 14.

Notice of Child Abuse, Family Violence or Risk

384. Since 1 November 2020, it has been mandatory for each party to a proceeding, where parenting orders are sought, to file a **Notice** of Child Abuse, Family Violence or Risk.

385. Under the Act, the Courts have a mandatory obligation to report certain information to child welfare authorities which includes:

- allegations of child abuse or a risk of child abuse (section 67Z); and
- allegations of family violence, or a risk of family violence, that amount to abuse of a child (section 67ZBA).

386. The Notice is the way the Courts ensure families and their child/ren receive appropriate and targeted early intervention and assistance. Allegations of child abuse recorded in the Notice are reported to child welfare authorities. The Notice also fulfils the court's responsibilities under paragraph 69ZQ(1)(aa) of the Act to ask each party to the proceedings:

- whether they consider that the child/ren concerned have been, or are at risk of being, subjected to, or exposed to, abuse, neglect or family violence; and
- whether they consider that they themselves, or another party to the proceedings, have been, or are at risk of being, subjected to family violence.

In the financial year 2022–23, 78 per cent of parenting matters were mandatorily referred to the relevant child welfare agency on this basis.[137]

387. The Notice requires a party applying for parenting order to also indicate whether they believe harm has, or may, be caused to the child because of another family member's mental health issues. The Notice includes the following examples:

- *Child is left to look after himself and his other siblings at home because his mother cannot get out of bed (depression).*
- *Father has become paranoid and refuses to leave the house to take the child to school.*
- *Mother does not comfort or support child with her homework, instead yells and taunts her.*

Parenting Questionnaire

388. Unless required to file an affidavit, a party to parenting proceeding must file a Parenting Questionnaire with their *Initiating Application (Family Law)* or *Response to Initiating Application (Family Law)*. The Parenting Questionnaire requires parents to address their current circumstances, including answering the following questions:

    a. *Do you suffer from any medical condition which requires supervision by a medical practitioner or for which you take prescribed medication or which could affect your ability to supervise and care for a child? If so, please provide details.*

    b. *Do you now have or have you in the past had any problems with drug or alcohol abuse? If so, please provide details.*

[137] Ibid 13.

389. The Parenting Questionnaire, unlike an affidavit, is not a sworn document. Instead, parties sign a Statement of Truth, which reads:

> *I believe that the facts contained in this Questionnaire are true. I understand that a Judge of the Court and the other parties in the case will rely on the facts that I have set out in this Questionnaire as being true.*

390. The Parenting Questionnaire thus relies upon a party to complete it accurately. In the experience of the Family Law Section, it is not uncommon for protective concerns to be denied, not admitted, downplayed or diminished in both a Parenting Questionnaire and/or affidavit.

Subpoenas

391. Given most parenting proceedings involve allegations of harm, or risk of harm, subpoenas to produce documents are a useful tool to gather independent evidence to substantiate or contradict a risk or safety-based concern.

392. If material would be of assistance to the Court in making an order in the best interests of the child, it should be available.[138] That material might include:

- **the primary care giver's mental health records**, in circumstances where their status as primary care giver is challenged, as it is alleged that their mental health issues have caused harm to a child or posed a risk of harm to a child;
- **a parent's mental health records**, in circumstances where in response to an application for time, it is alleged that their mental health issues had caused harm to a child or posed a risk of harm to a child; or
- **the mental health records of a child**, where it has been alleged that a parent has caused harm or posed risk of harm to a child.

393. Where these allegations are made, the production of mental health records on subpoena, often issued at the request of an Independent Children's Lawyer (**ICL**) (where appointed) can be key to establishing a harm, or risk of harm, to a child. This is particularly useful at an interim stage in the proceedings, and in the absence of any other independent evidence, such as an issues assessment report or family report, or psychiatric assessment prepared by a single expert witness (where the parties have the means to pay for such a report), where there is limited or no opportunity for cross-examination and the court cannot make a finding of fact.

394. The documents produced typically disclose diagnosis, treatment, medication regime, and compliance (or non-compliance) with treatment, none of which may be addressed in either a Parenting Questionnaire or Affidavit.

<u>The relevance of protected confidence material – Financial proceedings</u>

395. As canvassed earlier in this submission, the Consultation Paper seeks to make family violence relevant to the alteration of property in three distinct ways, namely making the effect of:

- family violence on contributions a consideration in subsection 79(4);
- economic or financial abuse a consideration in subsection 79(4); and

[138] See NSW Bar Association, Submission in Response to the ALRC's Discussion Paper 86: Review of the Family Law System (December 2018) [96].

- family violence on current and future circumstances a consideration in subsection 79(5).

396. In cases where allegations of family violence are made (whether in the context of parenting proceedings or financial proceedings), admissible evidence must be available to the Court.

397. The proposed amendments in Schedule 1 of the Exposure Draft, if passed, will likely see an increase in the issuing of subpoenas for the production of protected confidence material in the prosecution or defence of financial proceedings. That material may contain:

- disclosures of family violence by the alleged perpetrator;
- disclosures of family violence by the alleged victim-survivor; and
- disclosures of family violence as witnessed or experienced by a child.

398. The material may be equally relevant as to what information has not been disclosed.

<u>The Federal Circuit and Family Court of Australia (Family Law) Rules 2021</u>

399. The Rules prescribe that each party to a proceeding has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the proceeding, in a timely manner (rule 6.01). The duty of disclosure applies from the start of the proceeding and continues until the proceeding is finalised (rule 6.02).

400. The proceedings to which the duty of disclosure applies include both parenting proceedings and financial proceedings. Failure to comply with the duty may result in the court excluding evidence that is not disclosed or imposing a consequence, including punishment for contempt of Court.

401. Rule 6.05(1) provides that the duty of disclosure applies to a parenting proceeding and sets out at rule 6.05(2) that documents that may contain information relevant to a parenting proceeding may include, among other documents:

- criminal records of a party; and
- documents filed in intervention order proceedings concerning a party; and
- medical reports about a child or party; and
- school reports.

402. When parties do not comply with their duty of disclosure (as is often the case), a subpoena for the production of the relevant documents is a quick and inexpensive remedy. As noted by the NSW Bar in its 2018 submission to the ALRC, “frankly, subpoenas and material produced in response to them, are often the only sources of reliable or expositive information.”[139]

403. As noted earlier in this submission, the Family Law Section is concerned that Part 3 of Schedule 1 of the Exposure Draft, which legislates a duty of disclosure for property and financial proceedings, may unintentionally diminish the duty of disclosure as it also applies to parenting proceedings.

[139] Ibid [94].

Leave of the court should be required for a legally-represented party to issue a subpoena that relates to 'protected confidences' records

404. If a party to a proceeding is not legally represented, they must seek the permission of the Court to issue a subpoena.

405. If a party to a proceeding is legally represented, the party must seek permission to issue a subpoena, including for the production of documents, only for a final hearing. A legally represented party may request the issue of up to five subpoenas for production of documents for the hearing of an application for an interlocutory order, without the permission of the court.

406. An ICL may request the issue of any number of subpoenas for production for the hearing of an application for an interlocutory order, without the permission of the court.

407. If leave of the court is required for all subpoenas that relate to protected confidence records, that will presumably have an impact on the workload of registrars and the costs for litigants. The Family Law Section anticipates that this impact will be significant, and will require an accompanying increase in resourcing of the FCFCOA.

<u>More awareness of the existing powers of the court</u>

408. A party to a proceeding and the recipient of a subpoena for the production of documents are able to object to the production, inspection or copying of the documents the release of documents on subpoena. The court produces Fact Sheets (available online) for parties to proceedings seeking to issue a subpoena and a prescribed brochure to recipients of subpoenas.

409. The Rules require that a subpoena must be served on the recipient with the prescribed brochure, '*Subpoena: Information for named person or other person* (served with a subpoena or a copy of a subpoena)'. The brochure includes the following statement:

> *If you wish to object to producing the document/s subpoenaed see 'objecting to the production or inspection or copying of subpoenaed documents'. You can object to the production of documents required by a subpoena for reasons such as:*
>
> - *the documents requested are irrelevant*
> - *the documents are privileged; for example, documents which came into existence as a result of a lawyer/client relationship, or*
> - *the terms of the subpoena are too broad*
>
> *If you do not object to producing the documents, the parties, interested persons, and the independent children's lawyer may have an automatic right to inspect the documents. If the documents are not child welfare records, criminal records, medical records, or police records, they may also be copied.*

410. The Family Law Section considers that the *Notice of Objection - Subpoena* form could be enhanced by the inclusion of a series of simple tick boxes setting out grounds for objection. This would make it easier for the user of that form to identify and articulate the basis on which they object, including that the information sought to be obtained contains protected confidences.

Changes to Rules

411. In the case of medical records, the party the subject of the medical records can provide a written notice to the court, prior to the date of production, advising that they wish to inspect the records for the purpose of determining whether they object to the inspection or copying of the document/s by any other party. The Family Law Section recommends that right be extended to "counselling records".

412. It is the experience of Family Law Section members that "counselling records" produced on subpoena are routinely prohibited from being copied when released for inspection. In addition, leave is often sought for that material to copied and provided to an independent single expert witness, appointed by the Court to prepare a Family Report.

413. To ensure consistency of approach across the FCFCOA Registries, the Family Law Section recommends that "counselling records" (and other types of protected confidences records) be included in the list of documents prohibited from being copied in the Rules (under rule 6.37(2)(b)) (along with child welfare records, criminal records, medical records and police records).

Section 131A of the *Evidence Act 1998* (NSW)

414. The Law Council previously submitted to the ALRC that provisions for the exclusion of evidence of protected confidences are unnecessary, as the existing legislative regime, provides a sufficient and proper balance between protecting and appropriately using this kind of material.[140]

415. The courts already have significant discretionary powers which can be used to protect confidential documents or information, including discretion in relation to:

- subpoenas;
- compelling the production of material;
- when to allow access to material; and
- whether to admit records into evidence.

416. The Family Law Section considers it preferable to continue to rely on the courts' existing power to exclude evidence, rather than using section 131A of the *Evidence Act 1998* (NSW) as a model of legislative protection regarding preliminary proceedings of the court, as has been suggested by some stakeholders.[141]

Constituent Body views

417. In addition to the views of the Family Law Section, as canvassed above, the Law Council has received a variety of views from its Constituent Bodies in relation to protected confidences. These views are set out below for the Department's consideration.

[140] Law Council of Australia, Review of the Family Law System: Discussion Paper (Submission to the ALRC, 16 November 2018) 57-58.
[141] Attorney-General's Department, Family Law Amendment Bill (No. 2) 2023 (Consultation Paper, September 2023) 38.

Law Institute of Victoria

General comments

418. The LIV, particularly its Health Law Committee, is deeply concerned by the lack of protection of sensitive health information in family law matters, and it submits that the Act must be amended to introduce an express power for the court to exclude evidence of Protected Confidences. The LIV agrees with the Senate Committee that "resolution of this issue should be expedited", due to the current and ongoing risk of harm.[142]

419. The LIV supports the protection of sensitive health information in the Act for the following reasons:

- to address the lack of existing safeguards in relation to sensitive health information in family law proceedings;
- to introduce an assumption that a baseline level of harm to patients and to public confidence results from unwanted disclosure of sensitive health information from confidential therapeutic settings;
- to enhance the power of the court to protect parties, and their children, from harm;
- to provide guidance to the court on factors to consider when determining admissibility of evidence and production of documents;
- to provide a more trauma-informed process for the gathering of relevant evidence; and
- to help ensure that subpoenas are not maliciously misused, for example by perpetrators of family violence.

420. The LIV notes that, currently, sensitive health information can be sought in a subpoena even if it has no probative value or relevance to the evidence. The party that is the subject of the health information, or the health service that holds the information, then has the burden of pursuing a formal objection through court processes if it wants to challenge the subpoena.

421. The LIV considers that introducing safeguards in the legislation to protect sensitive health information has the potential to result in less costs, less delay and less of a burden on the family court system by:

- discouraging a party from seeking a subpoena for a person's sensitive health information if it has no probative value or relevance to the evidence and would amount to a "fishing expedition"; and
- encouraging parties to pursue other less formal options for obtaining relevant evidence, such as a request for a report from a treating practitioner.

The need for additional safeguards in the Family Law Act

422. Currently, a person seeking to exclude evidence of protected confidences is required to object to a subpoena, which they can only do after the documents sought by the subpoena have been produced to the court.

423. The LIV is of the view that this process is inappropriate and unfair for many parties, as the objection process is fraught with practical challenges and is very difficult,

[142] Senate Legal and Constitutional Affairs Committee, Family Law Amendment Bill 2023 [Provisions] (Report, August 2023) [4.32].

particularly for those who are vulnerable (such as victim-survivors of family violence), not legally represented or not well-informed about the legal process.

424. The LIV considers that, as a result, the current system is weighted in favour of perpetrators and well-resourced parties, who can abuse the subpoena process by way of a "fishing expedition" or by seeking to cause harm by gaining access to sensitive health information.

425. For healthcare providers, objecting to a subpoena is challenging because they:

- have extensive demands to provide clinical care, which is their main focus;
- have limited resources to apply to the court for an objection;
- are often not familiar with court processes and might not be aware that they can object;
- are unlikely to be aware of the issues in dispute in the litigation and therefore are not in a position to assess relevance; and
- should not bear the onus of providing that harm would be caused by disclosure.

426. The LIV is of the strong view that the Act requires amendment to better safeguard protected confidences. There should be a presumption that protected confidences are not admissible in family law matters, and that the onus of rebutting the presumption should fall on the person seeking access to protected confidences.

427. Proposed section 99 of the Bill related to the admissibility of evidence in family law proceedings, rather than on procedural matters relating to the production, inspection, or copying of documents produced under subpoena. The LIV acknowledges that, while the potential inadmissibility of protected confidences may have some deterrent effect, this would not prevent harm from occurring on inspection of the documents.

428. To prevent harm from occurring on inspection of documents, it has been suggested by some stakeholders that section 131A of the *Evidence Act 1995* (NSW) could be used as a model of legislative protections regarding preliminary proceedings of the court.[143] However, the LIV considers that the relevant provisions in Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) would be a better model. Under section 32C of the Victorian legislation, a "confidential communication" or "protected health information" is not to be compelled to be produced or adduced in a legal proceeding, unless the court grants leave.

429. The LIV accordingly suggests that the Act should contain provisions similar to those safeguarding 'protected health information' in the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).

430. The LIV agrees with the Senate Committee's view that the Act must balance the need to protect sensitive health information with the need for the court to have access to information that would allow it to make decisions that are in the best interests of children.[144] The LIV also agrees with ALRC Recommendation 37 that the court should have discretion to exclude evidence of protected confidences if harm would, or might, be caused by allowing those records into evidence, and the

[143] Attorney-General's Department, Family Law Amendment Bill (No. 2) 2023 (Consultation Paper, September 2023) 38.
[144] Senate Legal and Constitutional Affairs Committee, Family Law Amendment Bill 2023 [Provisions] (Report, August 2023) [4.29].

nature and extent of that harm outweighs the desirability of the evidence being given.

431. Accordingly, the LIV submits that the Act should contain provisions to assist the court in undertaking the relevant balancing process, including sufficient barriers to avoid any abuse of the process.

432. The *Evidence (Miscellaneous Provisions) Act 1958* (Vic) contains various procedural fairness requirements, including a process to enable the balancing of the need for the court to have access to relevant information with the need to protect sensitive health information:

- Section 32CF empowers the court to inspect relevant documents for the purposes of determining the application for leave.
- Under subsection 32D(1), the court must not grant leave unless is it satisfied of various matters, including the probative value of the evidence and the public interest in protecting the confidential information.

The LIV submits that a similar process would be effective in the Act.

433. The LIV also supports the development of a 'Return of Subpoena' list as recommended by Women's Legal Services Australia in its submission to the Department in February 2023.[145] This list would apply to all hospital, medical and counselling records, and domestic and family violence related records, and provide an option for a Judicial Registrar to determine whether records contain protected confidences. Additionally, the process would provide an opportunity to inform all parties of their right to object to the inspection and copy of subpoenaed documents, and to object to the admission of evidence on the grounds it contains protected confidences.

Sufficiency of the court's discretionary powers

434. The LIV does not agree that the discretionary powers in Part 6.5 of the Rules are sufficient to protect confidential information from being misused.

435. The LIV notes that there are currently no provisions in the Act indicating that sensitive health information should be protected. After a subpoena has been issued, even if a formal objection is made seeking protection of sensitive health information, there is no statutory guidance for the court on how to exercise its discretion.

436. The LIV understands that many litigants, including self-represented litigants, may not be aware of their right of first inspection of subpoena material. This could be addressed by the development of a 'Return of Subpoena' list, as recommended above.

437. Alternatively, and as recommended by the Family Law Section (above), the LIV considers that the Rules could be amended to provide that parties are prohibited from taking copies of a subpoenaed document that relates to a counselling record, noting that this exception is currently limited to medical records (r 6.37 (2)(b)).

[145] Women's Legal Services Australia, Response to the Exposure Draft Family Law Amendment Bill (Submission to the Attorney-General's Department, 27 February 2023) 26-27.

Other proposed approaches

438. The LIV considers that several other legislative and/or non-legislative approaches could be adopted to ensure protected confidences are accessed and used appropriately in family law proceedings.

439. Firstly, the LIV is aware that the Parliament recently passed the *Family Law Amendment (Information Sharing) Act 2013* (Cth) (**Information Sharing Act**) to enable the family law courts to seek information relating to family violence, child abuse, and neglect directly from State and Territory police, child protection and firearms agencies. These changes will impact the way that family law courts seek and manage sensitive information relating to family violence, child abuse, or neglect risk.

440. While the LIV supports the Information Sharing Act, these changes do not directly apply to protected confidences, and will therefore not significantly protect sensitive health information from inappropriate access by way of subpoena.

441. Secondly, the Exposure Draft of the Family Law Amendment Bill 2023 contained processes which would provide guidance to the court in deciding whether to grant leave to admit evidence of protected confidences in subsections 99(5), (6) and (7). The LIV generally supported the introduction of these provisions.

- The LIV highlights the importance of the requirement for the court to consider the availability of other evidence concerning the matters to which the evidence relates, and whether the substance of the evidence has already been disclosed under proposed paragraphs 99(7)(c) or (f).
- The LIV supports the proposed legislative requirement to consider all other available forms of evidence, including evidence provided within a Family Report or an Independent Psychiatric Assessment of one or both parties, before the court may consider adducing evidence of protected confidences.

442. The LIV makes the following recommendations:

- An express statutory power should be included in the Act for the court to order a report from anyone who may be able to provide relevant evidence, before any protected confidences are adduced as evidence, as this would assist in preserving the sensitive relationship between a patient and a healthcare practitioner.
- Factors should be included in the Act, which the court should be required to consider beyond those outlined in proposed (now omitted) section 99(7), such as the views of the person who is the subject of the protected confidences and whether or not they are legally represented.
- The definition of “protected confidence” (as it appeared in subsection 99(2)) should be expanded to include “counselling records”, for the same reasons that counselling records are included in the definition of “confidential communication” in subsection 32B(1) and “protected health information” in section 32BA of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).
- A requirement should be introduced for a document, detailing the legitimate forensic purpose, to be attached to the application for a subpoena to a health service provider as an additional non-legislative safeguard. This requirement could be introduced through amendment to the Rules, or the publication of a Practice Note.

Queensland Law Society

443. The QLS notes that aim of the proposed protected confidences provisions is to protect records of a sensitive therapeutic nature, as discussed by the ALRC, culminating in recommendation 37.

444. In high-risk matters, personal and sensitive information may be highly relevant to the court's consideration of a child's best interests. At the same time, there are compelling policy grounds for protecting this information, particularly where accessing this material is used as a form of systems abuse.

445. The QLS supports measures which guard against systems abuse, including using legal systems to expose personal and sensitive information, which would ordinarily be subject to confidentiality. However, as an evidentiary exclusion only, the aims of the proposed section 99 in the Bill would not have been achieved.

446. In determining whether or not to exclude the evidence, the material must be released to the parties so that parties have the opportunity to make submissions as part of the objections process. Yet, even where material is not ultimately admitted into evidence, harm may have been caused as a result of the production and subsequent release.

447. In the view of the QLS, the only way this could be prevented is if particular material cannot be subpoenaed or requested via information sharing processes at all, or where a party must demonstrate compelling reasons for requiring the information, before it can be requested (or a subpoena is issued). This would be similar to the sexual assault counselling privilege that exists for criminal law matters in Queensland by virtue of the framework contained in Division 2A of Part 2 of the *Evidence Act 1977* (Qld). The QLS understands that similar provisions exist in some other jurisdictions, including New South Wales and the Australian Capital Territory.

448. Protected confiders covered by the Queensland scheme are able to receive legal advice from the Counselling Notes Protect service delivered by Women's Legal Service Queensland and Legal Aid Queensland. The QLS anticipates that legal aid commissions in other states and territories would be similarly involved in their local schemes.

449. The QLS recommends that the Department consider the sexual assault counselling privilege frameworks and liaise with legal aid providers with relevant experience to see whether an analogous privilege framework could be developed for family law.

Law Society of South Australia and the South Australian Bar Association

450. The SA Law Society and the SA Bar are of the view that Part 6.5 of the Rules already provides extensive protection of confidential information, accompanied by Part II, Division 2 of the Act.

451. It is further noted that parties and persons subpoenaed have a right to object to subpoenas and, in doing so, can argue that a subpoena should be set aside on the basis that:

- the contents are more prejudicial than probative; or
- that the subpoena is contrary to public policy; or
- that the subpoena is otherwise an abuse of process.

452. A party objecting can also instead seek alternative orders for release, such as inspection only by a legal practitioner, or copies to be retained only by legal representatives and not provided to parties.

453. The SA Law Society and the SA Bar have two brief suggestions to assist in ensuring litigants are aware of these powers:

- The *Subpoena – Family Law* form could be varied to include information about the capacity of parties or persons subpoenaed to object to the subpoena in part, or to object to the usual rules of inspection and copying to apply (and seek an alternative order instead).
- Fact sheets could be made for professionals and organisations who maintain such records with respect to their rights of objection (in whole, in part, or in respect of inspection and copying rights) with links to these fact sheets included on the *Subpoena – Family Law* form notes.

454. As to the question of whether there should be additional safeguards, the SA Law Society and SA Bar emphasise the importance of the discussion about Recommendation 37 of the ALRC's Report. These considerations were serious and are concerning, to the extent that such issues have arisen, and continue to arise.[146]

455. However, members of the SA Law Society's Family Law Committee do not receive many reports about such concerns in their professional experience. There is some risk if additional 'safeguards' are put in place to address issues that are more hypothetical than common. For instance, there could be considerable risks, not just to procedural fairness, but also to the courts being able properly to exercise their functions so as to be satisfied that they are making orders for the division of property which are just and equitable, and orders regarding parenting matters that are in the best interests of a child.

456. The SA Law Society and SA Bar consider that the following changes may assist the court and the parties to protect confidential information, while simultaneously not posing a risk to the court and parties' access to that information:

- Self-represented parties can only inspect documents relating to protected confidences without a specific order of the court. While it is noted that this would infringe on the right of self-represented litigants, it would not do so any more than existing rule 6.27(1). This would need to be accompanied by a rule prohibiting a legal practitioner from providing a copy to their clients in the circumstances.
- There could be greater emphasis on the making of costs orders by the court in circumstances where a subpoena is set aside.
- There could be greater education for professionals and organisations who maintain such records with respect to their rights of objection.

[146] ALRC, Family Law for the Future: An Inquiry into the Family Law System (ALRC Report 135, 2019) 335-345.