THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
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Dear Dr Popple,

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

Thank you for the opportunity to provide feedback on the exposure draft Family Law Amendment Bill (No. 2) 2023 (the **Bill**) and Consultation Paper. The Law Society's Family Law Committee contributed to this submission.

We support the Bill as drafted, subject to the following comments or concerns in response to relevant questions in the Consultation Paper, as applicable.

Schedule 1: Property reforms

Part 1: Property framework

Codifying the property decision-making principles

1. *Does the proposed structure of the property decision-making principles achieve a clearer legislative framework for property settlement?*

2. *If not, please expand on what changes you think are required and why.*

   The Law Society agrees that the structure proposed in new s 79(2) achieves a simpler legislative framework for determining property arrangements. We support the collation of the relevant principles in the *Family Law Act 1975* (Cth) (**FLA**) into one legislative provision, removing the current need to cross-refer between provisions.

   We also support clarifying the legal impact of the decision in *Stanford v Stanford*[1] regarding the circumstances in which the Court should make an order to alter the parties' property and financial interests. In our view, this approach will overcome the current tendency, in matters where a *Stanford*-based argument is run by one party, for a great deal of extraneous evidence to be brought, which is otherwise outside the scope of matters to be

[1] [2012] HCA 52.

considered under s 79, and which may not be necessary. This will help to reduce delays and costs in these proceedings. It will also assist both represented and self-represented litigants to understand their position and move towards resolution.

We consider that subs 79(2)(a)-(d) provide a sensible approach to determining property and financial arrangements.

New subs 79(2)(a)-(c) require the Court to consider the current value and composition of the property pool, contributions and factors affecting the parties' ability to contribute to financial assets, and the parties' current and future needs. While they are discrete factors and properly the subject of separate determinations, the Court may consider certain types of evidence to the extent that it is relevant to more than one factor.[2] It is therefore appropriate that the Court is not constrained as to the process for determining the three factors, and may determine them in any sequence.

In new s 79(2)(d), the words "in all the circumstances" require the Court to consider all three factors in subs 79(2)(a)-(c) for the purpose of determining and calculating what (if any) order is just and equitable to make. The process of making an order must be informed by the three factors in subs 79(2)(a)-(c), while being guided by the overarching principle that the order must be just and equitable. As a consequence, s 79(2)(d) can only be determined *after* the three factors in subs 79(2)(a)-(c).

We support this approach, which in our view is sensible and mirrors the current practice of the Court in many cases. This approach accommodates the vast majority of cases where what is just and equitable is necessarily informed by the Court's determination of the other three factors. It also accommodates exceptional cases where there are threshold issues, such as where only one party seeks an order, or where the party seeking the order previously made representations to the other that no order would be sought. Even in such cases, the Court will need to consider the financial impact on the parties of declining to make an order, based on the available evidence (or lack thereof). It will therefore be appropriate for the Court to consider the factors in subs 79(a)-(c) to the extent relevant.

However, we are concerned that, as drafted, the Note to proposed s 79(2) appears to contradict the stated intention of the subsection, creating uncertainty as to how the provisions should be applied.

We suggest amending the Note so as to clarify that the Court may consider the factors in subs 79(2)(a)-(c) in any particular sequence, but must consider them all before making a determination under s 79(2)(d).

Effect of family violence

5. *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?*

6. *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?*

[2] For example, for the purpose of determining current and future needs (s 79(2)(c)), where relevant the Court should consider the parties' income, property and financial resources (s 79(5)(c)) and contributions to each others' income, earning capacity, property and financial resources (s 79(5)(l)).

We do not object to the proposed mechanism in new subs 79(4)(ca)-(cb) and s 79(5)(a) for recognising and accounting for the economic impact of family violence in property proceedings. In our view, it is helpful to clarify the application of the decision in *Kennon v Kennon*,[3] and to focus on the impact of family violence on contributions during the relationship and on the parties' future needs. Articulating the principle in *Kennon*, albeit in a simplified way, may also help to raise awareness and increase understanding of it, particularly in cases involving unrepresented litigants.

We note that while these provisions do not preclude a victim from bringing a separate action in tort, they offer an alternative remedy, such that the victim need not necessarily commence proceedings in two separate jurisdictions. Given that an action in tort may involve a greater evidentiary burden than raising the issue of family violence in property proceedings under the proposed mechanism, the compensatory needs of some victims may be satisfied via the latter. In our view this outcome would be a positive one from both an individual and systems perspective. The provisions also offer an avenue for parties whose circumstances may not support a tortious claim.

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 the family violence or economic abuse occurred. Such a finding will draw on evidence led by the party alleging the abuse, which may include, for example, police records as to violent behaviour, domestic violence orders, or financial records. To that extent, the culpability or fault of the alleged perpetrator will necessarily be in issue.

However, the provisions require that having made findings in relation to family violence, the Court's focus will be on the impact of the behaviour, and thus, accountability rather than culpability. This may help to reduce conflict between the parties and facilitate the resolution of their dispute as well as positioning victims financially to move forward with their lives.

The practical impact of these provisions is uncertain and will emerge over time. There may be evidentiary problems proving allegations of family violence or abuse that occurred many years prior to the trial. 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. Over time, decisions in that regard may help to inform negotiations. In time the amendments may also support a general culture of accountability for abusive behaviour which helps the parties psychologically to move towards resolution.

While we appreciate the importance of these matters, raising the impact of alleged family violence or abuse is likely to lengthen proceedings. This will have cost implications for the parties and Court resourcing implications. It may also have resourcing implications for the Family Violence and Cross-Examination of Parties Scheme under s 102NA of the FLA.

New contributions factors

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

Our view is that economic and financial abuse constitute forms of family violence. We note that s 4AB of the FLA defines 'family violence' to include "behaviour by a person that coerces or controls a member of the person's family" and that examples include "unreasonably withholding financial support needed to meet the reasonable living

[3] (1997) FLC 92-757.

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".

Accordingly, adding the effect of economic and financial abuse as a contributions factor under new s 79(4)(cb) goes towards clarifying the principle in *Kennon*. As discussed in relation to Question 6, this is supported.

8. *Do you agree with the proposed amendments to establish new separate contributions factors for wastage and debt?*

The Law Society does not object to these provisions.

Case law has established that, in certain circumstances, economic abuse is properly considered as a 'negative' contribution to the conservation or improvement of property. In *Kowaliw & Kowaliw*,[4] Baker J found that an exception to the general approach that debt is to be shared applies if:

1. one of the parties embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets; or
2. one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value.

Establishing separate contributions factors for waste and debt in the FLA clarifies the position as to the relevance of these factors, and properly accounts for the impact of economic abuse. It also relieves the party alleging debt and/or wastage of the burden of proving the particular circumstances set out in *Kowaliw.*

It is appropriate, in our view, that the Court retains a broad discretion to consider what magnitude of debt or wastage should be taken into account in each case. Over time, decisions in that regard may inform the negotiations of parties prior to trial.

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

9. *Do you agree with the proposed approach to establish less adversarial trial processes for property or other non-child-related proceedings?*

10. *If not, please expand on what you do not agree with and why. What would you propose instead?*

11. *Do you agree with the scope of proceedings proposed to be within the meaning of 'property or other non-child-related proceedings'?*

12. *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?*

As a general principle, we do not object to making a less formal process available in non-child-related proceedings.

In the experience of our members, the Less Adversarial Trial 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 helps the Court to

[4] (1981) FLC 91-092 at 76,643 – 76,644.

manage the proceedings in in a sensible and pragmatic way and to focus the parties on the best interests of children.

However, non-child-related proceedings are inherently adversarial in nature, not being subject to the paramount consideration of the best interests of children. We agree with the Law Council, particularly in relation to non-child-related proceedings, that judicial fact-finding is a critical process which must be approached with care.[5]

New s 102NK(3)(a) provides that, in non-child-related proceedings, certain provisions of the *Evidence Act 1995* do not apply unless "the Court is satisfied that the circumstances are exceptional". We suggest that in non-child-related proceedings, there should be a presumption that the rules of evidence apply, as these matters routinely consider complex evidence, for example involving valuations or trusts, which warrant the application of the rules of evidence. There should, however, be a judicial discretion, not limited to exceptional circumstances, to direct that some or all of the rules of evidence do not apply. This will enable the Court to adopt a less formal process wherever it is appropriate in the circumstances. It may be appropriate for example, where there are allegations of family violence, and in that regard we note s 102NE(4), which provides that the principles for applying the proposed less adversarial approach include that "the proceedings are to be conducted in a way that will safeguard the parties to the proceedings against family violence".

Part 3: Duty of disclosure and arbitration

Establish the disclosure requirements for people with financial matters

13. Do the amendments achieve a desirable balance between what is provided for in the Family Law Act and the Family Law Rules?

14. If not, please expand on what changes you would propose and why.

We generally support providing disclosure requirements in the FLA.

New subs 71B(5)-(6) apply a duty of disclosure when the parties are "preparing for a proceeding". It appears that these provisions are intended to correlate with the duty of disclosure in pre-action procedures in Item 4 of Schedule 1 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (**FLR**). If so, we suggest using the words "pre-action procedures" in the FLA, for consistency and to avoid confusion. If not, we suggest further clarifying the distinction between the two terms.

15. 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?

New s 71A(7) provides that "financial or property matters" include matters that "might become the subject of [various types of] proceedings". This is a broadly-worded provision which, we suggest, may facilitate systems abuse by enabling parties to object to the non-disclosure of a wide range of documents. If the intention is to be consistent with the FLR pre-action procedures, we suggest narrowing the provision to documents required under those procedures.

[5] Law Council of Australia, Review of the Family Law System: Discussion Paper, 16 November 2018, p 45.

Removing the distinction between court-ordered arbitration and private arbitration

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

Yes. We suggest, however, that, for completeness, in addition to s 106A proceedings (Execution of instruments by order of court), the list should include s 106B proceedings (Transaction to defeat claims).

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

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?

We generally support these provisions.

New s 13F(3)(b) empowers the Court to terminate an arbitration if a change in circumstances means that it is no longer appropriate for the arbitration to continue. We suggest extending this provision 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. This would confirm the position regarding the significance of a party's withdrawal, whether before or after the arbitration agreement has been executed.[6]

Schedule 2: Children's contact services

18. Does the definition of Children's Contact Service (CCS) (proposed new section 10KB) sufficiently capture the nature of a CCS, while excluding services that should not be covered by later regulation?

19. Does the definition of CCS intake procedure effectively define screening practices for the purposes of applying confidentiality and inadmissibility protections?

We have no concerns with these proposed amendments.

20. Will the proposed penalty provisions be effective in preventing children's contact services being offered without accreditation?

In general terms we support minimum standards for Children's Contact Services. However, given that, anecdotally, there is a general shortage of these services, care should be taken to ensure the penalty provisions do not operate as a disincentive to new or continuing service providers.

[6] See *Olsen v Rich* [2022] FedCFamC1F 324, which suggests that consent to arbitration could effectively be unilaterally withdrawn where no arbitration agreement has yet been signed.

Schedule 3: Case management and procedure

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

22. 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?

Under current s 60I(7), the Court must not hear a Part VII application which is filed without family dispute resolution certification, unless an exception in s 60I(9) applies. Under new s 60I(7), the words "must not hear" are replaced with the words "must not accept for filing".

If an application is accepted for filing by registry staff on the grounds that an exemption applies, it is unclear whether the judicial officer hearing the application retains the power to reject the application on the ground that they take a different view regarding the exemption. We suggest this be clarified.

23. Do you have any views on the inclusion of a further provision allowing review of pre-filing decisions in the FCFCOA Act?

We agree it is not clear in the amendments how the provisions will operate in practice, including whether a pre-filing decision to reject an application is reviewable.

In our view, any decision to reject an application under s 60I should be reviewable. If the decision as to whether an exemption applies under s 60I(9) is made by registry staff or a judicial registrar, there should be a clear process for applying for review of that decision by a judicial officer. Alternatively, that decision should be reviewed by a judicial officer in every case.

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

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

We do not object to the proposed amendments.

We agree that not requiring parties to appear in divorce matters where there are no children under 18 is likely to reduce costs and delays. We suggest this objective would be further achieved if the Application for Divorce form were revised and simplified. Our members report that, currently, incomplete or incorrect completion of the form can lead to requisitions or the need for adjournments following appearances so that the application can be amended.

Part 3: Commonwealth Information Orders

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

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

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

We have no concerns about the proposed amendments, other than to note the importance of government agencies receiving training in relation to the new processes and proper resourcing to enable them to respond to orders appropriately.

Schedule 4: General provisions

Part 1: Costs orders

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.

30. Are there any means-tested legal service providers that would not be captured by the new definition of 'means-tested legal aid'?

31. 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.

We support the objective of clarifying the Court's power to make a costs order relating to the appointment of an ICL.

We note that s 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 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, for example because their financial circumstances have changed. We suggest the provision should be amended to clarify that it applies to parties who *are currently receiving* means-tested legal aid.

Overarching Question for Schedules 1-4:

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

Our view is that all amendments should commence on the same date, and should apply to all proceedings filed after that date. A single commencement date is clearer and more straightforward to apply.

We suggest the amendments should commence on proclamation, or within a short period after, such as 28 days after proclamation. Subject to our suggestions for clarification outlined above, the proposed amendments are not complex or difficult to understand, and, in our view, a lengthy lead time for professional and community education will not be necessary. Also, 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 encouraged to file proceedings with undue haste, so as to avoid the operation of new s 79.

If you have any further questions in relation to this letter, please contact Sue Hunt, Senior Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

Cassandra Banks
President