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SOUTH WEST SYDNEY COMMUNITY LEGAL SERVICE

16 November 2023

By email only: FamilyLawAmendmentBillNo2@ag.gov.au

Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Sir/Madam,

RE: DRAFT *FAMILY LAW AMENDMENT BILL NO.2 2023* SUBMISSIONS

Justice Support Centre thanks the Attorney-General's Department for the opportunity to comment on the *Family Law Amendment Bill No. 2 2023* (**"the Exposure Draft"**).

We are also grateful for the extension of time to provide our submissions to 17 November 2023.

This report was authored by
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About Justice Support Centre

Justice Support Centre ('JSC'), formerly known as South West Sydney Legal Centre, was founded in Liverpool in 1986, to provide free legal services so the most vulnerable members of our community can improve their access to justice. We are now also one of the larger frontline providers of Domestic Family Violence (DFV) services in NSW.

Our services support many thousands of clients every year and serve some of the state's most disadvantaged local government areas. In 2022-2023 alone we supported over 7,465 women and children affected by DFV to make safety plans, access protection from the courts and connect with services like housing, counselling and legal advice.

We operate multiple specialist services, all of which work with victim-survivors of DFV:

1. Justice Support Centre Community Legal Service
2. South West Sydney Women's Domestic Violence Court Advocacy Service (SWS WDVCAS)
3. Sydney Women's Domestic Violence Court Advocacy Service (SYD WDVCAS)
4. Bankstown Domestic Violence Service (BDVS)
5. Liverpool and Fairfield Staying Home Leaving Violence Service (SHLV)
6. Financial Counselling Service for women affected by DFV.

In 2022-23, there was a 24% increase in the number of referrals to our legal service of women experiencing DFV. In the same year, women at risk of or experiencing DFV accounted for 79% of clients accessing our legal representation services.

Our legal team delivers advice and assistance to a range of vulnerable people, including:

- women experiencing or fleeing from domestic and family violence
- women from CALD backgrounds with limited access to language, technology or community support
- women experiencing financial hardship, including women who may not qualify for legal aid, but are still unable to afford a private lawyer.

We regularly assist clients navigating their way through family law financial proceedings, often, victim-survivors of domestic violence. It is our observation that in relationships where family violence is alleged, the victim-survivor is most likely to be in a financially weaker position than

the perpetrator of violence. They are often also the primary carers for the parties' children and homemakers. Victim-survivors we speak to are almost entirely women.

Common among this cohort of clients are:

- The only asset of value arising from the relationship is a property in the name of the other party only
- Property owned by one of the parties (usually the male perpetrator) overseas
- Despite the victim-survivor being in a weaker financial position, they are jointly liable on loans or in some cases, are listed as guarantors on loans taken out by and for the sole benefit of the perpetrator.

We have had the benefit of reviewing the Exposure Draft and we now offer our submissions on the proposed amendments to the *Family Law Act 1975* (Cth) (**"the Act"**) and how they are likely to impact our clients in South West Sydney.

For transparency and accountability, we agree to the publication of these submissions.

If you would like further information or input on matters raised in these submissions, please contact me by email to info@justicesupportcentre.org.au.

Yours sincerely,
JUSTICE SUPPORT CENTRE

Melanie Noden
Chief Executive Officer

Encl.

SUBMISSIONS

Scope of submissions

In these submissions, as a matter of convenience, we turn our attention to the proposed amendments in relation to property matters arising from marriage only, noting that there are equivalent proposals in relation to property matters arising from *de facto* relationships and our submissions would apply equally to those proposed amendments.

Due to time constraints and the brief consultation period, our submissions are limited to Part 1 (Property Framework) of Schedule 1 (Property Reforms). If there is opportunity to provide further submissions in relation to the remaining parts and schedules in future, we would welcome such opportunity.

Schedule 1 – Property Reforms
Part 1: Property Framework

Does the proposed structure of the property decion-making principles achieve a clearer legislative framework for property settlement?

The apparent codification of the "preferred four-step approach" articulated in the *Hickey*[1] case, is a welcome step towards clarification about how courts are to make decisions in altering property interests arising from a marriage.

In particular, by clarifying that the court can take into account any spousal maintenance orders as one of the current and future circumstances considerations (proposed paragraph (p) of subsection 79(5)), there is less ambiguity about the distinct powers of the court to alter property interests (under section 79) ***and*** to separately make orders as to maintenance (under section 74).

However, we are of the view that this codification does not ultimately effect greater clarity or guidance about the relationship between "the just and equitable requirement" and the four-step process, which we address in the next section.

[1] *Hickey & Hickey & Attorney-General for the Commonwealth of Australia* [2003] FamCA 395

Recommendation 1

For abundant clarity, paragraph (p) of subsection 79(5) (line 31 at page 7) should be revised as follows:

(p) the terms of any order made, or proposed to be made, under section ~~75~~ 74 in relation to the maintenance of a party to the marriage

Do you agree with the proposed framing of the just and equitable requirement as an overarching consideration through the decision-making steps?

We are of the view that the framing of the fourth principle (requiring the court to determine whether it is just and equitable to make any order at all to alter the parties' property interests) in proposed paragraph (d) of subsection 79(2), is somewhat misleading and may effectively be a codification of the existing uncertainties in case law.

The Consultation Paper states at page 10:

> *The amendments include a minor re-ordering of the property provisions in Parts VIII... to co-locate and more clearly identify the process that a court will follow when considering whether to make an order altering the property interests of a party. This is intended to help clarify the property decision-making process within the Family Law Act, but not displace existing principles in case law or the discretion exercised by the court.*

Whether the just and equitable requirement is a "threshold issue" or "permeates the decision-making process"[2], it is clear that there are clear differences in existing subsections 79(2) and 79(4):

- subsection 79(2) requires the court to exercise discretion in deciding **whether** orders should be made at all and is not limited in the matters it can take into account; whereas

[2] *Bevan & Bevan* [2013] FamCAFC 116

- subsection 79(4) requires the court to exercise discretion in deciding **what** orders should be made having regard to specific considerations of contributions and future needs.

Case law warns against the conflation of the two different issues in subsections (2) and (4) of section 79. In *Bevan*[3] the Full Court of the Family Court of Australia remarked at paragraph 85:

> *This requirement to consider the s 79(4) matters in determining whether it is just and equitable to make any order provides fertile ground for potential conflation of the two different issues, which the High Court has warned against. However, this potential will not be realised in many cases because of what the plurality said at [42] about the "just and equitable" requirement being "readily satisfied". But there will be a range of cases, of which arguably the present is a good example, where determining whether it is just and equitable to make any order altering property interests will not be so clear cut and will therefore require not only separate but very careful deliberation.*

Then at paragraph 89:

> *In our view, it will be less likely that the separate issues arising under s 79(2) and s 79(4) will be conflated if judges refrain from* evaluating *contributions and other relevant factors in percentage or monetary terms until they have first determined that it would be just and equitable to make* an *order. Ultimately, however, appellate error will not be demonstrated if it is possible to ascertain, either by reference to an express finding or by necessary inference, that the trial judge has given separate consideration to the two issues.*

What is clear from the cases of *Stanford*[4] and *Bevan* is that an inquiry under the existing subsection 79(2) can take place ***without*** consideration of subsection 79(4) factors or the four-step approach.

If there was uncertainty about the scope of the subsection 79(2) inquiry, the Exposure Draft does not provide any greater clarity about the matters the court can take into consideration in refusing to make orders to alter property interests.

The wording of the proposed paragraph (d) of subsection 79(2), that in making orders under this section, the court:

> *must not make an order unless satisfied that,* ***in all the circumstances****, it is just and equitable for the court to make the order* [emphasis added]

[3] *Ibid*, at para 85
[4] *Stanford & Stanford* [2012] HCA 52

does not clarify whether this is simply a re-enactment of the existing subsection 79(2) or whether "in all the circumstances" is limited to the circumstances of the preceding parapgrahs (a) to (c).

The re-ordering of considerations in the proposed subsection 79(2) ***appears*** to codify the four-step approach. However, it is clear from the Consultation Paper and the Note at the bottom of the proposed amendment, that *"this subsection does not require the court to do things mentioned in paragraphs (2)(a) to (d) in any particular order"*.

An ordinary construction of the inclusion of the word "and" after paragraphs (a) to (c) would lead to an interpretation where the court ***must*** do all things mentioned in paragraphs (2)(a) to (d), whether in any particular sequence or not. This is ***not*** the current position under case law where a court, being careful not to conflate the subsection 79(2) and 79(4) inquiries, can refuse to make an order under subsection 79(2) without need to make any inquiry under subsection 79(4).

If, as under the current case law, the court were to ***only*** have regard to paragraph (d) of proposed subsection 79(2), without regard to paragraphs (a) to (c), then there is no requirement for the court to make any orders that are just and equitable. This replicates the absence of any requirement to make just and equitable orders in existing subsection 79(4).

In this way, the proposed amendment does not, in fact, frame the just and equitable requirement as an overarching consideration in the decision-making steps.

In our submission, the proposed amendment does nothing to give greater clarity or certainty as to how a court should inform itself about whether it is just and equitable to make any orders at all. Any attempt to codify case law principles must enact clearly established principles and clarify any gaps or confusion under existing case law. In the context of codification of criminal law case authorities, it has been said:

> *Codifications can also be sought with the aim of reforming the law. On the specific level they provide an opportunity to remedy inconsistencies in the old law or create new, updated or revised rules. They are restatements of the law, retaining what is working and altering what is not.*[5]

This purpose of codification is as relevant to the current proposed amendment and in our submissions, this purpose is not achieved.

[5] Stella Tarrant, "Building Bridges in Australian Criminal Law: Codification and the Common Law", (2013) *Monash University Law Review* (Vol 39 No 3), 838 at 843, citing Reinhard Zimmermann, "Codification: History and Present Significance of an Idea", (1995) *3 European Review of Private Law* 95 at 107

Recommendation 2

The proposed subsection 79(2) should provide greater clarification and resolve any doubts raised by authorities to date. We suggest the following:

(2) In making orders under this section, the court must not make an order unless satisfied that, in all the circumstances, it is just and equitable for the court to make the order having regard to the following:

(a) ~~is to identify the~~ the identification of 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; ~~and~~

(b) ~~is to take into account~~ the considerations set out in subsection (4) (consideration relating to contributions); ~~and~~

(c) ~~is to take into account~~ the considerations set out in subsection (5) (considerations relating to current and future circumstances); and

(d) ~~must not make an order unless satisfied that, in all the circumstances, it is just and equitable for the court to make the order~~ any other relevant matter.

~~Note: This subsection does not require the court to do things mentioned in paragraphs (2)(a) to (d) in any particular sequence.~~

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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?

We start by congratulating the commitment of the Attorney-General's Department to recognise the significant impact of family violence on victim-survivors and its efforts to redress the inadequacies under the current Act and case authorities.

However, we submit that if the inadequacies of current case authorities are replicated in any legislative enactment, then the amendments do no more than pay lip service to the need for courts to take into account the impact of family violence in family law property matters.

In this regard, it is important to identify two very separate issues arising from the two separate proposed paragraphs in responding to this question:

- paragraph (ca) of subsection 79(4) – which enables a court to take into account the impact of family violence on a party's homemaker contributions ("increased contributions approach"); and

- paragraph (a) of subsection 79(5) – which enables a court to take into account the impact of family violence on a party's current and future circumstances ("financial consequences approach").

The leading authority on how the court should take into account the impact of family violence in family law property matters is the case of *Kennon*[6]. However, the principles arising from *Kennon* have been regarded as problematic and even arbitrary, leading to inconsistency in outcomes[7].

Professor Patrick Parkinson articulates the inconsistency well[8]:

> *the proposition was that the evaluation of a woman's contributions to the welfare of the family could be treated as greater than they would otherwise be because of what she had suffered, and by implication, this could be recognised by giving her a greater share of the assets based on 'contributions'. In effect it could be seen as akin to a damages award, but expressed as a percentage of the parties' combined assets. The judges were nonetheless concerned not to open the floodgates to all*

[6] *Kennon & Kennon* (1997) FLC 92-757

[7] See for example, Sarah Middleton, "The Verdict on Kennon: Failings of a contribution-based approach to domestic violence in Family Court property proceedings", *AltLJ*, Vol 30:5, October 2005, 237 and Patrick Parkinson, "Why are Decisions on Family Property so Inconsistent", *Legal Studies Research Paper No. 17/*94, December 2017

[8] Patrick Parkinson, "Why are Decisions on Family Property so Inconsistent", *Legal Studies Research Paper No. 17/*94, December 2017 at 18-20

> *kinds of claims of wrongdoing. They insisted first that there be a course of conduct, and secondly that it be during the marriage. This was no doubt because they were basing the doctrine on the assessment of 'contributions' throughout the marriage and treating the victim's experience of violence as part of her homemaker contribution.*
>
> *In subsequent expositions of the doctrine, the Full Court has held that there need not be a course of conduct and it need not be during the marriage. In Stevens and Stevens, the Court held that the violence need not be frequent although a degree of repetition was required. In Baranski and Baranski the Court held that post-separation violence could be considered.*
>
> *It follows that there is not much left of the constraints contained in the original principle. As the case law currently stands, there must have been some kind of bad behaviour, not limited to violence, which occurs at some point during the marriage or after separation, happening more than once, as a result of which the Court considers the victim should receive a greater percentage of the property than would otherwise be the case. To the extent that the original version of the doctrine rested upon some interpretation of the contribution as homemaker and parent being made more arduous and thus affecting contributions, the later Full Court decisions have eroded even this doctrinal explanation.*

Professor Parkinson then considers the arbitrary way in which adjustments of between 5%-10% have been made in favour of victims of domestic violence[9]:

> *While there is, as will be seen, a perfectly rational basis for saying that homemaking contributions ought to be given a similar value to earned income in the course of the marriage, based upon the notion of marriage as a socio-economic partnership, there is no nexus between the violence and the asset pool. So to say that a party has 'contributed' 5% or 10% of the asset pool by being a victim of violence is to engage in an entirely irrational 'calculation'. The absence of a principle of quantification results in an absence of consistency in how to quantify outcomes.*

Sarah Middleton takes this a step further[10]:

> *Without coherent principles of quantification it is possible that an increased contribution claim, even when successfully proved, will have little impact on financial outcomes. While trial judges must demonstrate proper deference to* Kennon*, if no quantification of the claim can be made, the question arises whether the money spent on legal fees to run the domestic violence part of the case achieves an outcome any greater than that which the victim woul have obtained without running the claim.*

The theoretical difficulties raised by Professor Parkinson and Sarah Middleton are amplified in the lives of our JSC clients who experience layers of disadvantage. Consistent with research of the experience of domestic violence victim-survivors, many of our clients have fled circumstances of DFV only after years of being too afraid to take action or speak out, after years of being threatened – with physical assault or death, financial deprivation, social insecurity, a return to their country of birth without their child and so on.

[9] *Ibid* at 20
[10] Sarah Middleton, *supra,* at 239

Many will readily abandon their just and equitable claim to any property arising from the marriage rather than risk the safety of themselves or their children. When property claims are made, our clients must weigh up the retraumatising effect of raising a *Kennon* claim as against the possible benefit to be derived from it.

Unless and until the principles arising from the *Kennon* case are more clearly and consistently enunciated in legislation or case law, we are of the view that the current proposal to introduce a contributions approach to an assessment of family violence will do little to help victim-survivors of domestic violence to access a just and equitable outcome.

Indeed, we suspect the introduction of a domestic violence contributions approach will raise legitimate concerns about a return to a fault-based regime of property division under Australian law and do little more than agitate sectors of the community who believe that laws in Australia unfairly disadvantage men and fathers.

Sarah Middleton argues that[11]:

> *using the increased contribution approach to deal with domestic violence issues is fraught with difficulty and impracticalities… instead… the Court and the legal profession should focus more fully on the financial consequences of violence, and… there should be legislative change to encourage this.*

In this context, we submit that the questions for consultation are missing a key threshold question – should a contributions approach be taken at all in considering the impact of family violence in property matters?

Sarah Middleton suggests that if there is a contributions approach to be taken at all, it should be limted to use as a defence by a victim to any claim that the victim has made less of a contribution than would normally be expected and the *"violence defence would simply bring a victim's contribution back to what it would otherwise have been, but for the violence"*[12].

We submit that before a contributions approach is enacted into legislation, there should be wider consultation, to ensure that any enactment remedies ambiguities, inefficacies, or problems with the existing law and does not merely pay lip service and continues the uncertainties arising from existing law.

[11] *Ibid*, at 237
[12] *Ibid*, at 240

Recommendation 3

Until there has been wider consultation about the insertion of a contributions approach to the impact of family violence in property matters, proposed paragraph (ca) of subsection 79(4) should removed from any proposed amendments.

Returning then to the question at hand, it is impossible to respond to this question without a consideration of the wording of the proposed amendment. This is because it is in the wording of the proposed amendment that there can be a proper construction of the proposed paragraph and whether the effect of the paragraph is to effectively punish a perpetrator of family violence and thus reintroduce fault into Australia's no-fault regime of family law rather than to properly account for the impact of family violence on a victim and ensuring a just and equitable distribution in property cases.

As such, we consider this question together with the next question, noting that our response will be limited to the proposed introduction of paragraph (a) of subsection 79(5).

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?

Paragraph (a) of the proposed subsection 79(5) reads as follows:

> *(5) For the purposes of paragraph (2)(c), the court is to take into account the following considerations in making orders under subsection (1), so far as they are relevant:*
>
> *(a) the effect of any family violence, to which one party to the marriage has subjected the other party, on the current and future circumstances of the other party, including on any of the matters mentioned elsewhere in this subsection;*

In our submission, the wording of this paragraph unnecessarily places focus on the perpetrator of the violence by referencing *"family violence, **to which one party to the marriage has subjected the other party**"*. This could be perceived as a reintroduction of fault in property divisions with a view to punish a perpetrator.

Rather, the wording should emphasise that the court's concern should remain with the victim and how the family violence has impacted the victim's current and future circumstances.

Recommendation 4

The proposed paragraph should be changed as follows:

(5) For the purposes of paragraph (2)(c), the court is to take into account the following considerations in making orders under subsection (1), so far as they are relevant:

(a) the effect of any family violence, ~~to~~ which one party to the marriage has ~~subjected~~ experienced because of the other party's conduct, on the current and future circumstances of that~~e other~~ party, including on any of the matters mentioned elsewhere in this subsection;

While we welcome the inclusion of this consideration, we are concerned that without supporting ancillary provisions as to evidentiary requirements, the utility of this paragraph will be diminished while we await a body of case law to be developed around how the impact of family violence on a victim's current and future circumstances is to be evidenced.

We have not had sufficient time to consider whether the introduction of proposed section 102NK in the Exposure Draft would effectively support the operation of the proposed family violence provisions, and we would welcome further opportunity to make submissions in relation to this in future.

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

For the reasons given about a contributions approach to an assessment of the impact of family violence in property matters, we would have concerns about the introduction of economic and financial abuse as a contributions factor.

Instead, and consistent with our submissions above, we are of the view that the impact of economic and financial abuse on property matters should be considered from a financial consequences perspective in relation to a victim's current and future circumstances.

In addition, we believe that a separate and specific consideration of the effect of "economic and financial abuse" as distinct from "family violence" perpetuates the misconception that economic and financial abuse is ***not*** a form of domestic violence.

Recommendation 5

Paragraph (cb) of subsection 79(4) should be removed from any proposed amendments and instead, the definition of "family violence" in section 4AB of the Act should be widened to specifically include "economic and financial abuse", whether in addition to or in refinement of existing paragraphs (g) and (h) of subection 4AB(2) of the Act.

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

The case law around wastage is complex and within the short consultation period, we have not had sufficient time to formulate a response. We urge the Department to extend the consultation period in relation to these new contributions factors to enable the legal community to provide a considered response.