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MFC response to the Exposure Draft: Family Law Amendment Bill (no. 2) 2023

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Schedule 1: Property reforms – Part 1: Property framework

Part 1 of Schedule 1 of the exposure draft contains amendments to specify the decision-making principles a court will take when considering whether to make an order altering the property interests of parties to a relationship. As part of these amendments, the Family Law Act will be amended to remove cross-referencing to spousal maintenance provisions and to insert the effect of family violence as a factor for consideration in determining a property settlement.

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

Yes.

Mallee Family Care (MFC) supports the overall approach to simplify the Family Law Act (FLA) making it easier for people to understand this legislation as they attempt to resolve their own problems. Currently, the Act is very convoluted which makes it difficult for people without legal training to follow.

MFC supports the amendments to decision-making principles a court will take when considering whether to make an order altering the property interests of parties to a relationship. Codifying these principles together in the legislation will remove the need to go back and forth between sections and make it less confusing for consumers as decisions won't be so reliant on being informed by caselaw.

For example, as outlined, at present, the property decision-making principles and the specific factors to be considered by a court are scattered across different sections within both Parts VIII and VIIIAB of the Family Law Act and underpinned by case law, thus often making the law difficult to understand.

Therefore, the intention of the proposed section 79 (2) amendments to clarify on the face of the Family Law Act the decision-making principles that a court considers in determining a property division will 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.

This is clarifies the 4 steps approach and adopts the position taken by the HCA in Stanford The proposed amendments bring the matters in 79(4) and 75(2) together, which makes the approach clearer to follow and apply – easier for practitioners to advise clients and for courts to apply the relevant sections/factors.

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

Agree.

MFC supports the proposed framing of the just and equitable requirement as an overarching consideration. We believe that this supports the intention of the amendments to clarify the decision-making principles that a court would consider in determining a property division and to assist users, legal representatives, the dispute resolution sector and the courts to better understand and apply the property decision-making framework. We agree that this would also provide more certainty to those using the Family Law Act as guidance for settling their own property matters.

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?

MFC believes 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. We support the need for the FLA to be more responsive to family violence, child abuse and neglect as in our experience this impacts every aspect of family law, including decisions about responsibilities for children and property settlements.

MFC clients experiencing family violence who are seeking property settlements often cannot meet the threshold of the Kennon test on evidentiary grounds or due to lack of resources to run this argument in litigation. As a consequence, settlements achieved may not adequately factor in family violence impacts and cannot be said to be just and equitable in all of the circumstances.

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?

MFC supports the proposed drafting of the amendments to allow the court to consider the effect of financial and economic abuse perpetrated by one party to the relationship on the other party. We agree that the term 'economic and financial abuse' is appropriate to capture a broad range of conduct, including controlling or denying access to money, finances or information about money and finances, and also undermining a party's earning potential, for example, by limiting access to employment, education or training.

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

MFC supports the proposed amendment to allow the court to consider the effect of financial and economic abuse perpetrated by one party to the relationship on the other party. By codifying relevant caselaw we believe that this amendment would support the stated intent of the reforms to make expressly relevant the effect of this type of abuse, including coercive controlling behaviours, when the court assesses a party's contributions during the relationship.

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

MFC supports the proposed amendments to establish new separate contributions factors for wastage and debt which would enable the court to consider the effect of any wastage or debt by a party to the marriage or de facto relationship (extending the Kennon principle).
This is a welcome change and shows the government's response to give greater consideration of the effect of family violence in property settlements between separating couples, to better recognise the ongoing financial impact of abuse. MFC notes that family violence has been a factor for courts in ruling on the division of assets in the past, but it has never been explicitly included in the Family Law Act. The following case study illustrates how the proposed changes could impact people who have experienced family violence.

Case Study

The wife had worked throughout the long marriage and was the main income earner. The husband was an alcoholic who physically beat the wife regularly. When the husband was drunk and in a rage, he would destroy the home by punching holes in walls and doors, and on one occasion drove a motor vehicle into the house causing significant damage. Given the wife had continued to work despite the family violence, this could not be attributed to a loss of income or earning capacity in the traditional Kennon sense.

Debt

We believe that these amendments will capture circumstances where a party has made a financial contribution which has wasted, rather than increased, the value of the property pool and where any debts incurred by either of the parties to the relationship or both of them, has had a negative financial contribution to the property pool, consistent with the current approach in case law. While some debt is undoubtedly incurred for a positive purpose (that is to obtain a house or a car for the benefit of the parties), other types of debt may be incurred for the benefit of one party only (for example, loans, gambling debts, taxation liabilities).

Including debt as an explicit factor in the contributions assessment is intended to recognise that debt can create specific and ongoing challenges for the party who did not incur the debt, or who may have incurred legal liability for the debt. Legal liability for the debt may continue following a property settlement, even if the court orders require one party to indemnify the other against payment. An express debt factor in the assessment of contributions would provide clearer guidance for people referring to the FLA to negotiate their own property settlements outside of court, that the law can, and does, factor in debts (and how they were accrued) when dividing marital/de facto property.

We agree that explicitly capturing case law concerning these issues will assist in displacing existing case law concerning the treatment of debt. Rather, the court would continue to exercise its broad discretion in considering debt, including how and when a debt was incurred (that is, before, during or after the relationship), who incurred the debt and who it is owed to, and whether it was incurred with the awareness and/or consent of the other party to the relationship.

Wastage

Under the current Family Law Act the consideration of wastage is not absolute and is not prescribed by the Act.

The court's approach has been to consider the wastage of matrimonial assets as a factor under section 75(2)(o) (any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account).

Currently, case law sets out the approach to be considered be the court. In the case of Kowaliw (1981) FLC ¶91-092 the Court outlined those financial losses incurred by the parties or either of them during relationship, should be shared by them 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
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.

The classic example for waste is gambling. Proving gambling wastage can be a challenging process. In order to establish that one party has incurred significant gambling losses or negatively contributed to the asset pool, the evidence must be provided to support this claim. This may include bank statements, betting records, and evidence of attendance at gambling venues.

One example of this comes from a MFC staff member's experience as a graduate solicitor running a wastage argument where the other party (the wife) had an addiction to online gambling and wasted around $350,000 from matrimonial assets in less than 3 years. In some nights she would spend more than $15,000 on online gambling. The records provided to

support this argument included thousands of pages of bank statements , betting records and websites tracing.

Other examples of wastage include extravagant living, failed business ventures and spending moneys on drug and alcohol (noting that it can be hard to establish whether the use of drugs and alcohol is wastage or addiction/illness)

An example (from the private practice of a MFC solicitor) is of a husband who stopped making mortgage repayments and cancelled insurance on the property until the bank repossessed the property – he did this to "teach the wife a lesson and stop her from getting any money from the sale of the property".

Summary of MFC position

Therefore, overall MFC supports the proposed section 79 (4) (ca to cd) amendments and believes that these changes will provide a clear legislative framework for recognising wastage and debt in property settlements and will better support parties, both in and out of court, to understand the relevance of the issues to property distribution following separation. Specifically, the proposed amendments will achieve two things:

1. codify and streamline the current process / court's approach;
2. encourage clients to report wastage and negative intentional debt contribution.

However, MFC also raises the following potential unintended adverse impacts of the proposed amendments:

- The proposed changes also have the capacity to complicate and slow down a case, e.g., through prolonged negotiations on the issue or the only issue for trial being the family violence/wastage factor.
- They also have the capacity to increase legal costs as the case may not settle due to the specific family violence/wastage issue (etc), leaving the issue to be determined at trial.
- In addition they have the capacity to encourage people (male or female) to make false claims and, in turn, put more strain on the court system by making it more adversarial. Given that the court only benefits from legitimate claims and is hurt by false claims, the risk of encouraging people to make false claims risks other claims that may be plausible to be seen as not credible.

All the above have the potential of adversely affecting MFC clients, who usually have small asset pools and, therefore, often cannot afford overly adversarial processes or having the matters progress to trial. The barriers to our vulnerable clients may also cause further challenges at trial, including their inability to be model litigants.

Case Study

The parties were both in their 80s and had a medium-sized asset pool. The parties had been married for over 30 years. The wife raised Kennon, Stanford and Kouper argument for family violence and wastage. Relevant expert reports had to be obtained to corroborate the allegations. This was an expensive and re-traumatising process for the client. Initially, the matter had been listed for a one-day trial, but after receiving the relevant expert reports, it was determined that the matter would be listed for at least a two- or three-day trial. No doubt, this was going to be more costly and stressful for the client.

On the day of the trial, his honour said he did not have availability for a two or three-day trial and was not minded to hear the matter on a part-heard basis. His earliest availability for a trial of more than one day was six months away. Again, this would have further increased our client's legal and disbursement costs and caused further stress and anxiety waiting for the new trial dates.

Schedule 1: Property reforms – Part 2: Principles for conducting property or other non-child-related proceedings

Part 2 of Schedule 1 of the exposure draft contains amendments to establish 'Less Adversarial Trial' (LAT) processes for conducting property or other non-child-related proceedings. The amendments are modelled on, and adapt the existing LAT processes for child-related proceedings under Division 12A, Part VII of the Family Law Act to be fit-for-purpose in property or other non-child-related proceedings.

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

Agree.

MFC agrees with the proposed approach to establish less adversarial trial processes for property or other non-child-related proceedings, and supports the view that current procedures used in the family courts are overly adversarial, are intimidating for litigants, and exacerbate conflict. We believe that the proposed approach would help reduce the hardship and financial burden on families caused by protracted and adversarial litigation particularly for small property pools. In particular, MFC believes that a less adversarial trial process is beneficial for self-represented clients to achieve their own outcomes and clients with social and health impediments to better understand and participate in the process.

In 2006, Div 12A in PT VIII was added to the FLA to address the principals for conducting child-related proceedings (s69ZM(4) FLA) as less adversarial trial (LAT) proceedings. All parenting cases determined in the Family Court under the FLA are determined as LAT proceedings. Where proceedings are for both final parenting orders and final financial orders, under Pt VII Div 12A of the FLA parties can consent to the proceedings being heard and determined as a less adversarial trial (LAT) procedure: s 69ZT. This means, inter alia, that certain provisions of the Evidence Act are excluded from those proceedings (unless the court otherwise orders).

The potential of excluding certain provisions from the Evidence Act to stand alone property proceedings may have undesirable consequences on the determination of property proceedings and appeals.

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

Agree.

MFC supports the proposed wide-ranging approach which gives lawyers greater court oversight to resolve a broad range of matters where less adversarial trial processes may be beneficial. We believe that the proposed approach achieves a balance in terms of incorporating the rules into the FLA without limiting them to cases directly connected to marriage breakdown or financial issues in de facto relationships. This allows for the potential inclusion of other types of cases, such as those involving contempt of court, vexatious litigants, or violations of specific Family Law Act sections.

Schedule 1: Property reforms – Part 3: Duty of disclosure and arbitration

Part 3 of Schedule 1 of the exposure draft contains amendments relating to the duty of disclosure and family law arbitration. These amendments would:

- *establish the disclosure requirements for people with financial matters within the Family Law Act*
- *implement changes to reduce complexity of family law arbitration provisions.*

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

Yes.

MFC believes that the amendments achieve a desirable balance between what is provided for in the Family Law Act and the Family Law Rules. We support the requirement for people

involved in financial and property matters related to family disputes to share all relevant financial information with each other and with the court, as well as any other relevant parties, apart from cases where someone is accused of breaking court orders or being in contempt of court, which is consistent with the current rules.

In addition, MFC believes the amendments explain the rules in a way that is more accessible and less technical than the wording in the current legislation.

What changes would you proposed and why?

The proposed amendments to the disclosure duty and court's power in relation to non-compliance is imperative. We support the amendment of inclusion of notes into the act that reference existing powers in FLR and FLA in relation to consequences of non-compliance. However, the court needs to regularly exercise these powers when a party fails to comply with disclosure or a court order. There are often considerable delays to financial matters where the other party hasn't provided full and frank disclosure nor complied with court orders to do so and there is no consequence. The only option is to make a costs application, however these are generally at more expense to the client and the client is likely to only recover a small portion of their costs back.

A majority of property proceedings issued are due to the other party's failure to provide disclosure. A recent conciliation conference was adjourned to a date 3 months later because the other party hadn't provided disclosure (despite being ordered to provide a month pre conciliation conference).

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?

Yes.

MFC agrees that 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.

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

Arbitration is not usually a process undertaken by MFC clients and therefore our experience of this is limited. However, we support the proposed provisions and believe that they would assist in reducing the complexity of the arbitration provisions in the FLA and promote the uptake of arbitration to resolve property settlement disputes.

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?

MFC supports the proposed arbitration amendments and the discretion they provide to the courts to be able to stop arbitration and go back to court when they consider that it is no longer appropriate to arbitrate the matter. MFC suggests that the threshold for this needs to include family violence factors.

Schedule 2: Children's contact services

Schedule 2 of the exposure draft contains amendments that would enhance the operation of Children's Contact Services (CCS) by:

- *implementing a regulatory scheme for government-funded and private CCSs*
- *introducing penalties associated with non-compliance with standards.*

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?

MFC broadly supports the definition of a CCS in the proposed new section 10KB. We suggest that the Commonwealth consult with relevant Indigenous organisations and communities to ensure the proposed new section 10KB reflects their understanding of CCS.

MFC also highlights the need for additional work to be undertaken on how the scheme would work in practice, including issues of governance and other implications of these changes for organisations.

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

MFC supports the intent of these proposed amendments to require accredited providers of children's contact services to keep communications made as part of their intake procedures confidential (with some exceptions). We also note the need to provide education and support for CCS providers to ensure they can provide appropriate training to staff on the proposed changes.

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

MFC notes the potential for the proposed penalty provisions to create a deterrent to organisations offering a CCS and stresses the importance of working with the sector to develop and implement the scheme to avoid unintended negative outcomes of the proposed accreditation requirements.

MFC suggests the Commonwealth develop an implementation plan in conjunction with providers, including providers based in regional areas where workforce shortages and limited numbers of services overall can create challenges to the adoption of new regulations.

Are there more effective alternatives to the penalty provisions proposed?

As above, MFC highlights the importance of supporting a collaborative implementation process to increase compliance with the proposed new scheme and reduce the need for penalty provisions.

MFC also stresses that in some regional areas it is almost impossible to find a CCS for clients. For example, until this year the only options for many MFC clients in the regional communities we serve was for the parties to travel to MFC Mildura or Bendigo (both around 2.5 hours away) and often these services have month long waits or can only accommodate spend time arrangements happening on a monthly (or longer) recurrence.

In 2022 MFC submitted an application to be considered for one of the 20 new CCS around the State and were successful in our tender to establish a centre located regionally in Swan Hill. This centre, along with our Mildura centre, provide support to children and families locally whereby previously families would have travelled to access the service. However, due to ongoing recruitment issues identified across the State the centre can currently only offer service at a limited capacity.

Overall, MFC believes that CCS should be regulated but we are concerned that if the accreditation process is too cumbersome, it will deter potential providers from completing the process, resulting in fewer CCS services being available for clients, particularly in remote areas where these services are critical. In particular MFC feels that the implementation of penalties being imposed for non-compliance may increase the risk of service disruption in regional areas resulting in families and children again missing out on accessing the CCS service locally.

Case Study (pre-Swan Hill contact centre)

Parenting matter involving young child (around 7 years old) who was severely autistic (non-verbal). Supervised contact was proposed to OP on the basis of a significant history of alleged family violence between parties and OP's disclosures about beliefs about curing autism by administering medicinal cannabis. OC also alleged that OP had attempted to medicate child with medicinal cannabis previously. Initially had to wait 2 months to get into Fairground CCS Bendigo who could only accommodate monthly visits. However, child struggled with the 5 hour return trip (OC could not afford overnight accommodation) and supervised contact ceased. Months of enquiries were made in relation to Swan Hill

potential supervisors, with OP's continual threat to issue proceedings on the basis of OC withholding child. Around 3 months later, the child's disability worker offered to supervise the contact. Despite having no experience, the arrangement proceeded out of desperation.

Schedule 3: Case management and procedure – Part 1: Attending family dispute resolution before applying for Part VII order

Part 1 of Schedule 3 of the exposure draft includes amendments that would allow a court to reject an application before proceedings commence, if the application does not comply with the requirements in section 60I regarding attendance at family dispute resolution in advance of court proceedings. The exposure draft includes amendments to section 60I that would provide that the courts must only accept an application for filing if it meets the exemption criteria.

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?

MFC supports the proposed amendments to section 60I to allow the courts to consider the exemption criteria prior to accepting filing of an application. We believe that these amendments would support the courts to expeditiously consider whether an exemption applies and refer applicants that have not complied with section 60I to family dispute resolution services. In general, MFC believes that the threshold for rejecting applications needs to be quite low, as issuing proceedings can itself be a method of abuse. There needs to be an appropriate balance between permitting the exemption to FDRS in cases of family violence/abuse, and where a party issues proceedings without meeting the criteria for this exemption.

Parents should be referred back to FDRS where applicants have issued proceedings without meeting the exemption criteria. Unrepresented applicants are (at best) not aware of the requirement or (at worst) may be using litigation as a tool to intimidate a coparent. The intention of the amendment should not have the unintended effect of delaying the filing of urgent applications which would be required to be considered instantaneously.

There appears to be some confusion among legal practitioners of whether solicitor negotiations come within the meaning of mediation. MFC also suggests that the proposed provisions may need to be expanded as currently they do not cover situations in which parties solicitors engage in negotiations and then file proceedings. This is technically not covered in

the proposed amendments and should be included, in particular when parties have recently engaged in solicitor assisted negotiations but failed to reach an agreement.

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

MFC supports a further amendment to the FCFCOA Act to allow affected persons to seek a review of a decision made by a registrar to reject filing of their application, or a request for an exemption, before a judge.

However, from a practical viewpoint solicitors should be aware of the importance of drafting applications to set out why the matter is urgent and addressing exemption criteria and therefore trust that the Registrar can make a determination based on that material. Unless the reviews are able to take place immediately, it may very well be quicker for a rejected applicant to participate in an FDR and make a further application to the court if unsuccessful than it would be to await a review.

Schedule 3: Case management and procedure – Part 2: Requirement to attend divorce hearings in person and delegations

Part 2 of Schedule 3 of the exposure draft includes amendments to section 98A of the Family Law Act that would allow all divorce applications to be heard in the absence of the divorcing parties and their legal representatives, unless their attendance is requested by the court.

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

MFC supports the intent of this measure to minimise unnecessary attendance at court hearings.

As most divorce hearings are perfunctory at best, we do not believe that it is necessary for parties to attend the divorce hearing when there are children of the divorcing parties' marriage who are aged under 18 years and where there is a sole applicant. MFC supports aligning the court attendance requirements for divorcing parties, regardless of whether parties file solely or jointly, and whether there are children of the marriage.

In sole applications, the Respondent has an opportunity to file a response to the application if they do not concede care arrangements and welfare of the children. Minimizing unnecessary attendances at court hearings would make the hearings more efficient and free up valuable court time which could be utilised for other matters.

Schedule 3: Case management and procedure – Part 3: Commonwealth Information Orders

Part 3 of Schedule 3 of the exposure draft proposes to make clear that in responding to Commonwealth Information Orders (CIOs) violence-related information must be provided, even if a department or agency does not have location information. The Bill would make clear that CIO obligations apply regardless of other laws that may prevent information disclosure. The exposure draft also proposes to amend subsection 67N(8) to expand the category of persons that a department or agency would need to provide violence related information about under CIOs.

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

MFC supports the overall intent of these amendments to clarify that in responding to Commonwealth Information Orders (CIOs) violence-related information must be provided, even if a department or agency does not have location information. This will ensure the court has all relevant information to determine risk of the child.

We are satisfied that sections 67NP protects the privacy of this information.

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

The expansion of category of family members about which a department or agency must provide information about will help to ensure the court has all relevant information to determine risk of the child.

MFC recommends consultation on this issue with relevant Aboriginal and Torres Strait Islander and other linguistically and culturally diverse communities to ensure any proposed changed accurately reflect kinship relations in these cultures.

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

MLC supports the inclusion of kinship relationships as long as issues relevant to cultural appropriateness are addressed.

Schedule 3: Case management and procedure – Part 4: Operation of section 69GA

Part 4 of Schedule 3 of the exposure draft contains amendments to section 69GA of the Family Law Act, which concern the jurisdiction of courts that have been prescribed under the Family Law Regulations for the purpose of that section.

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

MFC supports these amendments clarifying that, consistent with courts of summary jurisdiction, state or territory courts prescribed under section 69GA are 'expressly' vested with jurisdiction under Part VII of the FLA. MFC also stresses the importance of judicial members involved in family law matters having appropriate knowledge of the family law jurisdiction.

Schedule 4: General provisions – Part 1: Costs orders

Schedule 4 of the exposure draft contains amendments of general applicability to family law proceedings. Part 1 of Schedule 4 of the exposure draft contains amendments that would redraft the provisions relating to costs orders. The amendments would:

- *incorporate Family Law Rules relating to costs orders into the Family Law Act, to provide greater clarity about the scope and application of the courts' power to order costs, and*
- *clarify the circumstances in which a court is permitted to make an order for a party to contribute towards the cost of an Independent Children's Lawyer.*

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.

MFC supports the proposed new Part XIVC of the FLA and the incorporation of details presently confined to the Family Law Rules into the legislation. We believe that this would help provide greater clarity about the scope and application of the courts' power to order costs, without limiting the breadth of the existing power and assist parties, including self-represented litigants and non-parties associated with family law matters, such as practitioners, to understand those powers.

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

MFC supports the intent of the policy to allow courts the power to order parties to make reasonable contributions towards the cost of independent children's lawyer (ICL) appointments unless this would cause financial hardship.

Are there any unintended consequences from the new term 'means-tested legal aid'? If yes, please outline what these consequences would be.

If the definition of "means-tested legal aid" is not clarified, it could restrict the courts' ability to order parties to make contributions to the cost of ICL appointments.

Schedule 4: General provisions – Part 2: Clarification of inadmissibility provisions

Part 2 of Schedule 4 of the exposure draft includes amendments to clarify the admissibility protections in sections 10E,10J, 10V and 70NEF of the Family Law Act relating to family counselling, family dispute resolution, risk screening and post-separation parenting programs. The proposed amendments seek to clarify the Commonwealth's intent that evidence of anything said in these confidential contexts is inadmissible before any court – including state and territory courts. The exposure draft also contains clarifying amendments to sections 67ZB and 56.

Do you have any concerns with the proposed amendments, including the new exemption to the inadmissibility of evidence for coronial proceedings?

MFC supports the proposed amendments and believes that they effectively clarify that the admissibility protections under the Family Law Act are intended to apply to any court proceedings, with appropriate exceptions.

It is important that the coronial court has all evidence available before it, including confidential family law services information if applicable. This upholds public interest in enabling coronial courts to operate unimpeded.

Overarching Question for Schedules 1-4

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

MFC suggests that the commencement of these provision be delayed until appropriate consultation with the sector has been undertaken to ensure they have the time and resources to implement these changes and to avoid any unintended negative consequences.

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

The exposure draft does not include proposed amendments to the Family Law Act on the use of protected confidences. Such amendments were included in the exposure draft of the Family Law Amendment Bill 2023, but were not included as part of the Bill introduced to Parliament in March 2023. This was because stakeholders raised a number of concerns, including that the amendments as drafted could result in unintended operational consequences. We intend to engage closely with the feedback already provided, and are seeking further feedback through this consultation paper (at the end of Schedule 4) to develop these amendments further.

We are seeking views to 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 matters.

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?

MFC supports an approach to protected confidences 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. We suggest that the need for additional safeguards be considered once the 12-month statutory review of the Family Law Amendment (Information Sharing) Bill 2023 has taken place.

Are the 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?

MFC supports an approach which 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. We also support the need for increased awareness of the existing powers of the Court to protect confidential information and better awareness of these powers amongst lawyers and litigants.

Are there any legislative or non-legislative approaches you would propose to ensure protected confidences are accessed and used appropriately in family law proceedings?

MFC believes that children and young people, with the right support and protections, should be allowed to agree to share private information about their own treatment. Therefore, we would support changes to the legislation which allow adults who were involved in court cases as children to openly talk about how those court decisions affected them.

We stress the importance of protecting private conversations in cases involving domestic violence and family issues and recognise that some victims have faced difficulties accessing therapy because they were advised not to, to prevent their therapy records from being used in court. There we support changes to the legislation ensure that victims feel confident that their private conversations will be kept safe if they seek therapy. This could include changes to court rules so that 'counselling records' (and other types of protected confidences records) are included in the list of documents prohibited from being copied under rule 6.37(2)(b) of the Family Law Rules (along with child welfare records, criminal records, medical records and police records').

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