



Community
driven justice.

FITZROY LEGAL SERVICE SUBMISSION TO INQUIRY INTO *FAMILY LAW AMENDMENT BILL 2024*

**For all enquiries related to this
submission:**

Name: Amity Mara
Position: Manager of Policy, Advocacy and Projects
Email: amara@fls.org.au

About Fitzroy Legal Service

Established in 1972, Fitzroy Legal Service ('FLS') is Victoria's longest standing community legal centre championing justice for the most marginalised members of our community. With a deep commitment to community-driven change, we provide individuals and communities with access to justice when they need it most and boldly agitate for high-impact policy and legislative reforms.

FLS has supported our communities to navigate family law and family violence legal systems for decades. Our substantive practice now includes five family law and family violence Health Justice Partnerships across the local government areas of Yarra and Darebin, monthly divorce clinics, and duty lawyer services at the Neighborhood Justice Centre in Collingwood and the Heidelberg Magistrates' Court's Specialist Family Violence Court. FLS is one of the few community legal centers that provide advice and casework on family law property matters. We provide high quality free legal services, including legal advice and representation, to both victim-survivors of family violence and people who engage in or use gender-based violence. Providing services to both victim-survivors and those who use violence gives us unique insight into how both groups engage with the family law and family violence legal systems, their needs, and what processes are effective at reducing the risk of ongoing violence.

Endorsements

This submission is endorsed by:

- InTouch Women's Legal Centre
- South-East Monash Legal Service
- Federation of Community Legal Centres Victoria



Introduction

FLS welcomes the introduction of the *Family Law Amendment Bill 2024* ('the Bill') and its referral to the Legal and Constitutional Affairs Legislation Committee for a public inquiry. We are encouraged by the Commonwealth Government's continued commitment to amending the family law system to make it safer, simpler, and fairer for separating couples – with a particular focus on those affected by family violence.

We are supportive of the Bill as a whole, regard it as a step forward in making the system safer and fairer, and would commend its passage through parliament. However, we believe there are a handful of amendments that can be made to ensure the Bill can better protect victim-survivors, reduce opportunities for systems abuse by those who use violence, and increase the ability of self-represented litigants to navigate the family law system.

We note that this inquiry did not include specified terms of reference. We do not seek to provide analysis of the Bill as a whole, but rather to provide commentary and feedback on matters to which we have a specific recommendation for further improvement.

We are grateful to our clients for trusting us with their stories and we acknowledge the victim-survivors of family violence we work closely with, whose voices and experiences inform our advocacy for justice. The case studies in this submission are drawn from our legal practice. All identifying details have been changed or omitted, including by not using their real names.

Further clarification is needed of what standard of proof and evidence is required for the effects of family violence to be considered

We support the proposed changes requiring the court to consider the effect of family violence on a victim-survivor's contributions and their current and future circumstances. As many as half of the women who choose to leave violent relationships end up in poverty,¹ and FLS regularly assists people who have experienced physical or psychological injuries, or coercive controlling conduct, that limited their ability to earn an income or care for their children during the relationship (contributions), and further limit their ability to work in the future due to trauma and long-term physical and psychological consequences (future needs).

We support the focus on the 'effect' of family violence in so far as it does not require the court to consider issues of fault and culpability as part of determining property divisions. By focussing on the impact of the behaviour, the sections focus on the effects of family violence on the victim-survivor and accountability of the person who uses violence, rather than culpability or fault.

The court will still be required to make a finding of fact that family violence has occurred, as it already is required to do in parenting matters and in property matters if issues of family violence are raised pursuant to the principles established in *Kennon*.² However, while hearing and adjudicating evidence of family violence is not an entirely new exercise for the Federal Circuit and Family Court of Australia ('the court'), further guidance is required regarding the standard of proof and evidence required for the court to take the effects of family violence into consideration.

Proving that family violence has occurred can be very difficult and cause ongoing trauma for victim-survivors. This is particularly true for self-represented litigants who research shows struggle to adequately document their experience of family violence in affidavits or engage in the subpoena process to obtain crucial evidence concerning the violence.³ The need for clarity for self-represented victim-survivors over what evidence they need to present, and in what format, is of vital importance given up to 82% of matters with self-represented litigants in family law proceedings involve allegations of family violence.⁴

The very nature of family violence, in that it most predominantly occurs within the privacy of the family home, where there are no witnesses outside the immediate family, can make it hard to prove in the absence of medical evidence or police records and solely through the testimony of the victim-survivor. It is currently unclear if this provision would allow for the court to make a finding of fact based on the balance of probabilities on the evidence of the victim-survivor, or if further evidence would be necessary such as a Family Violence Intervention Order ('FVIO') (or equivalent Orders in States other than Victoria).

We would be concerned by any requirement for FVIOs or police reports as necessary evidence for family law proceedings. Many parties avoid reporting family violence incidents to police, or seeking FVIOs, because they do not feel safe interacting with the police or because they fear further escalation in family violence as a result. These safety decisions by victim-survivors must be respected. Furthermore, if the presence of FVIOs are to be used as evidence that family violence has occurred, clarity is required as to how circumstances where FVIOs have been consented to without admission are to be dealt with. Should consent without admission FVIOs be determinative in matters of property settlement it may result in an

¹ Summers, A. (2022). *The Choice: Violence or Poverty*. University of Technology Sydney, p.12.

² *Marriage of Kennon* (1997) 22 Fam LR 1.

³ University of Technology Sydney and ANROWS, "No straight lines": Self-represented litigants in family law proceedings involving allegations about family violence, 2020.

⁴ *Ibid*.

increased number of contested matters in FVIO proceedings in the Magistrates' Court – in turn increasing risks to victim-survivors at a time where immediate safety is of paramount concern.

Most concerning, this lack of clarity over the standard of proof may increase the ability of those who use violence to engage in systems abuse against victim-survivors by raising vexatious allegations of family violence that the victim-survivors must spend additional time and resources arguing against. This is in line with accounts of victim-survivors engaging with the family law system who repeatedly reported that former partners who used violence adopted legal strategies designed to deplete their limited funds and prolong contact.⁵ Having clarity on the standard of proof and evidence required would constrain the ability of those who use violence from weaponising the family law system against victim-survivors by making it easier to quickly dismiss unmeritorious allegations that are not based in the right evidence. The case study below illustrates the ways in which people who use violence engage in systems abuse to cause further trauma to victim survivors.

Poppy's story – baseless allegations of family violence as a form of systems abuse

Poppy had experienced significant family violence at the hands of her ex-partner Bert*. Bert had previously made an application for a FVIO alleging that Poppy had committed family violence against him. The Magistrate's Court had refused to grant an interim or final order, having not been satisfied on the facts that Poppy had committed any acts of family violence towards him.*

Despite this finding of the Magistrate's Court, Bert filed extensive material in subsequent family law court proceedings alleging that Poppy had committed family violence toward him. His allegations included behavior outside the definition of family violence, including Poppy complying with court orders. He also alleged that Poppy was abusive toward him but provided no evidence or particulars of this alleged abuse. Nevertheless, the court permitted Bert to continue to run these arguments, including allowing him to speak to them in open court.

This was extremely distressing for Poppy and took up a considerable amount of time and resources, prolonging her contact with Bert and the legal system longer than was necessary.

**This case has been de-identified, including by not using their real names.*

Poppy's story highlights how a lack of clarity over the evidence and standard of proof required to establish that family violence has occurred can allow people who use violence to run vexatious allegations of family violence against victim-survivors. Had such clarity existed, Poppy or her lawyers would have easily been able to have those allegations quashed at an earlier stage of the proceedings due to a lack of evidence, and spare Poppy the trauma of that experience.

It is our recommendation that the court be able to determine if family violence has occurred based on the balance of probabilities and evidence put before it, and that the bill should contain clarifying provisions over what evidence would and would not be regarded as persuasive.

Furthermore, Poppy's story demonstrates how people who use violence will argue the same allegations already dealt with by a state court again in family law proceedings as a form of systems abuse. While this case study illustrates an instance of systems abuse by a person who uses violence repeating vexatious allegations of family violence that have already been found to be without merit by a state court, a more common scenario is victim-survivors in family law proceedings having to re-prove and re-argue that family violence did occur against them despite a finding of fact on this already existing from a state court. This

⁵ Ibid.

process can be incredibly retraumatising for victim-survivors and is unnecessary in the absence of any new evidence to the contrary being presented by the other party.

We would recommend that if a finding of fact regarding whether or not family violence has occurred already exists from a state court, there should exist in family law proceedings a presumption in favor of that finding unless the other party can rebut the finding based on new or different evidence not presented in the original hearing. This presumption would be a vital protection for victim-survivors to not have to continuously retraumatise themselves by going over the same ground and serve to limit the ability of people who use violence to repeatedly bring unmeritorious allegations of family violence against victim-survivors as a form of systems abuse.

Recommendations:

- 1. That the Bill include a clarification that the court will determine if family violence has occurred based on the balance of probabilities and the evidence put before it.**
- 2. That the Bill contain clarifying provisions over what evidence would and would not be considered as persuasive**
- 3. That the Bill establish a presumption in favor of any finding of fact by a state court regarding whether family violence has or has not occurred, that can only be rebutted based on the other party producing new or different evidence to the contrary**

A definition and examples of wastage are required

FLS supports the addition of wastage as a new contributing factor to be considered in the assessment of current and future circumstances under proposed section 79(5)(d), and commends the efforts made since the Exposure Draft to bring the wording closer to the current common law test in *Kowaliw*⁶ by the inclusion of 'intentionally or recklessly' in the proposed section. However, we believe that further clarification is required by way of a definition of the term 'wastage' in order to fully reflect *Kowaliw* and ensure that the proposed section does not unintentionally create confusion over what types of conduct should be raised under a wastage argument.

Within the current structure of proposed section 79(5)(d), which already includes the requirement for the conduct to be done intentionally or recklessly, wastage could be defined as the reduction or minimisation of the effective value or worth of assets.

Examples should also be included in the Bill to further clarify the meaning of wastage. These could include:

- Undermining the profitability of a business or investment (such as intentionally damaging good will and reputation)
- Diversion of income
- Selling or transferring marital assets without consent from the other party
- Unilaterally spending joint savings on large purchases for the sole benefit of one party and without consent of the other party
- Intentionally diminishing a property's value by not completing renovations.

Providing this additional clarification would be helpful for self-represented litigants, for whom the meaning of technical concepts such as 'wastage' is not self-evident, particularly when they are negotiating matters with the other party without the court's oversight.

⁶ Kowaliw & Kowaliw (1981) FLC 91-092.

Recommendations:

1. That the Bill include a definition of wastage that fully reflects the common law test in *Kowaliw*
2. That the Bill include examples of wastage to provide further clarity to the definition

The risk of homelessness for victim-survivors and dependent children should be an additional factor for consideration of current and future circumstances

Research shows that women, particularly mothers with dependent children, experience significant economic disadvantage post-separation.⁷ This is especially true for victim-survivors of family violence, with data from Homelessness Australia showing that the number of women and children sleeping rough or in a car has almost tripled between 2012-13 and 2022-23.⁸ This comes at a time when homelessness and housing services are increasingly unable to meet the demand for long-term housing from victim survivors. The Council of Homeless Persons reports that up to 78% of households with victim-survivors who needed long-term housing were not provided with any.⁹

Considering this reality, further amendments are needed to better protect victim-survivors leaving violent relationships from the risks of poverty and homelessness. When assessing current and future circumstances, the court should consider the need to avoid parties becoming homeless if they have no financial or economic security and the need to provide suitable housing for dependent children. The case study below highlights the very real risk of homelessness to victim-survivors, particularly mothers, after separation.

Fiona's story – the risk of homelessness post separation

Fiona had two young children and had stopped working after the birth of her first child. As a result, she was wholly dependent on her partner Matt* to give her money to buy things for herself and the children - including clothing and groceries.*

Following a violent incident by Matt, a family violence intervention order was issued and Matt was excluded from the home. Fiona remained in the home with the two young children and obtained Centrelink to cover her and the children's minimum daily expenses.

Matt initiated proceedings in the Federal Circuit & Family Court of Australia seeking for Fiona to be evicted from the home and for Matt to have sole use of the property. This would have made Fiona and the children homeless as, while she had been able to obtain Centrelink, she had no savings and nowhere to go.

FLS assisted Fiona in responding to this application seeking a property settlement and for Fiona to have sole use of the property until she is able to find suitable accommodation for her and the children. We argued that the risk of harm to the children if they were to be made homeless should be prioritised. Luckily, the court agreed with us and made orders for Fiona to be able to stay in the house until after the property settlement had finished.

**This case has been de-identified, including by not using their real names.*

⁷ Belinda Fehlberg and Lisa Sarmas, 'Australian family property law: 'Just and equitable outcomes?' (2018) 32 Australian Journal of Family Law 81.

⁸ Homelessness Australia, Homelessness and domestic and family violence State Of Response Report 2024.

⁹ Council to Homeless Persons, New data highlights desperate housing crisis for women fleeing family violence in Victoria 2022.

Fiona's story demonstrates the real risk of homelessness faced by victim-survivors and their dependent children at separation. While we were able to successfully obtain a delay in Fiona having to leave the house, the lack of clarity that she may have been evicted at the start of these proceedings was extremely distressing for her and the children. This is why it is vital that these factors be explicitly included in the legislation as factors for consideration in property matters. We support the proposal by academics for the inclusion of 'the provision of suitable housing for dependent children' and 'material and economic well-being' as additional factors for consideration under proposed section 79(5).¹⁰

Recommendation:

- 1. That the Bill include 'the provision of suitable housing for dependent children' and 'material and economic well-being' as additional factors for consideration under proposed section 79(5)**

Compensation awards and claims arising from family violence between the parties must be excluded from being considered in assessment

Depending on the facts of the case, it is currently open for awards of compensation received by one party, arising out of injuries they sustained as a result of family violence from the other party, to be taken into account as a financial resource of that party and could be used as grounds for an adjustment being made in favor of the other party – who used the violence for which the compensation was provided. This possibility goes against the policy principles at the heart of both the compensation schemes and this Bill.

Many victim-survivor clients who seek assistance from community legal centres also have claims for compensation arising from injuries they sustained from the other party. This compensation should not be used to then inadvertently disadvantage them in property proceedings with the very person who caused their injuries.

The Bill should be amended to explicitly exclude compensation awards and claims arising from family violence between the parties from being considered in the assessment of the parties' property settlement entitlements.

Recommendation:

- 1. That the Bill explicitly exclude compensation awards and claims arising from family violence between the parties from being considered in the assessment of the parties' property settlement entitlements**

Cost protections must be extended to clients of Community Legal Centres

FLS supports the costs provisions being contained in a single place and incorporating them into the legislation, to increase accessibility and clarity of how they operate. However, we are concerned that the current wording of 'legal aid' doesn't provide the necessary clarity of whether clients of community legal centres, such as Fitzroy Legal Service, would be included or not.

The terminology of 'legal aid' can be confusing for both legal professionals and the community due to the difference between Legal Aid and Community Legal Centres as legal assistance services providers and the funding arrangements between the two. Furthermore, many community legal centres, including FLS, provide assistance to a whole range of clients. Some of these clients might be experiencing explicit financial or economic disadvantage, but many of them may be vulnerable for a variety of other reasons

¹⁰ Belinda Fehlberg and Lisa Sarmas, 'Australian family property law: 'Just and equitable outcomes?' (2018) 32 Australian Journal of Family Law 81.

including demographic factors, past criminalisation, or the complexity of the family violence they face. Limiting the legislation to legal aid and financial hardship may inadvertently exclude some FLS clients.

Recommendation:

- 1. That the Bill be amended to expand costs protections to all clients of Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services**

Additional protections are needed to limit access to protected confidences

While we acknowledge there are circumstances when a person's protected confidences are relevant in determining risk of violence or abuse, and the best interests of the child, and should be adduced into evidence, the current proposed process does not adequately consider the risk to, or agency of, victim-survivors in having their sensitive records accessed.

Currently, a subpoena is filed and the party whose sensitive records are being sought has to object to their production. The case study below demonstrates how distressing and high risk this process can be.

Siew Mei's story – increased risk of family violence due to production of protected confidences

Siew Mei and her children had been subjected to family violence at the hands of the children's father, Dave*, throughout their relationship and after separation. As a result, Siew Mei had engaged in counselling with a specialist family violence service for approximately one year.*

In the course of subsequent parenting proceedings in the Federal Circuit and Family Court of Australia, the Independent Children's Lawyer subpoenaed Siew Mei's family violence counselling records. Siew Mei had shared very intimate, personal, and confidential information with her counsellor, and she was distressed at the prospect of her ex having access to the material as she felt it placed her at increased risk of further family violence.

Siew Mei sought to inspect the records prior to their release but struggled to object to her ex Dave inspecting the material on the basis that it put her and her children at increased risk of harm.

**This case has been de-identified, including by not using their real names.*

Siew Mei's story highlights how the disclosure of a victim-survivor's protected confidences can place them at increased risk of further family violence by giving access to the person who has used violence against them. The knowledge that these records may not be confidential can undermine the public interest in people accessing counselling and other support to help with their recovery.

FLS has also witnessed instances where parties who use violence have sought the sensitive documents of victim-survivors through vexatious subpoenas and fishing exercises that the victim-survivor then must try to argue against. This is another form of systems abuse.

The primary considerations in determining whether such evidence should be adduced should be the best interests of the child and the need to protect the safety of victim-survivors from further violence. In order for this to be the case, a threshold test must be introduced where, in the absence of informed consent of the victim-survivor, a party seeking to issue a subpoena to access protected confidences must show the information is relevant and the probative value of the records would outweigh any risk of harm to the party whose records are being accessed.

Recommendation:

- 1. That the Bill introduce a threshold test whereby a party seeking to issue a subpoena to access protected confidences must show the information is relevant and the probative**

value of the records would outweigh any risk of harm to the party whose records are being accessed.