



PACIFICA CONGRESS

**Submission in response to the
Family Law Amendment Bill (No. 2) 2023
Exposure Draft**

10 November 2023

TO: Attorney-General's Department

3-5 National Circuit

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Pacifica Congress is a leading multidisciplinary organisation of family law professionals in the Pacific region. We are dedicated to ensuring that children and their families are better equipped to overcome the harm caused by family conflict.

Pacifica Congress is a unique and formidable organisation – one that thinks outside the family law square, and looks at innovative ideas to improve the practice of family law, and the lives of children and their families. Pacifica Congress members include judicial officers, legal practitioners, researchers, teachers, social scientists, mediators, and policy makers in the family law area.



Our Vision:

A Family Law system in which the professional participants work together to protect children and their families, the most vulnerable members of our community, from the harm that conflict causes.

The Board of Directors of Pacifica Congress comprises professionals from all spheres of family law, from judicial officers & legal practitioners, to psychologists, counsellors and family report writers, to administrators, and to mediators and dispute resolution practitioners.

Their individual skills provide the catalyst to meeting the charitable goals and aspirations of Pacifica Congress.

About Pacifica Congress

We shape positive change for children & families
in the Family Law System

Pacifica Congress brings together family law professionals from the Pacific region countries including Hong Kong, Japan, Aotearoa New Zealand, Singapore and Australia. Pacifica Congress is a not-for-profit member-based organisation registered with the ACNC. Our work involves ensuring that children and their families are better equipped to overcome the harm caused by family conflict, thereby enhancing their lives.

At Pacifica Congress we create forums and networks for family law professionals to share information and ideas. We identify trends to shape constructive change for children and their families.

*“We advocate for innovation in the courts and legal systems,
which are called to serve children and their families.”*

Consultation Questions

Schedule 1 – Property Reforms

Part 1: Property framework

Codifying the property decision-making principles

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

Pacifica Congress considers that the proposed structure of the property decision-making principles do achieve a clearer legislative framework for property settlement.

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

Pacifica Congress makes no further comment.

Just and equitable

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

Pacifica Congress does agree with the proposed framing of the just and equitable requirement.

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

Pacifica Congress makes no further comment.

Effect of family violence

5. *Do the proposed amendments achieve an appropriate balance in allowing the court to consider the relevance and economic impact of family violence as part of a family law property matter, without requiring the court to focus on issues of culpability or fault?*

Pacifica Congress considers that the proposed amendments require a Court to make a finding of fact as to an act of family violence or economic or financial abuse before it can make a determination on the effect of such on contributions and current and future circumstances. It is submitted that the proposed wording makes the two inextricably linked, and therefore Pacifica Congress opines that with the need to make a finding of fact that an act of family violence or economic or financial abuse has occurred, the Court cannot avoid focusing on issues of culpability or fault.

If it is the intention to amend the *Family Law Act 1975* to require a court to consider the effect of family violence or economic or financial abuse on contributions and current and future circumstances (a position with which Pacifica Congress agrees completely) then it is respectfully submitted that it is a non sequitur to suggest that such amendments to the legislation do not or cannot require the court to focus on issues of culpability or fault. That then inevitably leads to the need for further evidence including expert medical evidence, delays in finalisation, increased costs, and the need for specific expertise which may be lacking in the Court.

6. *Do you agree with the proposed drafting, which requires the court to consider the effect of family violence to which one party has subjected the other?*

Subject to the above, Pacifica Congress does agree with such proposed drafting, bearing in mind that it will require an initial finding of fact.

New contributions factors

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

Again, as long as it is understood that there will need to be an initial finding of fact, Pacifica Congress does agree with such proposed amendment.

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

Pacifica Congress makes the same comment as in the response to question 7.

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

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

Pacifica Congress agrees with establishing a less adversarial trial process for some property and / or other non-child-related proceedings. Pacifica Congress is of the view that some matters will benefit from the establishment of a less adversarial trial process for property and / or other non-child-related proceedings; however, with respect to complex property proceedings including, for example, where third parties are joined, it is submitted that the rules of evidence should apply as a matter of course in order to properly conduct such matters. It is not enough to leave it to a demonstration of “exceptional circumstances” to have the rules of evidence apply.

Pacifica Congress also submits that proposed section 102NL(2) be expanded to allow the use of pleadings in proceedings under Division 4.

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

Pacifica Congress makes no further comment.

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

Pacifica Congress does agree with the scope of proceedings proposed to be within the meaning of ‘property or other non-child-related proceedings’ subject to our comments in answer to question 9, above.

12. *If not, please expand on what you do not agree with and why. Should any specific types of proceedings under the Family Law Act be excluded?*

Pacifica Congress makes no further comment.

Part 3: Duty of disclosure and arbitration

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

Pacifica Congress does agree that the amendments achieve a desirable balance between what is provided for in the *Family Law Act 1975* and the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, noting that the *Family Law Rules 2004* have been superseded by the *Family Law Act and the Federal Circuit and Family Court of Australia (Family Law) Rules 2021*; however, Pacifica Congress submits that further clarity would be achieved by expanding the Note after proposed 71B(9) (replicated in the Note after 90RI(9)) to include specific reference to the particular Rule applicable such that self-represented litigants are directed where to go for a list of prescribed documents required to be disclosed.

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

Pacifica Congress makes no further comment.

15. *Do the definitions of ‘property and financial matters’ in proposed subsections 71B(7) and 90RI(7) capture all matters when financial information and documents should be disclosed? If not, what should be changed and why?*

Pacifica Congress considers that they do.

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

Pacifica Congress considers that the proposed provisions do simplify (albeit expand) the list of matters that may be arbitrated and are easier to follow. Pacifica Congress adopts the submissions made by the Australian Institute of Family Law Arbitrators and Mediators addressing the amendments dealing with arbitration.

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

Pacifica Congress has no concerns in this regard. Again, Pacifica Congress adopts the submissions made in this regard by the Australian Institute of Family Law Mediators and Arbitrators.

Schedule 2 – Children’s Contact Services

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

Pacifica Congress agrees that the definition of Children’s Contact Service (CCS) (proposed new section 10KB) sufficiently captures the nature of a CCS, while excluding services that should not be covered by later regulation. However, Pacifica Congress suggests substitution of the word ‘*contact*’ in proposed section 10KB(2)(b) with the word ‘*communication*’ to align more closely with wording and themes throughout part VII of the *Family Law Act 1975*.

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

Pacifica Congress considers that it does.

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

Pacifica Congress makes no further comment in relation to this question.

21. *Are there more effective alternatives to the penalty provisions proposed?*

Pacifica Congress makes no further comment in relation to this question.

Schedule 3 – Case Management and Procedure

22. Do you have any comments on the drafting of the proposed amendments to section 60I, or are there any unintended consequences that may result from the amendments proposed?

Pacifica Congress considers the proposed amendments to section 60I appropriate and supports such amendments.

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

Pacifica Congress makes no further comment in relation to this question.

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

Pacifica Congress makes no further comment in relation to this question.

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

Pacifica Congress considers the proposed amendments to section 67N appropriate and supports such amendments.

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

Pacifica Congress considers the proposed categories of family members proposed to be included in subsection 67NA to be appropriate. However, it is suggested that to be completely exhaustive, subsections 67NA(1)(b) to (f) should be expanded to refer to such persons falling into those categories of relationship to the child by virtue of an adoptive relationship.

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

Pacifica Congress considers it to be appropriate to include kinship relationships in the definitions of family members in section 67N(8).

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

Pacifica Congress makes no further comment in relation to this question.

Schedule 4 — General Provisions

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

Pacifica Congress would support and welcome all measures taken to considerably simplify the *Family Law Act 1975* and the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* in order to substantially improve readability and usability and to remove, so far as is possible, all duplication or overlap of provisions. To this end, Pacifica Congress takes no issue with incorporating aspects of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* into the *Family Law Act 1975* provided that care is taken to avoid unnecessary duplication and to make clear appropriate cross referencing.

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

Pacifica Congress makes no further comment in relation to this question.

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

Pacifica Congress makes no further comment in relation to this question.

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

Pacifica Congress makes no further comment in relation to this question.

33. *If yes, please expand on what your concerns are and why.*

Pacifica Congress makes no further comment in relation to this question.

Overarching Question for Schedules 1-4:

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

Pacifica Congress considers that six months is an appropriate lead in time for the amendments to commence and provides various stakeholders and representative bodies time to develop and provide training and information sessions to the users of the system.

35. *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?*

Pacifica Congress wonders whether granting leave to inspect and / or copy documents containing protected confidences ought be limited to legal representatives only, being a party's legal representative or an Independent Children's Lawyer. This might provide additional safeguards for the use of documents containing protected confidences. Noting that *Re K*¹ suggests that the Court should consider appointing an Independent Children's Lawyer where one or more of the factors requiring same exists, including (relevantly for the purpose of this discussion) where none of the parties to the proceeding are legally represented, Pacifica Congress considers that in most matters where neither party is represented an Independent Children's Lawyer would be appointed. However, in matters where this is not the case, and neither party is represented and nor has an Independent Children's Lawyer been appointed, consideration might be given to expanding Legal Aid Funding to allow duty lawyers or other legal aid practitioners to be appointed for the sole purpose of viewing documents containing protected confidences, in a similar manner to the funding afforded where the provisions of section 102NA currently apply.

36. 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?

Pacifica Congress makes no further comment in relation to this question. See above.

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

Pacifica Congress makes no further comment in relation to this question. See above.

¹ (1994) FLC 92-461

