Submission to the consultation on the Family Law Amendment Bill

We welcome the opportunity to provide feedback on the Exposure Draft of the Family Law Amendment Bill 2023 (the **Exposure Draft**). This is a key area of reform for the community legal sector in Victoria which has expertise in family law. Community Legal Centres (**CLCs**) in Victoria provide legal advice and representation in family law matters, particularly to families experiencing financial hardship and family violence.

We commend the Government's commitment to improving the family law system so that it is more accessible, safer, and simpler to use and prioritises the best interests of the child. To achieve meaningful reform alongside the proposed family law amendments, the family law system must be properly resourced. Family law assistance comes at a high cost which many families cannot afford. Legal advice and representation in family law matters is critical, particularly where there is family violence. Lack of access to legal representation can lead to unfair outcomes and increased safety risks for women and children. It is critical that disadvantaged and at-risk families have access to affordable, culturally safe and trauma informed legal assistance in their family law matters. The Joint Select Committee on Australia's Family Law System recommended that the Australian Government increase funding to legal aid commissions and CLCs to enable them to increase assistance to vulnerable families in family law matters. While we welcome the funding provided to date, we highlight the importance of increasing funding to the legal assistance sector to ensure access to legal representation for vulnerable families.

We highlight the need for more funding in other parts of the family law system, particularly for Independent Children's Lawyers (**ICLs**) and Indigenous Liaison Officers in each registry. There also needs to be greater access to lawyer-assisted family dispute resolution, including for family law matters involving family violence, to avoid protracted and complex litigation. It is essential that these dispute resolution processes are trauma and family violence informed and culturally safe.

In line with Women's Legal Services Australia's (**WLSA**) submission, we also highlight the importance of ensuring cultural safety for Aboriginal and Torres Strait people as part of the family law system. This requires improving cultural competency for all professionals involved in the family law system. It is also important to ensure that all professionals in the family law system work in a trauma and family violence informed way and are child focused. This requires greater access to regular training designed and delivered by subject matter experts and people with lived experience which is subject to independent evaluation on its effectiveness.

We endorse WLSA's submission and have set out additional feedback below. We welcome the opportunity to work with the Government on its ongoing family law reforms.

About the Federation

The Federation of Community Legal Centres (Vic) is the peak body for Victoria's 47 CLCs. Our members are at the forefront of helping those facing economic, cultural or social disadvantage and whose life circumstances are severely affected by their legal problem.

For 50 years CLCs have been part of a powerful movement for social change, reshaping how people access justice, creating stronger more equitable laws, and more accountable government and democracy. We want a community that is fair, inclusive and thriving: where every person belongs and can learn, grow, heal, participate and be heard.

CLCs in Victoria provide legal advice and representation in family law matters, particularly to families experiencing financial hardship and family violence. CLCs provide legal assistance as part of the Family Advocacy and Support Service (**FASS**) in metropolitan and regional Federal Circuit and Family Court of Australia (**FCFCOA**) locations across Victoria. The FASS provides services at court for families involved in family law proceedings who are affected by family violence. CLCs also have considerable expertise in intersecting areas of law, including family violence and child protection.

CLCs work with local partners and communities to support children and families who are experiencing disadvantage and family violence. CLCs deliver a range of innovative programs, including early intervention initiatives and justice partnerships with the community, health and social sectors.

Summary of recommendations

Set out below are a summary of our recommendations:

Best interest factors

- Recommendation 1: Proposed s60CC should prioritise the safety of children and adult victim survivors by ensuring that greater weight is placed on the best interest factor set out in proposed s60CC(2)(a).
- Recommendation 2: The definition of 'carer' in proposed s60CC(2)(a)(ii) should not be limited to a person vested with parental responsibility. There should also be consideration of the safety of other children in the household who may not be part of the proceedings, but whose safety is relevant.
- Recommendation 3: Proposed s60CC(2)(a) could be reframed to make it clear that it captures psychological and other non-physical forms of harm. This could be achieved by retaining similar phrasing to the existing provision - the need to protect each relevant person from "physical and psychological harm and from being subject to, or exposed to abuse, neglect or family violence".
- Recommendation 4: The proposed best interest factor concerning the views of the child (s60CC(2)(b)) should retain elements of the existing provision which refers to factors relevant to weight (such as, the child's maturity or level of understanding) (s60CC(3)(a), *Family Law Act 1975* (**FLA**)).

- Recommendation 5: While we support the inclusion of the "carer's ability and willingness to seek support", it is important to ensure that this does not lead to unintended implications, particularly where support is not available, appropriate or culturally safe.
- Recommendation 6: Some of the existing best interest considerations in the FLA should be retained, in particular, the best interests factor concerning the lifestyle, culture and traditions of the child and their parents.

Removal of equal shared parental responsibility and specific time provisions

- Recommendation 7: Alongside the removal of the presumption of equal shared parental responsibility and the specific time provisions in the FLA, the Government should promote community understanding about the changes through widespread education campaigns.

Reconsideration of final parenting orders (*Rice & Asplund)*

- Recommendation 8: It should be specified that the rule in *Rice & Asplund* be considered by the court as a threshold issue in proposed s65DAAA.

Definition of 'member of the family' and 'relative'

- Recommendation 9: There should be carve outs in the proposed legislation to ensure that Aboriginal and Torres Strait Islander families are not subject to more onerous disclosure obligations as a result of the expanded definition of 'member of the family' and 'relative' in the Exposure Draft.

Independent children's lawyers

- Recommendation 10: The proposed provision should clarify the timing around the ICL meeting with the child and obtaining their views.
- Recommendation 11: Where a child does not wish to meet with the ICL or express their views, there should be mechanisms in place to assess the reasons for this to ensure it is not influenced by parental pressure or due to parental isolation.

Harmful proceedings orders

- Recommendation 12: In line with WLSA's position, once a person is subject to a harmful proceedings order, all other parties be served each leave application made by the person subject to the order unless they opt out at as follows:
    - to only be served a leave application that may have reasonable prospects of success (a prima facie leave application). This would provide them with the right to be heard on whether or not leave should be granted to initiate proceedings; or
    - if they wish to only be advised of the outcome of the leave application.

  All other parties should be given the opportunity to opt out (as above) at the time the harmful proceedings order is made, or at any later point.

Extending the overarching purpose of 'family law practice and procedure'

- Recommendation 13: The considerations of safety and best interests of the child should be listed before the quick, inexpensive and efficient resolution of family law disputes to prioritise these factors.

Protecting sensitive information

- Recommendation 14: A party could be required to seek leave to issue a subpoena for evidence subject to a protected confidence which would allow the scope of the subpoena to be limited.
- Recommendation 15: In addition to health records, the protected confidence should also cover communications with specialist family violence and sexual assault services.

Schedule 1 – Changes to the framework for making parenting orders

Redraft of objectives

Consultation questions

1. *Do you have any feedback on the two objects included in the proposed redraft?*
2. *Do you have any other comments on the impact of the proposed simplification of section 60B?*

We understand that the purpose of amending the principles and objects section for Part VII of the FLA is to reduce overlap with the best interest factors and minimise confusion. We support the redraft to section 60B and consider that the proposed changes streamline the FLA and make it clear that the best interests of the child is paramount. We also support the reference to the *Convention on the Rights of the Child* in the proposed section 60B.

Best interest factors

Consultation questions

3. *Do you have any feedback on the wording of the factors, including whether any particular wording could have adverse or unintended consequence?*
4. *Do you have any comments on the simplified structure of the section, including the removal of the 'primary considerations' and 'additional considerations'?*
5. *Do you have any other feedback or comments on the proposed redraft of section 60CC?*

We support streamlining the child's best interest factors in proposed s60CC with the aim of simplifying this provision. However, we consider that the proposed section could be strengthened, in particular by ensuring safety as a best interest factor is elevated.

Safety of children and adult victim survivors (proposed s60CC(2)(a))

In the proposed s60CC(2), we consider that the safety of children and adult victim survivors needs to be prioritised to ensure that the family law system's response to family violence is not

diluted. The existing provision requires the court to place greater weight on protecting the child from harm than the benefit of the child having a meaningful relationship with both parents (s60CC(2A), FLA). We consider that the proposed s60CC should similarly prioritise safety considerations above the other best interest factors, otherwise the court may give all the best interest factors equal weight.

We support the focus on the safety of the child and the child's carers in the proposed s60CC(2)(a). The Exposure Draft provides that the court must consider what arrangements would best promote safety of the child and "each person who has parental responsibility for the child (the **carer**)" (s60CC(2)(a)). While we support the expansion of safety considerations to 'carers', this should be framed more broadly. The framing of 'carer' as a person with parental responsibility could potentially exclude people who play a significant role in caring for the child, but do not have parental responsibility, such as grandparents. The safety of other children in the household who may not be part of the family law proceedings, but whose safety is relevant should also be considered.

We are concerned that the references to 'safety' in the proposed section may be interpreted narrowly and focus on protection from physical harm. The current phrasing in the FLA explicitly refers to psychological and other non-physical forms of harm and for this reason could be retained. The current provision refers to the need to protect the child from "physical and psychological harm and from being subjected to, or exposed to abuse, neglect or family violence" (s60CC(2)(b), FLA).

Recommendation 1

Proposed s60CC should prioritise the safety of children and adult victim survivors by ensuring that greater weight is placed on this best interest factor (i.e., s60CC(2)(a)).

Recommendation 2

The definition of 'carer' in proposed s60CC(2)(a)(ii) should not be limited to a person vested with parental responsibility. There should also be consideration of the safety of other children in the household who may not be part of the proceedings, but whose safety is relevant.

Recommendation 3

Proposed s60CC(2)(a) could be reframed to make it clear that it captures psychological and other non-physical forms of harm. This could be achieved by retaining similar phrasing to the existing provision - the need to protect each relevant person from "physical and psychological harm and from being subject to, or exposed to abuse, neglect or family violence".

The views of the child (proposed s60CC(2)(b))

The Exposure Draft provides that the court must consider any views expressed by the child (s60CC(2)(b)). We suggest that this retains some elements of existing best interest factor which provides that the court must take into account any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to weight (s60CC(3)(a), FLA).

Recommendation 4

The proposed best interest factor concerning the views of the child (s60CC(2)(b)) should retain elements of the existing provision which refer to factors relevant to weight (such as, the child's maturity or level of understanding) (s60CC(3)(a), FLA).

Carer's ability and willingness to seek support (proposed s60CC(2)(d))

The Exposure Draft requires the court to consider the capacity of each proposed carer to provide for the child's developmental, psychological and emotional needs, having regard to *the carer's ability and willingness to seek support to assist them with caring* (s60CC(2)(d)). We understand that the Australian Law Reform Commission (**ALRC**) recommended the inclusion of "ability and willingness to seek support to assist with caring" to address obstacles that a parent may face providing such support to the child, in particular for parents with a disability. The ALRC provided that it also intended to address the "perverse situation where a person who has experienced family violence is considered to have lower parenting capacity due to unresolved trauma from family violence".[1] We support the intent behind this additional consideration, particularly as it relates to parents with a disability, victim survivors of family violence and other parents with trauma.

However, the proposed provision could have unintended consequences, particularly for parents who are unable to access support. For example, adverse findings could be made where a victim survivor is unable to access counselling because there are no culturally appropriate therapeutic options available, there are long waitlists or support is unaffordable. It is important that this provision is applied within a strengths-based framework and that there are properly resourced services available to support parents which are trauma informed and culturally safe.

Recommendation 5

While we support the inclusion of the "carer's ability and willingness to seek support", it is important to ensure that this does not lead to unintended implications, particularly where appropriate support is not available.

Maintaining relationships with both parents and other people who are significant, where it is safe to do so (proposed s60CC(2)(e))

The current provision focuses on the benefit of the child having a *meaningful relationship* with both parents (s60CC(2)(a), FLA). We support the reformulation of this best interest factor in the Exposure Draft which focuses on *maintaining relationships* with both parents and other people who are significant to the child (s60CC(2(e)). As highlighted in the Consultation Paper, this removes an assumption that a relationship with a parent is necessarily in the child's best interests, for example when the child has had no relationship with the parent to date. We understand that this will allow for an assessment of the history of care of the child in determining what is in their best interests.

[1] ALRC (Australian Law Reform Commission), *Family Law for the Future – An Inquiry into the Family Law System* (2019), para 5.64.

We do not consider that the addition of "where it is safe to do so" alone is sufficient in prioritising safety. As noted in Recommendation 1 above, safety should be elevated by directing the court to provide greater weight to proposed s60CC(2)(a).

Other relevant best interest factors

While we support streamlining s60CC to reduce overlap and confusion, we consider that some important best interest factors that have been removed should be retained. We support the retention of the best interest factor concerning the lifestyle, culture and traditions of the child and/or parent (s60CC(3)(g), FLA).

Recommendation 6

Some of the existing best interest considerations should be retained, in particular, the best interests factor concerning the lifestyle, culture and traditions of the child and their parents.

Removal of equal shared parental responsibility and specific time provisions

Consultation questions

6. *If you are a legal practitioner, family dispute resolution practitioner, family counsellor or family consultant, will the simplification of the legislative framework for making parenting orders make it easier for you to explain the law to your clients?*
7. *Do you have any comments on the removal of obligations on legal practitioners, family dispute resolution practitioners, family counsellors or family consultants to encourage parents to consider particular time arrangements? Will this amendment have any other consequences and/or significantly impact your work?*
8. *With the removal of the presumption of equal shared parental responsibility, do any elements of section 65DAC (which sets out how an order providing for shared parental responsibility is taken to be required to be made jointly, including the requirement to consult the other person on the issue) need to be retained?*

We strongly support the removal of the presumption of equal shared parental responsibility and the requirement to consider equal or substantial and significant spend time arrangements with each parent. The removal of the presumption of equal shared parental responsibility makes the FLA more child focused and will reduce misconceptions that the presumption involves a preference for equal time arrangements. We also support the removal of the additional step of considering equal or substantial/significant spend time arrangements which detracts from a focus on the best interests of the child.

We do not consider that education or awareness-raising will address the entrenched community misunderstanding about the effect of the presumption of equal shared parental responsibility. The presumption was introduced in 2006 and misconception about its effect still exists. We consider that this can only be cured through legislative changes. Most family law matters are resolved outside of court, often with no legal assistance. The presumption can lead parents to believe that their only choice is to agree to equal spend time arrangements and to

enter into informal agreements based on a misunderstanding of the law[2]. This is particularly problematic in a family violence context where perpetrators can use this as a form of coercive control to push for shared parenting arrangements, leading to unsafe outcomes for women and children.

It is important that the Government initiates an awareness and education campaign which explains the removal of the presumption and what this means for spend time arrangements to promote community understanding.

We support the changes to the advisors' obligations which remove references to the presumption of equal shared parental responsibility and the consideration of equal or substantial/significant spend time arrangements. We support the focus on the best interests of the child as the paramount consideration. We consider that this simplified framework will make it easier for advisers to explain the relevant law to clients.

We support the retention of section 65DAC of the FLA, so that the requirement for consultation and joint decision making for major long-term decisions is still applicable where the court makes an order for shared parental responsibility.

Recommendation 7

Alongside the removal of the presumption of equal shared parental responsibility and the specific time provisions in the FLA, the Government should promote community understanding about the legislative changes through widespread education campaigns.

Reconsideration of final parenting orders (*Rice & Asplund*)

Consultation questions

9. *Does proposed section 65DAAA accurately reflect the common law rule in Rice & Asplund? If not, what are your suggestions for more accurately capturing the rule?*
10. *Do you support the inclusion of the list of considerations that courts may consider in determining whether final parenting orders should be reconsidered? Does the choice of considerations appropriately reflect current case law?*

We support the codification of the common law rule in *Rice & Asplund* that for a final parenting order to be reconsidered there must have been a significant change of circumstances since the order was made and it must be in the best interests of the child for the order to be reconsidered (s65DAAA).

The Exposure Draft is not clear as to when s65DAAA needs to be considered by the court. In practice, *Rice & Asplund* can be considered at different stages of the proceedings – at the start of the proceedings, but also only at the final hearing. We suggest that the Exposure Draft specifies that s65DAAA be considered by the court as a threshold issue. For clarity purposes and to enhance understanding of this provision, the proposed section could set out a non-exhaustive list of examples of when final parenting orders may/may not be reconsidered.

[2] Ibid., para 1.32.

Recommendation 8

It should be specified that the rule in *Rice & Asplund* be considered by the court as a threshold issue in proposed s65DAAA.

Schedule 2 – Enforcement of child-related orders

Consultation questions

11. *Do you think the proposed changes make Division 13A easier to understand?*
12. *Do you have any feedback on the objects of Division 13A? Do they capture your understanding of the goals of the enforcement regime?*
13. *Do you have any feedback on the proposed cost order provisions in section 70NBE?*
14. *Should proposed subparagraph 70NBE(1)(b)(i) also allow a court to consider awarding costs against a complainant in a situation where the court does not make a finding either way about whether the order was contravened?*
15. *Do you agree with the approach taken in proposed subsection 70NBA(1) (which does not limit the circumstances in which a court may deal with a contravention of child-related orders that arises in proceedings) or should subsection 70NBA(1) specify that the court may only consider a contravention matter on application from a party?*
16. *Do you have any other feedback or comments on the amendments in Schedule 2?*

We do not have any additional feedback in relation to Schedule 2 – Enforcement of child-related orders in the Exposure Draft.

Schedule 3 – Definition of 'member of the family' and 'relative'

Consultation questions

17. *Do you have any feedback on the wording of the definitions of 'relative' and 'member of the family' or the approach to implementing ALRC recommendation 9?*
18. *Do you have any concerns about the flow-on implications of amending the definitions of 'relative' and 'member of the family', including on the disclosure obligations of parties?*
19. *In section 2 of the Bill, it is proposed that these amendments commence the day after the Bill receives Royal Assent, in contrast to most of the other changes which would not commence for 6 months. Given the benefit to children of widening consideration of family violence this is appropriate – do you agree?*
20. *Do you have any other feedback or comments on the amendments in Schedule 3?*

We support the extension of the meaning 'member of the family' and 'relative' to recognise Aboriginal and Torres Strait Islander notions of family and kinship. However, we are concerned about the flow-on implications on the disclosure obligations for Aboriginal and Torres Strait Islander families.

We understand the changes to these definitions will expand the disclosure obligations for Aboriginal and Torres Strait Islander families under s60CF, s60CH and s60CI of the FLA. This means that a party would also be required to inform the court:

- of any family violence order that applies to a member of the kinship group of a child who is part of the proceedings (s60CF, FLA).
- if they are aware that another child, who is a member of the kinship group of a child who is part of the proceedings, is under child protection's care (s60CH, FLA).
- if another child, who is a member of the kinship group of a child who is part of the proceedings, were subject of a child protection notification, investigation or assessment (where a party is aware of this) (s60CI, FLA).

This will result in Aboriginal and Torres Strait Islander families having more onerous reporting obligations than other parties. It may require the disclosure of information to the court that is not relevant and for large kinship groups, require significant additional information to be provided to the court. We suggest that there are carve outs included in the proposed provisions to make it clear that the expanded definitions of 'member of the family' and 'relative' for Aboriginal and Torres Strait Islander families do not apply to the notification provisions.

Recommendation 9

There should be carve outs in the proposed legislation to ensure that Aboriginal and Torres Strait Islander families are not subject to more onerous disclosure obligations as a result of the expanded definition of 'member of the family' and 'relative' in the Exposure Draft.

Schedule 4 – Independent Children's Lawyers

Requirement to meet with the child

Consultation questions

21. *Do you agree that the proposed requirement in subsection 68LA(5A) that an ICL must meet with a child and provide the child with an opportunity to express a view, and the exceptions in subsections 68LA(5B) and (5C), achieves the objectives of providing certainty of an ICLs role in engaging with children, while retaining ICL discretion in appropriate circumstances?*
22. *Does the amendment strike the right balance between ensuring children have a say and can exercise their rights to participate, while also protecting those that could be harmed by being subjected to family law proceedings?*
23. *Are there any additional exceptional circumstances that should be considered for listing in subsection 68LA(5C)?*

We support the proposed changes requiring ICLs to meet with the child and provide the child with an opportunity to express their views, subject to the exceptions set out in the Exposure Draft (s68LA(5)(5B) and (5C)).

The proposed legislation is not clear about the timing of when the ICL should meet with the child or provide the child with an opportunity to express any views. We suggest that this be

clarified in the proposed provision. If the timing is left open, it could result in this issue being raised by a party at every court event. Alternatively, it could lead to an ICL meeting a child once early on in the proceedings and not obtaining the child's current views again before a major court event which could have assisted the court in determining the parenting matter.

There should be further consideration about how the court will deal with circumstances where a child indicates that they do not want to meet with the ICL or provide their views to ensure that this is genuinely coming from the child and is not a result of parental isolation or pressure. For example, in appropriate cases, another child expert, such as family consultant, could assist in determining why the child does not wish to meet with the ICL or provide their views.

Recognising the important role that ICLs play in family law proceedings, it is critical that ICLs are highly trained and experienced with working with children. It is also important that ICLs receive training on working in a way that is family violence and trauma informed and culturally safe. This requires increased funding for specialist training which must be regular, run by trained experts and independently evaluated for its effectiveness.

Recommendation 10

The proposed provision should clarify the timing around the ICL meeting with the child and obtaining their views.

Recommendation 11

Where a child does not wish to meet with the ICL or express their views, there should be mechanisms in place to assess the reasons for this to ensure it is not influenced by parental pressure or due to parental isolation.

Expansion of use of ICLs in cases brought under the 1980 Hague Convention

Consultation questions

24. *Do you consider there may be adverse or unintended consequences as a result of the proposed repeal of subsection 68L(3)?*
25. *Do you anticipate this amendment will significantly impact your work? If so, how?*
26. *Do you have any other feedback or comments on the proposed repeal of subsection 68L(3)?*

We support the removal of the requirement that the appointment of an ICL in Hague matters can only be done in 'exceptional circumstances'. We consider that ICLs should be appointed by the Court for Hague Convention matters in the same circumstances as other family law matters. The proposed change aligns with the amendments to the *Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022*. Among other changes, this clarifies that the 'grave risk defence' can include consideration of family violence risks and introduces a new provision requiring courts to consider whether to include protective conditions where this is raised by ICLs and parties.

The proposed changes will likely lead to an increase in ICL appointments which will require increased funding for ICLs.

Schedule 5 – Case management and procedure

Harmful proceedings orders

Consultation questions

27. *Would the introduction of harmful proceedings orders address the need highlighted by Marsden & Winch and by the ALRC?*
28. *Do the proposed harmful proceeding orders, as drafted, appropriately balance procedural fairness considerations?*
29. *Do you have any feedback on the tests to be applied by the court in considering whether to make a harmful proceedings order, or to grant leave for the affected party to institute further proceedings?*
30. *Do you have any views about whether the introduction of harmful proceedings orders, which is intended to protect vulnerable parties from vexatious litigants, would cause adverse consequences for a vulnerable party? If yes, do you have any suggestions on how this could be mitigated?*

Notifying the intended respondent of the proceedings for leave

We support the introduction of the harmful proceedings orders to prevent harm caused by continuous litigation, but consider that there should be changes to the notification provisions.

The Exposure Draft provides that once a harmful proceedings order is in place, the applicant must obtain leave of the court to start proceedings. This occurs ex-parte, meaning that the intended respondent is not served with any court documents. While we support the intent of making the proceedings ex-parte to minimise harm to the intended respondent, this could have safety consequences in matters involving family violence, particularly where leave is not granted. It is important for the intended respondent to be aware of these circumstances, so they can manage any safety risks that may arise, particularly where the court does not grant leave to the applicant to file further proceedings.

We recognise that in some cases, the intended respondent may not wish to be informed about these proceedings given the stress involved, while in other cases, this will be essential information in managing risk and for safety planning. This can be addressed by giving the party the choice about how they wish to be informed about the proceedings.

In line with WLSA's position, once a party is subject to a harmful proceedings order, all other parties should be served each leave application made by the subject person unless they opt out as follows:

- to only be served a leave application that may have reasonable prospects of success (a prima facie leave application). This would provide a party with the right to be heard on whether or not leave should be granted to initiate proceedings; or

- if they wish to only be advised of the outcome of the leave application.

The parties should be given an opportunity to opt out (as above) at the time the harmful proceedings order is made, or at any later stage. They should be able to change their mind at any point and advise the court of their preferred option. Where a party is served the application for leave, there should be no adverse inferences drawn where they do not participate in the relevant proceedings.

Potential unintended consequences

We are concerned about potential unintended consequences of the proposed provisions. There is a risk that it could prevent parties trying to raise genuine safety concerns about children, such as child sexual abuse allegations, which can be difficult to prove. It could also be used in circumstances where a vulnerable party has filed a badly prepared application without legal assistance and then files a subsequent application after seeking legal advice. We suggest that there is further consideration about how to mitigate these risks. The proposed provision could include some examples or guidelines for the court could be developed.

Recommendation 12:

In line with WLSA's position, once a person is subject to a harmful proceedings order, all other parties be served each leave application made by the person subject to the order unless they opt out at as follows:

- to only be served a leave application that may have reasonable prospects of success (a prima facie leave application). This would provide them with the right to be heard on whether or not leave should be granted to initiate proceedings; or
- if they wish to only be advised of the outcome of the leave application.

All other parties should be given the opportunity to opt out (as above) at the time the harmful proceedings order is made, or at any later point.

Broadening and extending overarching purpose of 'family law practice and procedure'

Consultation questions

31. *Do you have any feedback on the proposed wording of the expanded overarching purpose of family law practice and procedure?*

We welcome the inclusion of the overarching purpose of family law practice and procedure in the FLA and the specific reference to resolving disputes in a way that ensures the safety of families and children and promotes the best interests of the child (s95).

We suggest listing the considerations of safety (s95(1)(c)) and best interests of the child (s95(1)(d)) before the resolution of family law disputes quickly, inexpensively and efficiently (s95(1)(b)) to prioritise these factors.

Recommendation 13

The considerations of safety and best interests of the child should be listed before the quick, inexpensive and efficient resolution of family law disputes to prioritise these factors.

Schedule 6 – Protecting sensitive information

Consultation questions

32. *Do you have any views on the proposed approach that would require a party to seek leave of court to adduce evidence of a protected confidence?*
33. *Does the proposed definition of a protected confidence accurately capture the confidential records and communications of concern, in line with the ALRC recommendation?*
34. *What are your views on the test for determining whether evidence of protected confidences should be admitted? Should the onus be on the party seeking to admit the evidence?*
35. *Should a person be able to consent to the admission of evidence of a protected confidence relating to their own treatment?*

We welcome the proposed provisions to protect sensitive information in family law proceedings (s99). We support the intended approach which presumes that the disclosure of the confidential health records will have a harmful impact and places the onus on the party issuing the subpoena to prove otherwise. However, we consider that these proposed provisions could be strengthened.

The proposed provision requires the court to grant leave for a party to adduce evidence subject to a protected confidence in proceedings with the focus being on admissibility of the evidence. We suggest that the party be required to seek leave at an earlier stage when the subpoena is issued which would allow for the scope of the subpoena to be limited.

The proposed provision applies to communications with a professional who is providing a health service (as defined in the *Privacy Act 1988).* We consider that protected confidences should also capture communications with specialist family violence and sexual assault services. Similar to health records, the disclosure of these types of records can be highly sensitive and have a harmful impact.

Recommendation 14

A party could be required to seek leave to issue a subpoena for evidence subject to a protected confidence which would allow the scope of the subpoena to be limited.

Recommendation 15

In addition to health records, the protected confidence should also cover communications with specialist family violence and sexual assault services.

Schedule 7 – Communications of details of family law proceedings

Consultation questions

36. *Is Part XIVB easier to understand than the current section 121?*
37. *Are there elements of Part XIVB that could be further clarified? How would you clarify them?*
38. *Does the simplified outline at section 114N clearly explain the offences?*
39. *Does section 114S help clarify what constitutes a communication to the public?*

We support Part XIVB of the FLA which provides greater clarity than s121 of the FLA and is more in line with modern modes of communication.

Schedule 8 – Establishing regulatory schemes for family law professionals

Consultation questions

40. *Do the definitions effectively capture the range of family reports prepared for family courts, particularly by family consultants and single expert witnesses?*
41. *Are the proposed matters for which regulations may be made sufficient and comprehensive to improve the competency and accountability of family report writers and the quality of the family reports they produce?*

We support a new power to make regulations that provide standards and requirements to be met by family report writers who prepare family reports. Once the standards and requirements are developed, they should be open to stakeholder consultation.