Senate Legal and Constitutional Affairs Committee - Family Law Amendment Bill

We welcome the introduction of the Family Law Amendment Bill 2023 (the **Bill**) and the focus of these reforms on making the family law system more accessible, safer, and simpler to use alongside prioritising the best interests of the child. We strongly support the current position in the Bill which removes the presumption of equal shared parental responsibility and the requirement to consider equal or substantial and significant spend time with each parent. This makes the *Family Law Act 1975* (Cth) (**FLA**) more child focused and will reduce misconceptions that the presumption involves a preference for equal time arrangements. This is critical in prioritising the safety of children and adult victim survivors who are involved in the family law system.

There are a number of other parts of the Bill which we support, including the streamlined best interest factors, the requirement of Independent Children's Lawyers (**ICL**) to meet with children and obtain their views, the codification of the *Rice v Asplund* rule regarding reconsideration of final parenting orders and the power to make 'harmful proceedings orders' to minimise systems abuse.

However, there are changes that could be made to strengthen the Bill and ensure that the safety of children and adult victim survivors in the family law system are prioritised. As a priority, we recommend that the best interests factors (s60CC) in the Bill require the court to place greater weight on safety considerations than the other factors and to consider the history of family violence in determining arrangements that are in the child's best interests. This is critical in ensuring that the protection of children and adult victim survivors is central in the family law process.

To achieve meaningful reform, the family law system must be properly resourced alongside these legislative changes. Family law assistance comes at a high cost which many families cannot afford. It is critical that there is increased funding to the legal assistance sector to ensure access to legal representation for vulnerable families. There is also a need for greater funding in other parts of the family law system, particularly for ICLs and Indigenous Liaison Officers in each registry, as well as greater access to lawyer-assisted family dispute resolution to avoid protracted and complex litigation, including in matters involving family violence. It is essential that there is training for all professionals involved in the family law system in trauma informed, culturally safe and child focused practices and widespread community education campaigns on the new family law framework.

We endorse Women's Legal Services Australia's (**WLSA**'s) submission and have set out additional feedback below.

About the Federation

The Federation of Community Legal Centres (Vic) is the peak body for Victoria's 47 Community Legal Centres (**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: To ensure safety is prioritised when considering the best interest factors, the Bill be amended to require the court to place greater weight on the safety consideration set out in 60CC(2)(a) than the other best interest factors.
- Recommendation 2: The reference to 'safety' in s60CC(2)(a) of the Bill include protection from "physical, sexual and psychological harm and from being subject to, or exposed to abuse, neglect or family violence" (consistent with the current phrasing in the FLA).
- Recommendation 3: Require the court to consider 'history of family violence, abuse and neglect' in the best interests factors in s60CC(2).
- Recommendation 4: The best interest factor concerning the views of the child (s60CC(2)(b)) also require the court to consider "any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views" (consistent with the current provision in the FLA).

Removal of equal shared parental responsibility and specific time provisions

- Recommendation 5: 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 in the Bill.

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

- Recommendation 6: Specify that the rule in *Rice & Asplund* regarding the reconsideration of final parenting orders be treated by the court as a threshold issue in s65DAAA of the Bill.
- Recommendation 7: In the non-exhaustive list of factors that the court may consider in s65DAAA(2) include an additional factor: "whether a party was pressured into accepting final orders by consent due to family violence".

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

- Recommendation 8: Include carve outs in the Bill 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'.

Independent children's lawyers

- Recommendation 9: Clarify the timing around the ICL meeting with the child and obtaining their views, such as a requirement to meet with the child before major court events (e.g., interim hearings, final hearings or court-based and external family dispute resolution).
- Recommendation 10: 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 11: Where a harmful proceedings order is in place and the other party is not served with the leave application and leave is denied, the other party should be notified of the outcome in advance of the applicant to allow them to manage any safety risks.

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

- Recommendation 12: Amend the overarching purpose of family law practice and procedure by placing greater weight on safety than the quick, inexpensive and efficient resolution of matters (s95).

Commencement provisions

- Recommendation 13: To reduce confusion, the amendments should all take effect at the same time (e.g., a set period after the legislation receives Royal Assent). Specific transitional provisions can be included for matters where trials have commenced, will commence shortly or where judgment is pending.

Parenting framework (schedule 1)

Objects

We support the simplification of the objects (s60B) and the reference to the Convention on the Rights of the Child. We also welcome the specific reference to ensuring that the best interest of children are met, "including by ensuring their safety".

Child's best interest factors

Prioritising safety

We support the streamlined list of best interest factors in s60CC of the Bill and recognise that the current two-tiered system of primary factors and numerous additional considerations has led to misunderstanding and confusion. We support the replacement of the two-tier system with a streamlined list of key considerations.

However, we are concerned that the changes to s60CC dilute the focus on safety contrary to the intent of these reforms. The existing provision in the FLA requires the court to place greater weight on protecting the child from harm over other considerations, in particular the benefit of the child having a meaningful relationship with both parents (s60CC(2A), FLA). This prioritisation of safety has not been reflected in s60CC of the Bill. The removal of this weighting may lead to the court giving the best interest factors in s60CC(2) equal weight. This will de-prioritise safety in family law decision making which we understand is not the government's intention as part of these reforms. We do not consider that the addition of "where it is safe to do so" when considering the benefit of the child having a relationship with their parents or other significant people in s60CC(2)(e) of the Bill adequately prioritises safety for children and adult victim survivors.

We strongly recommend that the Bill is strengthened by requiring the court to place greater weight on safety considerations in s60CC(2(a) than the other factors. This is critical in ensuring that protecting children and adult victim survivors from family violence is prioritised in family law decision making. We support a standalone direction to the court to consider safety above other factors. This could be achieved by including an additional sub-section which provides that when considering the factors in s60CC(2), the court is to give greater weight to the consideration of safety set out in s60CC(2)(a).

Recommendation 1

To ensure safety is prioritised when considering the best interests factors, the Bill be amended to require the court to place greater weight on the safety consideration set out in 60CC(2)(a) than the other best interest factors.

Improving the description of safety

We support the focus on promoting the safety of the child and people who care for the child (whether or not they have parental responsibility for the child) in s60CC(2)(a) of the Bill. This recognises that exposure of a child to family violence directed against a parent or carer harms the child and can have serious safety implications.

The framing of 'safety' in this provision should be strengthened. The Bill frames safety as "including safety from family violence, abuse, neglect or other harm" of the child and other people who are caring for the child. We are concerned that this framing of 'safety' could be interpreted narrowly and focus on protection from physical harm. It is important that the Bill makes clear that safety also involves protection from psychological harm.

The current phrasing in the FLA explicitly refers to psychological and other non-physical forms of harm. The current provision refers to safety as protection from "physical and psychological harm and from being subjected to, or exposed to abuse, neglect or family violence" (s60CC(2)(b), FLA). The current phrasing is well understood and should be retained. We also suggest including a specific reference to sexual harm or to clarify in a note that sexual harm is included.

Recommendation 2

The reference to 'safety' in s60CC(2)(a) of the Bill include protection from "physical, sexual and psychological harm and from being subject to, or exposed to abuse, neglect or family violence" (consistent with the current phrasing in the FLA).

History of family violence

There is no express requirement in the best interest factors to consider any history of family violence. The current provision requires the court to consider any family violence involving the child or a member of the child's family (s60CC(3)(j), FLA) and any family violence order that applies or has applied (s60CC(3)(k), FLA). While this may be considered as part of the catch all provision (i.e., any other relevant factors) in s60CC(2)(f) of the Bill, there is no specific obligation on the court to consider the family's history of family violence. To identify parenting arrangements which are in the best interests of the child and are safe, it is critical that the court considers any history of family violence, abuse and neglect. It is important that this factor is included in the best interests factors in s60CC(2).

Recommendation 3

Require the court to consider 'history of family violence, abuse and neglect' in the best interests factors in s60CC(2).

The views of the child

The Bill provides that the court must consider any views expressed by the child (s60CC(2)(b)). We recommend that the current phrasing in s60CC(3)(a) of the FLA be retained as this requires the court to also consider relevant factors which will influence the weight given to the child's view, such as the child's maturity and level of understanding. Without consideration of weight, there is a risk that the child may be pressured to give a view and may be placed in the position of decision-maker.

We suggest that consistent with the current provision (s60CC(3)(a), FLA), s60CC(2)(b) in the Bill provides: "any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views".

Recommendation 4

The best interest factor concerning the views of the child (s60CC(2)(b)) also require the court to consider "any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views" (consistent with the current provision in the FLA).

Recognising cultural rights

We support a standalone provision that promotes the rights of Aboriginal and Torres Strait Islander children to enjoy their culture in s60CC(3) of the Bill. We also support WLSA's recommendations in relation to strengthening this provision in line with current law. We highlight the importance of comprehensive consultation with Aboriginal Community Controlled Organisations and legal services prior to implementation of these reforms.

The exposure draft to the Bill did not have any reference to the cultural needs of the child in s60CC. We welcome the inclusion of "cultural needs" in s60CC(2)(c) and (d) of the Bill. The focus on cultural needs of culturally and linguistically diverse families could be strengthened by including a standalone consideration of the cultural rights of the child to explore the full extent of their culture in s60CC.

Removal of equal shared parental responsibility and specific time provisions

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 in the Bill. 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.[1] 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.

We support the new provisions in the Bill (s61CA, s61DAA and s61DAB) 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. We highlight that s61CA encourages consultation between parents on major long-term issues, but is unlikely to be

[1] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (2019), para 1.32.

enforceable. We recommend that the government resources comprehensive education for families to encourage consultation between parents/carers and decision making that is in the best interests of the child, as well as an education campaign which explains the removal of the presumption and what this means for spend time arrangements.

Recommendation 5

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 in the Bill.

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

We support the codification of the common law rule in *Rice & Asplund* in s65DAAA of the Bill. That is, 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 Bill is not clear as to when s65DAAA needs to be considered by the court. In practice, the application of the *Rice & Asplund* rule is inconsistent and is considered at different stages of the proceedings – in some matters at the start of the proceedings and in others only at the final hearing stage. We suggest that the Bill specifies that the rule in *Rice v Asplund* in s65DAAA be considered by the court as a threshold issue before a case can be heard.

This section sets out a non-exhaustive list of factors the court may consider (s65DAAA(2)). We recommend that the list includes an additional factor which directly addresses circumstances where a victim survivor has been pressured to accept final orders by consent due to family violence.

Recommendation 6

Specify that the rule in *Rice & Asplund* regarding the reconsideration of final parenting orders be treated by the court as a threshold issue in s65DAAA of the Bill.

Recommendation 7

In the non-exhaustive list of factors that the court may consider in s65DAAA(2) include an additional factor: "whether a party was pressured into accepting final orders by consent due to family violence".

Enforcement of child-related orders (schedule 2)

We support WLSA's feedback in relation to schedule 3 – enforcement of child-related orders and do not have any additional feedback.

Definition of 'member of the family' and 'relative' (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 to the family subject of the proceedings and for large kinship groups, require significant additional information to be provided to the court.

We recommend that there are carve outs included in the Bill 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 8

Include carve outs in the Bill 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'.

Independent Children's Lawyers (schedule 4)

Requirement to meet with the child

We support the proposed changes requiring ICLs to meet with children and provide children with an opportunity to express their views, subject to certain exceptions. The Bill is not clear about the timing of when an ICL should meet with children or provide children with an opportunity to express any views and we recommend that this is clarified in the provision. If the timing is left open, it could result in this issue being raised by a party at every court event which could lead to delays and have cost implications. Alternatively, it could result in an ICL only meeting a child once early on in the proceedings and not obtaining the child's current views before major court events (such as, interim hearings, final hearings or court-based and external family dispute resolution). This information is likely to be important in the proceedings in determining parenting arrangements in the child's best interests.

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. ICLs should be required to obtain relevant information and records to inform the decision-making process about what arrangements are in the best interests of the child. 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 9

Clarify the timing around the ICL meeting with the child and obtaining their views, such as a requirement to meet with the child before major court events (e.g., interim hearings, final hearings or court-based and external family dispute resolution).

Recommendation 10

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

We support the removal of the requirement that the appointment of an ICL in Hague matters can only occur 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* (Cth). 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.

Case management and procedure (schedule 5)

Harmful proceedings orders

We support the introduction of the harmful proceedings orders to prevent harm caused by continuous litigation and to address systems abuse.

We previously raised concerns about the other party not being notified about applications to institute proceedings where a harmful proceedings order is in place. We highlighted the importance of the other party being aware of any applications, so they could manage any safety risks that may arise, particularly where the application for leave is denied.

The Bill seeks to address this concern by providing that where a harmful proceedings order is made, the court must also make an order as to whether the court is to notify the other party that an application for leave has been made and/or whether it has been dismissed having

regard to the wishes of the other party (s102QAC(7) and (8)). It is important that the other party's choice about whether they are notified that the harmful proceedings order is in place and about the outcome of any applications for leave to initiate further proceedings is central to the court's decision about notification.

In line with WLSA, where the applicant elects not to be informed of any applications for leave to institute proceedings, but wishes to be notified if the application is denied, it is important that they are advised of the outcome in advance of the applicant to allow them to manage any safety risks.

The harmful proceedings orders only apply to new proceedings; however, systems abuse can occur at other stages of the family law process. There should be further consideration about extending the harmful proceedings orders to other types of proceedings, such as repeated and abusive applications for family dispute resolution.

Recommendation 11 Where a harmful proceedings order is in place and the other party is not served with the leave application and leave is denied, the other party should be notified of the outcome in advance of the applicant to allow them to manage any safety risks.

Broadening and extending 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 (prior to the quick, inexpensive and efficient resolution of matters) (s95).

In line with WLSA, we suggest that safety is given greater weight than the quick, inexpensive and efficient resolution of family law matters. Otherwise, this could lead to all the considerations being given equal weight as set out in the Explanatory Memorandum and place pressure on families experiencing family violence to resolve matters quickly to the detriment of their safety.

Recommendation 12

Amend the overarching purpose of family law practice and procedure by placing greater weight on safety than the quick, inexpensive and efficient resolution of matters (s95).

Communications of details of family law proceedings (Schedule 6)

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.

Establishing regulatory schemes for family law professionals (schedule 7)

We support a new power to make regulations that provide standards and requirements to be met by family report writers who prepare family reports. We support WLSA's recommendation to include mandatory core competencies for family report writers in the regulations. Once the standards and requirements are developed, this should be open to stakeholder consultation.

Commencement provisions

The Bill's commencement and transitional provisions are not consistent. Some parts of the Bill apply retrospectively, while others apply to proceedings that start following commencement. The varied commencement provisions may lead to confusion among the judiciary, legal practitioners and families. For clarity and simplicity, the amendments should all take effect at the same time (e.g., a set period after the legislation receives Royal Assent). There could be specific transitional provisions for matters where trials have already commenced (or will start shortly) or where judgement is pending.

Recommendation 13

To reduce confusion, the amendments should all take effect at the same time (e.g., a set period after the legislation receives Royal Assent). Specific transitional provisions can be included for matters where trials have commenced, will commence shortly or where judgment is pending.

Protecting sensitive information

The exposure draft to the Bill included provisions to protect sensitive information in family law proceedings (schedule 6 of the exposure draft). We supported the inclusion of these provisions to protect confidential health and counselling records recognising that disclosure can have a harmful impact for people seeking support. This can deter people from accessing critical mental health support, including victim survivors of family violence who are seeking support as part of their recovery process. While we suggested amendments to the proposed provisions, we supported their introduction. We would have liked to have seen provisions protecting sensitive information being included in the Bill. We encourage the government to continue to undertake work to introduce provisions to protect sensitive information, such as confidential counselling and health records, in family law proceedings.

Key reforms to support the legislative changes

Education on the family law changes

It is important that the introduction of the family law reforms is accompanied by widespread community education campaigns to improve understanding of the new legislative framework. The government must properly resource education campaigns about the family law changes, in particular the removal of the presumption of equal shared parental responsibility, for all professionals working in the family law system and the wider community.

Adequately resourcing the family law system

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 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.

Improving cultural competency and other essential training

In line with WLSA's 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 which must be led by Aboriginal Community Controlled Organisations and frontline services.

It is also important to ensure that all professionals in the family law system work in a trauma-informed 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.