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7 March 2023

Dear Family Law Reform Team,

## **Exposure Draft Family Law Amendment Bill 2023**

### **Introduction**

National Legal Aid (NLA), representing the directors (CEOs) of the eight Australian state and territory legal aid commissions (LACs), welcomes the opportunity to participate in the public consultation on the Exposure Draft Family Law Amendment Bill 2023 (the Exposure Draft).

In 2021-22, LACs provided over 1.5 million legal services to people across the country.<sup>1</sup> These services included Grants of Legal Aid approved for legal representation in ongoing matters, Family Advocacy and Support Services (FASS) and duty lawyer services, legal advice, legal task, legal information and community and service provider legal education.

Of the 150,000 Grants of Legal Aid for ongoing legal representation, 23,000 were for Commonwealth family law matters and another 22,000 were in connection with state/territory laws about family violence and child protection. Nationally, around 86% of the Grants of Legal Aid for legal representation in Commonwealth family law include family violence as an issue.<sup>2</sup> Many more FASS, duty lawyer, legal advice, legal task, information, and community legal education services were also provided in family law.

NLA's purpose is to:

- Lead and encourage a national system of legal aid that allows disadvantaged individuals to access justice
- Ensure the legal assistance sector is adequately funded
- Provide a forum for collaboration at a national level between government, stakeholders, community and legal assistance providers, to develop best practice legal assistance.

NLA's response to the questions in the Exposure Draft Consultation Paper follows.

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<sup>1</sup> 2021-22 National Legal Aid Statistics <https://nla.legalaid.nsw.gov.au/nlareports/> and legal aid commissions.

<sup>2</sup> 2022 - Legal Aid Commission Commonwealth family law party file sample (matters opened in the 2021-22 financial year - total E. 800 files).

## Consultation questions

### Schedule 1: Amendments to the framework for making parenting orders

#### Redraft of objects

#### 1. Do you have any feedback on the two objects included in the proposed redraft?

The proposed amendment is supported. It reinforces that the Commonwealth *Family Law Act 1975* is a best interests of the child jurisdiction.

Object (a) [to ensure that the best interests of children are met] succinctly states the intent of the legislation in so far as it relates to parenting.

Object (b) [to give effect to the Convention on the Rights of the Child (CROC)] is an important re-statement of existing s. 60B(4).

Best interests [Object (a)] encompasses safety. Safety appears first in the list of considerations which the court must consider in determining what is in the child's best interests ["what arrangements would best promote safety"].

The framing ensures that safety is appropriately addressed without implying "that it is not a component of best interests" (by separating it out of best interests of the child) which "has the potential to raise a range of issues, including the role of child protection authorities and appropriate benchmarks for intervention, and the question of what else might not be encompassed by best interests".<sup>3</sup> The Court must also consider risk of family violence in accordance with s. 60CG.

CROC requires state parties to take all appropriate steps, including through judicial action, to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of a parent, legal guardian or any other person who has the care of the child.<sup>4</sup> Consideration could be given to including this reference in the Explanatory Memorandum.

It is envisaged that an education campaign about the reforms would emphasise a simplified approach in line with the recommendations of the report by the Australian Law Reform Commission (ALRC) *Family Law for the Future - An Inquiry into the Family Law System* (the ALRC Report),<sup>5</sup> with the focus being the child's best interests, and that family violence is an aspect of safety which the Court must consider in deciding what is in a child's best interests. In emphasising that family violence is an aspect of safety, the education campaign should address the types and patterns of behaviour that constitute family violence and its consequences.

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<sup>3</sup> NLA submission to the Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) 15.

<sup>4</sup> Article 19.

<sup>5</sup> See Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (2019), "First, the *Family Law Act* itself has by virtue of over 40 years of constant amendment become 'impenetrable' for lay people and even many lawyers. The law should be sufficiently transparent and accessible for parties to understand the parameters within which decisions will be made about their children, and their property and financial interests." 32 [1.8].

**2. Do you have any other comments on the impact of the proposed simplification of section 60B?**

The reduction of content simplifies the section and contributes to the simplification of the legislation overall.

*Best interests factors*

**3. Do you have any feedback on the wording of the factors, including whether any particular wording could have adverse or unintended consequences?**

NLA supports the intent of the wording in the proposed new S. 60CC. Particular concerns follow:

(2)(a) what arrangements would best promote the safety (including safety from family violence, abuse, neglect, or other harm) of (ii) *each person who has parental responsibility for the child (the carer)*;

It is suggested that the section could instead refer to "each person who has the care of the child." Carers are not always people with parental responsibility e.g., stepparents, grandparents, etc.

(2)(c) *the developmental, psychological and emotional needs of the child*;

NLA is supportive of the proposed amendment, however, it is anticipated that there may be costs associated with it.

The proposed amendment requires the court to consider this factor (*The court must consider...*). The court may therefore determine that the most appropriate way to be informed of these needs is to obtain a report. This may impact the number of reports ordered, leading to additional costs associated with the preparation of reports, and potentially to increased appointments of Independent Children's Lawyers (ICLs).

Reports are costly and either the court, the parties or Legal Aid will be paying for the preparation of the report. There are often challenges finding appropriate experts exacerbated by the challenging nature of the family law environment including the prospect of being required to attend, and be cross-examined, at court. The fees that are sometimes sought in this constrained environment are prohibitive.

(2)(d) *having regard to the carer's ability and willingness to seek support to assist them with caring*;

NLA suggests that the word *access* should be substituted for *seek*. *Seek* may place too great an onus on some carers with disability who have appropriate family and/or community supports already or for whom supports could readily be made available, although they [the carer] did not seek those supports which they are able and willing to access.

(2)(e) *the benefit to the child of being able to maintain a relationship with both of the child's parents, and other people who are significant to the child, where it is safe to do so;*

NLA suggests that the word *have* should be substituted for *maintain*, and that the words *both of* be deleted.

In some instances, there will not be an existing relationship with the parent or person significant to the child to maintain.

#### Connection to culture

Consideration of the child's connection to their culture where the child is not an Aboriginal or Torres Strait Islander, is not referenced. Whilst this consideration could be read into the new section, concerns may be raised that there should be an express reference to it and it is suggested that culture could be included in s60CC (2)(c).

#### **4. Do you have any comments on the simplified structure of the section, including the removal of 'primary considerations' and 'additional considerations'?**

The proposed new s.60CC is supported as it simplifies structure and content of the provisions making it easier for a reader to understand how a court determines what is in a child's best interests.

#### **5. Do you have any other feedback or comments on the proposed redraft of section 60CC?**

Education about the reforms should help to narrow gaps between the law and perceptions.

Service providers will need to review available community legal education materials to determine what will need changing and the resources required.

#### ***Removal of equal shared parental responsibility and specific time provisions***

#### **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?**

LACs employ and contract with legal practitioners, family dispute resolution practitioners, and family report writers.

Yes, the simplification of the legislative framework will assist clients to understand that there is no entitlement to shared time, and support practitioners in explaining to their clients the law and its potential application in their individual circumstances.

**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?**

NLA supports the proposed amendment.

**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?**

Section 65DAC should be retained, it makes clear the expectations on the parties if an order for equal shared parental responsibility is made, and that an order for equal shared parental responsibility can still be made, notwithstanding the intention to repeal the presumption.

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

**9. Does the proposed section 65DAAA accurately reflect the common law rule in Rice & Asplund? If not, what are your suggestions for more accurately capturing the rule?**

Yes.

**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?**

Yes.

## Schedule 2: Enforcement of child-related orders

### 11. Do you think the proposed changes make Division 13A easier to understand?

Yes. The proposed changes make the provisions easier to understand however issues of accessibility and understanding could be expected to persist. The provisions could benefit from further revision (e.g., the repetition of *child related orders* becomes confusing).

### 12. Do you have any feedback on the objects of Division 13A? Do they capture your understanding of the goals of the enforcement regime?

Yes.

It is suggested that proposed 70NAB Objects (a) *supporting parties to child-related orders to comply with those orders* should be amended to (a) *supporting compliance with child related orders*.

### 13. Do you have any feedback on the proposed cost order provisions in proposed section 70NBE?

The proposed provisions are consistent with current provisions.

Issues experienced in relation to costs orders generally, such as non-payment, impecunity, cost to enforce, the risk of heightening the dispute, are likely to persist.

Judicial Officers will need to continue to be alert to the potential existence of family violence, and the impact on parties and the children of making costs orders.

### 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?

This appears to be the effect of proposed 70NBE(1)(b)(i) as currently drafted. It is suggested that this proposed sub-section should read that the *court finds that the respondent did not contravene the child related order*.

Additionally, there should be a provision which allows a court to consider awarding costs against a complainant where the court does not make a finding either way because there may be situations in which an application should not have been brought because of a lack of evidence and ultimately the inability of the Court to make a finding. Costs in those circumstances might be appropriate and a deterrent to potential future unreasonable applications, made often as means to control another party.

**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?**

Yes, the approach is agreed. NLA generally supports the court having a broad discretion and ability to act on its own motion. The approach might be of particular benefit to a vulnerable party including victims of family violence who might not have brought an application for reasons which might include their disempowerment and/or the wish to avoid litigation.

**16. Do you have any other feedback or comments on the amendments in Schedule 2?**

The amendments are supported, however ultimately Schedule 2 remains complex.

Education may be a way to improve general understanding of the importance of compliance.

### Schedule 3: Definition of ‘member of the family’ and ‘relative’

- 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?**

The Consultation Paper states that that the wording of the redrafted definition was developed following preliminary consultation with peak Aboriginal and Torres Strait Islander organisations. The proposed amended definitions, noting the related disclosure obligations of parties, may need to be subject to further consultation with peak Aboriginal and Torres Strait Islander organisations.



## Schedule 4: Independent Children's Lawyers

### *Requirement to meet with the child*

**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 ICL's role in engaging with children, while retaining ICL discretion in appropriate circumstances?**

In relation to proposed s. 68LA(5D), NLA is of the view that the word "may" should be substituted for the word "must".

This is because, whilst it is appropriate for a Judicial Officer and an ICL to engage about any decision by the ICL not to meet with a child, there is no one point in time at which an ICL will always be in a position to make a decision about whether or not it is appropriate to meet with a child. An ICL's position about whether to meet (or again meet) with a child may also change over time depending on the developing circumstances of the individual case.

Concerns include that:

- the Judicial Officer retains discretion
- a Judicial Officer is not compelled to deliver multiple judgements in the same matter potentially involving distress, delay, and additional cost
- there will be circumstances where the basis on which the ICL has formed the view not to meet the child will be evident to the Judicial Officer from materials filed, and
- circumstances may arise where it is not in the best interests of the child for the details of the issues that have informed the decision to meet or to not to meet the child to be disclosed to one or more the parties.

Substituting "may" for "must" will enable the Court to take the action it deems necessary in the best interests of the child.

Please also see comments below in relation to the use of technology to meet with children.

**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?**

Yes, subject to our comments in response to Q. 21 about proposed s.68LA(5D).

**23. Are there any additional exceptional circumstances that should be considered for listing in subsection 68LA(5C)?**

In many instances where a child is in a remote location, the ICL will be able to meet with the child by video link, but this is not always possible because of limited range or appropriate in the context of the issues in the particular proceedings, e.g., family violence.

Travel to remote locations is usually very expensive in terms of both travel costs and practitioner time out of office. It should be anticipated, absent funding for the purpose, that the costs associated with some potential meetings will be prohibitive.

Proposed s. 68LC(5C) could include where the child is potentially a witness to a criminal prosecution. The ICL will be alert to the potential for adverse impact on the criminal proceedings.

*Expansion of the use of Independent Children’s Lawyers in cases brought under the 1980 Hague Convention*

**24. Do you consider there may be adverse or unintended consequences as a result of the proposed repeal of subsection 68L(3)?**

It is anticipated that there will be increased ICL appointments and associated costs for LACs.

There can be barriers to costs applications by ICLs arising in connection with s. 117AA and s. 117(4).

**25. Do you anticipate this amendment will significantly impact your work? If so, how?**

It is possible that there will be not insignificant impacts on LACs because of increased appointments. The extent of the impact will likely vary between LACs.

**26. Do you have any other feedback or comments on the proposed repeal of subsection 68L(3)?**

The proposed repeal is supported in principle with some cost related concerns.

## Schedule 5: Case management and procedure

### *Harmful proceedings orders*

**27. Would the introduction of harmful proceedings orders address the need highlighted by Marsden & Winch and by the ALRC?**

The amendments reflect a greater focus on the effect on a party or a child and this is welcomed.

**28. Do the proposed harmful proceeding orders, as drafted, appropriately balance procedural fairness considerations?**

Yes.

**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?**

The tests and the definition of harm may benefit from some further consideration. E.g.,

- Related matters that are not court proceedings may be relevant as evidence of whether a harmful proceedings order should be made, e.g., complaints/notifications to agencies such as child support, police, departments of education etc.
- Proposed s. 102QAC(3)(b) could be revised so it is easier to read.<sup>6</sup>

**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?**

Vulnerable parties may wish to be informed of applications following a harmful proceedings order, including because such an application may be indicative of a potential escalation of family violence. If a party is not informed of a potential risk they may be unable to take the protective action that they otherwise would have.

Mitigations might include:

- The Court will need to be alert to, and carefully manage any potential safety risks, particularly where a party is not informed of an event which they might recognise as an escalation.
- An “opt-out” of notification system, with a party able to “cancel” their opt-out at any time.

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<sup>6</sup> E.g., revision of bracket placement and punctuation

- Legal advice and representation to the extent appropriate, including in relation to the making of the harmful proceedings order, the obtaining of any necessary personal protection orders, and regarding any further applications filed. Matters involving the potential for harmful proceedings orders are likely, but not necessarily, to be matters within the Family Violence and Cross-examination Scheme (the Scheme).

### *Overarching purpose of the family law practice and procedure provisions*

<b>31. Do you have any feedback on the proposed wording of the expanded overarching purpose of family law practice and procedure?</b>
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The provisions appear to mirror the principles in the Federal Circuit and Family Court of Australia *Family Law Case Management Central Practice Direction*.

In the context of the *Family Law Act*, it is suggested that consideration could be given to re-ordering the factors appearing in proposed s. 95(1) and s. 95(2).

#### Proposed provisions s.96(2) *Duty of Lawyers* and s. 96(3)(5) costs

LACs represent persons who are eligible for a Grant of Legal Aid or appear for them on a duty basis. A Grant of Legal Aid (and the associated representation) may be terminated if a person is not following legal advice provided.

In relation to the Scheme which is administered by the LACs, there is a particular concern that the proposed amendments might affect a lawyer's preparedness to undertake this challenging work in individual matters and more generally.

## Schedule 6: Protecting sensitive information

### *Express power to exclude evidence of protected confidences*

**32. Do you have any views on the proposed approach that would require a party to seek leave of a court to adduce evidence of a protected confidence?**

NLA supports the intent of the proposed amendment, however, is concerned that harm from production of a protected confidence, may arise at inspection stage, i.e., before an argument about admissibility is reached, the protected confidence will already have been produced and inspected such that sensitive information may have been accessed by people other than the protected confider to whom it relates.

It is not uncommon that parents seek to access records relating to the child protected confider. ICLs will object to documents being produced or released or will consider other mechanisms by which this information can be obtained and provided to the Court, e.g., by way of a report. ICLs will also routinely communicate with providers of services to children to discuss the risks of the documents being produced and seen by parents in litigation.

If leave to issue any subpoena were to be necessary, this would give the Court the ability to limit the extent of the subpoena and to tailor the arrangements for inspection, e.g., potentially the affected party or an ICL could inspect first. There would be related resourcing requirements.

**33. Does the proposed definition of a protected confidence accurately capture the confidential records and communications of concern, in line with the ALRC recommendation?**

The proposed definition is broad.

**34. What are your views on the test for determining whether evidence of protected confidences should be admitted?**

The test appears consistent with State/Territory legislative approaches which apply in family law proceedings<sup>7</sup>, and includes that the Court must have regard to the best interests of the child as the paramount consideration.

**35. Should a person be able to consent to the admission of evidence of a protected confidence relating to their own treatment?**

Yes, however there are concerns about capacity, and that consent is informed and voluntary, e.g., not the product of family violence. The availability of legal advice and information will be critical.

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<sup>7</sup>Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (2019), 335 [10.147].

## Schedule 7: Communication of details of family law proceedings

### *Clarifying restrictions around public communication of family law proceedings*

#### **36. Is Part XIVB easier to understand than the current section 121?**

Yes.

#### **37. Are there elements of Part XIVB that could be further clarified? How would you clarify them?**

The continuation of an exemption for information being given to *a body that grants assistance by way of legal aid* is supported as necessary.

The generality of *a person concerned in those proceedings*<sup>8</sup> [proposed s. 114S(2)(b)] continues to be of some concern in connection with family dispute resolution practitioners, family report writers etc. These roles could be specifically mentioned, potentially in the Explanatory Memorandum.

#### **38. Does the simplified outline at section 114N clearly explain the offences?**

There is some concern that the word *public* appearing in the first paragraph might be understood by some readers to mean the public more broadly, i.e., as distinct from a section of the public.

#### **39. Does section 114S help clarify what constitutes a communication to the public?**

Yes.

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<sup>8</sup> Currently s.121(9)(a) *persons concerned*.

## Schedule 8: Establishing regulatory schemes for family law professionals

### Family Report Writers schemes

**40. Do the definitions effectively capture the range of family reports prepared for the family courts, particularly by family consultants and single expert witnesses?**

Yes.

**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?**

Yes.

NLA, appreciates the advice that the regulations will be developed in consultation with stakeholders, and the opportunities that have so far been provided to contribute to the reviews and consultations in connection with the important work undertaken by family report writers.

NLA confirms previously expressed concerns in connection with the availability of family report writers and the costs associated with obtaining reports.<sup>9</sup>

### Commencement of the changes

**42. Is a six-month lead in time appropriate for these changes? Should they commence sooner?**

Yes.

Whilst proposed changes are largely to simplify and so clarify, comprehensive community education about the changes will help inform understandings and address any concerns.

There will be a need for training of professionals, including the legal profession, family report writers etc. This will have some funding implications.

**43. Are the proposed application provisions appropriate for these changes?**

It would be preferable to have the amendments apply to all matters from the date of commencement.

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<sup>9</sup> National Legal Aid submission to AGD Consultation Paper, *Improving the Competency and Accountability of Family Report Writers*, <https://consultations.ag.gov.au/families-and-marriage/family-report-writers/>

**Conclusion**

Thank you for the opportunity to provide this submission.

Please do not hesitate to contact us if you require any further information.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John', followed by a large, stylized flourish that extends to the right and then curves back down.

Dr John Boersig PSM  
Acting Chair, National Legal Aid