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20 June 2023

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

BY EMAIL ONLY: legcon.sen@aph.gov.au

Dear Sir/Madam

Re: Family Law Amendment Bill 2023 (Cth)

Aboriginal Legal Rights Movement ("**ALRM**") is grateful for the opportunity to provide a submission to the Family Law Amendment Bill 2023 ("**the Bill**").

Aboriginal Legal Rights Movement ("**ALRM**") notes at the outset this this submission is an expanded version of the input provided to the Law Council of Australia ("**LCA**") in response to their Memorandum to constituent bodies.

The Law Council distributed a table outlining its proposed position in relation to the key measures proposed in the Bill, which identified where additional input is sought from constituent bodies and sections, should they have capacity to contribute further.

ALRM, as a key stakeholder with respect to advocating for the rights of Aboriginal and Torres Strait Islander people and children consider it appropriate to make an individual submission to the Senate Legal and Constitutional Affairs Committee in relation to its inquiry into the provisions of the Family Law Amendment Bill 2023.

Where appropriate, ALRM will comment where their position either agrees and/or differs with the position of the LCA.

1. Position on section 60B

ALRM understands that the LCA is unlikely to support the proposed redraft of section 60B as it does not add clarity or more broadly assist in an understanding of subsequent provisions.

It is acknowledged that the ALRC proposed the complete removal of the objects of Part VII in recommendation 4 of the 2019 report "Family Law for the Future – An Inquiry into the Family Law System" (ALRC Report 135).

Simplification of section 60B is required; and further pressure should be placed on the Government to ensure that section 60B adds clarity and assists in understanding subsequent provisions.

The current proposed section 60B is brief, and relates to ensuring the best interests of children are met, including by ensuring their safety; and including by giving effect to the Convention on the Rights of the Child ("**CRC**").

With respect to Aboriginal and Torres Strait Islander ("**ATSI**") Children, ALRM also recommends that the objects of Part VII make specific reference to the CRC with respect to the rights of ATSI children and ensuring that decisions made under Part VII are in accordance with an ATSI child's right to enjoy, profess and practise their culture, language and religion. A child's active involvement in their culture and language forms part of their identity and their lived experiences on country and in community. A child's connection and right to their culture is not a fact finding exercise, it is a presumptive right.

In particular, ALRM considers express reference should be made in the objects of Part VII to the child-rearing and collective practices of ATSI families in raising their children, and how applying collective and group decision making through the court process is fundamental when the court applies Part VII. This is also consistent with the right of self-determination pursuant to the United Nations Convention on the Rights of Indigenous People ("**UNDRIP**"), and consideration should also be given to whether the objects of Part VII should also make an express reference to the UNDRIP.

ALRM considers the Law Council not supporting the proposed re-draft is appropriate, and as noted above recommends that further pressure should be placed on the Government to ensure that s 60B promotes clarity and assists in the interpretation and understanding of Part VII as a whole.

2. Position on section 60CC

In response to the LCA, ALRM outlined the following with respect to the proposed simplification of section 60CC, whether any critical factors and considerations from existing s 60CC have been unjustifiably omitted, and whether any additional factors should be included.

ALRM submits that a more precise and refined list of best interests considerations is required, and generally agrees with the position of the LCA. This related to LCA supporting the simplified structure of section 60CC and the application of the paramountcy principle, subject to minor amendments and comments with respect to drafting.
However, ALRM notes and raises concern regarding proposed section 60CC(3) and that there may be adverse or unintended consequences

with the proposed re-drafting creating general considerations and then ATSI culture is an *additional consideration.*

The proposed redraft now includes at proposed section 60CC(2)(c) that the cultural needs of children are to be taken into account. This may alleviate this issue, but the legislation should draw a connection between sections 60CC(2) and (3) by including a note that when the court considers the cultural needs of ATSI children, they are to have reference to the considerations in section 60CC(3).

3. Should an equivalent provision to existing s 60CC(2A) be included which requires the court to give greater weight to safety considerations

ALRM raises the family violence amendments of 2011. They inserted a provision whereby safety considerations and protections from harm must be given greater weight.[1] The proposed re-draft of the legislation outline that relationships are to be maintained where it is "safe to do so", to apparently seek to achieve the same effect. However, this does not alleviate the appearance that all factors are considered equally through a holistic approach. Priority must be given to considerations of safety and the legislation must expressly provide for this, rather than allowing there to be a discretion in such an assessment, as the re-drafting of proposed section 60CC(2)(e) proposes.

ALRM also suggests that the meaning of *harm* within the FLA should extend and encompass the concept of cultural harm.

4. Standalone best interests factor for ATSI Children

ALRM agrees with the position of the LCA with respect to supporting the standalone best interests factor, and provided the following comments about whether this factor should also include the language and concepts which currently exist in sections 60CC(3)(h) and 60CC(6).

Proposed section 60CC(3) relating to a child's right to enjoy their ATSI culture is more encapsulating than the current provision within s 60CC(3)(h). The proposed re-draft now contains family, community, culture, country and language, and not only that a child *enjoy* their

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1 Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (2019, Final Report) 39; 166.

culture, but defines it by stating that the child should have the *opportunity to connect with and maintain their connection* to culture.

ALRM would support the incorporation of other language and concepts of the existing sections 60CC(3)(h) and 60CC(6), such as:

- the right to enjoy that culture with other people who share that culture (section 60CC(3)(h)(i);

- to have the support, opportunity and encouragement necessary:
    - to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
    - to develop a positive appreciation of that culture.

5. Consent orders as outlined in proposed section 60CC(4)

ALRM agrees with the LCA's approach and ALRM shares the concerns of the LCA that even when orders are proposed to be made by consent, the court must have consideration to all factors within sections 60CC(2) and (3) otherwise, this could lead to orders that do not reflect the best interests considerations and are inappropriate, particularly if the orders do not address the risk factors and ensuring a child is safe from harm, abuse, family violence or neglect.

It is also a requirement under the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) when making consent orders at 5.28 and 5.29 (for interim consent orders), and 10.04 and 10.05 (for final consent orders); and that the parties must advise the court how the proposed orders intend to deal with allegations and concerns of risk.

6. Parental Responsibility

The LCA sought input on the views of constituent bodies about their response to concerns raised by some commentators and MPs that these measures will 'lead to a return to a time when mothers were given primacy in parenting arrangements'.

ALRM strongly disagrees with such statements. The court's concern when making decisions for children is to have regard to their best interests. ALRM considers that these comments are misguided and should be viewed through the lens of what (if any) parent has had *primary care* of the child, and that it is more often the case that mothers are the primary caregiver, and the court is hesitant to sever the child's connection from their primary caregiver. It is not the case that mothers are given priority in parenting arrangements.

Anecdotally, ALRM workers have experienced a common misconception among clients and parties to proceedings within the

FCFCOA that equal shared parental responsibility means equal time and this should be removed.

ALRM agrees with the LCA's position which supports removing the presumption of Equal Shared Parental Responsibility.

7. Additional provisions with respect to Parental Responsibility

The LCA sought the views of constituent bodies on the below provisions which have been added since the consultation on the Exposure Draft.

- **s 61CA (not enforceable)**

it is acknowledged that proposed section 61CA is not enforceable and is presumed to encourage parties to consult each other in good faith about long term issues.

- **s 61D(3) (reflects existing s 64B(3))**
- **s 61DAA (reflects some parts of existing s 65DAC)**
- **s 61DAB (reflects existing s 65DAC)**

These sections appear to make provision for orders the court may make with respect to parental responsibility if the presumption of Equal Shared Parental Responsibility is removed.

8. What examples could be included in the Bill to assist parties in appropriately interpreting the rule in s 65DAAA(1)?

Examples may include:

- Relocation (for personal and/or professional reasons);
- Allegations of unacceptable risk of harm, abuse or family violence;
- Serious injury or medical issue of the child/ren's parents or to the child/ren that may make the current orders before the court unworkable;
- Serious criminal proceedings relating to a parent/s.

A "catch all factor" which could state that the court is able to consider any other fact or circumstance it thinks is relevant to assess whether a significant change of circumstances has arisen.

9. Position on section 70NBA(1)?

This subsection now requires that the court may only consider a contravention matter on application from a party, while the approach in the exposure draft did not limit the circumstances in which a court may deal with a contravention of child-related orders that arises in proceedings.

ALRM agrees with this proposed amendment and the position of the LCA, noting that Division 13A remains difficult to understand and that there is scope to improve the drafting of the division.

The previous proposed section 70NBA(1) (which proposed to not limit the circumstances in which a court may deal with a contravention of child-related orders that arises in proceedings) should be confined to, and specify that the court may only consider a contravention matter upon an application from a party.

Without a limitation on such a provision, it could create further delays within the family law system especially if there were no limits on when the court can deal with contraventions. It may also create instances where unmeritorious contravention applications are made, and may also allow contraventions to be made by oral application. Contravention applications are required to be sufficiently particularised and it would not assist the court if no limits were placed on contravention proceedings.

10. Delegation of power under the FCFCOA Act to allow for Registrars to make orders that compensate for time lost with a child (s 7(1)(ba))

ALRM notes that the LCA has no position with respect to this proposed measure.

ALRM notes that there could be adverse consequences with delegating the power to order "make up time" to Registrars. The drafting of such provisions must be considered carefully. There could be adverse consequences and further delay, especially because a decision of a Registrar has an automatic right of review and must be conducted as an original hearing under the Rules.[2]

11. Definition of "member of the family" and "relative"

ALRM generally agrees with the LCA's position and also adds the following with respect to ATSI children:

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[2] See *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) rr 14.05, 14.07.

ALRM notes that the proposed amendments to section 4 state the following:

> For an Aboriginal child or Torres Strait Islander child — a person who, in accordance with the child's Aboriginal or Torres Strait Islander culture, is related to the child.

ALRM submits that this definition does not acknowledge the intricacies of ATSI culture, and the collective and community responsibilities associated with parenting,[3] nor does it address or contemplate the intricacies of ATSI families and their dynamics, kinship, and child rearing practices. As Dr Tracey Westerman outlines:

> Aboriginal communities believe that it takes a whole community to raise a child and this means that it is commonplace for different caregivers to respond to the different emotional needs of the child – the collective arguably making it more likely that the child's innate temperament and personality style which is of biological and genetic origin can then be 'assisted' or responded to by a range of external caregivers.[4]

ALRM submits the drafting is open to interpretation, is restrictive, and it is tokenistic. The proposed definition does not show a satisfactory attempt at addressing and defining the intricacies of ATSI families. ALRM submits that any definition of family should not be non-exhaustive, and the definition should be more considered, particularised and acknowledge cultural ways. For example, the definition could state:

> For an Aboriginal child ***and/***or Torres Strait Islander child — a person who, in accordance with ***Aboriginal and/or Torres Strait culture, kinship, and child rearing practices***, is related to the child.

12. Independent Children's Lawyers ("ICL")

The LCA sought input on what the threshold should be instead of exceptional circumstances.

ALRM agrees with the position of the LCA which supports ICL's meeting with children, but noting that there should be an element of discretion involved.

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[3] Dr Tracy Westerman, Statement to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (24 November 2020) 38 [103]; 36 [97].

[4] Ibid 38 [103].

ALRM considers that "exceptional circumstances" could be too high a threshold for an ICL to not meet with a child.

ALRM agrees with the LCA's position that a lower threshold of it not being practicable or in the child's best interests to meet with the ICL.

13. Views on proposed subsection 68LA(5D)

The LCA also sought input on proposed subsection 68LA(5D) and whether it should be removed, so that if a party has a concern that the ICL has failed to discharge their obligation, they may be raised with the court to address on a case-by-case basis.

ALRM considers that this section should be reworded to apply on a case-by-case basis and at the interim stage. This could be an important provision, but should be more wide-reaching.

14. Removal of the exceptional circumstances requirement in cases brought under the Hague Convention (s 68L)

ALRM agrees with the proposed position of the LCA with respect to matters brought pursuant to the Hague Convention, noting the LCA supports this proposed measure.

15. Harmful Proceedings Orders

ALRM agrees with the proposed position of the LCA with respect to Harmful Proceedings Orders.

16. Additional Provisions with respect to Harmful Proceedings Orders.

The LCA sought the views of constituent bodies on the below provisions which have been added since the consultation on the Exposure Draft.

- **s 102QAC(7) and (8)**

ALRM considers that these orders are drafted to ensure procedural fairness, particularly in respect of whether the other party is to be notified and served, or if the application is to proceed ex parte.

There may be some confusion with sections 102QAC(7) and (8) and the overlap with 102QAE(4).

17. Overarching purpose of the family law practice and procedure provisions

ALRM agrees with the LCA's proposed position and including an overarching purpose of the family law system.

18. Imposing a duty on parties and practitioners to conduct proceedings in accordance with the overarching purpose

ALRM agrees with the LCA's proposed position with respect to solicitors conducting proceedings consistent with the overarching purpose of the family law system, noting there are some difficulties with section 96(3) and estimation of costs.

19. Redrafting of section 121

ALRM agrees with the LCA's position and the proposed re-draft of section 121.

20. Family Report Writers

ALRM generally agrees with the LCA's proposed position with respect to family reports. It is noted that further consultation and input is required with respect to implementing regulations and accreditation schemes for family report writers.

21. Review of the operation of the FCFCOA Act

ALRM agrees with the LCA's position and that the review of the Act should be brought forward to ensure a timely assessment of family law system.

22. Dual appointments to the Family Court of Western Australia

ALRM agrees with the LCA's position and sees benefit in providing an express legislative provision allowing for a judicial officer to be dually appointed to the Family Court of WA and the FCFCOA Division 1, noting this was the case prior to 1 September 2021.

Thank you for considering ALRM's submission. The proposed amendments to the FLA presents an opportunity as well as an obligation to create meaningful change within the family law sphere, a jurisdiction that impacts the most vulnerable members of our community. We trust that these comments, alongside the comments and submissions of other stakeholders are a catalyst for such change.

Yours faithfully
ABORIGINAL LEGAL RIGHTS MOVEMENT

Chris Larkin
Chief Executive