



Law Council
OF AUSTRALIA

Office of the President

15 August 2023

Senator Nita Green
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator Green

Supplementary Submission: Family Law Amendment Bill 2023

The Law Council of Australia appreciates the opportunity to have appeared before the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) on 11 August 2023 in relation to its inquiry into the provisions of the Family Law Amendment Bill 2023 (Cth) (**the Bill**).

Response to submission by Dr Patrick Parkinson AM

During the Law Council's appearance, the Deputy Chair of the Committee, Senator Scarr, asked the Law Council to provide a response to the recommendations made by Dr Patrick Parkinson AM in his submission to the Committee.¹

Section 60B

Dr Parkinson recommends amending the Bill in order to retain the existing objects and principles in section 60B of the *Family Law Act 1975* (Cth) (**the Act**).

The Law Council recommended in its submission that existing section 60B be repealed and not replaced.² This position is consistent with Recommendation 4 of the Australian Law Reform Commission (**ALRC**) in its 2019 Report.³ On balance, the Law Council does not share Dr Parkinson's concerns regarding the practical implications of removing the objects and principles as they appear in the Act. Resolving the suboptimal and confusing interplay that currently exists between the objects of Part VII, the underlying principles and the best interests considerations, would be best achieved by removing existing section 60B.⁴

¹ Emeritus Professor Patrick Parkinson AM, *Submission to the Senate Legal and Constitutional Affairs Committee - Family Law Amendment Bill 2023* (Submission 4, 5 June 2023).

² Law Council of Australia, *Family Law Amendment Bill 2023* (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 3 July 2023) <<https://lawcouncil.au/resources/submissions/family-law-amendment-bill-2023->> 12-13.

³ ALRC, *Family Law for the Future—An Inquiry into the Family Law System* (Final Report 135, March 2019), Recommendation 4.

⁴ Law Council of Australia, *Family Law Amendment Bill 2023* (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 3 July 2023) 12.

Paragraph 60CC(2)(e)

Dr Parkinson recommends amending proposed paragraph 60CC(2)(e) to replace ‘a relationship’ with ‘a meaningful relationship’. The Law Council made the same recommendation in its submission, expressing concerns that to remove consideration of a meaningful relationship could lead a court to consider that *any* relationship may be acceptable, with a consequent reduction in time and communication arrangements being deemed sufficient to meet that lower threshold.⁵

While Recommendation 5 of the ALRC Report did not import the phrase ‘meaningful relationship’ into the simplified list of section 60CC best interest factors,⁶ the Law Council considers it would be undesirable for the Bill to abandon this concept.⁷ As noted in the Law Council’s submission, this phrase has been the product of considerable jurisprudence over the last two decades, which is available to guide the Court’s consideration of the child’s relationship with their parents and other people significant to them.⁸

Dr Parkinson further recommends replacing the phrase, ‘where it is safe to do so’, with ‘unless it is unsafe for the child’ in proposed paragraph 60CC(2)(e). However, the Law Council supported the inclusion of the specific phrase ‘where it is safe to do’ in its submission, as this makes it clear—in necessarily stronger terms than proposed by Dr Parkinson—that the benefit of having a relationship with both parents must always be subordinate to the child’s safety.⁹ The inclusion of this specific phrase is important because the Bill does not propose to require the court to give greater weight to safety factors, as is currently provided in existing subparagraph 60CC(2A) of the Act.¹⁰

Section 60D

Dr Parkinson recommends that subsection 60D(1), which relates to an adviser’s obligations in relation to the best interests of the child, be substantively amended.

The Law Council considers that proposed paragraph 60D(1)(b), which the Bill consequentially amends, makes it sufficiently clear that advisers (legal practitioners, family counsellors, family dispute resolution practitioners and family consultants)¹¹ must encourage a person to act in the child’s best interests.¹² In the Law Council’s view, subsection 60D(1) does not require substantive amendment, noting that Rule 7 of the *Australian Solicitors’ Conduct Rules* requires solicitors to properly advise clients of available options.¹³

As expressed in the Law Council’s submission, the proposed consequential amendments to section 60D, in addition to the proposed repeal of equal shared parental responsibility (**ESPR**), will enable practitioners to clearly direct parents’ attention towards what is best for the child and away from what arrangements appeal more to an adult’s perception of fairness.¹⁴

⁵ Ibid 18.

⁶ ALRC, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report 135, March 2019), Recommendation 5.

⁷ Law Council of Australia, *Family Law Amendment Bill 2023* (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 3 July 2023) 18.

⁸ Ibid.

⁹ Ibid 17.

¹⁰ Ibid 15.

¹¹ Family Law Act 1975 (Cth) s 60D(2), 63DA(5).

¹² Law Council of Australia, *Family Law Amendment Bill 2023* (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 3 July 2023) 18.

¹³ See, e.g., *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (NSW), r 7.

¹⁴ Law Council of Australia, *Family Law Amendment Bill 2023* (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 3 July 2023) 26-27.

Section 61CA

Dr Parkinson recommends substantial redrafts to proposed section 61CA, which, as presently drafted, encourages consultation between parents on major long-term issues.

In its submission, the Law Council queried the utility of proposed non-enforceable section 61CA and recommended that consideration be given to clarifying and/or relocating it.¹⁵ Nonetheless, the Law Council supports the intention of this section and the explicit inclusion of the phrase ‘if it is safe to do so, and subject to any court orders’. It does not consider a substantive redraft to be necessary, however welcomes further clarification on its future application.

Response to submission by Professor Richard Chisholm AM

Senator Scarr also asked that the Law Council provide a response to the submission made by Professor Richard Chisholm AM, which primarily relates to Schedule 1 to the Bill. The Law Council is generally supportive of Professor Chisholm’s submission, noting he endorses the Bill, including its proposed repeal of the presumption of ESPR. The Law Council considers there is significant merit to Professor Chisholm’s suggestions for refining the Bill.

Quantum of funding required for the family law system

During the hearing, Senator Waters sought the Law Council’s views on the quantum of funding required to ease the current pressure on Australia’s family law system.

The Law Council emphasises the importance of a properly resourced family law system to meet its substantial ongoing demands, particularly for the Federal Circuit and Family Court of Australia (Divisions 1 and 2) (**FCFCOA**) and the legal assistance sector. While the Law Council acknowledges that the 2022–23 and 2023–24 Federal Budgets included numerous measures aimed at improving the family law system,¹⁶ it considers that critical gaps remain. Should the Bill pass without the provision of corresponding resourcing, these gaps will be exacerbated.

As the Law Council emphasised in its submission, and during its appearance at the hearing, several measures in the Bill are likely to have significant funding implications for legal assistance organisations and the family law system more broadly, including the proposed changes to the work of Independent Children’s Lawyers (**ICLs**), the introduction of harmful proceedings orders, and the new power for the Commonwealth to make regulations for family report writers.¹⁷ Should the Bill pass, additional funding will also be required to develop and implement education campaigns and guidance to ensure that family law professionals—and the broader community—understand the reforms and their potential consequences.¹⁸

¹⁵ Ibid 22.

¹⁶ See the Hon Mark Dreyfus KC MP, Investing in Integrity, Human Rights and Safety (Media Release, 25 October 2022) <<https://ministers.ag.gov.au/media-centre/investing-integrity-human-rights-and-safety-25-10-2022>> and Investing in a justice system that keeps Australians safe & advances integrity & accountability (Media Release, 9 May 2023) <<https://ministers.ag.gov.au/media-centre/investing-justice-system-keeps-australians-safe-advances-integrity-accountability-09-05-2023>>.

¹⁷ Law Council of Australia, Family Law Amendment Bill 2023 (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 3 July 2023) 7, 10, 11, 27, 39-40, 44, 54, 56.

¹⁸ Ibid 7.

The Law Council is of the strong view that a sustained increase in resourcing across the family law system is required.¹⁹ Given the critical importance of the legal assistance sector in family law matters, the Law Council suggests that the Committee have regard to the submission made by National Legal Aid to the Treasury in December 2022.²⁰ That submission called for immediate investment in Legal Aid Commissions, including:²¹

- \$4.4 million to maintain and expand the quality oversight of ICLs in contested parenting proceedings;
- \$16.6 million to maintain legally aided support for people experiencing disadvantage to have their family law issues resolved through the FCFCOA's case management pathway;
- \$27.0 million to expand the ICL program to provide best interests representation to 3,000 per matters per year, or 65 per cent of children in contested parenting proceedings; and
- \$64.2 million to expand the means test for approximately 7,500 more matters per year, with a focus on family law access for women and children escaping domestic and family violence.

The Law Council acknowledges that funding for Legal Aid Commissions, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services is provided by the Commonwealth and the states and territories under the *National Legal Assistance Partnership 2020–25 (NLAP)*. It notes that an Independent Review of the NLAP was announced in June 2023 and is expected to be completed by early 2024, with the Review's findings informing decisions on future funding arrangements for legal assistance services.²²

The Law Council looks forward to engaging closely with this Review in the coming months, noting that the quantum of Commonwealth legal assistance funding is expressly included in the Review's terms of reference.²³

Contact

If the Law Council can be of any further assistance to the Committee in the course of its inquiry, please contact Ms Leonie Campbell, Director of Policy on [REDACTED] [REDACTED] [REDACTED] or at [REDACTED]

Yours sincerely

Luke Murphy
President

¹⁹ Ibid.

²⁰ National Legal Aid, 2023-24 Pre-Budget Submission (Submission to the Treasury, 13 December 2022) <<https://www.nationallegalaid.org/wp-content/uploads/2023/05/NLA-2023-Budget-Submission-final.pdf>>.

²¹ Ibid 2-3.

²² The Hon Mark Dreyfus KC MP, Independent Review of the National Legal Assistance Partnership (Media Release, 23 June 2023) <<https://ministers.ag.gov.au/media-centre/independent-review-national-legal-assistance-partnership-23-06-2023>>.

²³ Attorney-General's Department, Independent Review of the National Legal Assistance Partnership (2020-2025), Terms of Reference (23 June 2023) <<https://www.ag.gov.au/sites/default/files/2023-06/terms-of-reference-nlap-review.PDF>>.