caxton
legal centre inc

21 June 2023
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
Parliament of the Commonwealth of Australia

Email: legcon.sen@aph.gov.au

Dear Secretary,

Re: Family Law Amendment Bill 2023

Caxton Legal Centre Inc (Caxton) welcomes the opportunity to provide a submission on the Bill. We refer to our previous submission on the Exposure Draft of the Family Law Amendment Bill 2023 dated 27 February 2023.

Background

1. Caxton Legal Centre is Queensland's oldest community legal centre providing legal advice and social work supports to disadvantaged clients including those experiencing domestic and family violence, and those charged with domestic violence offences.

2. To prepare this submission, we have drawn from the experience of our lawyers and social workers who provide services to clients through a number of our programs relevant to this Bill:

- Domestic Violence Duty Lawyer – court based legal advice for Respondents in the Domestic Violence Court, Brisbane Magistrates Court.

- Family Law Duty Lawyer – court based legal advice provided five days per week at the Brisbane Registry of the Federal Circuit Court and Family Court of Australia.

- Family and Advocacy Support Service – court based legal advice and social work supports for persons affected by domestic and family violence five days per week at the Brisbane Registry of the Federal Circuit Court and Family Court of Australia.

- Family Law and Domestic Violence Advice and Casework program – day time and evening advices and casework. Our evening advices are delivered by volunteer lawyers.

- Seniors Legal and Support Service – legal and social work supports for older persons who are experiencing or at risk of experiencing elder abuse, including domestic and family violence

- Older Persons Advocacy and Legal Service – a Health Justice Partnership with Metro South Health providing legal and social work supports for older persons who are experiencing or at risk of experiencing elder abuse, including domestic and family violence.

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- Human Rights and Civil Law program – day time and evening advices and casework across a broad range of legal issues including policing with a focus on assisting persons experiencing domestic and family violence.

3. Clients who access our services are either court users or people who do not qualify for legal aid and cannot afford private legal services.

Section 60CC(2)(e)

4. We support the use of the phrase, *"…the benefit to the child of being able to **have** a relationship with the child's parents…"* as a more easily understandable alternative to the phrase, *"…**maintain** a relationship"*. This language reflects that some parents initiate court proceedings in order to commence a relationship with their child/children.

Part 2 – Parental Responsibility

5. We support the addition of sections 61CA, 61DAA and 61DAB and the amendment 61D and refer to paragraphs 12 to 16 of our submission dated 23 February 2023.

6. Overall, we support the use of the clear and more easily understandable language under these sections, especially for self-represented litigants and/or for parties engaging in pre-action procedures and negotiations.

7. Under section 61CA the phrasing, *"encouraged"* to consult each other about major long-term issues, *"if it is safe to do so and subject to any court orders"*, creates a clear message to separating families that joint decision-making should be used as the default position where possible and where safe.

8. Under section 61DAA(1) we strongly support the requirements to, *"consult each other…"*, and *"make a genuine effort"* to facilitate joint decision-making.

9. With reference to section 61DAA(2) we respectfully submit that:

a. In the instance where a joint decision is required but has not been made, this subsection appears to be explicitly authorising unilateral communication of a decision about a long-term issue to a third party when a joint decision may be required but has not been made. If that is the intention, this seems to only benefit the third party and not the child because the assumption must be that the joint decision-making order has been made to benefit the child. If that is not the intention, then this unintended consequence needs to be addressed. For example, this subsection would make it possible for a parent to unilaterally communicate to a school a change in a child's schooling, knowing that the parent is not required to produce any proof of a joint decision and knowing that the school is not under any obligation to check that the decision has been made jointly. If a joint decision-making order has been made then there is likely to have been some conflict between the parents and the order resolves that, or if it is made by consent then it is an agreed parenting approach, and in either case it ought not be undermined by what this subsection authorises one party to do. It may have the unintended consequence of creating more conflict instead of less.

b. If the subsection is trying to cure a particular ill in the best interests of the child (for example, a child's urgent medical treatment is being delayed) then this ought to be

particularised to give certainty around how the subsection is to benefit the child and be workable for the parents so as to avoid the situations cited above. Alternatively, it may be preferable to remove subsection 2 altogether.

c. If what is trying to be achieved is a balancing of the rights of the child to have both parents participate in an important decision about their long-term welfare and the practical issues that affect parents trying to make or communicate jointly made decisions, this falls too short of that balancing effort. If the issue is important enough for the benefit of the child to have a joint decision-making order then it ought not be trivialized but supported with proper legislative scaffolding. Amendments to the Family Law legislation over the years in respect of joint decision-making have seen many attempts being made to get this balance right. Without being overly prescriptive the Bill needs to provide a minimum expectation about what joint decision-making ought to look like and at the least it should expect the decision to be recorded in writing between the parents (any form will do including via text message or use of a parenting App) and produced to a third party when communicating the decision.

10. With regards to section 61DAB, we refer to our submission dated 23 February 2023 and reiterate that it would be highly beneficial, especially for self-represented litigants, to include a more detailed notation that categorises further examples of which types of day-to-day decisions can be made separately to avoid an overreach into one parent's day-to-day decision-making. The list might include: daily routines, childcare and babysitting, use of their local GP, attendance at birthday parties, meals, attendance at school excursions etc. Our services spend a significant amount of time advising on these points.

Part III – Child Related Proceedings

11. We support the addition of section 65DAA(3). In our clients' experience it is not uncommon for parties to agree to an amendment of a final order in the absence of any *Rice v Asplund* considerations. For example, a slight change in work arrangements might result in a practical need for a slight variation of parenting orders that is uncontentious and that both parents agree to.

Division 1B – Harmful proceedings orders

12. We strongly support the addition of section 102QAC (7) and (8) and the subheading *Order about notifying other party in relation to application for leave etc.* and refer to paragraphs 27 to 35 of our submission dated 23 February 2023.

This submission was prepared by Colette Bots, Director Family, Domestic Violence, and Elder Law Practice and authorised by Cybele Koning, CEO.

Yours faithfully

Cybele Koning
CEO
Caxton Legal Centre Inc.