Australian Government
Attorney-General's Department

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15 August 2023

Attn: Ms Sophie Dunstone
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Department of the Senate
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Dear Committee Secretary

Questions on Notice – 11 August 2023 Senate Legal and Constitutional Affairs Committee Hearing on the Family Law Amendment Bill 2023

The Attorney-General's Department (the department) appreciated the opportunity to appear at the hearing on the Family Law Amendment Bill 2023 (the Bill) on 11 August 2023. This letter provides information in response to questions on notice taken by the department at the hearing. The department has addressed the issues raised by the Committee as best as possible in the time available.

Issues raised in the submission of Professor Patrick Parkinson

There is currently no legally enforceable obligation that parties should consult on major long-term issues where no parenting orders have been made. The Bill introduces new section 61CA, which signals to parents that, subject to court orders, and if it is safe to do so, parents are encouraged to consult each other about major long-term issues in relation to the child, having regard to the best interests of the child as the paramount consideration.

The intention of section 61CA is not to significantly change the approach to consultation between parents in the absence of parenting orders. Section 61CA will effectively replace the unenforceable common law qualified duty arising out of the decision of *In the marriage of B* (1997) 21 Fam LR 676 (*B and B*) in a situation where no parenting orders have been made. Section 61CA reflects a slightly different concept than in *B and B* because section 61CA uses the language of 'encouragement' rather than saying parents 'should consult' and is not expressed as a 'duty'. It also makes express reference to safety issues and their effect on the encouragement to consult, which is not a matter which courts have emphasised in the context of the *B and B* duty, although would be relevant to a parent deciding whether to consult on major long-term issues both before the introduction of section 61CA and after (among other matters).

For parties seeking court orders in the family law system, the Bill will remove the presumption of equal shared parental responsibility which only operates when a Court is making a parenting order. Amendments to section 61D makes it clear that the court may make an order that deals with decision making about major long-term issues in relation to the child. New section 61DAA sets out the effect of an order that provides for joint decision-making on major long-term issues which is to consult and make a genuine effort to come to a joint decision. In effect, orders for joint decision making on major long-term issues will still be made by the Court but without the presumption.

The repeal of equal shared parental responsibility is child-focused. It means that there will be no presumption of a particular outcome, and the Court can focus on assessing the best interests of the child based on the particular circumstances in each case. The operation of the presumption has led to unsafe parenting arrangements. AIFS research findings support the removal of the presumption. As AIFS states in their Senate submission "*...Despite the policy intent of the 2006 family law reforms for shared parental responsibility not to be an expected outcome in cases involving family violence, child abuse and highly conflicted relationships, such outcomes are common. The compliance with and enforcement of family law parenting orders research concluded that 'some children are living in parenting arrangements that are inconsistent with safety and positive wellbeing' indicating they are at risk* (p. 173 – page 9 of AIFS submission).

The Explanatory Memorandum explains that the repeal of the objects and principles (current section 60B) to simplify these provisions does not indicate that they are no longer relevant. Rather, the intention is to simplify the objects to better assist with the interpretation of Part VII and avoid duplication with section 60CC. This is in line with the recommendations of the ALRC, and the Government's commitment to make the Family Law Act more user friendly. The department notes that combined stakeholder support for either the full repeal of the objects and principles, or simplified objects in the current Bill, was very strong, indicating wide acceptance of the ALRC's findings that the lengthy objects and principles presented practical difficulties for system users.

<u>Interaction between subpoena rules and withdrawn protected confidences provisions</u>

Parties to family law proceedings may seek to subpoena records of another party's 'protected confidences' (sensitive information including medical, counselling or therapeutic records) to inspect them, and/or have them admitted into evidence. Rule 6.27 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* outlines the limits on requests for subpoenas in family law proceedings, including for protected confidences. For a represented party, up to five subpoenas for production can be issued per interlocutory application without permission of the court (subject to subrules (1) and (2)). Self-represented litigants must not request the issue of a subpoena without permission of the court (subrule (1)). The changes in Schedule 6 of the Exposure Draft would not have altered the number of subpoenas that parties could seek to issue, or the circumstances in which court permission is needed, as changes were only proposed to the adducing of the information obtained into evidence, rather than the subpoena process itself. Further detail about subpoena requirements is provided by the FCFCOA on its website https://www.fcfcoa.gov.au/fl/subpoenas and https://www.fcfcoa.gov.au/fl/pubs/leave-requirements-subpoena.

<u>Women's Legal Services Australia recommendations on Hague Convention</u>

The Women's Legal Services of Australia (WLSA) submission recommended further amendments to the *Family Law (Child Abduction Convention) Regulations 1986* to provide better safeguards for a parent/carer fleeing violence across international borders with their child and that this occur in consultation with relevant experts.

On 12 December 2022, the Attorney-General, the Hon Mark Dreyfus KC MP, announced that the Family Law Regulations had been amended to make it clear that allegations of family and domestic violence can be considered before return orders are made for children under the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*. In that announcement, the Attorney-General indicated continued engagement with stakeholders on further measures to improve the safety of women and children in Convention cases.

Women's Legal Services Australia recommendations on harmful proceedings orders

Recommendations in relation to harmful proceedings orders

The WLSA submission to the Committee made recommendations in relation to harmful proceedings orders.

The intent of harmful proceedings orders is to support victim-survivors experiencing systems abuse in the family law context. As harm that a person may experience is subjective, it is more appropriate that the respondent satisfies the court, on the balance of probabilities, of the harm that may be experienced as a result of further proceedings. Shifting the evidentiary burden to the applicant would require the court to focus on the intention or actions of the party engaging in systems abuse and may result in an unintended narrowing of the provision and less protection for those who may experience harm from repeated proceedings and applications.

Independent Children's Lawyers (as raised in the submission from National Legal Aid)

The provisions requiring ICLs to meet with and seek the views of children unless exceptional circumstances apply would legislate existing expectations of ICLs reflected in the *Guidelines for Independent Children's Lawyers*, and are consistent with the practice of most ICLs who receive grants of aid from legal aid commissions to meet with children. The Bill does not specify when an ICL must meet with a child, or how often, so that ICLs retain discretion as to timing, frequency and method of engagement, or to justify the exceptional circumstances for not doing so, although the Bill provides that it needs to occur before the court makes final orders in the matter. The Bill establishes that the judge in the matter provide oversight to ensure ICLs meet with children unless exceptional circumstances apply. These provisions ensure that children can express their view in judicial proceedings affecting them, consistent with Article 12 of the *United Nations Convention on the Rights of the Child*, and replace the current and less-definitive subsection 68L(5) where judges *may* make an order for the ICL to find out the child's views.

The Australian Government provides funding to states and territories for distribution to legal service providers, including baseline funding for legal aid commissions, under the National Legal Assistance Partnership (NLAP). Legal aid commissions use this funding to support ICL appointments. The current NLAP expires on 30 June 2025, and an independent review of the agreement has commenced. The review will involve a holistic assessment of all Commonwealth legal assistance funding and will inform future funding arrangements.

Training for judges, the legal profession and law enforcement

Education and training measures for the justice sector on family and domestic violence were announced as part of the funding commitments for women's safety in the 2022-23 Federal Budget. These measures support the implementation of the National Plan to End Violence against Women and Children 2022-2032. Funding for the department included $0.2 million for the continued maintenance of the National Domestic and Family Violence Bench Book (Bench Book), by the

Australasian Institute of Judicial Administration; $0.2 million for the continued development and delivery of the Family Violence in the Court (FVitC) training program, by the National Judicial College of Australia over five years from 2022-23 to 26-27; and $0.9 million for the development and delivery of continuing professional development (CPD) training for legal practitioners on coercive control from 2022-23 to 2025-26.

The National Domestic and Family Violence Bench Book (the Bench Book) is an online educational resource for judicial officers in all Australian jurisdictions which aims to promote best practice, develop consistency in judicial decision-making and improve court experiences for victim-survivors. The FVitC training builds on the Bench Book and is an optional training program available to federal, state and territory judicial officers in all jurisdictions. The FVitC training familiarises judicial officers with the Bench Book and promotes consistency in the interpretation and application of laws relevant to family violence across jurisdictions. Work is also progressing through the agreement of the Standing Council of Attorney's General for the Law Council of Australia to continue leading work to implement family safety competency of legal practitioners in continuing professional development as a discretionary unit, with consideration to making it mandatory in the future. For more information regarding the provision of training to court staff and the judiciary questions should be directed to the Federal Circuit and Family Court of Australia (FCFCOA).

Additionally, the Government committed $4.1 million over four years from 2022-23 to 2025-26 for the department to develop and deliver a national training package aimed to enhance law enforcement responses to family, domestic and sexual violence (FDSV), by increasing awareness and understanding among police to the indicators to identify FDSV, such as coercive control and the linkages it has with technology facilitated abuse. A scoping study is currently being undertaken and the department is working closely with state and territory police to identify and determine key areas of focus required to enhance and complement existing police training. This includes work to capture different local and regional arrangements, as well as organisations and groups involved in training delivery and/or its content. It is intended that broader consultation, including with frontline providers and services, will occur in future phases of this work.

Resourcing of community education

The department will use existing avenues for access to information about the family law system to ensure the general public receive information about the changes to the Family Law Act. These include Family Relationships Online, the Family Relationships Advice Line and the department's internet page. The department will also develop plain English resources for circulation amongst family law sector service providers. The department notes that it is standard practice for FCFCOA resources to be updated to reflect major changes in legislation, and will work with the family courts on consistent communication in the implementation stage.

Issues raised in the submission of the Law Council of Australia

Safety considerations in relation to section 60CC
The Law Council of Australia (LCA) made recommendations in relation to elevating consideration of a child's safety within the best interests factors. It is intended that the history of family violence must be considered by the court in order to determine the safety arrangements that would promote the safety of the child and the child's carers in section 60CC(2)(a). Further, section 60CG of the Act (which is retained) requires the court to consider risk of family violence in relation to making parenting orders.

In relation to the issue of giving greater weight to safety than the other factors, the Explanatory Memorandum outlines that it was a recommendation of the ALRC that six factors form the basis of the new section 60CC and that legislative prioritisation be removed. The intention is to address the complex and repetitive nature of the previous section 60CC, and ensure that matters are given different weight as appropriate to the particular situation of a child. To this end, new section 60CC is intended to continue to provide the court with a wide discretion to consider the facts in each case, with a list of non-exhaustive considerations providing guidance.

Consideration be given to maintaining certain terms from the current Family Law Act in section 60CC
The LCA has also made a number of recommendations in relation to retaining certain language in the best interests factors in section 60CC.

The objective of the Bill is to simplify the existing complex framework of considerations when a court determines what is in the best interests of the child, and as such the Bill proposes simpler, easier to understand versions of these provisions that strike the appropriate balance between simplicity and functionality.

The redrafting of the below provisions have all centred on ALRC recommendations. In relation to section 60CC(2)(b), the ALRC originally recommended 'relevant' views of the child be taken into account, however, it was anticipated that there would be confusion as to what 'relevant' would refer to without the additional criteria present in existing 60CC(3)(a) so the Bill requires that the Court must consider 'any views expressed by the child'. This was also in response to concerns that children's' views were being disregarded. It remains a matter for the court to determine the weight given to the views expressed by the child.

Additional consideration for each issue is as follows:

- *'Relevant views' - Section 60CC(2)(b)*

As under the existing framework, the courts will still need to consider the views of the child and will continue to have discretion as to the weight to be given to those views.

- *'Meaningful relationship' - Section 60CC(2)(e)*

The word 'meaningful' was not included in the best interests factors recommended by the ALRC. The Bill does not include this term to avoid potential confusion about its meaning, for example that 'meaningful' could be misinterpreted as referring to being meaningful to the parent. Case law has attempted to clarify and define what a 'meaningful relationship' means over time, however, the concern is that ambiguity and confusion remains, particularly for self-represented litigants or parties who try to reach agreements outside of court.

- *Aboriginal and Torres Strait Islander stand-alone provision - Section 60CC(3)*

The intent of the reform is to capture this consideration in a simplified manner. This provision is elevated by having a standalone provision so that the particular needs and cultural rights of Aboriginal and Torres Strait Islander children are acknowledged and focused on specifically when considering their best interests. Further, amendments to the definition of 'member of the family' in Schedule 3 reflect that Aboriginal or Torres Strait Islander peoples may have extended family structures or kinship systems, and that child-rearing responsibilities may extend beyond the immediate family group or what is reflected in the current definition of relative.

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

The department notes that consultation with Aboriginal and Torres Strait Islander organisations has occurred since 2021, including following the release of the exposure draft. Stakeholders have supported the drafting as provided noting that it is applicable to individual circumstances, while taking into account that concepts of family and kinship vary across Aboriginal and Torres Strait Islander communities. This approach is also consistent with approaches of defining Aboriginal and Torres Strait Islander concepts of family in legislation in Western Australia and the Northern Territory which stakeholders expressed a preference for.

Independent Children's lawyers

The recommendations of the LCA concerning the ICL provisions are primarily addressed in the response to National Legal Aid's recommendations on this Schedule (above). In relation to the recommendation for ICL training, the department notes that ICLs undergo National ICL Training and ongoing professional development by legal aid commissions, to support them in meeting with children.

Family Report Writers

Schedule 7 of the Bill provides a power to make regulations to establish standards and requirements for professionals who prepare family reports and provides a framework for what those regulations can cover. The prescription of standards and requirements is left to the regulations, rather than amendments to the Family Law Act, to enable the development of a regulatory model that is targeted and nuanced to address each of the different professions who prepare family reports. This approach would minimise duplication of regulation for some family report writing professionals, to avoid disincentivising the existing and future workforce. The approach is informed by departmental stakeholder consultation on family report writers, a summary of which is available on the department's website at: Improving the competency and accountability of family report writers - Summary of submissions to the consultation paper (ag.gov.au).

The action officer for this matter is Kathleen Denley, Assistant Secretary, Family Law Branch who can be contacted on .

Yours sincerely

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First Assistant Secretary
Children and Families Division