FAMILY LAW AMENDMENT BILL 2023

Senate Legal and Constitutional Affairs Committee

Kyra Quinlivan

6 June 2023

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

6 June 2023

Dear Committee Secretary,

RE: Family Law Amendment Bill 2023

I refer to the Family Law Amendment Bill 2023 in which was referred to the Senate Legal and Constitutional Affairs Legislation Committee, in which is currently seeking submissions from individuals and organisations on the proposed amendments to the Family Law Act 1975 (Cth) (Family Law Act).

I am an Australian citizen who has been a party to proceedings in the United Kingdom Family Court, and currently a party in Australian Family Court.

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

Principles and objects of Part VII

The current Family Law Act is failing many families and the Australian community, and this reform is long overdue. Whilst I fully welcome many of the proposed amendments, I am concerned that the scope of the amendments does not fully capture and address the wider issues many separating families face, particularly where domestic violence is a factor. My concern is that if this bill is passed in its current form, that further addressing the matters of Family Law amendments will discontinue.

As it stands, the current bill fails to address other key principles and objectives including:

- The promotion of gender equality in Family Law matters
- Protection of victim parent/caregiver in cases with allegations of Domestic Abuse and Family Violence
- Prevention of Legal System Abuse
- Promote equality between men and women and balance between work and family life.
- Encourage women to continue to participate in the workforce.
- Provide parents with flexibility to balance work and family life.
- Qualifications required by those making determinations.

The proposed amendments to the Family Law Act need to mirror other government incentives and objectives for separated families, in addition to focusing on the best interests of a child. Family Law needs recognise the increase in international relationships as well as the high rates of divorces/ separated families in Australia and that the greater long-term needs of the entire modern family dynamic post separation.

The amendments and overarching goals need to not only place the best interest of the child but the entire Family. It is, after all "*Family* Law".

Best interests of the child factors

When addressing the best interest of a child, it is important that this acknowledges that the best interest of a child extends to having parents/carers best interests also addressed.

Any orders made need to take into account the practical elements of a child's upbringing, including workplace participation.

What arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, neglect or other harm.

I support the safety of a child given greater weight than children having a meaningful relationship with both parents. We know that meaningful relationships with both parents enhances a child's upbringing, but only when it is safe to do so.

When determining the arrangements for a child, the court needs to look further at the practicality of arrangements. It is not in the best interest of a child to live in poverty because arrangements imposed on the parent/carers enable or cause financial hardship and economic disadvantage of the parent/carer.

The Governments recent women's budget statement address many of the barriers' women face when fleeing violence.
A key barrier is when there is a child to the relationship that forces victims to continue their connections with their abuser.

In cases where equal shared parental responsibility is being proposed, the ability for parents to co-parent and to agree to matters must be carefully evaluated. It is the courts process that parties are required to attend mediation prior to making an application to the court. Where mediation fails and the matter proceeds to the court, it has been established that the parties are unable to make joint decisions.

This is particularly the case where Coercive Control is a factor.

In circumstances where a party has perpetrated coercive controlling family violence, protective measures need to be implemented, not only for the child's welfare, but for the victim party also.

Coercive controlling family violence is a pernicious pattern of behaviour (often involving financial control or abuse, intimidation, monitoring of the victim, sexual coercion or abuse), which is associated with negative impacts on child development and well-being (evidenced over time with the child experiencing limited achievement academically, engagement in poor quality relationships, and a range of emotional and behavioural difficulties), negative impacts on the parenting capacity of the victim parent and a range of problematic parenting behaviours by the offending parent (including providing a child with developmentally inappropriate information, overly rigid parenting and neglectful parenting). Coercive controlling family violence involves creating fear and uncertainty for the victim and is not necessarily associated with the use of significant physical violence.

The impact of coercive controlling family violence is typically more severe developmentally on younger children, although the impacts of such may not be evident until the child reaches later developmental stages.

If a perpetrator is abusing the other parent, that does not make them safe for the child, nor the victim parent/carer.

Any views expressed by the child.

Views of the child should always be heard, however as particularly vulnerable people, the weight of any such views require scrutiny with the child's age, maturity and level of understanding being critical factors.

I do not view that it should be the courts discretion on how much weight is placed on the child views. Any weight must only be determined by a suitably experienced child expert or social worker who is qualified, trained and informed in domestic violence.

The rights of children to life, and to protection from exploitation, violence and abuse is a key consideration in my view.

Domestic Violence is a complex issue whereby a child may be exposed to mental and psychological violence. In simple terms, a child's views may be influenced by a range of factors, including 'coaching' either directly or in-directly by one party.

It is imperative to protect children from all forms of abuse and violence, including physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse.

Article 12 of the United Nations Convention on the Rights of the Child states Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

The capacity of each proposed carer of the child to provide for the child's developmental, psychological and emotional needs, having regard to the carer's ability and willingness to seek support to assist them with caring.
I support the amendments but also make the following comment:
In cases where coercive controlling family violence is alleged, the process of dispute resolution between parties needs to be appropriately and safely managed both in relation to the victim parent and in relation to the arrangements for the child. If parties are incapable of agreement at mediation, the court must recognise the parties capacity to co-parent if a shared care and responsibility arrangement is being proposed.

The benefit of being able to maintain relationships with each parent and other people who are significant to them, where it is safe to do so
Studies demonstrate the benefits of shared parenting and are endorsed by many professionals, but only when safe to do so. Many recognise that physical and sexual abuse is a form of domestic violence, however the impact on children and victim-survivor parents of coercive controlling family violence can significantly impact their mental wellbeing and must not be overlooked.

Repeal of the presumption of equal shared parental responsibility and consideration of specific time arrangements

I understand that there are many fathers and fathers' right activists who disagree with these proposed amendments of the presumption of shared care due to their experiences with the Family Court and I sympathise with them. There, too, are many mothers who have experienced poor outcomes and these proposed amendments are designed to simplify and clarify the existing provisions. I do not believe the proposed amendments discriminate towards any gender.

Additionally, I raise that with the rise in same-sex relationships with children, that the argument of gender being disadvantaged is untenable. Simply, I say that if you are not a perpetrator of abuse or violence, then you have nothing to worry about and these amendments towards shared responsibility and care shall have no impact on the court's decision making.

Reconsideration of final parenting orders (Rice & Asplund)

I am concerned that the proposed amendments fail to consider orders that were made in a foreign jurisdiction. Australia has arrangements with some countries to register court orders made overseas so that they are enforceable in Australia. These countries can be found in Schedule 1A of the Family Law Regulations 1984.

Australia is a signatory to the 1996 Hague Convention, which is the main international agreement that covers international parental child abduction. It provides a process through which a parent can seek to have their child returned to their home country.

Whilst the Hague Convention is designed to prevent parents internationally abducting a child, what it also does is place victim-survivors of domestic violence at risk for further harm.

Australia is a leading country in its laws that provide equal rights for men and women and protection from violence, with the amendments to the family law act being an example of this. But sadly, many countries signatory of the Hague Convention don't have the same values or family laws and process that reflect the advancement of our own.

This places victim-survivors of grave danger in foreign countries seeking to come home, and those 'lucky' enough to be able to return home to the safety of Australia can often find themselves at further risk due to the provision of being able to register overseas parenting orders.

For example, A UK Inquiry into the effectiveness of CAFCASS's operations on court proceedings;
The Children and Family Court Advisory and Support Service (CAFCASS) is a non-departmental public body in England set up to promote the welfare of children and families involved in family court It has been largely criticised in the

United Kingdom as being unfit for purpose. Often, like Child Impact Reports and Family Reports in Australian proceedings, the Court rarely deviates from the recommendation of these third-party expert reports, and often report writers vary in qualifications.

This means, that Courts follow the poor recommendations of CAFCASS reports, exposing children and victim-survivors at further risk of harm.

These key differences in process and law vary across countries, and the registration of overseas parenting orders in Australia can cause issues with how they can be enforced against Australian Law.

Regulation 23 of the Family Law Regulations 1984 sets out the rules for a party to register overseas orders, which can be harmful for victim-survivors. The current rules allow for only one party to register the overseas orders, without any notice to the other party.

In cases where an overseas parenting order was made under a Relocation Application (Leave to Remove), under restricted parenting arrangement criteria's, often the 'winning' party, the one seeking to return to Australia, has been prevented from raising domestic violence as part of their proceedings. This is largely due to the other countries Family Law Act varies significantly on its presumption of shared care and how it manages allegations of domestic violence. The UK, for example, has low granting of relocation to Australia because of its physical distance compared to higher granting to European countries, and relocation cases focus on how the applicant parent will maintain the child and other parent relationship. Domestic abuse concerns are in direct conflict with assuring maintaining contact.

Where overseas orders are registered in Australia by a perpetrator, a victim-survivor seeking to vary the order to seek safety in Australia, is burdened with the additional requirement to pass the requirements of the section 65DAAA.

It is on the above scenario that the registration of overseas orders and section 65DAAA place a barrier to those fleeing domestic violence.

Review of registration of overseas parenting orders requires deeper exploration of how Section 65DAA is written and administered.

Under the proposed section 65DAAA, the wording "special 'change' of circumstances" does not adequately describe circumstances where orders were made overseas and registered in Australia. Perhaps "grounds for changing orders" would be a better terminology to use.

Changes to the Registration of Overseas Orders and the Rice vs Asplund rule will help mitigate Abuse of Process and Legal Disadvantage to victims of domestic abuse and family violence.

A potential solution may be to introduce other measures similar to the proposed section on 'harmful proceedings orders' where a party must first obtain leave from the court to register overseas orders, and notice served the other party for right to respond.

This may look like:

- Parties applying for the registration of overseas orders, must seek leave from the court to file & requires serving notice to the other party of the intention to register.
- The court then may hear from both parties, prior to determining if it is safe to be registered.
- In matters where parties are in dispute about the registration, or safeguarding issues are raised, the court at its discretion may invite parties to attend mediation.
- If mediation would not be effective or safe to do so, the Court may grant leave for the matters to be brought to the Australian court without the need to satisfy the requirements of Rice vs Asplund threshold.
- Where parties agree to the registration of overseas orders with no variation, the Australian Court treats it as 'consent orders.'

Schedule 2: Enforcement of child-related orders

Non-compliance with parenting orders is very common and undermines the courts authority. It also causes further significant hardship on the party who does comply.

I support the redraft that clarifies the courts powers and the provisions of compensation of expenses and cost orders against the non-complying party.

Schedule 3: Definition of 'member of the family 'and 'relative'

I support the proposed amendments.

Schedule 4: Independent Children's Lawyers

I have no experience with this section and therefore have no comment.

Schedule 5: Case management and procedure

I have no experience with this section and therefore have no comment.

Schedule 6: Protecting sensitive information.

I have no experience with this section and therefore have no comment.

Schedule 7: Communications of details of family law proceedings

Clarifying restrictions around public communication of family law proceedings (section 121)

The purpose of section 121 is to protect the privacy of those in family law proceedings.

What the section does do, however, is silence victims from being able to address the domestic abuse crisis across Australia, by sharing their stories. **Silence allows violence.**

Healing is an important factor in the recovery and wellbeing of victim-survivors, and often being able to speak up of their experiences connects the victim-survivor with the supports they need. By publicly being able to talk about an individual's specific circumstances, friends, family, and support networks are able to effectively direct victim-survivors to services and resources that otherwise may not have been known to the victim-survivor.

For example, now that I am following politics closely around domestic violence issues, I have learnt about the emergency domestic violence payments available to those fleeing, but unfortunately, I am no longer eligible for.

According to the Australia's National Research Organisation for Women's Safety (ANROWS) 2021 National Community Attitudes towards Violence against Women Survey (NCAS), despite 91% of Australians agreeing that Domestic Violence was an issue in Australia, only 47% believe it is an issue in their own suburb or town.

Statistics show that 80% of Family Law matters have allegations of domestic violence.
With victim-survivors being silenced and restricted by section 121, the wider community is left uninformed.

Whilst I agree that privacy is a key component of section 121, I believe there are legal avenues that can allow victim-survivors of using their voice, whilst not providing personally identifiable information of the alleged perpetrator or the child. Perhaps for example an amendment can be considered to allow for an application for a perpetrator to seek to obtain an order restricting publicly sharing or an application for a victim-survivor to seek an exemption of this provision as part of the proceedings.

The battle to tackle the issue of domestic violence is a very complex issue, but it calls for the entire Australian community to be informed and aware of what domestic violence in all its forms looks like and be a key driver in the prevention of other potential victims.

Section 121 protects the perpetrator and punishes the victim-survivor.

I believe the provisions of Section 121 conflict with Section 16 of the Human Rights Act 2004 (ACT) states that:

1. Everyone has the right to hold opinions without interference.
2. Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

Section 15 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) provides:

1. Every person has the right to hold an opinion without interference.
2. Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether-
   a) orally; or
   b) in writing; or
   c) in print; or
   d) by way of art; or
   e) in another medium chosen by him or her.

The Convention on the Rights of the Child recognises the right to freedom of expression and information in the same terms as ICCPR Article 19. As with other rights recognised in the CRC this provision should be read with Article 5, which states:

1. States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 17 goes on to state:

1. States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:
   a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
   b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

c) Encourage the production and dissemination of children's books;
d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

In the matter of public interest, provisions must be made in order to allow victim-survivors to share their experiences, which in turn raises awareness of the issue of domestic violence, and allows the community to come together to support victims.

Recently in NSW Parliament, Minister for Prevention of Domestic Violence and Sexual Assault, Jodie Harrison was asked a question about measures the NSW Government is taking in regard to domestic violence. The Minister responded, and I quote *"If you see family and domestic violence, I urge you to call it out."*

If perpetrators of abuse don't want to be called out on their behaviour, they should not commit the behaviour.

It is crucial that State and Federal Government work together when developing these laws, to ensure the overarching goal in ending domestic violence is realistically achievable.
Community perspectives, advocacy and lived experience must be considered in all amendments to law.

Schedule 8: Establishing regulatory schemes for family law professionals.

I support the intention of standards and requirements for family report writers and extend this to requirements of Registrars and Judges.

I believe all Registrars and Judges who make any determination of domestic violence need to have a minimum standard of qualifications in domestic violence. It is critical that they have received specialised training to be truly informed.

Perhaps as an alternative to the above suggestion, it would be in the best interests of the court to introduce another third-party independent party to proceedings, being domestic violence expert writers.
Currently family report writers are not designed to determine fact and can only make neutral recommendations based on if any allegations are true or not. A third-party domestic violence report writer could be a suitably trained domestic violence expert that conducts forensic investigations into alleged domestic violence.

Commencement of Changes

With the current Family Law provisions being acknowledged by the Government to be placing children and domestic violence victims at further risk of harm, I believe the commencement of amendments should be upon assent.

Out of scope considerations and comments

Outside of the scope of the consultation, the following areas of family law need to be addressed:
Trauma whilst seeking justice.
The Escaping Violence Payment (EVP) - When parents flee domestic violence and receive this payment, and then are brought to the Family Court, has DV already been substantiated? Will victims be required again to be re-traumatised by re-telling?

Conclusion

Overall, I support the amendments to the Family Law Act, and I thank the Committee for the opportunity to provide a submission. I do, however, believe the bill in its current form needs revision.

I therefore request that the Senate returns the bill to the House with a schedule of amendments, particularly in regard to overseas parenting orders, section 65DAAA and section 121.

Sincerely,

Kyra Quinlivan