MACQUARIE LAW SCHOOL

Faculty of Arts

16 June 2023

Committee Secretary

Senate Legal and Constitutional Affairs Committee

Family Law Amendment Bill 2023

To whom it may concern,

I am a family law academic at Macquarie University. In this submission, I will only be focusing on the best interests of the child factors under section 60CC of the *Family Law Act 1975* (Cth), and the proposal to abolish the presumption of equal shared parental responsibility.

I strongly support the enactment of the Family Law Amendment Bill 2023.

The proposed law would give effect to recommendations 5 and 6 of the 2019 Australian Law Reform Commission report *Family Law for the Future —An Inquiry into the Family Law System*.

Recommendation 5 states:

> Section 60CC of the *Family Law Act 1975* (Cth) should be amended so that the factors to be considered when determining parenting arrangements that best promote a child's best interests are:
>
> - what arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, or other harm;
> - any relevant views expressed by the child;
> - the developmental, psychological, and emotional needs of the child;
> - the benefit to the child of being able to maintain relationships with each parent and other people who are significant to them, where it is safe to do so;

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- the capacity of each proposed carer of the child to provide for the developmental, psychological, and emotional needs of the child, having regard to the carer's ability and willingness to seek support to assist them with caring; and
- anything else that is relevant to the particular circumstances of the child.

Recommendation 6 states:

> The Family Law Act 1975 (Cth) should be amended to provide that in determining what arrangements best promote the best interests of an Aboriginal or Torres Strait Islander child, a court must consider the child's opportunities to connect with, and maintain the child's connection to, the child's family, community, culture and country.

The proposed changes in the Bill are consistent with the suggestions of many academics, practitioners and other relevant stakeholders. The current section 60CC is divided into two primary and thirteen additional considerations (NB: it would be fourteen additional considerations if section 60CC(3)(ca) is counted as part of the tally). There are too many factors in the current section 60CC, which does not provide helpful guidance to the Court in the exercise of judicial discretion. The division of primary and additional considerations are not supported by the United Nations Convention on the Rights of the Child, as the best interests of the child ought to be treated holistically. The division also means that additional considerations can be overlooked in the long list of factors. For example, the right of Indigenous children to enjoy their culture is at present merely an additional consideration rather than a stand-alone section. This is such a significant consideration that it ought to be given more weight. In a journal article, Henry Kha and Marica Ratnam, 'The Right of Indigenous Children to Cultural Safety in the Family Laws of Australia and New Zealand' (2022) 45(4) UNSW Law Journal 1367, which was written by my co-author and I, we state: "The [*Family Law Act 1975* (Cth)] diminishes the significance of Indigenous cultural safety by forcing courts to weigh culture against twelve 'additional considerations." Australia has an obligation to promote Article 30 of the United Nations Convention on the Rights of the Child to protect an Indigenous child's right to culture. The Bill proposes to achieve this by introducing section 60CC(3), which makes the child's right to enjoy their Aboriginal or Torres Strait Islander culture as a standalone subsection. The Bill would give effect to

Recommendation 6. The Bill expressly gives effect to the Australian Law Reform Commission's recommendations in the proposed amendment to section 60CC(2), which basically lists the six proposed best interests of the child factors and removes the distinction between primary and additional considerations based on Recommendation 5. The six factors are simple, clear and effectively promotes the important principles that are relevant in determining the best interests of the child.

Although the Australian Law Reform Commission recommended replacing the presumption of equal shared parental responsibility in favour of presumption of "joint decision making about major long-term issues", there are strong reasons to abolish the presumption of equal shared parental responsibility altogether as proposed by the Bill. The presumption is often misunderstood to mean each parent has a right to equal time with the child, which has led to the presumption being an unnecessary source of conflict. The presumption of equal shared parental responsibility refers to the responsibility of each parent to jointly make decisions about major long-term decisions for their child. This includes decisions about the child's lifestyle, education, religious and cultural upbringing, name, health, and living arrangements. While it is appropriate in many circumstances to apply the presumption where it actually promotes the best interests of the child, it is not always axiomatic that the presumption will promote the best interests of the child in all circumstances, especially where there is family violence. The presumption can operate too prescriptively. Although the presumption can be rebutted if there is family violence, the threshold test for harm can be practically challenging to prove. If there is no family violence but it would not be in the best interests of the child for the presumption to apply, then it represents an unnecessary legal obstacle to overcome before the substantive best interests of the child factors are even considered in the first place. It does not make sense to apply the presumption on litigating parents, who are the least likely to agree and who are more likely to contest parenting orders.

In a journal article, Henry Kha and Kailee Cross, "Equal Shared Parental Responsibility and Children's Rights in Australia" (2020) 14 *UNSW Law Society Court of Conscience* 27, which was written by my co-author and I, we state:

> The rhetoric of equal shared parental responsibility highlights two issues. The first is the issue of the [previous Liberal-National Coalition] Government being too influenced by political exigencies. There is no doubt that these

changes were made with the best interests of the child in mind, but such significant amendments appear to have been influenced by fathers' rights groups and women's advocates. This creates particular unease given that this legislative change is in relation to children, who are one of the most vulnerable groups in society. The second issue is that the rights-based rhetoric in the presumption of equal shared parental responsibility is centred on the parents rather than focusing on the best interests of the child. Consequently, there appears to be a disparity between the perceived rights of a parent and the legal reality that the best interests of the child are paramount in parenting orders. The introduction of equal shared parental responsibility was supposed to promote the child's right to have a meaningful relationship with both parents, but judges and lawyers continue to have to educate litigant parents on focusing on what is in the best interests of their children. The issue here is that many parties confuse equal shared parental responsibility with equal time. A misunderstanding of the meaning of the presumption of equal shared parental responsibility and an assumption that it is about equal time with the child has led to an increasing focus on parents' rights rather than advancing the best interests of the child.

Therefore, I believe that the Bill will help promote family justice by abolishing the presumption of equal shared parental responsibility.

If you would like further information, please email me.

Yours sincerely,

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