Women's Legal Services Australia

Women's Legal Services Australia response to the Exposure Draft Family Law Amendment Bill 2023

27 February 2023

Acknowledgement

We acknowledge the family and domestic violence victim-survivors with whom we work and whose voices and experiences inform our advocacy in the hope for positive change.

WLSA members operate from many different locations across Australia. Across these locations, we acknowledge the Traditional Owners of Country, recognise their continuing connection to land, water and community, and pay respect to Elders past and present.

Who we are

Women's Legal Services Australia (**WLSA**) is a national network of 13 specialist Women's Legal Services in each State and Territory across Australia, specifically designed to improve women's lives through gender-led and trauma-informed specialist legal representation, support, and advocacy.

WLSA members include:

- Women's Legal Service Victoria
- Women's Legal Service Tasmania
- Women's Legal Service NSW
- Women's Legal Service WA
- Women's Legal Service SA
- Women's Legal Service Queensland
- North Queensland Women's Legal Service
- First Nations Women's Legal Service Queensland
- Women's Legal Centre ACT
- Wirringa Baiya Aboriginal Women's Legal Centre (NSW)
- Top End Women's Legal Service
- Central Australian Women's Legal Service
- Katherine Women's Information and Legal Service

What we do

WLSA members provide high quality free legal services, including representation and law reform activities, to support women's safety, access to rights and entitlements, and gender equality. We seek to promote a legal system that is safe, supportive, non-discriminatory, and responsive to the needs of women. Some of our services have operated for almost 40 years.

The principal areas of law that our members assist with are family law, family violence intervention orders, child protection, migration law, victims of crime compensation, employment law and discrimination law. Some of our members also assist with other areas of civil law and criminal law. Our members also develop and deliver training programs and educational workshops to share our expertise regarding effective legal responses to violence and relationship breakdown.

The majority of our members' clients have experienced, or are still experiencing, family and domestic violence. WLSA members have specialist expertise in safety and risk management, maintaining a holistic and trauma- informed legal practice, providing women additional multidisciplinary supports, including social workers, financial counsellors, and trauma counsellors, for long-term safety outcomes.

WLSA members approach the legal issues facing women and their experience of the legal system within a broader analysis of systemic gender inequality. We are committed to providing individual services whilst also

working towards deeper legal and cultural change to redress power imbalances and address violence and gender inequality. We contribute to policy development and law reform to ensure that the law does not unfairly impact on women experiencing violence and relationship breakdown.

Contact us

For further information, please contact:

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Table of contents

Endorsements

The organisations below endorse this submission.

List of endorsing organisations

1. Australia's National Research Organisation for Women's Safety (ANROWS)
2. Australian Women Against Violence Alliance (AWAVA)
3. Central Coast Community Legal Centre
4. Centre for Non-Violence
5. Centre for Women's Safety and Wellbeing
6. Central Tablelands and Blue Mountains Community Legal Centre
7. Community Legal Centres Australia
8. Community Legal Centres NSW
9. Domestic Violence NSW
10. Federation of Community Legal Centres (Vic)
11. Gowland Family Lawyers
12. HIV/AIDS Legal Centre
13. Inner Melbourne Community Legal
14. International Social Service Australia
15. Macarthur Legal Centre
16. Mountains Community Resource Network
17. Mountains Outreach Community Service
18. National Aboriginal and Torres Strait Islander Women's Alliance (NATSIWA)
19. North and North West Community Legal Service
20. Northern Rivers Community Legal Centre
21. Redfern Legal Centre
22. Safe and Equal
23. Seniors Rights Service
24. Sexual Assault Support Service (Inc.)
25. Sexual Assault Services Victoria (SASVic)
26. Shoalcoast Community Legal Centre Inc.
27. Western Sydney Community Legal Centre
28. Women's Services Network (WESNET)
29. Western NSW Community Legal Centre
30. Western Sydney University Justice Clinic
31. Western Sydney University School of Law
32. Women's Health NSW

Endorsing Individuals

1. Dr Becky Batagol, Associate Professor, Law, Monash University

Introduction

WLSA has developed the following principles which should guide decision-makers in any reforms to the family law system:

1. Ensuring safety for children and adult victim-survivors who are predominantly women by putting safety and risk at the centre of all practice and decision-making.

2. Promoting accessibility and engagement, including addressing issues of cultural competency and accessibility for Aboriginal and Torres Strait Islander, culturally and linguistically diverse and LGBTQIA+ people and communities and people with a disability, reducing delay, and availability of legal assistance.

3. Fairness and recognition of diversity, including acknowledging and responding to structural inequalities and bias in the family law system.

Noting that we live and work on unceded land it is important we specifically acknowledge the importance of cultural safety for Aboriginal and Torres Strait Islander people. Cultural safety requires the family law system and the professionals involved to provide services in a manner that acknowledges the history of Aboriginal and Torres Strait Islander peoples and their treatment in Australia, that is respectful of their culture and beliefs, and that is free from discrimination. Being free from discrimination requires conscious efforts to identify and address direct discrimination, as well as indirect discrimination born from unconscious biases within the system and its family law professionals against Aboriginal and Torres Strait Islander peoples. Affirmative action and committed efforts must be undertaken to ensure that Aboriginal and Torres Strait Islander peoples and the services that represent them are genuinely listened to and heard.

The steps towards improving the cultural competency of family law system professionals must be multifaceted. The design of this targeted approach must be led with input from Aboriginal and Torres Strait Islander peoples and frontline services. The elements that should be incorporated include, but are not limited to, cultural competency training and education, as well as a set of competencies and standards, and statement of principles for family law professionals. An example of good practice in a similar design process was that with SNAICC – National Voice for our Children in devising the Aboriginal and Torres Strait Islander Child Placement Principles. The importance of cultural safety is discussed further in Wirringa Baiya Aboriginal Women's Legal Centre and the NSW Aboriginal Women's Advisory Network joint submission.

We welcome the prioritising of children and adult-victim-survivor's safety in the family law system in the Exposure Draft - Family Law Amendment Bill 2023 (**Exposure Draft**). This is clearly evident in the removal of the presumption of equal shared parental responsibility and the removal of the requirement to consider particular forms of time - equal time or substantial and significant time with each parent.

While welcoming these reforms and providing recommendations for the reforms to be strengthened, we also reiterate the importance of properly resourcing the family law system. More work is required to ensure all professionals within the family law system are family violence informed, trauma-informed, culturally safe, child rights focused, disability aware and LGBTIQA+ aware. This requires regular access to meaningful training developed and delivered by subject matter and lived-experience experts that is regularly independently evaluated for its effectiveness, including evidence of improvements in the practice of professionals working in the family law system.

There must also be more funding particularly for Independent Children's Lawyers, several Indigenous Liaison Officers in each family court registry and greater access to family violence-informed, culturally safe legal assistance services. It is also important to properly resource the front end of the family law system as a way of preventing and limiting systems abuse. This includes through greater access to family violence

informed, trauma informed, culturally safe, child focused, lawyer-assisted family dispute resolution and early judicial determination of family violence.

Outstanding Family Law Council recommendations, including those related to workforce development strategies to ensure greater diversity across all professional roles in the family law system, including judicial officers, lawyers, family dispute resolution practitioners, family report writers (court child experts) and other experts must also be implemented.[1] The 2016 Family Law Council Report also recommended a pilot involving the participation of Elders and Respected Persons to provide cultural advice in family law matters.[2] The implementation of these recommendations is key to increasing accessibility within the family law system.

We welcome efforts to simplify the legislation. Creating simplicity in the administration of these provisions means simplicity and consistency not just in drafting but in the practical application, interpretation, and explanation to litigants. Plain language resources will be important. We note the need to also update Bench books.

We look forward to working with the Government in the implementation of these important reforms.

Schedule 1: Amendments to the framework for making parenting orders

Redraft of objects

Question 1: Do you have any feedback on the two objects included in the proposed redraft?
Question 2: Do you have any other comments on the impact of the proposed simplification of section 60B?

WLSA supports simplification of the objects in the proposed redraft. The objects are clear, concise and remove repetition that currently occurs in the objects of the Part (s60B) and best interest of the child factors (s60CC).

We support inclusion of reference to the *Convention on the Rights of the Child*. It would be useful to consider how this Convention can be more meaningfully implemented.

Best interests factors

Question 3: Do you have any feedback on the wording of the factors, including whether any particular wording could have adverse or unintended consequences?
Question 4: Do you have any comments on the simplified structure of the section, including the removal of 'primary considerations' and 'additional considerations'?
Question 5: Do you have any other feedback or comments on the proposed redraft of section 60CC?

Simplified structure and prioritisation of safety

WLSA is supportive of refining the list of "*child's best interests*" factors at section 60CC including into a single list. This will help to achieve the intended aims of being more responsive to family violence, abuse

[1] Family Law Council, (2012) *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, p99 (105), Recommendation 5; Family Law Council (2012) *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*, Recommendation 4, p 96 (103); Family Law Council (2016) *Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Terms 3, 4, 5*, Recommendation 16(1) and Recommendation 17(1)

[2] Family Law Council (2016) *Families with Complex Needs and the Intersection of the Family Law and Child Protection systems, Final Report,* Recommendation 16.4

and neglect as well as to simplify complex and confusing legislation.

Our support for a single list of factors is contingent upon prioritising the safety of children and adult victim-survivors. This can be achieved by retaining s60CC(2A) "*In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph 2(b)*". This consideration in the current *Family Law Act (**the** **Act**)* is: "*the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence*." This would need to be inserted and the numbering adjusted.

Without the inclusion of subsection 60CC(2A), the draft provisions conceivably provide for all section 60CC "*child's best interests"* factors to be given equal weight. To date current s60CC(2A) has been the most effective provision to ensure the safety of children and it is currently a provision that works well and is well understood by parties and the profession. WLSA strongly advocates that safety is given priority over all other ""*child's best interests"* considerations.

Recommendation 1.1
The child's best interests factors prioritise safety of children and adult victim-survivors. This can be achieved by retaining s60CC(2A) of the *Family Law Act*.

Wording of the best interest factors - Safety

We welcome the explicit consideration of the safety of children and adults in the child's best interests factors at proposed s60CC(2)(a).

However, rather than use the proposed requirement that the court to consider "*what arrangements would best promote the safety (including safety from family violence, abuse, neglect or other harm) of the child and each person who has parental responsibility of the child*," we prefer the language of the current law. "*Safety*" may be narrowly understood, for example, a focus on physical violence. It is important to recognise psychological and other non-physical forms of harm. Further, the current phrasing "*need to protect the child from physical and psychological harm and from being subjected to, or exposed to abuse, neglect or family violence*" is already well understood.

History of family violence, abuse or neglect

Given previous family violence is a predictor for future family violence, including lethal violence,[3] it is vital that a history of family violence is also included. This should also extend to history of abuse and neglect.

Wording of the best interests factors – children and carer

A child's safety cannot be viewed in isolation from abuse and family violence perpetrated against people who are significant to the child. Harm perpetrated against an adult victim-survivor also harms a child. There are significant impacts on children exposed to abuse and family violence.

"*The child*" does not allow consideration of other children in the household who may not be the subject of particular proceedings, but whose safety is relevant and should be considered.

"*Each person who has parental responsibility for the child*" similarly is too narrow. There are often several caregivers to a child, not merely those vested with parental responsibility for a child. Where someone

[3] Australian Domestic and Family Violence Death Review Network, & Australia's National Research Organisation for Women's Safety (ANROWS) report found that of the cases in which a male domestic violence primary abuser killed a female victim, 81.6% had exhibited emotionally and psychologically abusive behaviours against their female partners they killed, 63.2% had previously been socially abusive and 16% were sexually abusive.
See Australian Domestic and Family Violence Death Review Network, & Australia's National Research Organisation for Women's Safety. (2022). Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018 (2nd ed.; Research report 03/2022). ANROWS, p 49-50 (53 -54)

important to the child plays a significant role in the child's life and may care for the child but is not vested with parental responsibility for the child, it is important that promoting their safety is also captured by the legislation.

To ensure that the safety of all relevant persons is taken into account in considering the child's best interests, we believe that in addition to the consideration of the safety of the child at 60CC2(a)(i), the following wording should be used at S60CC(2)(a)(ii) "*each person who is significant to the child's care, welfare and development."* We note this wording is used in proposed s11J in relation to "*designated reports*".

Recommendation 1.2
The safety provisions in proposed s60CC(2)(a) should not be limited only to the child and those who have parental responsibility for the child. This provision should include consideration of the safety of "children" and "*each person who is significant to the child's care, welfare and development*."

Recommendation 1.3
These provisions should use existing language and refer to the need to protect each relevant person *from physical or psychological harm from being subjected to, or exposed to abuse, neglect or family violence.* History of family violence, abuse and neglect must also be included.

Views expressed by the child
WLSA acknowledges that fundamental to the *Convention on the Rights of the Child* is the right of children and young people to participate in decisions that affect them. Children also have a right to be free from all forms of violence and abuse. It is important to ensure children and young people can safely participate and express their views in family law processes, including in family dispute resolution.

The National Children's Commissioner has recommended Independent Children's Lawyers (**ICLs**) and family consultants be "*provided with specific training and resources on how to effectively communicate with children of various ages and maturity, and seek their views about family law matters that concern them*."[4] WLSA supports this recommendation. We refer to the submission of Youth Law Australia for further comments on the participation of children and young people.

It is imperative that all family law professionals, including ICLs, are family violence informed, trauma informed, culturally safe, disability aware and LGBTIQA+ aware. It is vital that ICLs are properly supported in their role including through training and resourcing. We further note the need for increased numbers of ICLs in the family law system particularly given the important role that ICLs can and should play.

The issue of ICLs is discussed further at Questions 21-26.

Recommendation 1.4
Independent Children's Lawyers and family consultants (child court experts) be provided with specific training and resources on how to effectively communicate with children of various ages and maturity, and seek their views about family law matters that concern them.

The capacity of each proposed carer to provide for the child's developmental, psychological and emotional needs
We note the word "*carer*" is limited in s60CC to "*each person who has parental responsibility for the child*". This term is used in proposed s60CC(2)(a) and (2)(d). We believe a carer's capacity to provide for the needs

[4] Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Parenting Management Hearings) Bill 2017*, Recommendation 2

of the child (s60CC(2)(d)) is relevant for people who have parental responsibility for the child as well as others who care for the child but are not vested with parental responsibility. We recommend the expanded definition of "carer" for proposed s60CC(2)(a)(ii) as outlined in Recommendation 1.2 also apply to proposed s60CC(2)(d), that is, to "each person who is significant to the child's care, welfare and development."

We note the final ALRC recommendation is different to the proposal the ALRC presented in the Consultation Paper, adding "*and willingness to seek support to assist them with caring*".

The ALRC report states this was added to seek to address concerns raised that "*capacity to provide for the child's needs*" might unfairly discriminate against parents with a disability.[5] It was also included to address where a parent's capacity may be impacted due to "*unresolved trauma from family violence*".[6]

If this part of this provision is retained it is important a strengths-based approach is adopted and there is proper funding so carers can access family violence-informed, trauma informed, disability informed and culturally safe support in a timely way where it is relevant to do.

Recommendation 1.5
The term "carer" in s60CC(2)(d) has the expanded definition as outlined in Recommendation 1.2, that is, "*each person who is significant to the child's care, welfare and development*."

Recommendation 1.6
If retained there is a strengths-based approach to "*willingness to seek support to assist them with caring*" and proper funding so carers can access family violence-informed, trauma informed, culturally safe support in a timely way where it is relevant to do.

Maintain a relationship
We welcome use of the term "*maintain a relationship.*" This approach is consistent with the Australian Law Reform Commission's comments cited in the Consultation Paper that it should not be presumed that a relationship is necessarily in the child's best interests. It is also important that history of the relationship is considered.

If section 60CC(2A) is retained, then the words "*where it is safe to do so*" can be removed at proposed s60CC(2)(e).

Recommendation 1.7
History of the relationship be included.

Rights of the child to enjoy Aboriginal and Torres Strait Islander culture
When determining what arrangements best promote the best interests of an Aboriginal and Torres Strait Islander child, we support a separate provision about the rights of the child to enjoy Aboriginal and Torres Strait Islander culture, rather than its current inclusion in a lengthy list of additional factors. This will ensure this issue is given the necessary consideration.

We note the proposed wording of the child's best interests provision 60CC(3) about the right to enjoy Aboriginal and Torres Strait Islander culture has been amended.

First Nations staff are concerned the proposed new provision is weaker than the current s60CC(6). We believe "*opportunity to connect with, and maintain their connection with, their family, community, culture, country and language*" does not fully capture the current provision which also refers to:

[5] ALRC (2019) *Family Law for the Future — An Inquiry into the Family Law System Final Report, ALRC Report 135* paragraph 5.63
[6] Ibid, paragraph 5.64

"*have the support, opportunity and encouragement necessary:*
(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
(ii) to develop a positive appreciation of that culture"

The words "*the full extent of that culture*" and "*positive appreciation of that culture*" are vital, as this ensures that consideration is given to meaningful participation and positive valuing of Aboriginal and Torres Strait Islander culture and is important to prevent a tokenistic response. We recommend this aspect of the current provision be retained and that this is included in addition to the wording at proposed s60CC(3)(a) and (b).

We also believe that there should be a reference to "kin" and that a child has the "*right to enjoy the child's Aboriginal or Torres Strait Islander culture, by having the opportunity to connect with, and maintain their connection with, their family, kin, community, culture, country and language*."

Recommendation 1.7
The new proposed provision about the rights of the child to enjoy Aboriginal and Torres Strait Islander culture retain current s60CC(6)(b) wording:
"*to have the support, opportunity and encouragement necessary:*
(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
(ii) to develop a positive appreciation of that culture"

Recommendation 1.8
The provision should also make reference to "kin."

Consent orders
We acknowledge that s60CC(4) in the Exposure Draft reflects current s60CC(5) in the Act. However, we recommend that this be amended to ensure the court must have regard to the safety of the child and other relevant people in the child's life when making orders by consent.

Consideration must also be given by the court when making orders by consent for Aboriginal or Torres Strait Islander children to ensure they reflect the child's right to enjoy their Aboriginal and Torres Strait Islander culture.

Recommendation 1.9
In making consent orders the court must have regard to
(i) the safety of the child and other relevant people in the child's life, and
(ii) in matters involving Aboriginal and Torres Strait Islander children ensuring the child's right to enjoy their Aboriginal and Torres Strait Islander culture.

Removal of equal shared parental responsibility and specific time provisions

Question 6: If you are a legal practitioner, family dispute resolution practitioner, family counsellor or family consultant, will the simplification of the legislative framework for making parenting orders make it easier for you to explain the law to your clients?
Question 7: Do you have any comments on the removal of obligations on legal practitioners, family dispute resolution practitioners, family counsellors or family consultants to encourage parents to consider particular time arrangements? Will this amendment have any other consequences and/or significantly impact your work?
Question 8: With the removal of the presumption of equal shared parental responsibility, do any elements of section 65DAC (which sets out how an order providing for shared parental

responsibility is taken to be required to be made jointly, including the requirement to consult the other person on the issue) need to be retained?

WLSA welcomes the prioritisation of victim-survivor safety, of both children and adults, in the family law system. We strongly support the removal of the presumption of equal shared parental responsibility and the removal of the requirement to consider particular forms of time – equal time or substantial and significant time with each parent. It is essential to determine parental responsibility on a case-by-case basis within the best interests of the child framework. Similarly, it is important to consider time on a case-by-case basis. These approaches will ensure a more child-focused and safety-focused approach.

WLSA has long advocated for the removal of the presumption of equal shared parental responsibility on the basis that it incentivises violent fathers to litigate through the family law courts, enables violent men to exert ongoing power and control, and has created a well-entrenched community misunderstanding that both parents are entitled to equal time regardless of family violence and abuse. This is particularly concerning because a significant number of family law matters are settled "in the shadow of the law", that is, without legal advice and based on misconceptions and fear. This has been to the detriment of the safety of children and adult victim-survivors and often leads to continued exposure to violence and abuse on the part of the child and adult victim-survivor.

To improve community understanding, it is vital that the Government properly resources an awareness and education campaign on the removal of the presumption and what this means for parenting arrangements/decision-making.

Finally, we believe the removal of the presumption and requirement to consider equal time and substantial and significant time will make it easier to explain the law to clients and for clients to understand the law and how it might apply to them and their particular circumstances.

We recognise the need to retain s65DAC of the *Family Law Act* to make clear how decisions are made if the court makes a shared parental responsibility order.

Recommendation 2
The Government properly resources an awareness and education campaign on the removal of the presumption and what this means for parenting arrangements/decision-making to improve community understanding.

Reconsideration of final parenting orders (Rice & Asplund)

Question 9: Does the proposed section 65DAAA accurately reflect the common law rule in Rice & Asplund? If not, what are your suggestions for more accurately capturing the rule?
Question 10: Do you support the inclusion of the list of considerations that courts may consider in determining whether final parenting orders should be reconsidered? Does the choice of considerations appropriately reflect current case law?

We support the inclusion of this provision in the legislation.

We support the inclusion of the proposed list of considerations that courts may consider in determining whether final parenting orders should be reconsidered.

Schedule 2: Enforcement of child-related orders

Question 11: Do you think the proposed changes make Division 13A easier to understand?
Question 12: Do you have any feedback on the objects of Division 13A? Do they capture your understanding of the goals of the enforcement regime?
Question 13: Do you have any feedback on the proposed cost order provisions in proposed section 70NBE?
Question 14: Should proposed subparagraph 70NBE(1)(b)(i) also allow a court to consider awarding costs against a complainant in a situation where the court does not make a finding either way about whether the order was contravened?
Question 15: Do you agree with the approach taken in proposed subsection 70NBA(1) (which does not limit the circumstances in which a court may deal with a contravention of child-related orders that arises in proceedings) or should subsection 70NBA(1) specify that the court may only consider a contravention matter on application from a party?
Question 16: Do you have any other feedback or comments on the amendments in Schedule 2?

Costs

While WLSA acknowledges efforts to simplify the legislation, there are some sections in Division 13A that are confusing. For example, s70NBE (2)(b) refers to "*the most recent allegation*." Does this mean the allegation that is the basis for the current application before the court or a previous application before the court?

WLSA does not support the family law system having a quasi-criminal contravention regime. We consider this inconsistent with the best interests of a child, and the overarching objects of the *Act*. The evidence shows that non-compliance in family law is complex and commonly relates to safety concerns, child refusal, and the orders themselves being confusing and/or not implementable. This is discussed further below.

WLSA does not support the proposed costs order provision in proposed section 70NBE. We are concerned about the amendment which removes the distinction between "*more serious*" and "*less serious*". One of the consequences of the proposed simplification of this division and, in particular, the removal of the dichotomy between "*more serious*" and "*less serious*" contraventions is the significant change in relation to the way that the costs provisions apply. The proposed amendments essentially adopt the current provisions in relation to more serious contraventions and applies that to less serious contraventions too (with the proposed simplification). WLSA submits that this may lead to unfair outcomes where parents who are found to contravene orders in minor ways or in a manner that they thought did amount to a reasonable excuse (although with this not being accepted by the court) may end up with onerous costs orders.

We are also concerned by s70NBE(3) where a court is prohibited from making a cost order (1) where the court finds the respondent had a reasonable excuse for contravening the child-related order, *and (2)* the court makes a make-up order. There seems the potential for parents who are acting protectively and found to have a reasonable excuse then agreeing to a make-up time order to avoid a costs order.

We are also concerned by contraventions and the presumption in favour of a costs order where there is a finding that a person did not have reasonable excuse. The presumption in favour of a costs order is not consistent with the other amendments in the Exposure Draft where presumptions have been removed, where safety is prioritised and where there is a move toward assessment of matters on a case-by-case basis.

WLSA is concerned about the impact these provisions might have on the safety of children and adult victim-survivors. Many of our clients contravene orders in circumstances where they have serious concerns for the safety of their children and for themselves and they should not be penalised for trying to act protectively,

even though they have not met the evidential threshold of reasonable excuse. In our experience it can be difficult for our clients to prove that they have a reasonable excuse, particularly where disclosures of abuse have been made by very young children or in circumstances where disclosures have not been made to independent third parties.

Further, a costs order is a significant penalty. Many of our clients are at extreme financial disadvantage. Fear of a cost risk places these women in a near impossible situation and the cost risk would be a real deterrent to act protectively.

It is our position that a costs order should not be awarded against a party in circumstances where there has not been a finding that they have contravened orders. Our concerns extend to any kind of penalty being applied against a party in circumstances where there have been no findings, but particularly in circumstances where they have not been heard on the issue of reasonable excuse because this may place children and adult victim-survivors directly at risk of harm. This is especially relevant where the court is considering making an order for make-up time. We are concerned that the Exposure Draft does not address how a defence of reasonable excuse will be dealt with, and by extension, the safety of children and adult victim survivors, if it is the intention to make such an order before any findings have been made and before any defence with respect to reasonable excuse has been heard.

It is WLSA's submission that the easiest way to resolve this issue would be to remove the separate costs provisions in this division and allow the existing s117 of the *Act* to govern the issue of costs in relation to these matters. It is submitted that s117 allows for broad discretion to the judicial officer in relation to the issue of costs that would hopefully allow for fairer outcomes in relation to this important issue.

We believe that there may be some benefit to the court being able to act on contraventions without the need for formal applications. However, it is unclear how this process would fit with the current national contravention list. We are also concerned that there may be flow on effects requiring recusals by the judicial officer making the decision to transfer without a formal application.

General comments

WLSA recommends that further consideration is given to the enforcement regime. The findings from the recent ANROWS research indicate that non-compliance with parenting orders regularly relates to circumstances where there are complex interactions between personal characteristics, systemic issues and, potentially, professional practices. Some of the key reasons for non-compliance identified were family violence and safety concerns, child-related issues, circumstances of particularly difficult parents' behaviour, and orders that were considered as unworkable for technical or substantive reasons.[7]

Critically, in this research professionals indicated it was not uncommon for clients to be complying with parenting orders they believed were not safe. They also reported that parents are deterred from addressing non-compliance with parenting orders because of fear of the other party and the delay, cost, trauma and uncertainty associated with legal proceedings. The financial cost associated with legal proceedings was the most commonly identified obstacle to taking action.[8]

WLSA supports the recommendations in the ANROWS report, in relation to two main areas to improve:
(1) identifying, assessing and managing risks arising from family violence and other complex behaviours, including systems abuse; and
(2) ensuring orders meet the needs of children and young people, including through more effective avenues for participation and responding to changes in their needs over time.[9] 79% of research participants

[7] Kaspiew, R., Carson, R., Rhoades, H., Qu, L., De Maio, J., Horsfall, B., & Stevens, E. (2022). *Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers* (Research report, 01/2022). ANROWS, p12(16)
[8] Ibid
[9] Ibid, p12-13(16-17)

agreed that more effective and widely available processes to support the participation of children and young people would reduce non-compliance.[10]

Importantly, the highest levels of support for measures to reduce non-compliance were accorded to therapeutic strategies.

In relation to punitive measures, the ANROWS report acknowledges the challenge of developing a contravention intervention that is effective and appropriately targets particular behaviours in a way that does not create or exacerbate unintended consequences. Such unintended consequences include creating further barriers for people with safety concerns seeking safer outcomes and providing further opportunities for systems abuse. It was considered that the application of punitive responses may also involve adverse outcomes for children and young people, including pressure to comply with arrangements that are not safe or in their best interests.

Recommendation 3.1
A costs order should not be awarded against a party in circumstances where there has not been a finding that they have contravened orders.

Recommendation 3.2
Where safety concerns are raised, orders, such as make up time orders, should not be made without a finding as to whether there was a reasonable excuse.

Recommendation 3.3
Consider removing the costs provisions proposed and allow the existing s117 of the *Act* to govern the issue of costs in relation to these matters.

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

Question 17: Do you have any feedback on the wording of the definitions of 'relative' and 'member of the family' or the approach to implementing ALRC recommendation 9?
Question 18: Do you have any concerns about the flow-on implications of amending the definitions of 'relative' and 'member of the family', including on the disclosure obligations of parties?
Question 19: In section 2 of the Bill, it is proposed that these amendments commence the day after the Bill receives Royal Assent, in contrast to most of the other changes which would not commence for 6 months. Given the benefit to children of widening consideration of family violence this is appropriate – do you agree?
Question 20: Do you have any other feedback or comments on the amendments in Schedule 3?

General comment regarding the definition as it relates to Aboriginal and Torres Strait Islander people

It is WLSA members' experience that the family law system largely focusses on the nuclear family and it does not adequately recognise Aboriginal and Torres Strait Islander family structures, child rearing practices or that multiple people may have an important role in raising an Aboriginal or Torres Strait Islander child.

[10] Ibid, p78(82)

For this reason, we support an expanded definition of "*member of the family*" and "*relative*" with respect to Aboriginal and Torres Straighter Islander people to better capture kinship systems. This definition more accurately reflects Aboriginal and Torres Strait Islander notions of family and individuals involved in a child's upbringing.

Unintended consequences of expanded definition

We are concerned about the consequences that will flow as a result of the expanded definition of "*member of the family*" and "*relative*" in relation to the disclosure obligations imposed by s60CF, s60CH and s60CI of the *Act* and in the Initiating Application Form and the Response.

Under the proposed expanded definitions, the disclosure obligations will mean that a party is required to disclose any and all family violence orders, child welfare orders and notifications to or investigations by State or Territory agencies about any and all members of a family or relative, even those who may have little or nothing to do with the child. These disclosure obligations are likely to be particularly cumbersome for Aboriginal and Torres Strait Islander parties, but also other large families and will create a barrier in accessing the court. Additionally, the obligations will mean the adducing of evidence that may be largely irrelevant and may cause unnecessary delay in proceedings.

We recommend that for the purposes **only of** s60CF, s60CH and s60CI of the *Act* and the Initiating Application and Response, that parties are only required to disclose those people who are "*significant to the child's care, welfare and development*."

Recommendation 4
Section 60CF, s60CH, s60CI and the Initiating Application form and Response form be amended to provide that disclosure only relates to those people who are "*significant to the child's care, welfare and development*".

Schedule 4: Independent Children's Lawyers

Requirement to meet with the child

Question 21: Do you agree that the proposed requirement in subsection 68LA(5A) that an ICL must meet with a child and provide the child with an opportunity to express a view, and the exceptions in subsections 68LA(5B) and (5C), achieves the objectives of providing certainty of an ICLs role in engaging with children, while retaining ICL discretion in appropriate circumstances?
Question 22: Does the amendment strike the right balance between ensuring children have a say and can exercise their rights to participate, while also protecting those that could be harmed by being subjected to family law proceedings?
Question 23: Are there any additional exceptional circumstances that should be considered for listing in subsection 68LA(5C)?

It is vital that an Independent Children's Lawyer (**ICL**) has meaningful interactions with a child and that they meet with a child at the beginning of proceedings and prior to and after each major court event. It is important that a child has the opportunity to express views and has someone who can explain the outcome of major points in proceedings.

The current role of the ICL is set out in the *Act* and provides that an ICL must form an independent view, based on the evidence available, of what is in the best interests of the child and act in relation to the

proceedings in what the ICL believes to be the best interests of the child.[11]

Generally, the ICL is to perform three key functions:

1. Enable a child's participation in proceedings;
2. Collect evidence that is relevant to a child's best interest; and
3. Manage the course of the litigation such as encouraging settlement where safe and appropriate to do so, attempt to avoid undue and lengthy delays in the proceedings and ensure proceedings are conducted in a child-centric and focused manner.

The *National Guidelines for Independent Children's Lawyers* (**the guidelines**) stipulate that ICLs should provide children with the opportunity to express their views in relation to the matter where they are free from influence of others, and meet with the child.

Contrary to the expectations set out in the guidelines, the AIFS *Independent Children's Lawyer Study* found that the approach adopted by some ICLs was to proceed cautiously about directly meeting with children. This study found the preference of some ICLs was for evidence of a child's views be sought via a report prepared by a court child expert or single expert witness.[12]

These findings by AIFS are consistent with the experiences of WLSA members. Further, in our experience, there is no consistency in the circumstances in which an ICL may (or may not) meet with a child. Further, some ICLs only meet once with a child and usually early on in proceedings, meaning that by the time there is a significant court event, the court does not have the benefit of the current views of the child. This is even in circumstances where the court has asked the ICL for the child's views and, had the ICL sought the child's views, it could have greatly assisted the court and earlier resolution of the matter.

WLSA agrees with the proposed requirement in subsection 68LA(5A) that the ICL must:
(a) "meet with the child" and
(b) "*provide the child with an opportunity to express any views in relation to the matters to which the proceedings relate*" (**ICL duties**)

However, we advocate the ICL duties be further strengthened beyond the proposed provisions to provide that ICLs are obliged to meet with the child and provide the child with the opportunity to express their views immediately prior to and after major court events including interim hearings, court-based and external family dispute resolution and final hearings.

We are concerned that the exceptions to an ICL performing their duties outlined in proposed s68LA(5)(5B) and (5C) are too broad. These include:

> *(5B)*
> *(a) the child is under 5 years of age; or*
> *(b) the child does not want to meet with the independent children's lawyer, or express their views (as the case requires); or*
> *(c) there are exceptional circumstances that justify not performing the duty.*
> *(5C) Without limiting paragraph (5B)(c), exceptional circumstances for the purposes of that paragraph include that performing the duty, would:*
> *(a) expose the child to the risk of physical or psychological harm; or*
> *(b) have a significant adverse effect on the wellbeing of the child.*

While we understand there may be safety concerns which prevent some children from expressing their

[11] *Family Law Act 1975 (Cth),* s 68LA
[12] Kaspiew,R. Carson,R. Moore, S. De Maio,J. Deblaquiere, J & Horsfall, B (2014) *Independent Children's Lawyers Study Final Repot*, Second Edition, p38 (50)

views, there should not be a broad exemption. There should be a greater emphasis on exploring how children can safely provide their views when they wish to do so and managing the risk.

Given the important role that ICLs play in family law proceedings, it is imperative that this role be filled by committed, highly trained and experienced professionals who are family violence and trauma-informed, culturally safe, disability aware and LGBTIQA+ aware. There must be increased funding for specialist training and retention of ICLs and a greater number of ICLs. Training for ICLs, as for all professionals in the family law system, must be frequent, meaningful, substantive, run by appropriately trained experts and regularly independently evaluated for its effectiveness.

Recommendation 5.1:
ICLs be obliged to meet with the child and provide the child with the opportunity to express their views immediately prior to and after major court events including interim hearings, court-based and external family dispute resolution and final hearings.

Recommendation 5.2
There be a greater emphasis on exploring how children can safely express their views when they wish to do so and managing the risk.

Expansion of the use of Independent Children's Lawyers in cases brought under the 1980 Hague Convention

Question 24: Do you consider there may be adverse or unintended consequences as a result of the proposed repeal of subsection 68L(3)?
Question 25: Do you anticipate this amendment will significantly impact your work? If so, how?
Question 26: Do you have any other feedback or comments on the proposed repeal of subsection 68L(3)?

WLSA welcomes the proposed changes in relation to the expansion of the use of Independent Children's Lawyers (**ICLs)** in cases brought under the *Convention on the Civil Aspects of International Child Abduction* (**the 1980 Hague Convention**). The 1980 Hague Convention is incorporated into domestic laws under the *Family Law (Child Abduction Convention) Regulations 1986* (**Child Abduction Regulations**).

The removal of the restrictive requirement that an ICL can only be appointed in Hague matters in "*exceptional circumstances*"[13] will better promote a child's ability to have their voice heard and represented in child abduction proceedings. Such a change also supports recent amendments made in the Child Abduction Regulations that:

- clarify that the "*grave risk*" defence[14] can include a consideration of any risk of the child being subjected to, or exposed to family violence if returned, regardless of whether the court is satisfied family violence has occurred, will occur or is likely to occur; and
- the new provision requiring courts to consider protective conditions to prevent or minimise any risks to a child where risks are raised by an Independent Children's Lawyer and/or parties to the proceedings.

Whilst WLSA welcomes the proposed amendments to section 68L as set out in the Exposure Draft and the recent amendments made in the *Child Abduction Regulations*, we remain concerned that child abduction proceedings continue to be used by perpetrators of violence and abuse as a mechanism to perpetrate ongoing abuse and place parents/carers and their children who flee violence back into unsafe circumstances.

[13] *Family Law Act 1975* (Cth) s68(L)(3)(a).
[14] *Family Law (Child Abduction Convention) Regulations 1986,* Regulation 16(3)(b).

The 1980 Hague Convention was originally intended to "*protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure the protection for rights of access*".[15] What was a well-intentioned Convention to address the issue of international child abduction, has, in practice, had unintended consequences of forcing children and their fleeing parent/carer back to a violent perpetrator and unsafe environment. An order under the 1980 Hague Convention is merely an order that the child be returned to the jurisdiction that is deemed most appropriate to determine the custody and access dispute and is not a determination on the merits of any custody dispute.[16] The narrow parameters of the 1980 Hague Convention is the rationale behind the requirement that the return order be promptly made.[17]

In 2015, a research study into the 1980 Hague Convention found that 73% of taking persons were mothers.[18] This was an increase on statistics recorded in 1999 (69%), 2003 (68%) and 2008 (69%).[19] The Global Action on Relocation and Return with Kids (**Globarrk**) is a charity that supports "*stuck*" parents (someone who is not lawfully able to return to live in the country they consider "*home*" with their child after an international residence or custody dispute). Globarrk's research shows that a significant majority of international child abductions under the Hague Convention are mothers. Around 90% of these cases involve family violence.[20]

In practice, it has been very difficult to get the courts in Australia to take into account family violence against a mother and the impact of exposure to that violence on the child. Whilst the recent amendments introduced into the *Child Abduction Regulations* seek to address this issue, we are concerned they do not go far enough.

Historically, the court has acceded to the relevant foreign jurisdiction and assumed the foreign jurisdiction has the requisite systems and processes to ensure the safety of the taking parent and the child. This reasoning was applied in *Murray v. Director of Family Services* where the court stated:

> *New Zealand has a system of family law and provides legal protection to persons in fear of family violence which is similar to the system in Australia. It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the side and the children are not capable of being protected by the New Zealand Courts or that the relevant New Zealand authorities would not enforce protection orders which are made by the Courts.*[21]

The tenuous assumptions adopted by the court that the jurisdiction to where the child is returned is able to sufficiently protect against risks caused by family violence must be addressed. We remain concerned that the notation for the court to consider family violence as a "*grave risk*" defence under the *Child Abduction Regulations* does not go far enough to address this issue.

Whilst WLSA welcomes the proposed changes in relation to the expansion of the use of Independent Children's Lawyers in cases brought under the 1980 Hague Convention, we recommend further amendments to the *Child Abduction Regulations* to provide better safeguards for a parent/carer fleeing violence across international borders with their child. These amendments should be made in consultation with sexual, domestic and family violence and abuse experts.

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[15] *Convention on the Civil Aspects of International Child Abduction,* (preamble).
[16] *Convention on the Civil Aspects of International Child Abduction,* Article 19.
[17] *Convention on the Civil Aspects of International Child Abduction,* Article 12.
[18] Lower, N, Stephens, V (2018) *Part I — A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Global report*, paragraph 10
[19] Ibid.
[20] Globarrk
[21] *Murry v. Director Family Service A.C.T 1993* FLC 92-146

Recommendation 6.1
That there be further amendments to the Child Abduction Regulations to provide better safeguards for a parent/carer fleeing violence across international borders with their child and this occur in consultation with sexual, domestic and family violence and abuse and legal experts.

Legal assistance for women and their children with the Hague Convention

WLSA is working closely with Hague Mothers, an international project supported by the feminist charity FiLiA which aims to end the injustices created by the Hague Convention. Hague Mothers have made a number of recommendations to the Commonwealth Government for reform to improve the safety of women and children in Convention cases. This includes a recommendation that the government fund legal assistance for the parent who has taken the child overseas, which is currently only provided for the parent who is left behind.

Women who have taken their child overseas are often fleeing from domestic and family violence. The application for the return of the child to Australia is made by the government, and the Commonwealth Government pays the legal costs. This results in perpetrators of family and domestic violence receiving free legal assistance, while the victim-survivor does not.

As Hague Mothers have noted, "*there is a huge inequality in legal representation for taking mothers and left-behind fathers which adds to the imbalance in these matters. Funding for both parents is required. This is a matter of equity but would also reduce trauma for children and could prevent inappropriate returns. The effect of the operation of the current arrangement is state-sanction systems abuse, where the motivations of the taking parent are rendered irrelevant, and the often abusive motivations of the left behind parent are ignored.*"

Women's Legal Services are well placed to establish a national legal service that can assist women who are involved in a Hague Convention matter, particularly where they have taken the child overseas and are experiencing family and domestic violence. Women's Legal Services have specialist expertise in providing family violence informed and trauma-informed assistance to women, along with wrap-around integrated supports that may be able to support women to remain in the country with their children. A national service could be established by one Women's Legal Service through an auspice arrangement.

Recommendation 6.2
Fund a Women's Legal Service to establish a national service that can assist women and their children with Hague Convention matters.

Schedule 5: Case management and procedure

Harmful proceedings order

Question 27: Would the introduction of harmful proceedings orders address the need highlighted by Marsden & Winch and by the ALRC?
Question 28: Do the proposed harmful proceeding orders, as drafted, appropriately balance procedural fairness considerations?
Question 29: Do you have any feedback on the tests to be applied by the court in considering whether to make a harmful proceedings order, or to grant leave for the affected party to institute further proceedings?
Question 30: Do you have any views about whether the introduction of harmful proceedings orders, which is intended to protect vulnerable parties from vexatious litigants, would cause adverse consequences for a

vulnerable party? If yes, do you have any suggestions on how this could be mitigated?

The Exposure Draft proposes a new "*harmful proceedings order*" power which will have the effect of restraining a person from filing and serving any further family law applications without the leave of the court.

The provision envisages that a harmful proceedings order would be made where there are reasonable grounds to believe the other party would suffer harm if the first party instituted further proceedings or, in the case of child-related proceedings, the subject child of proceedings would suffer harm if the first party instituted further proceedings.[22]

"*Harm*" may include:

(a) *psychological harm or oppression;*
(b) major mental distress;
(c) a detrimental effect on the other party's capacity to care for a child.[23]

The proposed legislation sets out the considerations to be taken into account in determining whether a harmful proceeding order should be made, namely:

a) the history of proceedings under the *Family Law Act* between the parties, and
b) whether the first party has frequently conducted or attempted to conduct proceedings against the other party in any Australian court or tribunal, and
c) any potential cumulative effect of any harm resulting from proceedings outlined in (a) or (b)[24]

Consideration should be given to expanding (b) to also include other instances of systems abuse such as multiple child support reviews.

Once an order is in place, further applications would first be assessed by the court to ensure they are "*not frivolous, vexatious or an abuse of process, and have reasonable prospects of success*"[25] before they can be filed and served on the other party.[26] The intention being to "*minimise the risk of further harm to the respondent by exposing them to unnecessary proceedings*."[27]

We acknowledge the intention is to address systems abuse and the trauma that results. However, there may be risks to the safety of adult victim-survivors and children if such applications are conducted ex-parte, and particularly where leave is not granted. In such circumstances the victim-survivor would not be aware of the leave application, nor the outcome, and would therefore not have the opportunity to ensure appropriate safety measures are in place to manage risk that may flow as a result of the refusal of leave.

To address this, we recommend once a person is subject to a harmful proceedings order, that all other parties be served each and every leave application made by the subject person unless they opt out at the time the harmful proceedings order is made, or at any later point, as outlined below

1) to only be served a prima facie leave application, that is, a leave application that may have reasonable prospects of success. This would provide a party with the right to be heard on whether or not leave should be granted to institute proceedings; or
2) If they wish to only be advised of the outcome of the leave application.

Victim-survivors must be able to change their mind at any time and be able to advise the court of their

[22] Proposed s102QAC(1) and (2)
[23] Proposed s102QAC(2)
[24] Proposed s102QAC(3)
[25] Proposed s102QAG(1)
[26] Proposed s102QAC(4)
[27] AGD, *Exposure Draft – Family Law Amendment Bill 2023 Consultation Paper*, p32.

preferred option. Further, there should be no adverse inferences drawn where a victim-survivor does not participate in leave proceedings.

At a minimum, if the victim-survivor is not served with the leave application, and if leave is denied, the victim-survivor should be advised of the outcome of these proceedings in advance of the person the subject of the harmful proceeding order to ensure appropriate management of risk. Consideration must also be given to referrals to assist a victim-survivor access risk assessment and safety planning.

Access to legal assistance will be vital to assist with navigating these provisions, as well as the provision of clear, accessible guidance and resources to explain the operation of these provisions to self-represented litigants.

Potential adverse consequences for a vulnerable party

We are mindful there is a risk that a harmful proceedings order prevents parties raising genuine safety concerns with respect to children. This is particularly problematic in circumstances where a party may continue to raise concerns about sexual abuse of children. These cases are very difficult to prove and are especially difficult where young children have made disclosures and where these disclosures have not been witnessed by third parties. Consideration should be given to this issue.

Recommendation 7.1

Once a person is subject to a harmful proceedings order, all other parties be served each and every leave application made by the subject person unless they opt out at the time the harmful proceedings order is made, or at any later point, as outlined below:

(1) to only be served a prima facie leave application, that is, a leave application that may have reasonable prospects of success. This would provide a party with the right to be heard on whether or not leave should be granted to institute proceedings; or

(2) if they wish to only be advised of the outcome of the leave application.

Recommendation 7.2

At a minimum, if the victim-survivor is not served with the leave application, and if leave is denied, the victim-survivor should be advised of the outcome of these proceedings in advance of the person the subject of the harmful proceeding order to ensure appropriate management of risk. Consideration must also be given to referrals to assist a victim-survivor access risk assessment and safety planning.

Recommendation 7.3

Consideration be given to expanding the proceedings to be considered to beyond court and tribunal proceedings to other instances of systems abuse. For example, multiple child support reviews.

Recommendation 7.4

Ensuring access to legal assistance to assist with navigating these provisions, as well as the provision of clear, accessible guidance and resources to explain the operation of these provisions to self-represented litigants.

Other ways to address systems abuse

Preventing and limiting systems abuse also requires a greater focus on properly resourcing the front end of the family law system.

This includes family violence informed, trauma informed, culturally safe, child focused, lawyer-assisted family dispute resolution.

It also includes early determination of family violence in court proceedings through a family violence informed case management process and the early testing of evidence of family violence. The parties' evidence would be tested through cross examination, with appropriate protections in place for victim-survivors, and findings of fact made. In addition to informing the decision-making of both the court and the parties going forward, it would provide a useful starting point for family report writers (child court experts) and other experts. It could encourage earlier, safer settlements and address some forms of systems abuse. In the current litigation process the testing of evidence generally does not take place until trial. Parties are often strongly encouraged to reach agreement before and up to trial and while this may have the benefit for many of reducing costs and conflict, for victim-survivors, settlement may be as a result of emotional or economic attrition, fear, failure to access adequate legal representation. It may be a matter of risk management.

Overarching purpose of the family law practice and procedure provisions

Question 31: Do you have any feedback on the proposed wording of the expanded overarching purpose of family law practice and procedure?

We welcome the inclusion of overarching purpose requirements in the *Act* which include safety of children and adult survivors and the best interests of the child in proposed s95 and a duty to act consistently with the overarching purpose in s96.

We do not support the inclusion of the reference to "*with the least acrimony"* as was proposed by the ALRC. We agree there is a risk this could inadvertently discourage parties from raising issues of family violence and other safety concerns.

To ensure safety is given necessary priority, we recommend a reordering of factors relating to overarching purpose of the family law practice and procedure provisions so that safety and best interests of the child are listed before "*as quickly, inexpensively and efficiently as possible*." The latter should be listed as proposed consideration s95(1)(d).

The provision should also note that safety is to be given greater weight than speed, efficiency, and minimisation of cost. In the absence of this, some victim-survivors of family violence may feel unduly pressured to resolve matters. It is imperative that parties not feel pressured to agree to terms that are ultimately unsafe or pose a risk because it is in the interest of speed, efficiency and/or minimises costs. Safety must be given primacy.

Recommendation 8
To ensure safety is given necessary priority, the provisions of proposed s95(1) are reordered so that safety and best interests of the child are listed before "*as quickly, inexpensively and efficiently as possible*" and safety should be given greater weight than speed, efficiency, and minimisation of cost.

Schedule 6: Protecting sensitive information

Question 32: Do you have any views on the proposed approach that would require a party to seek leave of a court to adduce evidence of a protected confidence?
Question 33: Does the proposed definition of a protected confidence accurately capture the confidential records and communications of concern, in line with the ALRC recommendation?
Question 34: What are your views on the test for determining whether evidence of protected confidences should be admitted?
Question 35: Should a person be able to consent to the admission of evidence of a protected confidence relating to their own treatment?

Overview

We support the protection of sensitive records (**protected confidences privilege**) in family law proceedings; there is public interest in encouraging people to access counselling and other support to help in their recovery and knowing those records and processes will be confidential.

While there may be many reasons why a victim-survivor may not want the perpetrator to know the impact the perpetrator's behaviour has had on them,[28] there are circumstances when a person's protected confidences will need to be adduced into evidence and are relevant in determining risk. We agree that the paramount consideration in determining whether or not such evidence should be adduced as being the best interests of the child.

We also support the proposed additional factors to be considered in making a decision about admitting evidence of a protected confidence in proposed s99(7) that balance harm with the value of the evidence, including:

- probative value of the evidence
- importance of the evidence
- availability of other evidence
- the likely effect of adducing the evidence, including the likelihood and nature and extent of harm to the protected confident and child/children to whom the proceedings relate
- the means available to the court to limit the harm
- whether the substance of evidence had already been disclosed by the person who made the protected communication or any other person
- the public interest in preserving confidentiality of the protected confidence.

We do however make recommendations for further reform which will ensure greater safeguards and transparency around protected confidences and are consistent with the policy intent of the provisions.

Current practice

Requirement for leave to issue a subpoena

We note there is a general rule to require leave for the issue of subpoenas.[29] There is an exception which allows a party to request the issue of up to 5 subpoenas for production for the hearing of an application for an interlocutory/interim order without the permission of the court.[30] An ICL may request the issue of any number of subpoenas for production for the hearing of an application for an interlocutory/interim order without the permission of the court.[31]

[28] Carolyn Jones (2016) *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* (Sydney: Women's Legal Service NSW) p 30-31 (32-33)
[29] Rule 6.27(2) of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021
[30] Rule 6.27(3) of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021
[31] Rule 6.27(4) of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021

The subpoena form requires the party to tick a box indicating if leave to issue the subpoena is required or not.

We note the requirement that subpoenas be filed at the court and served on all parties, ICL and interested persons:

> (a) at least 7 days before the date for attending court for a subpoena to attend court to give evidence;
> (b) at least 10 days before the date for attending court for a subpoena to attend court to give evidence and to produce documents;
> (c) at least 10 days before the date for producing documents for a subpoena requiring the person to produce documents to the court.[32]

We note, subject to any objection being upheld or an order of the court, and subject to the issuing party filing a Notice of Request to Inspect in the approved form, each party and any Independent Children's Lawyer can then automatically inspect all documents produced in response to the subpoena and may in some circumstances take copies of documents produced (other than a child welfare record, medical record, criminal record or police record).[33]

We note in the case of medical records, the party the subject of the medical records can provide a written notice to the court prior to the date stated for production which advises they wish to inspect the records for the purpose of determining whether to object to the inspection or copying of the document by any other party.[34] The party has 7 days from the date of production to inspect the documents and complete, file and service a Notice of objection.

The provisions and process outlined above depend on a party knowing the options available to them. We believe there needs to be stronger protections to alert parties and interested persons to their rights to object to production, inspection, copying access and adducing evidence.

Proposed new practice – Return of Subpoena list

This recommendation is predicated on the premise that there must be better and earlier safeguards and transparency when it comes to protected confidences. Once a perpetrator has access to the records, the damage is already done, even in circumstances where it is not allowed into evidence.

Return of Subpoena list

Where a subpoena is sought in relation to documents that may contain a protected confidence, we recommend that the production of documents is considered in a Return of Subpoena list operated by a Judicial Registrar. All hospital, medical and counselling records and sexual, domestic and family violence related records should be captured by this list.

Other records will generally continue to be issued as they currently are, without a requirement to be listed in the Return of Subpoena list.

We recommend however that there be exceptions to the above which will enable subpoenas relating to non-protected confidences records to be listed in the Return of Subpoena list, for example, when a party is concerned that their new contact details or location is disclosed in the records, and they seek redaction of this information prior to other parties having access. It would also provide an option for Judicial Registrar to determine whether records contain a protected confidence where there is a dispute on this question.

At the beginning of the first Return of Subpoena listing for each subpoena, we recommend the Judicial

[32] Rule 6.29 (3) of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021
[33] Rule 6.37 of the of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021
[34] Rule 6.38(2) of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021

Registrar be required to inform all parties they have a right to object to inspection, copy access and adducing evidence on the grounds of protected confidence privilege, explain what this means, and stand the matter down to enable a party to access legal advice if they are unrepresented.

The party who is the subject of the relevant document may claim protected confidence privilege or seek leave to inspect the documents first to check to determine whether they need to claim protected confidence privilege. If there is a claim of protected confidence privilege, the Judicial Registrar should inspect the document for the purposes of determining whether the claim is valid pursuant to s99, including if leave is granted to inspect and adduce evidence, what, if any, limitations there will be on inspection, copying and adducing evidence.[35] In making a decision pursuant to proposed s99 the court must consider the best interests of the child as the paramount consideration.

The court must state reasons for granting or refusing to grant leave.[36]

The different limitations on inspecting and copying the subpoenaed documents need to be clearly outlined in the Rules and in a court fact sheet so that parties, including self-represented litigants, know what to request. For example:

- Party seeking protected confidence to request first inspection
- Access limited to legal representatives
- Restriction on copy access

We note the current requirements in Rule 6.36(2) of the Federal Circuit and Family Court of Australia (Family Law Rules) 2021:
A person who inspects or copies a document under the Rules or an order:

(a) must use the document only for the purpose of the proceedings; and
(b) must not otherwise disclose the contents of the document, or give a copy of it, to any other person without the court's permission.

We note that in NSW and Queensland there is a specific legal service dedicated to Sexual Assault Communication Privilege. It is important in family law proceedings that people are able to access specialist legal advice and representation with respect to protected confidences.

We acknowledge these recommendations will require amendments to the *Act,* regulations, and court forms, including subpoena forms, but believe it is an important step for the court in ensuring protection of sensitive records and the safety of parties, children and other people involved in the life of the child. We include our suggestions below.

Mandating copy access limitations to counselling records

We note Rule 6.37(2)(b) of the Federal Circuit and Family Court of Australia (Family Law Rules) 2021 prevent copy access of "*a child welfare record, criminal record, medical record or police record*". We recommend "counselling records" are also included in this list.

Proposed changes to the subpoena form

We note the subpoena form outlines the process to object to production, inspection or copying of documents.

We propose an amendment to the subpoena form to provide information about how to seek orders to redact contact details and location of a party, children and other witnesses.

[35] We note the court already has this power with respect to objection to production - Rule 6.16(3) of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021
[36] See for example, s299D(5) of the *Criminal Procedure Act 1986 (NSW)*

Information about the process to object to production, inspection or copying of documents as well as the process to redact contact details and location of a party, children and other witnesses also needs to be available in other ways to ensure accessibility for self-represented litigants.

We note the subpoena form already includes a question about whether leave is required to issue the subpoena. It is imperative that the court has scrutiny where "no" is selected, as well as training to the legal profession about the changes.

The subpoena form could also include an additional tick a box indicating urgency with instructions in the form for issuing of urgent subpoenas, including requiring an affidavit outlining the reason for urgent issue of subpoena.

Proposed changes to the Notice of objection – subpoena form

The Notice of objection – subpoena form could be amended to provide a range of reasons for objecting with a tick a box for each. Protected confidences and redacting contact details and location should be included in the list. This would assist self-represented litigants.

Definition of protected confidence and health service

The proposed legislation defines "**protected confidence**" as a communication made by a person to another person in the course of a relationship in which one of the persons is acting in a professional capacity to provide a health service (within the meaning of the *Privacy Act 1988*) and the professional is under an obligation not to disclose the communications.

Health service *is defined as*
6FB Meaning of health service
(1) An activity performed in relation to an individual is a health service if the activity is intended or claimed (expressly or otherwise) by the individual or the person performing it:
(a) to assess, maintain or improve the individual's health; or
(b) where the individual's health cannot be maintained or improved—to manage the individual's health; or
(c) to diagnose the individual's illness, disability or injury; or
(d) to treat the individual's illness, disability or injury or suspected illness, disability or injury; or
(e) to record the individual's health for the purposes of assessing, maintaining, improving or managing the individual's health.
(2) The dispensing on prescription of a drug or medicinal preparation by a pharmacist is a health service.
(3) To avoid doubt:
(a) a reference in this section to an individual's health includes the individual's physical or psychological health; and
(b) an activity mentioned in subsection (1) or (2) that takes place in the course of providing aged care, palliative care or care for a person with a disability is a health service.
(4) The regulations may prescribe an activity that, despite subsections (1) and (2) is not to be treated as a health service for the purposes of this Act.

We are concerned "*health service*" is narrowly defined and focusses on assessing, maintaining, improving the individual's health or diagnosing and treating the individual's illness, disability, injury or suspected injury. This narrow definition may exclude, for example, specialist sexual, domestic and family violence and abuse (**SDFVA**) workers and so we recommend expanding the definition to specifically capture these workers.

The ALRC report refers to "*protected confidences*" as "*records of a sensitive therapeutic nature, such as*

records generated when a person attends a medical, counselling or psychological service".[37] This is not intended to be an exhaustive list of records. We believe the list should be broader and inclusive of, for example, specialist SDFVA services.

We note the definition of protected confidence in sexual assault communications privilege is broader, for example, in NSW, Queensland, and Victoria. In NSW, it means "*a counselling communication that is made by, to, or about a victim or alleged victim of a sexual assault*"[38] with the definition of "*counselling communication*" to mean a communication made in confidence by a person (**counselled person**) to another person (**the counsellor**) including when a parent, carer or supportive person is present.[39]
"C*ounsels*" is defined broadly to include
(a) "the person has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm, and
(b) the person
(i) listens to and gives verbal or other support or encouragement to the other person, or
(ii) advises, gives therapy to or treats the other person, whether or not for fee or reward."[40]

Matters to consider in determining objections to production, inspection, copying and adducing evidence of protected confidences

We support the matters outlined in the proposed provisions to be considered in determining if a protected confidence should be admitted. The same factors are relevant in an application for objecting to production, inspection, copying and adducing evidence and should also be legislated.

We support the proposal outlined in the Consultation Paper that "*proposed s99 presumes that disclosure of the confidential material will have a harmful impact and places the onus on the party issuing the subpoena to prove otherwise in each particular instance*". However, we do not believe the draft legislation makes clear that the onus shifts to the party issuing the subpoena to prove otherwise. This is important and must be made clearer.

The court must also state reasons for granting or refusing to grant leave.

Consent to admission of evidence of a protected confidence

A trauma-informed response requires victim-survivors have agency over the admission of their records. However, it is important this decision is made with informed consent and that a party has capacity and access to specialist legal advice prior to making this decision.

We recommend it is mandated that consent be provided in writing and specify what records the person is consenting to disclose. For example, a person may give consent to disclosure of only a particular part of the relevant record. Further, a victim-survivor may only wish to consent if there are restrictions on access by a perpetrator.

We note the different consent provisions relating to protected confidences for adults and children and young people (proposed s99(3)(a) and (b)) and refer to the submission of Youth Law Australia in relation to this issue and children and young people.

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[37] ALRC (2019) *Family Law for the Future — An Inquiry into the Family Law System Final Report, ALRC Report 135* Paragraph 10.146
[38] Section 296(1) of the *Criminal Procedure Act 1986 NSW*
[39] Section 296(4) of the *Criminal Procedure Act 1986 NSW*
[40] Section 296(5) of the *Criminal Procedure Act 1986 NSW*

Other issues relating to evidence

Valuing of expertise of specialist sexual, domestic and family violence workers and need for training in making records

It is important that the expertise of frontline specialist sexual, domestic and family violence and abuse (**SDFVA**) workers be properly recognised. Care needs to be taken not to privilege the evidence of medical experts in relation to issues of sexual, domestic and family violence and abuse over the evidence of SDFVA specialists. We recognise this is a cultural issue within the legal system broadly and not limited to family law, but it has great relevance in family law proceedings. Given the focus of these legislative reforms on ensuring the safety of children and adult victim-survivors, it is important to ensure all forms of evidence are given appropriate weight and value.

There is an important role for critical analysis of the records themselves. Records that are not family violence informed and trauma-informed can be victim-blaming, damaging to the adult victim-survivor and have the potential to result in decisions which are not in the best interests of the child and difficult to correct. For example, in some WLSA members' experience, some medical experts who lack expertise in identifying and responding to complex trauma and family violence informed practice may label an adult victim-survivor with borderline personality disorder or as bi-polar, labels that are used against adult victim-survivors to challenge their parenting capacity and perpetuate coercive control dynamics. In contrast, when workers with expertise in family violence informed and trauma-informed practice, including specialist sexual, domestic and family violence and abuse workers, engage with the same individuals, they may identify complex trauma and post-traumatic stress in the context of evidence of sexual, domestic and family violence and abuse. The label given to an adult-survivor can significantly influence the way that person is treated in family law proceedings with respect to an assessment of their parenting capacity. While we acknowledge submissions can be made about the weight that should be given to different pieces of evidence, in the circumstances outlined above, this requires an understanding of family violence informed and trauma-informed practice. While a lawyer may raise such objections and this may affect the weight the judicial officer gives to the evidence, what happens where a person is self-represented?

In addition to requiring everyone in the family law system to meet competencies in relation to being family violence informed, trauma-informed, culturally safe, disability aware and LGBTIQA+ aware, any reform seeking to ensure the safety of children and adult victim-survivors needs to ensure there is better understanding about how to make records. WLSA members, including Women's Legal Service NSW and Women's Legal Service Queensland provide training to services on making records. Women's Legal Services Australia is well placed to develop and deliver training on this across Australia.

Recommendation 9.1
The factors outlined in proposed s99 extend to making a decision about objecting to production, inspection and copying of protected confidences.

Recommendation 9.2
Where a subpoena is sought in relation to documents that may contain a protected confidence, there be a requirement for the matter to be considered in a Return of Subpoena list operated by a Judicial Registrar. We recommend this capture all hospital, medical and counselling records and sexual, domestic and family violence related records.

Recommendation 9.3
For other records, these could continue to be issued as they currently are without a requirement to be listed in the Return of Subpoena list, but there be exceptions enabling these subpoenas to be listed in the Return of Subpoena list, for example, when a party is concerned that their new contact details or location is disclosed, and they seek the redacting of this information prior to other parties having access. They could also be listed where there is a dispute as to whether it is a protected confidence.

Recommendation 9.4
At the beginning of the first Return of Subpoena listing for each subpoena the Judicial Registrar be required to inform all parties they have a right to object to inspection, copy access and adducing evidence on the grounds of protected confidence privilege, explain what this means, and stand the matter down to enable a party to access legal advice if they are unrepresented.

Recommendation 9.5
If there is a claim of protected confidence privilege, the Judicial Registrar inspect the document for the purposes of determining if the claim is valid pursuant to s99, including if leave is granted to inspect and adduce evidence, what if any, limitations there will be on inspection, copying and adducing evidence.

Recommendation 9.6
The court must state reasons for granting or refusing to grant leave.

Recommendation 9.7
The different limitations on inspecting and copying the subpoenaed documents need to be clearly outlined in the Rules and in a court fact sheet, so parties, including self-represented litigants know what to request. For example:
* Party seeking protected confidence to request to inspect first
* Access limited to legal representatives
* Restriction on copy access

Recommendation 9.8
People are able to access specialist legal advice and representation with respect to protected confidences.

Recommendation 9.9
The mandated copy access limitations rule extends to counselling records by amending Rule 6.37(2)(b) of the Federal Circuit and Family Court of Australia (Family Law Rules) 2021.

Recommendation 9.10
An amendment to the subpoena form to provide information about how to seek to redact contact details and location of a party, children and other witnesses.
The subpoena form could also include an additional tick a box indicating urgency with instructions in the form for issuing of urgent subpoenas, including requiring an affidavit outlining the reason for urgent issue of subpoena.

Recommendation 9.11
The Notice of objection – subpoena form be amended to provide a range of reasons for objecting with a tick a box for each. Protected confidences and redacting contact details and location be included in the list.

Recommendation 9.12
Clearly incorporate the proposal in legislation that "*proposed s99 presumes that disclosure of the confidential material will have a harmful impact and places the onus on the party issuing the subpoena to prove otherwise in each particular instance*".

Recommendation 9.13
Mandate consent be provided in writing and specify what the person is giving consent to disclose in relation to protected confidences.

Recommendation 9.14
Efforts to address the cultural issue of valuing medical evidence more than the evidence of specialist sexual, domestic and family violence and abuse workers.

Recommendation 9.15
Increased access to specialist training about how to make records. Women's Legal Services Australia is well placed to develop and deliver training on this across Australia.

Schedule 7: Communication of details of family law proceedings

Clarifying restrictions around public communication of family law proceedings

Question 36: Is Part XIVB easier to understand than the current section 121?
Question 37: Are there elements of Part XIVB that could be further clarified? How would you clarify them?
Question 38: Does the simplified outline at section 114N clearly explain the offences?
Question 39: Does section 114S help clarify what constitutes a communication to the public?

Part XIVB provides greater clarity than the current s121. It is important it be clear that it is not an offence to provide an account of proceedings to any professional regulator or for a regulator to use such accounts in connection with their regulatory functions.

We acknowledge that the purpose of s121 is to protect the privacy of those involved in family law proceedings. However, it is also important that victim-survivors are able to tell their own story and a balance needs to be struck between ensuring that victim-survivors can speak publicly about their experiences and respecting the privacy of others.

We also note s121 can impede advocacy and law reform when there are limits on parties' ability to discuss their matters which can be further disempowering for people engaging in the family law system.

Schedule 8: Establishing regulatory schemes for family law professionals

Family Report Writers schemes

Question 40: Do the definitions effectively capture the range of family reports prepared for the family courts, particularly by family consultants and single expert witnesses?
Question 41: Are the proposed matters for which regulations may be made sufficient and comprehensive to improve the competency and accountability of family report writers and the quality of the family reports they produce?

Definitions
We support the proposed provisions on the basis that they capture the relevant report writers, including Regulation 7 report writers.

We suggest proposed s11J(2)(e) could be simplified by removing the words crossed out below:
"any report prepared for parties ~~to proceedings before the court~~, or for the court for the purpose of proceeding before the court".

Improving competency and accountability of family report writers

We welcome the introduction of further provisions under the *Act* that regulate family report writers. However, the standards and requirements will be outlined in regulations which are yet to be drafted. It is therefore difficult to assess their effectiveness.

Family reports are frequently the only form of social science evidence available to the parties and the court in parenting matters. Family reports are not only regarded as vital evidence during court proceedings, but their content and recommendations can significantly influence family dispute resolution negotiations and other negotiations throughout proceedings and have significance for decisions about funding of grants of legal aid. It was recognised in the *Evaluation of the 2006 Family Law Reforms Report* that "*family reports were identified as a very powerful settlement tool*".[41]

It is crucial that this evidence be provided by nationally accredited, highly trained and experienced professionals. There should be effective oversight of their practices, with accountability mechanisms that are transparent for quality assurance purposes and to improve public confidence.

We suggest that it might be more effective to include the standards and requirements in the primary legislation. In the absence of this, it is vital the primary legislation mandates what will be included in the regulations. At proposed s11K(1)(a), rather than stating "*regulations may make provision for'*, this must be mandated - "*regulations must make provision for"*. Similarly, at proposed s 11K(1)(2), rather than "*may deal with any or all of the following'* it should be reframed so that the legislation prescribes what the regulations must deal with, for example "*must deal with all of the following."*

We are also concerned there are gaps in what has been included at proposed s11K. For example, we believe it is vital to mandate:

- core competencies for a family report writer in:
    - family violence informed practice,
    - responding to risk,
    - understanding child abuse
    - trauma-informed practice,
    - cultural safety,
    - working with priority populations,
    - working with children

We note 95% of stakeholders responding to the review on *Improving the competency and accountability of family report writers* recommended mandating core competencies[42]

- minimum content requirements as to what must be included in a report
- annual training requirements

Core competencies

We provide some detail below about some of the core competencies required.

Family violence informed: Given the prevalence of family violence in family law matters, it is vital family report writers are experienced and trained in family violence, including:

- understanding its gendered nature and dynamics, and unique experiences of family violence within Aboriginal and Torres Strait Islander communities, culturally and linguistically diverse communities, LGBTIQ communities and people with disability
- screening and responding appropriately to disclosures, risk assessment, safety planning and how to keep safety at the centre of proposed arrangements
- recognising harm perpetrated against an adult victim-survivor is harm against the child,

[41] Kaspiew et al (2009) *Evaluation of the 2006 Family Law Reforms*, Report, Australian Institute of Family Studies, at 13.3.3, p 317

[42] AGD, (2023) *Improving the competency and accountability of family report writers – Summary of submissions*, p9.

- an awareness of perpetrator tactics and perpetrator ability to manipulate systems and to engage in systems abuse and image management

Responding to risk. There are numerous factors that can pose risks to children including family violence, mental health, substance abuse, being prevented from enjoying and experiencing their culture and/or suicide. Multiple risk factors will often be prevalent within a family at any one time. A family report writer must be proficient at identifying such complex issues and have the knowledge and understanding to make recommendations about the ways in which these risks can be addressed and mitigated. Failure to do so can have serious and adverse consequences.

Understanding child abuse: Professionals should understand the impact of child abuse, including child sexual abuse and neglect.[43]

Trauma-informed practice. Trauma can influence both children and adults. It can have significant impacts on children's attachments and development. Family report writers need to have the ability to conduct trauma-informed practice and to recognise, know and understand trauma responses in both parents and children. Furthermore, it is vital that family report writers know and understand the effects of intergenerational trauma on Aboriginal and Torres Strait Islander people and that this form part of a family report writer's trauma informed practice. It is imperative that family report writers receive training and resources and deepen their understanding of the impacts of inter-generational trauma.

Aboriginal and Torres Strait Islander families. The AGD Consultation Paper on *Improving the competency and accountability of family report writers* noted many stakeholder's feedback to the ALRC Review of the Family Law System included that "*Family report writers working with Aboriginal and Torres Strait Islander families should be culturally competent in their interactions, and able to assess how a child's connection to kinship networks and country might be maintained*."[44]

WLSA recommends that for Aboriginal and Torres Strait Islander families, family reports should be prepared by Aboriginal or Torres Strait Islander family report writers. This requires an Aboriginal and Torres Strait Islander workforce development strategy as recommended in several Family Law Council reviews.[45]

Where it is currently not possible for an Aboriginal or Torres Strait Islander family report writer to prepare the report, the report writer must be culturally competent and work closely with relevant Aboriginal and Torres Strait Islander people in the production of the report, including Indigenous Liaison Officers and Elders and Respected Persons to provide cultural advice.

It is WLSA members' experience that family report writers can often be biased against and/or lack understanding and insight into Aboriginal and Torres Strait Islander culture and practices and fail to acknowledge and recognise cultural practices and the importance of kinship arrangements. For example, Aboriginal and Torres Strait Islander people and their parenting can be viewed in a negative light if they do not undertake parenting duties in line with mainstream views of a "nuclear family".

Diversity and cultural competency: The AGD Consultation Paper referred to "*Professionals should have an understanding of the specific family dynamics in culturally and linguistically diverse and LGBTQI+ families,*

[43] Stakeholders feedback from the ALRC report cited in Attorney-General's Department, (2021) *Improving the Competency and Accountability of Family Report Writers Consultation Paper*, p10 (12)
[44] Ibid, p 10
[45] Family Law Council, (2012) *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, p99 (105), Recommendation 5; Family Law Council (2016) *Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Terms 3, 4, 5*, Recommendation 16(1) and p96-98 (104-106)

and the unique challenges these families face when interacting with the family law system".[46] It is also essential to include competency in working with people with disability.

Working with children: Being able to engage with children in a developmentally appropriate manner to obtain and accurately represent their views.[47]

We refer to the submissions of Women's Legal Service NSW and Women's Legal Service Queensland to the AGD Consultation on *Improving the competency and accountability of family report writers* for case studies highlighting the need for this reform.

Additional comments

We recommend that Part 7.1, Rule 7.01(1)(d) *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* be repealed to allow parties to ask various clarifying questions of an expert witness (and in particular, court child experts and family consultants) pursuant to Rule 7.26. This would enable parties, to a limited degree, to test the evidence of a family report writer prior to a final hearing where they are given the opportunity to cross-examine the report writer.

We also recommend consideration of other opportunities to test the evidence of a family report writer at an earlier stage in proceedings.

Alongside an amendment to the *Act* and regulations, there must be comprehensive training implemented for all cohorts of family report writers. Training must be regular, ongoing, comprehensive, meaningful and independently evaluated.

The amendments to the *Act* and regulations should happen in conjunction with Implementation of a workforce development strategy to increase diversity in the workforce within the family law system.

Recommendation 10.1

Primary legislation mandates what will be included in the regulations relating to family report writers. At proposed s11K(1)(a) rather than stating "*regulations may make provision for*', this must be mandated - "*regulations must make provision for"*. Similarly, at proposed s 11K(1)(2) rather than "*may deal with any or all of the following'* it should be reframed so that the legislation prescribes what the regulations must deal with, for example "*must deal with all of the following."*

Recommendation 10.2

The legislation must refer to the regulations relating to family report writers including:
(1) core competencies for a family report writer in:
* family violence informed practice,
* responding to risk,
* understanding child abuse
* trauma-informed practice,
* cultural safety,
* working with priority populations,
* working with children
(2) minimum content requirements as to what must be included in a report
(3) annual training requirements

[46] Attorney-General's Department, (2021) *Improving the Competency and Accountability of Family Report Writers Consultation Paper*, p12

[47] Stakeholders feedback from the ALRC report cited in Attorney-General's Department, (2021) *Improving the Competency and Accountability of Family Report Writers Consultation Paper*, p9 (11)

Commencement of the changes

Question 42: Is a six-month lead in time appropriate for these changes? Should they commence sooner?
Question 43: Are the proposed application provisions appropriate for these changes?

WLSA believes the changes should commence as soon as possible after the legislation is passed. The amendments go directly to the safety of children and as such every child should have the benefit of the amended legislation. The legislation should apply to all proceedings, whether already filed with the court or filed after the commencement date, with the exception of those matters where they are waiting on a reserved judgement.

There will need to be systems in place to enable those parties who have matters that have already been listed for final hearing to provide further evidence, submissions and brief supplementary reports that address the legislative changes.

Recommendation 11
Once passed, the changes take effect as soon as possible and apply to all proceedings.