

Position Summary

Exposure Draft of the Family Law Amendment Bill 2023

Purpose

We have prepared this position summary to assist legal assistance, family violence and community services to make submissions to the Attorney-General's Department on the Exposure Draft of the Family Law Amendment Bill 2023.

WLSA's principles to guide reforms to the family law system

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, 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.

Key positions on proposed amendments to the *Family Law Act*

Removal of the presumption of equal shared parental responsibility and requirement to consider particular forms of time

WLSA welcomes the prioritisation of victim-survivor safety, of both children and adults, in the family law system. This is evident in the removal of the presumption of equal shared parental responsibility and 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 framework of applying the best interests of the child factors (which must prioritise safety). This is a more child-focused approach. Similarly, it is important to consider time on a case-by-case basis.

WLSA has long advocated for the presumption of equal shared parental responsibility to be removed 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 violence and abuse.

In the experience of Women's Legal Services across Australia, women are often pressured into agreeing to consent orders for equal shared parental responsibility with abusive men, and then are forced into continuing to engage in a violent relationship because of shared decision-making obligations, and the child continues to be exposed to violence and abuse.

Best interests of the child

WLSA welcomes the simplification of the best interests of the child factors in the exposure draft. This will help to achieve the intended aims of being more responsive to family violence, abuse, and neglect as well as to simplify complex and confusing legislation.

However, our support for a single list of factors is contingent upon prioritising the safety of children and adult victim-survivors. In our view, this can be achieved by retaining the operation of section 60CC(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* is: *“the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.”* In the exposure draft bill, the relevant consideration is at proposed section 60CC(2)(a).

We welcome explicitly considering the safety of children and adults in the best interest of the child factors at proposed section 60CC(2)(a). However, we believe the proposed wording should extend to “children” (there may be other children in the household who are not the subject of current proceedings) and to others with carer responsibilities beyond those with parental responsibility.

While welcoming a specific subsection about the rights of Aboriginal and Torres Strait Islander children to enjoy their culture, we also recommend retaining elements of the current provision including 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.”*

A child’s right to express views

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 and young people 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 where they choose to do so.

Harmful proceeding orders

The exposure draft proposes that courts would have a new power to restrain a person from filing any further family law applications and serving these on the other party without the leave of the court where there are reasonable grounds to believe that further proceedings would be harmful to the respondent.

The Consultation Paper explains that applications for leave would be made *ex parte* – without serving documents on the respondent – to minimise risk of further harm to the respondent by exposing them to unnecessary proceedings.

While WLSA acknowledges that this change is intended to address systems abuse, there may be safety concerns if a victim-survivor is not aware of a leave application and leave is not granted. It is possible that family violence will escalate if a harmful proceeding order is made, and if the victim-survivor is not informed about the application it will be difficult to ensure appropriate safety measures are put in place.

We recommend that parties be advised of leave applications unless they choose to opt out as follows:

- 1) Wish to only be advised of a *prima facie* leave application, that is a leave application that may have reasonable prospects of success; or
- 2) 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 preferred option. Further, there should be no adverse inferences made if a victim-survivor does not wish to participate in leave proceedings.

At a minimum, if the victim-survivor is not served with the leave application, and if leave is denied and a harmful proceeding order is made, the victim-survivor should be advised of the outcome of these proceedings *in advance* of the person against whom the order is made to ensure appropriate risk screening and assessment and safety planning can take place.

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.

Factors outlined in the proposed legislation to consider when making a harmful proceeding order include the history of proceedings under the *Family Law Act* between the parties and whether the first party has frequently conducted or attempted to conduct proceedings against the other party in any Australian court or tribunal. WLSA's view is that consideration should be given to expanding this to other forms of systems abuse beyond proceedings or attempted proceedings in a court or tribunal, such as abuse of child protection processes.

Overarching purpose

WLSA welcomes the broadening and extending of the overarching purpose of the family law practice and procedure provisions in section 95, which includes to facilitate the just resolution of disputes in a way that ensures the safety of children and adult victim-survivors, and in a way that promotes the best interests of the child. We also welcome the duty to act consistently with the overarching purpose in section 96.

To ensure safety is given necessary priority, we recommend a reordering of factors relating to the overarching purpose of the family law practice and procedure provisions that sees safety and the best interest of the child listed before "*as quickly, inexpensively and efficiently as possible*" which should be listed last at section 95(1)(d).

It should also be stated that safety is 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. This pressure may be real or perceived from the other party, their own legal representative, or the court, if the emphasis is on speedy, efficient resolutions which minimise cost, and if this is prioritised above safety.

Protecting sensitive information

WLSA welcomes recognition of the harm caused by perpetrators unnecessarily accessing sensitive information. Many victim-survivors experience a perpetrator accessing their sensitive records as court sanctioned violence and abuse. There is an important public interest in seeking to preserve the therapeutic relationship between a victim-survivor and the person providing support to encourage victim-survivors to access the support they need to help them with their recovery.

This protection should be strengthened by clearer processes for objections to inspecting and adducing evidence, as well as access to legal advice to assist with limiting unnecessary access to a victim-survivor's sensitive information.

Family report writers

The content and recommendations within a family report can significantly influence family law proceedings. It is therefore vital that family report writers have the necessary key competencies, meet annual training requirements, there be minimum requirements of what is included in a report, and there be clear compliance and accountability mechanisms.

The exposure draft proposes that regulations can prescribe standards and requirements for family report writers. WLSA is concerned that the detail will be in regulations instead of the legislation. It is vital that the legislation prescribe what the regulations *must* do and include the additional items listed above:

- key competencies;
- annual training requirements;
- minimum requirements of what is included in a report; and
- clear compliance, quality assurance and accountability mechanisms.

Key competencies must include:

- family violence informed¹;
- trauma informed;
- cultural safety;
- understanding of child abuse, child sexual abuse and neglect;
- working with priority populations; and
- working with children.

Commencement of changes

WLSA recognises the urgency of these reforms to the family law system, particularly given the need to protect the safety of children and adult victim-survivors of family violence. We support the commencement of these changes as soon as possible.

The need for proper resourcing and training

While WLSA welcomes these reforms, more work is required to ensure everyone in the family law system is family violence informed, trauma informed, culturally safe, child rights focused, disability aware and LGBTIQ+ aware. The family law system must be properly resourced – there must be more funding particularly for Independent Children's Lawyers, Indigenous Liaison Officers in courts and a greater focus on supporting greater diversity in the family law profession, including judges, family report writers and ICLs and greater access to family violence informed, culturally safe legal assistance services.

¹ This term is intended to include a gendered understanding of family violence, a focus on children and adult victim-survivor's safety as well as an awareness of perpetrator tactics and perpetrator ability to manipulate systems and to engage in systems abuse and image management.

All professionals working in the family law system must be able to access frequent and ongoing training that is regularly independently evaluated for its effectiveness, including evidence of improvements in the practice of professionals working in the family law system.

About Women's Legal Services Australia

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 developed to improve women's lives through specialist legal representation, support, and advocacy.

We provide trauma-informed, integrated, and wraparound legal services to women that meet a range of their legal and other support needs to improve women's safety and recovery from violence.

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