The National Council of Single Mothers & Their Children Inc.

council of single mothers and their children

Family Law Reform
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600
Email: FamilyLawReform@ag.gov.au

6 March 2023

Dear Attorney-General,

Re: Family Law Amendment Bill 2023

Thank you for your thorough response to the Australian Law Reform Commission report and for the opportunity to comment on your Exposure Draft.

Council of Single Mothers and their Children Inc. (CSMC) was founded in 1969 by single mothers to improve their lives and those of their children. Based in Victoria, we achieve change by championing the voices of single mother families and providing specialist support services.

National Council of Single Mothers and their Children Inc. (NCSMC) was formed in 1973 and provides a lead voice for single mothers and their children around Australia. A vital role is ensuring that single mothers' lived reality is before critical deliberations and policy-making processes.

Together we provide information, referrals, and assistance to single mothers, responding annually to thousands of requests, whilst our social media posts can reach more than 100,000 per week. A single mother heads 80% of lone parent households, and evidence shows single mother families are disproportionally affected by hardship, poverty and/or domestic violence, with 37% living below the poverty line and 60% affected by family violence.

We have tirelessly advocated for the pre-eminence of safety and, from the onset, opposed the presumption of shared parenting. Its enactment occurred despite the inherent danger, and tragically our misgivings have been realised. Furthermore, the presumption forces women to co-parent with their abuser, increasing the exposure to violence for them, their children, and their extended family.

We congratulate the Government's timely action and wish to work in unison to progress critical and long-overdue safety changes. We welcome the opportunity to appear before the Committee, and both Councils wish the Committee well with its deliberations.

Warm Regards,

Jenny Davidson
CEO, CSMC

Terese Edwards
CEO, NCSMC

CSMC
Level 1, QVWC
210 Lonsdale St
Melbourne Vic 3000

Administration
T 03 9654 0327
F 03 9654 0328
E csmc@csmc.org.au

Support Line
T 03 9654 0622
Outside Melbourne
1300 552 511

W csmc.org.au
facebook.com/councilofsinglemothers
ARN A0014618W

The purpose of these reforms

As two collaborating organisations launched before the 1975 Family Law Act we have seen many changes to the Act, and heartily welcome the revised commitment to the best interests of the children and the removal of the presumption of shared parenting as an obstacle to a full focus on the safety, health and wellbeing of the child or children.

In this submission, we outline our thinking about achieving the best interests of children in parenting arrangements, whilst answering as many questions as we feel able to do.

We are informed by women who have sought our services as they try to stay safe and who in doing so have provided first-hand accounts of their experiences. Furthermore, in response to the draft exposure Family Law Amendment Bill 2023, we developed a survey open to single mothers and adult children of single mothers. In six days we have received 140 responses which we trust will enable us to bring their lived reality before decision-makers.

Practical approaches to working out the best interests of children.

If Australia's future will be shaped by the success of our children's nurturing, we are currently creating much harm instead of shoring up future success. Across the world, research demonstrates that the conditions under which women raise their children, particularly in the early years, are critical to the life outcomes for each child and thus, to the social and economic outcomes for the country.

From Anne Summers's analysis of ABS data (2016) data we can extrapolate that 324,062 women who have experienced physical or sexual violence by a previous partner are living as single mothers in Australia today with children under the age of 18 years.[1] Many of these women have escaped violence and re-established a home for their children at significant cost. Too many of these women are within the 37% of female-headed one-parent families living in dire poverty, or the many more in financial hardship.

All women trying to escape violence know that poverty is one possible future ahead of them and sadly, they know too that they and their children will not necessarily find protection in our family law system.

For the children who have escaped with their mother, having witnessed and/or experienced the violence, there are very often separation fears and a huge reliance on this one parent who represents safety.

Therefore, we contend it is in Australia's best interests to ensure paramount considerations of family law are in the best interests of the child, in every instance, and in so doing recognise the significance of the safety and wellbeing of the primary carer (almost always the mother) to the immediate and long-term wellbeing and safety of the child or children.

[1] Anne Summers: **The Choice - violence or poverty.** A report into domestic violence and its consequences in Australia today July 2022 Available at: https://www.violenceorpoverty.com/

Practical considerations of achieving safety and 'best 'interests'

Listed below are some of the issues we have encountered that we consider must be part of determining the children's best interest in parenting arrangements:

- If the child is to be safe, the safety of the primary parent must be prioritised as a standalone matter.
- The perpetrator of violence should not control the primary parent's location. For a long-time unfair usage of the presumption of shared care has seen women ordered to move to the state or territory of their former partner's location or remain in a location close to the former parent but far from their own support networks, and refused consent for a child to have a passport and visit family in the home country of their primary parent. Both gender inequality and family violence patterns are often evident in these cases.
- Lack of consideration of housing arrangements so that the child/ren and carer can live in affordable accommodation, close to school and safety networks of family and friends. Achieving this for the carer and child/ren has too often been dismissed as less important than the second parents' location, employment or 'right' to have the child nearby.
- The use of the courts and legal systems to erode the primary carer's financial resources (through defending vexatious claims and being compelled to move from their employment networks), with low living standards experienced by children.
- The ways in which a persona of "responsible parent" can be misused to block such things as change of school or enrolment in activity of child's interest, all without consideration of the best interests of the child/ren.
- Insufficient attention paid to the child's physical, emotional and psychological safety. (Judges have made comments such as "X is young. S/he will get over it.")
- Insufficient understanding of trauma and long-term impacts of witnessing violence between their parents and/or between a parent and another child.

"I do not see enough done to ensure the financial needs of the either the primary carer or only carer are met. Often the primary carer is placed in a terrible situation, including abject poverty or living below the poverty line, even when the other parent is financially more than able to meet the needs for the child. There are many ways within the system where a parent can manipulate finances to the detriment of the child as well as the carer."

Is the best interests approach enough?

We raise here what, in our view, can be a critical flaw in relying upon the 'best interests' of the child. If we take, for example, the history of best interests in respect of people with a disability, we find some very perverse behaviours and decisions.

It is instructive to consider this reflection by the Australian Law Reform Commission:

> *2.61 'Best interests' standards, as suggested in this quote, were ones that preceded, and were to be contrasted with, a 'substituted judgement' approach. The 'best interests' principle was seen to reflect the idea of 'beneficence'—a dominant theme in medical ethics, in which the 'primary imperatives were for doing good for the patient, the avoidance of harm and the protection of life'.*[79]

> *2.62* ***A best interests standard was identified as associated with paternalistic approaches to persons with disability; 'substituted judgment' was seen as reflective of the person and respectful of their autonomy.*** *Describing the emergence of the substituted judgment approach in the United States in the context of healthcare decision-making, Dr Mary Donnelly said that it was a standard 'based on what the patient would have wished had [they] had capacity notwithstanding, in some cases, very limited evidence of [their] likely views or preferences'.[80] Even in the medical context, therefore, the best interests standard had given way to autonomy.[81]* [2]

If we follow this logic and the path from paternalism to autonomy in respect of children, it seems to us that there is a case to enshrine a right for any child to express a view wherever it is possible. It then may follow that:

- For babies the court may rely on attachment information and what is now known about the impact of certain life events in the first eighteen months to two years of a child's life.
- For children two years to primary school age and/or with certain disabilities, we already have people who specialise in play therapy and are adept at turning play to particular questions, which demonstrates that even very young children have the capacity to express a view.

We urge consideration of more work in this area to improve the rights of children to express their views in situations of conflict and where their futures may be affected.

Schedule 1: Amendments to the framework for making parenting orders

Redraft of objects

1. Do you have any feedback on the two objects included in the proposed redraft?

We strongly support a clear and unequivocal clarification that the best interests of the child are paramount and thus support the wording in the exposure draft, not as referred to in the consultation paper.

That is:

a) to **ensure** that the best interests of children are met; and

b) to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

While we understand the hierarchy of legislation and international agreements, we nevertheless find it disappointing that there is a presupposition that the Family Law Act will deviate from the Convention on the Rights of the Child and will therefore prevail. We ask the Attorney-General to consider if it is possible to minimise the likelihood of this occurring.

[2] Australian Law Reform Commission: Equality, Capacity And Disability In Commonwealth Laws (DP 81) / 2. Conceptual Landscape—The Context For Reform / Supported And Substituted Decision-Making 20/05/2014

The survey we just undertook to gather responses from single mothers about the proposed changes asked questions worded much as they are in the consultation paper. Nearly 91% agreed with placing the best interests of the child at the heart of parenting decisions. 7% did not and 2% were unsure.

Comments from those who said 'no' are instructive and highlight the need to ensure the manner of implementing all these changes must be done well.

- *"The shift to the "voice of the child" is horrific. This encourages the weaponizing of children and whichever parent is prepared to manipulate their children more will 'win' at the expense of the children."*

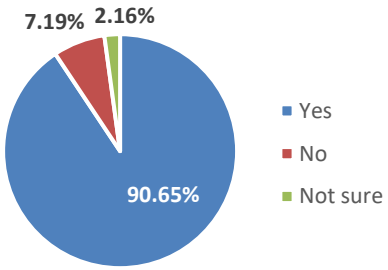


Figure 1: Agreement with 'main purpose' n=140

- *"If a 'party' in the proceedings cannot afford a lawyer, and doesn't qualify for Legal Aid, that party cannot access the same 'fair and equal' representation, legal advice etc, and is therefore disadvantaged."*
- *"Yes, but they're not. In theory this is great but is not executed adequately."*
- *"The mother needs to be protected from DV and coercive control through shared parenting."*
- *"The courts don't care about family violence in my opinion - they expect the mother to get over it. They say it was in the past. This is often not the case. The courts are abusive in the fact that they make the mother agree and follow orders and threaten removal of children. Mothers are force to make children have contact even though they are distressed."*

Interestingly, comments from respondents who said 'yes' share very similar concerns on the basis of their own experiences:

- *"Best interests is always open to interpretation and court manipulation."*
- *"The child's best interest is also mother's best interest - where there has been abuse the mother should not be forced to see the dad and the child should also not be required to see both parents. Sometimes it is better not to have abusive people in your life at all."*
- *"Ongoing abusive, controlling and manipulative behaviours of a parent to the other parent need to also be considered and addressed."*

Some respondents make suggestions on how to make the best interest test work, such as:

- *Stability needs to be considered. Swinging between homes like a nomad removes stability and massively impacts children's ability to form attachments and to participate properly in education.*
- *"There needs to be reassurance that a fair approach is taken. That it considers safety in all aspects, including recommendations from child safety if they are involved, doctors, counsellors etc. That there is no bias in regards to whether a mother works or doesn't work, her mental health compared to that of the other parent etc. It absolutely needs to be about what is best for the child (safely best) but also without bias. Children absolutely need to be given their own voice in these circumstances. They deserve to have their voice heard. Sometimes shared care with the other parent isn't always best, sometimes supervised access*

only is safest, sometimes no access is the safest. The courts need to keep an open mind and look at all in front of them, hear from the child/ren."

In Australia, we are faced with government policy decisions that are negatively impacting the safety, health and wellbeing of children because we do not have a specific child impact filter on all decisions. It is a lack of care for children personally that leads to the damage of them, but rather that they are not front of mind as a population cohort impacted by every single decision government makes. This has led the Australian Children's Commissioner to call for a Minister for Children and multi-disciplinary approaches to ensuring the needs of children are truly addressed.[3]

We think these current proposals move to underline that children are people in their own right with their own needs and not just an appendage of their parents.

We also recognise that there needs to be new and considerable resourcing for the courts to action these objects to full effect.

"Best Interests of the children is too broad - because everybody has a view and interpretation. The children's wishes must be heard (in a neutral environment and/or by social workers/ family violence services/ education and care services engaged with them) and given primary weight, which must be legislated. Children from the youngest age know who they feel safe and unsafe with. They need to be able to express this, without fear of reprisal, and these views need to be accommodated."

2. Do you have any other comments on the impact of the proposed simplification of section 60B?

We support the simplification, and the clear separation of objects of the Act and factors courts must consider in determining arrangements.

Best interest factors

1. Do you have any feedback on the wording of the factors, including whether any particular wording could have adverse or unintended consequences?

We comment on each section as they appear in the exposure draft.

For the purposes of paragraph (1)(a), the court must consider the following matters:
(a) what arrangements would best promote the safety (including safety from family violence, abuse, neglect, or other harm) of:
(i) the child; and
(ii) each person who has parental responsibility for the child (the carer).

In our view, it is a strength that consideration of the safety of the child and carer are considered separately.

Particularly in relation to (a)(i), we think it is essential that all judicial officers have access to clear definitions and good training on each of the elements of family violence, abuse, neglect, other harms and how to determine what impact these have on a child and the nature of ongoing harm

[3] https://www.smh.com.au/national/children-were-invisible-commissioner-calls-for-national-kids-minister-as-part-of-covid-recovery-20230207-p5cil7.html

to them. In this context, they may then be better able to understand what constitutes 'safety' and the 'best interests' of a child in each of these.

We say this because, too often, judges, lawyers and 'experts' labour under preconceived views about what does and does not constitute harm to a child, what incidents children may be able to recover from quickly, and what damage is likely to occur in certain forms of continued contact with the harming parent. Witnessing violence, for example, in some circumstances can be more harmful in the long term to a child than some physical violence and the impacts of vicarious and other forms of trauma manifest for many years in educational and social impact factors.

Where a court continues unsupervised contact with the parent who conducted the violence the child has witnessed, the residual trauma and uncertainty is highly likely to continue. It is worth noting that each jurisdiction in Australia has legislative definitions as to when a child needs protection.[4]

Additionally, as a single mother has recently written to us:

"Magistrate's court history of Intervention Orders (Apprehended Violence Orders etc) and breaches of these must be given weight. As raised in the previous Royal Commission into Family Violence by those working with women and children, the disparity between the two jurisdictions is one of the most significant and detrimental experiences that family violence victims experience. The Family Law and Federal Circuit Courts must cease overriding the Magistrate's Court's protections and instead work with them."

The woman who wrote this has drawn on her own lived experience:

"I had a full no-contact IVO on my ex-partner, yet the FLC judge openly dismissed this and disregarded our protections. He granted several orders for my ex-partner to have contact and care (unsupervised) with our two young children (aged just 2 and 4 years old at the time) and ordered me to return to the perpetrator's resident state within a 28 day period".

We provide this detail not because we require alteration of the wording, but because we know that the process of determining safety and the best interests of children is a difficult business and we want to encourage the best possible support structures for those making these decisions.

We add that similar understandings need to be brought to consideration of what constitutes the safety of the carer. What particularly needs to be understood in our view is:

- The full gender implications of family violence and coercive control as it plays out in court and in future parenting arrangements.
- The impact on children of seeing their primary parent, usually their mother, stressed and distressed, particularly when they understand as even very young children can perceive stress and that the stress and distress are caused by the behaviour of their other parent.
- The need for the parent who is the carer to be given a clear right to speak and be heard. This will include actions such as:
    - Clearing the court
    - Hearing in chambers
    - Accepting video statement
    - Allowing sufficient time and

[4] Australian Institute of Family Studies: *Australian legal definitions: When is a child in need of protection?* February 2023 Accessed at: https://aifs.gov.au/resources/resource-sheets/australian-legal-definitions-when-child-need-protection

- Understanding and not dismissing expressions of emotion.

(b) any views expressed by the child.

This is good and we like the simplicity of the wording.

While we are loath to section out children of different ages, we recommend consideration of returning the original section 64(1)(b): "where the child has attained the age of 14 years, the court shall not make an order under this Part contrary to the wishes of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so."

We are concerned that very young children and children with a disability, elsewhere in the draft (Schedule 4), may be considered to not necessarily have the capacity or interest in expressing a view. We will suggest in detail later that the courts should make every effort to support such children to express their views, including through skilled play and interpretive therapists. We will refute any right for it to be the Independent Children's Lawyer who can determine these exemptions.

(c) the developmental, psychological and emotional needs of the child.

It is good to have these factors separately outlined and will allow for consideration of some of the harms we noted in (a) above. Critical to the success of these will be the expertise available to the courts to assist them in determining these.

Recommendations about regulating family report writers, single expert witnesses etc. are key to improving this area.

(d) the capacity of each proposed carer to provide for the child's developmental, psychological and emotional needs, having regard to the carer's ability and willingness to seek support to assist them with caring.

We do not want to see it assumed that the capacity of each proposed carer is limited in those with a disability. We also urge that where violence has occurred, there be no consideration of a parent having unsupervised care of a child whilst engaging in anger management and other such courses. Children are not a practice ground.

We also raise the fact that in too many circumstances, the capacity of single mothers to care for their child's developmental needs is, by their own description, impaired as the result of court decisions that grant unsupervised access and part-care to former partners they know to have been violent in the past and who they know to be continuing to abuse their child in the present, albeit in different forms. Examples are taunting a child about their mother, railing about the mother in the child's presence etc.

Additionally, where mother and child/ren have been exposed to violence and are still struggling to recover, their only income is often either the Parenting Payment Single or JobSeeker. Both are below the poverty line, both come with arduous obligations, and both have 'exception' processes that cause re-traumatising even in the application. Recent research has highlighted the impact of the awful choice too many women must make – violence or poverty – and estimated on ABS data that as many as sixty per cent of single mothers may at some point have faced this choice.[5]

[5] Anne Summers: **The Choice - violence or poverty** https://www.violenceorpoverty.com/

In our view, it would be unacceptable entirely if women in such positions are not deemed capable of caring for their children.

"I think on top of the less capable parent getting help, the protective parent also needs resources if it turns out the less capable parent uses therapy to increase their skills of hiding abuse. I wish that psychological abuse carried more weight."

(e) the benefit to the child of being able to maintain a relationship with both of the child's parents, and other people who are significant to the child, where it is safe to do so.

In principle, we say yes, of course. In practice however, as a society we now have a culture of 'parents rights' and none of 'children's rights.' So the question of how well the 'safety' (physical, emotional, psychological and developmental) is ascertained, is again utterly critical to achieving the best intentions of this point.

The following comment from a mother who wrote to us, commenting on this matter:

"A child can and will choose who they want to have a relationship with, at any lifestage, and in line with CROC needs to have the ability and power to do so. Being in the care of an abuser does not benefit them. Adults are told to leave unsafe, abusive relationships... why aren't the same rights, advice and protections afforded to children?"

(f) anything else that is relevant to the particular circumstances of the child.

Agreed.

2. Do you have any comments on the simplified structure of the section, including the removal of 'primary considerations' and 'additional considerations'?

We support the revised structure noting our comments above.

3. Do you have any other feedback or comments on the proposed redraft of section 60CC?

Only that as noted above, we see a huge need for education of all judicial officers and the public in general to bring about the required changes. While these sit outside the Exposure Draft, we urge the Attorney-General and the Department, in putting these changes to Parliament, to make the case for sufficient resourcing and support work to ensure the changes have real effect.

It is our position that the Family Law system, beginning with the Act and flowing through, must become, and be seen as, a pillar of protection for children in a complex and changing world, and accessible to all families regardless of their construction.

Removal of equal shared parental responsibility and specific time provisions

4. 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?

No comment

5. 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?

We strongly support the removal of these obligations in their entirety which, in our view, existed without proper consideration of the wellbeing and safety of both the child and their carer. Our experience has been that encouraging parents to consider time arrangements has almost always focussed on persuading one party to do what the other is making clear they expect. Where violence has been suggested, the 'persuasion' sometimes leans more toward a kind of negotiated blackmail. An example is where a lawyer forcefully suggested to one party that their agreement to a particular time arrangement could bring certain benefits including agreement to purchase all kit and pay fees for children's preferred sport.

In relation to the following point in the Consultation Paper, we have to ask, what will be different and how will it guarantee no child is further abused?

> *"After the repeal of this section, it would still be open to the court to consider equal time arrangements, or arrangements that give substantial or significant time with each parent, when deciding parenting arrangements in the best interests of the child in accordance with the new section 60CC." (pg 17)*

We ask this question because we observe that judges making harmful decisions do not intend them to be so. They can be swayed by persuasive, charismatic parties and are often led to believe their decision is indeed in the child's best interest. This underlines our recommendation for re-education and a whole revision of the culture of the courts.

Some comments from our survey respondents:

- *"It (joint parental decision making) doesn't work if one parent is abusive. They use it to control the other parent and their child."*
- *"Where the child continues to resist seeing a parent that child should never be forced to see them."*
- *"My kids were forced into spending time with their abusive father at a contact centre when they hated it."*
- *"Yes (to joint parental decision making and equal time orders) but the orders must be clear and enforced by a court appointed person. Strict penalties for noncompliance. Immediate decision without fees and court applications to enforce orders."*
- *"There is scope for many more no contact, no time cases to occur in Family Court when DV, coercive control and or psychological, emotional and or physical abuse has happened to children. The views of the child - however young - should be taken into account. If the child is in real fear of the perpetrator then that child should not be forced to have a relationship AT ALL with that person. Children as young as 8 years old are perfectly capable of understanding who they feel and are safe with, who has abused them etc. Children at this age and younger are independent thinkers in their own right. The views of the child must be listened to and acted upon in order for the child to grow up in safety and in the understanding that it is the responsibility of adults and the law to protect them from harm."*
- *"This will provide another form of power to violent and controlling parents to continue to dominate decision making. It seems that there is an abundance of parents who make it their mission to use their children as a way to manipulate legal rights to their favour."*

6. 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?

In our view, no. While the ideal situation is amicable co-parenting and decision-making between separated parents, very many of the hardest situations facing single mothers seeking help for themselves and/or their children involve conflict over major decisions.

During COVID restrictions, we had many calls for help from mothers who said their ex-partner was anti-vaccinations, didn't believe the nature of the condition, and was refusing to take active precautions. This was particularly perturbing for mothers whose children were immune compromised.

In respect of any court ordered involvement in decision making, it would be, in our view, wise to consider the capacity of each parent to engage calmly and cooperatively in decision making and where necessary, to seek help to do so.

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

7. 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?

Two comments, both from Aboriginal single mothers who responded to this question in our survey:

"Yes, including consideration of cultural travel if Aboriginal family members are located elsewhere."

"Keeping those connections is absolutely vital in helping a child maintain a big part of their identity not just their family, community, culture etc."

8. 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?

We are not able to offer informed comment on this.

9. 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?

Yes, we agree but we do not agree that all others should wait for six months. No child or carer should be left in a situation of violence and uncertainty if there is a remedy available.

10. Do you have any other feedback or comments on the amendments in Schedule 3?

No further comment.

Schedule 4: Independent Children's Lawyers

Requirement to meet with the child

11. 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?

Insofar as this proposal goes, we largely agree with it. There must however be changes to the role of ICL and real attention paid to the manner in which the new role is crafted as, under the current regime, there is a very real risk of damage to children.

We also see a number of gaps and one area where we cannot agree. **We strongly oppose ICLs having discretion to decide they will not meet with a child.**

a. Independent Children's Lawyers are coming off a very low base where they have largely been able to meet with children or not, under their own discretion, without concern for the value of time to the child, environment or indeed, their own skill.

   Critically, they have not been subject to any process of complaint such as to Legal Aid or the Legal Services Complaints Committee (because a parent is not their client) and children have no right to ask for another if they do not trust the one they are given.

b. The role of ICL must be clearly outlined, with an equivalent kind of regulation proposed for the Family Court writer put in place for ICLs.

c. If the ICL believes there is a case for 'exceptional circumstances' they must bring it to the court which must consider if there are ways around this, such as:

   - does the child not feel safe talking to a stranger?
   - Is there a safe and familiar person who could sit in?
   - Can a play therapist be engaged to create familiarity?

   These questions will not be the appropriate ones in every instance but if the paramount object is to place the child's best interests at the heart of any decision making about parenting arrangements, then we contend it is worth doing all we can to determine what the child thinks.

   ICLs must not have this discretion until they are better trained and are accountable for their decisions.

d. ICL's must demonstrate current understanding of family violence and the impacts of this on children's wellbeing, safety and capacity to communicate.

e. ICL's must also either demonstrate excellent skills in communicating with children who are at best experiencing stress, and more likely, carry some trauma, OR where the ICL does not have these skills, they must be accompanied by people who work regularly with children in these difficult situations and who are able to facilitate the conversation so the children can express their view in ways comfortable to them and the ICL can observe and hear or see what the child is expressing.

f. ICL's must be prepared to invest in sufficient time to enable children to feel comfortable in their presence.

g. The courts must be willing to hear the views of children through:

   i. Allowing submission to the court of children's drawings and stories.

   ii. Engaging skilled play therapists, children's counsellors, and other trained people (particularly with young children and those whose disability inhibits their ability to speak) to determine the child's views on specific questions such as a proposal to live part-time with each parent.

   iii. Use of video, audio recordings and other technologies that may facilitate the voices of children.

iv. Children, particularly teenagers, able to address the court (in person or via video) regardless of the consent of their parents and without the presence of their parents if they wish.

v. Ensuring that all expert witnesses dealing with children demonstrate current expertise in understanding the impacts of family violence on children, and in skilful communication with children.

We recommend:

- That the roles of Independent Children's Lawyer must meet a professional standard and be subject to complaint and review mechanisms along with, and not limited to, processes of peer review.
- Every Independent Children's Lawyer must demonstrate current and considerable expertise in communicating with children and in understanding the effects of family violence on their wellbeing or be willing to be advised/ accompanied by someone who does.
- Every Independent Children's Lawyer or Family Consultant required to report to the Court must meet with affected children and take the time to form a valid position.
- Every Independent Children's Lawyer or Family Consultant who recommends children spend time with a formerly violent parent should be capable of being sued if the child is later harmed.

12. 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?

It will provided that all the improvements to the ICL position can occur. We cannot emphasise enough, the importance of this role and critical improvements to it. We know it is a big resource investment but ask the Attorney-General to take our points seriously.

The other risk is that some children will never be okay with speaking with an ICL but might be willing and able to authorise a mediator or skilled person working with them, to express a view to the court on their behalf.

We posed the following question in the survey and present the answers of 140 respondents.

Do you support amending the Family Law Act to require Independent Children's Lawyers (ICL) to do the following:	Yes	No	Not sure
a) To meet with the child and to provide the child with an opportunity to express a view	77.86%	7.14%	15.00%
b) To spend appropriate time with a child to enable them to feel confident to express a view	82.14%	6.43%	11.43%
c) To be trained in talking with children or to engage someone who is skilled to accompany them	87.14%	4.29%	8.57%
d) To engage a skilled facilitator to accompany them to talk with a very young child, child with communication disability or a traumatised child who wishes to have their say	84.29%	5.71%	10.00%
e) Amend the child-inclusive mediation services to enable a child to nominate an adult (family member, service provider, mediator etc.) to present their views to the ICL and/or to the court	80.00%	3.57%	16.43%

13. Are there any additional exceptional circumstances that should be considered for listing in subsection 68LA(5C)?

We asked this question in the survey. Here are some of the many responses:

- *"No. I do believe what happens at the meetings should be adjusted to suit the child though. I.e. If a child is traumatised and feels safe at home, the ICL should visit the child at home."*
- *"Gender may be an issue if for example the child has been abused by the father, meeting a male ICL could be traumatising."*
- *"Children are not adults and are usually traumatised by the parents' separation and other factors such as family violence. They should not be forced into the pressures of deciding A or B or C etc when a parents marriage fails."*
- *"Where there is risk of a powerful parent bullying or inducing and manipulating the ICL".*
- *"If the child is traumatised"*
- *"If this is to occur the ICL must have extensive training in gathering evidence, working one-on-one with children and be trained extensively in identifying domestic violence and psychological, emotional and physical abuse of children."*
- *"The ICL should only meet with a child with a professional trained in family violence. They should meet with both parents several times to get a fuller picture".*
- *"Sexual abuse, domestic violence is serious and power and control concerns means the child has been too seriously affected to provide realistic opinion reflective of abusive environment."*
- *"ICL's require specialist training in psychology and FDV. In my experience, they have been lawyers who don't always interpret the correct meaning behind behaviours, especially in the disability sector."*
- *"Children should not be embroiled in court matters full stop. If the legal system worked and properly identified abuse, the matter can be sorted without the need to involve children."*
- *"Yes, possibly where the child is scared of talking truthfully due to past trauma and fear of a parent's reactions."*
- *"NO, never!!!! The ICL needs to meet with the child! We are 18 months in - 5 months from trial, hardly heard anything from ICL, let alone met my child!"*
- *"If it may jeopardise their safety - complex communication needs."*
- *"Lawyers all know each other. They go out for dinners together. My lawyer spoke to the ICL off the record. There are concerns around personal friendships and conversations about cases."*
- *"My issue is in trusting the Independent Children's Lawyer (will they be alone with the child?) and dependant on the age of the child. I think it's important for children wanting the express themselves to have a safe place to do so without the influence of their parents however it needs to be ensured it's a safe place for children in the first place."*

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

14. Do you consider there may be adverse or unintended consequences as a result of the proposed repeal of subsection 68L(3)?

Not that we can foresee.

15. Do you anticipate this amendment will significantly impact your work? If so, how?

Not yet, although with a growing number of single mothers contacting us who are in the country on temporary visas, or in hiding from a violent Australian-born former partner, it may do so in the future. We cannot however anticipate any significant impact.

16. Do you have any other feedback or comments on the proposed repeal of subsection 68L(3)?

Only that we are a little concerned at the following wording in the Consultation Paper: "This change will support safer implementation of the Hague Convention by expanding judicial discretion to appoint ICLs in appropriate cases. **Where appointed,** the use of ICLs may also provide a greater opportunity for the child to express a view during proceedings and offer additional assurance that all available evidence relating to the child is introduced.' "

We ask that trained ICLs be appointed in every case where there is a child who may have a view on matters that involve parenting arrangements.

5: Case management and procedure

Harmful proceedings orders

17. Would the introduction of harmful proceedings orders address the need highlighted by *Marsden & Winch* and by the ALRC?

We think that in the main, they would, on the basis that:

- This presumes that the court will be paying attention to the nature of applications and their impact on the respondent.
- The making of the order seems to us a way of marking the overarching purpose of the court and restraining conflict even though the intention to remove "with the least acrimony possible" is being removed.
- The success of this change depends on judges receiving sufficient training on family violence that they see the play and particularly where a party is articulate, charismatic and successful, that they do not fall for the assumption that this means they are well intended. We see many cases where it is not necessarily true that the law is deficient but is certainly true that a sense of fellow feeling develops between judge and submitting partner such that applications are allowed year after year in spite of clear evidence of harm.
- Bringing all the courts powers relating to vexatious, harmful, or unmeritorious proceedings together helps self-represented parties keep things straight in their minds.
- We support meritorious applications proceeding.

18. Do the proposed harmful proceeding orders, as drafted, appropriately balance procedural fairness considerations?

Yes.

- Having applications submitted ex-parte in the first instance for the court to approve submission seems to us to both protect the respondent and to provide due consideration of the application itself. (Even where the respondent is informed that an application or a number of applications were submitted, being informed is very different from being served or confronting a document without warning.)

- We repeat that we support meritorious applications.

Respondents to our survey made several comments along these lines:

- *"I feel this needs more clarity as to how they will check to see if it's a vexatious claim etc before stopping it. This would be an extremely helpful thing to have in place and also free up the courts somewhat. It needs to ensure its thorough and does not stop genuine claims going through."*
- *"The judges need to have a balanced and non prejudice view of the material put before the court and allow material to be tested well before final trial."*

Another aspect of procedural fairness is the means by which respondents are notified that an application has been made against them. 91% of respondents to our survey said they would want to know, the remainder not sure. There were many comments, these particularly helpful:

- *"I got served at work - disgraceful. The other party's lawyer (applicant) should have to formally write to you with plenty of response time before the court action… like 14 days after receipt of notification to respond. And it should be a form letter - not allowing for a threatening tone."*
- *"Through own lawyer so understand what this actually means."*
- *"Once informed that the other party has filed a new application it would be useful to have a helpline to call for further information about what to expect next so as to allay any fears or anxiety about the process."*

19. 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?

We see here critical moments where the judge's understanding of what constitutes family violence and harm is part of a nuanced balance in trying to make the right call.

- On the one hand, it would be easy to say any matter where family violence or the best interests of the child alleged must be heard. On the other, we have years of examples where a former perpetrator of violence now accuses the former victim of committing violence against the accusing adult, or against their children.
- We recognise the extreme difficulty in some of these cases and rely on earlier suggestions around training and constant learning to ensure this behaviour is recognised and stopped well before the kind of harm experienced by the respondent in *Marsden & Winch.*
- We presume that family violence will always be a test. On this basis, we suggest that courts will always give deep and thoughtful consideration to any application from a respondent who has been subject to violence and is seeking to further protect themselves and their children.

20. 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?

As alluded to in our last answer, we do see possible adverse consequences. One of these is likely, in our view, to be a feature of applications in the next few years if the exposure draft is accepted in its current form.

Very many women and children have not fared well in decisions by the Family or Federal Circuit Courts. We have seen evidence (presented and confirmed in Magistrates Courts for example) of family violence toward both women and children and yet, the Family or Federal courts have awarded primary care or unsupervised access to the perpetrator. In some cases, despite evidence from police and magistrates' courts, judges have actually said they did not believe it and/or did not believe it would constitute ongoing harm, and/or that hospitalising the mother did not constitute a risk to a child.

It is likely that some mothers in these situations may file on behalf of their children to have the case revised and the children heard. We know many mothers have tried to do this but been warned off by lawyers who say their cases will be seen as vexatious.

As above, we suggest that that courts always give deep and thoughtful consideration to any application from a respondent who has been subject to violence and is seeking to further protect themselves and their children.

"Once again, it can be used against a protective parent. There are double standards in the courts for men and women. Where a man uses the courts to abuse it is nearly impossible to have him labelled vexatious. Yet when women try to use the courts/ legislation to protect themselves they are quickly labelled as using systems abuse and referred to as vexatious."

Overarching purpose of the family law practice and procedure provisions

21. Do you have any feedback on the proposed wording of the expanded overarching purpose of family law practice and procedure?

In general terms, we think it is excellent but that it could be better.

We disagree with the decision to leave out the words "with least possible acrimony". These words are, in our view, an essential part of the shift from popular understanding that there is a shared presumption of equal care and therefore, a strong sense of entitlement and an arena for combat.

- In our submission to the ALRC Family Law System Review, we recommended that: *A key objective of the Family Law System must be to ensure that the entire Australian public knows that a foundation principle of the system is the best interests of the children and that in order to effect this, parents have responsibilities, not rights.*
- We then went on to recommend fair and respectful treatment of all parties and active steps within the Court to minimise conflict.
- We believe that it is absolutely in the best interests of children that they see, even if it is years later, that the Family Law system and courts in particular recognised how hard this can be for parents and worked actively to ensure that parents were encouraged, supported and, where necessary, ordered to behave in ways that were not acrimonious, in order that the child or children could always remain the focus.

"I think the law needs to be more sensitive to women's compromised positions before the law and beware of the institutional biases that exist."

We appreciate the concern that those words ('acrimony') might make some fearful of raising concerns about safety and violence but in our experience, dodging the hard words will not achieve this. If fearful parties, whether female or male, are routinely treated fairly and respectfully and encouraged to put forward any concerns, they will do so. For years now, women

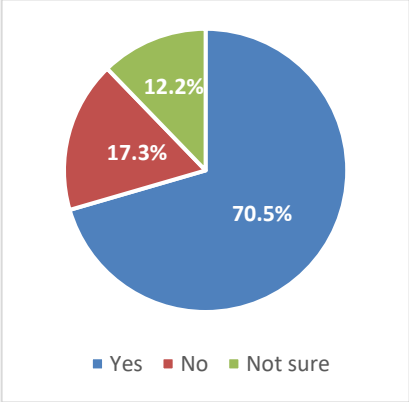
(our client group) have been routinely advised NOT to raise concerns of violence, largely by lawyers who suggest to them that this will see them lose their children.

We recommend the words "with least possible acrimony" be retained.

Schedule 6: Protecting sensitive information

Express power to exclude evidence of protected confidences

22. 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?



There are very good aspects of this, particularly that the onus sits with the party seeking to subpoena evidence of a protected confidence.
We asked this question in our survey and unfortunately don't have any comments to explain the 'no' answers (see responses in graph to the right).

23. Does the proposed definition of a protected confidence accurately capture the confidential records and communications of concern, in line with the ALRC recommendation?

We want to see Allied Health practitioners, particularly physiotherapists, osteopaths, social workers, counsellors, pharmacists, optometrists and speech therapists included, as while it may not be very common, we know each of these professions is involved in treating people who have experienced violence along with related injuries and traumas.

We also add hospitals to the list as many victims of family violence present to hospital emergency rooms for assistance. We draw attention to the evidence that 40% of the 16,000 victims of family violence attending Victorian hospitals over a ten-year period sustained a brain injury. 31% of victims of family violence attending Victorian hospitals over a ten-year period were children under the age of 15, and 25% of these children sustained a brain injury.[6]

The Consultation Paper (page 35) mentions that the Exposure Draft "assumes a baseline level of harm to both parties and public confidence." While 'parties' could cover all parties to a matter, we wish to express our view that any harm will additionally flow to the child and in their future, sometimes prove a barrier to their own seeking help for anything from drug or alcohol counselling to employment-based advice.

24. What are your views on the test for determining whether evidence of protected confidences should be admitted?

Paramount consideration of the child's best interests is a good test although we urge caution in using it. Lawyers and parties are sometimes adept at making something seem what it is not and an argument that it may be in the child's best interests to allow protected material might be just a clever guise.

[6] Brain Injury Australia: The prevalence of acquired brain injury among victims and perpetrators of family violence. 2018 Available at: https://www.braininjuryaustralia.org.au/download-bias-report-on-australias-first-research-into-family-violence-and-brain-injury/

25. Should a person be able to consent to the admission of evidence of a protected confidence relating to their own treatment?

Yes, but we suggest the test should be the same as for other matters: *Is it in the child's best interests?*

Schedule 7: Communication of details of family law proceedings

Clarifying restrictions around public communication of family law proceedings

26. Is Part XIVB easier to understand than the current section 121?

Yes.

84% of 137 respondents to our survey support clarifying restrictions around communicating their proceedings.

This support notwithstanding, 35 made additional comment and raised issues including:

- The importance of being able to seek help and support and to know when you can talk safely.
- Deeply held concerns that the current and new section will continue to protect the perpetrators of domestic violence and child abuse.
- Concerns that judges and other judicial officers including lawyers, report writers etc. are never held to account for decisions that ignore other court findings, return children to violent perpetrators and other failings.
- That the "mess that is the Family Court" is a direct result of no public oversight. One of the people making this point noted that in the UK, the media have started to report on the family court, protecting the identity of participants.
- Another woman making this point above noted that in trying to have issues address, she contacted a number of public authorities. She writes:

  "*An email from Anne Hollonds the Children's Commissioner explained that as the matter is currently in the Family Court, due to judicial immunity, they (Human Rights Commission) would be unable to help myself or my child. I felt completely powerless and further victimised and had nowhere to turn for support or advice*."
- One of the people responding is a child of a single mother, over 18 years of age who had experience of the family law. S/he says:

  "*Clarity is fine, however, perhaps sec 121 needs a 'best interest of the child' consideration too. For example, if the child is now adult and agrees with public advocacy for change, this meets the test of best interest."*
- Some pointed out that their ex-partner had spoken out publicly including in one case, *"supplying family court documents to damage my reputation"* and the courts did nothing.

Overall, the consensus is that while some sensitivity may be appropriate, keeping silent about what actually happens under the family law, perpetuates family violence.

We submit that this is a very small sample of a very large public frustration. The Family Law

Council has a specific charter to advise the Attorney-General on a wide range of matters involving the family law system, yet no capacity to hear from individuals affected by decisions.

27. Are there elements of Part XIVB that could be further clarified? How would you clarify them?

Every party to a family law matter could receive a clear, plain language version (in their own preferred language), with examples about:

- How they can seek help without breaching the requirement.
- How they can participate in public advocacy for change without breaching the requirement.
- How to use or not use screenshots e.g. a demand from a partner that names a child.
- Explanations of how this will be policed. This is important as currently it appears to rely on one party to report the other party to the court and in so doing, incur all the costs and exhaustion of yet another application.

28. Does the simplified outline at section 114N clearly explain the offences?

No. Terms such as “certain persons” are completely unclear. Better to say what you mean e.g. any parent or child etc

29. Does section 114S help clarify what constitutes a communication to the public?

This question is confusing as 114S seeks to clarify what does NOT constitute a communication to the public.

Generally, yes, it helps but whom? It can never be presumed that distraught parties will be able to make any sense of material written in such a way.

We favour active discussion with people, materials written plainly in their language, and a hotline to the courts for any party to ask any question of clarification.

Schedule 8: Establishing regulatory schemes for family law professionals

Family Report Writers schemes

30. Do the definitions effectively capture the range of family reports prepared for the family courts, particularly by family consultants and single expert witnesses?

As far as we are aware.

31. 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?

As far as we are aware.

While we strongly support the intentions of this schedule, we are concerned about the powers some clinical psychologists appear to wield. It has been drawn to our attention that a Victorian clinical psychologist has apparently developed RIFT (Reportable Intensive Family Therapy), where children who are resisting contact are compelled to live in the home with the parent for whom they have an aversion, and the psychologist breaks down their aversion. A six year old has

recently been ordered to engage in this, with no information provided to her primary parent beyond this description. Lawyers appear to be the people most successfully generating interest in this therapy.

We strong request that there be a requirement that the family report writers use approved therapies and methods and that all family report writers be fully trained in family violence and child development.

"Reforms to Family Report writers, ICLs are valuable, but will not resolve the experience I had where they are influenced and persuaded by charismatic and authoritarian perpetrators of Family Violence. Primary weight must be given to the recommendations of case workers, social workers at Family Violence shelters. They are qualified professionals who have a specialist understanding of FV (in all forms), can often offer contemporaneous and historical evidence of their engagement with the victim/children, and can offer the Court their experience and knowledge of a victim/family that spans well beyond one or two hour sessions conducted by 'experts' during proceedings."

Commencement of the changes

32. Is a six-month lead in time appropriate for these changes? Should they commence sooner?

We strongly urge consideration of immediate application of these changes to matters that are just starting now. It is like a dilemma in medical ethics: If the clinical trial or report shows a treatment is working, it is unjust to continue with a lesser treatment or placebo.

We have women contacting us as we write this submission, pleading their case to have any changes, once legislated, applied to their cases. Given the relative speed with which the Chief Justice shifted the procedures of the courts online during COVID restrictions, we are confident he can lead these changes expeditiously.

33. Are the proposed application provisions appropriate for these changes?

We do not really understand this question and are therefore unable to comment.

Final words

"I appreciate the opportunity given to respond to proposed changes and to finally have a voice. This survey raised important ideas, particularly those about protecting victim-survivors as they navigate the Family Court process. I am heartened that amendments will be made to Family Court that may make it safer for women and children to speak out about abuse without the fear of being vilified or punished by a broken system as is currently happening to so many of us."

This final comment is from a child, 16 years of age, who has been through the family court. Our survey was open only to single mothers/ women raising children alone and children over 18 years of age who had experience of the family court. We had 24 over 18, this one at 16, and a grandparent.

"Please help families be healthy and happy instead of destroying them. Even adult kids like me are extremely upset and stressed by the Family Court. I have been feeling very depressed and anxious due to what has happened to my family for the past 3 years. Even though my mum has finished in Family Court my dad sends her very abusive messages and tries to tell me my mum is crazy and a psycho. My dad hit me and my mum and siblings. No one protected us. No one cares about my family."