THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: FLC/CLIC/IIC/PDL:CBsh240223

24 February 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: natalie.cooper@lawcouncil.asn.au

Dear Dr Popple,

Family Law Amendment Bill Exposure Draft and Consultation Paper

Thank you for the opportunity to provide feedback on the draft Family Law Amendment Bill 2023 (**Bill**) and Consultation Paper. The Law Society's Family Law, Children's Legal Issues, Indigenous Issues and Privacy and Data Law Committees contributed to this submission.

General comments

The Law Society supports the overall aim of simplifying the objects of Part VII of the *Family Law Act 1975* (Cth) (**FLA**), while suggesting the objects emphasise the importance of children's best interests in the context of parenting arrangements.

The Bill proposes significant changes to the approach to making parenting orders. The Law Society supports the removal of the presumption of shared parental responsibility and the requirement to consider equal time with each parent, in favour of focusing on the best interests of children. However, while we support simplifying the factors to be considered when making parenting orders, in our view the proposed list of factors may result in important factors being overlooked.

Other aspects of the proposed reforms are broadly supported, including:

- expressing the rule in *Rice & Asplund* in the FLA;
- clarification of the provisions for enforcing child-related orders;
- requiring an Independent Children's Lawyer (**ICL**) to meet with a child, including in Hague Convention cases;
- the introduction of harmful proceedings orders as a measure to curb the use of repeated and vexatious litigation; and
- introducing professional standards and requirements for family report writers.

We consider there are adequate existing provisions in the FLA that allow a court to exclude evidence without the need for provisions excluding evidence of 'protected confidences'.

Regarding the proposed definitions 'member of the family' and 'relative', we query the move away from more familiar terminology such as kin and kinship to describe a family member of an Aboriginal child or Torres Strait Islander child.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
Law Council OF AUSTRALIA
CONSTITUENT BODY

The Law Society strongly supports the existing Indigenous lists which are run in a number of registries of the Federal Circuit and Family Court of Australia (**FCFCOA**). While it does not appear that the Bill contains any provisions that would affect the operations of these lists, in our view, it is imperative that any amendments to the Family Law Act do not hinder their continued operation.

Below are our responses to the questions in the Consultation Paper.

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 support a simplification of the objects of the Part as set out in section 60B of the Bill. We agree with the ALRC's finding in its Final Report[1] (**ALRC Report**) that the current long list of objects is prone to being confused with the substantive considerations to be applied in making applications for parenting orders.

   In our view, "to ensure that the best interests of children are met", as set out in proposed section 60B(a), is an appropriate object. However, it is very broad and does not reflect the policy intent of Part VII, as indicated in the Consultation Paper, of emphasising the importance of children's best interests *in making decisions about parenting arrangements*. We suggest greater clarity would be achieved, without excessive complexity, by adding two of the objects set out in the current subsections 60B(1)(a) and (b), namely:

   - ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child, and
   - protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

   These objects are directly relevant to, and flow on from, the object in proposed section 60B(a) and would seem to express the intention of the Part as amended by the Bill. Noting that the general reference to the Convention of the Rights of the Child 1989 (**Convention**) is also to be retained, in our view the inclusion of these additional objects gives expression to the most relevant Articles in the Convention.[2]

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

   The proposed amended Part VII retains the underlying objectives of ensuring children still have the benefit of parenting from both their parents, subject to their best interests, and of ensuring children are protected from harm. By including the additional objects as proposed above, the Part would remain child-centred.

   Additionally, as drafted, section 60B would include only two objects: to ensure the best interests of children and to give effect to the Convention. While we acknowledge the appropriateness of formally referencing the Convention, reducing the objects to these two objects would give increased prominence to the object of giving effect to the Convention. As a result, the objects of the Part overall may be less clear, and in practice may be particularly confusing for self-represented litigants. Including the additional two objects, as

[1] Australian Law Reform Commission, Family Law for the Future – an Inquiry into the Family Law System (Report 135) March 2019, 158ff.
[2] United Nations Convention on the Rights of the Child 1989, Articles 9.3, 19.1.

we suggest above, would help to avoid this difficulty and assist in the interpretation and application of the Part to parenting proceedings.

Best interests of the child factors

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

   Proposed section 60CC(2)(a)(ii) requires the court, when determining a child's best interests, to consider what arrangements would promote the safety of each person who has parental responsibility for the child.

   In the experience of our members, it is not unusual in proceedings for a child to be living with another person such as another family member, whether temporarily, regularly or long-term, who does not have parental responsibility as defined in section 61B. For example, a child may be placed with a carer while parental responsibility is allocated to the Minister for Families and Communities. That person may consequently be at risk of harm, however their safety need not be considered by the court under proposed section 60CC(2)(a)(ii).

   We suggest the subsection should extend to the protection of another person with whom the child is living, but who does not have parental responsibility.

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

   We support the simplification of section 60CC and agree that removing the distinction between 'primary considerations' and 'additional considerations' may be easier for parties, and particularly for self-represented litigants, to understand. This may facilitate the resolution of parenting disputes.

   The Consultation Paper notes that the intention of proposed section 60CC is to list the most commonly arising considerations in parenting matters rather than including all factors that may be relevant in any given matter. It appears the intention is that other factors relevant in each case would be considered pursuant to the 'catch all' provision at section 60CC(2)(f). Our concern is that, despite section 60CC(2)(f), there is a risk that relevant factors may be overlooked by parties or the court. These include:

   - the child's maturity or level of understanding (current subsection (3)(a));
   - a parent's past willingness to take opportunities to engage in parenting (current subsections (3)(c) and (ca));
   - the likely effect on the child of any change in circumstances (current subsection (3)(d));
   - the practicalities of any arrangement (current subsection (3)(e)); and
   - whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child (current subsection (3)(l)).

   It may be helpful to include these factors as examples in a note to proposed section 60CC(2)(f).

   Additionally, in proposed section 60CC, the words "having regard to the carer's ability and willingness to seek support to assist them with caring" are unnecessary and may encourage one party to put into issue, without merit, the other party's capacity to care and their need for support. We suggest those words be deleted.

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

   The Law Society supports requirements for the court to have regard to the right of an Aboriginal child or Torres Strait Islander to enjoy their culture as practiced by their own families and communities.

   More broadly, consideration could be given to also acknowledging that regard should be given in every case to every child's right to enjoy their culture as practiced by their families and communities, as a reflection of the cultural diversity that exists in Australia and noting this is consistent with the existing objects of Part VII. At the very least, it could be included as an example of a factor to be considered in a note to section 60CC(2)(f).

Removal of equal shared parental responsibility and specific time provisions

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?*

   In relation to legal practitioners, it will. The existing framework is a complex legislative pathway which, in our experience, is at times misconstrued (particularly by self-represented parties) as providing for a presumption of equal time. The proposed amendments will obviate the need to advise that the presumption of equal shared parental responsibility differs to shared care, what a rebuttable presumption means, and provide legislative framework advice about relevant factors in ss 60B-65DA.

   The existing pathway to a parenting order results in a focus on process-related outcomes rather than on determining care arrangements that are in a child's best interests.

   Removing the presumption of equal shared parental responsibility and the consequent consideration of specific time arrangements, will help to direct parents' attention away from the conflict between them, and away from the notion of competing for time with, and control over, the children. It will be more straightforward to advise a client that the FLA directs focus to their children's best interests, without the need to explain the current legislative framework. The legislative framework will also be easier for self-represented litigants to understand.

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?*

   Consistent with the response to question 6 above, the process of advising parties about what they need to consider will be simpler. The obligation on legal practitioners to focus primarily on the best interests of children will encourage a child-focused approach and enable practitioners to direct parents' attention away from what time they see as desirable or as an entitlement for themselves.

   In relation to clients experiencing family violence, the amendment will enable their legal practitioners to focus on what arrangements are appropriate for their circumstances, and what would be child-focused and safe, if arrangements involving shared care and substantial and significant time would not be appropriate.

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?

Section 65DAC currently provides that where the court orders that the parties have shared parental responsibility in relation to a major long-term issue in relation to the child, the parties have an obligation to make the decision jointly (subs (2)). That obligation will be fulfilled if they:

- consult each other in relation to that decision (subs (3)(a)); and
- make a genuine effort to come to a joint decision (subs (3)(b)).

With the removal of the presumption of equal shared parental responsibility, the court would still have occasion to make orders for shared parenting responsibility in relation to particular major long-term issues. The parties may seek such orders by consent, to formalise via court orders their agreement to engage in joint decision-making on the issue (for example if the issue will arise in the future). Alternatively, one party may seek such orders because the other wishes to exclude them from decision-making on the issue.

There may also be circumstances where the parties do not agree about decision-making on the issue, but have not sought specific orders in that regard. In considering the overall best interests of children, the court may consider the issue and make an order of its own motion regarding decision-making, although it has no obligation to do so. This could include an order for shared parental responsibility on the issue.

Accordingly, the Law Society considers there would still be a place for section 65DAC(2), in providing that the exercise of shared parental responsibility in relation to a major long-term issue involves an obligation to make decisions jointly on that issue. Some of our members take the view that the existing provision is not well drafted, particularly the requirement to make a 'genuine effort', and can serve as a trigger for further dispute. If the provision were to be redrafted, as a matter of principle, the requirement to consult should be retained, but it should be made clear that there is no formal requirement to make a joint decision.

Reconsideration of final parenting orders (Rice & Asplund)

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?*

Yes, however we suggest section 65DAAA(1) should include words to the following effect (emphasis added):

> If a final parenting order is in force in relation to a child, a court must not reconsider the final parenting order *(other than by consent)* unless…

The inclusion of these words would be consistent with the suggested wording at Appendix G to the ALRC Report which sets out the suggested drafting of particular provisions in the FLA.

The foundation of the common law rule in *Rice & Asplund* is that re-litigation of a matter before the courts would not generally be in a child's best interests, not that reconsidering a final parenting order is generally not in a child's best interests.

The Consultation Paper states that the FLA provides two mechanisms for variation or replacement of existing parenting orders: making a parenting plan, or seeking to have the orders amended through the courts, and that the rule in *Rice & Asplund* governs the second option. In practice, however, parties do not commonly vary parenting orders by

making a parenting plan that overrides the existing order (although that is available to them), or have orders amended through the courts (that is, via litigation). More often, parties reach an agreement to vary existing orders and file an application for consent orders giving effect to same. Parties also agree on consent orders at various stages of the proceedings, including before a court has considered whether there has been a significant change of circumstances since the final parenting order was made. The paramount consideration is that the parenting order is in the best interests of the children.

Presently, parties who consent to vary final parenting orders in application for consent orders or during litigation are not required to satisfy the principle in *Rice & Asplund* before the court considers making the order. There is no requirement in the application for consent orders to address that matter or to make a submission to the court on that issue and it would be an unnecessary hurdle to parties reaching an agreement that they consider is in their children's best interests.

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

We consider the choice of considerations appropriately reflects current case law. However, we suggest including words to the following effect at the commencement of the proposed 65DAA(2)(a), (emphasis added):

> *The past circumstances, including* the reasons for the final parenting order and the material on which it was based …

The inclusion of those words would capture the many situations whereby final parenting orders are made by way of an application for consent orders or resolved by consent after proceedings have been initiated, but prior to any reasons for judgment being delivered by a court, following a final hearing.

Additionally, we suggest the word 'new' in proposed section 65DAAA(2)(b) may be interpreted as referring to material that post-dates the final parenting order. This would not adequately capture a circumstance where relevant material may have existed at the time the final parenting order was made, but as a result of a failure to disclose relevant information, it was not available to the court that made the final parenting order. We suggest section 65DAAA(2)(b) read along the following lines:

> whether there is any relevant material available that was not available to the court that made the final parenting order (including due to failure to disclose relevant information).

Schedule 2: Enforcement of child-related orders

11. *Do you think the proposed changes make Division 13A easier to understand?*

The Division still retains some complexity overall, but in our view is significantly improved on the existing Division 13A provisions.

12. *Do you have any feedback on the objects of Division 13A? Do they capture your understanding of the goals of the enforcement regime?*

The objects provisions make clearer the overall purpose of the Division.

13. *Do you have any feedback on the proposed cost order provisions in proposed section 70NBE?*

    The proposed provisions generally improve clarity regarding costs orders in Division 13A proceedings. We note that proposed section 70NBE deals with costs orders both against complainants and against respondents. While the meaning of the section is not ambiguous, it may be clearer to court users, particularly self-represented litigants, if section 70NBE(2) and (3) specified that they concern costs orders against complainants.

    We also suggest adding at the end of section 70NBE(3) words to the effect "unless the court is satisfied that it is appropriate to do so in the circumstances". This would enable the court to respond appropriately in circumstances that justify a costs order, even though one of the two subparagraphs (a) or (b) apply.

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?*

    Yes. There may be circumstances where, given the technical nature of a contravention application and the requirements for presentation of the evidence about whether a contravention occurred, the court is unable to make any positive finding, but it is still appropriate to consider making a costs order.

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?*

    We agree with the approach enabling the court to make a contravention order of its own motion in child-related proceedings. We note that in practice, the need to do so may only arise in limited circumstances: either where the parties already had interim child-related orders in place, and were pressing for final determination by a court, or where the parties were seeking to reopen parenting proceedings with a view to obtaining alternative child-related orders.

    However, limiting the court's powers to considering a contravention matter on application from a party would mean that a contravention order could only be made in circumstances where there is no cost or funding barrier to the party making such an application. The current approach does provide the court latitude to comprehensively address contravention of child-related orders, where those matters impact on the interests of children. For these reasons, the broader approach proposed in the Bill is supported.

16. *Do you have any other feedback or comments on the amendments in Schedule 2?*

    No.

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

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?*

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?*

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?*

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

In response to questions 17-20, the Law Society queries the move away from more familiar terminology such as kin and kinship to describe a family member of an Aboriginal child or Torres Strait Islander child, particularly noting that section 61F of the FLA requires the court to "have regard to any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture."

We note that family law jurisprudence has developed in respect of the concepts of 'kin', 'kinship structures' and 'kinship responsibilities'.[3] Furthermore, kinship is a concept that is used in other jurisdictions, including in the NSW legislation relevant to the care and protection of children[4] and the definition of 'domestic relationships' in NSW apprehended violence orders.

We support the inclusion of the term 'ancestor' and support the reference in the definition to the fact that this connection is to be determined and recognised by the Aboriginal or Torres Strait Islander community itself. However, in our view, it is essential that a kinship group and kinship roles be recognised clearly in the definition, without regard to terminology such as 'related to' which continues to afford primacy to biological relationships.

We suggest that language to this effect would more likely embed the cultural expectations associated with these roles in the legislation and require a judicial officer to consider the kinship structure and relationships. In some circumstances, the burden on litigants to prove they were a 'relative' in accordance with the culture of the child's family or community, and the cultural understanding and expectations associated may be mitigated. To take an example of a child has been cared for by an aunt from birth: a non-Indigenous aunt would not have to prove her role as an aunt as the role is understood in the mainstream context. However, if the aunt is Indigenous, her role might more accurately be understood as a 'cultural mother' and she would be required to lead evidence about her kinship responsibility/role as a cultural mother. We suggest that if the legislation used kinship

---

[3] See for example, Titterton, Adelaide, "Indigenous Access to Family Law in Australia and Caring for Indigenous Children" [2017] UNSWLawJl 7; (2017) 40(1) UNSW Law Journal 146 noting, for example, case law as far back as *Re CP* (1997) 21 Fam LR 486, where the Full Court of the Family Court of Australia recommended introducing a provision into the *Family Law Act* that would require judges to take account of Indigenous kinship care systems and childrearing practices: at 506 (Nicholson CJ, Ellis and Moore JJ).

[4] *Children and Young Persons (Care and Protection) Act 1998* (NSW) section 3 provides as follows:

> **kin** of a child or young person means a person who shares a cultural, tribal or community connection with the child or young person that is recognised by that child or young person's family or community.
> **relative** of a child or young person means any of the following—
> (a) a parent, step-parent, or spouse of a parent or step-parent, of the child or young person,
> (b) a grandparent, brother, sister, step-brother, step-sister, cousin, niece or nephew, uncle or aunt (whether by blood, marriage, affinity or adoption) of the child or young person,
> (c) a person who has parental responsibility for the child or young person (not being the Minister, the Secretary or a person who has parental responsibility other than in his or her personal capacity),
> (d) a person who has care responsibility for the child or young person under the *Adoption Act 2000* (not being the Minister, the Secretary or a person who has care responsibility other than in his or her personal capacity),
> (e) in the case of a child or young person who is an Aboriginal or Torres Strait Islander—a person who is part of the extended family or kin of the child or young person.

terminology that at first instance acknowledged broader Indigenous kinship structures, and the roles and responsibilities, the aunt in this example may be less likely to be required by a judicial officer to provide anthropological evidence on that point.

For the reasons above, we suggest that that the concept of a family member of an Aboriginal child or Torres Strait Islander child, may be more accurately captured by drafting to the effect of "a person who, in accordance with the child's Aboriginal or Torres Strait Islander culture, is part of the child's kinship group/structure, as recognised by that child's family or community."

Schedule 4: Independent Children's Lawyers

Requirement to meet with the child

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?*

    The Law Society supports the requirement for the ICL to meet with the child. The Guidelines for Independent Children's Lawyers (2021), which have been endorsed by heads of jurisdiction in the FCFCOA and the Family Court of Western Australia, include an expectation that the ICL will meet with the child.

    The proposed section does not specify the frequency or timing of meetings with children, or how meetings are to occur (for example, whether face to face or online). While we do not suggest the legislation should provide this level of detail, we anticipate the provision would result in applications to the court by the parents to require ICLs to meet children at specific times or in a specific way. This may have caseload management implications for the court.

    The effectiveness of the proposed new arrangements will also rely on the capacity of available ICLs to provide services in compliance with their duties. We anticipate that the proposed arrangements would result in the work required of ICLs increasing. For example, a judicial officer may take the view that the ICL should meet with the child prior to each court event. In addition, if the ICL considers that exceptional circumstances apply, they may consider it appropriate to seek a determination that exceptional circumstances exist. Any increase in the work required of ICLs will have resourcing implications for legal aid commissions.

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?*

    The existing subsections 68L(5) and (6) enable the court to make facilitative orders to assist an ICL to meet with a child in the face of, for example, parental opposition, assisting children to exercise their rights to participate. The new subsection (5) appears to be directed to a different purpose, namely setting out requirements for an ICL to meet with a child and their duties. Members are of the view that the removal of the existing subsections is unnecessary, will not result in improved processes and may result in more applications and increased costs.

    Otherwise, the proposed amendment strikes a reasonable balance between competing considerations.

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

    Situations which could be included as exceptional circumstances include where the child is a witness in criminal proceedings or where there are current investigations by the Joint Child Protection Response Team (or the equivalent in other states and territories).

    Consideration could also be given to including circumstances where the child has a disability so that meeting the ICL is inappropriate. This is likely to affect only a small number of matters where a child has such a significant disability that their participation is impossible. However, we would counsel caution in setting an appropriate threshold for these instances to be considered "exceptional circumstances", and suggest clear guidelines for assessing capacity.

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

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

    The Law Society considers it is appropriate to appoint ICLs in applications under the Hague Convention. Many of these proceedings involve allegations of family violence and other issues which pose a risk to children. The involvement of an ICL would assist the court in determining what is in the best interests of the children, which is a paramount consideration in Hague Convention matters.

    We note, however, that section 117AAA limits the making of a costs order in a Hague Convention matter to a party who has been substantially successful. This would appear to prevent a costs order being made in favour of an ICL in such matters. Consideration could be given to creating an exception in the case of ICLs.

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

    An increase in the number of ICLs being appointed in Hague Convention matters will result in more grants of legal aid for ICLs. This will have resourcing implications for legal aid commissions.

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

    We agree with the suggestion in the Consultation Paper that in these matters ICLs can facilitate more efficient resolution in complex matters through, for example, pre-trial resolution, active case management, compensation for deficiencies in parties' cases and expedited return processes. Accordingly we consider that the repeal of the current section 68L(3) is appropriate.

Schedule 5: Case management and procedure

Harmful proceedings orders

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

In general terms, the introduction of harmful proceedings orders is likely to adequately address concerns about harm to parties that is occasioned by repeated and vexatious litigation in the family law system, as highlighted by *Marsden & Winch* and the ALRC.

In the experience of our members, the existing vexatious proceedings powers do not provide adequate protection against the other party in these circumstances. As suggested in the Consultation Paper, they focus on the intent of the applicant rather than the impact on the other party or their family.

The proposed provisions include a new power, distinct from the vexatious proceedings provisions, such that the court may prohibit a party from further initiating proceedings if, on reasonable grounds, the other party would suffer harm or the child the subject of the proceedings would suffer harm. In our view, as highlighted in *Marsden & Winch,* this will ensure that the modification and exception to a fundamental common law right / privilege to commence proceedings is clearly and explicitly stated in statute.

We note, however, that under section 102QAC(1), it appears the power to make harmful proceedings orders would be limited to prohibiting the filing of fresh proceedings. It would not encapsulate different types of applications such as further interlocutory applications within existing proceedings. We suggest extending the power to make harmful proceedings orders to particular types of proceedings or applications within proceedings.

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

We agree with the Law Council that measures to address process abuse in family law matters must balance the rights (and needs) of people to be able to access the court system, against abuse of both other litigants and the system itself by misuse.[5]

In our view, the proposed amendments largely achieve that balance. In circumstances where the court is satisfied that proceedings would cause psychological harm, major mental distress or detriment to the other party's capacity to care for a child and a prohibition order is made, the court would assess applications subsequently made by a party subject to the prohibition, requiring them to seek leave before proceeding with further applications and serving them on the other party. This would not prevent access to the courts, but would serve as an effective gatekeeping mechanism, preventing frivolous or harassing applications and reducing the burden on the court system and negative impacts on litigants. The provision in proposed section 102QAC(5) requiring the court to grant the person a hearing or the chance to be heard before making a harmful proceedings order ensure that the procedural fairness considerations are appropriately balanced.

We note that any application under section 102QAE would be made *ex parte* and without the other party being afforded procedural fairness in having an opportunity to respond to any application for leave to initiating proceedings. However, in circumstances where the applicant is already subject to a harmful proceedings order, to notify the other party without the court making a determination as to whether the proposed new proceedings are not frivolous, vexatious or an abuse of process, may be contrary to the intention of the provisions. To balance potential harm against the need for procedural fairness, we suggest including in section 102QAG a judicial discretion to direct that the other party be served with the application or affidavit before granting leave. Having regard to the period of time that has passed since the making of the harmful proceedings order, and to the application or affidavit for leave that has been filed, the court may view it appropriate to provide the

[5] Law Council of Australia, submission to ALRC, Review of the Family Law System – Issues Paper 48, May 2018, [279].

other party an opportunity to respond to the application before leave is granted. Providing such an opportunity may help to reduce the incidence of review or appeal of harmful proceedings orders.

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?*

    We consider the tests are appropriate.

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?*

    As drafted, the proposed provisions would empower the court to make harmful proceedings orders on a summary basis based on evidence obtained at a hearing of the applicant and a review of the history of relevant proceedings. However, it appears the court would also have a discretion to require further evidence from the vulnerable party to assist in its determination of anticipated harm, such as psychological harm, oppression, major mental distress, or negative impact on the other party's ability to care for the child. The need for such evidence will vary depending the type of application brought to the court, including the timing of any application and/or whether the application for a harmful proceedings order is brought following a final determination where relevant findings of harm have been made. In exercising this discretion, the court will also need to consider the likely burden on the vulnerable party of producing such evidence, in comparison to the likely adverse impact of the proposed new proceedings on the vulnerable party or on children in their care. The court will also need to consider the overarching purpose of family law proceedings to ensure proceedings are conducted in a proportionate and cost effective manner.

    In our view, the operation of the provisions should be closely monitored to determine how these considerations are applied and whether the legislative intent of the amendments is delivered.

Overarching purpose of the family law practice and procedure provisions

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

    The general codification of the overarching purpose of family law proceedings into the FLA, which already exists in the *Federal Circuit and Family Court of Australia Act 2021* (Cth), is supported, noting it is consistent with recommendations articulated at [10.4] and [10.18] of the ALRC Report. However, proposed subsections 96(4) and (6), in respect of costs consequences of a breach of duty to comply with the overarching purpose, are not supported.

    We support the recommendation of the Joint Select Committee and the ALRC that failure to act in accordance with the overarching purpose should attract a cost consequence. We hold concerns, however, that these provisions require the court, in the exercise of its discretion to make costs orders, to consider *any* failure to comply with the duty to comply with section 96, rather than conferring a broad discretion on the matter. This may give rise to disputes as to what level of cooperation is required to comply with the overarching purpose and distract from the core issues of the dispute. We suggest replacing the words “must take into account any failure to comply with” in section 96(4) with words to the effect

"shall have regard to" in order to confer an appropriately broad discretion in determining such issues.

We note this is consistent with the current principle relating to determining costs that no one factor as contained in section 117(2A) ought to prevail over another when the court considers whether to order a party to pay the costs of another. In *Medlon & Medlon (No 6) (Indemnity Costs)* (2015) FLC 93-664 at 80,400, Strickland J held that it is a matter of weight that is accorded to each of the relevant factors in the trial judge's discretion.[6]

Schedule 6: Protecting sensitive information

Express power to exclude evidence of protected confidences

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?

The Law Society understands the concerns which were raised with the ALRC regarding the use of evidence of protected confidences in family law proceedings. We support the principle expressed in Recommendation 37 of the ALRC Report that the court should have an express statutory power to exclude evidence of 'protected confidences'.

However, it is important in children's matters that the court has access to the best evidence on what is in the best interests of the child. Information from medical practitioners, psychologists and counsellors is likely to assist in the process. We consider that ensuring the court has access to all available information which is relevant to the child's best interests outweighs the interests of individuals in keeping information confidential.

The FLA currently enables the court to exclude evidence if, for example, it is of no probative value (section 69ZT(3)(b)(iii)). In our view, provisions which allow a court to exclude evidence are underutilised. We consider it preferable to continue to rely on the court's existing power to exclude evidence than to introduce the proposed provisions.

We note also that the proposed provisions appear to go further than Recommendation 37, in providing that evidence is not admissible unless the court gives leave (rather than evidence being presumed admissible until excluded by the court). It is unclear how the proposed provision would operate procedurally, for example, whether parties would seek leave to file a subpoena adducing the evidence, or whether submissions would be heard as to the admissibility of the evidence after it has been filed. Should the provisions be enacted, we look forward to commenting on draft Rules in due course, noting the risk that the process may increase costs and delays.

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

We have no concerns about the proposed definition.

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

The wording in proposed subsections 99(5)-(7) echoes the language of other provisions such as section 126B of the *Evidence Act 1995* (NSW). That provision fulfils a different

[6] See also *Fitzgerald (as child representative for A (Legal Aid Commission of Tasmania)) v Fish* (2005) per Kay, Warnick and Boland JJ at 130: there is "nothing to prevent any factor being the sole foundation for an order for costs" being made.

purpose, as it operates particularly in criminal trials, where a defence lawyer may seek to adduce evidence of a complainant's counselling records when those records do not assist in determining the issue at hand (for example, whether a sexual assault took place). In proceedings such as a criminal trial, the public interest in the confidentiality of records is relevant. In family law proceedings, however, the overriding consideration should be whether the evidence assists the court in determining what is in the best interests of the children. We suggest reframing the test with that emphasis.

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

    It is appropriate for a person to be able to consent to the admission of evidence of a protected confidence relating to their own treatment. However, it appears that providing a person the ability to consent would not also address the need for an ICL to provide the best evidence to the court. Where a person does not consent, the ICL may need to make an application to the court to adduce the evidence. We suggest this could be avoided if section 99 made provision for an ICL to consent where appropriate.

Schedule 7: Communication of details of family law proceedings

Clarifying restrictions around public communication of family law proceedings

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

    Yes.

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

    We note the ALRC's finding that "it is also critical that the Family Law Act enables family courts to share information with state and territory family violence and child protection systems when appropriate" (ALRC Report at [4.164]). Accordingly, we suggest section 114S(2) should specify that it does not restrict sharing of "pleading, transcript of evidence, or other document" with professional regulators (not just legal regulators), government agencies, family relationship services, family law service providers, service providers for children or family violence service providers, in connection with the agency's or organisation's provision of service to the family or a family member.

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

    In relation to the first two paragraphs, yes. The third paragraph may be clarified by providing the examples that are contained in section 114S(2), which provide necessary context.

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

    Yes, subject to our response to question 37.

Schedule 8: Establishing regulatory schemes for family law professionals

Family Report Writers schemes

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

The Law Society supports appropriate professional regulation of report writers in family law matters. The proposed definition covers a wide and appropriate range of reports.

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?

We have no objection to the proposed matters for which regulations may be made and look forward to engaging in further consultation regarding the standards and requirements proposed for inclusion in the regulations in due course.

Care will be needed in drafting regulations that set appropriate standards without creating an unreasonable barrier to existing or prospective family law report writers. It will be important to consult widely on the content of the regulations, particularly with existing report writers and professional organisations representing those report writers.

Commencement of the changes

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

The lead time should aim to strike a balance between allowing sufficient time for education and preparation for the changes, and minimising the potential for parties to gain a strategic advantage from the amendments, particularly as regards to the amendments to the considerations relating to parenting arrangements.

A six-month lead time may be an unnecessary delay to the commencement of the amendments in circumstances where the new law would be simplifying and codifying the law as it stands. However, in the event that the amendments apply to all matters unresolved before the court, as proposed below, and to any proceedings commenced following commencement of the Bill, a six-month lead time is not opposed.

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

It is of concern that aspects of the reform would only apply to proceedings filed after the commencement date. This may result, prior to the commencement date, in an influx of new applications filed in haste in order to gain a strategic advantage under the existing law.

We suggest the most workable approach is for the amendments as a whole to take effect and apply to all proceedings, whether already before the court or whether filed after the commencement date, with the exception of any matter that is awaiting delivery of a reserved judgment.

There would be limited prejudice to parties to a proceeding already before the court in being subject to the amendments, especially in circumstances where they have an opportunity to prepare and put on evidence in their proceedings to address the impact of the new provisions.

If the amendments applied to matters awaiting delivery of a reserved judgment, this may result in applications for leave to lead further evidence, which would impose a significant resourcing burden on the court. Accordingly, in our view, these matters should be carved out as an exception.

Noting the intent of the Bill to make the family law system safer, accessible and deliver justice and fairness, we suggest Australian families already the subject of proceedings should be subject to the same amendments.

Accordingly, we suggest:

1. Items 12 and 23 to Schedule 1 should provide that the relevant amendments apply to proceedings initiated before the commencement of the Schedule that are not finally determined and proceedings instituted after the commencement of the Schedule.

2. Item 25 to Schedule 1 should remain as drafted.

3. Item 6 to Schedule 3 should provide that the relevant amendments apply to proceedings initiated before the commencement of the Schedule that are not finally determined and proceedings instituted after the commencement.

4. Items 3 and 6 to Schedule 4 should provide that the relevant amendments apply to proceedings initiated before the commencement of the Schedule that are not finally determined and proceedings instituted after the commencement.

5. Items 14, 18 and 35 to Schedule 5 should remain as drafted.

6. Item 3 in Schedule 6 should provide that the relevant amendments apply to proceedings instituted before the commencement of the Schedule that are not finally determined and proceedings instituted after the commencement.

7. Item 9 in Schedule 7 should remain as drafted.

If you have any further questions in relation to this letter, please contact Sue Hunt, Senior Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

Cassandra Banks
President