



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: FLC:CBsh080623

8 June 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 2023

Thank you for the opportunity to provide input into a Law Council submission to the Senate Legal and Constitutional Affairs Committee in relation to its inquiry into the Family Law Amendment Bill 2023 (Cth) (**the Bill**). The Law Society's Family Law Committee contributed to this submission.

We thank the Law Council for identifying many of the key issues associated with the Bill. We support the Law Council's proposed position on many of these issues and reiterate the views expressed in our submission dated 24 February 2023 (**previous submission**).¹

Below are our responses to the questions in Attachment A to the Law Council's memorandum of 15 May 2023.

Overview of responses

We suggest the considerations relevant to a child's best interests² should include any history of family violence, as well as the need to protect against physical and psychological harm. First Nations children should also be supported to explore the full extent of, and develop a full appreciation of, their culture.

Regarding parental responsibility,³ if an order for joint decision-making on major long-term issues has been made, in our view the requirement for consultation should be subject to safety considerations and practicability. We also have concerns about the practicality of "encouraging" consultation on major decisions in other cases.

We suggest that where an Independent Children's Lawyer (**ICL**) is appointed,⁴ they should be required to meet with a child unless it is not in the child's best interests, rather than unless exceptional circumstances apply.

¹ Law Society of NSW, submission to Law Council of Australia, Family Law Amendment Bill Exposure Draft and Consultation Paper, 24 February 2023.

² Schedule 1 Part 1.

³ Schedule 1 Part 2.

⁴ Schedule 4 Part 1.

We support the regulation of family report writers,⁵ including the development of national standards, and would not oppose the development of accreditation if it does not pose a significant entry barrier for family report writers.

Finally, we maintain our concern about the proposed transitional arrangements, which may cause confusion and result in inadvertent non-compliance. We suggest the reforms should apply to all matters filed after a single commencement date.

Schedule 1: Parenting framework

Part 1: Best interests of children

Redraft of objects and principles (s 60B)

1. *Do you have any concerns with the Law Council's likely position on s 60B? If so, please specify and recommend alternative options.*

We have no concerns with the Law Council's proposed position on section 60B. We note that the Law Council's comments in its submission dated 16 March 2023 suggesting changes to section 60B, are consistent with the position stated in our previous submission.

Simplification of best interests factors (s 60CC(2))

2. *Does the proposed simplification mean that any critical factors and considerations from existing s 60CC have been unjustifiably omitted? Should any additional factors be included?*

We agree that section 60CC(2)(a) should refer to "other physical or psychological harm" rather than "other harm". This would be consistent with the current provision, which refers to "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence". In the experience of our members, it is helpful to explicitly refer to safety from psychological, as well as physical, harm.

We also agree there is merit in restoring the phrase "meaningful relationship" in section 60CC(2)(e), as there is jurisprudence underlying that phrase which is available to guide the Court's consideration of the child's relationship with parents and other people significant to the child.

In our view, certain critical factors have been omitted from section 60CC, and may be overlooked in the application of that section. For example, when determining a child's best interests, it is important that the Court assess any history of family violence, which is relevant to determining the likelihood that family violence may occur again. We suggest including words to the effect of the current s 60CC(3)(j): "any family violence involving the child or a member of a child's family".

Other important factors that may be overlooked if omitted from the Bill, as stated in our previous submission, 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 subsection (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

⁵ Schedule 7.

- 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)).

3. *Should an equivalent provision to existing s 60CC(2A) be included which requires the court to give greater weight to safety considerations? Why or why not?*

We agree the best interest factors should emphasise the safety of children and their carers. One option for achieving this is to include an equivalent provision to existing section 60CC(2A), to give safety considerations greater weight than all other best interest factors. We note, however, that when considering the best interest factors, giving greater weight to certain factors in the context of a broad judicial discretion is a difficult process, and difficult to assess and review.

Another option to consider is to modify section 60CC(2)(e) so that the Court must consider the benefit to the child of being able to have a relationship with the child's parents and other people significant to the child only "if it does not increase the risk of physical or psychological harm to the child".

Standalone best interests factor for matters involving a First Nations child (s 60CC(3))

4. *Should the standalone best interests factor also include the language/concepts which are currently in existing subs 60CC(3)(h) and 60CC(6)? Why / why not?*

We would support the inclusion of concepts expressed in existing sections 60CC(3)(h) and 60CC(6). Particularly important is the requirement in existing section 60CC(6)(b) to "have the support, opportunity and encouragement necessary:

- (i) to explore *the full extent of that culture*, consistent with the child's age and developmental level and the child's views; and
- (ii) to develop *a positive appreciation of that culture.*" (emphasis added)

In our view, the requirement in proposed section 60CC(3) to merely provide the "opportunity to connect with, and maintain their connection with, their family, community, culture, country and language" is likely to be less effective in protecting an Aboriginal or Torres Strait Islander child's right to engage with culture in a substantial and meaningful way.

Consent orders (s 60CC(4))

5. *Do you agree with the Law Council's concerns/position on s 60CC(4)?*

We share the Law Council's concerns about the drafting of section 60CC(4) in the Bill. It would seem anomalous if, when considering an Application for Consent Orders, the Court did not need to consider the factors set out in subsections (2) and (3). These factors are consistent with the objects of Part VII set out in section 60B (to ensure that the best interests of children are met, including by ensuring their safety, and to give effect to the Convention of the Rights of the Child). The Court will have access to information relevant to these factors contained in the Notice of Child Abuse Family Violence or Risk filed with the Application.

Part 2: Parental responsibility

Repeal presumption of equal shared responsibility (s 61DA)

Repeal equal, substantial and significant time provisions (s 65DAA)

6. *What is your response to concerns raised by some commentators and MPs that these measures will ‘lead to a return to a time when mothers were given primacy in parenting arrangements’?*⁶

The Law Society does not share these concerns. We broadly support the proposed measures which, in our view, encourage parties to focus on the best interests of children, rather than the rights or entitlements of parents.

7. *What are your views on the below provisions which have been added since the consultation on the exposure draft?*
- s 61CA (not enforceable);
 - 61D(3) (reflects existing s 64B(3));
 - 61DAA (reflects some parts of existing s 65DAC)
 - 61DAB (reflects existing s 65DAC)

Overall, we do not object to the addition of sections 61CA, 61D(3), 61DAA and 61DAB.

It appears the effect of these provisions is that if an order for joint decision-making on major long-term issues is in place, consultation on those decisions is mandatory (section 61DAB), and in all other cases it is “encouraged” (section 61CA). In that regard, sections 61DAB and 61CA are thematically consistent in promoting consultation on major long-term issues. This is consistent with the Law Society’s position that in relation to major decisions, there should be a requirement to consult, without any formal requirement to make a joint decision.

However, the practical impact of section 61CA is uncertain. In circumstances where an order for joint decision-making on major long-term issues is not appropriate, consultation on those issues would seem less likely to occur, and may be unsafe or impracticable. Section 61CA may also be construed as justiciable, particularly by self-represented litigants, and give rise to further dispute between the parties. We agree that at the very least, the provisions should be supported by community education as to their intent and effect.

We suggest also that the requirement to consult in section 61DAB should only apply “if it is safe to do so”. Consideration could also be given to adding words to the effect “and reasonably practicable”, to accommodate circumstances where consultation is not practicable, such as where one parent cannot be contacted. While such circumstances may be contemplated in the requirement to make a “genuine effort” to reach a joint decision, explicitly including the element of practicality may provide further clarity. Section 61D(3) would also seem to support this approach.

It will be particularly important to monitor the operation of these provisions to assess whether they achieve their policy intent.

Part 3: Child-related proceedings

Codifying Rice & Asplund: Reconsideration of final parenting orders (s 65DAAA)

8. *What examples could the Law Council suggest be included in the Bill to assist parties in appropriately interpreting the rule in s 65DAAA(1)?*

The Law Society does not support the inclusion of examples in the Bill. In our view, examples may be construed as impliedly limiting the factors relevant to determining

⁶ See, e.g., Jess Malcolm, Concerns scupper change to family law, The Australian ([Online](#), 12 May 2023).

whether there has been a significant change in circumstances since the final parenting order was made.

As noted in our previous submission, we suggest also that the words “new material” in subsection (2)(b) may be interpreted as referring to material that post-dates the final parenting order. This would exclude material that pre-dates the final parenting order, but which was not available to the Court at the time the order was made. We suggest deleting the word “new”.

Schedule 2: Enforcement of child-related orders

Part 1: Enforcement of child-related orders

Redraft of Part VII, Division 13A

9. *What is your position on s 70NBA(1)?*

This subsection now requires that the court may only consider a contravention matter on application from a party, while the approach in the exposure draft did not limit the circumstances in which a court may deal with a contravention of child-related orders that arises in proceedings.

We reiterate the view expressed in our previous submission that the Court should be able to make a contravention order of its own motion. This would overcome circumstances where there is a cost or funding barrier to a party making a contravention application.

Delegation of power under the FCFCOA Act to allow for Registrars to make orders that compensate for time lost with a child (s 7(1)(ba) FCFCOA Act)

10. *Do you support this proposed measure? Why/why not?*

The Law Society does not object to this proposed measure. This further expansion of delegations to registrars would seem consistent with the expansion of delegations introduced by the *Federal Circuit and Family Court of Australia (Family Law) Amendment (2022 Measures No. 1) Rules 2022*.

Schedule 3: Definition of ‘member of the family’ and ‘relative’

Providing a definition of ‘member of the family’ and ‘relative’ that is inclusive of any relevant First Nations’ concepts of family (s 4)

11. *Do you have any concerns with the Law Council’s proposed position in response to this measure?*

We have no concerns with the Law Council’s proposed position. We reiterate concerns raised in our previous submission about the proposed departure from the use of terminology such as ‘kin’ and ‘kinship’ to describe a family member of an Aboriginal child or Torres Strait Islander child, noting these concerns are largely reflected in the Law Council’s March 2023 submission.

Schedule 4: Independent Children’s Lawyers (ICLs)

Part 1: Requirement to meet with the child

Requiring ICLs to meet with a child (s 68LA(5A)-(5D))

12. *What should the threshold be instead of exceptional circumstances? For instance, should an exception be available where it is not practicable or in the child's best interests to meet with the ICL?*

We suggest that, rather than 'exceptional circumstances', a more effective threshold would be that it is not in the child's best interests for the ICL to meet with the child or provide an opportunity to express any views relating to the proceedings. This would encapsulate circumstances, whether exceptional or not, where a meeting would expose the child to a risk of harm or have a significant adverse effect on the child.

13. *What are your views on proposed subsection 68LA(5D)? Should it be removed, so that if a party has a concern that the ICL has failed to discharge their obligation, they may be raised with the court to address on a case-by case basis? Why or why not?*

We agree with the Law Council's proposed approach. In our view, a more workable arrangement would be for the ICL to notify the other parties of any decision not to meet with the child or provide the child with an opportunity to express their views, and to give reasons for that decision. It would then be a matter for the other parties to raise any concerns about the ICL's decision with the Court.

Part 2: Convention on the Civil Aspects of International Child Abduction

Removal of exceptional circumstances requirement in cases brought under the 1980 Hague Convention (s 68L)

14. *Do you have any concerns with the Law Council's proposed position in response to this measure?*

We have no concerns with the Law Council's proposed position.

We note, however, that 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.

Schedule 5: Case management and procedure

Part 1: Harmful proceedings orders and co-location of sections 45A and 102Q

Providing courts with a power to restrain a party from filing new applications in a matter without leave of court, where it is necessary for the protection of the child or the respondent

15. *Do you have any concerns with the Law Council's proposed position in response to this measure?*

We have no concerns with the Law Council's proposed position, and reiterate our view that the Court's jurisdiction to make harmful proceedings orders should apply to prohibiting fresh applications, as well as to prohibiting fresh proceedings. This would enable the Court to prevent process abuse perpetrated, for example, through the filing of further interlocutory applications within existing proceedings.

16. *What are your views on the following subsections that have been inserted since the consultation on the exposure draft?*

- s 102QAC(7) and (8)
- s 102QAE(3) and (4)

We have no concerns with subsections 102QAC(7) and (8), although we suggest it will be important to closely monitor the operation of the Court's harmful proceedings jurisdiction.

Regarding the prohibition on service of the application or affidavit in section 102QAE(4), we note that if an application and affidavit pursuant to section 102QAE(3) are filed electronically, the other party may have notice that the application has been filed, regardless of whether the documents are served. This may undermine the provision's effectiveness.

Part 2: Overarching purpose of the family law practice and procedure provisions

Include an overarching purpose of family law practice and procedure

17. *Do you have any concerns with the Law Council's proposed position in response to this measure?*

We have no concerns with the Law Council's proposed position.

Impose a duty on parties and their legal representatives to conduct the proceedings consistent with the overarching purpose

18. *Do you have any concerns with the Law Council's proposed position in response to this measure?*

We reiterate our concerns that subsection (4) requires the Court to "take into account any failure to comply" with the duty imposed by subsections (1) and (2), regardless of the severity of the failure. It would be more appropriate, for example, for the Court to "have regard to any failure to comply" and to give the failure appropriate weight.

As regards subsections (5) and (6), it will be helpful to provide education and guidance to the legal profession about the positive duty imposed by these provisions, including implications for the client retainer if a client fails to follow legal advice regarding compliance.

Schedule 6: Communications of details of family law proceedings

Redraft existing section 121 (Part XIVB)

19. *Do you have any concerns with the Law Council's proposed position in response to this measure?*

We have no concerns with the Law Council's proposed position and do not object to the points raised in the Law Council's submission of March 2023.

Schedule 7: Family report writers

Power to make regulations that set standards and requirements to be met by family report writers

20. *Do you have any concerns with the Law Council's proposed position in response to this measure?*

We agree with the Law Council that it will be important to consult broadly on the content of the regulations regarding the standards and requirements of family report writers.

As noted in our previous submission, we would support the professional regulation of family report writers. We would support the development of national standards, and would not oppose the development of accreditation, unless it posed a significant practical or financial barrier to existing or prospective family report writers. Accreditation which is based on national standards may help to ensure that family report writers are, and remain, appropriately skilled and experienced.

Schedule 8: Review of operation of the FCFCOA Act

Bring forward the review of the operation of the FCFCOA Act by two years (conducted between 1 September 2024 and 31 March 2025)

21. Do you agree with the Law Council's likely position?

We have no concerns with a position in favour of bringing forward the review of the legislation as proposed.

Schedule 9: Dual appointments to the Family Court of Western Australia and the FCFCOA (Division 1)

Provide an express legislative provision to clarify that a person can be dually appointed to the Family Court of WA and the FCFCOA (Division 1)

22. Do you agree with the Law Council's likely position?

The Law Society has no position on this proposal.

Transitional arrangements

We reiterate the concerns in our previous submission about transitional arrangements, and the proposal that various provisions will only apply to matters filed after the commencement date. Our view is that the amendments should all apply to every matter heard after a single commencement date. The proposed arrangements may lead to confusion amongst the parties to proceedings and the Court, resulting in inadvertent failure to comply with the amendments and/or appeals.

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