Relationships Australia
1300 364 277
www.relationships.org.au

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Family Law Reform
Attorney-General's Department

By email: FamilyLawReform@ag.gov.au

SUBMISSION TO CONSULTATION ON EXPOSURE DRAFT – FAMILY LAW AMENDMENT BILL 2023

Thank you for the opportunity to comment on the Exposure Draft of the Family Law Amendment Bill 2023, released on 30 January 2023. Following a series of reviews and inquiries into the family law and adjacent systems, Relationships Australia welcomes the Government's introduction of this legislative package as a first instalment of the comprehensive suite of evidence-based measures that is vital to address the serious concerns that have been expressed by diverse stakeholders over several years, and which continue to put at risk the safety and wellbeing of children and young people. We also welcome the use of simplified outlines as improving the readability of the Act.

Part 1 Framing principles

This submission is informed by the various submissions which Relationships Australia has made in recent years, and which can be found at https://relationships.org.au/what-we-do/#advocacy. These include our submissions responding to the:

- ALRC Issues Paper 48
- ALRC Discussion Paper 85
- 2020 inquiry by the House of Representatives Standing Committee on Social Policy and Legal Affairs into family, domestic and sexual violence
- inquiry by the Senate Standing Committee on Legal and Constitutional Affairs Committee into the Federal Circuit and Family Court of Australia Bill 2019, and
- inquiry by the Joint Select Committee on Australia's Family Law System.

Principle 1 – commitment to human rights

Relationships Australia contextualises its services, research and advocacy within imperatives to strengthen connections between people, scaffolded by a robust commitment to human rights. Relationships Australia recognises the indivisibility and universality of human rights and the inherent and equal freedom and dignity of all.

Principle 2 – the best interests of the child are paramount

Consistent with Principle 1, and with the policy intent underpinning both existing legislation and proposed amendments, Relationships Australia is committed to ensuring that the paramountcy of children's best interests, in all domains, is honoured and upheld. This includes, but is not limited to, ensuring that children's voices and children's developmental needs and safety are centred in all systems and processes with which they engage.

Principle 3 – a system that genuinely centres children is not one that harms them

The existing family law system derives from how common law civil disputes have traditionally been resolved, has been consistently and unequivocally shown to harm children. That harm is intrinsic to the nature of the system, which assigns innately combative roles to parents. Nearly half a century of 'retrofitting' the Act and supporting processes to centre children, and to soften the edges of win/loss litigation dynamics, has failed to mitigate this harm. Children and young people have suffered from entanglement in this system, and continue to suffer in their adult lives and relationships.

The Exposure Draft puts forward a number of proposals which, taken discretely, Relationships Australia supports as likely to improve the *status quo*. But these improvements do not alter the fundamental problem, which is that the future best interests of a child is not a question that can ever be answered by legal argument or analysis. If the intended purpose is to centre children, protecting them from harm, supporting them to flourish, and listening to their voices, then the Family Law System, even with the improvements of recent years and the proposed amendments, will remain signally unfit for that purpose.

Principle 4 – cultural responsiveness

Relationships Australia is committed to working with Aboriginal and Torres Strait Islander people, families and communities. Relationships Australia is also committed to enhancing the cultural responsiveness of our services to other culturally and linguistically diverse individuals, families and communities.

Principle 5 – Accessibility: simplification, transparency, fragmentation, cost, and geographic equity

Relationships Australia is committed to promoting accessibility of its services, and advocating for accessibility, including by:

- reducing fragmentation
- reducing complexity of the law and its supporting processes, to benefit not only those families who require a judicial disposition of their matters, but also families who will 'bargain in the shadow of the law'
- ensuring high quality and evidence-based service delivery, accompanied by robust accountability mechanisms, and
- reducing barriers to access arising from financial or economic disadvantage, as well as other positionalities and circumstances that create barriers to accessing services (including by promoting geographic equity).

Part 2 Overarching comments and recommendations

2.1 Rights of children and young people

Relationships Australia is currently preparing a response to the Family Law Council survey on the rights of children and young people in the family law system. Our response will reflect our view, expressed in previous submissions, that the Australian family law system does not uphold

the rights of children as articulated in the Convention on the Rights of the Child. Relationships Australia has previously proposed, in its submission responding to ALRC IP48, that matters about children should be dealt with in an inquiry-like proceeding before which parents or caregivers would be witnesses, not parties, and in which counsel assisting would assist decision-makers by finding and presenting evidence about the nature of the best interests of the child/ren and how those interests can best be promoted.

Conventional civil litigation in common law jurisdictions is designed to, and does, deliver win/loss outcomes. The culture, practices, court craft and the rules that apply in court and to professionals working in courts all derive from that. The Family Law Act and family law courts were, with adaptations, built on this foundation. But the adaptations did not change the nature of the outcomes available to families whose disputes fell within the operation of the Act or the jurisdiction of the courts. Thus, the 'family law system' turns parents into winners and losers, and delivers institutional entrenchment and even encouragement of parental conflict. This is wrong. Parental conflict predicts poor wellbeing outcomes for children. Mitcham-Smith and Henry (2007) observed that the win/loss nature of litigation in the family law courts can:

- entangle children in perpetual turmoil, as parents navigate through complex, expensive, emotional, intimidating and too-often prolonged processes
- diminish the role of parents as legitimate protectors of their children
- complicate the child's role identity
- teach ineffective conflict-resolution skills, and
- embed shame and self-blame by children if ongoing parental conflict relates to parenting matters, including contact arrangements and child support.

A win/loss system, embedded in the Act in an era when the future wellbeing of children was not at the forefront of the legislature's mind, is not fit for purpose. Win/lose outcomes do not facilitate, and can entirely thwart, ongoing co-parenting relationships.[1] Just as litigation can poison co-parenting, so too can it damage the parenting capacity of each individual parent.[2]
In 2001, Elrod commented that

> The win/loss framework encourages parents to find fault with each other rather than to cooperate. In an attempt to be in the best position to argue for stability, a parent may try to take or maintain possession of the child….When an attorney increases hostility between parents, their parenting ability often decreases. For example, advising clients not to talk to the other spouse, filing for protective orders…

Nor are legal doctrine and methods useful tools for understanding children's needs, and how they might best be met. Children's interests embrace all facets of child development, including attachment, emotional and physical safety, physical and mental health, education, and social development. The inquiry into children's best interests is an inquiry into a dynamic future.

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[1] Morris et al, 2016, 1 at 3, 14.

[2] See, also for example, Crockenberg and Langrock, 2001.

This differs starkly from other litigation because:

- it is an inquiry about an individual who is not only not a party to the litigation but whose views and interests may never be put directly to the decision-maker (even with the proposed amendments about ICLs)
- it is an inquiry about that individual's future, but not from a legal perspective; the Court is not concerned with children's future legal rights or obligations, but their safety, welfare and development, and
- it is not an inquiry about the past and existing legal rights of the named parties to the litigation.

The best interests inquiry most closely resembles a guardianship inquiry. Parents are valuable witnesses, but they should not be positioned, by the state, as contestants.

It would perhaps be useful to revisit the question of whether matters of the kind contemplated by Part VII involve an exercise of judicial power that must be undertaken only by a court established under Chapter III of the Constitution. In 1979, the High Court observed that, in parenting matters, 'Reasons for judgement, necessarily in many cases, especially in a finely balanced case, are a rationalisation of a largely intuitive judgement based on an assessment of the personalities of the parties and the child'.[3] Such intuitions are, we respectfully suggest, more likely to be sound when formed by professionals with expertise in psychology, child development and relational dynamics, rather than through legal reasoning.

Later, in *M v M*, the High Court recognised that the court's concern is '…promot[ing] and protect[ing] the interests of the child', not enforcing a 'parental right'.[4] The Court emphasised the future orientation of parenting matters, and their distinctiveness from other litigation:

> …the ultimate and paramount issue to be decided in proceedings for custody of, or access to, a child is whether the making of the order sought is in the interests of the welfare of the child….. Proceedings for custody or access are not disputes inter partes in the ordinary sense of that expression: Reynolds v Reynolds (1973) 47 ALJR 499; 1 ALR 318; McKee v McKee (1951) AC 352, at pp 364-365. In proceedings of that kind the court is not enforcing a parental right of custody or right to access. The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child.[5]

In 1997, ALRC Report 84 reported that children believed that the family law system was 'dominated by legal strategizing by competing parties to maximise their chances of winning the

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[3] *Gronow v Gronow* (1979) 144 CLR 513, paragraph 6. See also *Brandy v Human Rights and Equal Opportunity Commission (*1995) 183 CLR 245.

[4] *M v M* (1988) 166 CLR 69, joint judgment.

[5] *M v M* (1988) 166 CLR 69, joint judgment, paragraphs 19-20. See also *M v M* (1988) 166 CLR 69, joint judgment, paragraph 24. The Law Council of Australia, in its submission to the ALRC inquiry, referred to the view of the New South Wales Law Society that ' … if interim orders are drafted such that therapeutic intervention was linked to or required as a condition of time with or residency of a child, (that is to say, therapeutic jurisprudence) this practice may not be repugnant to the principle in *R v Kirby; Ex parte Boilermakers Society of Australia…'.*

case…The interests of the child often get lost between the warring parties.'[6] From the binary win/loss outcomes that litigation is designed to produce flow all manner of serious and sometimes irreparable harm to children and their families:

- entrenching and deepening conflict between parents
- incentivising litigation tactics such as burning off and making unfounded allegations
- incentivising other misuse of court processes and other legal and administrative systems, and
- incentivising aggressive behaviours intended by one parent to incapacitate the other parent from co-parenting effectively (as mentioned below, we welcome the proposed harmful proceeding orders as a potentially valuable tool in responding to such behaviours; it will be necessary to see if, over time, these orders prove effective in both hindering systems misuse – and deterring it – against the weight of other countervailing incentives).

This cannot be allowed to continue. Our society, through its elected governments, has a responsibility to current and future families to reject win/loss models and instead to foster decision-making models that support, encourage and expect that children's best interests will be paramount. After nearly half a century, it is clear that, despite best efforts to tailor it to the needs of children and their families, a traditional family law system cannot achieve this.

If society can stop institutionalising conflict between parents, and weaponising their emotions, then parents will have a far better chance to be the best parents and co-parents they can be.

2.2 Urgent need for systemic reform

Relationships Australia welcomes the Government's prioritisation of reforms aimed at centring the children's best interests in matters involving them.

In submissions to multiple Government inquiries,[7] Relationships Australia has advocated for transformation from a system that:

- centres litigation and privileges legal responses while subordinating the social and psychological dimensions of family dynamics and children's development, and
- tacitly enshrines judicial determination as the 'gold standard' for families.

In place of such a system, we propose a system built around co-equal pillars, of which courts form one pillar, in which the primary response to families is therapeutic in nature.

We recognise that the Exposure Draft is one element of a broader package of reforms, and hope that these overarching comments will be considered by Government in its ongoing policy work. We continue to support the ALRC's recommendation that the Act in its entirety be re-drafted.

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[6] ALRC Report 84, *Seen and heard: priority for children in the legal process*, paragraph 4.25.

[7] See https://relationships.org.au/what-we-do/#advocacy

From its inception, the Family Court of Australia was intended to enable dignified and private dissolution of marriage between adult parties to civil proceedings. It was not designed or intended to function, as it must now do to meet community expectations, as an institution largely concerned with children's safety, welfare and healthy development. Nor was it designed to serve a demographic characterised, as it now is, by complex health, relationship, emotional and social co-morbidities who, as a condition precedent of safe and positive co-parenting, need help that cannot be delivered through court decisions. Indeed, this would not be possible, because of the constraints imposed by Chapter III of the Constitution.

Recurrent appearances before the family courts may make it seem that the families' problems are legal in nature, but focus on this surface presentation can obscure underlying needs, and delay or inhibit referral to specialist therapeutic services that are most effectively delivered outside a court environment. The cycle of interim applications, enforcement applications, and appeals before multiple courts will only be halted if underlying health, relationship, emotional and social needs are seen and responded to for what they are. But in a society where courts are seen as the ultimate vindication and the 'gold standard' of decision-making, it is all too easy to imagine that only the courts can – and should - make decisions about arrangements for children in separating families. These are, after all, some of the highest stakes issues that many Australians will ever face in their personal lives – the care and wellbeing of their children.

2.3 Court processes

Relationships Australia has welcomed innovations by the Court to streamline, nationally standardise and centralise its processes. These innovations support improved accessibility and timeliness, and mitigation of stress and trauma for families who need to engage with the Court.

However, the fundamental problem is not that the court processes are not good enough; it is that they are the wrong tool for what successive governments have recognised as the pre-eminent job of the family law courts - to identify and uphold children's best interests and elevate children's visibility. Furthermore, innovations in court processes do not help the majority of children whose parents settle out of court, or make unsafe or impractical consent orders.

What is most urgently required to support decisions that are informed by a rich understanding of individual children, their needs, hopes and aspirations, is universal access to multidisciplinary services that have conventionally been seen as peripheral, and bolted onto the court processes. These include counselling services to parents and children, family group conferencing, mental health services, FDR, Parenting Coordination services, services with expertise in responding to alcohol and other drug misuse and to harmful gambling. Services must be culturally responsive. To this end, Government should revisit the 2012 reports of the Family Law Council for still-pertinent insights to underpin legislative and programme development.[8] While the intervening decade has seen a range of innovations and enhancements (such as re-funding specialist liaison officers, creating specialist lists and contracting with ACCOs), there remains much work to be done (one example is the lack of resourcing for adequate interpreter services).

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[8] See the Family Law Council reports on *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* and *Improving the Family Law System for Culturally and Linguistically Diverse Clients*, at https://www.ag.gov.au/families-and-marriage/family-law-council/family-law-council-published-reports

Services should also be trauma informed and DFV informed. The best, most clearly crafted orders in the world will not 'stick' for people who are facing these obstacles, which is the case for a high proportion of those who need a final determination by the Court.

At some level, governments, courts and professionals working with separating families have always understood the centrality of psycho-social services to actualising the paramountcy of the children's best interests. This understanding can be seen reflected in the profusion, over nearly half a century, of attempts to make the Act and the Court more therapeutic, and to soften the win/loss dynamics of a system based on common law civil litigation. Regrettably, but inevitably, these attempts, while supported by committed and highly skilled professionals from numerous disciplines, have foundered. The 'lowest common denominator' is the default to litigation practices and legalistic formalism that have, time and again, thwarted truly child-centred processes. This will always be the fate of such reforms, because of the innate character of a court, created under Chapter III and able to exercise only judicial functions.

2.4 Evaluation of impact of reforms, and need for supporting data collection

A comprehensive data collection and evaluation plan is needed to inform ongoing legislative reforms and service delivery. At the minimum, data should be collected to inform an understanding of:

- whether the reforms have supported improved safety of children and young people
- whether children and young people feel that they have sufficient opportunity to be heard, both in their own matters and in systemic advocacy
- how often, and in what circumstances, ICLs are not appointed (ie what has been found to constitute 'exceptional circumstances' and how often)
- how often, and in what circumstances, the Court has made harmful proceedings orders and how often, and in what circumstances, the Court has granted leave pursuant to proposed section 102QAG
- community perceptions of the effectiveness of harmful proceedings orders
- ongoing and emerging patterns of systems abuse, to evaluate the impact of the harmful proceedings provisions (including the courts, tribunals and other bodies used to perpetrate systems abuse)
- user satisfaction with regulatory arrangements for professionals
- nature and prevalence of non-compliance with orders made under Part VII, and
- perceptions of the cultural responsiveness of processes and structures that comprise the system.

2.5 Recommendations

Recommendation 1 Replace the Family Law System with a Family Wellbeing System

Merely reforming the family law system every few years is not sufficient to centre children or to support families experiencing the multiple co-morbidities that can be a cause, characteristic and consequence of family separation. It is past time for governments to commit to transformational change focused on creating and maintaining conditions in which children are safe and supported to flourish. It is past time to recognise that the law, while an indispensable element, is not the answer to the psycho-social, economic and environmental circumstances experienced

by families, and that Ch III of the Constitution poses what have been interpreted as insuperable barriers to a federal family court dealing safely and effectively with matters relating to the protection and support of children. Society cannot police its way out of a domestic, family and sexual violence crisis and it cannot litigate its way to addressing the multi-faceted and time sensitive needs of children caught up in family separation.

Accordingly, and as canvassed at length in our submissions responding to ALRC IP48 and DP85 and the terms of reference of the Joint Select Committee, we recommend the establishment of a Family Wellbeing System centred on Family Wellbeing Hubs.[9]

Recommendation 2 Establish Family Wellbeing Hubs as the primary agency of service delivery

Government should create Family Wellbeing Hubs to be the primary agency of service delivery, as a unified and multi-disciplinary point of first contact, with which courts with appropriate powers would be co-equal pillars. The nature and function of such Hubs are explored in detail in previous submissions, and would offer the fullest expression of FASS and FRCs functions, to implement recommendations made by the ALRC Report 135 and the Joint Select Committee in its inquiry into the family law system. Relationships Australia notes that, in its response to the Joint Select Committee recommendations, Government has indicated that 'further consideration would need to be given to the capacity for the FASS to provide expanded case management and the overlap with the role of Family Relationship Centres'.[10] Relationships Australia suggests that re-conceptualisation of FRCs as Family Wellbeing Hubs would better recognise the centrality of children, and would allow greater responsiveness to the co-morbidities that we know accompany family conflict and domestic and family violence.

Recommendation 3

Orders made pursuant to Part VII should be re-named as 'child-related orders', or 'orders about children' to better reflect the paramountcy of children's best interests.

Recommendation 4 Establish discrete roles for children's advocates and separate legal representatives

To give effect to its policy intention to elevate and amplify children's rights, Government should implement Proposals 7-8 to 7-10 of ALRC DP85.

Recommendation 5 Establish a Children and Young People's Advisory Board

To better support Australia's compliance with the Convention on the Rights of the Child, Government should implement Recommendation 50 of ALRC Report 135 by establishing a Children and Young People's Advisory Board, possibly under the aegis of the Family Law

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[9] See https://relationships.org.au/what-we-do/#advocacy

[10] See Government response to PJC Recommendation 26, p 42.

Council. This would allow systemic advocacy to complement children's participation in matters affecting them.

Recommendation 6 Evaluate impact

Government should commit to a comprehensive and ongoing evaluation of these reforms, from commencement until at least five years post-commencement, with annual summative reports to inform timely evidence-based adjustments. Final evaluation should be undertaken no fewer than five years after commencement, to best inform ongoing policy development. The evaluation must be carried out by persons and/or bodies with established specialist expertise.

Recommendation 7 Collect data

Government should, from commencement of the amendments, ensure that quantitative and qualitative data is collected to measure the impact of the amendments.

Recommendation 8 Ensure legal representation of children and young people in applications for special medical procedures

Government should further amend section 68LA to expressly require that ICLs must be appointed for proceedings related to special medical proceedings.[11]

Part 3 Responses to questions

Redraft of objects

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

Relationships Australia supports simplification of the objects provisions, which will help our practitioners in explaining Australia's family law system.

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

Relationships Australia welcomes the efforts to ensure that the paramountcy of children's best interests is reflected in a simplified objects clause. This will support our practitioners' emphasis, to parents, that their children's best interests are paramount, and should be at the forefront of all FDR discussions, and subsequent co-parenting.

To bolster the focus on children's best interests, Relationships Australia suggests re-naming orders as 'child-related orders', or 'orders about children', rather than 'parenting orders'. This would deliver a range of benefits, including explicit focus on the purpose of orders to promote a child's wellbeing. It would also better accommodate the range of family roles, formations and structures in Australian society (for example, grandparent carers and kinship care).

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[11] See section 67ZC of the Act; see also Family Law Practice Direction – Medical Procedure Proceedings (https://www.fcfcoa.gov.au/fl/pd/fam-medical , accessed 8 February 2023).

Best interests factors

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

Relationships Australia welcomes the removal of the hierarchy of primary and additional considerations, which added to the complexity (and expenses) of applying Part VII, without delivering a proportionate enhancement in the quality of agreements or decisions.

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

Relationships Australia welcomes the inclusion of proposed paragraph 60CC(2)(c) (Schedule 1, item 6), which we hope will provide a strengths-based lens through which the Court can view parents with disability. We do, however, have some concerns about how the provision, as currently framed, may inadvertently create opportunities for combative parties (especially those inclined to perpetrate systems abuse) to undermine the parenting capacity of another parent who has experienced an array of physical and mental health challenges. Close attention should be paid to how this provision is interpreted by litigants, the Court and professionals in the system (including ICLs).

Relationships Australia welcomes proposed subclause 60CC(4), as offering a potential mechanism by which the Court can consider whether a proposed consent order is in a child’s best interests, while not requiring the Court to ‘look behind’ consent orders in all cases. We are aware of instances in which ‘consent orders’ have been made without the Court being aware of, or having reason to believe, that the ‘consent’ is in fact tainted by coercion, violence, intimidation, harassment or duress, by misapprehension of the law, or by the application of laws that were not informed by the contemporary understanding of the causes, characteristics and effects of domestic and family violence.

In relation to proposed paragraph 60CC(3), Relationships Australia has, in previous submissions, supported amendments that better reflect Aboriginal and Torres Strait Islander connections to community, Country, culture and language, and defers to the views of ACCOs and other First Nations service providers.

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?

Yes. The proposed amendments will simplify what FDRPs need to say to clients and offers a clear and strong statement that parental responsibility does not translate into ‘time with’. In particular, the changes will support the impartial and child-focused role of FDRPs by not requiring them to start with giving advice around time arrangements and instead start with what is going on for children and how arrangements best support children and families on a case by case basis. Government should also provide services with support to update resources for practitioners and clients about the reforms and consider how to support parents to shift away

from these entrenched presumptions and the language that has supported them. Relationships Australia finds that, even in the absence of DFV or other safety issues, parents benefit from accessing clear guidance about decision-making and parental responsibility. These are often real sources of conflict, where parents struggle to agree on when to consult and when to decide unilaterally.

For the amendment to fully achieve its aims, resources offering guidance in how to share responsibility in the best interests of children will be vital to practitioners and clients. The reforms must be buttressed by large scale, clear and ongoing public education campaigns to inform the community, users of the family law system, and professionals working in and adjacent to that system of the intention and nature of the reforms. The mythology which has grown up around the presumption is well-entrenched, and likely to be tenacious. Practitioners are still educating parents about the shift from terminology such as 'custody and access', and foresee that these changes, too, will take time to permeate the culture of the system. Legal practitioners, FDRPs, family counsellors, family consultants, the Court, self-represented litigants and others should all receive specific, tailored messages to support them in explaining the nature and intent of the reforms. To ensure the best possible service to clients, these messages cannot be one off, ‘one and done’; they must be provided continually and refreshed regularly to stay salient and maintain their impact.

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?

See response to Question 6. Relationships Australia supports the removal of these obligations, which are conceptually based in generalisations that unnecessarily (and in various circumstances, harmfully) complicate giving advice which is meant to focus on the best interests of an individual child. This can lead to advice being harder to understand, more expensive to obtain, and more confusing to implement.

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?

Relationships Australia welcomes the removal of the presumption. We consider that the ‘deeming’ provisions in existing subsections 65DAC(2) and (3) do not reflect contemporary understanding of the causes, characteristics and effects of domestic and family violence; nor are they necessarily congruent with trauma-informed practice. Their effect has been to create circumstances in which victim survivors of domestic and family violence, both adults and children, are exposed to ongoing harm. This has been the case for families who were engaged in the Court to the point of final orders and beyond, and for families who were ‘bargaining in the shadow of the law’.

It should always be open to the Court to make an order including the elements currently reflected in these provisions where it is safe to do so. Similarly, materials intended to assist

parents in making agreements should invite parents to consider these elements. However, orders under Part VII should not be required, as a matter of law, to include them.

Reconsideration of final parenting orders (Rice & Asplund)

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?

Relationships Australia is concerned that, despite the discretion conferred on the Court by the chapeau of subclause (2), parties and their lawyers may regard it as necessary, in an abundance of caution, to traverse each item in their application materials, including their affidavits. This will lead to lengthy affidavits, higher costs and potentially more grounds for appeal, potentially undermining other benefits of simplification. We further anticipate that motivated parties will take an expansive approach to interpreting 'significant change', and that Government should monitor this in evaluating the impact of these amendments.

Schedule 2: Enforcement of child-related orders

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

Relationships Australia welcomes:

- simplification of Division 13A, to overcome longstanding issues, including those identified by AIFS in its 2022 report, *Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers*[12]
- the prominence given to the best interests of the child in proposed section 70NAB
- removal of the distinction between 'less serious' and 'more serious' contraventions, which added complexity without encouraging compliance or deterring non-compliance
- the flexibility of enabling the Court to make an order at any stage and in the absence of a finding about contravention, and
- centralisation of provisions relating to penalties and costs.

Relationships Australia strongly supports retention of the power of the Court to deal with a contravention matter on its own motion, and would not support confining the Court to dealing with such matters only on application by a party. We consider the 'own motion' power to be important to assist, for example, self-represented litigants, victim survivors of domestic and family violence, and other individuals whose positionality and other circumstances may create barriers to engaging with legal systems and processes.

Relationships Australia is, however, concerned that the proposal does not engage with one of the most important findings of the AIFS report: that non-compliance can arise from safety concerns. Given the prominence of the best interests of the child in the ED, and contemporary

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

understanding of domestic and family violence (and children's experience of it[13]), this is a conspicuous and concerning omission from the legislative package.

We would welcome opportunities to discuss this further.

Further, the amendments do not appear to engage with another significant driver of non-compliance - inappropriate orders, plans and agreements (reached with or without external assistance). We look forward to working with the Government, the legal profession and other service providers to ensure that arrangements for children are, *inter alia*, clear, DFV *and* trauma informed, safe, and include mechanisms to enable them to 'grow' with a child. This should include support for services that build families' capacities to self-manage, communicate more effectively and de-escalate conflict. In our submission to the Joint Select Committee, Relationships Australia noted the acknowledgement, in the ALRC's final report (ALRC No. 135) of stakeholders' insistence on 'the need for improved measures to support highly conflicted parties to implement parenting arrangements and develop positive post-order communication.'[14] In this regard, Relationships Australia National Office and Relationships Australia Western Australia have, for example, briefed the Department on the use of Parenting Coordination, domestically and overseas, as an innovation that can add to the suite of tools available to services and parents in high conflict families.

Recommendations 38 and 39 of ALRC 135 focus on court-based solutions while overlooking innovations that do not require expensive court resources. Post-order and post-agreement services, outside the often-distressing court setting, should be available in accordance with principles of geographic equity and universal access.

Reliance on the court paradigm for post-order/post-agreement services, as contemplated by Recommendations 38 and 39, will pose the following problems:

- expense will always be a barrier (no matter how well courts are funded, they will always be prohibitively expensive for most people)
- people are at the mercy of court lists (and which are not as flexible or responsive for timing in dealing with day-to-day issues that arise for families), and
- difficulty in physical access, and challenges of digital exclusion, for people in rural, regional and remote areas.

Children and their parents benefit significantly from participation in existing post-order support programmes. Successful participation can minimise repeated court events for matters such as alleged breaches of orders. Even where parents reach agreement through mediation (or without assistance), it is still often difficult to manage implementation (particularly where there is a history of conflict and/or poor communication). At the point of reaching agreement through

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[13] See Carson, R., Dunstan, E., Dunstan, J., & Roopani, D. (2018). Children and young people in separated families: Family law system experiences and needs. Melbourne: Australian Institute of Family Studies; Fitz-Gibbon, K., McGowan, J. and Stewart, R. (2023) *I believe you: Children and young people's experiences of seeking help, securing help and navigating the family violence system*. Monash Gender and Family Violence Prevention Centre, Monash University, doi: 10.26180/21709562.

[14] ALRC report 135, paragraph 11.1.

mediation or a final court order, parents are still processing their emotions, and they can benefit greatly from support before, during and after court orders or mediation agreements.

The benefits of therapeutically-focused services in supporting parents to focus on their child are well-documented in the research literature, as well as in accounts of users of various post-separation services provided by Relationships Australia. For example, client feedback about what they learned from the Focus on Kids program conducted by Relationships Australia Victoria in 2022 included:

> ‘Children’s feelings comes before anything else.’
>
> ‘Keep adult themes and conversations away from children and be a safe harbour.’
>
> ‘How important my children's feelings are. And how I must not show my frustration with their dad in front of them.’
>
> ‘How the happiness, resilience, sense of agency, independence and self-love our children feel is significantly correlated to how well we hold ourselves in their presence - how present we are with them and with each other as their parents. I learnt to look for more of the subtle signs that a child might be struggling internally too. I did also love the safe harbour image.’
>
> ‘I need to be brave and strong for my child be their voice when they don't feel they can talk.’

In a survey following participation in Relationships Australia Victoria’s Parenting After Separation, clients identified the following growth in parenting capacity and capability:

- 91.7% agreed or strongly agreed with the following statement: ‘I have an increased understanding of self-care.’
- 90.9% agreed or strongly agreed that: ‘I have learned new skills that I will apply to my co-parenting relationship.’
- 90.27% agreed or strongly agreed with the following statement: ‘I have a greater understanding of my child(ren)'s behaviour and emotions.’

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

Relationships Australia considers that the objects capture the goals of the proposed enforcement provisions.

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

Relationships Australia supports the provisions, and hopes that they will be used to deter contravention, including contravention that occurs within the context of coercive controlling behaviour of a parent in relation to the other parent, other caregivers and/or the child.

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. This would allow maximum flexibility.

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?

Relationships Australia agrees with the approach taken in proposed subsection 70NBA(1), for the reasons set out in our response to Q 11.

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?

Relationships Australia has, in previous submissions, supported amendment of definitions to reflect Aboriginal and Torres Strait Islander kinship systems, and defers to the views of ACCOs and other First Nations service providers in relation to proposed Schedule 3 of the Bill.

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?

Concerns have been raised within our federation about how this may affect Aboriginal and Torres Strait Islander clients where the (appropriate) expansion of the definitions of relative and family may inadvertently result in imposition of an unduly broad obligation to disclose that family members have a history of issues around child protection and family violence (for example). This risk could perhaps be mitigated by more closely confining obligations to disclose by reference, for example, to factors such as whether extended family members are even known to the parents, and have contact with the parents and children.

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 proposed requirement would meet the narrow objective described in the question but, in the view of Relationships Australia, would not make substantive progress in improving Australia's compliance with the Convention on the Rights of the Child. Parents and children have, over several years, expressed their dismay (and outright disbelief) that ICLs are not required to meet children. In our experience, a key driver of those concerns is misapprehension of the role and

function of ICLs, compounded by the limitations on what ICLs, as a cohort and as individuals, can and should be doing. The title, Independent Children's Lawyer, is a misnomer, and leads parents and children to believe and expect that an ICL is to act in some way as a child's lawyer. This misapprehension, and the dissatisfaction it generates, is strongly evident in the 2014 and 2018 AIFS studies.[15]

Compounding this is the 'function creep' that has been cast onto hard-pressed ICLs. The 2014 AIFS study found that ICLs were increasingly expected, and relied upon, to undertake case management and litigation management functions, especially in matters in which both parties were self-represented. In 1991, Brennan J remarked of the Family Court that

> It seems the pressures on the Family Court are such that there is no time to pay more than lip service to the lofty rhetoric of s. 43 of the Act….It is a matter of public notoriety that the Family Court has frequently been embarrassed by a failure of government to provide the resources needed to perform the vast functions expected of the Court under the Act.[16]

In 2023, this statement applies to many elements of the family law system, including ICLs. Some registries are delaying matters because of the difficulty in accessing ICLs. Expecting ICLs to fulfil the obligations proposed by this amendment, without an overhaul in how they are resourced, risks doing more harm than good and exacerbating the dissatisfaction and distress of children and their parents. At very the least, it is probable that, over time, 'exceptional circumstances' will be found to exist in an increasing proportion of cases, simply to ease the pressure on ICLs and legal aid commissions, thus undermining the policy intent of the amendment.

The existence of ICLs is an example of how successive governments have sought to 'retrofit' the Act to give life to the paramountcy of children's best interests. Inevitably, perhaps, their role (and that of their predecessors, the separate representatives) has always been somewhat anomalous within a Ch III court. This has been long recognised by the Court itself. For example, Fogarty J in *Harris and Harris*, in observations that are as applicable to ICLs as they were to separate representatives:

> …such a person occupies the position of an advocate appearing for a particular party in the litigation although [with] certain unusual features including: (i) that he is not appointed by the party whom he represents; (ii) that he may not be removed by that person; and (iii) that he does not necessarily advance what the 'client' wants but what in his view is in the best interests of that 'client' and to that extent exercises an independent judgment quite out of character with the position ordinarily occupied by an advocate.[17]

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[15] See Carson et al, 2018; Kaspiew, R., Carson, R., Moore, S., De Maio, J., Deblaquiere, J., & Horsfall, B. (2014). *Independent Children's Lawyers Study: Final report* (2nd ed.). Canberra: Attorney-General's Department.

[16] *Harris v Caladine* (1991) 172 CLR 84, 112.

[17] *Harris and Harris* (1977) FLC 90-276 at p 76,476.

In *Bennett and Bennett*, the Full Court of the Family Court observed that

> …We think that the role of the separate representative is broadly analogous to that of counsel assisting a Royal Commission.[18]

In *Francesco Pagliarella and Jennifer Pagliarella and N*, Hannon J held that

> …it is apparent from the authorities that a [separate representative] is not bound by the instructions of the 'client'. Although the separate representative must put the child's wishes to the court, he or she may make submissions contrary to those wishes if it is thought to be in the interests of the child to do so.[19]

Reliance on ICLs misconceives the nature of the question to be asked – what is in a child's best interests? This is not a question of law. The central needs of children, which fall within the parameters of 'best interests', are not legal needs. We completely agree that the legal interests and voices of children need to be heard, in accordance with the Convention on the Rights of the Child, and have therefore supported the proposals in ALRC DP85 for the establishment of separate legal representatives. But such professionals should be working with, and informed by other experts, as recognised in ALRC DP85, who are better placed to undertake child-focused and child-inclusive practice. It is difficult, for example, to see how ICLs will determine whether 'exceptional circumstances' apply so that they should not meet children; such a determination goes to a child's psycho-social and developmental circumstances. These are not areas on which legal professionals have sufficient and appropriate expertise.

Governments have suggested that they have not implemented recommendations of this nature because there are already too many professionals involved in this kind of work in the system. However, these professionals have, collectively, not met children's needs, and this shortcoming will not be addressed by imposing additional statutory obligations on professionals who are not professionally equipped to meet children's needs.

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?

Please see the response to Q 21, to which we would add, first, that ICLs are not necessarily equipped with the knowledge and skills necessary to determine risks of harm in these circumstances. We have, in other submissions concerning family law and family violence reforms, recommended the utilisation of children's advocates (where a skilled and experienced workforce is already in place) as the primary point of contact with children and young people, and who can support ICLs/separate legal representatives in fulfilling the range of functions for

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[18] *Bennett and Bennett* (1991) FLC 92-191 at p 78,529. See also *Wotherspoon and Cooper* (1981) FLC 91-029; *Francesco Pagliarella and Jennifer Pagliarella and N* [1993] FamCA 64; *Re Alex (Hormonal Treatment for Gender Identity Dysphoria)* [2004] FamCA 297, per Nicholson CJ at paragraph 43, noting that the 'hearing was conducted in an inquisitorial rather than adversarial format.' See also *Re Alex* [2009] FamCA 292, which Bryant CJ conducted in accordance with the Less Adversarial Trial provisions in Part XIIA of the Family Law Act (paragraphs 32-34).

[19] *Francesco Pagliarella and Jennifer Pagliarella and N* [1993] FamCA 64, paragraph 18.

which they are best equipped.[20] A separate children's advocate could provide particularly valuable support for ICLs working with children with more complex needs, including children from culturally and linguistically diverse backgrounds and children living with disability.

The absence of an opportunity to express their views is more harmful to children and young people than being afforded a safe space to do so.[21] Children and young people for whom an ICL is appointed are, by definition, children and young people who are already enmeshed in circumstances that require some form of external intervention. In relation to Part VII matters, and as confirmed by AIFS' 2018 report,[22] a conversation with an ICL will not be a child's first exposure to conflict within their family. Silencing children does not protect them from that conflict and is perceived by children and young people as invalidating their experiences; an opportunity to speak is more likely to be protective, as well as affirming children's agency in developmentally appropriate ways. Concerns about the effect that meeting an ICL might have would better be addressed by creation of a role of specialist children's advocates, as we have previously recommended. Such an approach would be consistent with protecting the rights of children and young people, as well as offering scope for DFV and trauma informed practice to support them.

Relationships Australia warmly welcomes the Government's establishment of youth advisory groups in relation to mental health and wellbeing, the promotion of STEM, climate change, and safety, as well as a dedicated First Nations Youth Advisory Group to work with the National Indigenous Australians Agency.[23] Relationships Australia has, in previous submissions to Government, advocated for the establishment of a children and young people's advisory body, to inform policy and programme development, and consider that a similar advisory group should be established, with a specific focus on family law, family violence and child protection. This would implement Recommendation 50 of ALRC 135.

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 proposed expansion of the use of ICLs in Hague matters appears consistent with Australia's shift in policy towards interpretation of the 'grave risk' exception in Article 13(B) of the Convention. We consider that this shift, combined with the proposed amendment, may lead (and perhaps is intended to lead) to the Court treating Hague matters no longer as strict questions of jurisdiction, to be determined by reference to the child's habitual residence and

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[20] Located at https://relationships.org.au/what-we-do/#advocacy and including submissions to the Australian Law Reform Commission, the House of Representatives Social and Policy Affairs Committee, the Senate Legal and Constitutional Affairs Committee, and the Joint Select Committee inquiring into Australia's family law system.

[21] See Carson et al, 2018.

[22] Carson et al, 2018. For observations from Victorian children and young people aged between 10 and 25 on their sense of invisibility in various legal and justice settings, see Fitz-Gibbon et al, 2023.

[23] See media release, 23 January 2023, by the Honourable Dr Anne Aly MP (https://ministers.education.gov.au/aly/call-young-australians-join-new-youth-advisory-groups-and-have-say-issues-important-them, accessed 8 February 2023).

consistent with the international law doctrine of 'hot pursuit', but as more closely resembling domestic Part VII matters. This may well lead to other countries preferring to apply their own domestic laws (including laws about domestic and family violence, and other gendered laws) to determine Hague applications from Australia's State Central Authority. This may lead to fewer children unlawfully removed from Australia, or unlawfully retained in another country, being returned to 'left behind' parents in Australia.

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

The proposed repeal of subsection 68L(3), which erected obstacles to appointing ICLs in Hague Convention (s 111B) matters, should be complemented by a requirement that ICLs be appointed for all medical procedure proceedings, with any exception to be confined to cases in which there is no dispute about the procedure among concerned parties (including people with parental responsibility for the child, clinicians, and children's advocate and/or (if developmentally appropriate) the child. Such a requirement would provide important human rights protections for children and young people.

This would address a range of human rights concerns about oversight of special medical proceedings, and would constitute significant progress in bringing the Act into alignment with the decision of the High Court in *Re Marion*[24] and Article 12 of the Convention on the Rights of the Child. It would also complement proposed amendments in Victoria and the Australian Capital Territory to better protect children and young people from harmful and deferrable medical practices to alter their sex characteristics.

We consider that the extra workload created by such a requirement would be of negligible proportions compared with that created by the new requirements to meet with children in Part VII matters and section 111B matters. This is particularly the case following the 2017 decision in *Re Kelvin*.[25]

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?

Relationships Australia welcomes evolving recognition of the many forms of systems abuse, including litigation abuse, and its significance in the context of coercive controlling behaviour. We urge that, from implementation, evaluation be carried out to determine the impact of introducing these orders in terms of reducing harm to victim survivors and deterring systems abuse, while complying with the principles of natural justice and enabling access to the courts.

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[24] *Department of Health and Community Services (NT) v JWB and SMB* ('*Re Marion*') (1992) 175 CLR 218.

[25] *Re Kelvin (Case Stated)* [2017] FAMCAFC 258.

Our practitioners have raised questions about the intended interaction between the proposed requirement to seek the Court's approval before serving a new application and the obligation to attempt to resolve a new dispute in FDR before going to court. Determined perpetrators of systems abuse are likely to try to 'game the system' by confecting 'new disputes' in relation to which they will seek to invite a respondent to engage in FDR, with the goal of harassing the victim survivor. Victim survivors must be 'kept out of the loop' until the Court has determined whether it should grant approval.

Proposed Division 1B of Part XIB should deal with this risk expressly, while not inappropriately precluding parties from engaging in FDR in respect of new proceedings. One way in which to balance these aims, perhaps, is to explicitly provide that if the Court approves a proposed proceeding, it may also require or permit the parties to engage in FDR before filing an application.

We are also concerned that this amendment will meet the fate of so many other amendments to the Family Law Act and gradually fall into disuse under the day to day workload pressures in the Court (for example, the Less Adversarial Trial provisions). To mitigate this risk, the ongoing information and education campaigns recommended elsewhere in this submission should include components, accessible to the general community, court users, and court professionals (including judges) about the proposed orders.

Further, while these orders are intended to ameliorate the harms consequent on parental conflict and combative behaviour (including systems abuse), their effect is inevitably blunted because of the conflictual and win/loss dynamics that sit at the heart of the Act. Modest reforms, while not unwelcome, cannot cure the fundamental defect of the Act in how it (fails to) properly reflect the paramountcy of children's best interests.

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

Yes.

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?

Proposed subsection 102QAC(3) should be broadened. The subsection should at least allow the Court to have regard to a party's history of use of FDR. It is our experience, for example, that a party will wait until the expiry of a dispute resolution / section 60I certificate, and then restart FDR, or will 'forum shop' among FRCs, forcing the other party to engage repeatedly. Other means of perpetrating systems abuse, which could be reflected in the Act, include unmeritorious and harassing reports to child protection authorities, to regulators (including professional disciplinary bodies), licensing authorities, and complaints handling agencies (eg Ombudsman offices).

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?

Vexatious litigants may also be experiencing circumstances of vulnerability; indeed, our practice experience demonstrates that this is often the case. They may be experiencing mental illness, cognitive impairment, issues with dependence on alcohol and other drugs, or a combination of these and other circumstances. This amplifies the need for co-located therapeutic services, and robust warm referral pathways between Courts and services, that could be accommodated within the Family Wellbeing Hubs recommended in this and previous submissions.

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?

In relation to proposed paragraph 95(2)(a), it is unclear how the concept of 'just determination' sits with Part VII, in both its existing and proposed forms. A parent will commonly appeal to a concept of 'justice' to justify their position, but pursuit of 'justice' as between the parties to Part VII matters innately obscures and undermines what is meant to be the paramount consideration for the parties *qua* parents rather than *qua* litigants.

Proposed paragraph (a) reinforces the equivocal position of children and young people in relation to the Court: while their best interests are said to be 'paramount', they are not parties, they do not have access to advocates who will ensure that their views are known and considered by the Court, they have no standing to appeal, and their best interests are vulnerable to being undermined by focussing on achieving justice between the parties before the Court.

Schedule 6: Protecting sensitive information - express power to exclude evidence of protected confidence

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?

Schedule 6 is a clear example of how the therapeutic functions required of a system that aims to minimise harm exist in tension with the inherent requirements of a system reliant on litigation processes to determine children's best interests.

Relationships Australia supports the requirement to seek leave as supporting help-seeking behaviour, maximising candour between clients and practitioners, and thus promoting positive therapeutic outcomes. Currently, too, our services bear substantial burdens of time and cost to respond to subpoenae (whether to comply or to challenge them), diverting resources from direct service provision. Our practitioners have expressed dismay at subpoenae being routinely applied for (including even by some ICLs) in respect of records that are clearly out of scope. This is another form of systems abuse.

We hope that this approach may lead to a reduction in subpoenae seeking unprotected counselling records. It will mean some changes to how counsellors explain confidentiality and obligations to produce records if subpoenaed - as well as how and when these records will be produced.

The Bill should be clearer as to whether the Court will allow a person to issue a subpoena before they establish that it is appropriate to do so. It is unclear, for example, whether services bear the onus to bring this to the Court's attention and argue for records to be excluded if counsellors believe the provision of such records will cause harm. This is especially important if the party whose records are being requested is vulnerable, and may present particular challenges if that party is self-represented and not in a position to appreciate what their counselling records contain (there will be particular difficulties if the records are from some years ago).

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

It would be clearer – and safer from a therapeutic perspective – if consent can be sought only after consultation with a counselling service / therapist, who should discuss what is contained in the records, and the potential risks / harms that may flow from the contents being admitted into evidence.

It is also unclear how a person seeking another's counselling records will, for the purposes of proposed section 99, establish that admission of the records will not cause harm. Further, it is unclear how the Court will exercise its proposed powers. For example, will the Court expect the party seeking the records, or the protected confider, to provide some sort of disclosure about what the counselling records will contain?

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

Yes. This supports individual agency. However, to ensure that these amendments achieve their aim of protecting persons from undue harm, this must be informed consent, and the legislation should be explicit in saying so. Some clients may not recall fully or accurately what their counselling records may contain. It may have been many years since they attended the relevant session; they may have been distressed, traumatised, and not realised what they said in counselling. Consent should be obtained only after they have been reacquainted with what is in these records. We acknowledge that this would impose obligations on, and would have resourcing implications for, service providers to implement, but consider that it is an important element to minimise the ongoing harm to parties caused by the litigation process.

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?

Relationships Australia welcomes clarification of the policy intent underlying current section 121. This provision was never intended to shield professionals from accountability and oversight.

Nor should it deny access to support networks. Expressly allowing communication with regulators and disciplinary bodies is consistent with principles of transparency and accountability, and will support ongoing integrity of the family law system. It is helpful also to clarify that communications that are private in nature are not captured by the prohibition.

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

Yes.

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

Yes.

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?

Relationships Australia welcomes the proposed definitions of family report writers and designated 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?

Yes. The regulation and oversight of family report writers is long overdue. Relationships Australia supports the approach to legislating for such matters, and looks forward to reforms that will achieve like regulatory outcomes for Children's Contact Services and child consultants. In some locations, however, there is a scarcity of FRWs. We have heard many accounts of clients being ordered to obtain a report, and having to pay considerable amounts because the court report writer is unavailable. This may occur, for example, because of workload and conflict of interest considerations. Relationships Australia would welcome regulation of costs to be charged.

Commencement of the changes

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

Relationships Australia considers the proposed six month lead time to be appropriate, having regard to the underlying purpose of amplifying the best interests of the child as the paramount purpose of Part VII. However, we caveat this support by emphasising the need for well-resourced, effective information and education campaigns, tailored to audiences including the general public, current and imminent users of the system, and professionals working in and adjacent to the family law system. Critically, this includes law enforcement professionals, professionals working in state and territory family violence and child protection system, and professionals in the education and health care systems.

The Government should leverage, *inter alia*, the Family Law Pathways Network and the FRCs to support information and education campaigns, including through additional funding focused on implementation. FRCs, FLPNs and other networks should be appropriately resourced to update current materials, collateral and resources which may become redundant or irrelevant as a result of the amendments. For example, many of our resources refer to the provisions relating to shared parental responsibility, and costs will be involved in ensuring that they reflect the amendments.

Conclusion

Thank you for the opportunity to comment on these important proposals, and for the opportunity you provided for an earlier briefing. Relationships Australia would also warmly welcome opportunities to be involved in ongoing policy development, as foreshadowed in the consultation paper, about compulsory arbitration, taking domestic and family violence into account in property matters, binding financial agreements, and measures to control costs to families in engaging with these systems.

Should you wish to discuss any aspect of this submission in more detail, please do not hesitate to contact me at ntebbey@relationships.org.au, or our National Policy Officer, Dr Susan Cochrane, at scochrane@relationships.org.au. Alternatively, you can contact us by telephone at 02 6162 9300.

Kind regards

Nick Tebbey
National Executive Officer