

27 February 2023

Family Law Reform
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

Submitted online by email to: FamilyLawReform@ag.gov.au

EXPOSURE DRAFT OF THE FAMILY LAW AMENDMENT BILL 2023

WEstjustice welcomes the opportunity to provide written feedback to the Family Law Amendment Bill. Our submission addresses some of the proposed amendments. We also support the Federation of Community Legal Centre's submission to the Family Law Amendment Bill.

WEstjustice is a community legal centre servicing the Western suburbs of Melbourne across the local government areas of Maribyrnong, Hobsons Bay and Wyndham. Our community is one of the fastest growing areas in Australia and is highly diverse, comprising many newly arrived refugee and migrant communities, with significant representation from Asia, Africa and the Pacific Islands, a growing Aboriginal and Torres Strait Islander community, and people of many faiths and no faith.

People experiencing family and gender-based violence represent a significant portion of our case load. Last financial year alone WEstjustice's Family Violence and Family Law Program assisted 1,482 clients through our Early Resolution Services partnership and Duty Lawyer services at Sunshine and Werribee Magistrates Court of Victoria. Our Program further assists victim survivors of family violence with Child Protection and Family Law advice, casework and representation in the Children's Court of Victoria and the Federal Circuit and Family Court of Australia.

Schedule 1: Amendments To The Framework For Making Parenting Orders

Objects of Part

WEstjustice generally supports the proposed amendments to the Objects and Principles at section 60B of the *Family Law Act 1975 (Cth)* (*The Family Law Act*) which has been simplified to:

The objects of this Part are:

- (a) To ensure that the best interests of children are met; and
- (b) To give effect to the Convention on the Rights of the Child done as New York on 20 November 1989.

However, to reinforce and ensure understanding of the Object, we propose that section 60B(b) should retain similar wording of the current section 60B(1)(b), that is, 'To protect children from physical or psychological harm by being subjected to, or exposed to, abuse, neglect or family violence. The proposed section 60B(b) would then read as follows:

The objects of this Part are:

- (a) To ensure that the best interests of children are met;
- (b) To protect children from physical or psychological harm by being subjected to, or exposed to, abuse, neglect or family violence; and

- (c) To give effect to the Convention on the Rights of the Child done as New York on 20 November 1989.

Parental Responsibility and Time Provisions

In our work in both the Family Violence Courts and Family Law Courts, family violence does not end with victim survivors obtaining a Family Violence Intervention Order. In many instances family violence can escalate once victim survivors decide to leave the relationship with parenting and/or property issues used as another avenue to perpetuate family violence.

The presumption of equal shared parental responsibility and specific time provision of equal time or significant and substantial time allows for conflict and family violence to escalate rather than looking at what is in the best interests of the child. Accordingly, WEstjustice welcomes the removal of equal shared parental responsibility and mandatory consideration of certain time arrangements in the *Family Law Act*.

We further support the changes to the adviser's obligations in section 60D(1)(b) to encourage the person to act in the child's best interests by applying the considerations set out in the proposed subsections 60CC(2) and (3).

Schedule 4: Independent Children's Lawyer

WEstjustice welcomes the proposed amendment in subsection 68LA(5A) *Family Law Act* requiring that the Independent Children's Lawyer (ICL) must meet with a child and provide the child with the opportunity to express a view. In the period since the last amendments to the Family Law Act, the developments and understanding of child safety and the views of children have vastly evolved, and we consider that the learning ought to be applied to the Federal Circuit and Family Court of Australia (the Court) and the law that decide the best interests of children.

Children's views should be given directly to the Court, and this can be through the Independent Children's Lawyer. However, the specific words and transcript of the interviews should be made available to the decision-maker of the Court. The reason for this is three-fold:

1. The Royal Commission into Institutional Responses to Child Sexual Abuse (The Royal Commission) spoke with 6,875 children and young people who are victims and survivors of child sexual abuse in institutions and gave 10 recommendations to make institutions Child Safe. The second recommendation read:

- *"Children participate in decisions affecting them and are taken seriously"*¹.

Parenting proceedings actively discourage the participation of the children, or placing weight on the views of young children, contrary to child safe practices and recommendations, creating an institutional context that facilitates child abuse.

2. Further studies commissioned by the Royal Commission found "that having a level of control over what happens in these places made a difference to how safe children and young people felt."²

¹ Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report: Recommendations. Volume 6, Making institutions child safe recommendations. Creating child safe communities through prevention. Recommendation 6.5. The Child Safe Standards no. 2.

² S Robinson (2016) Feeling safe, being safe: What is important to children and young people with disability and high support needs about safety in institutional settings?, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2016. Pg. 40.

3. It is concerning when Courts become reliant on the opinions of professionals whose interpretation and judgement of how and why a child may say something has been posited by those who interview the children. This ostensibly creates a form of gatekeeping for the views of the children from the court. The ICL meeting with the child will allow an officer of the court to realise the original intention, which is to include the child's views.

The Children's Court of Victoria has a direct instructions and best interest model for representation of children in sections 524 and 525 the *Children Youth and Families Act 2005 (Vic)*. In particular, the direct instructions model gives children with the opportunity to provide their views and wishes to the Court directly through their legal representative. We also see this as best practice to support the agency of children in family law proceedings. We see this as a rights-based approach which supports children to have a voice with respect to their living arrangements. It would be a matter for the Court to determine the weight to be given to the children's views.

In many matters that are funded by legal aid, ICLs are appointed by the Court upon the application of one of the parties to the proceedings. However, in matters that are not legal aid funded, or where one or both parties are unable or unwilling to pay, or contribute to the costs of the ICL, there is little incentive to make such an application even though the matter meets the threshold, and it would be in the best interest of the child to have an ICL appointed. Accordingly, to ensure that the views of the child are considered by the Court, we further propose that the Court should be proactive in appointing an ICL in appropriate matters rather than relying on one of the parties to the proceedings to make that application.

Schedule 5: Case Management and Procedure

Harmful proceedings orders

WEstjustice is supportive of the proposed section 102QAC which enables the Court to make an order prohibiting a party to the proceedings from initiating further proceedings against the other party to the proceedings without leave of the court if there are reasonable grounds to believe that the other party and/or the child who is the subject of the proceedings would suffer psychological harm, major mental distress or there would be a detrimental effect on the other party's capacity to care for a child.

We view this proposed section as being victim-survivor focussed with the intention to prevent perpetrators from further perpetrating systems abuse against their victims including any child in the Family Law matter. We hope that this new section will also assist with ensuring that children are not subject to ongoing harmful litigation throughout their childhoods because frequent and intense conflict between parents can have a negative impact on children's sense of safety and security.

The Consultation Paper explains that this new section will allow for procedural fairness, as the applicant will be given the opportunity to make submissions and these proceedings can be conducted ex-parte to reduce harm to other party of the further proceedings. We concur with the view of many of our fellow Community Legal Centres that:

- The *Family Law Act* should also provide an avenue for the respondent to elect whether they would like to be notified of further proceedings which are subject to a harmful proceedings order; and
- If the respondent elects not to be informed of such proceedings, there should be a risk assessment conducted to put in place safety measures.

WEstjustice considers that an option for the Court is to implement a court family violence practitioner, similar to those in the Magistrates Court, who would make risk assessments in these matters and contact the respondent's support worker or, in the absence of one, the respondent, in a trauma informed way to manage any safety risks.

Schedule 6: Protecting Sensitive Information

WEstjustice is supportive of the proposed section 99 enabling the Court to have the power to exclude evidence of 'protected confidences' relating to the provision of health services, medical or counselling records.

We consider that this proposed section will be beneficial to victim-survivors of family violence whose recovery could be negatively impacted by their medical records (particularly psychological records) being made available to the Court. Production of these materials can result in a loss of confidence between professional and patient and consequently hinder.

Many of the clients that WEstjustice assist also have family violence support workers. Many of our client want their family violence support worker to attend appointments with them or communicate with us on their behalf for various reasons. In these circumstances, we feel that it is prudent to provide our clients with advice that they can choose to have their support worker present but that that worker is not covered by lawyer-client privilege and can be subpoenaed to provide evidence or produce documents. We propose that the new subsection 99(2) should be extended to include family violence support workers and services.

We further support the proposed subsection 99(3) which we consider to be family violence and trauma informed as it allows for victim-survivors to consent to protected confidence evidence being admitted in the proceedings to corroborate their evidence and reduce the need to repeat their story and the trauma experienced.

WEstjustice concurs with the view of many of our fellow Community Legal Centres that this new provision should not only focus on the admissibility of evidence as this would defeat the intention of protecting sensitive information if the subpoena has been issued and the material inspected by the parties. Instead, the party wishing to subpoena sensitive information should be required to seek leave of the Court to do so and, if such leave is granted, the Court can limit the scope of what information is to be subpoenaed and produced.

Funding Community Legal Centres to undertake Family Law Case work

We participated in the Family Law Access Project led by Women's Legal Service Victoria which provided intensive coaching, mentoring and supervision to our lawyers in Family Law. We also have recruited lawyers with Family Law experience and built a well-functioning Family Law practice. We advocate for direct long-term funding to Community Legal Centres (CLCs) in Family Law as the demand for assistance is significant, but services for free or low-cost Family Law assistance is limited, particularly for property matters where there are small asset pools. CLCs can provide Family Law case work for disadvantaged people who may not qualify for a grant of legal assistance through the state legal aid agency and in addition, in the case of Victoria, provide dedicated assistance in Family Law property disputes which Victoria Legal Aid is currently not funding.

We thank you for taking the time to consider this submission. If the Attorney-General's Department would like more information about our response or any Westjustice projects or programs, or information about how we work closely with our community to co-design and deliver place-based free legal services, we would be more than happy to meet to discuss. Please contact Cleona Feuerring (Cleona@westjustice.org.au) Legal Director of our Family Violence and Family Law Program for assistance.

Yours Sincerely



Melissa Hardham
CEO
Westjustice