Centre for Excellence in Child and Family Welfare

# Submission:
## The Family Law Amendment Bill

The Centre for Excellence in Child and Family Welfare (the Centre) welcomes the opportunity to provide a submission to the Australian Government Attorney-General's Department for the Family Law Amendment Bill 2023 (Cth).

The Centre is the peak body for child and family services in Victoria. For over 100 years we have advocated for the rights of children and young people to be heard, to be safe, to access education and to remain connected to family, community and culture. We represent over 150 community service organisations, students and individuals in Victoria working across the continuum of child and family services, from prevention and early intervention to the provision of out-of-home care.

### Introduction

The purpose of the *Family Law Act 1975* (Cth) is to assist families in dispute resolution and to ensure children are protected from harm, supported after family separation, and have decisions made in their best interests.[1] However, family law has become a system which causes distress and hardship for many. Challenges include having to navigate a complex system, the financial cost of litigation and often onerous and time-consuming legal proceedings. In particular, the system does not provide a supportive and welcome place for children and young people who are involved in litigation, and who often remain voiceless and lack autonomy over decisions made in their 'best interests'.

The shortcomings of the current family law system have been highlighted in 12 reports since 2009, most recently the 2018 Joint Select Committee on Australia's family law system and the 2019 Inquiry by the Australian Government Law Reform Commission (ALRC) into the family law system. These inquiries have made extensive recommendations aimed at reforming a system which currently lacks community confidence and has become increasingly difficult to understand and navigate.[2] The Centre supports this consultation into the proposed amendments to the Family Law Act, as described in the Bill, and the move toward improving the family law system. In particular, we support:

- The intention to place children's rights at the centre of the family law system and give them an increased voice in decision making.
- Giving increased weight to connection to culture for decisions involving Aboriginal and Torres Strait Islander children.
- Expanding the notion of 'family'.
- Simplifying the list of best interest factors.

[1] Australian Government Attorney-General's Department, *Children and family law,* (viewed 21 February 2023, <https://www.ag.gov.au/families-and-marriage/families/children-and-family-law#:~:text=The%20Family%20Law%20Act%201975%20focuses%20on%20the%20rights%20of,and%20are%20protected%20from%20harm>

[2] Australian Government, Australian Law Reform Commission (2019), *Family Law for the Future – An Inquiry into the Family Law System, Final Report,* ALCRC Report 135.

- Amendments that repeal the presumption of 'equal shared responsibility'.

Although the Family Law Amendment Bill improves certain elements of the legislation, we believe it does not address some of the broader issues in the system which have been highlighted by previous inquiries and the lived experience of service users. Our submission outlines the key areas we believe require further attention, including strengthening the courts' response to the rights of children, responding to family violence, aligning systems across jurisdictions, and adequately supporting parents with disability to make sure they are not discriminated against in the system.

## Independent Children's Lawyers

We support the proposed changes to the provisions surrounding Independent Children's Lawyers (ICLs) contained in Schedule 4, particularly in relation to subsection 68LA(5A), including the addition of the legislative requirement to meet with children to gather their views and the expansion of access to ICLs.

However, we believe a stronger approach to child wellbeing is required within the court system and that all children should have the right to representation. The new legislation notes that 'where appointed' ICLs will be required to meet with children and gather their view. However, the key wording here is 'where appointed' rather than 'when appointed.' Too many children will still go unrepresented under this amendment, and we believe that unless children have the opportunity to express their views, their rights and interests cannot be served.

Additionally, when children do have an ICL, if a child declines to speak the ICL will not be required to gather their views, as stipulated under subsections 68LA(5B) and (5C). We support the notion that children should have the agency of choice to participate in the court process, however we also believe that those engaging with children with complex trauma stemming from experiences of family violence or other experiences should be adequately trained and trauma informed to gather their views.

It may be more complex to gather views from children with disability. Children with disability have the right to express themselves and have their view heard, often systems have a lack of respect for the capacity of children with disability to express themselves and have their preferences heard and realised.[3] One solution is for more vulnerable children to be provided with an independent advocate who has expertise in communicating with children.

## Systems alignment

At present, the segregation of systems across jurisdictions poses difficulties to the way state and federal legislation is applied and how information is used and shared. The ALRC review found that improvements are required to juridical gaps that undermine the safety of victim survivors of family violence.[4] This includes the recommendation for the Federal Government to consider the establishment of state and territory family courts that would be able to operate under the national Family Law Act, while also being able to take into account state and territory child protection and

[3] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2020), <https://disability.royalcommission.gov.au/>

[4] Ibid, ALRC Report.

family violence jurisdiction and work toward abolishing first instance family law courts.[5] In the Victorian context, there has been widespread reform in family violence and child protection, and the state is moving at a very fast pace toward systems improvement. We are concerned that the reforms in Victoria will outpace the national Family Law Act, making it increasingly difficult to navigate this legislation for Victorian families. As the ALRC outlines:

> *the various inquiries and reports over several decades, and especially those within the last 20 years, have all identified similar structural and systemic problems in the family law system. They have all recommended improved inter-jurisdictional collaboration and cooperation through a variety of protocols, information sharing agreements, and the conferral of enhanced family law jurisdiction on state and territory courts. In spite of those recommendations, the submissions to this Inquiry suggest that little progress has been made in protecting children and vulnerable parties from the 'jurisdictional gap'.*[6]

We support the ALRC findings which highlight the risks to children and family safety posed by the separation of systems. We support a national framework to facilitate progress toward an integrated systems approach. We believe that the system cannot be working toward the best interests of children while this siloed approach exists.

## Systems abuse

The new legislation moves toward preventing systems abuse by adding the proposed amendments to Part XIB of the Act, under Schedule 5 of the Bill, which introduces 'harmful proceedings orders' to 'prevent a vexatious litigant from filing and serving new applications without first obtaining leave from the court.'[7] The Centre supports reform in preventing systems abuse, however, we are concerned that this change could prevent people who have legitimate reason from filing an application to change a parenting order. We believe there should be a review mechanism to account for exceptional circumstances. We also emphasise that it does not prevent broader systems abuse that may be used by perpetrators of family violence. This includes the ability for perpetrators to make multiple applications in various legal jurisdictions to 'reassert power and control over the victim.'[8] We believe the proposed amendments under Schedule 5 do not go far enough in protecting vulnerable family members, particularly those who may have disability, language barriers or lack financial resources to respond to systems abuse. We endorse the recommendations from the ALRC review toward the establishment of state and territory family courts which can take into account local jurisdiction across systems to prevent broader systems abuse.

## Family violence information sharing

One example of the shortcomings of the separate national and state systems is the inability to share information relating to family violence across jurisdictions. As outlined in the ALRC report, it is concerning that the federal family courts continue to 'have limited investigative powers to follow up

[5] Ibid.
[6] Ibid, ALRC Report.
[7] Ibid.
[8] The Australian Institute of Judicial Administration (2019), *National Domestic and Family Violence Bench book,* <https://aija.org.au/publications/national-domestic-and-family-violence-bench-book/>

allegations made in family law proceedings that indicate potential risks to the parties, their children and third parties'.[9] The ALRC review recommended the development of a national information sharing framework to 'guide the sharing of information about the safety, welfare and wellbeing of families and children between the family law, family violence and child protection systems'.[10]

As the system currently stands, it cannot make informed decisions that prioritise child safety and wellbeing without access to correct information and the ability to identify incidents and behaviour across jurisdictions. An example of a cross sector information sharing tool is the Multi Agency Risk Assessment Management Tool (MARAM), which was created in Victoria in response to the 2016 Royal Commission into Family Violence. MARAM is used to identify, assess, and manage family violence risk, allowing for the sharing of information between services to ensure that people using violence are kept in view and children and victim survivors are safe and supported.[11]

MARAM seeks to create an integrated approach to assessing family violence risk, lessen the likelihood of misidentification of users of violence or 'perpetrators' and decrease the instances of victim-survivors having to re-tell their stories to multiple services. MARAM is also an educational tool which aims to ensure that all staff within systems have a shared understanding of family violence risk factors and indicators, to help agencies communicate with each other and create a coordinated and integrated approach to family violence. We endorse the recommendation for an information sharing system that promotes safe and appropriate sharing of risk-relevant information implemented nationally alongside the Family Law Act. This goes further than the proposed amendments in the current Bill.

## Parents with disability

Parents with disability face increased barriers when navigating the complex family law system and the service system in general. In their 2018 submission to the ALRC, the Australian Human Rights Commission raised its concerns about reports of discrimination against parents with disability in the family court system, with common themes including 'Not knowing their rights, not having support and being afraid to ask for help for fear of being judged and negative assumptions about their ability to parent'.[12]

These themes can also be found in interactions with the broader services system. Parents with disability are often reluctant to approach services due to discrimination and increased likelihood of the removal of children from their care. International research indicates that between 40-60 per cent of parents with a cognitive disability have their children removed from their care.[24] It comes as no surprise then that 'many parents with disability live with the fear that contact with welfare and disability services will result in the removal of their children, making it less likely that they will seek help to successfully parent their children'.[13] Disability is regularly listed as a risk factor for a range

[9] Ibid, ALRC Report.

[10] Ibid.

[11] The State Government of Victoria, *MARAM practice guides and resources,* <https://www.vic.gov.au/maram-practice-guides-and-resources>.

[12] Australian Human Rights Commission (2018), *Review of the Family Law System, Submission to the Australian Law Reform Commission.*

[13] Office of the Public Advocate (OPA) (2015), *Rebuilding the village: Supporting families where a parent has a disability – Report 2: child protection*, Melbourne: OPA.

of negative outcomes, often without the context as to why this is the case. The *Protecting Victoria's Vulnerable Children* inquiry identified disability as a risk factor for abuse and neglect with no acknowledgement that parents with a disability have the capacity and ability to parent effectively. The Office of the Public Advocate notes that:

> *there is little evidence that parents with disabilities abuse their children, with most children being removed from parents with disabilities on the grounds of neglect or risk of neglect.*[14]

While parents with disability are more likely to experience a range of risk factors for child maltreatment, disability itself should not be considered a risk factor. At present, there is a lack of education and support services that are skilled at working with families with parental disability and entrenched societal attitudes toward parents with disability continue to impact the removal of children from their care. We are concerned that the wording (below) of the proposed amendments to the Family Law Act under paragraph 60CC(2)(d) could have adverse or unintended outcomes for parents with disability if interpreted incorrectly:

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

We recommend paragraph 60CC(2)(d) is reworded to specify the shared responsibility of the service system to make services accessible and non-discriminatory for parents with disability. This wording could help make sure that a previous lack of willingness to seek help from the system is not weaponised against parents with disability or used as a reason to undermine their 'capacity' to parent their child.

## Recommendations

1. That the Family Law Amendment Bill ensures children have an Independent Children's Lawyer or an Independent Advocate in all cases that come before the court.
2. That the Federal Government consider the establishment of State and Territory Family Courts that would be able to operate under the Family Law Act, consider state and territory child protection and family violence jurisdiction and work toward abolishing first instance family law courts.
3. That the Federal Government develop a national information sharing framework which considers information from systems including child protection, schools, health services, community services and courts across jurisdictions.
4. That the Family Law Amendment Bill rewords paragraph 60CC(2)(d) to specify the shared responsibility for services to be accessible for parents with disability.

[14] OPA (2022), Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability, Carlton: Office of the Public Advocate, p.13.