Women's Legal Services Australia

Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Family Law Amendment Bill 2023

23 June 2023

Acknowledgement

We acknowledge the victim-survivors of domestic, family, and sexual violence who we work with and their voices and experiences which inform our advocacy work.

Women's legal services operate from many different locations across Australia. Across these locations, we acknowledge the Traditional Owners of Country, recognise their continuing connection to land, water and community, and pay respect to Elders past and present.

Who we are

Women's Legal Services Australia (WLSA) is a national network of 13 specialist women's legal services in each state and territory across Australia, specifically designed to improve women's lives through gender-led and trauma-informed specialist legal representation, support, and advocacy.

WLSA members include:

- Women's Legal Service Victoria
- Women's Legal Service Tasmania
- Women's Legal Service NSW
- Women's Legal Service WA
- Women's Legal Service SA
- Women's Legal Service Queensland
- North Queensland Women's Legal Service
- First Nations Women's Legal Service Queensland
- Women's Legal Centre ACT
- Wirringa Baiya Aboriginal Women's Legal Centre (NSW)
- Top End Women's Legal Service
- Central Australian Women's Legal Service
- Katherine Women's Information and Legal Service

What we do

Women's legal services provide high quality free legal services, including representation and law reform activities, to support women's safety, access to rights and entitlements, and gender equality. We seek to promote a legal system that is safe, supportive, non-discriminatory, and responsive to the needs of women. Some of our services have operated for almost 40 years.

The principal areas of law that our services assist with are family law, family violence intervention orders, child protection, migration law, victims of crime compensation, employment law and discrimination law. Some of our services also assist with other areas of civil law and criminal law. Our services also develop and deliver training programs and educational workshops to share our expertise regarding effective legal responses to violence and relationship breakdown.

Most of the clients assisted by women's legal services have experienced, or are still experiencing, family and domestic violence. Our services have specialist expertise in safety and risk management, maintaining a holistic and trauma-informed legal practice, and providing women additional multidisciplinary supports, including social workers, financial counsellors, and trauma counsellors, for long-term safety outcomes.

Our advocacy approach

Our advocacy work is informed by the specialist expertise of women's legal services and their experience providing on the ground legal assistance and wraparound supports to women in the community. Our advocacy work is also informed by the lived experience of clients, many who are victim-survivors of domestic, family, and sexual violence, and who are often experiencing multiple forms of disadvantage.

We provide a unique, gendered and trauma-informed perspective on how the law is affecting women every day, and the barriers to safety, justice, and equality that women are experiencing through engagement with the legal system. Our primary concern when considering any proposed legislative amendments is whether the changes will make the legal system fairer and safer for children and adult victim-survivors of violence, who are predominantly women.

Contact us

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Endorsements

The organisations below endorse this submission.

Introduction

WLSA welcomes the introduction of the Family Law Amendment Bill 2023 (**the Bill**).

We welcome the focus of these reforms on the safety of children and adult victim-survivors in the family law system. This is evident in the removal from the *Family Law Act 1975* (Cth) (**the Act**) of the presumption of equal shared parental responsibility (**ESPR**) and the removal of the requirement to consider particular forms of time – equal time or substantial and significant time – with each parent. Removing these provisions is essential to ensuring the safety of children and adult victim-survivors during and after separation.

WLSA also supports the following important changes to the family law system:

- The power to make 'harmful proceedings orders' to address systems abuse.
- The inclusion of 'overarching purpose of family law practice and procedure' provisions, and the accompanying duty, in the Bill, and listing safety and best interest factors before speed, efficiency and minimisation of cost.
- The simplification of the objects provisions. The objects are clear, concise and remove repetition that currently occurs in the objects of the Part (section 60B) and best interest of the child factors (section 60CC).
- The requirement for Independent Children's Lawyers (**ICLs**) to meet with children and consider their views. It is important to ensure children and young people can safely participate and express their views in family law processes.
- The inclusion of the proposed section 65DAAA to reflect the common law principles set out in *Rice v Asplund* to guide a court in how to determine if final parenting orders should be reconsidered.
- The provisions to promote greater accountability of family report writers. The content and recommendations within a family report can significantly influence family law proceedings. Many inquiries have recommended accreditation and greater accountability of family report writers.
- The proposed changes to expand the use of ICLs in cases brought under the *Hague Convention on the Civil Aspects of International Child Abduction* (**the Hague Convention**).

WLSA has a number of recommendations to improve the Bill and to better ensure the safety of children and young people, as well as adult-victim survivors of family violence. Our key concerns are:

- The court will not be required to prioritise safety when making decisions about what is in the best interests of the child.
- The court will not be required to consider the history of violence, abuse and neglect when making decisions about what is in the best interests of the child.
- The rights of Aboriginal and Torres Strait Islander children to enjoy and explore the full extent of their culture are weakened by the Bill's removal of existing provisions that protect these cultural rights.
- Safety is not prioritised in the overarching purpose provisions.
- Safety has not been appropriately considered in relation to the provisions regarding costs for non-compliance of parenting orders.

It is not possible to have a safe, simple, accessible, and fair family law system without significant investment in the professionals that work in the system, including specialist legal assistance services for victim-survivors of domestic and family violence. Alongside these legislative reforms, the government must commit to properly resourcing the system, training for family law professionals on family violence, cultural safety and trauma-informed practice, and a workforce development strategy to ensure greater diversity across the system.

Summary of recommendations

We recommend the following amendments to the Bill:

Schedule 1: Parenting framework

1. The court must prioritise safety when determining the child's "best interests". A provision be added which prioritises safety over all other best interests factors, similar to the current wording of section 60CC(2A) of the *Family Law Act 1975* (Cth).
2. Use the language of "*physical, psychological, or sexual harm from being subjected to or exposed to*" family violence, abuse, or neglect in the "best interests" factors.
3. Include "*history of family violence, abuse and neglect*" in the "best interests" factors.
4. Better recognise the cultural rights of First Nations children by referring to "kin" at proposed section 60CC(3) and retaining current s60CC(6)(b) wording as follows:

   "to have the support, opportunity and encouragement necessary:

   (i) *to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and*

   (ii) *to develop a positive appreciation of that culture"*
5. In making consent orders, the court be required to have regard to the safety of the child and other relevant people in the child's life; and in matters involving Aboriginal and Torres Strait Islander children, ensuring the child's right to enjoy their culture.

Schedule 2: Enforcement of child-related orders

6. The costs provisions must be reconsidered to prioritise safety and ensure that they do not lead to unsafe outcomes for children and adult victim-survivors.
7. A costs order must not be awarded against a party in circumstances where there has not been a finding that they have contravened orders.
8. Where safety concerns are raised, orders, such as make-up time orders, must not be made without a finding as to whether there was a reasonable excuse.
9. Proposed s70NBE(4) must be amended so that "*must make an order*" reads "*must **consider** making an order (a costs order) that the respondent pay some or all of the costs of any other party to the proceedings if the court finds that the respondent contravened the child-related order without reasonable excuse, unless the court is satisfied that it is not appropriate to do so in the circumstances*".

Schedule 3: Definition of member of the family

10. Sections 60CF, 60CH, 60CI and the Initiating Application form and Response form must be amended to provide that disclosure only relates to those people who are "*significant to the child's care, welfare and development*".

Schedule 4: Independent Children's Lawyers

11. Independent Children's Lawyers must be obliged to meet with the child and provide the child with the opportunity to express their views immediately prior to and after major court events, including interim hearings, court-based and external family dispute resolution and final hearings, and meet with the child at other times as requested by the child.
12. That there be further amendments to the Child Abduction Regulations to provide better safeguards for a parent/carer fleeing violence across international borders with their child and this occur in consultation with sexual, domestic and family violence and abuse and legal experts.

Schedule 5: Case management and procedure

Harmful proceedings orders

13. The Bill must be amended to provide that the victim-survivor does not need to prove they have suffered harm. This could be done by adding the word "*likely*" so the provisions read "*would likely suffer harm*" in both proposed s102QAC(1)(a) and (b).

14. Consideration must also be given to adding a provision such as: "*Making a harmful proceedings order does not depend on proving the other party or the child the subject of proceedings actually suffers harm*".
15. At a minimum, if the victim-survivor is not served with the leave application, and if leave is denied, the victim-survivor should be advised of the outcome of these proceedings in advance of the person the subject of the harmful proceeding order to ensure appropriate management of risk.

Overarching purpose of the family law practice and procedure provisions

16. Proposed section 95 must be amended to give safety greater weight than other factors in the overarching purpose.

Schedule 7: Family report writers

17. At proposed s11K(1)(a) rather than stating "*regulations may make provision for*', this must be mandated - "*regulations **must** make provision for.*" Similarly, at proposed s 11K(1)(2) rather than "*may deal with any or all of the following*" it should be reframed so that the legislation prescribes what the regulations must deal with, for example "***must** deal with all of the following*."
18. The legislation must refer to the regulations relating to family report writers including core competencies for a family report writer in family violence informed practice, responding to risk, understanding child abuse, trauma-informed practice, cultural safety, working with priority populations, and working with children, minimum content requirements as to what must be included in a report, and annual training requirements.
19. Part 7.1, Rule 7.01(1)(d) *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* be repealed to allow parties to ask various clarifying questions of an expert witness (and in particular, court child experts and family consultants) pursuant to Rule 7.26.

Commencement

20. Once the Bill is passed, the changes must take effect as soon as possible and apply to all proceedings.

Protecting sensitive information

21. The Government should introduce legislation, and improve procedures, consistent with the recommendations in WLSA's submission on the Exposure Draft of the Family Law Amendment Bill 2023, to increase protections for sensitive information, including counselling records and medical records, in family law matters.

We make the following non-legislative recommendations:

Education campaign

22. The Government properly resources an awareness and education campaign on the changes to the Act, including the removal of the presumption of equal shared parental responsibility and consideration of equal time and what this means for parenting arrangements/decision-making to improve community understanding. It is important the education campaign target all professionals working within the family law and child protection systems as well as the broader community.

Additional improvements to the family law system

23. More funding particularly for Independent Children's Lawyers, several Indigenous Liaison Officers in each family court registry and greater access to family violence-informed, culturally safe legal assistance services.

24. Ensuring all professionals within the family law system are family violence informed, trauma-informed, culturally safe, child rights focused, disability aware and LGBTIQA+ aware. This requires regular access to meaningful training developed and delivered by subject matter and lived-experience experts that is regularly independently evaluated for its effectiveness, including evidence of improvements in the practice of professionals working in the family law system.

25. Properly resourcing the front end of the family law system as a way of preventing and limiting systems abuse. This includes through greater access to family violence informed, trauma informed, culturally safe, child focused, lawyer-assisted family dispute resolution and early judicial determination of family violence.

26. Supporting greater diversity and inclusion in the family law profession, including judges, legal practitioners, family report writers, and family dispute resolution practitioners to ensure the diverse needs of the Australian community can be met by the system.

27. A greater focus on preventing systems abuse and identifying it early to limit harm, for example, through including relevant questions in the risk screening and assessment process of the Lighthouse Project and through active case management of such matters.

28. Improving Aboriginal and Torres Strait Islander cultural safety, including through further consultation with Aboriginal and Torres Strait Islander people and Aboriginal and Torres Strait Islander organisations about the establishment of a Council of Elders in each family court registry.

Schedule 1 – Parenting framework

Redraft of objects

1. WLSA supports simplification of the objects in the proposed redraft. The objects are clear, concise and remove repetition that currently occurs in the objects of the Part (s60B) and best interest of the child factors (s60CC).

2. We also support inclusion of reference to the *Convention on the Rights of the Child*.

Best interests factors

3. In parenting proceedings, every decision made by the court must be in the child's best interests. The Act states that the child's "*best interests*" is the paramount consideration of the court (section 60CA). This means that in parenting proceedings, the provisions regarding the child's "*best interests*" are the most important provisions in the Act. The Bill has not changed this, but it has changed what the court needs to consider when determining the child's "*best interests*". We are concerned that these changes do not prioritise the safety of children or adult victim-survivors.

4. In 2011, the Parliament passed laws that prioritised the safety of children in parenting matters. These laws were enacted after multiple reviews showed that the Act failed to adequately protect children as well as adult victim-survivors from family violence and abuse.[1] Removing these laws is inconsistent with the clear intention of this Bill to address safety concerns that have been raised by the community.

5. Under the Act, a child's safety is the most important factor when a court is determining what is in a child's best interests. The legislation specifically states that greater weight must be given to the need to protect a child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect, or family violence above all other considerations (section 60CC(2A)). This prioritisation of safety informs every decision that is made about a child and shows clear legislative intent that child safety is a matter of great importance and must be prioritised over the benefit to the child of having a meaningful relationship with both parents.

6. In the Bill, safety is no longer the most important consideration when the court is determining what is in the child's "*best interests*". Rather, there is now a list of factors that the court must take into account and safety is one of a number of factors. WLSA is supportive of refining the list of the child's *"best interests*" factors at section 60CC, including into a single list. This will help to achieve the intended aims of being more responsive to family violence, abuse and neglect as well as to simplify complex and confusing legislation. However, our support for a single list of factors is contingent upon prioritising the safety of children and adult victim-survivors.

7. This can be achieved by stating safety has greater weight. For example, amend the Bill at proposed s60CC to add "*In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph 2(a)*".

[1] Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K., Qu, L., & the Family Law Evaluation Team (2009). *Evaluation of the 2006 family law reforms*. Melbourne: Australian Institute of Family Studies; the Hon Prof Richard Chisholm (2010) *Family Courts Violence Review*; Family Law Council (2009) *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*

8. Without the inclusion of this proposed amendment the draft provisions conceivably provide for all section 60CC "*child's best interests"* factors to be given equal weight. To date current s60CC(2A) which prioritises safety has been the most effective provision to ensure the safety of children and it is currently a provision that works well and is well understood by parties and the profession. WLSA strongly advocates that safety is given priority over all other child's "*best interests"* considerations.

9. We note that proposed section 60CC(2)(e) in the Bill, which relates to the benefit of the child being able to have a relationship with the child's parents and other people who are significant to the child, does include the qualification of "*where it is safe to do so"*. However, this is not sufficient because decisions about whether or not it is safe to have a relationship is just one relevant safety consideration when making parenting orders in circumstances where there is history or risk of family violence.

10. For example, there is nothing in the Bill that requires the court to prioritise safety when making decisions about who has parental responsibility (i.e. long-term decision making) for a child. Further, there is nothing in the Bill that requires the court to prioritise safety when considering the views expressed by the child or practical considerations.

11. The Australian Institute of Family Studies (**AIFS**) states: "*the removal of s60CC(2A) both reduces the visibility and removes the legal requirement to prioritise safety ahead of other considerations*". AIFS further states they "*would support that consideration should be given to the addition of a subsection, substantially in accordance with the existing s 60CC(2A), … confirming that greater weight is to be accorded to the children's safety from harm".*[2]

12. The Family Law Council states "it may *also be appropriate to consider adding an additional sub-section substantially in accordance with existing subsection 60CC(2A) …confirming that the court is to give greater weight to the issue of the child's safety"*.[3]

13. Several other organisations have raised the need to prioritise safety in the child's "*best interests*" factors.[4]

14. To achieve this, the Bill must include the word *"best*" so that proposed s60CC(2)(a) "*what arrangements would promote the safety…*" reads "*what arrangements would best promote the safety"* as was originally proposed in the Exposure Draft of the Bill.

Recommendation 1:
The court must prioritise safety when determining the child's "best interests". A provision be added which prioritises safety over all other best interests factors, similar to the current wording of section 60CC(2A) of the *Family Law Act 1975* (Cth).

[2] Australian Institute of Family Studies (2023), Exposure Draft – Family Law Amendment Bill 2023: Submission in response to the Consultation Paper, p. 3
[3] Family Law Council (2023), Response to Consultation Paper: Family Law Amendment Bill 2023, paragraphs 33
[4] National Women's Safety Alliance (2023), Response to Consultation Paper on Family Law Amendment Bill, p2-3; Domestic Violence NSW (2023), Re: Consultation on the Family Law Amendment Bill 2023, p1; Sexual Assault Services Victoria (2023), Exposure Draft of the Family Law Amendment Bill 2023, p1-2; Winda-Mara Aboriginal Corporation (2023), Re: Exposure Draft – Family Law Amendment Bill 2023, p3; Aboriginal Legal Rights Movement (2023), *Submission to the Family Law Amendment Bill 2023*, p6; InTouch Multicultural Centre Against Family Violence (2023), inTouch Submission: Family Law Amendment Bill 2023, p2; Miranda Kaye (2023), Family Law Amendment Bill 2023 Exposure Draft – Submission to Attorney-General's Department, p4; Dr Jessica Mant, Associate Professor Becky Batagol and Dr Cate Banks (2023), Family Law Amendment Bill 2023 (Exposure Draft): Consultation Response, p4, p6; Rainbow Families, Submission – Family Law Amendment Bill, p3; Hunter Valley Family Law Practitioners Association (2023), Family Law Amendment Bill Submission, p2; Queensland Family and Child Commission (2023), Response 660376639 to Exposure Draft of the Family Law Amendment Bill 2023, p1; Youth Law Australia (2023), Consultation on Exposure Draft - Family Law Amendment Bill 2023, p4

Better language to explain safety in the best interests factors

15. The Bill refers to arrangements to "*promote the safety (including safety from family violence, abuse, neglect, or other harm)*" of both the child and people caring for the child. We support the reference to both the child and people caring for the child, which includes adult victim-survivors.

16. However, given that most parenting decisions are made outside of court, it is important to make it clear that safety includes protection from physical and psychological harm, as well as exposure to family violence. This is currently missing from the Bill. The current law refers to "*the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence*" and this phrasing is already well understood. We also recommend inserting a specific reference to sexual harm in the provision, or in a note to clarify that sexual harm is included. It is important to make sexual harm more visible and to normalise discussions about sexual harm to help encourage victim-survivors to feel safe to disclose sexual harm, or to feel that they have permission to disclose sexual harm.

17. To address this concern, the Bill should use existing language as well as the addition of sexual harm and refer to the need to protect each relevant person from physical, psychological, or sexual harm from being subjected to, or exposed to abuse, neglect or family violence. This will ensure the focus is not limited to physical violence.

Recommendation 2:
Use the language of "*physical, psychological, or sexual harm from being subjected to or exposed to*" family violence, abuse, or neglect in the "best interests" factors.

Including history of violence, abuse, and neglect in the best interests factors

18. There is no specific requirement in the Bill that the court consider history of violence, abuse or neglect of a child or member of a child's family. It is critical to include this because previous family violence is a predictor of future family violence, including lethal violence.[5] This also extends to a history of abuse and neglect. Under the current law, the court is required to consider "*any family violence involving the child or a member of the child's family*" (s60CC(3)(j)) and any family violence order that applies or has applied *(s60CC(3)(k)).*

19. It could be argued that history of violence, abuse and neglect can be captured by the proposed provision that enables the court to consider "*anything else that is relevant to the particular circumstances of the child*". However, there is no obligation on the court to consider this, and it is not clear that this is covered in the legislation. It is imperative that the law is very clear, especially when it comes to family violence, abuse, and neglect. History of family violence, abuse and neglect must be included in the child's "*best interests*" factors.

Recommendation 3:
Include "*history of family violence, abuse and neglect*" in the "best interests" factors.

[5] Australian Domestic and Family Violence Death Review Network, & Australia's National Research Organisation for Women's Safety (ANROWS) report found that of the cases in which a male domestic violence primary abuser killed a female victim, 81.6% had exhibited emotionally and psychologically abusive behaviours against their female partners they killed, 63.2% had previously been socially abusive and 16% were sexually abusive.
See Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018 (2nd ed.; Research report 03/2022). ANROWS, p 49-50 (53 -54)

Consideration of carers in the best interest factors

20. A child's safety cannot be viewed in isolation from abuse and family violence perpetrated against people who are significant to the child. Harm perpetrated against an adult victim-survivor also harms a child. There are significant impacts on children exposed to abuse and family violence.

21. We welcome recognition of this in considering the safety of the child and "*each person who has care of the child (whether or not a person has parental responsibility for the child)"*

Views expressed by the child

22. WLSA acknowledges that fundamental to the *Convention on the Rights of the Child* is the right of children and young people to participate in decisions that affect them. Children also have a right to be free from all forms of violence and abuse. It is important to ensure children and young people can safely participate and express their views in family law processes, including in family dispute resolution.

23. The National Children's Commissioner has recommended Independent Children's Lawyers (**ICLs**) and family consultants be "*provided with specific training and resources on how to effectively communicate with children of various ages and maturity, and seek their views about family law matters that concern them*."[6] WLSA supports this recommendation.

24. It is imperative that all family law professionals, including ICLs, are family violence informed, trauma informed, culturally safe, disability aware and LGBTIQA+ aware. It is vital that ICLs are properly supported in their role including through training and resourcing. We further note the need for increased numbers of ICLs in the family law system particularly given the important role that ICLs can and should play.

Recognising the cultural rights of Aboriginal and Torres Strait Islander children

25. When determining what arrangements best promote the best interests of an Aboriginal and Torres Strait Islander child, we recommend a separate provision about the rights of the child to enjoy Aboriginal and Torres Strait Islander culture, rather than its inclusion in a lengthy list of additional factors. This will ensure this issue is given the necessary consideration.

26. The current law provides extensive protections for Aboriginal and Torres Strait Islander children in relation to their culture. Most significantly, the Act recognises the right of Aboriginal and Torres Strait Islander children to maintain a connection to their culture, explore "*the full extent of that culture*" and develop a "*positive appreciation of that culture"* (s60CC(6)). Under the existing legislation there is a far greater imperative for the court to meaningfully consider cultural aspects. The current wording of the Act imbues the notion of "*connection*" with a stronger and more active meaning.

27. We are concerned that "*opportunity to connect with, and maintain their connection with, their family, community, culture, country and language*" does not fully capture the current provision which also refers to:
"*have the support, opportunity and encouragement necessary:*
(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
(ii) to develop a positive appreciation of that culture."

[6] Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Parenting Management Hearings) Bill 2017*, Recommendation 2

28. First Nations staff are concerned the proposed new provision is weaker than the current s60CC(6).

29. By removing the current provisions set out at section 60CC(6), the Bill weakens the existing protections for Aboriginal and Torres Strait Islander children to enjoy their culture. The court will no longer be required to make orders that provide for an in-depth, meaningful connection to culture. It is vital that protections to enable the child to explore the full extent of their culture and develop a positive appreciate of that culture are retained.

30. It is reasonably foreseeable that based on the current wording of the Bill, orders could be made, for example, for a child to live with their non-Aboriginal father and spend only occasional time with their Aboriginal family members for the purpose of participating in a cultural activity during NAIDOC week and a class once a year to learn their language.

31. The current sections 60CC(3)(h) and 60CC(6) were introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)* (**the 2006 Amendments**). The Family Law Amendment (Shared Parental Responsibility) Bill 2005 Explanatory Memorandum details the reasoning behind the introduction of S60CC(6):

    Subsection 60CC(6) – Right to enjoy Aboriginal or Torres Strait Islander culture

    For the purpose of new paragraph 60CC(3)(h), new subsection 60CC(6) clarifies the meaning of an Aboriginal or a Torres Strait Islander child's right to enjoy his or her culture. The provision reflects the importance of Aboriginal and Torres Strait Islander children being able to maintain a connection with their culture and to have the support, opportunity and encouragement necessary to develop a positive appreciation of that culture and to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views. These changes are made as a result of recommendation 4 in the Family Law Council's December 2004 Report, Recognition of Traditional Aboriginal and Torres Strait Islander Child- Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze.

32. Since then, these sections have been frequently relied on by the court when making decisions about Aboriginal and Torres Strait Islander children. One of the first cases to examine this issue following the 2006 amendments, and which gave careful consideration to the full impact and importance of subsection 60CC(3)(h) and 60CC(6), was *Davis & Spring (2007)*[7] where Young J stated at para [79]:

    The 2006 amendments strengthened the language of the provisions in relation to the cultural needs of Indigenous children. They introduced a specific right of the child to, inter alia, "explore the full extent" of his or her culture and "to have the support, opportunity and encouragement necessary" to do so. A child of Aboriginal heritage also has the right to "develop a positive appreciation of that culture". The previous legislation required the Court to consider "the need" of an Indigenous child to maintain a connection with his or her culture. By comparison, the new language creates a far greater imperative for the Court to give consideration to issues of culture. Certainly, the 2006 amendments imbued the notion of "connection" with a stronger and more active meaning. (emphasis added)

33. It is clearly evident in the judgment of Young J in *Davis & Spring* that the court considers the inclusion of the provisions of section 60CC(6) to strengthen and more rigorously ensure in-depth and meaningful "*connection*" to culture for Aboriginal or Torres Strait Islander children.

34. Should the current section 60CC(6) be omitted from the Act, as proposed in the Bill, then the court will no longer be required to imbue such a thorough and significant interpretation to what "*connection*" to culture is for Aboriginal and Torres Strait Islander children. We are deeply concerned that this may lead to orders being made that merely superficially provide for "*connection"* to culture and do not, in fact, allow for a child to *"explore the full extent of that culture, consistent with the*

child's age and developmental level and the child's views" and *"develop a positive appreciation of that culture.*"

35. There have been numerous other judicial decisions that highlight the importance of the provisions of section 60CC(3)(h) and 60CC(6). Many of these cases often reference the jurisprudence of Young J in D*avis & Spring.*[8]

36. The provision should also make reference to "*kin*" and that a child has the "*right to enjoy the child's Aboriginal or Torres Strait Islander culture, by having the opportunity to connect with, and maintain their connection with members of their family and with their* ***kin****, community, culture, country and language*."

Recommendation 4:
Better recognise the cultural rights of First Nations children by referring to "kin" at proposed section 60CC(3) and retaining current s60CC(6)(b) wording as follows: *"to have the support, opportunity and encouragement necessary: to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and to develop a positive appreciation of that culture."*

Recognising all cultural rights

37. All children have the right to enjoy their culture, consistent with the *Convention on the Rights of the Child*. This is recognised in the current Act in the objectives at section 60B(2)(e), "*children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture)"* and in section 60CC(3)(g), "*the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant".*

38. The Exposure Draft did not include a general reference to culture in the objects or section 60CC(2). However, the objects include reference to the *Convention on the Rights of the Child* which includes the right to enjoy culture.

39. The Bill includes reference to "cultural needs" at proposed section 60CC(2)(d). We support this, and also support a standalone item in the "best interests" factors that requires the court to consider the cultural rights of children to explore the full extent of their culture and have a positive appreciation of their culture, including community connection. This could include, for example, in relation to culturally and linguistically diverse people, people with disability and LGBTIQA+ people.

Consent Orders

40. The Act states that the court may, but is not required to, have regard to the ways in which the court determines a child's "*best interests*" set out at subsection 60CC(2) and (3) when making consent orders. When seeking orders by consent where there are no pending proceedings before the court, the Applicant must file a *Notice of Child Abuse, Family Violence and Risk* with the application for consent orders.

41. The *Notice of Child Abuse, Family Violence and Risk* is a form where the parties provide information to the court about whether the child has been, or is at risk of being subjected to abuse, or exposed to, abuse, neglect, or family violence, and whether that party considers they themselves, or another party to the proceedings, have been, or are at risk of being subjected to family violence. Therefore, when seeking orders by consent where there are no pending proceedings before the court, the court will still have information before it about allegations of family violence and risk.

42. When a Registrar reviews an application for consent orders, the Registrar can require one or both parties to undertake further steps in order to show the orders are appropriate based on individual circumstances. For example, the court may issue a requisition letter and request further information or an affidavit to justify or explain why certain orders are sought. This helps the court to understand the circumstances of the child and parties seeking consent orders and the appropriateness of the proposed orders.

43. Under the Act, there is no requirement that the court must consider whether consent orders being made for a child are actually safe for that child. While the court can require further information to inform itself as to the appropriateness of the orders, there is no requirement that it actually do so. This could lead to unsafe orders being sought by consent with no requirement that the court to consider whether what is proposed is safe for the child.

44. The court ought to be required to ensure that it considers whether proposed orders are safe for the child based on the information available to it. Legal representatives, or parties, should also be required to turn their mind to, and address how, the proposed orders address any safety risks.

45. In the event the court is not satisfied that the proposed orders have addressed safety concerns, then it is vital the court lists the matter so that proper consideration of the safety of the child is addressed. It is imperative that the consent order process is not simply a "rubber stamping" exercise.

46. In relation to consent orders regarding Aboriginal and Torres Strait Islander children, there is also no requirement that the court consider whether consent orders being made for that child ensure their right to enjoy their culture is protected. It is imperative that the court turns its mind to whether the proposed orders are sufficient in this regard.

Recommendation 5:
In making consent orders, the court must have regard to the safety of the child and other relevant people in the child's life, and in matters involving Aboriginal and Torres Strait Islander children, ensuring the child's right to enjoy their culture.

Removal of equal shared parental responsibility and specific time provisions

47. WLSA welcomes the prioritisation of victim-survivor safety, of both children and adults, in the family law system. We strongly support the removal of the presumption of equal shared parental responsibility (**ESPR)** and the removal of the requirement to consider particular forms of time – equal time or substantial and significant time with each parent. While we recognise that it is often in the best interests of children to spend time with both parents, this must be considered on a case-by-case basis, and the safety of children and adult victim-survivors of domestic, family and sexual violence and abuse must always be prioritised.

48. The law currently assumes that it is in the '*best interests*' of the child for there to be an order for ESPR. This means that the law assumes that it is in the 'best interests' of the child for parents to jointly make major decisions in relation to a child. This presumption does not apply where the Court accepts there has been family violence. It may be rebutted if it is not in the 'best interests' of the child. If the Court makes an order for ESPR, the court is required to consider making an order that a child spends equal time with both parents. If that is not practical or in the child's best interest the Court must consider making an order for substantial and significant time.

49. The Act is not well understood in the community – misunderstandings about the presumption of ESPR results in parents agreeing to equal time where it is not in the best interests of the child, particularly in the context of family violence and abuse. The presumption encourages people to

assume that “we are all entitled to equal time” with the child, and does not recognise that over 80 per cent of matters before the Federal Circuit and Family Court of Australia involve family violence (based on the Federal Circuit and Family Court of Australia’s media release ‘Federal Circuit and Family Court of Australia launches major family law reform to improve safety and support for children and families’).

50. The current provisions in the Act have created a well-entrenched misunderstanding in the community that both parents are entitled to equal time with their children, regardless of family violence and abuse and this misunderstanding leads to the making of unsafe arrangements, both for children and for victim-survivors.

51. There are provisions in the Act which are intended to ensure that perpetrators of domestic and family violence do not receive equal time, however these only apply if the matter goes to Court. These protections are not well understood or widely known in the community. A significant number of family law matters are resolved or settled out of court, without the involvement of lawyers. This is why we need a simpler family law system that is easier for people to understand.

52. The presumption of ESPR is used as a tool by perpetrators to continue to control victim-survivors through fear and misconceptions, incentivises violent fathers to litigate through the family law courts, and prevents victim-survivors from being able to leave or recover from violent or abusive relationships because of shared parenting obligations. It must be repealed.

Case Study - Jeff*

Jeff was 12 years old. His father perpetrated violence against his mother and Jeff was exposed to family violence. Both parents agreed to Jeff having contact with his dad, without consulting him.

Jeff refused to meet with his dad because of the violent behaviour he had seen towards his mother in the relationship. Jeff’s mother took Jeff to the agreed place for handover to spend time with his father, but Jeff refused to get out of the car. Jeff’s mother was distraught. She was fearful that the violence would escalate again because of Jeff’s behaviour. She felt she had to force Jeff to spend time with his father which was deeply upsetting for Jeff.

The parents made an agreement outside of court, and without legal advice, that both parents would have equal time with Jeff. They both misunderstood what the presumption of equal shared parental responsibility and requirements to consider particular forms of time meant. The father had told the mother equal shared parental responsibility meant equal time. She reluctantly agreed believing she had no other choice.

*This name has been changed to protect confidentiality.

53. The removal of the presumption simplifies the law. This means there will be greater understanding of the law in the community and that it is less likely agreements will be made that are not safe for children. It also takes away a method of control that perpetrators have been using to manipulate victim-survivors.

54. We are hopeful that for our clients, who are among the most marginalised and disadvantaged in the community, these changes will mean their experience through the family law system will lead to safer outcomes for children and parents/carers and it will be less confusing and traumatic.

55. To improve community understanding, it is vital that the Government properly resources an awareness and education campaign on the removal of the presumption and what this means for parenting arrangements/decision-making.

56. We recognise the need to retain section 65DAC of the Act to make clear how decisions are made if the court makes a shared parental responsibility order.

Reconsideration of final parenting orders (Rice & Asplund)

57. We support the inclusion of a provision to reflect the common law rule in *Rice & Asplund* in the legislation.

58. We support the inclusion of the proposed list of considerations that courts may consider in determining whether final parenting orders should be reconsidered.

Schedule 2 – Enforcement of child-related orders

59. WLSA does not support the family law system having a quasi-criminal contravention regime. We consider this is inconsistent with the best interests of a child, and the overarching objects of the Act. The evidence shows that non-compliance in family law is complex and commonly relates to safety concerns, child refusal, and the orders themselves being confusing or not implementable.

60. The findings from the recent ANROWS research indicate that non-compliance with parenting orders regularly relates to circumstances where there are complex interactions between personal characteristics, systemic issues and, potentially, professional practices. Some of the key reasons for non-compliance identified were family violence and safety concerns, child-related issues, circumstances of particularly difficult parents' behaviour, and orders that were considered as unworkable for technical or substantive reasons.[7]

61. Critically, in this research professionals indicated it was not uncommon for clients to be complying with parenting orders they believed were not safe. They also reported that parents are deterred from addressing non-compliance with parenting orders because of fear of the other party and the delay, cost, trauma and uncertainty associated with legal proceedings. The financial cost associated with legal proceedings was the most commonly identified obstacle to taking action.[8] 79% of research participants agreed that more effective and widely available processes to support the participation of children and young people would reduce non-compliance.[9] Importantly, the highest levels of support for measures to reduce non-compliance were accorded to therapeutic strategies.

62. The Bill removes the distinction between "*more serious*" and "*less serious*" contraventions. By removing this, the proposed amendments adopt the current provisions in relation to more serious contraventions and applies them to less serious contraventions as well.

63. The proposed costs provisions may lead to unfair and unsafe outcomes for children and adult victim-survivors. We are concerned that parents who are found to have contravened orders in minor ways, have contravened orders to protect their child, or have contravened orders in a manner that they thought amounted to a reasonable excuse (notwithstanding this might not be the view of the court), may end up with onerous costs orders.

64. Proposed s70NBE(3) provides that the court must not make a costs order where the person had a reasonable excuse for non-compliance, and the court has made, or will make, a make-up time

[7] 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, p12(16)
[8] Ibid
[9] Ibid, p78(82)

parenting order. Where orders have been breached for safety reasons, the result of this provision is that a parent may be forced to provide make-up time to avoid a costs order, thus putting themselves or the child at further safety risk.

65. Further, if the court makes an order for make-up time, in the absence of a finding of contravention as outlined at proposed s70NBA(1) note, this does not encourage carers to act protectively where the child's safety is at risk. This approach undermines the intention of the Bill to enhance the safety of children and adult victim-survivors.

66. Many of our clients contravene orders in circumstances where they have serious concerns for the safety of their children and for themselves and they should not be penalised for trying to act protectively, even though they have not met the evidential threshold of reasonable excuse. In our experience it can be difficult for our clients to prove that they have a reasonable excuse, particularly where disclosures of abuse have been made by very young children or in circumstances where disclosures have not been made to independent third parties.

67. Further, a costs order is a significant penalty. Many of our clients are at extreme financial disadvantage. Fear of a cost risk places these women in a near impossible situation and the cost risk would be a real deterrent to act protectively.

68. It is our position that a costs order should not be awarded against a party in circumstances where there has not been a finding that they have contravened orders. Our concerns extend to any kind of penalty being applied against a party in circumstances where there have been no findings, but particularly in circumstances where they have not been heard on the issue of reasonable excuse because this may place children and adult victim-survivors directly at risk of harm. This is especially relevant where the court is considering making an order for make-up time. We are concerned that the Bill does not address how a defence of reasonable excuse will be dealt with, and by extension, the safety of children and adult victim survivors, if it is the intention to make such an order before any findings have been made and before any defence with respect to reasonable excuse has been heard.

69. It is WLSA's submission that the easiest way to resolve this issue would be to remove the separate costs provisions in this division and allow the existing s117 of the *Act* to govern the issue of costs in relation to these matters. It is submitted that s117 allows for broad discretion to the judicial officer in relation to the issue of costs that would hopefully allow for fairer outcomes in relation to this important issue.

70. If costs provisions in relation to enforcement of child-related orders proceed they must be reconsidered to prioritise safety and ensure that they do not lead to unsafe outcomes for children and adult victim-survivors. The court should only be required to consider making a costs order, unless it is not appropriate to do so in the circumstances, under proposed s70NBE(4).

Recommendation 6:
The costs provisions must be reconsidered to prioritise safety and ensure that they do not lead to unsafe outcomes for children and adult victim-survivors.

Recommendation 7:
A costs order must not be awarded against a party in circumstances where there has not been a finding that they have contravened orders.

Recommendation 8:
Where safety concerns are raised, orders, such as make-up time orders, must not be made without a finding as to whether there was a reasonable excuse.

Recommendation 9:
Proposed s70NBE(4) must be amended so that "*must make an order*" reads "*must **consider** maki**ng** an order (a costs order) that the respondent pay some or all of the costs of any other party to the proceedings if the court finds that the respondent contravened the child-related order without reasonable excuse, unless the court is satisfied that it is not appropriate to do so in the circumstances*".

Schedule 3 – Definition of member of the family

71. It is our experience that the family law system largely focusses on the nuclear family and it does not adequately recognise Aboriginal and Torres Strait Islander family structures, child rearing practices or that multiple people may have an important role in raising an Aboriginal or Torres Strait Islander child.

72. For this reason, we support an expanded definition of "*member of the family*" and "*relative*" with respect to Aboriginal and Torres Straighter Islander people to better capture kinship systems. This definition more accurately reflects Aboriginal and Torres Strait Islander notions of family and individuals involved in a child's upbringing.

73. The Bill expands the definition of "*member of the family*" and "*relative*" with respect to Aboriginal and Torres Strait Islander people. We support this amendment on the basis that it is more inclusive and better captures kinship systems.

74. An unintended consequence of an expansion of the definition of "*member of the family*" and "*relative*" is a corresponding expansion of the list of people for whom parties and non-parties must disclose to the court family violence orders, child welfare laws or child welfare agency involvement, irrespective of whether the person who falls under the definition has any contact with the child and poses any risk to the child. These are the disclosure obligations imposed by s60CF, s60CH and s60CI of the *Act* and in the Initiating Application Form and the Response.

75. Under the proposed expanded definitions, the disclosure obligations will mean that a party is required to disclose any and all family violence orders, child welfare orders and notifications to or investigations by State or Territory agencies about any and all members of a family or relative, even those who may have little or nothing to do with the child. These disclosure obligations are likely to be particularly cumbersome for Aboriginal and Torres Strait Islander parties, but also other large families and will create a barrier in accessing the court. Additionally, the obligations will mean the adducing of evidence that may be largely irrelevant and may cause unnecessary delay in proceedings.

76. We recommend that for the purposes only of s60CF, s60CH and s60CI of the Act and the Initiating Application and Response, that parties are only required to disclose those people who are "*significant to the child's care, welfare and development.*"

Recommendation 10:
Section 60CF, s60CH, s60CI and the Initiating Application form and Response form must be amended to provide that disclosure only relates to those people who are "*significant to the child's care, welfare and development*".

Schedule 4 – Independent children's lawyers

77. It is vital that an Independent Children's Lawyer (**ICL**) has meaningful interactions with a child and that they meet with a child at the beginning of proceedings and prior to and after each major court event. It is important that a child has the opportunity to express views and has someone who can explain the outcome of major points in proceedings.

78. The current role of the ICL is set out in the Act and provides that an ICL must form an independent view, based on the evidence available, of what is in the best interests of the child and act in relation to the proceedings in what the ICL believes to be the best interests of the child.[10]

79. Generally, the ICL is to perform three key functions:
    1. Enable a child's participation in proceedings;
    2. Collect evidence that is relevant to a child's best interest; and
    3. Manage the course of the litigation such as encouraging settlement where safe and appropriate to do so, attempt to avoid undue and lengthy delays in the proceedings and ensure proceedings are conducted in a child-centric and focused manner.

80. The *National Guidelines for Independent Children's Lawyers* (**the guidelines**) stipulate that ICLs should provide children with the opportunity to express their views in relation to the matter where they are free from influence of others, and meet with the child.

81. Contrary to the expectations set out in the guidelines, the Australian Institute of Family Studies (**AIFS**) *Independent Children's Lawyer Study* found that the approach adopted by some ICLs was to proceed cautiously about directly meeting with children. This study found the preference of some ICLs was for evidence of a child's views be sought via a report prepared by a court child expert or single expert witness.[11]

82. These findings by AIFS are consistent with the experiences of women's legal services. Further, in our experience, there is no consistency in the circumstances in which an ICL may (or may not) meet with a child. Further, some ICLs only meet once with a child and usually early on in proceedings, meaning that by the time there is a significant court event, the court does not have the benefit of the current views of the child. This is even in circumstances where the court has asked the ICL for the child's views and, had the ICL sought the child's views, it could have greatly assisted the court and earlier resolution of the matter.

83. The Bill requires ICLs to meet with the child and provide the child with an opportunity to express their views except where the child is under 5 years of age, the child does not want to meet with the ICL or express their views, or there are exceptional circumstances that justify why the ICL should not meet with the child. The exceptional circumstances for why an ICL may not meet with the child include if it exposes the child to a risk of harm that cannot be safely managed, or it would have a significant adverse impact on the wellbeing of the child.

84. We are concerned that the requirement to "*meet with the child*" could be fulfilled by an ICL meeting only once with the child.

85. To ensure an ICL has meaningful interactions with a child it is important they meet with a child at the beginning of proceedings and prior to and after each major court event and at other times as requested by the child. It is important that a child has the opportunity to express views and has

[10] *Family Law Act 1975 (Cth),* s 68LA

[11] Kaspiew,R. Carson,R. Moore, S. De Maio,J. Deblaquiere, J & Horsfall, B (2014) *Independent Children's Lawyers Study Final Repot*, Second Edition, p38 (50)

someone who can explain the outcome of major points in proceedings.

86. We agree with the proposed requirement in subsection 68LA(5A) that the ICL must: (a) "*meet with the child*"; and (b) "*provide the child with an opportunity to express any views in relation to the matters to which the proceedings relate*" (**ICL duties**).

87. We recommend the ICL duties be further strengthened beyond the proposed provisions to provide that ICLs are obliged to meet with the child and provide the child with the opportunity to express their views immediately prior to and after major court events including interim hearings, court-based and external family dispute resolution and final hearings and at other times requested by the child.

88. We support limitations on "*exceptional circumstances*" in proposed s68LA(5C)(a) that acknowledge that in some circumstances where safety concerns are an issue, those safety concerns can be managed in a way that enables a child or young person to safely express their views where they choose to do so. Safety concerns in and of themselves should not automatically mean a child is denied the opportunity to express their views.

89. Given the important role that ICLs play in family law proceedings, it is imperative that this role be filled by committed, highly trained and experienced professionals who are family violence and trauma-informed, culturally safe, disability aware and LGBTIQA+ aware. There must be increased funding for specialist training and retention of ICLs and a greater number of ICLs. Training for ICLs, as for all professionals in the family law system, must be frequent, meaningful, substantive, run by appropriately trained experts and regularly independently evaluated for its effectiveness.

Recommendation 11:
Independent Children's Lawyers must be obliged to meet with the child and provide the child with the opportunity to express their views immediately prior to and after major court events, including interim hearings, court-based and external family dispute resolution and final hearings, and meet with the child at other times as requested by the child.

Convention on the Civil Aspects of International Child Abduction

90. WLSA welcomes the proposed changes in relation to the expansion of the use of Independent Children's Lawyers (**ICLs)** in cases brought under the *Convention on the Civil Aspects of International Child Abduction* (**the Hague Convention**). The Hague Convention is incorporated into domestic law under the *Family Law (Child Abduction Convention) Regulations 1986* (**Child Abduction Regulations**).

91. The removal of the restrictive requirement that an ICL can only be appointed in Hague matters in "*exceptional circumstances*"[12] will better promote a child's ability to have their voice heard and represented in child abduction proceedings. Such a change also supports recent amendments made in the Child Abduction Regulations that:

    - clarify that the "*grave risk*" defence[13] can include a consideration of any risk of the child being subjected to, or exposed to family violence if returned, regardless of whether the court is satisfied family violence has occurred, will occur or is likely to occur; and
    - the new provision requiring courts to consider protective conditions to prevent or minimise any risks to a child where risks are raised by an Independent Children's Lawyer and/or parties to the proceedings.

[12] *Family Law Act 1975* (Cth) s68L(3).
[13] *Family Law (Child Abduction Convention) Regulations 1986,* Regulation 16(3)(b).

92. Whilst WLSA welcomes the proposed amendments to section 68L and the recent amendments made in the *Child Abduction Regulations*, we remain concerned that child abduction proceedings continue to be used by perpetrators of violence and abuse as a mechanism to perpetrate ongoing abuse and place parents or carers and their children who flee violence back into unsafe circumstances.

93. The Hague Convention was originally intended to "*protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure the protection for rights of access*".[14] What was a well-intentioned Convention to address the issue of international child abduction, has, in practice, had unintended consequences of forcing children and their fleeing parent/carer back to a violent perpetrator and unsafe environment. An order under the Hague Convention is merely an order that the child be returned to the jurisdiction that is deemed most appropriate to determine the custody and access dispute and is not a determination on the merits of any custody dispute.[15] The narrow parameters of the Hague Convention is the rationale behind the requirement that the return order be promptly made.[16]

94. In 2015, a research study into the Hague Convention found that 73% of taking persons were mothers.[17] This was an increase on statistics recorded in 1999 (69%), 2003 (68%) and 2008 (69%).[18] The Global Action on Relocation and Return with Kids (**Globarrk**) is a charity that supports "*stuck*" parents (someone who is not lawfully able to return to live in the country they consider "*home*" with their child after an international residence or custody dispute). Globarrk's research shows that a significant majority of international child abductions under the Hague Convention are mothers. Around 90% of these cases involve family violence.[19]

95. In practice, it has been very difficult to get the courts in Australia to take into account family violence against a mother and the impact of exposure to that violence on the child. Whilst the recent amendments introduced into the *Child Abduction Regulations* seek to address this issue, we are concerned they do not go far enough.

96. Historically, the court has acceded to the relevant foreign jurisdiction and assumed the foreign jurisdiction has the requisite systems and processes to ensure the safety of the taking parent and the child. This reasoning was applied in *Murray v. Director of Family Services* where the court stated:

    New Zealand has a system of family law and provides legal protection to persons in fear of family violence which is similar to the system in Australia. It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the side and the children are not capable of being protected by the New Zealand Courts or that the relevant New Zealand authorities would not enforce protection orders which are made by the Courts.[20]

97. The tenuous assumptions adopted by the court that the jurisdiction to where the child is returned is able to sufficiently protect against risks caused by family violence must be addressed. We remain concerned that the notation for the court to consider family violence as a "*grave risk*" defence

[14] *Convention on the Civil Aspects of International Child Abduction,* (preamble).
[15] *Convention on the Civil Aspects of International Child Abduction,* Article 19.
[16] *Convention on the Civil Aspects of International Child Abduction,* Article 12.
[17] Lower, N, Stephens, V (2018) *Part I — A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Global report*, paragraph 10
[18] Ibid.
[19] Globarrk
[20] *Murry v. Director Family Service A.C.T 1993* FLC 92-146

under the *Child Abduction Regulations* does not go far enough to address this issue.

98. Whilst WLSA welcomes the proposed changes in relation to the expansion of the use of Independent Children's Lawyers in cases brought under the 1980 Hague Convention, we recommend further amendments to the *Child Abduction Regulations* to provide better safeguards for a parent/carer fleeing violence across international borders with their child. These amendments should be made in consultation with sexual, domestic and family violence and abuse experts.

Recommendation 12
That there be further amendments to the Child Abduction Regulations to provide better safeguards for a parent/carer fleeing violence across international borders with their child and this occur in consultation with sexual, domestic and family violence and abuse and legal experts.

Schedule 5 – Case management and procedure

Harmful proceedings orders

99. The Bill proposes a new "*harmful proceedings order*" power which will have the effect of restraining a person from filing and serving any further family law applications without the leave of the court. The proposed provision provides that a harmful proceedings order may be made "*if the court is satisfied that there are reasonable grounds to believe"* that the other party or the child the subject of the proceedings would suffer harm if the first party instituted further proceedings against the other party.

100. We are concerned that victim-survivors should not be required to prove that they would suffer harm. The evidentiary burden should not be on the victim-survivor.

101. Once an order is in place, further applications would first be assessed by the court to ensure they are "*not frivolous, vexatious or an abuse of process, and have reasonable prospects of success*" (proposed s102QAG(1)) before they can be filed and served on the other party (proposed s102QAE(4)).

102. We have previously raised safety concerns in relation to victim-survivors not being notified about harmful proceedings order applications in our submission on the Exposure Draft of the Bill. We raised concerns that harmful proceedings orders may result in an escalation of violence or abuse, and that therefore notification is important to ensure that safety risks can be managed appropriately. We note the Bill seeks to address safety concerns at proposed s102QAC(7) and (8). These provisions require the court to make an order as to whether the court is to notify the other party of the application or if the application has been dismissed and that the court must have regard to the wishes of the other party in making such an order.

103. If a victim-survivor elects not to be informed of the application being made but wants to be informed if the application is dismissed, it is important the victim-survivor is advised of the outcome of these proceedings in advance of the person the subject of the harmful proceeding order to ensure that any potential risks to safety can be managed appropriately.

104. Preventing and limiting systems abuse requires a greater focus on properly resourcing the front end of the family law system. This includes family violence informed, trauma informed, culturally safe, child focused, lawyer-assisted family dispute resolution. It also includes early determination of family violence in court proceedings through a family violence informed case management process and the early testing of evidence of family violence.

Recommendation 13:
The Bill must be amended to provide that the victim-survivor does not need to prove they have suffered harm. This could be done by adding the word "*likely*" so the provisions read "*would likely suffer harm*" in both proposed s102QAC(1)(a) and (b).

Recommendation 14:
Consideration must also be given to adding a provision such as: "*Making a harmful proceedings order does not depend on proving the other party or the child the subject of proceedings actually suffers harm*".

Recommendation 15:
At a minimum, if the victim-survivor is not served with the leave application, and if leave is denied, the victim-survivor should be advised of the outcome of these proceedings in advance of the person the subject of the harmful proceeding order to ensure appropriate management of risk.

Overarching purpose of the family law practice and procedure provisions

105. The Bill includes the overarching purpose provisions that currently exist in the *Federal Circuit and Family Court of Australia Act 2021* as well as extending the overarching purpose to cover all proceedings under the Act. Safety and best interests factors are listed in the overarching purpose provisions before speed, efficiency and minimisation of costs.

106. We support inclusion of overarching purpose provisions in the Bill and that safety and best interests factors are listed before speed, efficiency and minimisation of cost. However, the Explanatory Memorandum states that all considerations in the overarching purpose provisions are to be given equal weight. We are concerned that safety is not prioritised in the overarching purpose provisions. This could result in decisions being made that prioritise speed, efficiency and minimisation of cost at the expense of safety.

107. Safety should be given greater weight than speed, efficiency and minimisation of costs in the overarching purpose provisions. In the absence of this, some victim-survivors of family violence may feel unduly pressured to resolve matters. It is imperative that parties not feel pressured to agree to terms that are ultimately unsafe or pose a risk because it is in the interest of speed, efficiency and/or minimises costs. Safety must be given primacy.

Recommendation 16:
Proposed section 95 must be amended to give safety greater weight than other factors in the overarching purpose.

Schedule 6 – Communications of details of family law proceedings

108. The new Part XIVB clarifies the current section 121. It is important it be clear that it is not an offence to provide an account of proceedings to any professional regulator or for a regulator to use such accounts in connection with their regulatory functions.

109. We acknowledge that the purpose of section 121 is to protect the privacy of those involved in family law proceedings. However, it is also important that victim-survivors are able to tell their own story and a balance needs to be struck between ensuring that victim-survivors can speak

publicly about their experiences and respecting the privacy of others.

110. We also note section 121 can impede advocacy and law reform when there are limits on parties' ability to discuss their matters which can be further disempowering for people engaging in the family law system.

Schedule 7 – Family report writers

111. We welcome the introduction of further provisions to regulate family report writers. The Act does not currently prescribe any standards or core competencies for family report writers. The regulations are also silent in this regard. The *Australian Standards of Practice for Family Assessments and Reporting* are not binding or enforceable.

112. The Bill provides that there will be regulations that prescribe standards and requirements for family report writers. The Bill provides that the regulations *may* make provisions for certain standards and requirements for family report writers and that those standards and requirements *may* deal with a number of matters. We are concerned that the regulations setting out the standards and requirements have not yet been drafted. Discretionary language is used in describing what may be included in the regulations. It is therefore difficult to assess their effectiveness.

113. Family reports are frequently the only form of social science evidence available to the parties and the court in parenting matters. Family reports are not only regarded as vital evidence during court proceedings, but their content and recommendations can significantly influence family dispute resolution negotiations and other negotiations throughout proceedings and have significance for decisions about funding of grants of legal aid. It was recognised in the *Evaluation of the 2006 Family Law Reforms Report* that "*family reports were identified as a very powerful settlement tool*".[21]

114. It is crucial that this evidence be provided by nationally accredited, highly trained and experienced professionals. There should be effective oversight of their practices, with accountability mechanisms that are transparent for quality assurance purposes and to improve public confidence.

115. The standards and requirements for family report writers must be set out in the primary legislation rather than in regulations. In the absence of this, it is vital the primary legislation mandates what will be included in the regulations. At proposed s11K(1)(a), rather than stating "*regulations may make provision for*', this must be mandated - "*regulations must make provision for*". Similarly, at proposed s 11K(1)(2), rather than "*may deal with any or all of the following'* it should be reframed so that the legislation prescribes what the regulations must deal with, for example "*must deal with all of the following."*

116. We are also concerned there are gaps in what has been included at proposed s11K. For example, we believe it is vital to mandate core competencies for a family report writer in:

- family violence informed practice,
- responding to risk,
- understanding child abuse
- trauma-informed practice,
- cultural safety,
- working with priority populations, and
- working with children.

[21] Kaspiew et al (2009) *Evaluation of the 2006 Family Law Reforms*, Report, Australian Institute of Family Studies, at 13.3.3, p 317

117. We provide some detail below about some of the core competencies required.

118. **Family violence informed**: Given the prevalence of family violence in family law matters, it is vital family report writers are experienced and trained in family violence, including:

- understanding its gendered nature and dynamics, and unique experiences of family violence within Aboriginal and Torres Strait Islander communities, culturally and linguistically diverse communities, LGBTIQ communities and people with disability
- screening and responding appropriately to disclosures, risk assessment, safety planning and how to keep safety at the centre of proposed arrangements
- recognising harm perpetrated against an adult victim-survivor is harm against the child,
- an awareness of perpetrator tactics and perpetrator ability to manipulate systems and to engage in systems abuse and image management

119. **Responding to risk:** There are numerous factors that can pose risks to children including family violence, mental health, substance abuse, being prevented from enjoying and experiencing their culture and/or suicide. Multiple risk factors will often be prevalent within a family at any one time. A family report writer must be proficient at identifying such complex issues and have the knowledge and understanding to make recommendations about the ways in which these risks can be addressed and mitigated. Failure to do so can have serious and adverse consequences.

120. **Understanding child abuse:** Professionals should understand the impact of child abuse, including child sexual abuse and neglect.[22]

121. **Trauma-informed practice:** Trauma can influence both children and adults. It can have significant impacts on children's attachments and development. Family report writers need to have the ability to conduct trauma-informed practice and to recognise, know and understand trauma responses in both parents and children. Furthermore, it is vital that family report writers know and understand the effects of intergenerational trauma on Aboriginal and Torres Strait Islander people and that this form part of a family report writer's trauma informed practice. It is imperative that family report writers receive training and resources and deepen their understanding of the impacts of inter-generational trauma.

122. **Aboriginal and Torres Strait Islander families**: The AGD Consultation Paper on *Improving the competency and accountability of family report writers* noted many stakeholder's feedback to the ALRC Review of the Family Law System included that "*Family report writers working with Aboriginal and Torres Strait Islander families should be culturally competent in their interactions, and able to assess how a child's connection to kinship networks and country might be maintained*."[23]

123. WLSA recommends that for Aboriginal and Torres Strait Islander families, family reports should be prepared by Aboriginal or Torres Strait Islander family report writers. This requires an Aboriginal and Torres Strait Islander workforce development strategy as recommended in several Family Law Council reviews.[24]

124. Where it is currently not possible for an Aboriginal or Torres Strait Islander family report writer to prepare the report, the report writer must be culturally competent and work closely with

[22] Stakeholders feedback from the ALRC report cited in Attorney-General's Department, (2021) *Improving the Competency and Accountability of Family Report Writers Consultation Paper*, p10 (12)
[23] Ibid, p 10
[24] Family Law Council, (2012) *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, p99 (105), Recommendation 5; Family Law Council (2016) *Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Terms 3, 4, 5*, Recommendation 16(1) and p96-98 (104-106)

relevant Aboriginal and Torres Strait Islander people in the production of the report, including Indigenous Liaison Officers and Elders and Respected Persons to provide cultural advice.

125. It is our experience that family report writers can often be biased against and/or lack understanding and insight into Aboriginal and Torres Strait Islander culture and practices and fail to acknowledge and recognise cultural practices and the importance of kinship arrangements. For example, Aboriginal and Torres Strait Islander people and their parenting can be viewed in a negative light if they do not undertake parenting duties in line with mainstream views of a '*nuclear family*'.

126. **Diversity and cultural competency**: The AGD Consultation Paper referred to "*Professionals should have an understanding of the specific family dynamics in culturally and linguistically diverse and LGBTQI+ families, and the unique challenges these families face when interacting with the family law system*".[25] It is also essential to include competency in working with people with disability.

127. **Working with children:** Being able to engage with children in a developmentally appropriate manner to obtain and accurately represent their views.[26]

128. We refer to the submissions of Women's Legal Service NSW and Women's Legal Service Queensland to the Attorney-General's Department's Consultation on *Improving the competency and accountability of family report writers* for case studies highlighting the need for this reform.

129. We recommend that Part 7.1, Rule 7.01(1)(d) *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* be repealed to allow parties to ask various clarifying questions of an expert witness (and in particular, court child experts and family consultants) pursuant to Rule 7.26. This would enable parties, to a limited degree, to test the evidence of a family report writer prior to a final hearing where they are given the opportunity to cross-examine the report writer. We also recommend consideration of other opportunities to test the evidence of a family report writer at an earlier stage in proceedings.

130. Alongside an amendment to the Act and regulations, there must be comprehensive training implemented for all cohorts of family report writers. Training must be regular, ongoing, comprehensive, meaningful and independently evaluated. The amendments to the Act and regulations should happen in conjunction with Implementation of a workforce development strategy to increase diversity in the workforce within the family law system.

Recommendation 17
At proposed s11K(1)(a) rather than stating "*regulations may make provision for'*, this must be mandated - "*regulations **must** make provision for*". Similarly, at proposed s 11K(1)(2) rather than "*may deal with any or all of the following*" it should be reframed so that the legislation prescribes what the regulations must deal with, for example "***must** deal with all of the following*."

Recommendation 18:
The legislation must refer to the regulations relating to family report writers including core competencies for a family report writer in family violence informed practice, responding to risk, understanding child abuse, trauma-informed practice, cultural safety, working with priority populations, and working with children, minimum content requirements as to what must be included in a report, and annual training requirements.

[25] Attorney-General's Department, (2021) *Improving the Competency and Accountability of Family Report Writers Consultation Paper*, p12
[26] Stakeholders feedback from the ALRC report cited in Attorney-General's Department, (2021) *Improving the Competency and Accountability of Family Report Writers Consultation Paper*, p9 (11)

Recommendation 19
Part 7.1, Rule 7.01(1)(d) *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* be repealed to allow parties to ask various clarifying questions of an expert witness (and in particular, court child experts and family consultants) pursuant to Rule 7.26.

Commencement

131. The Bill provides a six-month lead in time for the changes to commence. Our view is that the changes proposed in this Bill should commence as soon as possible after the legislation is passed. The Bill will enhance the safety of children and adult victim-survivors and this requires urgency. The legislation should apply to all proceedings, whether already filed with the court or filed after the commencement date, with the exception of those matters waiting on a reserved judgement.

132. There will need to be transitional arrangements to enable those parties who have matters that have already been listed for final hearing to provide further evidence, submissions and brief supplementary reports that address the legislative changes.

Recommendation 20:
Once the Bill is passed, the changes must take effect as soon as possible and apply to all proceedings.

Protecting sensitive information

133. We note that Schedule 6 of the Exposure Draft version of the Bill in regard to protecting sensitive information is not included in the Bill introduced to Parliament. We made detailed comments and recommendations in our submission in response to the Exposure Draft outlining the importance of protecting sensitive information and proposed legislative amendments and changes to court procedure, including the Return of Subpoena List.[12]

134. We have repeatedly highlighted our concern that effectively responding to this issue will help to limit systems abuse. Access to victim-survivors sensitive records, such as counselling records and medical records, in family law and other proceedings can be a barrier to victim-survivors accessing the support they need to help them in their recovery.[13] It is in the public interest to ensure victim-survivors can access the support they need knowing these records and processes will be confidential.

135. We are disappointed this issue has not been addressed in this Bill. We strongly recommend further work be undertaken on this issue as another concrete way to limit systems abuse and ensure safety through the protection of confidential records. We look forward to working with the Government on the implementation of this important reform.

Recommendation 21:
The Government introduce legislation, and improve procedures, consistent with the recommendations in our submission on the Exposure Draft of the Family Law Amendment Bill 2023, to increase protections for sensitive information, including counselling records and medical records, in family law matters.

Education campaign about the family law reforms

136. To ensure community awareness and understanding of changes to the Act it is essential the Government properly resources an awareness and education campaign on the changes, including the removal of the presumption of equal shared parental responsibility and consideration of equal time and what this means for parenting arrangements/decision-making.

137. It is important there be an awareness and education campaign with all professionals working within the family law and child protection system as well as the broader community.

Recommendation 22:
The Government properly resources an awareness and education campaign on the changes to the Act, including the removal of the presumption of equal shared parental responsibility and consideration of equal time and what this means for parenting arrangements/decision-making. It is important the education campaign targets all professionals working within the family law and child protection systems as well as the broader community.

Additional improvements to the family law system

138. WLSA's priorities for reform to the family law system are:

- Ensuring safety for children and adult victim-survivors who are predominantly women by putting safety and risk at the centre of all practice and decision-making.
- Promoting accessibility and engagement, including addressing issues of cultural competency and accessibility for Aboriginal and Torres Strait Islander, culturally and linguistically diverse and LGBTQIA+ people and communities and people with a disability, reducing delay, and availability of legal assistance.
- Fairness and recognition of diversity, including acknowledging and responding to structural inequalities and bias in the family law system.

139. There are significant cultural safety issues for Aboriginal and Torres Strait Islander people engaged in the family law system. The family law system should provide services in a manner that acknowledges the history of Aboriginal and Torres Strait Islander peoples and their treatment in Australia, is respectful of their culture and beliefs, and non-discriminatory. This requires conscious efforts to identify and address direct and indirect discrimination, including unconscious biases within the system and its family law professionals against Aboriginal and Torres Strait Islander peoples. Affirmative action and committed efforts must be undertaken to ensure that Aboriginal and Torres Strait Islander peoples and the services that represent them are genuinely listened to and heard.

140. The steps towards improving the cultural competency of family law system professionals must be multifaceted. The design of a targeted approach must be led with input from Aboriginal and Torres Strait Islander peoples and frontline services. The elements that should be incorporated include, but are not limited to, cultural competency training and education, as well as a set of competencies and standards, and statement of principles for family law professionals. An example of good practice was the design process with SNAICC – National Voice for our Children in regard to the Aboriginal and Torres Strait Islander Child Placement Principles.

141. It is also important that the family law system is properly resourced to achieve safer, accessible, and fairer outcomes for people. More work is required to ensure all professionals within the family law system are family violence informed, trauma-informed, culturally safe, child rights focused, disability aware and LGBTIQA+ aware. This requires regular access to meaningful training

developed and delivered by subject matter and lived-experience experts that is regularly independently evaluated for its effectiveness, including evidence of improvements in the practice of professionals working in the family law system.

142. There must also be more funding particularly for Independent Children's Lawyers, several Indigenous Liaison Officers in each family court registry and greater access to family violence-informed, culturally safe legal assistance services. It is also important to properly resource the front end of the family law system as a way of preventing and limiting systems abuse. This includes through greater access to family violence informed, trauma informed, culturally safe, child focused, lawyer-assisted family dispute resolution and early judicial determination of family violence.

143. When filing at Court it is important to try and identify systems abuse early and prevent its escalation. This could be progressed through including relevant questions in the risk screening and assessment process of the Lighthouse Project and through active case management of such matters.

144. Outstanding Family Law Council recommendations, including those related to workforce development strategies to ensure greater diversity across all professional roles in the family law system, including judicial officers, lawyers, family dispute resolution practitioners, family report writers (court child experts) and other experts must also be implemented.[27] The 2016 Family Law Council Report also recommended a pilot involving the participation of Elders and Respected Persons to provide cultural advice in family law matters.[28] The implementation of these recommendations is key to increasing accessibility within the family law system.

Recommendation 23:
More funding particularly for Independent Children's Lawyers, several Indigenous Liaison Officers in each family court registry and greater access to family violence-informed, culturally safe legal assistance services.

Recommendation 24:
Ensuring all professionals within the family law system are family violence informed, trauma-informed, culturally safe, child rights focused, disability aware and LGBTIQA+ aware. This requires regular access to meaningful training developed and delivered by subject matter and lived-experience experts that is regularly independently evaluated for its effectiveness, including evidence of improvements in the practice of professionals working in the family law system.

Recommendation 25:
Properly resourcing the front end of the family law system as a way of preventing and limiting systems abuse. This includes through greater access to family violence informed, trauma informed, culturally safe, child focused, lawyer-assisted family dispute resolution and early judicial determination of family violence.

Recommendation 26:
Supporting greater diversity and inclusion in the family law profession, including judges, legal practitioners, family report writers, and family dispute resolution practitioners to ensure the diverse needs of the Australian community can be met by the system.

[27] Family Law Council, (2012) *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, p99 (105), Recommendation 5; Family Law Council (2012) *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*, Recommendation 4, p 96 (103); Family Law Council (2016) *Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Terms 3, 4, 5*, Recommendation 16(1) and Recommendation 17(1)

[28] Family Law Council (2016) *Families with Complex Needs and the Intersection of the Family Law and Child Protection systems, Final Report,* Recommendation 16.4

Recommendation 27:
A greater focus on preventing systems abuse and identifying it early to limit harm, for example, through including relevant questions in the risk screening and assessment process of the Lighthouse Project and through active case management of such matters.

Recommendation 28:
Improving Aboriginal and Torres Strait Islander cultural safety, including through further consultation with Aboriginal and Torres Strait Islander people and Aboriginal and Torres Strait Islander organisations about the establishment of a Council of Elders in each family court registry.