Exposure Draft – Family Law Amendment Bill 2023

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Table of Contents

Table of Contents 2
Introduction 3
The Consultation Brief 3
Consultation questions 4
Contact 13

Introduction

Lived Experience Australia Ltd (LEA) is a national representative organisation for Australian mental health consumers and carers, formed in 2002 with a focus on the private sector. All members of our Board and staff have mental health lived experience as either a consumer, family carer or both.

Our core business is to advocate for systemic change to improve mental health care across the whole Australian health system. This includes advocating for empowerment of people with mental health lived experience in the broad range of issues that impact their mental and physical health, and their lives more broadly. It includes empowering them in their own care and contact with health and social services, promoting their engagement and inclusion within system design, planning and evaluation and most importantly, advocating for systems promote choice, inclusion, justice and fairness, and address stigma, discrimination and prejudice. Our submission comes from the perspectives and experiences of people with lived experience of mental health challenges, their families, and carers.

We welcome the opportunity to provide our submission on the Exposure Draft – Family Law Amendment Bill 2023.

The Consultation Brief

We applaud the Australian Government's aim to make sure the best interests of children are prioritised and placed at the centre of the family law system. The release of this draft Family Law Amendment Bill 2023 (the exposure draft) as an opportunity for the community to provide feedback on the proposed amendments that aim to achieve this important outcome is welcomed.

We also applaud the goals of this work and the acknowledgement that the adversarial nature of courts operating within the family law system have led to escalated hostility, legal costs and drawn out proceedings, resulting in potentially negative consequences for all concerned, and particularly for children.

We recognise the issues raised previously in submissions to the Australian Law Reform Commission (ALRC) inquiry, the Joint Select Committee and other similar inquiries, which have consistently highlighted that the family law system faces significant challenges, including:

- the need to be more responsive to family violence, child abuse and neglect
- overly complex and confusing legislation that is a barrier to vulnerable users of the system and creates community misperceptions about the law
- inconsistency in the competency and accountability of various types of family law professionals
- a lack of culturally appropriate court processes and services for Aboriginal and Torres Strait Islander families
- hardship and financial burden caused by protracted and adversarial litigation
- lack of support for children, including to express their views, and
- non-compliance with, and ineffective enforcement of, parenting orders.

Each and all of these concerns can have significant consequences for the mental health and wellbeing of children, families and communities.

We acknowledge and stress that the needs of people with pre-existing mental ill-health have not always been addressed equitably, fairly or with sufficient understanding or compassion in relation to these concerns. We recognise that these issues are complex and mental ill-health can add to that complexity.

From our lived experience, we also understand that many people with mental health lived experience have experienced trauma as children, including as a consequence of the issues that the Family Court system attempts to resolve with and for families. We all must do better.

We understand that the changes being proposed are:

- a redraft of the principles and objects section for Part VII
- significant amendments to the list of 'best interests factors'
- a best interests factor specifically relating to the best interests of Aboriginal and Torres Strait Islander children
- removal of the presumption of equal shared parental responsibility and the linked consideration of specific care-time arrangements, and
- amendments to codify the rule in *Rice & Asplund* in relation to reconsideration of final parenting orders.

Consultation questions

Based on our understanding and the interests of those we represent, we have responded to the following questions within the consultation paper.

Schedule 1: Amendments to the framework for making parenting orders

Redraft of objects

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

We believe that this redraft now makes the core intent and information more accessible and understandable.

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

Our only concern is to ensure that, by simplifying this section, it doesn't inadvertently weaken the intent of the CRC and therefore Australia's international obligations, for example, given that it will be perceived by some as 'optional' and with the potential then to be completely ignored in deliberations in matters covered by the Family Law Act.

Best interests factors

3. **Do you have any feedback on the wording of the factors, including whether any particular wording could have adverse or unintended consequences?**

The wording seems more child-focused which is useful in directing the focus where it should be, fundamentally. The order of the points, beginning with a focus on safety for all concerned then the child's views, then other considerations, seems to be a logical approach.

We applaud the following factor appearing upfront in the list. This sends a clear message about their importance. Particularly viewed from a mental health lived experience perspective, the community and mental health services is 'riddled' with individuals who have suffered as children, and family members who have suffered as a result of family violence, with the consequences of such trauma having significant long-term and sometimes life-long impacts on them:

- what arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, neglect or other harm

We have some concern for how the following factor is understood and operationalised, given the importance of considering the age and developmental maturity of the child, as well as the potential for undue influence upon them by family or others in the kinship network, cultural pressures they may perceived, and the potential for them to perceive obligations to family members, especially where there is family violence, or particularly as we know that some children may wrongly perceive they are to blame for their parents' relationship problems.

- any views expressed by the child

All too often, in these matters, family members and carers are pitted against each other and the burden of proof of capacity, harm, safety and so forth are fueled by the structures in which these matters are heard and decided. Any process that minimises children being perceived as 'property' to be fought over is a positive step in minimising present and future emotional harm to the child and to their informal support networks and families.

That said, we recognise that, even with revisions, the potential for conflict, accusations and counter accusations, whether they have veracity or not, is a difficult process in such matters. We know this is particularly so where a parent/caregiver has mental health conditions or is accused of having such and this then influences considerations of their capacity and so forth to fulfil their role with the child.

We would hope that decision-makers take full account to minimise stigma and discriminatory perspectives, especially in relation to the below dot point within the list of best interest factors. In particular, we would hope that full and fair consideration be given in circumstances where a parent may have been subject to coercive control within the family which may have hitherto limited their capacity to demonstrate that they can provide for the child's needs and also impacted their ability to seek support. Such circumstances may not be able 'willingness' as such but able the reality of previously living with family violence as a core feature of their existence:

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

We applaud the clarity and directness of the following factor:

- the benefit of being able to maintain relationships with each parent and other people who are significant to them, where it is safe to do so

We agree the need to emphasise safety over maintaining a dangerous and harmful relationship with a parent. Again, the mental health system is full of examples of adults who, as children, were not protected by such harmful relationships as a result of Family Court decisions that did not emphasis the best interests of the child.

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

The simplified structure seems useful because it provides the imperative for considering each and all considerations as they apply to each circumstance or case. In contrast, a hierarchical list may lead the reader/decision-maker to think that some considerations are less important and then given less attention. A simplified list takes better account of the diversity of situations – what may be less significant to consider in one case may be a central consideration in another.

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

As per our comments above.

Removal of equal shared parental responsibility and specific time provisions

6. **If you are a legal practitioner, family dispute resolution practitioner, family counsellor or family consultant, will the simplification of the legislative framework for making parenting orders make it easier for you to explain the law to your clients?**

Not Applicable to our remit. However, there may be some contexts within mental health services where a peer worker with lived experience as either a consumer or carer may find themselves providing support to individuals who are subject to Family Court matters and therefore may be drawn into such discussions with the person.

We acknowledge that this change to the requirement to consider equal time, or substantial and significant time with each parent, is made to overcome the following concerns inherent in previous arrangements, that is that it:

- is an unnecessary additional step in the decision-making framework
- detracts from a focus on what is in a child's best interests, and
- provides scope for exacerbating conflict.

The proposed revisions would therefore make it easier for workers to explain the law to clients, and also lessen the potential for them to be drawn into conflicts or to be targeted for potential anger or aggression during and after such matters are being considered.

7. **Do you have any comments on the removal of obligations on legal practitioners, family dispute resolution practitioners, family counsellors or family consultants to encourage parents to consider particular time arrangements? Will this amendment have any other consequences and/or significantly impact your work?**

As per above comments.

8. **With the removal of the presumption of equal shared parental responsibility, do any elements of section 65DAC (which sets out how an order providing for shared parental responsibility is taken to be required to be made jointly, including the requirement to consult the other person on the issue) need to be retained?**

We are unsure whether any elements need to be retained, given it is the nuanced context of each case/family situation and the specific interests of that child/children in each family that is central. We would like to stress, though, that we think sufficient mental health training and understanding (particularly a deep understanding of trauma and its impacts for children and family) by legal practitioners, family counsellors, family dispute resolution practitioners and family consultants is of paramount importance in assisting and supporting these processes with and for families.

Reconsideration of final parenting orders (Rice & Asplund)

9. **Does the proposed section 65DAAA accurately reflect the common law rule in *Rice & Asplund?* If not, what are your suggestions for more accurately capturing the rule?**

We support the efforts made to clarify the process whereby the court is asked to reconsider a previous order based on establishing a *significant* change in circumstances to existing parent orders, given interpretation of 'significant' has been ambiguous and unclear and then open to the various parties chasing re-litigation repeatedly which may not in the best interests of the child. We also support such efforts given the emotional and financial damage on children and families that we know can result from matters being locked within court dispute processes, sometimes for years. We stress the importance of mental health recovery, particular where there has been family violence and that re-litigation may be a means by which some individuals perpetuate coercive control within former relationships.

10. **Do you support the inclusion of the list of considerations that courts *may* consider in determining whether final parenting orders should be reconsidered? Does the choice of considerations appropriately reflect current case law?**

We support the inclusion of the list of considerations that the court may consider, as stated below and as per the Exposure Draft; however, we acknowledge that these will still require significant case-by-case interpretation by the court:

(a) the reasons for the final parenting order and the material on which it was based;
(b) whether there is any new material available that was not available to the court that made the final parenting order;
(c) the likelihood that, if the final parenting order is reconsidered, the court will make a new parenting order that affects the operation of the final parenting order in a significant way (whether by varying, discharging or suspending the final parenting order, in whole or in part, or in some other way);
(d) any potential benefit, or detriment, to the child that might result from reconsidering the final parenting order.

Schedule 2: Enforcement of child-related orders

11. Do you think the proposed changes make Division 13A easier to understand?
12. **Do you have any feedback on the objects of Division 13A?** Do they capture your understanding of the goals of the enforcement regime?

We believe they do capture the goals of the enforcement regime.

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

We have no further comments on this issue.

14. **Should proposed subparagraph 70NBE(1)(b)(i) also allow a court to consider awarding costs against a complainant in a situation where the court does not make a finding either way about whether the order was contravened?**

This would certainly be a deterrent to that complainant making potentially malicious multiple re-litigation. However, we think such matters should be considered on a case by case basis given that a finding either way may involve a range of circumstances that may not be as a result of the actions of the complainant.

15. **Do you agree with the approach taken in proposed subsection 70NBA(1) (which does not limit the circumstances in which a court may deal with a contravention of child-related orders that arises in proceedings) or should subsection 70NBA(1) specify that the court may only consider a contravention matter on application from a party?**

We think that the former should apply given that a party may not have the literacy, resources or emotional strength to make an application at the time.

16. **Do you have any other feedback or comments on the amendments in Schedule 2?**

We support the intention of these revisions which have the goal of addressing the significant problem of non-compliance with parenting orders which is a common issue leading to distress and conflict for many families. As per our previous note about the potential for some individuals to attempt to exercise coercive control or simply be malicious, we welcome any measures that help overcome these problems. The impact of non-compliance on the mental health and wellbeing of the child/children and on parents/caregivers is of significant concern to us. It hinders recovery for all concerned and is damaging to their long-term health, wellbeing and welfare.

We acknowledge the conservative approach taken to the amendments in Schedule 2. We acknowledge the balance that must be struck between holding individuals to account for non-compliance, delivering and modelling an educative and mediated approach that builds bridges, and fuelling a more adversarial approach that may inadvertently lead to greater risk of family violence, or deterioration in the communications or negotiations between the parties involved in such orders.

We agree with the simplification and clarifications in these sections, particularly the discretion of the Court to tailor its response to match the gravity of the contravention and take into account a number of factors (including current and previous behaviour of the parties) rather than the former approach which tried to separate contravention into 'less serious' and 'more 'serious'.

Schedule 3: Definition of 'member of the family' and 'relative'

17. **Do you have any feedback on the wording of the definitions of 'relative' and 'member of the family' or the approach to implementing ALRC recommendation 9?**

We agree that the definitions need to be broader to acknowledge the realities of the broader kinship networks for some individuals, especially those who may be alienated from their biological family.

18. **Do you have any concerns about the flow-on implications of amending the definitions of 'relative' and 'member of the family', including on the disclosure obligations of parties?**

We acknowledge that any broadening of definitions does have the flow on effect of broadening the requirements that are then applied to a person's kinship group. This may inadvertently complicate the ability to safeguard a child's living situation (e.g. Non-contact with some members of the kinship group), especially in rural and remote areas or where specific cultural and kinship connections apply, and interconnected responsibilities and relationships cannot be avoided.

19. **In section 2 of the Bill, it is proposed that these amendments commence the day after the Bill receives Royal Assent, in contrast to most of the other changes which would not commence for 6 months. Given the benefit to children of widening consideration of family violence this is appropriate – do you agree?**

Yes, we agree.

20. **Do you have any other feedback or comments on the amendments in Schedule 3?**

No. Thank you.

Schedule 4: Independent Children's Lawyers

Requirement to meet with the child

21. **Do you agree that the proposed requirement in subsection 68LA(5A) that an ICL must meet with a child and provide the child with an opportunity to express a view, and the exceptions**

in subsections 68LA(5B) and (5C), achieves the objectives of providing certainty of an ICLs role in engaging with children, while retaining ICL discretion in appropriate circumstances?

Yes, though we favour every effort being made to accommodate the needs of every child to be heard in some form.

22. **Does the amendment strike the right balance between ensuring children have a say and can exercise their rights to participate, while also protecting those that could be harmed by being subjected to family law proceedings?**

Yes

23. **Are there any additional exceptional circumstances that should be considered for listing in subsection 68LA(5C)?**

There doesn't appear to be any mention of circumstances where the child may have significant disability and what supports may be in place to support such meetings with them?

Expansion of the use of Independent Children's Lawyers in cases brought under the 1980 Hague Convention

24. **Do you consider there may be adverse or unintended consequences as a result of the proposed repeal of subsection 68L(3)?**

We applaud this move in the sense that it opens up the benefits to a greater number of children and also ensures that the best interests of children are the focus. Our only reservation is whether it may inadvertently add the potential for further complication to an already complex legal process and what the repercussions are for children should this lead to more protracted consideration of cases?

25. **Do you anticipate this amendment will significantly impact your work? If so, how?**

NA

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

No. Thank you.

Schedule 5: Case management and procedure

Harmful proceedings orders

27. **Would the introduction of harmful proceedings orders address the need highlighted by *Marsden & Winch* and by the ALRC?**

We believe this would help alleviate this concern regarding case of continuous litigation which is considered vexatious, frivolous or an abuse of proceedings. Please see our earlier responses.

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

We believe the shift away from the *intent* of the applicant to the *effect* of further proceedings is a useful one.

29. **Do you have any feedback on the tests to be applied by the court in considering whether to make a harmful proceedings order, or to grant leave for the affected party to institute further proceedings?**

No.

30. **Do you have any views about whether the introduction of harmful proceedings orders, which is intended to protect vulnerable parties from vexatious litigants, would cause adverse consequences for a vulnerable party? If yes, do you have any suggestions on how this could be mitigated?**

We recognise the potential for unintended consequences, particularly as noted where vulnerable parties, for example, file a poorly self-prepared application and later file a subsequent application upon seeking legal representation and advice. Our main suggestions are to improve information and legal aide support so that such individuals may be better supported to make sound applications. This would include broadening the legal literacy of the various health, welfare and other professionals with who the person may have contact and may rely on for support.

Overarching purpose of the family law practice and procedure provisions

31. **Do you have any feedback on the proposed wording of the expanded overarching purpose of family law practice and procedure?**

No. Thank you.

Schedule 6: Protecting sensitive information

Express power to exclude evidence of protected confidences

32. **Do you have any views on the proposed approach that would require a party to seek leave of a court to adduce evidence of a protected confidence?**

We wish to raise the issue of COVID leading to a greater sense and presence of mental health concerns in the community. For example, it has led to an unprecedented increase in the number of people seeking counselling supports, including many people previously coped without such support services in their lives. With this comes the potential for mental ill-health and records of seeking therapy to be used against a parent within Family Court matters.

33. **Does the proposed definition of a protected confidence accurately capture the confidential records and communications of concern, in line with the ALRC recommendation?**

Yes.

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

From a lived experience perspective, we know that there are many people for whom their past mental health records are inaccurate or where they have been used to paint a picture of current circumstances that is both stigmatising and discriminatory. It runs counter to the notion of recovery which is fundamental to a person's sense of hope and wellbeing. We welcome any measures that protect again this problem.

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

Yes. We agree that this would reduce the need for the person to keep telling their story. However, we have significant reservations about how such information would and could then be manipulated or misused by legal counsel and by the other party once it was in the record of evidence, and the potential for further trauma as a consequence. We acknowledge also that the Family Court system has traditionally been one that has discriminated against people with a mental illness diagnosis. We hope that this situation is changing but know that stigma is still pervasive in the community and in all systems.

Schedule 7: Communication of details of family law proceedings

Clarifying restrictions around public communication of family law proceedings

36. Is Part XIVB easier to understand than the current section 121?
37. Are there elements of Part XIVB that could be further clarified? How would you clarify them?
38. **Does the simplified outline at section 114N clearly explain the offences?**

We think that the following definitions/statements may be too simplified and are ambiguous, and therefore wide open for interpretation and manipulation, and that they could be stated in stronger language. The 3rd dot point in particular could be readily justified by unscrupulous individuals in social media:

- It is an offence to communicate an account of proceedings under this Act to the public, if the account identifies certain people involved in the proceedings.
- It is an offence to communicate a list of proceedings that are to be dealt with under this Act to the public, and that are identified by reference to the names of the parties to those proceedings.
- A communication is not made to the public if the communication is made to a person with a significant and legitimate interest in the subject matter of the communication that is greater than the interest of members of the public generally.

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

In general response to the above questions, we believe the section is quite brief and more detail about social media should be given. Currently, the following is provided, with social media only referenced as a footnote:

communicate means communicate by any means, including by any of the following:
(a) publication in a book, newspaper, magazine or other written publication;
(b) broadcast by radio or television;
(c) public exhibition;
(d) broadcast or publication or other communication by means of the internet.
Example: For the purposes of paragraph (d), online communications and communications using a social media service.

Schedule 8: Establishing regulatory schemes for family law professionals

Family Report Writers schemes

40. **Do the definitions effectively capture the range of family reports prepared for the family courts, particularly by family consultants and single expert witnesses?**

Yes.

41. **Are the proposed matters for which regulations may be made sufficient and comprehensive to improve the competency and accountability of family report writers and the quality of the family reports they produce?**

We wish to add that there should be mechanisms in place for them to receive feedback on the quality and accuracy of their reports. This would complete the learning loop much better as part of a continuous improvement approach to the role.

Commencement of the changes

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

It would be good if these changes could occur sooner, for example, 3 months lead in time. The harms that occur within the Family Court system that these changes aim to alleviate cannot come soon enough. They are long over-due.

Contact

We thank the Attorney-General's Department for the work it is doing on this important national and community issue. We wish you every success with the next steps. We would be keen to discuss further, any clarification or issues raised here with you.

Your sincerely

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