Law Council
OF AUSTRALIA

Exposure Draft—Family Law Amendment Bill 2023

Attorney-General's Department

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

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- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

The Law Council thanks its Family Law Section for its guidance and contributions in the preparation of this submission, in addition to the following Constituent Bodies:

- The Law Institute of Victoria
- The Law Society of the Australian Capital Territory
- The Law Society of New South Wales
- The Law Society Northern Territory
- The Law Society of South Australia
- The Law Society of Tasmania
- The New South Wales Bar Association
- The Queensland Law Society
- The Victorian Bar

Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the Attorney-General's Department (**Department)** in relation to its January 2023 Consultation Paper on the exposure draft of the Family Law Amendment Bill 2023 (Cth) (**Draft Bill**).

2. The Law Council notes that the Draft Bill proposes the 'first tranche' of legislative reform addressing the 2019 Final Report of the Australian Law Reform Commission (**ALRC**), *Family Law for the Future—An Inquiry into the Family Law System* (**ALRC Report**)[1] and implementing elements of the 2023 Government Response to the Joint Select Committee on Australia's Family Law System (**Joint Select Committee**).[2]

3. The Law Council supports reform to Australia's family law system, including the *Family Law Act 1975* (Cth) (**Family Law Act**), that may facilitate the resolution of parenting disputes and places the best interests, safety and wellbeing of any child to a family law proceeding at the centre of the decision-making process. It makes the observation that many of the proposed changes are intended not only to improve the substantive law but to make it easier to understand for both self-represented litigants and for separating couples who are negotiating their own parenting arrangements without litigation, and likely without the assistance of any family law professional.

4. While this is an important goal, the Law Council emphasises that it must always be borne in mind that the matters that will come before a court are the most complex and difficult matters involving the most vulnerable children. The legislation must be able to respond appropriately to those cases, as well as being as accessible as possible to members of the public.

5. The Law Council further highlights that reform to Australia's family law system must be carefully considered and rely on contemporary research and data, particularly where the impact of decisions is likely to have a significant and ongoing impact on the lives of individuals. It is essential that the reforms do not give rise to unintended consequences, such as an inconsistency in decisions made by the judiciary across matters, increased barriers for unrepresented parties to access justice and potentially poorer outcomes for the most vulnerable parties, including children.

6. The Law Council acknowledges that, historically, education on reform within the Australian family law system has relied on legal practitioners communicating with and educating clients on new or developed legal principles. While the family law system may appear to be accessible due to the likelihood that a person has had some personal or vicarious interaction with the system (or its international counterparts), the Law Council strongly recommends the development and implementation of targeted educational campaigns to ensure that the broader community understands the reforms and their potential consequences.

[1] Australian Law Reform Commission ('ALRC'), Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019).
[2] Australian Government, Australian Government response to the inquiry of the Joint Select Committee on Australia's Family Law System (January 2023) <https://www.ag.gov.au/system/files/2023-01/government-response-to-the-JSC-reports.pdf>.

7. Further, the Law Council emphasises the need to ensure that resourcing follows reform, particularly as several reforms proposed in the Draft Bill may have significant funding implications for legal assistance organisations. Examples include changes to the work of Independent Children's Lawyers (**ICLs**) (usually funded through legal aid commissions) making clear certain obligations to meet with children and to engage their views, as well as the proposed introduction of 'harmful proceedings' orders, going beyond the current vexatious litigant process if the repeat applications might cause harm to the respondent.[3]

8. It is therefore vital that the implementation of these proposed reforms correspond with a sustained increase in resourcing across the family law system to ensure that the funding pressures facing the legal assistance sector are not exacerbated. Appropriate resourcing must also be provided to the Federal Circuit and Family Court of Australia (**FCFCOA**) to meet its substantial ongoing demands.[4]

9. The potential impact of these reforms is, in the Law Council's view, a further example of the necessity of Justice Impact Tests in identifying and addressing the complete cost and impact of Government measures.[5]

10. Finally, the Law Council thanks the Department for its engagement to date on the contents of the Draft Bill, particularly with its Family Law Section, which has significantly contributed to this submission. However, as a federated body, the Law Council also has an obligation to consult its Constituent Bodies on matters of policy, of which many have demonstrated a strong interest in this consultation. In this respect, the limited consultation timeframe has resulted in challenges for the Law Council when seeking to reconcile the positions of its Family Law Section with the range of detailed views expressed by its Constituent Bodies in the time available, in order to present a unified voice on behalf of the Australian legal profession on these matters of national significance.

11. In any case, the Law Council looks forward to continuing to engage with the Department and Government as these significant reforms progress, on behalf of the Family Law Section, its Constituent Bodies and its Advisory Committees where appropriate.

[3] Law Council of Australia, 2023-24 Pre-Budget Submission (3 February 2023) <https://www.lawcouncil.asn.au/publicassets/ab6bba63-bea5-ed11-9479005056be13b5/2023%2002%2003%20-%20S%20-%20Pre-Budget%20Submission%20%202023-24.pdf> 11.
[4] Ibid 5.
[5] Ibid.

Responses to Consultation Questions

Schedule 1: Amendments to the framework for making parenting orders

Redraft of objects

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

12. The Law Council agrees that the current interplay between the objects and the best interests provisions in the Family Law Act is suboptimal and that simplification is required, noting that the objects clause of legislation should clearly outline the underlying purpose of legislation and assist in resolving uncertainty and ambiguity.

13. While the ALRC recommended that section 60B of the Family Law Act be repealed,[6] the Draft Bill proposes to retain section 60B as a simplified objects section providing that the objects in Part VII are to ensure that the best interests of children are met and to give effect to the Convention on the Rights of the Child (**Convention**).[7]

14. The Law Council has received a range of views on the proposed redraft of the objects, particularly regarding whether the proposed drafting sufficiently addresses the objects of Part VII and aids interpretation, especially for self-represented litigants. It notes that its Family Law Section is of the strong view that the proposed objects do not assist the reader because they do not add clarity or more broadly assist in an understanding of subsequent provisions.

15. Further to this point, while an objects and principles provision may be intended as an expression of policy intent, they do little to assist a reader to understand those matters and may create confusion. Objects and principles are not justiciable rights and their inclusion may add to confusion, not clarity and serve to duplicate matters expressed elsewhere about best interests factors. After the introduction of the objects and principles provisions, in *B v B: Family Law Reform Act 1995*[8] the Full Court of the Family Court of Australia said, notwithstanding the objects and principles, it is the 'best interests' principle that 'defines the essential issue'.[9]

16. On balance, the Law Council is of the view that if simplification is the aim of these reforms, absent a complete re-write of Part VII, proposed section 60B should be removed in its entirety.

17. Alternatively, if proposed section 60B is to remain, consideration should be given to the removal of paragraph 60B(b), given:

    - the Convention is significantly broader in scope than Part VII of the Family Law Act;
    - the Convention covers both private law and public law considerations, and the latter are largely dealt with by the states and territories;

[6] Australian Law Reform Commission ('ALRC'), Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019).
[7] *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[8] (1997) FLC 92-755.
[9] Ibid [9.54] (Nicholson CJ, Fogarty and Lindenmayer JJ) at [9.54]

- as Justice Bennett noted in *Zammit v Zammit*,[10] reference to the Convention in the objects of Part VII 'is unlikely to be of great value in the adjudication of individual cases';[11] and
- reference to the Convention may be a source of confusion and/or create unintended consequences, including where parties do not have the benefit of legal advice, and may lead to misguided and protracted arguments about whether a proposed parenting order is consistent with the Convention (with attendant resource demands).

18. Having regard to the proposed simplification of section 60CC, paragraph 60B(a) could remain, noting that the Consultation Paper states that the proposed changes (emphasis added):

> *…will ensure that parents settling matters between themselves are able to more accurately and easily navigate the law,* ***and can make decisions informed by a better understanding of the purpose of the parenting framework****. The changes will help to ensure out-of-court settlements place the best interests of the child at the forefront…*[12]

19. From a practical perspective, legal practitioners assisting their clients negotiating parenting orders (or plans) or assisting clients with understanding what might be in their child's best interests, often refer to elements of section 60B of the Family Law Act. For example, existing subsection 60B(2) assists clients and carers to appreciate that the focus of Part VII is on rights of the child.

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

20. The Law Council notes that there are several features of existing section 60B which have been omitted from the proposed simplification of this section in the Draft Bill. Consideration ought to be given to retaining references to:

- a child's best interests being met by both of their parents having a 'meaningful' involvement in their lives to the maximum extent consistent with the best interests of a child (existing paragraph 60B(1)(a)); and
- the safety of a child, particularly being protected from physical or psychological harm, abuse or violence (existing paragraph 60B(1)(b)).

21. The Law Council considers that these key objects should not be removed from the legislation just because a layperson may not understand their legal operation at face value.

[10] [2020] FamCA 950.
[11] Ibid [24].
[12] Attorney-General's Department, Exposure Draft – Family Law Amendment Bill 2023 (Consultation Paper, January 2023) 5.

Best interests factors

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

22. The Draft Bill seeks to considerably restructure section 60CC to reflect the six 'best interests' factors recommended by the ALRC,[13] as well as including a reference to 'neglect' in the factor relating to safety.[14] While the Law Council agrees with the proposed simplification, it has identified several potential drafting issues with the factors at subsection 60CC(2) that warrant close examination, dealt with in turn below.

23. Firstly, the use of the terms '*carer*' and '*parent*' in proposed subsection 60CC(2) appears confused and requires clarification.

24. The Family Law Section has concerns about the introduction of the term 'carer'. The ALRC Report used the term in a number of places, but it was not separately defined at that time. Concerns were subsequently expressed to the Department by the Family Law Section as to the use of the term, absent careful definition, and the risk that such a term might be interpreted to include additional third parties with some but more removed interest in the care of a child (such as a paid nanny or occasional babysitter). In the Draft Bill:

    - A '*carer*' is defined as *'each person who has parental responsibility for the child',* a definition which sits alongside, but is not reconciled with, the treatment of *'parent'*, being a person who is deemed by subsection 61C(1) of the Act to have parental responsibility for a child who is not 18.
    - 'Carer' is referred to in proposed paragraph 60CC(2)(d) and no reference is made to 'parent'.
    - 'Parent' is referred to in proposed paragraph 60CC(2)(e) and no reference is made to 'carer'.

25. If '*carer*' is to be retained in other sections, it needs to be clearly defined and may need to include, for example, a definition encompassing non-parent parties, such as grandparents, who have caring responsibilities for children and other people concerned with the care, welfare and development of a child (noting the substantial jurisprudence relating to the broad range of people who may seek to apply for parenting orders).

26. The Law Council is of the view that the use of these two terms, each of which are not defined in reference to the other, despite the clear overlap of implied roles and responsibilities with respect to children, is likely to add to confusion. The meaning and application of the two terms requires clarification and reconciliation.

[13] Australian Law Reform Commission ('ALRC'), Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019) 165, Recommendation 5.
[14] Exposure Draft, Family Law Amendment Bill 2023, sch 1, pt 1, cl 6.

Paragraph 60CC(2)(a)—*what arrangements would best promote the safety (including safety from family violence, abuse, neglect, or other harm) of the child and each person who has parental responsibility for the child (the carer)*

27. The Law Council has received feedback that paragraph (a) is worded unnecessarily broadly and relies upon existing case law to set limits around what is and is not unacceptable risk. In this regard, consideration should be given to explicitly referring to '*exposure to family violence*' in recognition to the harm it causes children, rather than only '*safety from family violence*'.

28. The Family Law Section has noted that the term *'arrangements'* does not currently appear in section 60CC. Reference to it may imply something broader than that ordinarily covered by the term 'parenting order'. The Law Council proposes that the subsection instead refer to '*what parenting order would best promote* …'. Alternatively, the words '*what arrangements would best promote*' could be removed with the subsection commencing with the words '*the safety* …'.

29. The use of the word '*safety*', as drafted, appears to imply physical safety, particularly where harm is not defined to include psychological and emotional harm. If the intention of the proposed changes to section 60CC is to avoid confusion, then the wording in paragraph (a) may need clarifying, given that each person's perception of safety can vary considerably. The Law Council suggests that '*the safety of the child*' in be replaced by '*the safety and wellbeing of the child*'. While some choices a parent may make will fall short of being a safety issue, these choices may still pose detriment or risk to the child developing into their best self.

30. Constituent Bodies have raised concerns that considering what arrangements would best 'promote' safety appears to be a forward-looking exercise that does not explicitly take into account history of family violence or abuse, neglect or other harm that has already occurred. While case law informs practitioners and the court that what has occurred in the past can be used to inform decisions about unacceptable risk,[15] unrepresented members of the public may not read the provision in that way. The Law Council therefore submits that the history of family violence, abuse, neglect or other harm should be a consideration in deciding how to keep children safe in the present and future.

31. In addition, in instances where only the parent (or carer) is at risk of harm, it is not clear from this subsection which consideration (the safety of the parent/carer, or the best interest of the child) will take priority. Some Constituent Bodies have emphasised that as there are state and territory based processes in place to protect parents and carers, this section should remain focused solely on the best interests of the child in order to remain consistent with the Family Law Act more broadly. Others have recommended that this provision does not go far enough, and that consideration be given to extending paragraph (a) to the protection of another person with whom the child is living, but who does not have parental responsibility.

Paragraph 60CC(2)(b)—*any views expressed by the child*

32. The Law Council considers that paragraph (b) could be expanded or amended to align with existing paragraph 60CC(3)(a), to reflect the common considerations used to determine the weighting of a child's view, such as their age and stage of development, the level of influence experienced by the child in forming their view and the longer-term ramifications.

[15] *Isles & Nelissen* [2022] FedcFAMC1A 97.

33. The Law Council recognises that a commonly held misconception amongst the community is that there is a 'set age' where a child's view (such as regarding where they should live) is determinative. These reforms provide an opportunity to clarify that this is dependent on the individual child in question. As currently expressed, this paragraph may read to a layperson as an explicit and determining factor. This could result in parents placing undue pressure on children, coaching children or engaging in behaviour to alienate a child from the other parent.

34. The Law Council therefore recommends amending proposed paragraph (b) to 'any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views,' consistent with existing paragraph 60CC(3)(a).

35. The presumption of Article 12 of the Convention is that *all* children are capable of forming their own views.[16] Keeping section 60CC(2)(b) as currently worded is consistent with Article 12(1) because it gives a child who is capable of forming their own views '*the right to express those views freely in all matters affecting the child*', with those views being given 'due weight' in accordance with the child's age and maturity. The freedom to assess the weight to be applied to views expressed by the child (subject to certain criteria) is a familiar and valuable part of the jurisdiction of the courts, in assessing what is in the best interests of the child, and should not be minimised.

36. Alternatively, paragraph (b) could be expanded to provide for 'any relevant views expressed by the child', as recommended by the ALRC.[17]

Paragraph 60CC(2)(c)—*the developmental, psychological and emotional needs of the child*

37. The Law Council notes that the proposed wording in paragraph (c) *requires* the court to consider this factor. Some Constituent Bodies have expressed concern that this may be interpreted to mean that an expert report will need to be prepared in every case that comes before the court. This would increase costs for parties and constrain the already limited resourcing of the family law system.

Paragraph 60CC(2)(d)—*the capacity of each proposed carer 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*

38. The Law Council considers that linking the capacity of a carer to their ability and willingness to obtain support could have unintended consequences. For example, it could be used against parents who do not need support or cannot access support due to extraneous reasons (e.g., lack of services and backlogs) as it appears to *require* that carers with reduced capacity indicate a willingness to seek support and assistance. This may encourage one party to put into issue, without merit, the other party's capacity to care and their need for support.

[16] *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.
[17] Australian Law Reform Commission ('ALRC'), Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019) 165, Recommendation 5.

39. The drafting of paragraph (d) suggests that the only proof of capacity to care is the ability and willingness to seek support, which was likely not intended by the drafters. To rectify this, consideration ought to be given to adding the phrase *'where warranted*' to the end of paragraph (d). As presently drafted, this paragraph suggests that otherwise 'good enough' parents may be criticised by the other parent for not seeking support, in circumstances where none is warranted.

40. The Law Council also considers there should be consideration of a parent's capacity (and failure) to meet the child's financial needs, alongside their developmental, psychological and emotional needs.

Paragraph 60CC(2)(e)—*the benefit to the child of being able to maintain a relationship with both of the child's parents, and other people who are significant to the child, where it is safe to do so*

41. Some of the Law Council's Constituent Bodies have acknowledged that the inclusion of the phrase, '*where it is safe to do so*', makes it expressly clear that the benefit of maintaining a relationship with both parents must always be subordinate to the child's safety and is likely to assist with community understanding of proposed subsection 60CC(2). However, the Family Law Section is of the view that '*where it is safe to do so*' should be removed, because it appears to double up with paragraph (a).

42. As presently drafted, paragraph (e) is problematic because it is inconsistent with the ordinary natural meaning of '*parent'* and ignores the fact a child may have more than two parents. Further, the proposed drafting is inconsistent with the High Court's decision of *Masson v Parsons*[18] where the plurality held *inter alia* the Family Law Act did not define the term '*parent*' and that there was no indication that Parliament intended for this term to have anything other than its natural and ordinary meaning.

43. Other aspects of the drafting of paragraph (e) require careful consideration:

- The phrase '*meaningful relationship*' (in existing subparagraph 60CC(2)(a)) has been replaced with '*a relationship*'. To remove consideration of a meaningful relationship may lead the Court to perhaps considering that *any relationship* may be acceptable (and with the consequent reduction in time and communication arrangements as being sufficient to meet that lower threshold). It would be undesirable to abandon this concept—which has been the product of consideration and considerable jurisprudence over the last 20 years—merely in the interests of simplicity, which seems to be the explanation provided for removing it.
- There is a risk that continued discussion of the '*benefit*' of relationships will import old jurisprudence and problematic terminology from the Family Law Act into the Draft Bill which will continue to present difficulties in interpretation of the law and application to particular cases. Further, the word '*maintain*' ought to be replaced with '*have*'.
- Arguably, paragraph (e) is of a different nature to the other factors proposed in subsection 60CC(2). The wording of proposed paragraph (e) may be read more as an ideological statement that there is benefit in maintaining relationships, rather than a factual matter for the judge to determine, and the issue of *whether* there is benefit is an argument that should be made by counsel on behalf of their client based on the evidence, including evidence regarding family violence.

[18] [2019] HCA 21.

Paragraph 60CC(2)(f)—*anything else that is relevant to the particular circumstances of the child*

44. Proposed paragraph (f) reduces the scope of the court's discretion to consider other factors that are relevant to the best interests of the child, compared to existing paragraph 60CC(3)(m) that allows the court to consider any other fact or circumstances it considers relevant.

45. The Law Council considers this may lead to the exclusion of information that is highly relevant to a parenting order, if the information is not directly related to the child (e.g., logistical information and parent-to-parent protection orders).

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

46. The Draft Bill seeks to remove the existing two primary and 13 additional considerations and replace them with six factors that the court must consider in determining what is in the best interests of a child.

47. The Law Council broadly supports reforming the list of 'best interest' factors, noting that the existing list contained considerations which often overlapped in substance. It also considers that the removal of categorising considerations as 'primary' and 'additional' will simplify section 60CC and encourage holistic consideration of the six proposed factors.

48. Nonetheless, some Constituent Bodies have raised concerns that the removal of this framework is likely to increase litigation, costs and delays where parties are unable to reasonably predict how the court will decide a matter. In this respect, some practitioners have expressed a preference reform that refines, rather than replaces, the existing framework.

49. On balance, the Law Council supports the simplification of the best interest factors and also supports the continued application of the paramountcy principle in family law matters involving a determining of the arrangements for children. It suggests, however, that further consideration be given to the proposed redraft of section 60CC by Professor Richard Chisholm.[19]

[19] Richard Chisholm, 'Rewriting Part VII of the Family Law Act: A Modest Proposal' 24 (2015) *Australian Family Lawyer*.

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

Additional factors in subsection 60CC(2)

50. The Consultation Paper notes that the intention of proposed section 60CC is to list the most commonly arising considerations in parenting matters, rather than including all factors that may be relevant in any given matter.[20] It appears the intention is that other factors relevant in each case would be considered pursuant to the proposed 'catch-all' provision at paragraph 60CC(2)(f). The Law Council has a concern that, despite proposed paragraph 60CC(2)(f), there is a risk that relevant factors may be overlooked by parties or the court. These include:

    - the child's maturity of level of understanding (current paragraph (3)(a));
    - a parent's past willingness to take opportunities to engage in parenting (current paragraphs (3)(c) and (ca));
    - the likely effect on the child of any change in circumstances (current paragraph (3)(d));
    - the practicalities of any arrangement (current paragraph (3)(e)); and
    - whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child (current paragraph (3)(l)).

    It may be helpful to include these factors as examples in a note to proposed paragraph 60CC(2)(f).

51. The Law Council is also of the view that the express consideration of any existing family violence orders, and the basis upon which those orders were made, should also be incorporated as a general consideration. Whilst existing family violence orders could be considered at proposed paragraphs (a) or (f), this risks oversight by the court and misunderstanding amongst the community as to the interplay between family violence orders and parenting orders. Moreover, paragraph (f) is limited to the child, which could result in a parent-to-parent protection order being excluded as an irrelevant consideration. This is concerning, given that the co-parenting dynamic can be highly relevant to the child's wellbeing post-separation.

Subsection 60CC(3)

52. The Law Council acknowledges the need for the court, when determining what is in the best interests of a child, to specifically consider a child's right to enjoy their Aboriginal or Torres Strait Islander culture,[21] by having the opportunity to connect with, and maintain their connection with, their family, community, culture, country and language, together with consideration of the likely impact that any proposed parenting order will have on that right.

[20] Attorney-General's Department, Exposure Draft – Family Law Amendment Bill 2023 (Consultation Paper, January 2023) 12.
[21] See, e.g., *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 30 and 31; United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007), arts 3, 5, 8, 11, 12, 14, 31.

53. The Law Council supports the proposed amendments to consolidate existing subsections 60B(3), 60CC(3)(h) and 60CC(6) of the Family Law Act into proposed subsection 60CC(3). It makes the following minor suggestions:

- Paragraph 60CC(1)(b) should include the word '*also*' before the word '*consider*' to make it clear that proposed subsection 60CC(2) applies to Aboriginal and Torres Strait Islander Children in addition to the matters contained in section 60CC(3).
- Section 60CC could be further simplified by deleting proposed paragraph 60CC(1)(b) and integrating subsection 60CC(3) into subsection 60CC(2).

54. More broadly, according to the Australian Bureau of Statistics, in 2021, 7.5 million people in Australia were born overseas, representing 29.1 per cent of the resident population of Australia.[22] Many of these people, and their descendants, value and live by traditions and customs practised in their country of origin. Consideration could therefore be given to also acknowledging that regard should be given in every case to the broader rights of children[23] to enjoy their culture as practised by their families and communities, as a reflection of the cultural diversity that exists in Australia and noting that this is consistent with the existing objects of Part VII. At the very least, this could be included as an example of a factor to be considered in a note to proposed paragraph 60CC(2)(f).

Subsection 60CC(4)

55. The Law Council notes that proposed subsection 60CC(4) enables the court to make an order with the consent of the parties, whereby the court '*may, but is not required to*' have regard to the best interests considerations listed in proposed section 60CC (including considering whether a child will be safe from harm, abuse, violence or neglect). This appears to be contrary to the Convention, where children have the right to be properly cared for and protected from violence, abuse and neglect by their parents.[24] Further, this may lend itself to parents seeking to obtain orders by consent which are wholly inappropriate and do not meet the stated objectives of the Family Law Act.

56. Accordingly, the Law Council is of the view that even when making an order by consent, a court must consider whether by making the order, a child will be safe from harm, abuse, violence or neglect.

Removal of equal shared parental responsibility and specific time provisions

57. The Draft Bill seeks to repeal the presumption of equal shared parental responsibility (**ESPR**) in existing section 61DA, along with the equal time and substantial and significant time provisions in section 65DAA.[25]

[22] Australian Bureau of Statistics, Australia's Population by Country of Birth 2021 (Web Page, April 2022) <https://www.abs.gov.au/statistics/people/population/australias-population-country-birth/latest-release>.
[23] *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990), see art 30 (children belonging to ethnic, religious or linguistic minorities, as well as Indigenous children), also art 31 (participation in cultural life),
[24] *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 19.
[25] Exposure Draft, Family Law Amendment Bill 2023, sch 1, pt 2, cl 14, 22.

Question 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?

58. The Law Council has received divergent views in relation to this question, outlined below. This reflects the reality that family lawyers in Australia are not a homogenous cohort and have varying views regarding the impact that simplifying the framework for making parenting orders will have on their interactions with clients and the outcomes they seek to achieve for them.

59. Some Constituent Bodies, along with the Family Law Section, support the removal of sections 61DA and 65DAA. They agree that the simplification of the legislative framework for making parenting orders may assist in explaining the law to clients and clarifying misconceptions regarding the expectation of equal time arrangements in some situations, as follows:

    - The proposed amendments will obviate the need to advise:
        - that the presumption of ESPR differs to shared care;
        - what a rebuttable presumption means; and
        - about the legislative framework in relation to relevant factors in existing sections 60B to 65DAA.
    - Removing the presumption of ESPR and the consequent consideration of specific time arrangements will help direct parents' attention away from the conflict between them, and away from the notion of competing for time with, and control over, the children.
    - It will likely be more straightforward to advise a client that the Family Law Act directs focus to their children's best interests, without the need to explain the current legislative framework, which will also be easier for self-represented litigants to understand.

60. Other Constituent Bodies hold a different view, submitting that the existing presumption of ESPR provides a simplified framework for practitioners to explain to their clients how the court can be expected to determine shared time arrangements, and its removal may make it more difficult to explain the law on parental responsibility to a client, as follows:

    - The simplified legislative framework for making parenting orders would obfuscate established legislative principles, make it more difficult for practitioners to manage client expectations and confuse parents who are having their time with children withheld in circumstances where the reason is not readily apparent.
    - The removal of ESPR may make it more difficult for practitioners to reasonably and accurately predict how a court will determine shared time arrangements, which may have the effect of increasing litigation and costs incurred by parties.
    - The blanket removal of this structure may lead to inconsistencies in how parents and the judiciary determine shared time arrangements and how the concept of 'substantial and significant time' will be considered. This is especially the case in Division 2 of the FCFCOA, where the court has the benefit of appointments of judicial officers from a variety of legal backgrounds who preside over general federal law as well as family law—the latter not always being their area of expertise.

61. The Law Council notes that internationally, jurisdictions are increasingly moving towards a joint decision-making approach for shared parenting arrangements within their respective legislative frameworks.[26] Some Constituent Bodies have consequently identified that the proposal in the Draft Bill to repeal the presumption of ESPR may have the effect of moving Australia away from this increasingly common approach and discouraging parents from attempting to consult with each other on decisions relating to the welfare of the child.

Guidance and resourcing

62. Should the presumption of ESPR be repealed as proposed, the Law Council would support the release of further guidance from the FCFCOA on what factors will be considered in determining the child's best interests and the impact that allegations of family violence will likely have on shared time arrangements. This will be important, given that it will take practitioners time to fully understand the implications of the amendments as case law around the new provisions develops.

63. The Law Council is also of the strong view that reform in this area must be supported by considerable and targeted community education on any changes implemented and the likely consequences for parties. In this regard, the Law Council also notes the comments in the ALRC Report regarding the legislative amendments being accompanied by extensive, evidence-based resources to assist parents in working out arrangements that are in their child's best interests.[27] The Law Council hopes to see these resources released contemporaneously with any legislative change.

64. Additionally, greater funding for legal assistance providers would ensure that parties receive legal advice to understand the evidence that must be put before the court, and how the court is likely to determine the issue.

Question 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?

65. The removal of obligations on practitioners to encourage parents to consider equal time arrangements will ultimately result in significantly less shared, or substantially shared, care arrangements.

66. Most of the Law Council's Constituent Bodies have submitted that the obligation on legal practitioners to focus primarily on the best interests of children will enable practitioners to direct parents' attention away from what time they see as desirable or as an entitlement for themselves. The fact that parties are embroiled in disputes about time arrangements for children, including court proceedings, in and of itself indicates that they are having difficulty agreeing on issues relevant to the best interests of the child and that their interactions may be defined by conflict and a lack of trust.

[26] See United Kingdom Ministry of Justice, Family Justice Review (Final Report, November 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf> 150 [4.69]; *Belgium-Belgian Civil Code 2007* art 374; European Judicial Network, Parental Responsibility – Child Custody and Contact Rights (Web Page, 2022) <https://e-justice.europa.eu/content_parental_responsibility-302-de-en.do?member=1>.

[27] Australian Law Reform Commission ('ALRC'), Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019) 183 [5.119].

67. The repeal of ESPR in matters involving family violence could also be expected to afford greater protection to a victim-survivor. The proposed amendments will likely enable clients' legal representatives to focus on what arrangements are appropriate for their circumstances, and what would be child-focused and safe, if arrangements involving shared care and substantial and significant time would not be appropriate.

Question 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?

68. Section 65DAC currently provides that where the court orders that the parties have shared parental responsibility in relation to a major long-term issue in relation to the child, the parties have an obligation to make the decision jointly.[28] That obligation will be fulfilled if they:

- consult each other in relation to that decision;[29] and
- make a genuine effort to come to a joint decision.[30]

69. With the removal of the presumption of ESPR, the court would still be able to make orders for shared parenting responsibility in relation to particular major long-term issues. The parties may seek such orders by consent, to formalise via court orders their agreement to engage in joint decision-making on the issue (e.g., if the issue will arise in the future). Alternatively, one party may seek such orders because the other wishes to exclude them from decision-making on the issue. Issues of this nature may include:

- where the child will attend school;
- which extracurricular activities the child may participate in; and
- decisions around health or medical needs.

70. There may also be circumstances where the parties do not agree about decision-making on the issue but have not sought specific orders in that regard. In considering the overall best interests of children, the court may consider the issue and make an order of its own motion regarding decision-making, although it has no obligation to do so. This could include an order for shared parental responsibility on the issue.

71. Accordingly, the Law Council considers there would still be a place for section 65DAC, particularly subsection (2), in providing that the exercise of shared parental responsibility in relation to a major long-term issue involves an obligation to make decisions jointly on that issue.

72. However, if this subsection was to be retained, it should be redrafted to clarify that while there is a requirement to consult, there is no formal requirement to 'make a genuine effort to come to a joint decision', which currently serves as a trigger for further dispute.

[28] *Family Law Act 1975* (Cth) s 65DAC(2).
[29] Ibid para 65DAC(3)(a).
[30] Ibid para 65DAC(3)(b).

Changes to advisers' obligations when working with parents to reach parenting arrangements

73. As a result of the proposed changes regarding the presumption of ESPR and time arrangements, the Draft Bill contains amendments to advisers' obligations in sections 60D and 63DA.[31] The Law Council notes that '*advisers*' comprise legal practitioners, family counsellors, family dispute resolution practitioners and family consultants.[32]

74. The Law Council notes that Rule 7 of the *Australian Solicitors' Conduct Rules* requires solicitors to properly advise clients in available options.[33] Section 60D of the Family Law Act makes it explicit that advisers must encourage the person to act in the child's best interests.

75. Existing section 63DA (including subsection (1), which the Draft Bill does not propose to repeal) imposes additional obligations to advise about parenting plans, with no exception for matters where parenting plans are clearly inappropriate due to family violence. Accordingly, consideration should be given to further amending or repealing section 63DA so that solicitors are not mandated to advise their client on parenting plans, even where it is not appropriate to their circumstances.

76. Where a parenting plan is, or may be, relevant, a solicitor should properly be expected to provide advice to their clients in relation to this option, just as they will in relation to other relevant ways in which arrangements can be formalised.

Reconsideration of final parenting orders (*Rice & Asplund*)

Question 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?

77. The Law Council supports the codification of the rule in *Rice & Asplund*[34] which requires a party to demonstrate to the court a significant change in circumstances in order to vary an existing parenting order, and that it is in the best interests of the child for the order to be reconsidered.[35]

78. The foundation of this common law rule is that re-litigation of a matter before the courts would not generally be in a child's best interests. The Law Council notes there is benefit to expressing this rule within the Family Law Act, noting that many users of the family law system do not obtain legal representation and may not access additional resources to understand what is required of them in bringing an application in these circumstances.

79. The Law Council considers that proposed section 65DAAA reflects the main principles of the common law rule and the considerations set out in *Rice & Asplund*.

80. The Consultation Paper states that the Family Law Act provides two mechanisms for variation or replacement of existing parenting orders:

    - making a parenting plan; or

[31] Exposure Draft, Family Law Amendment Bill 2023, sch 1, pt 3, cl 17-18, 20-22.
[32] *Family Law Act 1975* (Cth) s 60D(2).
[33] See, e.g., *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW), r 7.
[34] (1979) FLC 90-725.
[35] Exposure Draft, Family Law Amendment Bill 2023, sch 1, pt 3, cl 24.

- seeking to have the orders amended through the courts.

The rule in *Rice & Asplund* governs the second option.[36]

81. In practice, however, parties do not commonly vary parenting orders by making a parenting plan that overrides the existing order (although that is available to them) or have orders amended through the courts (i.e., via litigation). More often, parties reach an agreement to vary existing orders and file an application for consent orders giving effect to the same. Parties also agree on consent orders at various stages of the proceedings, including prior to the court considering whether there has been a significant change of circumstances since the final parenting order was made. The paramount consideration is that the parenting order is in the best interests of the children.

82. Presently, parties who consent to vary final parenting orders in an application for consent orders or during litigation are not required to satisfy the principle in *Rice & Asplund* before the court considers making the order. There is no requirement in the application for consent orders to address that matter or to make a submission to the court on that issue, and it would be an unnecessary hurdle to parties reaching an agreement that they consider is in their children's best interests.

83. The Law Council accordingly suggests that proposed subsection 65DAAA(1) should include words to the following effect (emphasis added), consistent with the recommended wording in the ALRC Report:[37]

> *'If a final parenting order is in force in relation to a child, a court must not reconsider the final parenting order* ***(other than by consent)*** *unless…'*

84. The Law Council further notes that the rule in *Rice & Asplund* was applied in relation to variation of a change in 'custody' arrangements. However, in subsequent case law, the rule has been applied when parents bring an action seeking to vary time with the child. As the threshold to bring an action to vary time is lower than the threshold for seeking a variation to whom the child lives with, the Law Council recommends that this distinction should be reflected in proposed section 65DAAA.

85. Further, the Law Council recommends that a non-exhaustive list of examples be provided in the Draft Bill to assist parties in appropriately interpreting this rule.

Question 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 accurately reflect current case law?

86. The Law Council supports the inclusion of the list of considerations that courts may consider at proposed subsection 65DAAA(2) and is of the view that the choice of considerations appropriately reflects current case law. The inclusion of the list in the section should provide clarity for litigants and legal practitioners about when a final order may be '*reconsidered*' by the court, noting it would be necessary to avoid any ambiguity and misperceptions as to the law.

[36] Attorney-General's Department, Exposure Draft – Family Law Amendment Bill 2023 (Consultation Paper, January 2023) 18.
[37] ALRC, Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019) 533.

87. The Law Council makes the following comments, which could further enhance and clarify this proposed section:

- Words to the following effect could be added at the commencement of the proposed paragraph 65DAAA(2)(a) (emphasis added):

  '***The past circumstances**, including the reasons for the final parenting order and the material on which it was based…*'

  These words would capture the many situations whereby final parenting orders are made by way of an application for consent orders, or resolved by consent after proceedings have been initiated, but prior to any reasons for judgment being delivered by a court, following a final hearing.
- A factor could be included relating to whether or not the final parenting order to which a variation is sought is a parenting order with whom the child is to live or alternatively, with whom the child spends time.
- Consideration should also be given to when the *Rice v Asplund* rule should be applied and considered by the court, given that there are currently inconsistencies in practice. The rule could perhaps be viewed as a threshold issue to be considered at the first hearing.
- The word '*new*' in proposed paragraph 65DAAA(2)(b) is unnecessary and could lead to arguments as to the definition of '*material available*'. Queries arise as to at what point in time is the assessment of '*new*' undertaken, and whether it is 'new' because it has only just been discovered by a party, or because the material (such as an objective fact or circumstance) has only just occurred. The inclusion of the word '*new*' is unnecessary, and the intention of the section can still be met by simple reference to '*material*'.

Schedule 2: Enforcement of child-related orders

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

88. The Law Council considers that the four proposed subdivisions streamline and improve the readability of Division 13A. This will likely result in more consistent application by the courts of Division 13A and greater understanding by parties—particularly self-represented litigants—as to the consequences of non-compliance with an order and initiation of unmeritorious contravention applications.

89. The Law Council notes feedback from its Family Law Section and some of its Constituent Bodies that while the 'simplified outline' at proposed section 70NAA is clear and steps out the progression of contravention related issues in a succinct way, Schedule 2 remains complex and challenging overall. Consequently, where further simplification cannot be achieved, education around this Schedule may be necessary to improve general understanding.

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

90. The proposed objects of Division 13A in proposed section 70NAB largely encapsulate the articulated goals of the enforcement regime. The Law Council, including its Family Law Section, considers it sensible to include the objects of Division 13A within the Family Law Act.

91. However, the Law Council has received feedback from some Constituent Bodies that proposed paragraph 70NAB(e) ('providing for the imposition of appropriate sanctions on a person who seriously or repeatedly contravenes child-related orders without having a reasonable excuse') would benefit from refinement, particularly as the Draft Bill proposes to remove the distinction between 'more serious' contraventions and 'less serious' contraventions. Consideration should therefore be given to rewording this proposed principal object to provide words to the effect of:

> *'providing for the imposition of appropriate sanctions on a complainant bringing a contravention proceeding without merit, or on a respondent for non-compliance with child-related orders without reasonable excuse*.'

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

92. The Family Law Section is of the strong view that proposed section 70NBE continues to confuse unnecessarily the power to order costs in any proceedings, which is already set out in section 117 of the Family Law Act.

93. Further, rather than create a presumption (as recommended by the ALRC)[38], proposed section 70NBE generalises to an extreme when and how a costs order would be made. The use of the language, '*the Court must make an order…. unless it is satisfied it is not appropriate to do so in the circumstances*', does not tend to the interpretation of conferring a presumption (compared to, for example, the existing section 65DAA). The discretion given in section 70NBE is wide, unlike in subsection 117(2), where it is guided.

94. Additional feedback received from Constituent Bodies included the following:

- This section deals with costs orders both against complainants and against respondents. While the meaning of the section is not ambiguous, it may be clearer to court users (particularly self-represented litigants) if subsections 70NBE(2) and (3) specified that they relate to costs orders against complainants.
- Proposed paragraph 70NBE(3)(b) specifies that the court must not make the costs order if the court has made, or will make, a make-up time parenting order under section 70NBB in respect of the contravention. The rationale for this paragraph it not clear. It should be open to a court to make a costs order, irrespective of the fact that an order may be made, or has been made, for make-up time under proposed section 70NBB.
- While the proposed objects of Division 13A seek to uphold the authority of the court by enforcing compliance where '*necessary and appropriate*', section 70NBE appears to only require that it be '*appropriate*' to make a costs order.
- As currently drafted, proposed section 70NBE is unlikely in practice to result in costs orders being made. In this respect, only genuine costs consequences, with 'sharper teeth' than those proposed, will deter practitioners and self-represented litigants from proceeding with unmeritorious or trivial claims.

[38] Australian Law Reform Commission ('ALRC'), Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019) 165, Recommendation 42.

Question 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?

95. The Family Law Section notes that section 117 of the Family Law Act provides the court with the power to make a costs order in any proceeding under the Act. This would include making an order against a complainant in a situation where no finding is made (provided that it is 'just' to do so). Consequently, there is no need to have this costs power specifically set out in Division 13A.

96. Constituent Bodies were divided on this issue. On one hand, it is arguable that it would not be proper for a court to consider awarding costs against a complainant in a situation where a court does not make a finding either way about whether the order was contravened, given that there ought to be proper consideration of, and a determination about, the respondent's behaviour that has given rise to the complaint prior to making a costs order.

97. On the other hand, there may be circumstances where, given the technical nature of a contravention application and the requirements for presentation of the evidence about whether a contravention occurred, the court is unable to make any positive finding, but it is still appropriate to consider making a costs order. This could also have the effect of deterring similar future applications.

Question 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?

98. The Family Law Section does not agree with the approach taken in proposed subsection 70NBA(1). Due to the wording (emphasis added), '*if an **issue arises** in the proceedings about whether a person has contravened an order*', the requirement for an extant contravention proceeding falls away. It is not clear whether an application would need to be made in some manner, with the usual procedural fairness considerations.

99. There are significant consequences of contraventions and it should be made abundantly clear by a specific application when the Division is enlivened. Contravention proceedings can lead to substantial sanctions, including imprisonment. There are credit issues and evidentiary barriers which differ to other parenting proceedings, not the least of which is the principle—that is largely accepted by the Court—that respondents ought not be compelled to give evidence against their own interests and commonly will not file any evidence until the contravention is proved. As currently drafted, the Family Law Section is of the view that the amendments are likely to jeopardise the rights of a respondent to silence and may lead to procedural disadvantage to a party if it is not clear that a contravention is formally being asserted.

100. The Family Law Section has also raised that there may be resource implications in the event an asserted contravention was included in a general application in a proceeding and the matter was being case managed outside of the specific contravention list, only to be later properly identified and characterised.

101. Conversely, Constituent Bodies supported the broader approach taken in proposed subsection 70NBA(1). They are of the general view that the court's ability to deal with a contravention of child-related orders that arises in proceedings ought not be limited to a contravention application from a party only. This is in line with the aims of the proposed amendments to strengthen enforceability of orders and should reduce costs to parties in bringing fresh applications.

102. The Law Council notes that in practice, the need for the court to make a contravention order of its own motion in child-related proceedings may only arise in limited circumstances:

- where the parties already had interim child-related orders in place, and were pressing for final determination by a court; or
- where the parties were seeking to reopen parenting proceedings with a view to obtaining alternative child-related orders.

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

103. The Law Council accepts that this is a challenging and prescriptive part of the Family Law Act and so simplification is difficult to achieve. While the proposed amendments simplify the current Division 13A in part, it remains difficult to understand. In circumstances where the consequences to litigants can be significant (including imprisonment), careful consideration should be given to this Division.

104. There are some further aspects of Division 13A which the Law Council recommends for consideration:

- moving the definition of '*child related order*' to the top of the division where other prominent definitions are set out;
- it is not certain if much is gained from defining a subpoena as a child-related order, as the court has always dealt with such processes independently and appropriately; and
- the term '*complainant*' is used in this division, when '*applicant*' might be a more appropriate term, particularly if contravention proceedings may be triggered by only an affidavit in extant proceedings making a complaint about compliance with orders.

105. Finally, the Law Council notes that Professor Richard Chisholm has prepared a model draft of a new Division 13A,[39] and consideration should be given to its form and content.

[39] Richard Chisholm, 'Compliance with Parenting Orders: A Modest Proposal to Re-draft Division 13A of Part VII' 27 (2018) *Australian Family Lawyer*.

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

Question 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?

106. The Law Council considers that, consistent with Recommendation 9 of the ALRC Report, it is vital for the Family Law Act to recognise and value the traditions and culture of Aboriginal and Torres Strait Islander people and afford the family and the court broad discretion in identifying and including those they recognise in their traditions, cultures and community as family.

107. The changes being proposed are supported by the Family Law Section. However, some Constituent Bodies have queried the proposed departure from more familiar terminology, such as kin and kinship, to describe a family member of an Aboriginal or Torres Strait Islander child, particularly noting that section 61F of the Family Law Act requires the court to '*have regard to any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture*.'

108. The Law Council notes that family law jurisprudence has developed in respect of the concepts of 'kin', 'kinship structures' and 'kinship responsibilities.[40] Furthermore, kinship is a concept that is used in other jurisdictions, including in legislation relevant to the care and protection of children.[41]

109. The inclusion of the term '*ancestor*' within the definition of '*relative*' is welcomed and the Law Council supports the reference in the definition to the fact that this connection is to be determined and recognised by the Aboriginal or Torres Strait Islander community themselves. However, it is essential that a kinship group, and kinship roles, be recognised clearly in the definition, without regard to terminology such as '*related to*', which continues to afford primacy to biological relationships.

110. The Law Council accordingly suggests that the concept of a family member of an Aboriginal or Torres Strait Islander child may be more accurately captured by drafting to the effect of:

> *'a person who, in accordance with the child's Aboriginal or Torres Strait Islander culture, is part of the child's kinship group/structure, as recognised by that child's family or community.'*

111. In addition to the above considerations, the Law Council recommends close ongoing consultation with Aboriginal and Torres Strait Islander peoples regarding the precise wording of these definitions. In the limited time available for this consultation, the Law Council has not been able to seek the views of the Indigenous Legal Issues Committee on these matters, but it would be happy to do so should it assist.

[40] See. e.g., case law as far back as *Re CP* (1997) 21 Fam LR 486, where the Full Court of the Family Court of Australia recommended introducing a provision into the Family Law Act that would require judges to take account of Indigenous kinship care systems and childrearing practices: at 506 (Nicholson CJ, Ellis and Moore JJ).
[41] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3.

Question 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?

112. Constituent Bodies have raised concerns that a definition of '*member of the family*', which is inclusive of any relevant concept of Aboriginal and Torres Strait Islander family or kinship, but not specified as relevant in the particular circumstances of the case (as recommended by the ALRC[42]), could, at times, result in unintended difficulties. For instance, strangers to the litigation—who may not have anything to do with the care of the subject child—could have their health or police records subpoenaed and disclosed. It is inevitable that many people will find this invasive and will object to these records being produced or inspected. This will likely increase legal need and create additional costs and delay.

113. In addition, this broadened definition would result in an extension of the notification provisions for disclosing involvement with child protection agencies.[43] This imposes a more onerous notification requirement on Aboriginal and Torres Strait Islander families, which could effectively include all interactions between any member of the kinship group and child protection authorities. If this is not the intended purpose of the legislation, the Law Council recommends the inclusion of a provision clarifying that the notification requirement does not extend to certain persons within the kinship group who are not connected through the particular circumstances of the case.

Question 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?

114. Any changes of this nature will require a period of communication and education, particularly to ensure that legal practitioners and those working in the family law sector (including dispute resolution practitioners) understand the flow on consequences of the changes. These realities may necessitate reconsideration of the commencement dates provided in the Draft Bill.

115. Some Constituent Bodies are of the view that the commencement of these proposed amendments should be expedited, provided that increased funding of legal services is provided contemporaneously. However, the Family Law Section notes that it does not aid simplicity to have various and significantly different commencement dates applying to various parts of the Draft Bill.

[42] ALRC, Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019) 183, Recommendation 9.
[43] *Family Law Act 1975* (Cth) s 67Z.

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

116. It is envisaged that if a relevant cultural aspect of a specific Aboriginal or Torres Strait Islander community is disputed, then expert evidence will be needed. Such experts will need to be sourced and funded, although the Law Council recognises that expert evidence referred to in judgments may be able to be relied upon in another case if the facts are similar. Eventually, this will assist individual communities as judgments ruling on the concept of family in a relevant community are delivered, as the judgment must outline the expert evidence accepted in the reasons for judgment.

117. The Law Council also recognises that definitions of '*relative*' and '*member of the family*' in many culturally and linguistically diverse communities, such as Fijians, also fall outside the traditional western concepts of family. Consideration should be given to whether the broader definitions ought to also capture the needs of those communities, and if so, how this can be implemented without diminishing the importance of protecting the interests of Aboriginal and Torres Strait Islander children.

118. Further to this, if broader definitions were to be incorporated into the Family Law Act for more than one culture, the Law Council queries what would happen in practice if, for example, one parent is a Torres Strait Islander and one parent is Fijian, and their concepts of who is a '*member of the family'* or '*relative*' differed. Such circumstances would not be unusual today in Australia.

Schedule 4: Independent Children's Lawyers

119. The Law Council acknowledges the significant contributions made by ICLs to the practice of family law. The importance of the role of well-trained and properly focused ICLs cannot be overstated, as they assist the court with determining what is in a child's best interests. While the Law Council recognises the benefits of ensuring consistency of practice for ICLs engaged around Australia, it also acknowledges the necessary discretion exercised by ICLs in performing their role and the court's reliance on their diligent execution of that role.

120. The Law Council notes the *Guidelines for Independent Children's Lawyers* (**Guidelines**), prepared by National Legal Aid and endorsed by the FCFCOA, provide for best practice by ICLs and state that a child has a right to establish a professional relationship with an ICL.[44] Concurrently, it is acknowledged that the Convention states that children have a right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account.[45]

Requirement to meet with the child

121. The Draft Bill proposes to mandate that an ICL meet with a child over five years of age unless exceptional circumstances exist.[46] The Law Council notes that exceptional circumstances would include, but not be limited to, exposure to risk of physical or psychological harm or a significant adverse effect on the wellbeing of the child. The Law Council further notes that if a child does not want to meet with the ICL or express a view, the duty to meet would be discharged.

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[44] FCFCOA, Guidelines for Independent Children's Lawyers (1 September 2021) <https://www.fcfcoa.gov.au/fl/pubs/icl-guidelines>.
[45] *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.
[46] Exposure Draft, Family Law Amendment Bill 2023, sch 4 cl 2.

Question 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 ICL's role in engaging with children, while retaining ICL discretion in appropriate circumstances?

122. The Law Council notes that research has highlighted that children and young people seek to be heard in decision-making about their care and safety when they are the subject of family court proceedings.[47] Including the proposed requirement in the Family Law Act for an ICL to meet with a child and provide them with an opportunity to express any views is a step toward achieving this. Subject to the comments below, the Family Law Section supports ICLs meeting with children except in exceptional circumstances.

123. While the Law Council acknowledges that Schedule 4 of the Draft Bill may function as a safeguard to protect children, as well as acting as a quality-control measure to ensure that ICLs are discharging their roles suitably, implementing a mandatory requirement for an ICL to meet with a child may have practical and costs implications which warrant examination.

124. The Law Council wishes to emphasise, at the outset, that increased funding for legal aid organisations is essential if the proposal to introduce a mandatory requirement for ICLs to meet with the child is to be successful. For example, the Law Council is aware that funding is not always provided for meetings with children in their own communities and/or away from city offices (regional, rural and remote locations adding further resource demands). Funding is often not provided for multiple meetings with children and/or for liaising with Court Consultants, other relevant health practitioners and/or educational institutions on an ongoing basis.

125. It is therefore imperative that long-term funding (greater than 12 months) is secured for legal assistance providers, to enable these organisations to engage in budgetary planning. Within the current framework, the Law Council continues to hold concerns that the grants for funding of ICL appointments are limited and practitioners acting as ICLs are not appropriately remunerated for their expertise, time and travel. Amendments which impose additional, mandatory steps to be undertaken by ICLs must be considered with caution, in this context.

Meeting with the child

126. The Draft Bill does not provide clarity about when or how this duty ought to occur (nor can it). ICLs are appointed at different stages in matters and each will have its own unique factual matrix which warrants consideration from the ICL as to when, if at all, they ought to meet with a child and what they will discuss.

[47] See ALRC, Seen and heard: priority for children in the legal process (Report 84, November 1997) <https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/>; Australian Institute of Family Studies, Independent Children's Lawyers Study (Report, June 2014) <https://aifs.gov.au/research/commissioned-reports/independent-childrens-lawyers-study>.

127. This mandatory requirement may not be readily achievable due to funding and logistical reasons. For example, if an ICL is required to meet with the children on a number of occasions during litigation, increased funding will be required to be allocated to ICL matters to ensure compliance. Further, ICLs in regional, rural and remote areas tend to take matters across regional and circuit registries. Meeting children by remote or electronic means is possible, but it is generally preferable to conduct face-to-face meetings with the children, which could involve significant travel and expense.

128. The Law Council recognises that family law remedies are not limited to final hearings, and interim applications often require substantive decisions by the court which may, or may not, have regard to a child's views. Clarity in relation to when the mandated meeting(s) must occur would assist in the practical application of this amendment. If the Bill, as passed, does not provide this level of detail, the Law Council anticipates this provision would result in applications to the court by the parents to require ICLs to meet children at specific times or in a specific way. This may have caseload management implications for the court.

129. The Law Council recognises the discretion with which ICLs have worked under the existing framework, noting that the Guidelines currently provide that an ICL is expected to meet with the child except in certain circumstances, stating however that '*the assessment about whether to meet with the child and the nature of that meeting is a matter for the ICL*.'[48] The Law Council has received feedback reiterating the importance of allowing an ICL to maintain discretion as to whether it is appropriate to meet with a child and provide the child with an opportunity to express a view. Potential options in this regard could be to:

    - replace '*must*' with '*may*' in proposed subsection 68LA(5A); or
    - amend paragraph 68LA(5A(a) to read: '*meet with the child on at least one occasion in a child appropriate location*'.

Where the child does not want to meet

130. The Law Council notes that proposed paragraph 65LA(5B)(b) provides that an ICL is not required to perform a duty where the child does not want to meet with them or express their views (as the case requires). As drafted, this provision is unclear on how a desire on the part of a child not to meet with an ICL or express their views should, or would, need to be communicated.

131. In practice, it is unclear whether it is to be the parent who informs the ICL that a child does not want to meet with them, or whether it is assumed where the ICL sets up a meeting that the child then refuses to attend.

132. While the potential exists for parents to attempt to influence a child to not meet with an ICL, concerns would particularly arise if the parent of the child is required to inform the ICL that the child does not want to meet. For instance, this may encourage a parent, whose interests would not be served by their child meeting with an ICL, to communicate to the ICL that their child does not wish to meet or express their views.

[48] FCFCOA, Guidelines for Independent Children's Lawyers (1 September 2021) <https://www.fcfcoa.gov.au/fl/pubs/icl-guidelines> [6.2].

Determination not to meet with the child and 'exceptional circumstances'

133. Proposed paragraph 68LA(5B)(c) provides that an ICL is not required to perform a duty where there are exceptional circumstances that justify not performing the duty, including, pursuant to proposed subsection (5C), that performing the duty would:

    - expose the child to the risk of physical or psychological harm; or
    - have a significant adverse effect on the wellbeing of the child.

134. The Family Law Section, in addition to some Constituent Bodies, have expressed the view that the phrase '*exceptional circumstances*' is not appropriate in this context and is too high of a threshold, as what the ICL may consider 'exceptional' may differ from the view of a parent or the court. Further, the exceptions contemplated as 'exceptional', though expressed as not limited, appear to focus upon protecting the child from harm. An exceptional event is, by natural definition, one not usually or ordinarily occurring. How the reality of resource limitations will be managed in this context remains unclear. Those resource limitations include providing a means for ICLs to meet children who are based in remote locations and where alternate (technology based) means of communication are equally not readily available.

135. Further, pursuant to proposed paragraph 68LA(5C)(a), the assessment of the possible risk of psychological harm to the child is left with the ICL themselves, and not a psychologist or mental health professional. Constituent Bodies have raised concerns that these provisions require a lawyer to assess psychological harm without any supporting evidence particular to the question of meeting an ICL. This could cause issues of interpretation and expose the ICL to complaints and contravention applications if a parent does not agree with the ICL's assessment of the risk of psychological harm.

136. In addition, an ICL is not able to control how a parent may react to information provided by a child to an ICL, or to any recommendations made by the ICL. The Law Council therefore acknowledges that, in reality, the risk of physical or psychological harm to the child as a result of them meeting with the ICL is always present.

137. The Law Council notes that these proposed amendments require the court to make a separate determination pursuant to proposed subsection 68LA(5D), should an ICL elect not to meet with a child. This creates another court event and additional costs for the parties. The court must determine whether exceptional circumstances exist that justify the ICL not meeting with the child, and this raises questions as to:

    - when that determination is made (prior to a substantive hearing or during the hearing);
    - what evidence the court will rely on when making that determination, and by extension, whether the ICL will then become a witness in the proceedings; and
    - whether this determination is reviewable.

    As raised above, the Law Council queries whether 'exceptional circumstances' is an appropriate test to use in these circumstances. This proposal could have the opposite effect of ICLs erring on the side of caution in consideration of the exceptional circumstances and declining to meet with a child where they consider there is a risk of physical or psychological harm. This is also likely to lead to either additional court events or the extension of existing court events, creating delay and cost.

138. There may also be occasions where an ICL is unable to make submissions to the court about the exceptional circumstances, if for example, there is a concern that meeting with the child will expose them to physical and/or psychological harm and the ICL is unable, at that juncture, to explain why in the presence of the parties (e.g., an open child protection or police investigation regarding a party to the proceeding). The Law Council queries whether the ICL's submissions would be sufficient in such circumstances, or whether expert evidence will be needed, which would require further legal aid funding and another person meeting with the child.

139. The review of discretionary decisions by ICLs and the potential for litigation specifically about their decisions would place an added burden on the ICL to justify their decisions to the court as part of its mandatory determination and would likely result in a significant deterrence in recruiting and retaining ICLs. An ICL is a crucial part of many parenting matters and it is already difficult to recruit solicitors to undertake this work.

140. Another practical consideration arises from the fact that matters may be vacated or adjourned on the basis of the conduct of the ICL. For example, a matter may be listed for final hearing where the ICL has determined not to meet with the child. If the court does not accept that determination at the commencement of the final trial, the trial may be vacated at considerable expense to families, exacerbating delays and uncertainty. Accordingly, the Law Council would be concerned about any provision which had the potential to expand, rather than reduce, the need for litigation and court appearances.

141. The Law Council acknowledges that matters involving children are not static and considerations regarding the best interests of the child can change throughout a case. It may be that, at first instance, the ICL determined that a meeting with the child was appropriate or inappropriate, however, as circumstances of the case change, this may no longer be so. In the Law Council's view, it would not be appropriate for a court to rule on the issue of a meeting at one time during a litigated dispute and apply that ruling throughout, without regard to changing circumstances.

142. The Family Law Section suggests that consideration be given to removing proposed subsection 68LA(5D) altogether. If a party has a concern that the ICL has failed to discharge their obligation, they may be raised with the court to address on a case-by-case basis. The significant amendments in Schedule 1 of the Draft Bill, including the proposed insertion into section 60B to give effect to the Convention, could assist parties to make submissions to the court in this respect.

The child's engagement with other professionals

143. The Law Council considers that, by proposing to require ICLs to meet with a child, the Draft Bill fails to acknowledge the other ways in which children are engaged during the process of litigation, for example, in meeting with a Court Child Expert, family report writers and psychologists undertaking child assessments.

144. In these circumstances, the child meets with trained psychologists or counsellors who are more adequately equipped to employ trauma-informed practice and assess whether children are genuine in their wishes or have been coached, noting that this is generally not within the expertise of legal practitioners. These professionals are also likely better equipped than ICLs to identify and manage the risk of vicarious trauma they may develop through the performance of such duties.

145. Further, in these cases, the child is exposed to multiple strangers and potentially expected to relay specific or highly intimate or personal information to these professionals, known as 'over-interviewing'. ICLs are conscious of this potential for systems abuse and are cautious of contributing to this and further traumatising a child. Again, it ought to be queried whether 'exceptional circumstances' is too high of a threshold in these matters. Should an ICL consider it not appropriate to meet with a child due to the number of professionals a child has already been exposed to, such a circumstance is not uncommon, and therefore not 'exceptional'. As drafted, it would be difficult to successfully argue for the proposition that the ICL should not necessarily meet the child in such circumstances.

146. The Law Council suggests that greater focus be placed on facilitating interactions between children and an appropriately trained professional (e.g., psychologist or counsellor) to limit the harm which may be subjected to a child who is the subject of family law proceedings. There may also be benefit in the Draft Bill acknowledging the role of other practitioners in engaging children and obtaining their views in order to avoid circumstances where a child becomes repeatedly engaged unnecessarily in their parents' litigation.

Training and resourcing requirements

147. If Schedule 4 of the Draft Bill is passed, the Law Council encourages comprehensive training to be implemented for ICLs which can underpin practitioners' participation in the process. Such training should include how to assess the potential risk to a child if the ICL were to meet the child in person, and how to best understand the child's interests and needs.

148. The Law Council acknowledges that the effectiveness of the proposed arrangements will rely on the capacity of available ICLs to provide services in compliance with their duties. The Law Council anticipates these amendments could result in the work required of ICLs increasing, which, in turn, will have resourcing implications for legal aid commissions.

149. Accordingly, the Law Council reiterates that additional funding for state and territory legal aid commissions to support and enhance the important role of ICLs should accompany the proposed changes.

Question 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?

150. The Draft Bill also does not make clear whether the emphasis is on obtaining the views of a child, or on the process for children of an appropriate age to engage with court proceedings. If it is intended that the emphasis be on obtaining the views of the child, this needs to be considered in the context of the legislative framework governing how a court is to determine what is in a child's best interests, and how the views of the child fit within that framework. The Law Council notes that children's engagement with the court process is not limited to an expression of views, but also extends to the opportunity to participate and understand aspects of the process, independent of any view expressed or not.

151. The Law Council also acknowledges that the intent of these amendments, as described in the Consultation Paper, is not to unnecessarily prolong proceedings or introduce additional court events. However, this may occur in reality. Existing subsections 68L(5) and (6) of the Family Law Act (which the Draft Bill proposes to repeal) enable the court to make facilitative orders to assist an ICL to meet with a child in the face of, for example, parental opposition, assisting children to exercise their rights to participate. Schedule 4 of the Draft Bill appears to be directed to a different purpose, namely setting out requirements for an ICL to meet with a child and their duties. Some Constituent Bodies have expressed the view that the removal of the existing subsections is unnecessary, will not result in improved processes and may result in more applications and increased costs.

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

152. The Law Council notes that proposed subsection 68LA(5C) is expressed to be non-exhaustive. The Family Law Section does not consider any other exceptional circumstances should be listed. One hurdle may be that ICLs are unable to meet the child in person due to funding or practical constraints such as distance. However, they should be able to weigh the risk of harm to the child of meeting versus not meeting with them and utilise their discretion under the proposed provision. It is unlikely that resource limitations would be considered 'exceptional' given the well-known realities of inadequate legal aid funding.

153. However, the Law Council has received feedback from Constituent Bodies that an exception should be available where it is not practicable or in the child's best interests to meet with an ICL, such as where:

- there is geographical remoteness (as provided in the Guidelines);
- it is not appropriate to meet with a child, for example, if the child was above five years old but has a significant disability that their participation is impossible (clear guidelines for assessing capacity would be required);
- there is a risk of systems abuse for the child;
- the child has previously been assessed by health professionals and it may be unnecessary for the child to meet with the ICL in all the circumstances of the case; and
- the relevant child is subject to an ongoing police investigation (e.g., sexual abuse, assault or criminal neglect). The ICL meeting with the children has the potential to affect the evidence-gathering process and the ICL could later be placed in the position of being a witness, which would compromise their capacity to continue in the role.

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

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

154. The Law Council supports the proposed repeal of subsection 65L(3) in relation to the use of ICLs in cases brought under the 1980 Hague Convention. It emphasises the importance of children having an opportunity to express their independent voice in such matters, particularly given that many of these proceedings involve allegations of family violence and other issues which pose a risk to children.

155. Based on feedback received from its Constituent Bodies, the Law Council recognises the potential for unintended consequences arising from this proposed amendment as follows:

- When an ICL is appointed in parenting matters, there is often a delay between the order being made for the ICL, and the ICL actually becoming involved and getting 'up to speed' with the matter. If there is a similar delay when an ICL is appointed in Hague Convention proceedings, then that could be adverse to the overarching aim of having the child expeditiously returned to the parent or country they have been removed from as possible.
- Assuming that the criteria of *Re: K* (1994)[49] will still need to apply when deciding whether to appoint an ICL, if a case does not satisfy the criteria, it may result in an ICL not being appointed. If may be, therefore, that the repeal of subsection 68L(3) results in some cases not having an ICL appointed that would have ordinarily been appointed under the 'exceptional circumstances' provision in existing subsection 65L(3).
- Section 117AAA limits the making of a costs order in a Hague Convention matter to a party who has been substantially successful. This would appear to prevent a costs order being made in favour of an ICL in such matters. Consideration could be given to creating an exception in the case of ICLs.

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

156. The Law Council considers that the appointment of an ICL in Hague Convention matters may occur more frequently if subsection 68L(3) is repealed. If that is the case, that may result in the parties' legal fees being reduced as a result of the ICL assisting with negotiations and narrowing issues for determination, as well as attending to more of the 'leg work' in providing the necessary evidence to the court (e.g., in the form of subpoenas and reports). ICLs are also of particular value if a party is self-represented.

157. The Law Council notes that ultimately, each practitioner's capacity to accept further ICL appointments is a highly individual matter. Removing the requirement that appointments only be made in exceptional circumstances in Hague Convention matters will likely not significantly impact the workload of ICLs, as practitioners will either have the capacity to accept the appointment or not.

158. However, any increase in the number of ICLs being appointed in Hague Convention matters will result in more grants of legal aid for ICLs. This will have resourcing implications for legal aid commissions and the Law Council reiterates its view that increased funding will be required to manage this demand.

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

159. No.

[49] FLC 92-461.

Schedule 5: Case management and procedure

Harmful proceedings orders

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

160. While the Family Law Section agrees with this question, the Law Council has received competing views from its Constituent Bodies, indicating that it is another aspect of the Draft Bill where reasonable minds across the legal profession differ.

161. The Law Council notes at the outset that the proposed harmful proceedings orders in Part 1 of Schedule 5 of the Draft Bill do not restrict the person subject to the order from accessing the court. It is simply proposed that the other party, or parties, to the proceeding need not be involved in litigation until leave is granted. Nevertheless, any order which reduces a person's legal rights or access to justice should not be made lightly.

162. Some Constituent Bodies are of the view that the introduction of harmful proceedings orders is likely to adequately address concerns about harm to parties that is occasioned by repeated and vexatious litigation in the family law system, as highlighted by *Marsden & Winch*[50] and the ALRC.[51] They submit that the existing vexatious proceedings powers (which focus on the intent of the applicant) do not provide adequate protection against the other party in these circumstances, and the proposed harmful proceedings orders will ensure that the modification and exception to a fundamental common law right (or privilege) to commence proceedings is clearly and explicitly provided in statute.

163. Other Constituent Bodies have noted that since the implementation of the FCFCOA's new case management pathway in September 2021, the pre-trial work of the court has almost exclusively become that of Judicial Registrars and Senior Judicial Registrars. Given this, they anticipate that a decision to deny leave will result in either a 'review' (which litigants can obtain by right with respect to a decision of a Judicial Registrar or Senior Judicial Registrar) or appeal. The subjective nature of a finding of '*harm*' is likely to result in more resources being allocated to potentially unmeritorious matters which might otherwise be resolved with the participation of the other party, either by agreement or by efficient summary dismissal with costs.

164. The Law Council also notes that under proposed subsection 102QAC(1), it appears the power to make harmful proceedings orders would be limited to prohibiting the filing of fresh proceedings. It would not encapsulate different types of applications, such as further interlocutory applications within existing proceedings. The Law Council suggests extending the power to make harmful proceedings orders to particular types of proceedings, or applications within proceedings. This would also better reflect the ALRC's recommendation that:

> *the Family Law Act be amended to provide the family courts with a further power to make an order requiring a litigant to seek the leave of the court prior to making further applications and serving them on the*

[50] (2009) 42 Fam LR 1; [2009] FamCAFC 152; [2012] FamCA 557; (2013) 50 Fam LR 348; [2013] FamCAFC 177.
[51] ALRC, Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019) 308-310.

other party, or to make any other order restraining the conduct of a litigant as the court sees fit.[52]

165. On balance, the Law Council is of the view that the introduction of harmful proceedings orders address the need highlighted by *Marsden & Winch* and by the ALRC.

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

166. The Law Council notes that proposed harmful proceedings orders would not prevent access to the courts, but would serve as an effective gatekeeping mechanism, preventing frivolous or harassing applications and reducing the burden on the court system and negative impacts on litigants.

167. However, any application under proposed section 102QAE would be made *ex parte* and without the other party being afforded procedural fairness in having the opportunity to respond to any application for leave to initiate proceedings. Further, there is no provision allowing quick access to justice in circumstances of an application for an airport Watch List Order or recovery order. Requiring a party who has a legitimate fear of their child being relocated outside the jurisdiction, or whom is being withheld, the need to seek leave before their application is properly instituted may well deprive that party of the relief sought.

168. On balance, the Law Council considers that the proposed harmful proceeding orders, as drafted, appropriately balance procedural fairness considerations. However, the Law Council remains concerned that a respondent may be placed at greater risk if these proceedings were to occur without notice to or with the knowledge of the respondent/the vulnerable party.

169. Risk considerations may be accentuated if a party, making further applications to the court, is rebuffed in that process. A vulnerable respondent, without knowledge of these processes and outcomes, will be denied the opportunity to make additional safety/risk assessment considerations. the respondent/vulnerable party may be at greater risk at that time and may have no knowledge of those factors impacting their risk.

170. The Law Council also acknowledges that in circumstances where the applicant is already subject to a harmful proceedings order, to notify the other party without the court making a determination as to whether the proposed new proceedings are not frivolous, vexatious or an abuse of process, may be contrary to the intention of the provisions.

171. Measures to address process abuse in family law matters must balance the rights, and needs, of people to be able to access the court system, against abuse of other litigants and the system itself by misuse.[53] Accordingly, to better balance potential harm against the need for procedural fairness, the Law Council makes the following suggestions, as put forward by its Constituent Bodies:

- Proposed section 102QAG could include a judicial discretion to direct that the other party be served with the application or affidavit before granting leave.

[52] Ibid 309 [10.44].
[53] Law Council of Australia, Review of the Family Law System – Issues Paper 48 (Submission, 7 May 2018) < https://www.lawcouncil.asn.au/publicassets/674e2f97-7b6f-e811-93fb-005056be13b5/3440%20-%20 Review%20of%20the%20Family%20Law%20System%20%E2%80%93%20Issues%20Paper%2048.pdf> 70.

Having regard to the period of time that has passed since the making of the harmful proceedings order, and to the application or affidavit for leave that has been filed, the court may view it appropriate to provide the other party an opportunity to respond to the application before leave is granted. Providing such an opportunity may help to reduce the incidence of review or appeal of harmful proceedings orders.

- It is foreseeable that when seeking leave, the litigant could omit or misrepresent relevant facts which are detrimental to their case. Consideration could therefore be given to including a specific provision which provides that if leave is granted, and the court later finds the application was misleading, that the court can consider making a costs order.
- It could be useful to include sunset clauses in the harmful proceedings order, whereby the order will operate for a set period, outside of which leave is no longer required to commence proceedings.
- Consideration should be given to making legal assistance available to parties who are facing an application for a harmful proceedings order against them, should resourcing permit. This is relevant because research shows that a lack of knowledge and experience of legal concepts and processes may be a contributing factor where a self-represented person frequently engages with the legal system.[54]

Question 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?

172. The Law Council considers the tests in proposed section 102QAC are broadly appropriate, but makes the following comments based on feedback from the Family Law Section and its Constituent Bodies:

    - Most family law litigants experience some level of psychological or mental distress during proceedings. It is the nature of the jurisdiction that each litigant legitimately endures harm. Moreover, an application may be reasonable and meritorious and yet still give rise to mental distress on the part of the other party.
    - As drafted, the level of harm required to engage the operative sections is unclear. While the proposed paragraphs 102QAC(2)(b) and (c) appear to suggest that the harm must have a significant impact, paragraph (a) ('*psychological harm or oppression*') has broad application and is highly likely to be interpreted widely. To address this, the word '*unacceptable*' could be placed in front of the word '*harm*', which would denote that harm in and of itself is insufficient, and it must be significant enough to be an unacceptable consequence of curtailing a litigant's access to justice.
    - The Law Council queries how the court will determine what is '*psychological harm or oppression*', '*major mental distress*' or something that will have '*a detrimental effect on the other party's capacity to care for a child*'. Proposed subsection 102QAC(3) may provide scope for the consideration of expert evidence, such as a mental health report, in determining whether harm may occur. Nonetheless, it appears that these provisions are highly discretionary and there is currently ambiguity as to the procedure for such a report,

[54] See John Dewar et al., Litigants in Person in the Family Court of Australia: A report to the Family Court of Australia (Research Report No. 20, 2000) <https://pdfroom.com/books/litigants-in-person-in-the-family-court-of-australia/E1d4D0LZdOb/download>

including whether it is to be from the other party's treating mental health practitioner (if they have one) or from a jointly engaged court expert.

- The Law Council queries if it will be necessary, in contemplation of the *possibility* of such applications being made (including on the court's own motion), for a practice to develop where court child consultants and private experts, in preparing family reports, will be asked to consider the possible impact of future proceedings upon a party. Otherwise, it ought to be asked what contemporary evidence will be available to allow a finding as to risk of harm as contemplated in these provisions.

Question 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?

173. The Law Council acknowledges that litigation can be used as a weapon, and repeated court applications may be used in a way to intimidate or threaten another, or as a form of family violence. Although, it notes that if a litigant can be deemed 'vexatious', they will already be caught by existing Part XIB of the Family Law Act.

174. As drafted, the proposed provisions would empower the court to make harmful proceedings orders on a summary basis based on evidence obtained at a hearing of the applicant and a review of the history of relevant proceedings. However, it appears the court would also have a discretion to require further evidence from the vulnerable party to assist in its determination of anticipated harm under proposed section 102QAC.

175. In exercising this discretion, the court will also need to consider the likely burden on the vulnerable party of producing such evidence, in comparison to the likely adverse impact of the proposed new proceedings on the vulnerable party or on children in their care. The court will also need to consider the overarching purpose of family law proceedings to ensure proceedings are conducted in a proportionate and cost-effective manner.

176. The Law Council cautions that any proof of harm that is produced by a vulnerable party may later damage their own case that it is in the best interests of the child to live with them. Further, where a mental health report is required, depending on the process for such a report to be obtained and the involvement that the alleged perpetrator has in that process, then that could potentially have an adverse consequence.

177. Additionally, the Law Council recognises that safety concerns may arise where a victim-survivor of family violence is not made aware that an application for leave is brought and not granted. The Law Council recommends the inclusion of an 'opt in' process whereby a victim-survivor can elect to be notified of an application for leave, or the outcome of the application, in certain circumstances.

178. In the Law Council's view, given the considerations raised above, the operation of the provisions should be closely monitored to determine how these considerations are applied and whether the legislative intent of the amendments is delivered.

Overarching purpose of the family law practice and procedure provisions

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

179. While some Constituent Bodies submit that it is proper for the overarching purpose provisions to be contained in the Family Law Act and thus apply to any court exercising jurisdiction under the Family Law Act, others have questioned whether there is utility in this, where it is already provided for in the *Federal Circuit and Family Court of Australia Act 2021* (Cth) and the *Family Law Rules 2004* (Cth) (**Rules**). It will be important to ensure consistency within each instrument in this respect.

180. The Family Law Section notes that the wording of proposed section 95 does not address the concept of minimising acrimony but instead makes reference to safety. While the reference to safety is considered to be a useful addition, the wording of the proposed overarching purpose should be expanded to address explicitly the concept of minimising acrimony. The Family Law Section does not accept the suggestion in the Consultation Paper that including a reference to minimising acrimony would likely unintentionally discourage parties from raising issues of family violence or other safety concerns in proceedings.[55] In any event, any such possibility could be ameliorated by appropriate drafting.

181. Constituent Bodies also raised the following comments in relation to proposed section 95:

- The purpose of resolving disputes as quickly, inexpensively and efficiently as possible (paragraph 95(1)(b)) could be furthered by limiting the number of compulsory forms that must be filed in a matter.
- '*Ensures the safety of families and children*' in paragraph 95(1)(c) is a high bar and ignores the fact that not all unsafe acts can be predicted. The word '*ensures*' ought to be replaced with '*prioritises*' or '*promotes*'.
- The objective in proposed paragraph 95(2)(e), which relates to proportionate costs, is difficult to apply directly to child-related matters given the high importance and complexity of parenting matters that come before the court.

182. In respect of proposed section 96, the Law Council makes the following observations:

- Proposed subsection 96(3), relating to an estimate of costs, will present difficulties in parenting matters, given that duration and costs of proceedings are inherently related to the attitude of the other party and therefore outside the knowledge and control of the first party's lawyer.
- Proposed subsections 96(4) and (6) require the court, in the exercise of its discretion to make costs orders, to consider *any* failure to comply with the duty to comply with proposed section 96, rather than conferring a broad discretion on the matter. This may give rise to disputes as to what level of cooperation is required to comply with the overarching purpose and distract from the core issues of the dispute.
- The words '*must take into account any failure to comply with*' in subsection 96(4) could be replaced with words to the effect of '*shall have regard to*' in order to confer an appropriately broad discretion in determining such issues. The Law Council notes this is consistent with the current

[55] Attorney-General's Department, Exposure Draft – Family Law Amendment Bill 2023 (Consultation Paper, January 2023) 34.

principle relating to determining costs that no one factor, as contained in subsection 117(2A), ought to prevail over another when the court considers whether to order a party to pay the costs of another.[56]

Schedule 6: Protecting sensitive information

Express power to exclude evidence of protected confidences

183. Proposed section 99 would render inadmissible evidence of a protected confidence, or the contents of a document or information relating to a protected confidence, unless the court grants leave.[57] A '*protected confidence*' is defined as a communication made by one person to another in the course of a relationship, in which one of the persons is acting in a professional capacity to provide a health service to the other, and in circumstances in which the professional is under an obligation not to disclose communications made to them by the protected confider.

Question 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?

184. The Law Council acknowledges that these proposed changes could help address concerns around the efficacy of existing safeguards and exemptions which are intended to ensure that subpoenas for health information are not misused in family proceedings, particularly in circumstances involving allegations of family violence.

185. However, the Law Council considers that ensuring the court has access to all available information which is relevant to the child's best interests outweighs the interests of individuals in keeping information confidential. It is also difficult to accept that proposed section 99 would have any practical effect in enhancing the already significant powers the court already has in this regard.

186. The Law Council previously submitted to the ALRC that provisions for the exclusion of evidence of protected confidences are unnecessary, as the existing legislative regime, though underutilised, provides a sufficient and proper balance between protecting and appropriately using this kind of material.[58] In this regard, the court already has significant discretionary powers which can be used to protect confidential documents or information, including discretion in relation to:

- subpoenas;
- compelling the production of material;
- when to allow access to material; and
- whether to admit records into evidence.

[56] See *Medlon & Medlon (No 6) (Indemnity Costs)* (2015) FLC 93-664, where Strickland J held that it is a matter of weight that is accorded to each of the relevant factors in the trial judge's discretion. See also *Fitzgerald (as child representative for A (Legal Aid Commission of Tasmania)) v Fish* (2005) per Kay, Warnick and Boland JJ at 130: there is 'nothing to prevent any factor being the sole foundation for an order for costs' being made.
[57] Exposure Draft, Family Law Amendment Bill 2023, sch 6 cl 2.
[58] Law Council of Australia, Review of the Family Law System: Discussion Paper (Submission, 16 November 2018) <https://www.lawcouncil.asn.au/publicassets/9e580811-b601-e911-93fc-005056be13b5/3549%20-%20Review%20of%20the%20Family%20Law%20System%20Discussion%20Paper.pdf> 57-58.

187. The Law Council considers it preferable to continue to rely on the court's existing power to exclude evidence than to introduce the proposed provisions. If the current difficulty is that self-represented litigants do not know about the existing wide-ranging capacity to object to the admissibility of evidence, then a resource (such as a fact sheet) could be provided to them as part of the pre-action procedures. If the intent is to avoid the mental anguish a litigant may feel if evidence of protected confidence is adduced, then the focus needs to be on the original order to inspect the document which has been produced on subpoena.

188. The Law Council maintains the view that material which would assist the court to make an order in the best interests of the child ought to be available to the court. The contents of these kinds of records from medical practitioners, psychologists and counsellors—and what is omitted from them—can be of high relevance to the court in making decisions that are in the child's best interests. This is an important consideration, particularly in relation to cases of alleged risk and may limit parties' ability to properly test allegations made in the course of proceedings.

189. The inclusion of section 99 by Schedule 6 would see the law of evidence, when applied in family law proceedings, diverge from that applied in in other federal proceedings. Further, relevant statutory provisions then would be found in two separate Acts. Should public policy considerations favour the amendment to the law of evidence consistent with a provision such as the proposed section 99, such amendment should be made to the Evidence Act rather than to the Family Law Act. This would be consistent with the provisions on which the proposed section 99 is modelled.[59]

190. Further, and in any event, it is noted that proposed section 99 as relates only to the *admissibility* of the evidence, not its production and inspection. Thus, it would likely not prevent confidential information being required to be produced by way of subpoena and/or discovery. By way of example, a similarly drafted provision in the *Police Act 1990* (NSW) was held not to be a complete privilege against production and inspection. As currently drafted, it is unlikely that section 99 would achieve the policy objective of ensuring that confidential material would be kept private from former spouses or parents.

191. For these reasons, the inclusion of proposed section 99 by Schedule 6 is opposed. If, those views notwithstanding, the amendment via Schedule 6 proceeds, the Law Council notes that the introduction of the presumption will mean that—absent consent to admission into evidence—additional interlocutory rulings will be necessitated in each and every instance as a matter of course. That will presumably have an impact on the workload of judicial officers and registrars and the costs of litigants. The Family Law Section anticipates that impact will be significant. Consideration will also need to be given to appropriate court rules and practice directions to manage the process of these types of determinations.

192. Given these practical concerns, should these proposed provisions be enacted, the Law Council looks forward to commenting on draft Rules in due course, noting the risk that the process may increase costs and delays.

[59] Attorney-General's Department, Exposure Draft – Family Law Amendment Bill 2023 (Consultation Paper, January 2023) 35.

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

193. The Law Council repeats the matters set out above. If, those views notwithstanding, the amendment via Schedule 6 proceeds, it considers that the proposed definition is appropriate and adequately captures recommendation 37 of the ALRC Report.[60]

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

194. The Law Council reiterates the matters set out above. The Evidence Act already provides the pathway by which the court determines the admissibility of evidence, and the inclusion of a specific test on this issue is a departure from that being otherwise applied by the courts in the context of family law matters.

195. Some Constituent Bodies have noted that the wording for the test in proposed subsections 99(5) to (7) echoes the language in section 126B ('Exclusion of evidence of protected confidences') of the *Evidence Act 2011* (ACT), *Evidence Act 1995* (NSW) and *Evidence Act 2001* (Tas) (**Evidence Acts**), however:

- section 126B of the Evidence Acts fulfil a different purpose, operating particularly in criminal trials, where a defence lawyer may seek to adduce evidence of a complainant's counselling records when those records do not assist in determining the issue at hand (e.g., whether a sexual assault took place). In proceedings such as a criminal trial, the public interest in the confidentiality of records is relevant;
- in family law proceedings, the overriding consideration should be whether the evidence assists the court in determining what is in the best interests of the children. The Law Council suggests reframing the test with that emphasis;
- the list of matters which a court '*must*' have regard to under proposed subsection 99(7) appears in some respects similar to those which the court '*may*' have regard to under subsection 126B(4) of the Evidence Acts. The Law Council therefore queries whether the matters listed in proposed subsection 99(7) are intended to be exclusive; and
- subsection 126B(5) of the Evidence Acts require the court to provide reasons for giving or refusing to direct that evidence not be adduced in a proceeding. The Law Council suggests consideration be given to including a similar provision in the Draft Bill.

196. If the amendment via Schedule 6 proceeds, the Law Council notes that proposed subsection 99(5) would require the court to determine, in deciding whether to grant leave, whether the public interest in admitting the evidence outweighs the public interest in preventing harm to:

- the protected confider, or a person about whom or on whose behalf the protected confidence was made; or
- the relationship in the course of which the protected confidence was made or relationships of that kind generally.

[60] ALRC, Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019) 335, Recommendation 37.

197. This appears to be a broader test than what is contained in section 126B of the Evidence Acts, and one that was not recommended in the ALRC Report in relation to Recommendation 37.[61] While the Law Council considers that the reference to the public interest reflects the general intent that there is a public interest in ensuring that parties receive therapeutic assistance as required (which is encouraged by the preservation of confidentiality), this could detract from the relevance of the material to the proceedings. Consequently, the Law Council considers that the test could be simplified.

198. Proposed paragraph 99(7)(g) also requires the court to have regard to the public interest in preserving the confidentiality of protected confidences when making a decision. It is not clear by what means, evidence or assumption that the court is directed to take 'public interest' into account.

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

199. While the Law Council reiterates its opposition to proposed section 99, if these amendments proceed, it would be appropriate for a person to be able to consent to the admission of evidence of a protected confidence relating to their own treatment, noting:

- it should be made clear that no adverse inference can be made where a protected confider does not consent to evidence being admitted; and
- it appears that providing a person with the ability to consent would not also address the need for an ICL to provide the best evidence to the court. Where a person does not consent, the ICL may need to make an application to the court to adduce the evidence. This could be avoided if proposed section 99 made provision for an ICL to consent where appropriate.

Schedule 7: Communication of details of family law proceedings

Clarifying restrictions around public communication of family law proceedings

200. The legislative provisions restricting the public communication of family law proceedings are crucial to maintaining the privacy of parties to such proceedings, which often involve highly sensitive and personal matters. However, the Law Council recognises that section 121 of the Family Law Act has been overlooked at times by litigants due to its complexity, numerous exceptions and difficulty to locate in the 'Miscellaneous' part of the Family Law Act.

201. Proposed Part XIVB in the Draft Bill redrafts existing section 121, intended to modernise and address misconceptions about its operation rather than to alter the underlying policy of the provision. The Law Council largely supports the redraft, recognising that these changes aid understanding and reflect the progression of technological and broadcast mediums to communicate and share information, which include the use of the internet and social media, which can often be an issue in family law matters.

202. The Law Council makes the following initial comments about the proposed redraft:

[61] ALRC, Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019) 335, Recommendation 37.

- Sections 114Q to 114T arguably reproduce the problems which afflict existing section 121. The most serious issue, which should be addressed as a priority, is that these sections shut the gate well after the 'horse has bolted'. There is no overt power to grant an injunction to stop an offending publication or to take down material published in breach of the section.
- Paragraph 114R(1)(d), which provides that a communication for the purpose of Part XIVB includes '*broadcast or publication or other communication by means of the internet*', is unduly restrictive and could potentially be replaced with '*by means of the internet or any other electronic dissemination service'*.
- The words '*court etc.*' should be removed from the heading at proposed section 114R. Throughout proposed Part XIVB, reference is generally only made to a '*list of proceedings*' and not to a 'list of court etc. proceedings' as in this heading. The inclusion of '*court etc.*' in the heading is unnecessary, and it could potentially obfuscate the meaning of this provision.

203. The Law Council also recommends expanding the scope of proposed Part XIVB to include arbitrations. This could be done by amending the definition of *'proceedings*' in proposed section 114P to read:

    *'**proceedings** includes:*

    (a) part of proceedings;

    (b) an arbitration; and

    (c) part of an arbitration.'

    If this recommendation were accepted, then arbitration should be added to the list of proceedings in proposed paragraph 114S(2)(b).

Appropriateness of offence type and requirement for consent of the Director of Public Prosecutions

204. With a maximum penalty of imprisonment for one year pursuant to proposed sections 114Q and 114R, the Law Council queries whether such breaches ought to constitute indictable offences to be tried before a jury as proposed, or whether it would be more appropriate to have the offences dealt with summarily in a lower court, to allow for quicker and more resource-effective resolutions.

205. The Law Council notes that under the *Crimes Act 1914* (Cth), offences only punishable by imprisonment for a period exceeding 12 months are indictable offences,[62] while an offence punishable by 12 months or less, or by a fine only, is a summary offence.[63] Proposed sections 114Q and 114R unjustifiably depart from this well-established distinction by seeking to create indictable offences with a maximum penalty of 12 months' imprisonment.[64]

[62] *Crimes Act 1914* (Cth) s 4G.
[63] Ibid s 4H.
[64] See Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011) 43 [3.2.2].

206. Additionally, proposed section 114T requires the consent in writing of the Director of Public Prosecutions (**DPP**) to the commencement of proceedings for an offence, but is silent on who can commence such proceedings or who can apply for consent. Unless specific power is given to an affected person, the Australian Federal Police will be the effective prosecutors and they will not investigate if they may not obtain the DPP's consent.

207. The Law Council observes that section 114T reverses the usual criminal law practice of the police investigating, collecting evidence, and charging the offence and the DPP deciding whether to proceed with the prosecution. The proposed approach unjustifiably constrains the right to private prosecution in such circumstances. In the absence of a clear public policy rationale as to why this should be the case, the Law Council considers that commencement of proceedings should be able to proceed without the authority of the DPP.

Availability of supporting materials

208. The Law Council notes that parties are currently informed in plain language of the restrictions around communication of family law proceedings in a Notation which appears as a pro forma at the end of all FCFCOA orders as follows:

> *Section 121 of the Family Law Act 1975 (Cth) provides that it is an offence punishable by imprisonment for up to one year to publish or disseminate to the public or a section of the public any account of family law proceedings which identifies the parties, witnesses or other people concerned with the proceedings, unless specifically authorised by the court.*

Some Constituent Bodies have remarked that the existing wording in the above Notation is easier to understand than both the current section 121 and the proposed redraft.

209. If Schedule 7 of the Draft Bill successfully passes into law, materials should be made available to litigants as to:

- the restrictions that Part XIVB imposes;
- what the punishment is;
- how to report breaches of proposed section 114R; and
- to whom they may report this breach.

210. The Law Council also recommends that a brochure be prepared and be made available on the FCFCOA's website which details this information in a simple, concise and readable manner, to ensure that all parties are aware of their obligations in relation to public communications about their proceedings.

Question 36: Is Part XIVB easier to understand than the current section 121?

211. The Law Council considers that proposed Part XIVB is easier to understand as it separates the 11 subsections of existing section 121 into five sections, each with a clear purpose. This can ensure that parties have an enhanced awareness and understanding of these provisions and accompanying offences. Examples of specific improvements include:

- The definition of '*communicate*' at proposed subsection 114P(1) exemplifies the breadth of communications the provision covers and specifically mentions the internet and social media services.
- Proposed subsection 114Q(3) now clearly achieves the true purpose of existing subsection 121(3) as it encapsulates any material that is sufficient to identify the person and provides examples of such material.
- While the phrase '*communication to the public*' has not been defined in proposed section 114S, the instances of what does *not* constitute communication to the public has. This will create greater certainty and understanding with respect to what communications to the public are permissible.
- The inclusion of proposed paragraph 114S(2)(a) as the first exception to the operation of proposed section 114Q (indictable offence) ensures that litigants can feel at ease when privately communicating about the proceedings and seeking the support of family or friends.

Question 37: Are there elements of Part XIVB that could be further clarified? How would you clarify them?

212. Whilst proposed Part XIVB particularises additional definitions than currently provided in section 121, it is noted that the term '*account'* (which is frequently used throughout Part XIVB) has not been defined, although pleadings, transcripts of evidence or other documents appear to be referred to within the category of account in proposed subsection 114S(2).

213. For the purposes of the legislation, the word '*account*' seems to encompass both a description of the proceedings and documents relating to the proceedings, which may not be plainly apparent to an unrepresented litigant. It is therefore recommended that this be defined in subsection 114(1), using wording such as:

    *'**account** means a description of an event or events of the proceedings or any document or recording (in whole or in part) filed by any party in the Court, issued by the Court, related to the proceedings or created for the purpose of the proceedings. Example: Orders of the Court'*

214. The Law Council notes the risks of further publication from social media platforms. While it is proposed that communication to family and friends will be permitted, there is a clear risk of further publication from those sources. In circumstances where the definition of publisher is being expanded in other contexts (including defamatory publications) there may be unforeseen implications of the proposed reforms.

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

215. The Law Council considers that the simplified outline at proposed section 114N makes the offences easier to understand, should the recommendation in response to question 35 to expand the scope of proposed Part XIVB to include arbitrations be accepted.

216. However, some Constituent Bodies are of the view that there remains scope for clarification in each of the three paragraphs, outlined in turn below.

'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.'

217. As it is unclear what is meant or intended by the phrase '*certain people*', this paragraph ought to clarify precisely who is to be protected (i.e., the parties, the subject children of the proceedings, any other children of the parties, witnesses, etc.).

'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.'

218. The Law Council queries whether this paragraph, which relates to proposed section 114R, means that the daily court lists published on the court website will no longer be made available. If this is not the intention, this should be clarified. The Law Council also queries whether a practitioner who forwards the court list to clients would be deemed to have committed an offence under proposed section 114R.

'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 gallery.'

219. This paragraph appears to be intended to cover close family members, friends and therapeutic treaters of the parties (see proposed subsection 114S(2)). However, it is unclear whether the intention is that a party can freely discuss and provide court documents and reports to those people. If so, this would be a significant relaxation of the current requirements in section 121. This paragraph could also be clarified by providing the examples that are contained in proposed subsection 114S(2), which provide necessary context.

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

220. While the Law Council considers that section 114S helps clarify what constitutes a communication to the public, it has previously recommended that:

> *An avoidance of doubt provision should be inserted to clarify that government agencies, family law services, service providers for children, and family violence service providers are not parts of the 'public' for the purposes of [section 121].*[65]

221. In its Report, the ALRC acknowledged that it is critical that the Family Law Act enables family courts to share information with state and territory family violence and child protection systems when appropriate.[66] The ALRC accordingly recommended that section 121 should be redrafted to confirm that:

> *…it is not an offence to provide an account of proceedings to a government agency or other organisation in connection with that*

[65] Law Council of Australia, Review of the Family Law System: Discussion Paper (Submission, 16 November 2018) <https://www.lawcouncil.asn.au/publicassets/9e580811-b601-e911-93fc-005056be13b5/3549%20-%20Review%20of%20the%20Family%20Law%20System%20Discussion%20Paper.pdf> 81.
[66] ALRC, Family Law for the Future – An Inquiry into the Family Law System (Final Report 135, March 2019) 436 [14.54].

agency's or organisation's role in providing a service to a particular family or family member.[67]

222. As currently drafted, the above recommendations of the Law Council and ALRC either do not appear to have been incorporated into proposed subsection 114S(2) or are not made sufficiently clear. To address this, it should be specified that subsection 114S(2) does not restrict sharing of a '*pleading, transcript of evidence, or other document*' with:

- professional regulators (not just legal regulators);
- government agencies;
- family relationship services;
- service providers for children; or
- family violence service providers;

in connection with the agency's or organisation's provision of service to the family or family member.

223. The Law Council understands that parties are often asked to provide interim and/or final parenting orders to relevant persons/entities, such as a child's day care, school or medical practitioner. Providing such orders to these entities where appropriate can ensure that they properly understand their obligations as to which parent they are to communicate with and what care arrangements are in place, particularly in circumstances where a changeover is taking place on site.

224. If the provision of such orders to these entities has been accidentally omitted from the body of the order, this can create difficulty for the parents in providing these orders to these persons/entities where requested, as it could fall within the definition of '*public communication*' and be an indictable offence under proposed section 114Q. Therefore, the Law Council recommends that a new subsection to 114S(2) be inserted, to the effect of:

'(h) *a communication of interim or final parenting orders to the relevant child(ren)'s day care, school or medical practitioner(s) (where this communication has not otherwise been provided for in the body of the relevant orders)'.*

225. Relatedly, the Family Law Section has raised the risk that the concept of '*profession*' may be drafted too broadly and may allow publication to providers not directly involved in the support of a family or family law or related advice/service providers. There is merit in limiting the documents which could acceptably be provided to these other (more removed) professions (e.g., only court orders and judgments, once published), as the production and sharing of affidavit evidence may be highly controversial and inflammatory, and potentially damaging to a child in a particular context.

226. Proposed section 114S could contain a requirement that if information which is not considered public is published to a person/entity, the party must bring that person or entity's attention to the prohibition of publishing the material to the public.

[67] Ibid 152 [4.164].

Schedule 8: Establishing regulatory schemes for family law professionals

Family Report Writers schemes

227. It is noted that the proposed reforms do not seek to create a mandatory national accreditation scheme for family report writers. Instead, it is proposed that the Family Law Act be amended to permit the Government to make regulations to set *standards and requirements* (the details of which are presently unknown and which presumably, might include mandatory requirements). The language in draft section 11K of the Bill alludes to the possibility of mandatory standards and regulations ('…*regulations may make provision for…(a) standards and requirements that family report writers…must comply with*…'). The Law Council maintains its opposition to any mandatory accreditation scheme for family report writers.[68]

228. The Law Council observes that the consequences of mandatory accreditation (or something akin to that) may impact upon those qualified social scientists who are willing to undertake this important work, due to the costs and compliance burdens such a scheme may impose. That will place attendant pressure upon the court system and may lead to obvious delay and cost increases for families who must enter the system, where there is a scarcity of private report writers.

229. The Law Council recognises that the challenges in building a system of regulations to guide and provide for minimum standards for report writers is made more fraught by the different professional expectations and applicable eligibility criteria of various social science fields of expertise. Any costs consequences for compliance may create a further disincentive to participation and compliance (barriers to access) and lead to the further attrition of experts willing to perform this role.

230. Noting the Consultation Paper suggests that the extent and nature of the Regulations will be developed after further consultation with stakeholders, the Law Council notes that further comment at that time may be sought and will be provided.

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

231. The Law Council considers the cascading nature of the definitions in proposed section 11J appears to sufficiently capture the wide range of reports prepared for parenting proceedings.

232. However, some Constituent Bodies have noted that this section may still be difficult for a layperson to understand and to distinguish between the various types of reports.

[68] Law Council of Australia, Improving the competency and accountability of family report writers (Submission, 15 December 2021) <https://www.lawcouncil.asn.au/publicassets/0fde60eb-545d-ec11-9445-0050 56be13b5/4144%20%20Competency%20and%20accountability%20of%20family%20report%20writers.pdf>.

Question 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?

233. While regulation of family report writers may be an assurance to the public, it is difficult for the Law Council to predict or assess the potential impact of these amendments on family report writers and the quality of the reports they produce, given that there are no actual regulations currently proposed.

234. The intention of proposed section 11K appears to be to address the quality of family reports and accountability for the writers. In this respect, the Law Council acknowledges the importance of consistency in the practice of family report writing, that there are standards of practice to be upheld and that those standards apply to both court experts and private practitioners. However, these considerations must be balanced with appropriate funding for the writers, as well as not creating costly and burdensome obligations which, in practice, hinder the report writing process and discourage family report writers from remaining in the field or entering it altogether.

235. The Court Children's Service has a finite capacity to provide reports, and 'private' (i.e., not employed by the court) report writers are an important resource to obtain timely reports to assist the court, the parties and the children in the litigation process. One of the potential impacts of the proposed changes is that experienced private family report writers may increase their fees for preparing reports to cover the cost and administration required by the regulations, which would be a cost borne by the parties to the proceedings.

236. Further, some experienced report writers may elect not to continue with the work if the administrative and financial burden is onerous. There is already a shortage of qualified practitioners in the private sector who provide such reports, and they are booked many months in advance, delaying proceedings. The Law Council therefore cautions against introducing measures which may have the effect of further reducing the supply of private report writers.

237. In relation to the drafting of proposed section 11K, paragraph (2)(l) ('*standards and requirements in relation to the content of designated reports*') could be problematic, noting that family law is an area with a high level of discretion, and each case must be treated on its merits. The Law Council submits that any regulations on contents of reports must be done in consultation with those working in the field, to ensure they will not impose unnecessary restrictions on practitioners.

238. It is unclear from the Draft Bill who the regulator would be, and which body would manage compliance with standards and requirements. The broad scope of the standards and requirements identified in proposed subsection 11K(2) make clear the challenge of any such regulatory scheme—with regulators potentially to be established to cover each of the schools of social sciences and with resourcing, quality adherence and control looming as significant challenges. In addition, the eventual costs of such a scheme would be borne by the report writers and then ultimately passed to their clients. The Law Council notes that not all schools of social science have compulsory membership of professional associations, and this will make the rollout and compliance with such a scheme even more problematic.

239. The role of proposed regulators is broad, encompassing assessing compliance with schemes which result in recognition for the member, complaint management and dealing with non-compliance by members (the consequences of which appear to include, subject to the eventual drafting, fines, civil penalties, cancellation or suspension of recognition and that a court must not have regard to the reports of such persons). The regulator may be required to maintain public records of members who are compliant with the scheme, among other things. These are broad and significant responsibilities and the Law Council awaits detail of the proposed regulations in order to make further informed comments.

240. If these proposed provisions are passed, it will therefore be important to consult widely on the content of the regulations, particularly with existing report writers and professional organisations representing those report writers. However, the Law Council acknowledges that should regulations be introduced, the quality of the family report will still vary depending on the individual who prepares the report, who is interviewed, and the time taken in appointments or interviews by the family report writer. In addition, the inherent process of family report writing means that there will be some margin of error.

Commencement of the changes

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

241. The Law Council is of the view that the lead in time should aim to strike a balance between allowing sufficient time for education and preparation for the changes and minimising the potential for parties to gain a strategic advantage from the amendments, particularly regarding amendments to the considerations relating to parenting arrangements.

242. As expressed elsewhere in this submission, there is a concern that different commencement dates are being proposed for different parts of the Draft Bill. This reform will no doubt be accompanied by substantial education campaigns, to meet the needs of family members and professionals engaged in the support of family members. Having staggered commencement regimes adds to confusion.

243. Some Constituent Bodies have recommended a six-month lead in time to allow practitioners and parties to familiarise themselves with the substance of the changes and their implications, as well as those who do not seek the court's assistance to resolve matters, and for the court forms to be updated as required. Others have expressed a preference for a shorter lead-in time, such as three months, arguing that a longer timeframe may be an unnecessary delay to the amendments in circumstances where the new legislation would be simplifying and codifying the law as it stands.

244. On balance, the Law Council is of the view that a six-month lead in time is appropriate and sufficient for these changes.

245. As noted by the Family Law Section, the reality is that on the current proposal, there will be a period of time in which matters which have been commenced under the existing Part VII framework will need to progress and conclude in the courts (even after the commencement of the new provisions). In those matters, the courts, parties and practitioners will be faced with the operation and application of two sets of parenting laws. That is not desirable but the principles weighing against retrospective application, remain on balance, appropriate.

246. Consideration might be given to a more immediate commencement of the new provisions, subject to confidence about the delivery of appropriate information sessions, updating of forms and the Courts' resources generally (including its website).

Question 43: Are the proposed application provisions appropriate for these changes?

247. The Law Council considers that the proposed application provisions seem appropriate in light of the proposed amendments, noting:

- it may not be appropriate to apply the new legislation to breaches of the Family Law Act where, at the time of the breach, the previous legislation was in force; and
- aspects of the reform would only apply to proceedings filed after the commencement date. This may result, prior to the commencement date, in an influx of new applications filed in haste in order to gain what could be perceived as a strategic advantage under the existing law.