



27 February 2023

Family Law Reform  
Attorney-General's Department  
3-5 National Circuit  
Barton ACT 2600  
By email: [FamilyLawReform@ag.gov.au](mailto:FamilyLawReform@ag.gov.au)

Dear Attorney-General,

### **Consultation on Exposure Draft - Family Law Amendment Bill 2023**

1. Youth Law Australia thanks the Australian Government and the Attorney-General for the opportunity to make a submission on the Consultation on Exposure Draft - Family Law Amendment Bill 2023 (**Exposure Draft**). We commend the Attorney-General for taking action to prioritise the interests of children and young people in the family law system and to simplify the legislation.

### **Acknowledgements**

2. We acknowledge the disproportionate, ongoing and intergenerational harm experienced by Aboriginal and Torres Strait Islander children and young people and their families and communities. We also acknowledge the many young people who have been courageous and hopeful in sharing their experiences with us.

### **About Youth Law Australia**

3. Youth Law Australia (**YLA**) (formerly the National Children's and Youth Law Centre) is an accredited community legal centre dedicated to helping children and young people under the age of 25 years and their supporters to understand their legal rights and find solutions to their legal problems. YLA is Australia's only national, technology-based community legal service, providing specialist child rights informed legal services through email, phone and live webchat.
4. We have significant experience and expertise in advising children and young people and their advocates on family law matters, which also commonly intersect with safety concerns arising from sexual, domestic and family violence and abuse, child abuse, neglect, substance misuse,



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mental health conditions and poverty. We provide advice and assistance on issues including variations to live with and spend time with arrangements, change of name, passports and travel arrangements, forced marriage, change of school, relocation, contact with siblings and other significant people, and understanding the effect of restraining orders.

5. Wherever possible we support Gillick competent young people<sup>1</sup> to make independent decisions and prioritise the direct participation of all children and young people in all matters that impact them where safe to do so. This submission largely focuses on the right for older children to participate, but we would welcome further discussions with the Attorney-General's Department about how to facilitate all children's participation in the family law system.
6. YLA has included deidentified case studies throughout this submission to reflect the voices of the children and young people we work with. To protect the identity of our clients, we have changed some details.

### Introduction

7. We acknowledge that many of the proposed amendments, if implemented, will assist parents, carers and the family law system to make safer arrangements for children and young people, and will provide additional safeguards to facilitate engagement with children and young people. However, it is our position that the Exposure Draft does not go far enough, and our submission is primarily focussed on the deficiencies in both the current family law system and the Exposure Draft regarding genuine, ongoing, direct and meaningful participation of children and young people in the family law processes and proceedings that are about them.
8. The key principles that inform the reforms that we seek are:
  - A. The safety of children and young people must be prioritised.
  - B. *The Family Law 1975 (the Act)* expects the direct participation of children and young people pursuant to sections 60B, 60CC and 65C of the Act, including via the intention to give effect to the *Convention on the Rights of the Child (CRC)*.
  - C. The best interests of children and young people cannot be determined without hearing from them.
  - D. Children are not a homogenous group and any focus or commitment to the safety of children and young people requires a framework to assess the capacity of each individual child or young person to participate and to develop or adjust processes to ensure that all children and young people can participate directly at all stages of family law matters when they want to, and it is safe to do so.
  - E. Children and young people may also be parents and carers.
  - F. All organisations that provide services to children and young people under the Act must be committed to a child safe culture, including implementing the National Principles for Child Safe Organisations.

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<sup>1</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (“Gillick”).

## 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?*

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

9. YLA supports the simplification of the objects of the Act in section 60B.
10. We also support the continued intention of the Act to give effect to CRC, though it remains unclear how much of an impact this will have without the CRC being incorporated into domestic legislation.
11. We are hopeful that there will be increasing reliance on the CRC as a guide in decision-making but believe that this will only occur in a comprehensive and consistent manner if a range of materials are made available to inform children and young people, their advocates, and the wider family law system that the CRC is a relevant instrument. We note that the full text of the CRC does not appear to be available on the Federal Court and Family Court of Australia (FCFCoA) website.

#### **Recommendation 1.1**

That in addition to the full text of the CRC, that the following materials be made available on the FCFCoA website to coincide with the commencement of the FLA reforms, and where new content is to be developed that this is done so in consultation with children and young people and child rights experts from a range of relevant disciplines:

- A new section of the FCFCoA website for children and young people including at a minimum:
  - information about parenting matters in the family law system;
  - an overview of the rights of children and young people, including a link to the Children's Version of the CRC available on the UNICEF website here:  
<https://www.unicef.org/sop/convention-rights-child-child-friendly-version>;
  - referral options including for crisis support, counselling and legal advice;
  - access to the National Enquiry Centre, ideally via a webchat interface designed for children and young people;
  - details about what to expect from and how to complain about the family law professionals they come into contact with including Independent Children's Lawyers and Child Court Experts;
  - The National Principles for Child Safe Organisation; and
- A participation framework (potentially in the form of a Practice Direction) for assessing the maturity and capacity of children and young people to participate more directly and meaningfully in family law processes and proceedings (this is discussed further below).

### 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?

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

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

### Prioritisation of safety

12. YLA supports a simplified structure for section 60CC but strongly recommends the retention of the prioritisation of safety of children and young people, which must also be extended to prioritising the safety of people who are significant to the care, welfare and development of the child, and other children and young people in households and kinship networks where the parenting arrangements may be in effect.
13. Children and young people frequently contact YLA for advice and support about parenting arrangements. The most common types of harm that they identify are emotional or psychological abuse, having a "toxic relationship" with a parent, being manipulated by a parent or being exposed to verbal abuse or fighting in adult relationships, which may be described in ways like "home is not ideal" or "home is not good for my mental health". We acknowledge that there has been significant progress in recognising and responding to the impacts on children and young people exposed to abuse and family violence. However, we believe that the extent and effects of harm, particularly arising from the coercive control of children and young people by parents and carers is often misunderstood, ignored, minimised, or obscured by a focus on abuse and harm in adult relationships.
14. Greater care must also be taken to ensure better recognition of the direct harm experienced by children and young people, particularly post separation. This includes identifying and protecting children and young people who are being deliberately trained or conditioned by a perpetrator to become weaponised against another parent or carer or siblings.
15. We are therefore concerned that the proposed wording of section 60CC(2)(a) "what arrangements would best promote the safety..." may be narrowly interpreted. The current wording of section 60CC(2)(b) more appropriately emphasises the "need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence".

#### Recommendation 1.2

That the wording of current section 60CC(2)(b) be retained to encourage a more nuanced and specialised assessment of the ways that children and young people may be harmed by experiencing or exposure to abuse, neglect or family violence.

*Views expressed by the child*

*The developmental, psychological and emotional needs of the child*

16. We strongly support the inclusion of “*any views expressed by the child*” as a best interests factor. It is impossible to genuinely assess the best interests of a child or their developmental, psychological and emotional needs without their participation. In order to do this, it is also vital to adopt developmentally appropriate communication options for children and young people of all ages, which is also a powerful educative and protective approach. This is particularly important for children and young people where all parents or carers may be a risk to the child and the child has not had an opportunity for any independent oversight or assessment of this risk.
17. To do this in a meaningful and safe manner the Act must recognise and respond to each child or young person in a way which respects and incorporates their capacity to participate. This would also reflect the National Principles for Child Safe Organisations, and in particular Principle 2 which requires that children and young people are informed about their rights, participate in decisions affecting them and are taken seriously. This opportunity to participate should also not be limited to only the children and young people where a direction is made to inform the court of the views expressed by a child pursuant to the 60CD of the Act, and must also extend to other family law processes, such as family dispute resolution.
18. We also encourage the development of an alternative decision-making pathway for discrete legal issues, such as change of name, change of school, issue of passports and international travel (for example, where the young person has an opportunity to travel for reasons such as a school excursion or representative sport, as opposed to travelling with the other parent). We are regularly contacted by children and young people who are unable to resolve one or more of these discrete issues, primarily due to the ongoing coercive control of a parent and believe that Gillick competent young people should be supported to make these applications on their own behalf via a simplified application and dispute resolution process.

**Recommendation 1.3**

A participation framework be developed and implemented for all children and young people informed by the articles of the CRC and a Gillick assessment of maturity, and with guidance from children and young people.

*Maintaining relationships with parents and significant people*

19. We welcome a focus on the benefit to the child of being able to “maintain a relationship” with people who are significant to the child, subject to considerations of safety.

*The rights of Aboriginal and Torres Strait Islander children and young people*

20. We are concerned that the proposed section 60CC(3) appears to provide less recognition of the rights of Aboriginal and Torres Strait Islander children and young people to be supported and encouraged to explore the full extent of their culture than the current provision of the Act.

21. We are regularly contacted by Aboriginal and Torres Strait Islander children and young people about relationships with their families and kinship networks but are not in a position to provide culturally safe comments on this aspect of the Exposure Draft. We strongly encourage direct engagement with Aboriginal and Torres Strait Islander children and young people about their preferred ways to explore and maintain connection with their culture.

### Removal of equal shared parental responsibility and specific time provisions

*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?*

*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?*

*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?*

22. To assess best interests of the child, including safety of the child, parenting orders must be considered on a case-by-case basis. We strongly support the removal of the presumption of equal shared parental responsibility and specific time provisions. In our experience, the confusion surrounding the presumption and the link to 65DAA has led to many families agreeing to unsafe care arrangements in cases resolved by consent. Given the high percentage of families who resolve matters by consent, and the high incidence of family and domestic violence in separating families, the removal of the presumption will particularly benefit matters that are resolved “in the shadow of the law.”
23. It will be imperative to raise community awareness about this change, including specific training for legal practitioners, family dispute resolution practitioners, family counsellors and family consultants. This could also be a valuable opportunity for additional education on child abuse, neglect and family violence, including coercive control and other tactics used by perpetrators to dominate and manipulate outcomes in their favour.

### 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?*

*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 appropriately reflect current case law?*

24. While we support the inclusion of 65DAAA, we are concerned that the Act unnecessarily impacts children and young people who would be otherwise deemed as Gillick competent.<sup>2</sup>
25. When the Act was first enacted in 1975, it provided that once a child who was subject to family court orders attained the age of 14 years, an application could be made to discharge or vary the

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<sup>2</sup> See for example, Young, L., ‘Mature minors and parenting disputes in Australia: Engaging with the Debate on Best Interests v Autonomy’ (2019) 42(4) *UNSW Law Journal* 1362 – 1365.

order in accordance with the child's views.<sup>3</sup> Since this section was removed in the *Family Law Amendment Act* (1983), and despite the High Court's application of *Gillick v West Norfolk* (1985) in the case of *Marion* (1992), young people who would otherwise be deemed as Gillick competent have been unnecessarily subject to orders until they reach 18 years old. Young people regularly contact YLA to seek legal advice about how to change family law orders:

*"I've never liked living with my dad and I don't want to live there anymore. He knows that I'm dealing with stuff at school but he never listens. I spend half the time at Mum's house and the other half at Dad's. I want to live at Mum's full time and visit Dad instead. Mum said I can't because there is a Court Order and they have already been back to court once. I don't understand why other people my age can leave home if they have somewhere safe to go, but I'm not allowed? When does the order stop? Will I get into trouble if I ignore it?"*

**16-year-old**

*"I live with split parents and I'm wondering if there is a certain age when you can change the time you spend with certain parents in the order? I spend half the week with Dad and half the week with mum, I then alternate weekends each week. I want to spend Sunday with mum. Dad is refusing to take me to rep soccer but Mum can take me. I want to play soccer so I need to be with mum on Sunday."*

**16-year-old**

*"My mum is emotionally abusive to me and my brother and I want to live with my Dad. There are court orders that say where we have to be throughout the year, at the moment we spend half the time at dad's and half the time at mum's. I am physically safe but not emotionally safe with Mum, but I am safe at Dad's."*

**14-year-old**

26. By failing to recognise the evolving capacity of the child, the legislation constrains young people to arrangements that are unnecessarily restrictive or unsafe, and in most cases preferences one or more adult's assessment of the significance of any changes over the views of the young person. Not only does this place young people at additional risk, young people subject to family court orders often also fear that if they choose where to live contrary to orders, their protective parent or carers will be subjected to further abuse, retaliation or more litigation.

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<sup>3</sup> *Family Law Act 1975* (Cth) s64(8).

**Recommendation 1.4**

That Division 5 of the Act be amended to state that parenting orders end when the child attains 16 years unless there are special circumstances as is the case in New Zealand (*Care of Children Act 2004, NZ, s50*). We do not propose change to the requirements to financially support or maintain a child until they turn 18 years or as otherwise ordered.

**Recommendation 1.5**

That if the expiry of parenting orders is not reduced to 16 years, the list of considerations in 65DAAA(2) is amended to include “(e) any views expressed by the child”.

**Schedule 2: Enforcement of child-related orders**

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

*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?*

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

*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?*

*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?*

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

27. Despite regularly hearing from children and young people about significant breaches of the orders about them there appears to be limited use of the enforcement provisions in the Act. It is our position that the current provisions are not fit for purpose.
28. Whilst we support the simplification of enforcement options for non-compliance with parenting orders, we do not believe that the proposed amendments will achieve the desired outcome. We believe that in the absence of specific pathways to facilitate their meaningful participation, children and young people will remain trapped in unsafe and unstable arrangements.
29. We are opposed to the introduction of an express power for the making of make-up time parenting orders without having to make a finding about the contravention. The assessment of whether there is a reasonable excuse for contravening an order is an important safeguard for children and young people. The views of the child should also be sought before an order is made for make-up time.
30. We are also concerned that some children and young people reluctantly elect to continue a relationship with an abusive parent to avoid a contravention consequence for a protective parent or carer or to protect a sibling from abuse and interference from a perpetrator parent. They will



remain hidden victims unless their voices can be heard, and they have confidence that the system will listen and respond accordingly.

31. We believe that contravention proceedings involving the direct participation of Gillick competent young people, would be significantly simplified as the focus will be shifted to the views expressed by the Gillick competent young person rather than a detailed assessment of the behaviour of their parents or carers.

#### **Recommendation 2.1**

That a child friendly, developmentally appropriate summary of parenting orders and parenting plans and their effect be provided to all children and young people and also be available on demand from the Children's Court Services, at any time until the orders cease to have effect, and that this summary also include the details of services that can provide children and young people with crisis support, counselling, and independent legal advice.

#### **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?*

*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?*

*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?*

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

32. YLA supports the expanded definitions of "member of the family" and "relative" to better recognise Aboriginal and Torres Strait Islander notions of family and kinship.
33. We note the potential for scrutiny of a wider group of individuals who have a role in the child's upbringing. It will be important to balance the child's right to cultural safety in decision making about their care arrangements with the potential for delay in proceedings. This may require preliminary identification of the people who are most significant in the child's care, welfare and development for the purposes of the disclosure requirements in sections 60CF, 60CH and 60CI.

#### **Schedule 4: Independent Children's Lawyers**

##### **Requirement to meet with the child**

*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?*

*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?*

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

#### Requirement to meet

34. While we agree with the proposed requirement in s68LA(5A) that Independent Children’s Lawyers (ICL), must meet with the child, we are concerned that in practice, this will still not allow for adequate participation. We would like greater transparency around how often ICLs should meet with a child or young person during proceedings. We note that, particularly in cases where the young person has experienced trauma, it may take multiple meetings with the ICL to build enough trust and rapport for the young person to feel safe to express their views.
35. Specific to s68LA(5A)(b) there should be further clarification around different ways that children can safely express their views in family law proceedings, and these methods should be appropriate to the age, maturity and individual needs of the child. This information should also be available in the new content proposed for the FCFCoA website above in *Schedule 1: Amendments to the framework for making parenting orders*.

#### Recommendation 4.1

That the ICL is required to meet or speak to the child or young person before and after each significant court event (subject to the child’s wishes) where a decision is made that impacts the child and when a child specifically requests to meet the ICL.

#### Exceptions in 68LA(5B) and (5C)

36. We would like greater transparency around how ICLs and the courts will assess proposed sections 68LA(5B) and 68LA(5C), particularly sections (5C)(a) and (b) and what is perceived as harm or a “*significantly adverse effect*”. There has been a long-held belief that exposing children to family law proceedings is harmful and we are concerned that this section will be relied on to justify not meeting with the child. However, when children are not provided with an opportunity to express their views, not only does this potentially create unsafe situations for children, it can result in decisions that go on to impact children throughout their adult life.<sup>4</sup> To make a decision in the best interests of the child, the court must ensure that children and young people are provided with a safe space where they can express their views freely.
37. Many children express that they are worried that if they talk to an ICL they will get in trouble from one or both of the parents, or other adults in their lives such as grandparents. Children who fear for their safety should still be provided with the right to participate in their legal matter, and referral to independent lawyers, who are not mandatory reporters and do not have a duty to disclose information to the family law courts is an effective method to do this.

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<sup>4</sup> Nelson, C. (2022) “*They thought it was safe – but it wasn’t*” Recognising Children’s Rights as a Means of Securing Children’s Safety in Australia’s Family Law System. Whitlam Institute Sydney.

#### Recommendation 4.2

That if an ICL relies on proposed sections 68LA(5B) and 68LA(5C) and particularly sections 5C(a) and (b), the Court must examine the attempts made by the ICL to safely engage with the child or to manage the risk, including consideration of different methods to explore how the child can safely provide their views.

#### Recommendation 4.3

That if a child does not wish to meet with an ICL or the ICL argues that performing their duty would expose the child to risk of physical or psychological harm, the child is referred to an independent youth legal service, such as YLA, for independent advice.

### Ensuring children have their say

38. As recommended above we believe that a participation framework is required for the safety and inclusion of all children and young people in the family law system. We also believe that the current best interests approach is not only inappropriate, but studies also suggest that children feel betrayed when they understand their views will not be represented.<sup>5</sup>
39. Direct legal representatives “receive and act on instructions from the child client, irrespective of what the representative considers to be the best interests of the child client.”<sup>6</sup> In NSW, the *Children and Young Persons (Care and Protection) Act* includes a rebuttable presumption that children who are 12 years or older are presumed as capable of giving proper instructions<sup>7</sup>, and a legal representative for a child or young person is to act as a direct legal representative if the child is capable of giving proper instructions.<sup>8</sup> The Representation Principles for Children’s Lawyers states that “*this model allows children to participate directly in proceedings if they are able and willing to do so, as required by international law*”.<sup>9</sup> Additionally, the UN Committee has recommended that wherever possible, children are given the opportunity to be directly heard in any proceedings.<sup>10</sup> Even where ICLs are appointed, many children still feel unheard and unsafe in family law proceedings.<sup>11</sup> There is also limited guidance regarding the use of litigation guardians in proceedings involving minors.<sup>12</sup>

<sup>5</sup> Carson, R., Dunstan, E., Dunstan, J., & Roopani, D. (2018). Children and young people in separated families: Family law system experiences and needs. Melbourne: Australian Institute of Family Studies, 52.

<sup>6</sup> Law Society of NSW, *Representation Principles for Children’s Lawyers*, 4<sup>th</sup> Edition.

<sup>7</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s99c.

<sup>8</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 99a, 99c

<sup>9</sup> Law Society of NSW, *Representation Principles for Children’s Lawyers* – 4<sup>th</sup> Edition.

<sup>10</sup> United Nations Committee on the Rights of the Child, General Comment No. 12 (2009): The Right of the Child to be Heard, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009), [35]–[36], p 12.

<sup>11</sup> As above at 4 (Nelson).

<sup>12</sup> *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, Part 3.5.

40. While the proposed amendments in the Exposure Draft aim to facilitate greater participation for cases where an ICL is appointed, ICLs are only appointed for high-risk or complex matters. Further amendment is required to allow for greater participation for all children involved in family law proceedings, including orders made by consent. This includes giving children a choice as to whether they would like to participate, and how they would like to participate. The courts must also ensure that the child receives all necessary information and advice that they need to inform their views. The validity of acting in a child's best interests is called into question when family law actors haven't met or heard from the child, especially where concerns about safety have been raised.
41. Ideally for all decisions, but particularly where a decision is made contrary to a child's views, it is important to explain the decision to the child in a child friendly way that is age appropriate. In cases where an ICL is not appointed, this could include a child court expert writing a letter to the young person that is accessible to the child at an appropriate time. This is a common practice engaged in by Child Protection Practitioners known as Life Story work to "*assist young people to explore significant events in their life in a safe and trauma informed way*".<sup>13</sup> YLA often observes that children and young people are retraumatised by family law process where they feel that their voice hasn't been heard or where no one has explained to them why they can't live with a particular parent, for example, due to safety concerns.

*"I want my mum. I don't want to live with my Dad but the court says I have to, I told everyone that I don't want to live at my Dad's house, but nobody is listening to me. I can't even talk to mum because Dad won't let me call mum. Why can't I go home to my mum? It was my Dad that hurt me and not mum. I told my lawyer that I want my mum, but nobody cares. I hope someone sees this."*

**10-year-old**

42. It is important for the family law system to be responsive to the profound impact it has on children's lives and to be committed to trauma informed practices. Crucially, for the family law system to be trauma informed, it must consider the impact of vicarious trauma on family law professionals including judicial officers and legal practitioners.
43. We are concerned that by placing greater responsibility on ICLs, there is also a risk that less practitioners will be willing to act as an ICL.

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<sup>13</sup> Lucas, J. J., Velik, J., Matthews, L., Brady, K., Breguet, R., & Parson, J. (2022) *Therapeutic Life Story Work Barwon Pilot Program: Final Report 2022 (Research Report)*, Geelong, Victoria. Accessed at: <https://www.mackillop.org.au/about-mackillop/publications/therapeutic-life-story-work>

#### **Recommendation 4.4**

To allow for more effective participation of children and young people, in compliance with Article 12 of the CRC, and to improve safety outcomes for children, a rebuttable presumption of capacity be inserted into the Act and a model of direct legal representation is adopted for children who are capable of giving proper instruction.

#### **Recommendation 4.5**

Ideally for all decisions, but particularly where a decision is made contrary to a child's views, the decision is explained to the child in a way that is age appropriate.

#### **Recommendation 4.6**

That mandatory training and support is available to judicial officers and others working in the family law system, so that practitioners feel equipped to support children and young people to effectively participate.

#### **Recommendation 4.7**

That significant additional funding is provided to ensure that ICLs and direct legal representatives for children and young people can provide a more comprehensive service, as outlined above.

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

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

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

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

44. We welcome the expansion of use of ICLs, and direct legal representatives as outlined above, in cases brought under the *Convention on the Civil Aspects of International Child Abduction*. This will provide children and young people with an increased opportunity to express their views during proceedings which typically involve allegations of abuse and risk, relocation and other complexities.

### **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?*

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

*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?*

*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?*

45. YLA supports the introduction of harmful proceedings orders to address the trauma and harm associated with systems abuse.
46. In addition to the matters that the court is to have regard to under proposed section 102QAC(3), we believe that consideration should also be given to the behaviour of the person that is to be subject to the harmful proceedings order in relation to child support assessments and reviews, and to circumstances where their ongoing, unreasonable refusal to participate or to consent results in protracted mediation or administrative processes and harm to children and young people. For example, this may include refusing to consent to a change of school after a child has been subjected to bullying, which is both a wanted change for the child and in their best interests.
47. We acknowledge that there is merit in ex-parte leave applications to reduce the impact of systems abuse on adult victim-survivors and children and young people but hold concerns about the potential for increased harm if leave is refused and appropriate safety measures are not in place. We are particularly concerned for the safety of children and young people who may still regularly be in contact with the person subject to the harmful proceedings order.
48. We note that safety of adult victim-survivors and children and young people may be better addressed by the requirement to serve all parties with an application for leave to institute proceedings subject to an opt out provision and refer to the submission of Women's Legal Services Australia on this issue.

### **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?*

49. We support the inclusion of an overarching purpose to facilitate the just resolution of disputes but recommend that the factors relating to safety and best interests of children be included as the first factors in proposed section 95(1).
50. As outlined above, we also believe that genuine commitment to safety and the best interests of the child being the paramount consideration requires a significant expansion in the options for children and young people to participate directly in decision making about them. We anticipate that this could add additional steps in family law proceedings and are concerned that a focus on efficiency and cost may undermine the rights of children and young people to participate.

### **Schedule 6: Protecting sensitive information**

*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?*

*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?*

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

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

51. YLA supports the protection of sensitive information in family law proceedings and agrees that the paramount consideration in relation to such protected confidences must be the best interests of the child, subject to the comments below.

#### **Definition of protected confidence**

52. YLA is concerned that the proposed scope of “*health service*” as defined in the *Privacy Act 1988* is far too narrow and appears to preference protected confidences made in a more typically medical context. Children and young people access support and care to cope with the effects of child abuse, neglect, family violence and other harm from many specialised child and youth services that may be excluded under this definition. We believe that there needs to be a much broader definition to include a wider range of relationships involving communications of protected confidences.

#### **Protected confidences of children and young people**

53. Children and young people, particularly those who have experienced child abuse and family violence, often require significant investment in therapeutic or supportive relationships before they develop a trusted connection and can disclose the full extent of the harm that they have endured or the risks that are still present. We are highly concerned about the damage that is caused to supportive and therapeutic relationships for children and young people when sensitive records are sought for litigation purposes.
54. In our experience the fear and anxiety that is caused to children and young people by the knowledge or perception that a person who has hurt them may gain access to things that they have said about them, cannot be overstated. We have frequent contact with children who repeatedly seek reassurances that their contact with us is confidential and that perpetrators in their lives will not find out. Importantly children are often also concerned for the safety of their protective parent or carer and siblings and put their own care and recovery needs second to the safety of others.
55. We also regularly advise children about mandatory reporting requirements and other potential breaches of confidentiality when they access professional supportive relationships. We typically hear responses such as “*well in that in that case I won’t bother with a counsellor*”. It is also relevant to note that many services such as Kids Helpline and Headspace deliberately provide flexibility for anonymous interactions to ensure that children and young people can access a service and to avoid the harm that can be caused from discontinuing treatment after trust has been impacted. YLA is also providing specialised live webchat legal services, including anonymously, in an effort to provide children and young people with the opportunity to seek legal advice and information safely and as early as possible.

56. Requiring parties to seek leave before the issue of a subpoena for records containing a protected confidence would significantly improve the safety of children and young people and facilitate greater access to services.

**Recommendation 6.1**

That leave be required to issue a subpoena for material which may contain a protected confidence, in addition to any leave requirements to admit such evidence into proceedings.

***Gillick competent young people and consent to the admission of a protected confidence***

57. We refer to the intended effect of proposed section 99(3)(b) which gives the power to consent to the admissibility of a protected confidence of a child or young person under 18 years to each person who has parental responsibility for them.
58. YLA acknowledges the importance of victim-survivors and other vulnerable parties having agency over access to their records. This agency must also be extended to Gillick competent young people.
59. The CRC states that children have the right to freely give their opinion on issues that affect them and that they also have a right to privacy.<sup>14</sup> We submit that proposed section 99(3)(b) is not consistent with the intention of section 60B to give effect to the CRC.
60. Gillick competent young people can enter contracts which are to their benefit, and this extends to engaging in professional relationships with medical, therapeutic and specialised child abuse and family violence workers. In our experience it is routine for Gillick competent young people to have contact with such services without the knowledge or consent of at least one of their parents or carers.
61. We can see multiple potential problems with proposed section 99(3)(b), including:
- The child or the young person wants a protected confidence to be admitted into evidence as a way to be heard in the proceedings or is opposed to the protected confidence being admitted but has no control over this decision and is both harmed by the operation of the family law system and possibly at greater risk because relevant evidence is excluded or included without their input.
  - There is relevant evidence contained in a protected confidence and a protective parent provides consent to admission, but the perpetrator parent refuses to provide consent. Depending on the facts in issue this should ideally give rise to an inference that the protected confidence contains material damaging to that parent. Alternatively, we suggest discretion to waive the requirement of consent of a parent alleged to be of risk to a child.
  - There is relevant evidence contained in a protected confidence but also evidence relating to other care and treatment that one or both parents are not aware of, for example a child

<sup>14</sup> United Nations, *Convention on the Rights of the Child*, 20 November 1989, articles 12 and 16.



has sought therapeutic service in relation to exposure to family violence but has also disclosed that they have had an abortion. There must be safeguards to ensure that children and young people are informed when a protected confidence may be sought or accessed in proceedings, including access to independent legal advice to be able to oppose the admission of that protected confidence or be supported to provide informed consent to partial disclosure.

### **Recommendation 6.2**

That the Act be amended to provide that Gillick competent young people be supported to make an independent and informed decision about the admission of protected confidences arising from communications between that young person and a relevant professional.

## **Schedule 7: Communication of details of family law proceedings**

### **Clarifying restrictions around public communication of family law proceedings**

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

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

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

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

62. While the purpose of Part XIVB is to protect the privacy of families, children involved in family law proceedings should not be prevented from sharing their experience of family law proceedings once they reach adulthood. We note that the cost of seeking approval from the Court is prohibitive to many. The court will be limited in its ability to keep children safe if it does not listen to the experiences of children who felt unsafe during proceedings.<sup>15</sup>
63. The court needs to consider the potential impact that XIVB has on young people. For example, a young person (15-year-old) recently contacted YLA about their living arrangements but told us they were not allowed to talk about the court orders as they had been told they were not allowed to talk about what happened at court.

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<sup>15</sup> As above at 4 (Nelson).

### **Recommendation 7.1**

While Part XIVB is easier to understand than the current s121, further amendment is needed to allow children to share their experiences once they turn 18.

### **Recommendation 7.2**

If Part XIVB is not amended to allow children to share their experience once they turn 18, the Court needs to consider how children are informed of Part XIVB, to ensure that children do not unknowingly commit an offence. This should include explaining to children that Part XIVB does not prevent them from seeking independent legal advice or seeking support from a counsellor or psychologist.

## **Schedule 8: Establishing regulatory schemes for family law professionals**

### **Family Report Writers schemes**

*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?*

*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?*

64. We welcome additional provisions to regulate family report writers, but do not believe that the proposed reforms are sufficient.
65. Family reports are frequently the only mechanism by which the voice and views of the child or young person are heard in proceedings. At the very least the Act must include mandatory minimum requirements for what is to be included in the regulations rather than providing for a regulatory framework that appears optional. Preferably the standards and requirements for family report writers will be included in the Act.
66. Family report writers must also be highly trained, nationally accredited, and proficient in trauma informed practice, with relevant expertise including in:
  - understanding child abuse and neglect;
  - how exposure to sexual, family and domestic violence and abuse in adult relationships impacts children;
  - coercive control of children and young people;
  - child development; and
  - working with children and young people.

67. Family report writers must also be subject to transparent accountability mechanisms, including a requirement to provide all children and young people with information about complaint processes and options for independent legal advice and support.

**Recommendation 8.1**

The requirements for ongoing training of family report writers must specifically require comprehensive and child rights informed training on talking to children and young people in a developmentally appropriate manner and how trauma impacts children and young people.

**Recommendation 8.2**

The FCFCoA engage in a co-design consultation process with children and young people to review both their physical and online spaces to ensure that they are safe, inclusive and accessible to all children and young people.

**Commencement of the changes**

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

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

68. YLA believes that the safety of children and young people necessitates that the reforms commence as soon as possible after the passage of the legislation. The changes should also apply to all proceedings already filed at the time of commencement, excepting those awaiting a reserved judgment.

We agree to this submission being made public under the name of our organisation and welcome any opportunity to participate in future consultations about the Exposure Draft and the family law system or to assist with related implementation measures. If you would like to discuss any aspect of this submission, please contact Carolyn Jones, Principal Solicitor (Harm Practice) or Kate Richardson, Senior Solicitor on (02) 9067 6510.

Yours faithfully,

**Youth Law Australia**

**Carolyn Jones**

**Principal Solicitor (Harm Practice)**