Peninsula Community Legal Centre

PENINSULA COMMUNITY LEGAL CENTRE'S RESPONSE TO THE EXPOSURE DRAFT - FAMILY LAW AMENDMENT BILL 2023

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INTRODUCTION

Peninsula Community Legal Centre (**PCLC**) welcomes the opportunity to make a submission to the Australian Government's Consultation on the Exposure Draft – Family Law Amendment Bill 2023 (**Consultation**).

SCOPE OF SUBMISSION

PCLC's submission responds to the following questions in the Exposure Draft – Family Law Amendment Bill 2023 - Consultation Paper (January 2023) (**Consultation Paper**) of particular relevance to its practice and clients:

- Redraft of objects: questions 1 and 2
- Best interests factors: questions 3 and 4
- Removal of the presumption of equal shared parental responsibility: questions 6 to 8
- Reconsideration of final parenting orders: questions 9 and 10
- Harmful proceedings orders: questions 27 to 30
- Protecting sensitive information: questions 32 to 35

PCLC's submission also addresses additional areas of family law which it considers require priority reform and builds on its recent submissions on the family law system, including its:

- Submission to the Australian Law Reform Commission Review of the Family Law System (7 May 2018) (**May 2018 Submission)**
- Response to the Australian Law Reform Commission Review of the Family Law System Discussion Paper (2 November 2018) (**November 2018 Submission**).

ABOUT PENINSULA COMMUNITY LEGAL CENTRE

PCLC is an independent, not-for-profit organisation that has been providing free legal services to vulnerable and disadvantaged people in Melbourne's outer southeast since 1977. It is one of the largest community legal centres in Australia, with its family law and family violence programs serving a population of over one million people across six local government areas. PCLC's head office is in Frankston, with branch offices in Bentleigh East, Cranbourne, Frankston North and Rosebud, and 15 visiting outreach services across the catchment.

As is typical of community legal centres, PCLC provides legal information, advice, ongoing legal assistance and representation and undertakes community legal education, community development and public advocacy activities. In addition to its general legal services, the Centre operates programs and services in family law, family violence, fines, tenancy, rooming house outreach and general law.

PCLC provides clients with free and accessible legal services, particularly the most disadvantaged and marginalised in our community who may otherwise 'fall through the gaps' as they cannot afford private lawyers and would not qualify for legal aid. Our clients are low income earners with 81% on no or low income (less than $26,000 gross per annum).

Given the level of family breakdown and family violence in Australia, it is not surprising that the most common legal problems for our clients are family law and family violence, with 46% of all clients

accessing the Centre reporting family violence. Typically, our clients' family law and family violence problems are complicated by the risk of homelessness, welfare concerns for children, disability or a history of substance abuse.

Of particular relevance to this Consultation, PCLC has specialist programs in family law and family violence services and has one of the most comprehensive community legal centre family law and family violence practices in Australia. Contrary to a common misunderstanding about the work conducted by community legal centres, these specialist programs involve complex and significant casework where our family law and family violence lawyers conduct cases from start (negotiations/pre-action procedures) to finish (settlement/trial). Of the clients assisted by PCLC's family law litigation team, 75% instruct that they have experienced family violence either during the relationship or post separation.

PCLC is primarily funded through the Community Legal Services Programme of the Australian Attorney General's Department and Victorian Department of Justice and Regulation. It also receives funding from local governments and private foundations.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

Fund legal assistance services adequately (including community legal centres and Legal Aid Commissions) to ensure the reforms are accessible and implemented fairly and efficiently, particularly for the most disadvantaged and vulnerable members of the community.

Recommendation 2

To support the effective implementation of the reforms, provide mandatory ongoing specialised family law training for all judicial officers and court staff. The training should focus on the safety of children and their carers in family law proceedings, particularly where family violence is present.

Recommendation 3

Extend the proposed object in paragraph 60B(a), 'to ensure that the best interests of children are met' to include the words 'including safety from family violence, abuse, neglect, or other harm'.

Recommendation 4

Include an explanatory note to section 60B to clarify that the section operates as a statement of the objects of Part VII of the *Family Law Act 1975* (Cth) and does not affect decision-making.

Recommendation 5

Recommendation 14 from PCLC's Submission to the Australian Law Reform Commission, Review of the Family Law System (7 May 2018) - to amend the *Family Law Act* to require the court to make a determination in relation to allegations of family violence at an earlier stage in proceedings - should be implemented as a critical priority in the current suite of reforms to the Act.

Recommendation 6

Include an explanatory note to section 60CC2(c) explaining that the section may include consideration of the following existing factors as relevant to a particular case:

- the likely effect of any changes in the child's circumstances (section 60CC(3)(d))
- the attitude to the responsibilities of parenthood (section 60CC(3)(i))
- the extent to which the parents have previously participated in major long-term decisions about the child (section 60CC(3)(c))
- the nature of the child's relationship with their parents or others (section 60CC(3)(b))
- the maturity, sex, lifestyle, culture and traditions of the child and/or parent (section 60CC(3)(g)).

Recommendation 7

Include an explanatory note to proposed paragraph 60CC2(d) explaining that the section may include consideration of the existing factors in sections 60CC(3)(b), (c), (f) and (i).

Recommendation 8

The amendments should expressly state that where relevant, proposed paragraph 60CC(2)(a) should be prioritised in determining what is in a child's best interests.

Recommendation 9

Section 65DAC should be amended so that where a parenting order is made that provides for shared parental responsibility, the court has discretion about how a decision is required to be made jointly, and if so, how the parents are required to consult each other and make a genuine effort to come to a joint decision about the issue. The amended provision should also explicitly refer to circumstances where family violence is present.

Recommendation 10

The Australian Government should develop guidance for courts to promote the hearing of *Rice v Asplund* applications as expeditiously as possible.

Recommendation 11

Practical guidance on the application of proposed paragraph 65DAAA should be included in the annexure sheet for a final parenting order.

Recommendation 12

The Australian Government should consider broadening proposed paragraph 102QAC(3)(b) to include administrative proceedings that are relevant to parenting matters.

Recommendation 13

Proposed paragraph 102QAE should be amended to enable the respondent to an application for leave to institute further proceedings to elect to appear in the matter.

Recommendation 14

The court should be required to undertake further family violence and safety risk assessment to mitigate any safety risks associated with the making of a harmful proceedings order under proposed paragraph 102QAC or after the determination of an application for leave under proposed paragraph 102QAE (regardless of whether leave is granted or not).

Recommendation 15

Proposed paragraph 99 should explicitly state that where a party issues a subpoena for a protected disclosure, the protected disclosure should only be produced to the court and cannot be inspected by any person until the court has determined whether or not to grant leave to admit the protected disclosure as evidence under proposed paragraph 99(5-7).

Recommendation 16

To protect the best interests of children under proposed paragraph 99(5), where a protected confidence that relates to therapeutic interventions for a child is sought, the protected confidence should only be viewed by the judge.

Recommendation 17

Proposed paragraph 99(2)(a) should be broadened to include support services provided by a specialist family violence service.

Recommendation 18

Proposed paragraph 99(7) should be broadened to allow the court to also have regard to 'any other relevant matters'.

OVERARCHING COMMENTS

PCLC welcomes the Australian Government's Exposure Draft - Family Law Amendment Bill 2023 and overwhelmingly supports the proposed amendments to the family law system which will reprioritise the best interests of children as the paramount consideration in family law proceedings and help to simplify the law, particularly for the benefit of unrepresented litigants.

While the proposed amendments are likely to improve outcomes for the most disadvantaged and vulnerable clients in our community, any legislative change will require a cultural shift to ensure that the best interests of children are prioritised at the heart of family law matters. As set out below, this can be achieved in part by adequate funding to support disadvantaged and vulnerable litigants in family law proceedings and ongoing specialised judicial training which prioritises safety.

The need to prioritise safety

As set out in this submission, PCLC advocates for a stronger focus on prioritising the safety of children and their carers in family law proceedings, particularly in the context of the high rates of family violence reported by our family law clients (75%) and nationally. The most recent data shows that nationally one in four women (23%) has experienced violence by an intimate partner since age 15 and more than two-thirds (68%) of mothers who had children in their care when they experienced violence from a previous partner said their children had seen or heard the violence.[1]

PCLC considers that strengthening the focus on safety in the proposed amendments would also be consistent with the proposed overarching purpose of family law practice and procedure which includes facilitating the just resolution of disputes in a way that ensures the safety of families and children.[2] This is an objective that is of critical importance for PCLC's clients and particularly those who are victim-survivors of ongoing family violence. As set out in this submission, PCLC also remains of the view that courts should be required to make an early determination in relation to family violence allegations as a critical priority in the current suite of reforms.

The need for adequate funding

The proposed amendments represent a significant departure from the existing law which has operated since 2006. For this reason, the legislative amendments must be supported by adequate funding for legal assistance services, to promote the fair and effective implementation of the law for the most disadvantaged and vulnerable people in our community - as key beneficiaries of the reforms. In PCLC's experience, where both parties in family law proceedings are assisted by legal assistance services, the proceedings are more timely, efficient and trauma-informed, leading to better outcomes for both parties, their children and the justice system more broadly.

As set out in PCLC's May 2018 Submission,[3] a lack of legal representation for disadvantaged and vulnerable people in family law proceedings undermines access to justice and compromises the efficient operation of the family law system given the additional strain it places on over-worked courts to ensure unrepresented parties understand the process and the consequences of their choices. In short, it can make the process unfair, slow and more expensive.

Unrepresented litigants accessing PCLC's services almost overwhelmingly experience disadvantage, including low income, lack of education, disabilities, limited or no English, while many also experience family violence. Combined with the stress and sometimes trauma of court proceedings, PCLC's clients can have great difficulty handling their legal case. With the introduction of significant reforms to the family law system, it is critical that disadvantaged and vulnerable litigants are adequately supported to ensure the reforms are accessible and implemented fairly and efficiently.

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[1] Australian Bureau of Statistics, Personal Safety Survey, released 8 November 2017, https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release#experience-of-partner-violence.

[2] Exposure Draft, Family Law Amendment Bill 2023, paragraph 95(1).

[3] Peninsula Community Legal Centre, Submission to Australian Law Reform Commission Review of the Family Law System (7 May 2018), page 13.

Recommendation 1

Fund legal assistance services adequately (including community legal centres and Legal Aid Commissions) to ensure the reforms are accessible and implemented fairly and efficiently, particularly for the most disadvantaged and vulnerable members of the community.

The need for judicial training

PCLC also considers that the reforms should be supported by ongoing specialised family law training for judicial officers and court staff, which prioritises the safety of children and their carers in family law proceedings and recognises the prevalence and impact of family violence in such proceedings.

As set out in PCLC's May 2018 Submission, numerous studies and inquiries have confirmed the importance of training and professional development in building the capacity of the family law system to respond to family violence.[4] This includes the recommendations of the Victorian Royal Commission into Family Violence regarding the need for family violence, family law and child protection training for all court staff and judicial officers.[5]

In the context of the proposed amendments, which sharpen the focus on the best interests of children in family law proceedings, there is a clear and compelling need for mandatory ongoing specialised family law training that prioritises the safety of children and their carers.

Recommendation 2

To support the effective implementation of the reforms, provide mandatory ongoing specialised family law training for all judicial officers and court staff. The training should focus on the safety of children and their carers in family law proceedings, particularly where family violence is present.

RESPONSE TO CONSULTATION QUESTIONS

Redraft of objects

Q1: Do you have any feedback on the two objects included in the proposed redraft?

In general, PCLC supports the proposed simplification of section 60B, which will provide a useful statement of policy intention for unrepresented litigants and address the confusing overlap between the existing objects provision and section 60CC (the 'best interests' factors) for PCLC's clients.

However, in PCLC's view, the proposed amendment to section 60B should include express reference to ensuring the safety of children in family law proceedings, as a critical consideration for determining what is in a child's best interests. This could be achieved by extending the object in proposed paragraph 60B(a), 'to ensure that the best interests of children are met', to include the words 'including safety from family violence, abuse, neglect, or other harm'.

[4] Peninsula Community Legal Centre, Submission to Australian Law Reform Commission Review of the Family Law System (7 May 2018), page 34.
[5] Royal Commission into Family Violence Report, Recommendations 215 and 216.

PCLC considers that this will help to promote safety as a critical priority in family law proceedings, particularly given the high rates of family violence present in these matters. It is also consistent with the overarching purpose of family law practice and procedure in proposed paragraph 95(1)(c), including the just resolution of disputes 'in a way that ensures the safety of families and children'.

Recommendation 3

Extend the proposed object in paragraph 60B(a), 'to ensure that the best interests of children are met' to include the words 'including safety from family violence, abuse, neglect, or other harm'.

Q2: Do you have any other comments on the impact of the proposed simplification of section 60B?

PCLC proposes the inclusion of a short explanatory note for unrepresented litigants to clarify that section 60B operates as a statement of the objects of Part VII of the *Family Law Act 1975* (Cth) and does not affect decision-making.

Recommendation 4

Include an explanatory note to section 60B to clarify that the section operates as a statement of the objects of Part VII of the *Family Law Act 1975* (Cth) and does not affect decision-making.

Best interests of the child factors

In general, PCLC supports the proposed amendments to and simplification of the 'best interests' factors in section 60CC (subject to our limited comments below). We consider that the amendments will properly reinvest judicial officials with the discretion they need to make parenting orders in the best interests of children, and are unlikely to lead to inconsistent decision-making, particularly considering that parenting matters turn on their specific facts. The simplification of the 'best interests' factors is also likely to make the law more accessible for unpresented litigants.

Q3: Do you have any feedback on the wording of the factors, including whether any particular wording could have adverse or unintended consequences?

Paragraph 60CC(2)(a): What arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, neglect or other harm

PCLC supports proposed paragraph 60CC(2)(a) and the prominence it gives to the safety of children and their carers. However, it remains PCLC's view, that if family violence has been alleged, matters should be listed for contested hearing as soon as possible (to avoid delays between filing and hearing) on the issue of family violence alone.[6]

[6] Peninsula Community Legal Centre, Submission to Australian Law Reform Commission Review of the Family Law System (7 May 2018), pages 18-20; Peninsula Community Legal Centre, Response to

Although the Federal Circuit and Family Court of Australia already has the power to make early determinations about issues of fact under section 69ZR of the *Family Law Act 1975* (Cth), including whether violence has occurred, this power is not often exercised. PCLC considers that early fact finding hearings on family violence will help to ensure that the immediate and ongoing safety of children and their carers is prioritised, in accordance with the best interests of children.

Recommendation 5

Recommendation 14 from PCLC's Submission to the Australian Law Reform Commission, Review of the Family Law System (7 May 2018) - to amend the *Family Law Act* to require the court to make a determination in relation to allegations of family violence at an earlier stage in proceedings - should be implemented as a critical priority in the current suite of reforms to the Act.

PCLC also welcomes the recognition, in proposed paragraph 60CC(2)(a)(ii), that carers of children (or those seeking to care for children) are not always the child's parents. In PCLC's experience, consideration of a carer who is not the child's parents is particularly relevant where there have been child protection proceedings prior to the commencement of family law proceedings. Recognition of the changing shape of families in Australia will better support the safety of all carers of children.

PCLC agrees that proposed paragraph 60CC(2)(a) should be listed first as a reminder (especially to unrepresented parties) that the safety of children and their carers underpins all parenting proceedings. However, as a matter of legislative interpretation, this factor will not assume greater weight than the other factors simply because it is listed first. For this reason, PCLC considers that it should be expressly stated that where relevant, this factor is to be prioritised, similar to the primary considerations in existing section 60CC(2) (discussed under question 4 below).

Paragraph 60CC(2)(b): Any views expressed by the child

PCLC supports the simplified wording of paragraph 60CC(2)(b) which would enable the court to consider all factors relevant to establishing a child's views, the child's reasons for those views, and whether those views are influenced to any extent by either of the child's parents or other persons.

PCLC also supports the listing of this paragraph immediately after proposed paragraph 60CC(2)(a) to emphasise the importance of children's views in family law proceedings (noting again, that as a matter of legislative interpretation, this factor will not assume greater weight due to its listing).

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

PCLC supports the inclusion of proposed paragraph 60CC2(c) considering its relevance in most parenting proceedings. PCLC considers that the simple wording of the paragraph presumably permits a multidisciplinary, trauma-informed approach to determining what is in a child's best interests based on a broad range of social, emotional and psychological factors.

Australian Law Reform Commission Review of the Family Law System Discussion Paper (2 November 2018), pages 7-9.

The Consultation Paper states that a range of existing factors in section 60CC could be captured under proposed paragraph 60CC2(c), including:

- the likely effect of any changes in the child's circumstances (section 60CC(3)(d))
- the attitude to the responsibilities of parenthood (section 60CC(3)(i))
- the extent to which the parents have previously participated in major long-term decisions about the child (section 60CC(3)(c))
- the nature of the child's relationship with their parents or others (section 60CC(3)(b))
- the maturity, sex, lifestyle, culture and traditions of the child and/or parent (section 60CC(3)(g)).

Given that these factors are prominent in many parenting matters, PCLC is concerned that by not expressly referring to them, they may risk being forgotten. This is of particular concern considering that in many cases the safety of the child and their carer is in issue. For example, these factors may be particularly relevant in a parenting matter where there is a long history of family violence, an intervention order in place and the involvement of the 'spend time' parent has been sporadic due to substance abuse, high conflict between the parties and safety concerns. In such a case, the discrete consideration of 'the developmental, psychological and emotional needs of the child' may not adequately prompt a detailed consideration of the child's circumstances.

PCLC proposes the express inclusion of these factors as an explanatory note to paragraph 60CC2(c) to ensure that they inform a consistent and detailed approach to determining the development, psychological and emotional needs of a child, informed by existing case law on these factors.

Recommendation 6

Include an explanatory note to section 60CC2(c) explaining that the section may include consideration of the following existing factors as relevant to a particular case:

- the likely effect of any changes in the child's circumstances (section 60CC(3)(d))
- the attitude to the responsibilities of parenthood (section 60CC(3)(i))
- the extent to which the parents have previously participated in major long-term decisions about the child (section 60CC(3)(c))
- the nature of the child's relationship with their parents or others (section 60CC(3)(b))
- the maturity, sex, lifestyle, culture and traditions of the child and/or parent (section 60CC(3)(g)).

Paragraph 60CC(2)(d): The capacity of each proposed carer of the child to provide for the child's developmental, psychological and emotional needs, having regard to the carer's ability and willingness to seek support to assist with caring

PCLC supports the inclusion of proposed paragraph 60CC(2)(d) and its focus on capacity, which is a central consideration in most family law matters that PCLC conducts. PCLC considers that the broad drafting of this paragraph would allow for consideration of a range of factors in assessing capacity.

As with paragraph 60CC2(c) (discussed above), PCLC cautions against losing the guidance currently provided by the factors in existing sections 60CC(3)(b), (c), (f) and (i) in assessing capacity. As stated

in the Consultation Paper, proposed paragraph 60CC(2)(d) reflects these factors. However, PCLC considers it would be beneficial to expressly refer to the factors in an explanatory note to support a broad range of factors in assessing capacity in relation to a child's best interests.

PCLC also supports the inclusion of an assessment of a carer's ability and willingness to seek support to assist with caring, and in particular, the Australian Law Reform Commission's intention to address 'the perverse situation where a person who has experienced family violence is considered to have lower parenting capacity due to unresolved trauma from family violence'.[7]

Although the inclusion of a carer's ability and willingness to seek support is likely to benefit carers who require support, there may be unintended circumstances where a carer is unable or unwilling to seek support. For example, a culturally and linguistically diverse carer who is unable to seek support for cultural reasons or who is apprehensive about accessing community-based social services due to fear of community judgment or scorn. In these circumstances, it will be critical to ensure that a victim-survivor of family violence is not prejudiced in a parenting application, particularly where the same cultural constraints or expectations do not apply to the other party.

Recommendation 7

Include an explanatory note to proposed paragraph 60CC2(d) explaining that the section may include consideration of the existing factors in sections 60CC(3)(b), (c), (f) and (i).

Paragraph 60CC(2)(e): The benefit of being able to maintain relationships with each parent and other people who are significant to them, where it is safe to do so

PCLC supports the inclusion of proposed paragraph 60CC(2)(e) and welcomes the substitution of the existing words 'having a meaningful relationship' with the words 'maintain relationships'. PCLC's clients often express concern that they are required to encourage and facilitate a 'meaningful' relationship between a child and the other parent, where the relationship sought by the other parent is not safe for the child or our client and is unlikely to be in the child's best interests.

PCLC considers that the proposed paragraph encourages both a historical and prospective analysis of whether the relationships a child has had with their parents and others are likely to be safe and in the child's best interests, therefore allowing broad consideration of past and future relationships. This is welcome considering that our clients' family structures vary widely depending upon cultural traditions, socio-economic factors (including housing availability) and geographic location.

Q4: Do you have any comments on the simplified structure of the section, including the removal of the 'primary' and 'secondary' considerations?

Despite criticisms about the complexity of existing section 60CC, PCLC considers that the existing tiered structure including 'primary' and 'secondary' considerations prioritises (at least nominally) the

[7] Australian Law Reform Commission, Report 135, Family Law for the Future – An Inquiry into the Family Law System, March 2019, page 170 (paragraph 5.64).

protection of children from harm and from being subjected to or exposed to abuse, neglect or family violence (as is the case with the existing primary consideration in section 60CC(2)(b)).

PCLC considers that where relevant, similar priority should be given to a child's safety (as per proposed paragraph 60CC(2)(a)) in determining what is in a child's best interests (for example, priority should be given to a child's safety where allegations of family violence are made). PCLC considers that prioritising a child's safety is a critical precondition to a child's health and wellbeing more broadly and is fundamental to protecting them from future harm. This is particularly important given the high rates of family violence reported by PCLC's clients and nationally.

Recommendation 8

The amendments should expressly state that where relevant, proposed paragraph 60CC(2)(a) should be prioritised in determining what is in a child's best interests.

Repeal of the presumption of equal shared parental responsibility

PCLC welcomes the repeal of section 61DA and its associated provisions, signalling the return to the best interests of the child as the paramount consideration in making a parenting order (in accordance with section 60CA). PCLC considers that the proposed amendments will promote a culture of safety for children rather than a culture of 'equality' of shared parental responsibility and time. This is a welcome change for PCLC's clients, particularly those who report family violence.

PCLC acknowledges that the presumption of equal shared parental responsibility in section 61DA and the consideration of specific time arrangements in section 65DAA (**the Shared Care Amendments**) have been the subject of considerable critique. In its May 2018 Submission,[8] PCLC shared the concerns expressed by others in the legal services sector that the existing legislative pathway is not only needlessly complex and repetitive, but potentially increases parental conflict and the risk of family violence. This is because it requires parents to make decisions jointly, involving a degree of co-operation which is not possible in cases involving family violence. In the worst cases, it provides perpetrators with the means to continue to exert control over the carer parent.

Although the Shared Care Amendments have been operative since 2006, the operation of sections 61DA and 65DAA continue to give rise to significant and persistent community misconceptions that equal shared parental responsibility means equal time. In PCLC's experience, this can lead to clients making parenting arrangements on the basis of this misconception which are not safe. Considering the prevalence of family violence in parenting cases, this is unacceptable.

Although section 61DA states that the presumption of equal shared parental responsibility does not apply if there are reasonable grounds to believe that family violence has occurred, in practice, the issue is often not determined because most matters settle before that time. As stated under question 3 above, PCLC considers that if family violence has been alleged, matters should be listed for contested hearing as soon as possible on the issue of family violence alone. In the absence of an early contested hearing on the issue, matters often settle without priority being given to the safety

[8] Peninsula Community Legal Centre, Submission to Australian Law Reform Commission Review of the Family Law System (7 May 2018), pages 17-18.

of children and their carers. This means family violence issues have historically been 'lost in the wash' in the context of busy court negotiations, particularly for unrepresented clients.

Judges regularly acknowledge the artificiality of the obligation that the presumption of equal shared parental responsibility creates, being that parents must cooperate. In PCLC's experience, cooperation is often impossible, particularly for matters that are complex, involve family violence or where there is a high level of conflict between the parents. This is especially considering that by the time parties have issued proceedings, they are often highly polarised and unlikely to ever co-parent.

For these reasons, PCLC welcomes the repeal of the presumption of equal shared parental responsibility and notes the critical importance of early fact finding hearings on family violence to prioritise the safety of children and their carers as soon as possible.

Case study

Jane is a vulnerable client with two children aged 15 and 11. There is a history of family violence, characterised by coercive and controlling behaviours on the part of the father, Robert. There is a family violence intervention order in place protecting our client. The parties were married for 15 years and have been separated for four years. The two children aged 11 and 15 have lived with Jane since separation and she is solely responsible for their welfare and care. Jane instructs Robert makes no effort to assist with the parenting responsibilities such as attending school functions or parent teacher interviews or taking the children to medical appointments. Robert sees the children sporadically as per agreement between them, mainly on weekends.

The parties have been to Family Dispute Resolution to try to resolve parenting and property matters. There is a high level of conflict and Jane finds it extremely difficult communicating with Robert regarding children's issues.

Jane proposes that she has sole responsibility for making decisions regarding medical treatment and schooling, with an obligation to consult with Robert and consider his views prior to making any decisions. Robert is adamant in seeking equal shared parental responsibility.

Robert has a history of refusing to communicate with Jane regarding issues of parental responsibility. He regularly withholds consent to certain activities such as school excursions, to frustrate and exert control over Jane. She experiences this behaviour as controlling and manipulative, and it causes her a great deal of distress. This behaviour also negatively impacts the children as our client is unable to make plans with certainty because she cannot be confident Robert will respond to requests for consent.

Jane is adamant she will not agree to Robert's request for equal shared parental responsibility because she believes that Robert will rely upon that to control Jane's parenting where he can.

The proposed amendments that remove the presumption of equal shared parental responsibility would encourage settlement in a case such as this because Robert would not assume that despite the reality of his limited involvement in the children's daily lives and routines, his consent must be obtained for certain matters. Instead, both parties would have parental responsibility which they

could exercise jointly or separately, unless varied by court order. The proposed repeal of section 61DA may therefore have the positive effect of removing a source of conflict.

Of course, the repeal of section 61DA will not assist where the consent of both parties is legally required as for example, with a passport application.

Q6: If you are a legal practitioner, family dispute resolution practitioner, family counsellor of 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?

Yes. It will no longer be necessary to detail the current complex legislative pathway, but to simply advise clients that parenting arrangements will be decided in accordance with the child's best interests in accordance with the simplified factors in proposed paragraph 60CC.

It will also be necessary to advise clients that it is still possible to seek orders for equal shared parental responsibility (in accordance with section 65D) but that instead of a presumption to that effect, the issue will be determined in the child's best interests (under section 60CC). This will come as a relief to our clients, who often query how anything can be presumed when it comes to parenting, especially with the complex issues typically encountered in family law matters.

With the removal of the presumption of equal shared parental responsibility, parents will each retain parental responsibility in the absence of an order to the contrary. As a result, parents will no longer be obligated to consult each other in relation to major long-term issues (as currently required by section 65DAC(3)). PCLC welcomes the important cultural shift that will result from parents no longer being obligated to consult with each other (particularly where family violence is present) but notes the limited risk that the removal of the requirement to consult may be manipulated by a parent seeking to undermine the other parent.

For example, a parent could repeatedly take a child to a mental health professional to attempt to create the case that the child has psychological issues in the care of the other parent. This may result in the other parent initiating Family Dispute Resolution or legal proceedings. On the other hand, in the absence of an order to the contrary, a parent who fails to accept a paediatric diagnosis, may legitimately refuse to take the child to an appointment during their time with the child. Both of these scenarios are clearly contrary to a child's best interests. However, PCLC notes that these scenarios can nonetheless currently arise despite the existing mandate for parents to consult.

PCLC has consistently queried the practical benefit of the presumption of equal shared parental responsibility for parents faced with an impasse on major long-term issues and explain to our clients that although the law presumes equal shared parental responsibility, it is not legally enforceable until ordered by a court. Even where equal shared parental responsibility orders are made, in PCLC's experience, clients are rarely prepared to commence contravention or enforcement proceedings for breaches of an equal shared parental responsibility order alone.

Q7: 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 significant consequences and/or significantly affect your work?

PCLC supports the repeal of section 65DAA (which currently requires courts to consider making an order that the child spend equal time, or substantial and significant time with the parents, unless it is contrary to the child's best interests or impracticable) and the related amendments to section 63DA (which currently requires advisers to advise parents to consider the possibility of the child spending equal time with each parent or, if that is not reasonably practicable, substantial or significant time).

Considering that 75% of PCLC's Family Law Program clients report family violence and ongoing trauma related to family violence, PCLC welcomes the removal of the obligation to advise parents to consider the possibility of the child spending equal time or substantial or significant time with each parent. PCLC notes that this obligation, when observed by advisers, had the potential to retraumatise clients and to undermine their confidence that the family law system could be navigated in a way that protected the safety of their children and themselves.

As stated, the current legislative pathway is complex, repetitive and detracts from a focus on the child's best interests as the paramount consideration in making a parenting order. The proposed amendments will reprioritise the best interests and safety of children, make it easier for PCLC's legal practitioners to explain the law to our clients, and address the persistent misconception that equal shared parental responsibility means equal time.

PCLC also notes that proposed paragraph 60CC appears to be drafted sufficiently broadly to facilitate consideration of the factors in existing section 65DAA(5) in determining whether a party's proposal for equal time or substantial and significant time is reasonably practicable. This includes consideration of how far apart the parents live from each other, the parents' capacity to implement and resolve difficulties related to shared time arrangements, and the impact on the child.

Q8: 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 made jointly, including the requirement to consult the other person on the issue) need to be retained?

Where a parenting order is made that provides for shared parental responsibility, including making a decision about a major long-term issue, section 65DAC states that the order is taken to require:

- the decision to be made jointly by the parents (subsection 2); and
- the parents to consult each other in relation to the decision and to make a genuine effort to come to a joint decision (subsection 3).

However, as noted earlier, consultation between the parents is not always possible or safe, including where family violence is present or there is significant conflict. While there may be circumstances where an order for joint decision-making and consultation may be appropriate, in many cases it will

not be. For this reason, PCLC considers that the court should have discretion about whether a particular decision is required to be made jointly and if so, how the parents are required to consult each other and make a genuine effort to come to a joint decision about the issue.

Recommendation 9

Section 65DAC should be amended so that where a parenting order is made that provides for shared parental responsibility, the court has discretion about how a decision is required to be made jointly, and if so, how the parents are required to consult each other and make a genuine effort to come to a joint decision about the issue. The amended provision should also explicitly refer to circumstances where family violence is present.

Reconsideration of final parenting orders

Q9: Does proposed section 65DAAA accurately reflect the common law rule in Rice v. Asplund? If not, what are your suggestions for more accurately capturing the rule?

PCLC supports the codification of the common law rule in *Rice v Asplund* and considers that proposed paragraph 65DAAA accurately reflects the common law. The proposed amendments recognise that courts have broad discretion when considering the substance of these applications.

Procedurally, while there are circumstances where an application may be dismissed summarily (usually at an early contested interim hearing), there are cases where the court must proceed to a final hearing where it cannot summarily determine whether there has been a change of circumstances or not. This can be vexing for PCLC's clients, who may potentially have to face fresh and prolonged proceedings initiated by a perpetrator for a harmful purpose or for reasons counter to the overarching purpose of the Family Law Act. For this reason, PCLC supports the enactment of the proposed harmful proceedings provisions and the broadening of the overarching purpose of 'family law practice and procedure' in proposed paragraph 95 (discussed under question 28 below).

PCLC also considers that it would be beneficial to provide guidance to courts to promote the hearing of *Rice v Asplund* applications as expeditiously as possible, and to include practical guidance for parties on the application of proposed paragraph 65DAAA in the annexure sheet for a final parenting order. This would help to promote a clear understanding of when a final parenting order can be reconsidered and may prevent the time and cost of carers making unnecessary *Rice v Asplund* applications that are unlikely to meet the legislative requirements of proposed paragraph 65DAAA.

Recommendation 10

The Australian Government should develop guidance for courts to promote the hearing of *Rice v Asplund* applications as expeditiously as possible.

Recommendation 11

Practical guidance on the application of proposed paragraph 65DAAA should be included in the annexure sheet for a final parenting order.

Q10: 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 case law?

PCLC supports the list of considerations in proposed paragraph 65DAAA(2) that courts may consider in determining whether it would be in a child's best interests to reconsider final parenting orders.

Harmful proceedings orders

Q27: Would the introduction of harmful proceedings orders address the need highlighted by Marsden & Winch and by the ALRC?

Based on its client experience, PCLC supports the introduction of harmful proceedings orders to address the gap identified in the courts' existing vexatious proceedings and summary dismissal powers to scrutinise the institution of further proceedings.

PCLC welcomes the breadth of proceedings referred to in paragraph 102QAC(3)(b) which the court may have regard to in determining whether to make a harmful proceedings order under proposed paragraph 102QAC. However, PCLC queries whether this power should also be extended to administrative proceedings, where other attempted systems abuse may have occurred. For example, in PCLC's experience, a parent can make repeated notifications to the Department of Families, Fairness and Housing to intentionally harm the other parent.

Recommendation 12

The Australian Government should consider broadening proposed paragraph 102QAC(3)(b) to include administrative proceedings that are relevant to parenting matters.

Q28: Do the proposed harmful proceedings orders, as drafted, appropriately balance procedural fairness considerations?

In practice, the introduction of harmful proceedings orders would mean that any further applications by a party who is subject to such an order would be scrutinised by the court to ensure it has merit and is not otherwise frivolous, vexatious or an abuse of power (proposed paragraph 102QAG).

PCLC agrees with the Australian Law Reform Commission's observations about the important 'filtering function' of a court to balance procedural fairness considerations:

> *Case law confirms that powers to deprive people of access to courts are to be used sparingly. However, the effect of an order under the proposed powers would not be to deny a person access to the court to have legitimate claims heard. Rather, it would effectively introduce a court-supervised 'filter' on the applications made by that person; limiting the applications received by the*

respondent to those which the court is satisfied meet the threshold requirements for leave to serve.[9]

PCLC considers that the introduction of harmful proceedings orders will enable a court to effectively filter applications that are frivolous, vexatious or an abuse of power, and is consistent with the overarching purpose of family law practice and procedure in proposed paragraph 95 (in particular, the objective for the just determination of family law proceedings in paragraph 95(a)). This is particularly given that proposed paragraph 102QAC(5) will promote procedural fairness by ensuring that a court must not make a harmful proceedings order in relation to a person without hearing them or giving them an opportunity to be heard.

Q29: Do you have any feedback on the tests to be applied by the court in considering whether to make a harmful proceedings order, or grant leave for the affected party to institute further proceedings?

In general, PCLC supports the legal tests in proposed paragraph 102QAC (for making a harmful proceedings order) and proposed paragraph 102QAG (for granting leave for the affected party to institute further proceedings). PCLC notes, however, that the proposed amendments will not prevent a meritorious application from proceeding, even when the proceedings may be harmful – for example, where the applicant has previously filed and served repetitive proceedings.

While PCLC understands the policy intention to avoid constraining an applicant from filing new applications, PCLC considers that it is critical to balance procedural fairness for both parties by ensuring that the respondent to an application for leave to institute proceedings (under proposed paragraph 102QAG) can elect to appear in the matter (discussed under question 30 below). This approach could help to mitigate the harm of a meritorious application proceeding by empowering the respondent with the choice to participate in the proceedings and to manage any safety risks arising from it.

Q30: 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?

PCLC notes that once a harmful proceedings order is in place, proposed paragraph 102QAE provides for the affected party to make an application for leave to institute proceedings ex parte, without serving documents on the respondent. PCLC understands that the policy objective is to minimise the risk of further harm to the respondent by exposing them to unnecessary proceedings.[10] However, PCLC considers that the respondent should be able to elect whether they wish to appear or not and have the choice to apply for the application to be summarily dismissed.

[9] Australian Law Reform Commission, Report 135, Family Law for the Future – An Inquiry into the Family Law System, March 2019, page 310.
[10] Australian Government, Consultation Paper, Exposure Draft – Family Law Amendment Bill 2023 (January 2023), page 32.

In PCLC's view, empowering a respondent to appear in the proceedings if they elect to do so would balance the procedural right of both parties to be heard on the issue, while protecting the respondent from further harm should they choose not to appear in the matter. PCLC also recommends that a further family violence and safety risk assessment should occur whether leave is granted or not, considering that safety risks could arise in either case.

PCLC notes that choice is central to empowering a respondent in relation to their own affairs, particularly where the court has made a harmful proceedings order recognising that the other party and any children (if relevant) would suffer harm if the first party instituted further proceedings against them. This is particularly important in circumstances where family violence is present.

Case study

PCLC assisted Pritika, the mother in a parenting matter for several months. She is a culturally and linguistically diverse client with three young children and no family support in Australia. Pritika is the victim of physical, emotional and financial abuse and there is an intervention order in place protecting her and the children. The father has also been physically abusive to their young son.

Pritika consulted PCLC to obtain a family property settlement and negotiations with the father have been arduous. The father has not seen the children since their separation in 2021 and Pritika's communications with him to date have been primarily concerned with property matters. Pritika instructed the father had minimal interest in the children when they lived together and viewed them as her responsibility.

The father recently filed an Application in the Federal Circuit and Family Court of Australia for parenting Orders. Pritika is of the view that he is trying to use these proceedings to bully her with respect to the property matters.

To date, the father has not complied with several orders of the Court. Interim orders provide that the father is on notice that if he fails to comply with these Orders, the Court will consider hearing the matter on an undefended basis, or summarily dismiss his application.

In the event these Orders are made, it may be of assistance to Pritika for a harmful proceedings order to be made. On the proposed amendments in paragraph 102QAD, such an order would require the father to seek leave to issue further proceedings and may assist any application Pritika might make in the future to have proceedings commenced by the father summarily dismissed.

In this instance, the basis of Pritika's argument would be that the father is only instituting court proceedings to cause Pritika harm, as evidenced to date by his lack of engagement in the court process once the proceedings have been issued. However, if the father's application has merit and is not frivolous, vexatious or an abuse of process, the application is likely to stand (under proposed paragraph 102QAG) despite any potential harm to Pritika and her children.

For this reason, PCLC considers that Pritika should have the choice to elect whether she wants to appear in the father's application for leave to issue further proceedings, empowering her to participate in the proceedings if elected and potentially prevent further harm if the father's application is subsequently summarily dismissed.

Recommendation 13

Proposed paragraph 102QAE should be amended to enable the respondent to an application for leave to institute further proceedings to elect to appear in the matter.

Recommendation 14

The court should be required to undertake further family violence and safety risk assessment to mitigate any safety risks associated with the making of a harmful proceedings order under proposed paragraph 102QAC or after the determination of an application for leave under proposed paragraph 102QAE (regardless of whether leave is granted or not).

Protecting sensitive information

Q 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?

PCLC assists many vulnerable and disadvantaged clients where ongoing family violence is a persistent feature and therapeutic reports (mostly psychiatric, counselling or psychological) are key to parenting capacity which is invariably a key issue in dispute. As a result, the production of therapeutic records is often sought in circumstances where their admission may be:

- traumatic or harmful to the client or their children;
- sought for reasons inconsistent with the conduct of the proceedings (and may even be used as an attempt to perpetrate further abuse); or
- where the material may be of limited probative value anyway.

For this reason, PCLC welcomes proposed paragraph 99, which recognises the potential harm to victim-survivors and their therapeutic relationships when evidence of their protected confidences (which often do not contemplate legal proceedings) is unnecessarily admitted into evidence. The introduction of an express power for courts to exclude evidence of protected confidences has the potential to protect affected parties and their children from additional and unnecessary harm and to prevent a party from seeking the production of therapeutic records as a 'fishing expedition'.

PCLC also supports the presumption that disclosure of a protected confidence will have a harmful impact, by placing the onus on the party issuing the subpoena to prove otherwise (as explained in the Consultation Paper).[11] PCLC agrees that this will better support unrepresented litigants as each time evidence of a protected confidence is raised, it will automatically be subject to court scrutiny without relying on the affected party raising an objection.[12]

However, PCLC considers that it may be useful to explicitly clarify in the legislative amendments that where a party issues a subpoena for a protected disclosure, the protected disclosure should only be

[11] Australian Government, Consultation Paper, Exposure Draft – Family Law Amendment Bill 2023 (January 2023), page 35.
[12] Ibid.

produced to the court and cannot be inspected by any person until the court has determined whether or not to grant leave to admit the protected disclosure as evidence under proposed paragraphs 99(5-7). This will mitigate the risk of a protected disclosure being inspected by the party issuing the subpoena or their lawyer prior to proper court scrutiny and potentially being used for a harmful purpose, therefore undermining the intent of proposed paragraph 99.

PCLC notes that it is also unclear how the operation of proposed paragraph 99 would interact with existing rules pertaining to the production of evidence of protected confidences, objections to that production and inspection of those documents.

Finally, PCLC notes that protected confidences may also contain the views of children and the disclosure of those views may be contrary to their best interests. PCLC suggests that if records of therapeutic interventions for children are sought, that such records be viewed only by the judge. This approach would be consistent with proposed paragraph 99(5), which PCLC endorses, and which requires the court to regard the best interests of the child as the paramount consideration in in deciding whether to grant leave to admit evidence.

Case study

Maria was referred to PCLC by police who were concerned that she had been misidentified as the perpetrator of family violence following an application for a family violence intervention order (FVIO) by her husband, Michael, who was supported by Department of Families Fairness and Housing.

Maria and Michael have three children who were included in the interim FVIO against Maria. The children all have special needs and the mother is neurodivergent. Michael used the FVIO to withhold the children from Maria during the subsequent protracted family law proceedings, which further impacted Maria's distress and neurodivergent presentation.

Maria was supported by many organisations, including the Salvation Army, a specialist family violence practitioner and advocate, as well as police officers from the specialist Family Violence unit affiliated with the Magistrates' Court, which indicated the extent of the complexities in this matter.

During the family law proceedings, Michael subpoenaed all of Maria's medical records from several institutions, which included records from when she was a child and records of voluntary and involuntary admissions for short periods to psychiatric care following her desperate attempts to see her children. PCLC objected to Michael's subpoenas on the basis that most of the records were not relevant to the proceedings, that this was a fishing exercise and that the subpoenas were being used to further traumatise Maria.

The court did not accept this argument and ordered the production of the subpoenaed records. Further orders were made requiring Maria to engage in therapeutic treatment with an external psychiatrist.

Had these records been the subject of the proposed protected confidences legislation, the onus would have been on Michael to prove that the material would not have a harmful impact on Maria or their children. Without the protected confidences legislation in place at the time, the harm to

Maria became very obvious as the proceedings progressed and placed her at a significant disadvantage.

Recommendation 15

Proposed paragraph 99 should explicitly state that where a party issues a subpoena for a protected disclosure, the protected disclosure should only be produced to the court and cannot be inspected by any person until the court has determined whether or not to grant leave to admit the protected disclosure as evidence under proposed paragraph 99(5-7).

Recommendation 16

To protect the best interests of children under proposed paragraph 99(5), where a protected confidence that relates to therapeutic interventions for a child is sought, the protected confidence should only be viewed by the judge.

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

PCLC notes that the definition of a protected confidence in proposed paragraph 99(2)(a) is unlikely to extend to communications between a client and a specialist family violence support service because such services fall outside the definition of a 'health service' as defined in section 6FB of the *Privacy Act 1988* (Cth).

In PCLC's view, such records should also be included in the definition of a protected confidence because they may be subpoenaed by a perpetrator as a means of perpetrating further abuse - especially when perpetrators realise that the act of subpoenaing such records can detrimentally affect the client's preparedness to disclose confidential information, and therefore compromise the ongoing professional relationship between the victim-survivor and the support service.

PCLC otherwise supports the definition of a 'protected confidence' in proposed paragraph 99(2).

Recommendation 17

Proposed paragraph 99(2)(a) should be broadened to include support services provided by a specialist family violence service.

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

Whilst PCLC endorses the list of considerations in paragraph 99(7), it notes that the court is unlikely to be able to assess the probative value and importance of the evidence that may be obtained under the subpoena, nor the likelihood and extent of harm, unless it is first viewed by the court.

PCLC also considers that the court should be able to take account of any other fact or circumstance the court considers relevant in deciding whether to grant leave under paragraph 99(7). This will enable the broad consideration of all factors that are relevant to the circumstances and help to mitigate the risk of harm where leave may otherwise be granted.

Recommendation 18

Proposed paragraph 99(7) should be broadened to allow the court to also have regard to 'any other relevant matters'.

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

Yes. PCLC considers that it is critical that family violence victim-survivors are able to control the dissemination of otherwise confidential information, particularly where it may support their recovery from family violence related trauma, assist in the prosecution of their family law proceeding and avoid them having to re-tell their stories.

However, PCLC notes the importance of preventing the risk of further trauma to the victim-survivor by placing restrictions on the perpetrator's access to that information (for example, a court order restricting access to the information to the perpetrator's lawyer).