

Women Lawyers Association of New South Wales
Response to the Exposure Draft Family Law Amendment Bill – 2023
2 March 2023

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About us

1. The Women Lawyers Association of New South Wales (WLANSW) is the peak professional body representing women lawyers in New South Wales. Our commitment is to promote and protect the interests of women in the legal profession. WLANSW has been improving the status and working conditions of women lawyers since 1952.
2. Our patron is the Honourable Virginia Bell AC. Our members include individuals and corporate members throughout New South Wales who are solicitors, barristers, judicial officers, academics, government and corporate counsel, non-practising lawyers, and law students.
3. WLANSW provides a network for social interaction and continuing education and reform within the legal profession and broader community.

Preamble

4. As at June 2022, 14.2% of Australian families were one parent families with 79.9% of those parents being single mothers.¹ Of all one parent families with children and dependants, 51.5% had a youngest dependant aged zero - nine years.² One parent families, where the parent was employed and had dependants, represented 68.7% of all one parent families with dependants. Of these families, 81.1% had an employed mother while 18.9% had an employed father.³

Intersectionality between Gender pay gap, Legal Aid NSW funding & the constitution of the profession

5. The most recent data published by the Workplace Gender Equality Agency shows that for the year preceding 31 March 2022, the national gender pay gap was 22.8%. Women, on average, were earning \$26,596 less than men each year.⁴
6. Women continue to work in female dominated industries, the highest representation being within the Health Care and Social Assistance industry which in 2018, showed women making up 77.2% of that industry.⁵

¹ Australian Bureau of Statistics, <<https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-status-families/latest-release#one-parent-families>> .

² Ibid.

³ Ibid.

⁴ Workplace Gender Equality Agency, 'WGEA Scorecard 2022: the state of gender equality in Australia': <<https://www.wgea.gov.au/publications/australias-gender-equality-scorecard>>

⁵ Workplace Gender Equality Agency, Gender segregation in Australia's workforce: <<https://www.wgea.gov.au/publications/gender-segregation-in-australias-workforce>>

7. Legal Aid NSW provides funding grants for some family law matters, provided that stringent criteria are satisfied, however the grants are very limited (even if someone is eligible to receive a grant).
8. Women lawyers now account for 48% of solicitors in private practice.⁶
9. Analysis of the legal profession in New South Wales demonstrates that only 17% of practitioners practised in family law as a main practice area in 2010/2011. In 2021/2022 this was reported as comprising only 13% – representing a 4% loss of practitioners mainly practising in family law. This places strain on the lawyers remaining in that practice area.⁷ Women barristers represent 24.64% of the Bar; however, they are appearing in family law matters at twice the rate of their male counterparts.⁸
10. Family lawyers practise in the regions, suburbs and major cities in NSW.⁹
11. In June 2022, women solicitors made up 49% of private practice and 68% of government solicitors.¹⁰ The College of Law reported that predominantly women were seeking to expand their practice area knowledge into family law.¹¹ During the time women have been practising law, it has been an anecdotal theme that family law matters were provided to women as it was considered to be work ‘more suited’ to women.
12. In June 2022, the Law Society of New South Wales’ Annual Profile of solicitors showed that women were paid less than their male counterparts at every age.¹²
13. The relevance of the above seeks to demonstrate the intersectionality between the overwhelming number of women as sole parents; those women also suffering from gender wage gaps which limit their access to discretionary income that can be spent on legal representation; women lawyers practising family law and also suffering from gender pay gaps as compared to their male colleagues in the legal profession. Coupled with the current Legal Aid NSW funding model, it makes it difficult to ensure that practitioners and or their staff are remunerated appropriately for their time. The time spent on these matters usually far outweighs the grants and this contributes to a distorted concept of productivity under key performance indicators with respect to

⁶ Law Society of New South Wales, Gender Statistics: <<https://www.lawsociety.com.au/advocacy-and-resources/advancement-of-women/gender-statistics>>

⁷ Urbis: Law Society of NSW, 2021 Annual Profile of Solicitors NSW <<https://www.lawsociety.com.au/sites/default/files/2022-06/2021%20Annual%20Profile%20of%20Solicitors%20in%20NSW.pdf>>, pg 39-40

⁸ While male barristers appear to be in the majority of advocates practising in family law, reportedly being 144 of the total 1820 male barristers; when you compare that with 89 of the total 596 barristers, it represents 7.9% of male barristers practising family law versus 14.9% of female barristers being briefed.

⁹ Above n 7, pg 41

¹⁰ Above n 7, pg 23, 35.

¹¹ College of Law, The State of the Gender Equity in the Australian Legal Profession: <<https://www.collaw.edu.au/news/2022/11/16/gender-inequality-in-legal-profession>>

¹² Sarah Grace, Australia: Gender pay gap: Female lawyers earn less at every age, Mondaq, July 2022 <<https://www.mondaq.com/australia/recruiting/1209774/gender-pay-gap-female-lawyers-earn-less-at-every-age#>>.

budgeting. All factors combine to create a difficult landscape to practise family law in and that is reflected by the shrinking number of practitioners practising Family law in New South Wales.

Introduction

14. WLANSW welcomes the reforms to the *Family Law Act 1975 (Cth)* (**'the Act'**) proposed in the Exposure Draft – Family Law Amendment Bill 2023 (**Exposure Draft**) as they will be an important contribution to the cultural change essential to place the safety of children at the centre of the family law system, as well as in the broader community.¹³
15. WLANSW dedicates this submission to the late Olga Edwards, solicitor. In July 2018, Ms Edwards walked into her home, after finishing work, to discover the bodies of her 15-year-old son, Jack, and her 13-year-old daughter, Jennifer. The deaths of her children were the subject of a coronial inquest which found both children died from being shot with a firearm discharged by their father.¹⁴ The man she had tried to protect them from. Ms Edwards took her own life in December 2018. It was noted in the concluding remarks of the Coroner, that despite multiple complaints to agencies, entities, professionals within the police and within the family law system, none were able to effectively mobile to protect the victims.¹⁵
16. This submission is limited to and focussed on protecting adults and children from family, domestic and sexual violence.

Putting children first

17. The proposed changes recognise that, for most children, it is in their best interests to have a meaningful relationship with both parents after separation.
18. However, in the Federal Circuit and Family Court of Australia, 54% of cases involve allegations of physical violence and 85% allege emotional abuse.¹⁶ In 2015, the Australian Institute of Family Studies reported that family violence is a common experience among separated parents.¹⁷

¹³ "The deaths of Sydney lawyer Olga Edwards and her two teenage children could have been prevented", says NSW Law Society President Elizabeth Espinosa, Opening of Law Term, 30 January 2019.

¹⁴ Inquest into the deaths of John, Jack and Jennifer Edwards, 7 April 2021:

<https://coroners.nsw.gov.au/coroners-court/download.html/documents/findings/2021/Inquest_into_the_deaths_of_John_Jack_and_Jennifer_Edwards_-_findings_of_State_Coroner_dated_7_April_2021.pdf>, pg 2-3.

¹⁵ Ibid, at [1142].

¹⁶ Rae Kaspiew, 'Separated Parents and the family law system: What does the evidence say?' Australian Institute of Family Studies, 2016.

¹⁷ Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences', Australian Institute of Family Studies, 2015.

19. A leading child safety campaigner, Hetty Johnston, founder of Bravehearts,¹⁸ in 2018 declared *‘the family law system is the most dangerous institution for children Australia has ever seen’*.¹⁹
20. In 1975 the Act was enacted and the governing principle in parenting applications was that parenting orders should be made with the child’s best interests at the core. Over time, however, the Australian Law Reform Commission noted the focus on litigation has shifted away from a child-focussed approach.²⁰
21. There is substantial evidence of community misconception about the law - that is, that parenting arrangements after separation are based on a parent’s entitlement to equal time, rather than an assessment of what arrangements serve the child’s best interests.²¹ This misunderstanding may lead parents to agree to unsafe and unfair arrangements, or encourage parties to prolong litigation based on the incorrect expectation of equal time.²²
22. The WLANSW agrees that the proposed changes will help to ensure out-of-court settlements place the best interests of the child at the forefront, and that decisions about parenting arrangements are not influenced by misunderstandings about parental rights and responsibilities.²³
23. The 2009 review by the Australian Institute of Family Studies of the 2006 amendments found *“that the complexity of the new provisions, together with the presumption of equal shared parental responsibility have to some extent diverted attention from the primacy of the best interests of the child, particularly in negotiations over parenting arrangements.”*²⁴
24. Former Family Court Judge Richard Chisolm in his 2009 landmark report, *‘Family Courts Violence Review’* found that the 2006 reforms had led to a ‘victims dilemma’ when seeking protective parenting orders:

“the victim seeking protective parenting orders that will protect the children from risk (such as orders for no contact or for only supervised contact) and spelling out the reasons for the fear of risk, may be seen as vindictive or punitive, dwelling on the past and old grievances, or as a way of alienating the children from the perpetrator. The victim might therefore be rightly concerned that if the court does not accept his or her evidence, or if it considers that the protective orders are not warranted, it might take an adverse view of the victim, and not only fail to make the orders sought by the victim, but make orders placing the children with the perpetrator for longer periods, to protect them from what it might see as

¹⁸ Bravehearts is a preeminent Australian child protection organisation dedicated to the prevention and treatment of child sexual abuse.

¹⁹ See Hetty Johnston, Universal Children’s Day, Brisbane Library, 20 November 2018.

²⁰ Exposure Draft - Family Law Amendment Bill 2023, Consultation paper, January 2023: <https://consultations.ag.gov.au/families-and-marriage/family-law-amendment-bill/user_uploads/family-law-amendment-bill-2023-consultation-paper.pdf>, pg 4.

²¹ See ALRC (Australian Law Reform Commission), *Family Law for the Future – An Inquiry into the Family Law System* (2019), para 5.80.

²² Above n 20, pg 5.

²³ Above n 20 pg 5.

²⁴ See *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies.

*a style of parenting by the victim that would harm the children by alienating them from the other parent. Such an outcome, the victim would believe, would place the children at additional risk of harm.”*²⁵

25. The proposed changes will operate to make the family law system safer for separating families and their children as relevant expertise and real understanding of the complexities presented in families subjected to family violence will be more consistent across Australia’s family law system.

Reduce Court time and legal cost

26. The current framework is complex and confusing consequently contributing to unnecessary use of Court time and resources, and to excessive legal costs. The 2009 review by the Australian Institute of Family Studies of the 2006 amendments found that the 2006 provisions were, “*seen by lawyers and judicial officers to be complex and cumbersome to apply in advice-giving and decision-making practice*”.²⁶

Increase access to justice

27. In addition, simplification is a welcome measure as it will make the family law system more accessible, particularly for already marginalised victim survivors from Indigenous, migrant and refugee, disabilities and LGBTQIA+ communities.

²⁵ See *Family Courts Violence Review*, Judge Richard Chisholm, 27 November 2009.

²⁶ See *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, 2009

Schedule 1: Amendments to the framework for making parenting orders

1.1 Proposed Measure: Objects and Principles

Responses to consultation questions: for ease of reference we have repeated the consultation questions we seek to address here:

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

28. WLANSW supports the proposed redraft of section 60B of the Act.

29. WLANSW is of the view a shortened objects clause will eliminate the possibility of confusion and focus the objectives of decision makers and those involved in the Court system on the best interests of the Child and the United Nations Convention on the Rights of the Child.

1.2 Proposed Measure: Simplification of the best interests of the child

Responses to consultation questions: for ease of reference we have repeated the consultation questions we seek to address here:

Questions:

- Do you have any feedback on the wording of the factors, including whether any particular wording could have adverse or unintended consequence?
- Do you have any comments on the simplified structure of the section, including the removal of the 'primary considerations' and 'additional considerations'?
- Do you have any other feedback or comments on the proposed redraft of section 60CC?

30. Currently, when the Court is asked to consider making parenting orders, it must consider two primary and 13 additional factors. The Court must also be guided by four objects and five principles, a presumption relating to equal shared parental responsibility, specific considerations, and any other factor the Court thinks is relevant.

31. The current complex and confusing framework is contrary to the proposed Objects and Principles.

32. WLANSW welcomes the proposed draft's streamlined legal framework for decision making and the simplification of the best interests of the child factors in determining parenting arrangements.

33. This will promote the aims of being more responsive to family violence, abuse, and neglect as well as to make, what we consider, an overly complicated and confusing family law system more straightforward.

34. This will also contribute to bringing to an end any of the misconceptions that a parent has an entitlement to certain parenting arrangements.

35. We welcome the explicit consideration of the safety of children and adults in the best interests of the child factors at proposed section 60CC(2)(a). However, we are concerned that the considerations are not hierarchical. We support the single list of general considerations but seek the prioritisation of the safety of children and adult victim survivors in the determination of what parenting arrangements best promote the safety of the children and the children's carers.
36. WLANSW supports a separate provision about the rights of the child to enjoy Aboriginal and Torres Strait Islander culture to ensure this issue is given the necessary consideration.

1.3 Proposed Measure: Removal of the presumption of equal shared parental responsibility and requirement to consider particular forms of parenting arrangements.

37. The Law Council of Australia has raised concerns that the *“legislative pathway’ currently mandated under the Act results in the family courts needing to undertake a significant number of steps before reaching a consideration of the subject child’s best interests. It is best interests that ought to be the primary focus of any dispute under the Act and the route to determining them should be direct, rather than one that is convoluted, misunderstood by the public, and based upon a rebuttable presumption.”*²⁷
38. WLANSW supports these proposed measures because it means that the Act will prioritise the safety of victim survivors - both children and adult - in the family law system. The removal of the presumption of equal shared parental responsibility and the requirement to consider particular forms of time – equal time or substantial and significant time – provides a more child-focussed approach.
39. It is essential to determine parental responsibility and time arrangements on a case-by-case basis within the framework of applying the best interests of the child factors and where the child's safety is paramount. These reforms mean that there is no presumption of a particular parenting outcome and the Court will be able to focus on assessing the best interests of the child in each case using the best interests factors listed in proposed section 60CC(2) which include the child's safety as well as the benefit of the child having a relationship with both of the child's parents.
40. Under the present Act, the presumption of equal shared parental responsibility – and its associated provisions - has detracted from a focus on what is in the child's best interests and has been utilised to exacerbate conflict. We consider that the provisions have operated to aid systems abuse to create a well-entrenched misunderstanding that:
- A) an equal time arrangement is the Court's default position; and
 - B) both parents are entitled to equal time- or near equal time - regardless of family violence.

²⁷ See *Review of the Family Law System*, submission 43.

41. Anecdotally, the presumption of equal shared parental responsibility – and its associated provisions - has contributed to ongoing family violence. Victim survivors with well-founded fears for the safety of the children have reported that they have stayed in abusive, dangerous relationships to avoid the risk of the children being alone in the abuser's care.
42. In addition, victim survivors of family violence routinely accept consent orders for equal shared parental responsibility with a violent parent and are then exposed to family violence because of the shared decision-making obligations.
43. Anecdotally, family law practitioners regularly see the Court make orders for parents to share parental responsibility despite the inability of the parents to communicate about those decisions, which can often be because of a controlling and abusive parent dominating the decision-making process through a power imbalance which exists between the parents.

1.4 Proposed Measure: A child's right to express views

44. Children and young people's right to thrive to the maximum extent possible is fundamental to the United Nations Convention on the Rights of the Child.²⁸ Children and young people have a right to be free from all forms of violence and abuse. Article 6 of the United Nations Convention on the Rights of the Child requires '[p]arties ensure *to the maximum extent possible the survival and development of the child.*'
45. The right of children and young people to participate in decisions that affect them is fundamental to the United Nations Convention on the Rights of the Child.
46. WLANSW welcomes the proposed omission of the word 'relevant' in the factor relating to 'any relevant views expressed by the child'. This proposed amendment will help ensure children and young people can more effectively participate and express their views in family law processes, when they choose to do so.

1.5 Proposed Measure: Codification of *Rice & Asplund*

Responses to consultation questions: for ease of reference we have repeated the consultation questions here:

Questions:

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

47. WLANSW accepts the proposed section 65DAAA is an accurate codification of *Rice & Asplund*; we do not propose any amendments to the wording of the proposed codification.
48. Continually we support the proposed amendment to codify *Rice & Asplund*; thereby making this common law rule clear, including the provision of a list that the Court may

²⁸ United Nations Convention of the Rights of the Child, 1989

have regard to in weighing up whether it is in the child's best interests to reconsider a final parenting order.

Schedule 2: Enforcement of child-related orders

Responses to consultation questions: for ease of reference we have repeated the consultation questions we seek to address here:

Questions:

- Do you think the proposed changes make Division 13A easier to understand?
- Do you have any feedback on the objects of Division 13A? Do they capture your understanding of the goals of the enforcement regime?
- Do you have any feedback on the proposed cost order provisions in 70NBE?
- Do you have any other feedback or comments on the amendments in Schedule 2?

49. WLANSW supports the simplification of the legislation, however there are some sections in the redraft of Division 13A that are confusing.

50. For an enforcement regime to be consistent with the overarching objects of the Act and the best interests of the child, costs issues would be appropriately dealt with by removal of the separate costs provisions in this division and allowing the existing section 117 of the Act to govern the issue of costs. Section 117 allows for broad judicial discretion and should result in fairer outcomes in respect of the important issue of costs awards.

Schedule 3: Definition of ‘member of the family’ and ‘relative’

Responses to consultation questions: for ease of reference we have repeated the consultation questions we seek to address here:

Questions:

- 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?
- Do you have any other feedback or comments on the amendments in Schedule 3?

51. We welcome the amendments to the definitions of ‘relative’ and ‘member of the family’ to be more inclusive to Aboriginal and Torres Strait Islander peoples and their communities and kinship.

52. WLANSW recognises that these proposed changes should be made in consultation with Aboriginal and Torres Strait Islander peoples.

Schedule 4: Independent Children's Lawyers

Responses to consultation questions: for ease of reference we have repeated the consultation questions we seek to address here:

Questions:

- 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?
- 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?

53. WLANSW agrees that the proposed requirement in subsection 68LA(5A) that an Independent Children's Lawyer ('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. The amendment strikes the right balance between ensuring that 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.

54. Unfortunately, in New South Wales there is a shortage of ICLs particularly in regional areas. It is becoming more common for ICLs to not be within the same region as the children, for example, where the children are located in the Wollongong region and the ICL is in Sydney. Due to the limited funding provided by Legal Aid NSW, private practice ICL's are often only able to take on a small number of ICL matters.

55. ICLs do not always meet with the children due to the time pressures and limited grants. Whilst this is outside the scope of this submission, we consider that the grants available to ICLs need to increase to ensure that experienced ICLs continue to be able to take on ICL matters.

56. It is essential that ICLs are properly funded for the work that they do including meeting with the children. It is imperative that children have an independent person whom they can feel comfortable asking questions about the Court proceedings as often there are orders restraining parents from doing so. Children also need to feel heard and understood. Children should be given the opportunity to meet with the ICL and we support ICLs being required to meet with the children and to give them the opportunity to express their views.

Expansion of the use of Independent Children’s Lawyers in cases brought under the Hague Convention:

Responses to consultation questions: for ease of reference we have repeated the consultation questions we seek to address here:

Questions:

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

57. We support this amendment. The Court should always consider appointing an ICL in any parenting matter including cases brought under the Hague Convention. The current subsection 68L(3) is unnecessarily restrictive by requiring the Court to find that there are ‘exceptional circumstances’ beforehand.

58. Due to the complexity of Hague Convention cases, the government should consider whether the current ICL grants available are appropriate or need to be increased. We note the concerns raised in relation to the shortage of ICLs and their ability to take on large numbers of ICL matters due to inadequate Legal Aid grants. This is a funding issue that needs to be addressed urgently.

59. It is also essential that any ICLs appointed to these types of matters have experience in this discrete area of law and appropriate training.

Schedule 5: Case Management and Procedure

Responses to consultation questions: for ease of reference we have repeated the consultation questions we seek to address here:

Questions:

- Do the proposed harmful proceeding orders, as drafted, appropriately balance procedural fairness considerations?
- 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?

Proposed Measure: Harmful proceeding orders – empowering victim survivors

60. WLANSW welcomes these revisions which will allow the Court to consider the effect on the Respondent. The proposed measure will provide the Court with a mechanism to scrutinise the impact of the Applicant's institution of a proceeding on the Respondent.
61. WLANSW welcomes this change to address systems abuse as the current family law system does not effectively dissuade a perpetrator from using the Family Court system to control, harass and intimidate the victim survivor.
62. However, WLANSW recommends that a victim survivor is apprised of such applications to be able to monitor their safety. A victim survivor's safety may be compromised if they are not advised of an application for leave or the perpetrator has been denied leave to apply.
63. WLANSW considers that the Court's denial of a vexatious application may be a positive thing for a victim survivor. A victim survivor can be empowered and feel supported by the knowledge that the Family Courts did not allow the perpetrator to use the Court system to harass and intimidate them.
64. WLANSW's view is that consideration should be given to expanding this to other forms of systems abuse beyond proceedings or attempted proceedings in a court or tribunal, such as abuse of child protection processes, unfounded requests to police for 'welfare checks' on the victim survivor and unfounded Child Support appeals.
65. Access to legal assistance will be vital to assist with navigating these provisions, as well as the provision of clear, accessible guidance and resources to explain the operation of these provisions to self-represented litigants.

Broadening and extending overarching purpose of ‘family law practice and procedure’

Question:

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

66. WLANSW welcomes the overarching purpose of the family law practice and procedure provisions in section 95, which includes to facilitate the just resolution of disputes in a way that ensures the safety of children and adult victim survivors, and in a way that promotes the best interests of the child.
67. We also welcome the duty to act consistently with the overarching purpose in section 96. It is essential that lawyers are also held to account for the way in which proceedings are run.
68. To ensure safety is given necessary priority, we recommend:
- (a) That safety is given greater weight than speed, efficiency, and minimisation of cost, and
 - (b) a reordering of factors relating to the overarching purpose that sees safety and the best interests of the child listed before “as quickly, inexpensively and efficiently as possible” which should be listed last at section 95(1)(d).
69. To determine the effectiveness of the new measures, any subsequent evaluation of the family law system should go beyond a review of resource efficiency and include an analysis of outcomes in terms of ensuring the safety of victim survivors.

Schedule 6: Protecting sensitive information

Responses to consultation questions: for ease of reference we have repeated the consultation questions we seek to address here:

Questions:

- What are your views on the test for determining whether evidence of protected confidences should be admitted? Should the onus be on the party seeking to admit the evidence?
- Should a person be able to consent to the admission of evidence of a protected confidence relating to their own treatment?

Proposed Measure: Exclude evidence of ‘protected confidences’

70. WLANSW welcomes this measure’s recognition of the harm caused by perpetrators unnecessarily accessing highly sensitive information about the adult or child to whom the protected confidence relates.

71. This protection could be more readily accessible to victim survivors by the introduction of a clear process for objections to inspecting and adducing ‘protected confidence’ material produced under subpoena.

72. We agree that the onus falls on the party seeking to admit the evidence.

73. It is in the public interest to encourage children and adult victim survivors to access the support required to assist their recovery. Therefore, it is in the public interest to preserve the therapeutic relationship.

74. Victim survivors may experience a perpetrator’s access to their confidential records and communications as Court-sanctioned - or even Court-facilitated - abuse.

75. WLANSW supports the requirement of a party to seek leave of the Court to adduce evidence of a protected confidence.

76. People should have ownership over their own protected information and WLANSW also supports people being able to consent to the admission of evidence of a protected confidence relating to their own treatment.

Schedule 7: Communications of details of family law proceedings

Responses to consultation questions: for ease of reference we have repeated the consultation questions we seek to address here:

Questions:

- Is Part XIVB easier to understand than the current section 121?
- Does the simplified outline at section 114N clearly explain the offences?
- Does section 114S help clarify what constitutes a communication to the public?

77. Part XIVB is easier to understand than the current section 121 and WLANSW supports these proposed amendments.

78. The third paragraph of section 114N being “*A communication is not made to the public if the communication is made to a person with a significant and legitimate interest in the subject matter of the communication that is greater than the interest of members of the public generally*” may be problematic for the Court to enforce.

79. While section 114S provides some examples of those exceptions, it still does not sufficiently clarify what is meant by “*a person with a significant and legitimate interest in the subject matter of the communication that is greater than the interest of members of the public generally*”. While the construction of the proposed new section is an improvement on the previous provision, our concern is there is sufficient ambiguity that may make this proposed section difficult to enforce. Consideration should be had as to whether there is clearer wording that could be included in section 114N.

Schedule 8: Establishing regulatory schemes for family law professionals

Responses to consultation questions: for ease of reference we have repeated the consultation questions we seek to address here:

Questions:

- 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?

8.1 Proposed Measure: Standards for Family Report Writers

8.1.1 The Report

80. The Family Report should comply with minimum requirements. The content and recommendations of a Family Report are hugely influential in family law proceedings, including whether Legal Aid is granted.

81. The proposed provision does capture relevant report writers which includes Regulation 7 Family Consultants.

8.1.2 The Expert

82. A deep understanding of the complexities of family violence is required by any Expert in the family law system. It is important to understand the behaviours of victim survivors affected by trauma as strategies or behavioural adaptations developed to cope with the physical and emotional impact of past trauma.²⁹ They may have only a chaotic recollection of details of abuse due to trauma disrupting their memory processes.

83. Therefore, Experts need key competencies in 'family violence informed' and 'trauma informed' practice to understand:

- (a) behaviours of victim survivors that are often implausible because they are counter intuitive; and
- (b) perpetrator tactics such as: image management, the ability to manipulate systems, and engage in systems abuse.

84. Further, Family Report Writers must meet annual training requirements and be subject to compliance and accountability mechanisms.

8.1.3 Practical Challenges

85. While WLANSW supports these much-needed changes, the changes cannot be considered in a vacuum without consideration of the practical challenges often faced when obtaining suitably qualified and experienced Family Report Writers.

²⁹ Refer to *Essential Components of Trauma Informed Judicial Practice Report*, 2014, USA.

86. Wait times can be excessive which is particularly detrimental in domestic, family, and sexual violence situations.

87. Legal Aid NSW grants for Family Reports need to be increased urgently. Currently, parties are restricted as to which Experts are able to be appointed based on whether they will accept Legal Aid rates which are often substantially lower than their usual fees. Where Family Report Writers are already very busy there is less tendency to accept Legal Aid appointments at much lower rates.

88. Wait times for Family Reports with Court Family Consultants also remain high particularly in regional areas which can lead to unacceptable delays in matters involving urgency including where children are at risk of harm and where there is a history of domestic, family, and sexual violence.

8.2 Proposed Measure: Obligation of Advisors

89. Currently, Advisors working with parents must advise the parent in relation to these existing – and somewhat complex and confusing – considerations.

90. WLANSW welcomes the proposed changes to the obligations of Advisors as Advisors will simply need to advise – and note – that the best interests of the child is paramount.

9. Commencement of the changes

Responses to consultation questions: for ease of reference we have repeated the consultation questions we seek to address here:

Questions:

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

9.1 Commencement

91. WLANSW recognises the urgency of these reforms to the family law system, particularly given the need to protect the safety of children and adult victim survivors of domestic, family, and sexual violence. We support the commencement of these changes as soon as practicable.

9.2 Implementation

92. WLANSW welcomes these reforms. However, to be effective, action is required to ensure all providers of services in the family law system are family violence informed, trauma informed, culturally safe, child rights focused, disability aware and LGBTQIA+ aware.

Training and expertise and funding

93. The WLANSW welcomes the implementation of these reforms, but we are conscious of the intersectionality that exists between the implementation of these reforms and the funding model which may have an impact on access to justice and the ability for legal practitioners to adequately carry out the work required within the current funding model.
94. Legal Aid grant funding for solicitors on Legal Aid NSW panels including the ICL panel is essential to urgently address the shortage. The current grants are highly inadequate and mean that solicitors who want to help vulnerable and disadvantaged adults and children, simply cannot afford to do so, or otherwise have to substantially limit the number of Legal Aid funded matters that they can take on.
95. Legal Aid including ICL work is often complex and time consuming and solicitors working on these panels should be appropriately remunerated. The issue of Legal Aid funding is also fundamental to addressing the safety of children and victim survivors.

Consultation period

96. An additional consideration that legislative reform of this scale poses is the consultation period; the significance of these proposed reforms requires more than a 30 day period to form cogent and concise arguments. The WLANSW would have provided more detailed submissions on wider aspects of these proposed reforms however time did not permit. We submit that a longer consultation period be prescribed to a reform of this magnitude in future.

WLANSW thanks you for the opportunity to provide this submission and we would be very happy to discuss this submission further with the Attorney General if required.

Please contact our President, Justine Anderson at executive@womenlawyersnsw.org.au.

Kind regards,



Justine Anderson
President
Women Lawyers Association of New South Wales
2 March 2023