Australian Government
Family Law Council

Submission to the Senate Legal and Constitutional Affairs Committee: Family Law Amendment Bill 2023

This submission by the Family Law Council (Council) to the Senate Legal and Constitutional Affairs Committee in respect to the Family Law Amendment Bill 2023 primarily focuses upon those areas that overlap with the Council's Terms of reference endorsed by the Attorney-General on 13 September 2022.

The Council advises and makes recommendations to the Attorney-General about: (1) the workings of the Family Law Act and other legislation relating to family law; (2) the working of legal aid in relation to family law; and (3) any other matters relating to family law.

The Council's membership includes judges of the Federal Circuit and Family Court of Australia (Division 1) and (Division 2) (FCFCOA) and experts from a range of professional backgrounds, including lawyers, family dispute resolution practitioners, family counsellors, academics, and public officials.

The Council's Secretariat can be contacted if any additional clarification is required on the matters raised in this submission via familylawcouncil@ag.gov.au.

Schedule 1: Amendments to the framework for making parenting orders

Principles and objects section of Part VII

1. Part VII of the *Family Law Act 1975 (Cth)* (Family Law Act) sets out the legislative provisions that are applicable to the determination of disputes between parties concerning parenting arrangements for children.

2. The draft legislation proposes to replace the current objects and principles set out in section 60B with two objects being:

    a) to ensure that the best interests of children are met, including by ensuring their safety; and
    b) to give effect to the (United Nations) Convention on the Rights of the Child done at New York on 20 November 1989 ('*CROC*').

3. Council supports the addition of the explicit reference to safety in paragraph 60B(a) in the Bill as it is consistent with paragraph 60CC(2)(a), supporting the overall coherence of the Framework.

4. The proposals are consistent with the recommendations of the Australian Law Reform Commission Report "Family Law for the Future – an Inquiry into the Family Law System"

published in March 2019 (ALRC Report) which recommended the repeal of section 60B of the Family Law Act (recommendation 4). This is primarily because section 60B of the Act overlaps with section 60CC, which sets out legislative guidance for the determination as to what orders are in the best interests of the child.[1]

5. The simplification of the objects is consistent with the views expressed by the Full Court of the Family Court of Australia (as it was then known) in *Maldera v Orbel* [2012] FamCAFC 135, that the purpose of objects provision is to provide context, indicate the legislative purpose and assist with interpretation.

6. The Council is of the view that the legislative amendments are appropriate for the following reasons.

7. Article 3 of the CROC provides that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration**. (Emphasis added)

8. The CROC has been regarded by Courts in all jurisdictions of Australia as having particular significance to proceedings involving the welfare of children (see for instance *B and B: Family Law Reform Act 1995* [2] (*'B & B'*) and *Re Thomas*[3] at [36] – [37]). In *B & B*, the Full Court of the Family Court expressed the opinion that, by virtue of its widespread international acceptance and the fact that it is referred to as a Schedule to the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*, may give the CROC "special significance in Australian Law".[4]

9. The best interest principle has been incorporated into the Family Law Act, with section 60CA providing that the child's best interests is the paramount consideration in making a parenting order. Specifically including reference to the best interest principle in the objects of Part VII of the Act is therefore entirely appropriate.

10. The reference to the CROC in proposed paragraph 60B(b) is also appropriate because it reflects the position at common law. This was explained by Brereton J in *Re Thomas* as follows:

> [37] First, Australia's ratification of CROC creates a legitimate expectation that decisions will be made having regard to the principles espoused in CROC[5];

[1] ALRC (Australian Law Reform Commission) (2019) *Family Law for the Future – an Inquiry into the Family Law System* (Report Number 135, March 2019), para 5.31.
[2] (1997) 21 Fam LR 676; (1997) FLC 92-755; (1997) 140 FLR 11.
[3] *Director-General, Department of Community Services*; *Re Thomas* (*'Re Thomas'*)[2009] NSWSC 217; 41 Fam LR 220.
[4] *B & B* (above n 2) [10.19] – [10.20].
[5] *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20; (1995) 183 CLR 273; *B and B* (above n 2).

Secondly, the existence of a treaty obligation alone (that is, without legislation implementing it locally) allows a court to take such a treaty into account in the development of the common law[6];

Thirdly, where a convention has been ratified by Australia but has not been the subject of any legislative incorporation into domestic law, its terms may be resorted to in order to help resolve an ambiguity in domestic legislation[7], and in a case of ambiguity, a court should favour a construction of a statute which accords with Australia's obligations under an international convention;[8]

Fourthly, in the exercise of a discretion, regard may be had to an international obligation or agreement which has been ratified by Australia, though not otherwise incorporated into domestic law – unless the domestic law prohibits it;[9]

Fifthly, insofar as the *parens patriae* jurisdiction overlaps the welfare jurisdiction of the Family Court of Australia, it is material that Family Law Act, s 43(c), provides that the court, in the exercise of its jurisdiction, must have regard to the need to protect the rights of children and to promote their welfare.[10]

11. Having regard to the principles adumbrated in these authorities, the Council is of the opinion that it is appropriate that current subsection 60B(4) of the Family Law Act is replicated in the proposed amendments. The effect is to give the CROC greater visibility as it is no longer referred to as an additional object which only applied to subsection 60B(4).

12. The Council welcomes the inclusion of the reference to Article 19 of the CROC in the explanatory memorandum of the Bill, which emphasises the significance of safety and welfare issues.

Best interests of the child factors

Consolidation of primary considerations and secondary considerations.

13. The Council supports the consolidation of primary and secondary considerations set out in subsections 60CC(2) and (3) and simplifying the list factors to be considered by the Court in determining what parenting arrangements are in the best interests of the child.

14. The Council agrees with the ALRC Report that confusion is caused by the distinction between "primary" and "additional" considerations as set out in section 60CC.[11] The current provision of best interest considerations into those which are primary and secondary is considered misleading in that it detracts from the obligation on a trial judge to make a "holistic assessment and balancing of all the child's rights and needs".[12]

[6] *Mabo v Queensland [No.2]* (1992) 175 CLR 1, 42; *B & B* (above n 2).
[7] *Murray v Director Family Services, ACT* (1993) FLC 92-416, 81,255-256; B and B, 84, 224.
[8] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38; B and B, 84, 223.
[9] *Murray v Director Family Services, ACT* (1993) FLC 92-416, 81,255-256; B and B, 84, 224.
[10] *B and B*, (above n 2) 10.7.
[11] ALRC (above n 1), para 5.36.
[12] *Backford & Backford and Anor* [2017] FamCAFC 1, 22.

15. Section 60CC of the Family Law Act sets out those matters that "must" be considered by the Court in determining what orders are in the best interests of a child.

16. Section 60CC is currently divided into two primary considerations (s60CC(2)) and 13 secondary considerations (s60CC(3)).

17. The primary considerations are:

    a) the benefit of the child having a meaningful relationship with both of the child's parents; and
    b) the need to protect the child from physical or psychological harm from being subject to, or exposed to, abuse, neglect or family violence.

18. Should there be conflict between those primary considerations, the Family Law Act provides that protection from harm attracts the greater weight.

19. There is considerable overlap between the relevant additional considerations which, broadly, fall into the following groupings:

    - Issues relating to the children – their views, level of maturity, culture and relationships: ss 60CC(3)(a), (b), (g) and (h)
    - Issues relating to the parents – decision making, time spent with children, fulfilled obligations, attitude, capacity and exercise of responsibility: ss 60CC(3)(c), (ca), (f) and (i)
    - Issues of family violence: ss 60CC(3)(j) and (k)
    - Effect of change: s 60CC(3)(d) (which will be expanded upon below)
    - Practical difficulty of implementation: s 60CC(3)(e)
    - Avoiding further proceedings: s 60CC(3)(l) (which will be expanded below)
    - Other relevant matters: s 60CC(3)(m).

20. The legislative intention in separating the considerations into those which were primary and additional considerations was to elevate the importance of the primary considerations.[13] This was in the context where the objects provision in section 60B was also amended to place emphasis on those same two factors.

21. There is ongoing confusion regarding the application of the legislative pathway. For instance, in the recent decision of *Bielen & Kozma* [2022] FedCFamC1A 221 the Full Court of the FCFCOA (Division 1) overturned a first instance decision by a primary judge who had changed the residence of two children, being ages four and two, after having regard to only the primary considerations and failing to have regard to those other considerations set out in subsection 60CC(3) which the Full Court determined were "crucial" to the proper consideration of what orders were in the best interests of the children.

Simplification of Best Interest Considerations

22. The challenge faced by busy trial judges in applying the legislative pathway to determining what orders are in the best interests of the child, including the multiplicity of overlapping

[13] Revised Explanatory Memorandum, *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth) 14.

considerations currently set out in subsection 60CC(3), has appropriately been criticised as being repetitive in nature and as giving rise to artificiality in the reasoning process of judges.[14]

23. In *Marvel & Marvel* [2010] FamCAFC 101,[15] the Full Court of the Family Court observed:

> The legislative pathway to be considered since the amendments in 2006 is convoluted. It has been aptly described as "a dilemma of labyrinthine complexity".[16]

24. In considering the impact of the legislation it is important to keep in mind that many parenting orders are made on an urgent basis, in the context of busy duty lists, by not only judicial officers of the FCFCOA and Family Court of Western Australia (FCWA) but also state and territory judges who may be exercising family law jurisdiction (in accordance with section 69J of the Family Law Act).

25. As cautioned by the Full Court in *Banks & Banks* (2015) FLC 93-637 there is a risk that in discussing the current multiplicity of section 60CC factors, the judicial officer "may lose sight of the forest for the trees."

26. Many litigants also "lose sight of the forest for the trees", filing lengthy affidavits, addressing each additional factor under separate headings even when they are not relevant. It is also not unusual to receive affidavits which tell the client's story, and then repeat a lot of what has already been deposed to under each of the section 60CC considerations.

27. Analysis has also established that the complexity of the current legislation has resulted in increased delay in the delivery of judgements, with judgments being lengthier and more vulnerable to appeal.[17]

28. Accordingly, the Council supports the recommendations of the ALRC for the current best interest considerations to be consolidated and simplified to those matters identified by the ALRC as being of assistance to trial judges in determining what orders are in the best interests of the child. The Council notes that the proposed amendments are consistent with those recommendations. There ought to then be a flow on benefit with shorter affidavits.

29. The Council further supports the reference to safety being given prominence at paragraph 60CC(2)(a) of the Bill.

30. The Council also supports the reference in subparagraph 60CC(2)(a)(ii) of the Bill to 'each person who has care of the child' from 'each person who has parental responsibility for the child' in the exposure draft.

31. Research conducted by the Australian Institute of Family Studies (AIFS) indicates that safety concerns characterise a substantial proportion of separating families, particularly those using formal services such as courts to resolve their post-separation parenting arrangements.

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[14] Helen Rhoades, 'Rewriting Part VII of the Family Law Act' (Paper presented at the 16th National Family Law Conference, Sydney, October 2014) 3-6.
[15] 240 FLR 367, 87.
[16] *Zabini & Zabini* [2010] FamCA 10.
[17] See for example, Rick O'Brien, 'Simplifying the System: Family Law Challenges – Can the System Ever be Simple?' (2010) 16(3) Journal of Family Studies 264, 266.

Parents' concerns for their own and/or their children's safety post-separation as a result of ongoing contact with the other parent were reported by nearly one-fifth of parents participating in the AIFS Experiences of Separated Parents Study (ESPS) component of the Evaluation of the 2012 Family Violence Amendments, with the majority of these safety concerns arising from emotional abuse or anger issues, mental health concerns, violent or dangerous behaviour or substance misuse.[18] Data from the AIFS ESPS also indicates that 38% of separated parents in the post-2012 reform sample (n=6,079) reported four or more of these risk issues, with the use of court for the resolution of parenting disputes most common among families who have the greatest level of complexity in their circumstances.[19]

32. More recent data from the FCFCOA's Lighthouse Project also identifies more than 60% of applications for parenting orders screening as high risk. These data support an emphasis on protecting the safety of children.[20] This is supported by data from the Court's Notice of Child Abuse, Family Violence or Risk, which for 2021-22 indicates that in 80% of matters, one or more parties alleged they had experienced family violence and in 70% of matters, one or more parties alleged that a child had been abused or was at risk of child abuse.[21] Similar data is also reported by the FCWA.

33. The Council considers it may be appropriate to include an additional subsection in similar terms to the existing subsection 60CC(2A) to ensure that it is understood that the Court in its decision-making will give greater weight to the issue of the child's safety. In this context, as families often make decisions about parenting arrangements "in the shadow of the law", the role of the legal education campaign to accompany the implementation of the new section 60CC (as amended by the Bill) will be very important.

34. As an alternative to adding an additional subsection substantially in accordance with existing subsection 60CC(2A), the Council supports the reference in new objects paragraph 60B(a) to ensuring children's safety.

35. The Council supports the purpose of clause 60CC of the Bill, but notes that paragraph 60CC(2)(b) (child's views) does not contain reference to the reasons for those views. At times, children will express views, even fervently held views, which do not accord with their best interests, or are the product of refuse/resist dynamic.

36. The Explanatory Memorandum to the Bill appropriately explains that as with all of the general considerations in paragraph 60CC(2), the Court will have discretion to consider not only the views of the children, but also the reasons for those views and in light of the particular circumstances determine how much weight to place on those views.

37. The Council is supportive of amendments to the Bill from the exposure draft including:

- the addition of 'cultural needs' to paragraph 60CC(2)(c);

[18] Rae Kaspiew et al., *Experiences of Separated Parents Stud*y (Evaluation of the 2012 family violence amendments) (Melbourne: Australian Institute of Family Studies, 2015a) fig 3.12, table 3.10.

[19] Rae Kaspiew et al., *Evaluation of the 2012 family violence amendments: Synthesis Report*. (Melbourne: Australian Institute of Family Studies, 2015b) table 2.2.

[20] David Pringle, *Senate Estimates Opening Statement* (26 October 2021).

[21] Federal Circuit and Family Court of Australia, *2021-22 Annual Report*, 15.

- the revised framing of paragraph 60CC(2)(d); and
- the revised wording of paragraph 60CC(2)(e).

Removal of equal shared parental responsibility and specific time provisions[22]

38. The *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)* ("the SP reforms"), which commenced operation on 1 July 2006, introduced section 61DA to the Family Law Act which sets out a rebuttable presumption that, subject to specified exemptions substantially relating to child abuse and family violence, it is in a child's best interests for their parent to have "equal shared parental responsibility" (ESPR). Orders for ESPR require parents to consult about major long-term issues, including; the child's health, education, religious and cultural upbringing and significant changes to the child's living arrangements.[23]

39. Significantly, the making of an order for ESPR triggers the operation of section 65DAA which requires the Court to consider whether the child spending equal time or substantial and significant time with each parent is in the child's best interests and reasonably practicable.

40. As noted by the ALRC, these provisions, in particular, have generated confusion and resulted in unintended consequences.[24] Specifically, the ALRC noted that particularly with the linkage between sections 61DA and 65DAA, the presumption of equal shared parental responsibility "is commonly misunderstood as being a presumption of equal time".[25] Further, confusion reigns with parents thinking the major long terms decisions (to which parental responsibility applies), includes day-to-day matters such as haircuts and routine health care. Too much Court time and lengthy affidavits are devoted to parents litigating over such routine issues, accusing the other parent of not complying with the ESPR requirements. It is also the case that parents can often spend considerable energy seeking (or resisting) a Sole Parental Responsibility order, when no major long terms issues are likely to arise, or just one specific issue (for example, choice of school) is in dispute.

41. This has been confirmed to the Council in public consultations that have occurred in the context of inquiring into our broader terms of reference. For instance, in roundtable discussions with family dispute resolution service providers in Canberra on 29 November 2022, it was the common view of the representatives in attendance that the presumption of the ESPR is misunderstood, even by parties with legal representation. The Council was advised that the presumption can cause difficulties in negotiations "including that parties can be fixated on the presumption as an entitlement, even after receiving legal advice". It was further noted "that the best interests of the child are often overshadowed by perceived entitlements as a misunderstanding of the presumption." AIFS research identifies the existence of this

[22] Many of the references to academic and social science research contained in this section are from a doctoral thesis by Dr Anna Parker "Shared parenting and experimental family law reform: Section 65DAA of the Family Law Act 1975 (2019).
[23] *Family Law Act 1975,* s 4.
[24] ALRC above n 1, para 2.55, by reference to Richard Chisholm, Family Courts Violence Review (Commonwealth of Australia, 2009).
[25] ALRC above n 1, paras 5.19 and 5.85.

common misunderstanding in respect to the connection between ESPR and shared care time arrangements.[26]

42. Subsection 61DA(1) and, by linkage, section 65DAA are focused upon the litigation process. That is, section 61DA is a directive to the court that the presumption applies "when making a parenting order." The Council has been advised by experienced legal practitioners that there is a disconnect between the operation of presumption and the reality that the mere fact that parents are litigating, about the issue, is indicative of significant communication difficulties. Indicative of this, shared parental responsibility outcomes are common, even though a majority of parents who litigate are affected by family violence and safety concerns.[27] Research shows a majority of cases settled on a litigation pathway (94%) and a substantial minority (38%) determined by a judge result in orders for shared parental responsibility.[28] Recent research on contravention matters showed that shared parental responsibility orders applied in more than 70% of matters, even though concerns about family violence and/or child abuse had been raised in more than 90% of these matters.[29] These findings demonstrate that the legislative framework is not operating in way that supports a nuanced assessment of whether orders for shared parental responsibility are appropriate in any given case.

43. In that respect, it is observed that once an order for ESPR is made, parents are required to consult "in relation to the [major long term] decisions to be made about that issue; and to make a genuine effort to come to a joint decision about that issue." There is an unreality about requiring parties who are litigating about ESPR to act in accordance with those obligations. Further, and as already noted, the scope for potential conflict is exacerbated in circumstances where parties commonly have a poor understanding of what ESPR refers to and wrongly consider that it applies to day to day matters that routinely arise in the context of caring for children.

44. Even if agreement is reached in those difficult circumstances there is a risk that the negotiated outcome may not be one that is optimal for the child.[30] As Helen Rhoades has observed:

> empirical evidence suggests that decision-making and settlement practices may often be an exercise in finding a way to manage a shared parenting arrangement between

[26] Rae Kaspiew et al. (2015) *Evaluation of the 2006 Family Law Reforms* (Melbourne: Australian Institute of Family Studies), 365.

[27] Rae Kaspiew et al above n 18, table 2.2.

[28] Rae Kaspiew et al above n 19, table 3.24.

[29] Ibid; Rachel Carson et al (2022) *Compliance with and enforcement of family law parenting: Final report* (Research Report 20/2022, ANROWS) tables 24, 28; Rae Kaspiew et al (2015) *Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)* (Melbourne: Australian Institute of Family Studies).

[30] See for example Patrick Parkinson, 'The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience' (2014) 37(1) *Dalhousie Law Journal* 301, 336; Alison Tucker, 'Shared Parenting – Public Perception vs Legislative Reality: Our Role in Making it Work for Children' (Paper presented at the 13th National Family Law Conference, Adelaide, April 2008) 167; Gavin Howard, 'Shared Parenting at Work – The Reality' (2009) 20(3) *Australian Family Lawyer* 37, 59; Lixia Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics After Five Years' (Australian Institute of Family Studies, 2014) 2 ('2014 AIFS Study') 40-2.

> parents who cannot collaborate, rather than determining the optimal care environment for the child.[31]

45. Recent data confirms that the majority of parenting cases in the FCFCOA involve high conflict families with one or more parties alleging that they had experienced family violence in 80% of matters seeking final parenting orders.[32] Research indicates that shared care arrangements for children, in circumstances of high parental conflict, have particularly poor outcomes.[33]

46. As noted by Dr Anna Parker:

> Conflict is plainly more prevalent in litigating families than those who can agree on parenting arrangements. Experts continued to emphasise that parents with the types of friendly, cooperative relationships required for successful shared care arrangements were those least likely to litigate. Litigation can also exacerbate conflict. The cases to which section 65DAA has direct application, being litigating families, are therefore those most at risk of high levels of enduring, harmful conflict.[34]

47. Problems associated with the application of sections 61DA and 65DAA were identified by judges at an early stage following the implementation of the SP reforms. In a 2007 judgement, Carmody J cautioned about the legislature "trying to entice courts into the dangerous realm of finding a stock standard or 'off the shelf' response to unique and multi-faceted parenting problems".[35]

48. Research establishes that for shared parenting arrangements to be effective and operate in the best interests of child, a considerable degree of cooperation on the part of parents is required.[36] This is a result of the need for constant contact between parents, with communication being required in respect to, for instance, children leaving homework or sporting clothes or sporting equipment at the home of the other parent. Cooperation is also required to ensure that children, for instance, are able to continue to attend extracurricular activities such as music lessons, dance classes or sports training. The reality is that if parents are litigating it will be the exception rather than the rule that they have a sufficiently cooperative relationship to effectively share the care of their children in an appropriately child focused manner.[37]

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[31] Helen Rhoades, 'The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform' (2008) 36(3) *Federal Law Review* 279, 298; Parkinson above n 31, 336.
[32] Federal Circuit and Family Court of Australia, *2021-22 Annual Report*, 15.
[33] Judy Cashmore et al, 'Shared Care Parenting Arrangements Since the 2006 Family Law Reforms' (Social Policy Research Centre, University of New South Wales, 2010), 132-133.
[34] Dr Anna Parker, above n 23, 181 (references omitted).
[35] *Dylan v Dylan* [2007] FamCA 842 [124].
[36] Eleanor Maccoby and Robert Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Harvard University Press, 1992) 184, 227.
[37] See for example, Michael Flood, 'Fatherhood and Fatherlessness' (Discussion Paper, The Australia Institute, November 2003) 44.

49. Of significant concern is research that indicates that shared care can actually exacerbate conflict between parents and increase the likelihood of children's exposure to it.[38] As noted by Dr Anna Parker in her doctoral thesis:

> Across many studies from various countries, children's adjustment, psychological outcomes and emotional development were consistently poorer if they were exposed to parental conflict. McIntosh,[39] for example, found that the impact of conflict on children include heightened aggression, anxiety, poor social skills, emotional problems, the development of dysfunctional behavioural patterns and clinical disturbance.[40] This was consistent with other researchers' findings. Conflict was found to have a greater impact on children's wellbeing than other variables, including parental separation, parenting arrangement and parental absence.[41]

50. Even in circumstances where there is minimal prospect of a child being exposed to ongoing parental conflict the encouragement, as Carmody J noted, of the Courts to favour shared parenting arrangements can result in problems being created for the children by such arrangements being overlooked. This includes, for instance:

- children lacking a sense of belonging through having a "home base"[42]
- children being expected to adhere to potentially conflicting parenting practices styles, values, rules and expectations[43]
- children being placed in an ongoing situation of divided loyalties with subtle, and often not so subtle, pressure being brought to bear on children to tell the parent with whom they are residing what they anticipate that parent wishes to hear in respect to the child's alignment in the parental dispute.[44]

51. It is significant that, while the presumption as to ESPR does not apply where it is established that a party has engaged in family violence, an order for ESPR may nonetheless be made in those circumstances.[45] As noted, such an order then triggers the operation of section 65DAA. It goes without saying that an order for a child to spend equal or even substantial and significant time with the person who has perpetrated such violence may be contrary to the child's best interests.

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[38] See for example, Vincent Papaleo, 'Shared Parenting – One Size Does Not Fit All' (Paper, Leo Cussen Institute, February 2006,) 2.4.
[39] Jennifer McIntosh, 'Enduring Conflict in Parental Separation: Pathways of Impact on Child Development' (2003) 9(1) *Journal of Family Studies* 63, 70.
[40] Examples provided include Janet Johnston, Marsha Kline and Jeanne Tschann, 'Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access' (1989) 59(4) *American Journal of Orthopsychiatry* 576, 588-9; Paul Amato and Sandra Rezac, 'Contact with Nonresident Parents, Interparental Conflict and Children's Behavior' (1994) 15(2) *Journal of Family Issues* 191, 192-3.
[41] Dr Anna Parker, above n 23 (references omitted).
[42] Fehlberg, B., Natalier, K., & Smyth, B. (2018) 'Children's experiences of 'home' after parental separation', *Child and Family Law Quarterly*, *30*(1), 3–21; Campo, M., Fehlberg, B., Millward, C., & Carson, R. (2012) 'Shared parenting time in Australia: Exploring children's views', *Journal of Social Welfare & Family Law, 34*(3), 295–313.
[43] Eleanor Maccoby and Robert Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Harvard University Press, 1992) 184, 227
[44] Jan Hagen, 'Proceed with Caution: Advocating Joint Custody' (1987) 32(1) *Social Work* 26, 28.
[45] See for example *Wilson & Carter* [2022] FedCFamC1F 216.

52. Social science research indicates that, even in circumstances where a child is not at risk of physical harm, it is often the case that a parent who engages in a pattern of coercive or controlling behaviour towards their intimate partner:

- tend to utilise harsh and rigid discipline with their children
- lack empathy that allows parents to treat their children with respect and to validate their feeling.
- have difficulty focussing on their children's needs due to their selfish and self-centred tendencies.[46]

53. Children placed in that situation often adopt strategies to minimise the prospect of being exposed to their parent's coercive behaviour including "monitoring their speech, their self-presentation, self-expression and social interactions".[47]

54. The requirement for judges to have regard to a presumption intended to instil government policy goals in those circumstances rather than to exercise their discretion in the context of evaluating the infinitely variable factual scenarios that routinely come before the court is clearly problematic. This is particularly so given the ideal of shared parenting is not reflected in community practice. Empirical evidence demonstrates that shared parenting practices, in the sense of joint decision making on significant long-term issues and time arrangements of an equal or substantial and significant nature, are not the norm for the majority of separated families.[48]

55. Among the general population of separated parents, AIFS research shows that less than half of a near representative sample reported equal decision making in relation to major long-term issues. Shared decision making was reportedly highest for religion or cultural ties (45%) and lowest for health (30%).[49] In relation to time, the most common arrangement involves children spending most nights with their mother and seeing their fathers regularly.[50] Moreover, research evidence on the impact of different kinds of parenting arrangements on child well-being, and the circumstances in which shared parenting arrangements influence positive or negative outcomes remains equivocal and, in some respects, controversial. A recent literature review on 'dual residence' arrangements concluded that 'existing research does not give evidence that dual residence is the best post-divorce arrangement for (all) children' and noted that practical decision should be guided by consideration of the 'individual child' and 'their family'.[51]

56. In this context, the Council considers that a legislative framework that attempts to influence decision making towards a particular outcome is inappropriate, especially having regard to the

[46] See for example research referred to in Samantha Jeffries, "In the Best Interests of the Abuser: Coercive Control, Child Custody Proceedings and the Expert Assessments That Guide Judicial Determinations," Laws 5, no. 1 (March 2016): 1-17, 5.
[47] Ibid, 3.
[48] Rae Kaspiew et al, above n 18.
[49] Kaspiew et al., above n 19, Table 2.8.
[50] Kaspiew et al., above n 30, Figure 2.3.
[51] Berman, R., and Daneback, K. (2022) 'Children in dual-residence arrangements: a literature review' 28:4 *Journal of Family Studies* 1459.

high levels of concerns about child safety, family violence and other issues that can negatively influence child and adult wellbeing among the families that turn to the family law system for assistance with parenting arrangements.

57. After extensively analysing academic and social science research and number of decisions of the Family Court of Australia and the Federal Circuit Court of Australia (as they were then known) in the period between 2006 and 2015, Dr Anna Parker concluded:

> Despite overwhelming evidence demonstrating the inappropriateness of shared care in high-conflict families, the research examined and the case analysis both suggest that the legislative pathway enshrined by the reforms led to a significant increase in the implementation of such arrangements. In this respect, the reforms have had the significant detrimental outcome of many children being exposed to harmful conflict. They have therefore not only failed to promote the interests of many children in litigating families, but have, in some cases, actively promoted the implementation of harmful parenting arrangements.[52]

58. As a result, Dr Parker strongly advocated that the 2006 SP reforms be revisited. The Council agrees and supports the proposed amendments.

59. The difficulties caused by the presumption are not unique to Australia. In the UK in 2014 the *Children Act 1989 UK* was amended by section 11 of the *Children and Families Act 2014 UK* which introduced a presumption that parental involvement with the child advances the children's welfare unless the contrary is shown.

60. A review of the amendments to the UK's Children Act found similar concerns to those found in Australia, including misunderstanding and misapplication of the provision, a greater focus on parental involvement and created barriers for addressing family violence and abuse.[53]

61. Academic Professor Rosemary Hunter told the *Children and Families Act 2014 UK* Committee:

> The presumption might well be true for the average child, but children in the family court are not the average child. There are significant safeguarding risks so they need an individual welfare determination. You want the court to be thinking carefully about the specific welfare needs of the individual child in the case, rather than applying the presumption.[54]

62. Professor Hunter's comment applies equally to the presumption of ESPR.

63. The Council supports reference to joint-decision making between parties, in clauses 61DAA and 61DAB of the Bill.

64. Council has some concern that clause 61CA may complicate the interpretation of the simplified factors in clause 60CC of the Bill. Although clause 61CA is not intended to be

[52] Dr Anna Parker, above n 23, 185.
[53] House of Lords, Children and Families Act 2014 Committee, *Children and Families Act 2014: a Failure of Implementation*, 6 December 2022 [153-169].
[54] House of Lords, Children and Families Act 2014 Committee, *Children and Families Act 2014: A Failure of Implementation*, 6 December 2022, 156.

enforceable, parties and the Court may consider that evidence of relevant conduct under the section requires the Court's consideration in parenting disputes. It may be that consultation between parents or parties with parental responsibility in relation to major long-term issues is a subject that would be better addressed in the community legal education that will accompany the introduction of the amendments.

Timing of the amendments

65. The Council is concerned about proposing that the amendments in Schedule 1 apply to proceedings after the commencement of this legislation. This will result in litigants and judicial officers having to apply different versions of the Family Law Act for several years. If the new provisions apply to all matters listed for trial after a particular date, rather than the commencement of proceedings, that will significantly reduce the period where different versions of the legislation applies. If the amendments apply to cases listed for trial 6 months after the commencement of the amendments that would address any procedural fairness concerns.

66. This situation is potentially more problematic in Western Australia where it will be necessary to enact mirror amendments to the *Family Court Act 1997 (WA)* which applies to parties who are not married.

Reconsideration of final parenting orders (Rice & Asplund)

67. The Council is of the view that clause 65DAAA of the Bill accurately reflects the common law rule in *Rice v Asplund*. In an often-cited extract, Evatt CJ said:

> The principles which in my view should apply in such cases are that the court should have regard to any earlier order and to the reasons for and the material on which that order was based. It should not lightly entertain an application to reverse an earlier custody order. To do so would invite endless litigation for change in an everpresent factor in human affairs. Therefore, the court would need to be satisfied by the applicant that there was some changed circumstance which would justify such a serious step, some new factor arising, or, at any rate, some new factor which was not disclosed at the previous hearing which would have been material. (Emphasis added)

68. Not long after that, Nygh J said this in M*cEnerney* (1980) FLC 90-866 at 75, 499:

> ....the principle that there be an end to litigation has equal force in custodial disputes and in some respects may have even greater force in custodial disputes. The last thing, of course, that this court would wish to see would be a perennial football match between parents, who, because the strict principles of res judicata are not applicable might seek to canvass again and again the question of custody of a child with the enormous psychological harm which they would be inflicting not only upon each other but especially upon the child.
>
> One comes back to the fundamental principle that the interest of the child are paramount and that consideration alone should lead a court to discourage a parent from coming back before the court too soon after the court has had an opportunity to consider fully the

> situation of the child and there is really no startling new circumstances that can be brought before the court. (Emphasis added)

69. The Council recommends that this provision be assigned a different number as it may cause confusion with the repeal of section 65DAA.

70. Clause 65DAAA, as currently drafted, is repetitive, with the repetition of "whether there has been a significant change of circumstance" being referred to in paragraph 65DAAA(1)(a) and again at paragraph 65DAAA(1)(b). Consideration might be given as to whether the section can be drafted with greater clarity.

71. In *Poisat & Poisat* (2014) FLC 93-597 and *Elmi & AD* (2019) FLC 93-912 at [89]–[91], the Full Court referred to a useful summary of the principle by reference to the Explanatory Memorandum to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (at [10]-[13]), which described the "principle in Rice and Asplund" as limiting:

> … the court's capacity to rehear matters in two kinds of cases: those where there is a change in the circumstances of the parties where some new factor has arisen which would justify a serious step; and those where there is some factor which was not disclosed at a previous hearing that would have been material.

72. The rationale behind the principle is that it is not generally in the best interests of children for there to be repeated applications concerning parenting arrangements for the child.[55] However, the Council also acknowledges that it may on occasion be in the child's best interests to reconsider parenting orders due to a change in circumstances and/or the child's needs. Research has demonstrated that re-litigation is not uncommon in parenting matters, with 38% of matters in a judicially determined sample, and 32% of matters settled on a litigation pathway, having previously had a case before the Court.[56]

73. More specifically, the findings of recent AIFS research investigating the compliance with and enforcement of family law parenting orders indicate the nature and negative impact of repeated and prolonged litigation in cases involving contravention applications.[57] As noted below, the Council is also concerned about the misuse of litigation as part of a pattern of abuse and the potential for re-litigation to create trauma and hardship for children and protective caregivers. In this context, the proposed amendments in Schedule 5 will assist in striking the balance between appropriate reconsideration of parenting orders and misuse of litigation.

74. In *Tindall & Saldo (2016) FLC 93-727* at [88], the Full Court observed:

> …the relevant threshold determination is not met merely by a conclusion that 'fresh evidence' exists. It is, as the cases demonstrate, the nature and quality of the change in circumstances that is relevant.

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[55] *McEnearney & McEnearney* (1980) FLC 90-866; SPS & PLS (2008) FLC 93-363; *Marsden & Winch* (2009) 42 Fam LR 1, 47.
[56] Rae Kaspiew et al., above n 19, table 3.9.
[57] Rachel Carson et al., above n 30; see discussion in relation to Schedule 2 and 5.

75. In *Marsden & Winch*, the Full Court at [50] set out matters the Court should consider when considering whether a change in circumstance exists:

> (1) The past circumstances, including the reasons for the decision and the evidence upon which it was based.
>
> (2) Whether there is a likelihood of orders being varied in a significant way, as a result of a new hearing.
>
> (3) If there is such a likelihood, the nature of the likely changes must be weighed against the potential detriment to the child or children caused by the litigation itself. Thus, for example, small changes may not have sufficient benefit to compensate for the disruption caused by significant re-litigation.

76. The Council supports those principles being reflected in the legislation as a preliminary issue to be addressed by an applicant seeking variation of existing parenting orders rather than the current situation where a respondent to such an application carries the onus of establishing that the application for variation is without merit and should be dismissed.

77. Such an application to strike out an unmeritorious action is possible under section 45A of the Family Court Act. The use of powers to summarily dismiss an action must be exercised with caution and in circumstances where the respondent to the substantive application carries the onus of persuading the Court that the application has no reasonable prospects of succeeding.[58] This can be a substantial challenge for a respondent to an application for variation of parenting orders and it may well be that rather than dismissing an application the Court may, in the exercise of its discretion, determine not to deal with the motion but to defer it for a later point in time in the litigation.[59] That means the child is brought to the front and centre of another round of litigation, when research tells us prolonged and protracted litigation is damaging to children.

78. The proposed amendments appropriately, in the Council's view, place the onus on the applicant who is moving the Court for fresh orders and thus must establish the change of circumstances of such significance that it justifies the orders being revisited is appropriate.

79. It is to be noted that a similar approach is taken in Canada were section 17(5) of the *Divorce Act RSC 1985* provides that:

> Before the court makes a variation order in respect of a parenting order or contact order, the court shall satisfy itself that there has been a change in the circumstances of the child since the making of the order or the last variation order made in respect of the order.

[58] *Spencer v The Commonwealth of Australia* [2010] [2010] HCA 28; (2010) 241 CLR 118 (Spencer), 24; *Australian Securities and Investments Commission v Cassimatis* [2013] FCA 641; (2013) 220 FCR 256 (Cassimatis) at [45] (Reeves J).
[59] *Butorac v WIN Corporation Pty Ltd* [2009] FCA 1503 [19] (Buchanan J); Cassimatis [50] (Reeves J).

80. In *Gordon v Goertz*[60], the Supreme Court of Canada sets down the threshold conditions of the "material change" required for a parenting order to be varied:

> [11] The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued.
>
> [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier. Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.
>
> [13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. (Citations removed)

81. The Council is satisfied that requiring an applicant seeking variation of final parenting orders to establish changed circumstances as set out in the proposed legislation is appropriate. This is because: (a) an application for variation should not be utilised as an indirect means of appealing the final orders; (b) the current legislation places an inappropriate onus on the respondent to disprove the alleged material change; and (c) it has been established that repeated litigation may be contrary to the best interests of the child.

82. At the same time, depending on the circumstances, ongoing litigation may be necessary and justified and the proposed amendments will enable the court to make that determination.

83. Additionally, requiring that threshold to be met by the applicant reduces the prospect of systems abuse in circumstances where it is not uncommon for litigants to make repeated applications for variation of final parenting orders as a means of engaging in ongoing coercive and controlling conduct directed towards the other party. Abuse by litigation is not uncommon; nor is the phenomenon of one party maintaining a 'relationship' with the other party albeit by litigation. The children are caught in the middle.

[60] 1996 CanLII 191 (SCC), [1996] 2 R.C.S. 27, par. 11, 12, 13. See also *Mansour v. Hassan*, 2023 ONSC 505 [17]-[18].

Schedule 2: Enforcement of child-related orders

84. The Council's terms of reference, as endorsed by the Attorney-General on 13 September 2022, do not require the Council to inquire into and report on the enforcement of child-related orders.

85. Nevertheless, the Council has been requested to inquire into and report on "Whether current legislative protections are adequate to prevent and respond to systems abuse, including as a form of coercive control, in family law proceedings."

86. It is in that context that the Council provides comment upon the proposed amendments concerning the enforcement of child-related orders.

87. The concern about potential systems abuse, including by the making of repeated applications, including applications for contravention orders, was identified in the AIFS Compliance with and Enforcement of Family Law Parenting Orders Project commissioned by Australian National Research Organisation for Women Safety (ANROWS).[61] Relevant findings in the Stage One Report include:

> Concern about the legal system being used to perpetuate a family violence dynamic or to perpetuate litigation was raised by eight judicial officers and 31 professionals in open ended text responses. These descriptions included repeated non-compliance and vexatious litigants using the system to continue to perpetrate abuse, as well as inappropriate responses by the court to domestic and family violence and coercive control and prevailing power imbalances (n=31; 21%). Continuing family violence is one of the factors. I'm convinced that some parties to litigation use contravention proceedings as a way to intimidate or control their former partner and/or their children. (JO) Post-separation legal systems abuse is common in the Australian family law system. Perpetrators of violence are supported by the legal system to continue their abusive behaviours on their victims (ex-partner and child/ren) under the guise of parenting. Legal system professionals need to receive mandatory education on domestic and family violence. (Domestic and family violence professional, female, Qld) [62]

88. The AIFS Final Report from this project defined systems abuse as follows:

> Systems abuse involves the use of systems and processes, including the legal system, by perpetrators of domestic and family violence to assert power and control over the other party. Litigation tactics may be used to "gain an advantage over or to harass, intimidate, discredit or otherwise control the other party".[63]

89. The findings set out in the AIFS Final Report:

- do not support changes that would strengthen the punitive aspects of the regime.

[61] Carson et al, above n 30.
[62] Ibid 50.
[63] Ibid. The definition adopted in this report is the definition of systems abuse contained in the National Domestic and Family Violence Benchbook, 2021, at 3.1.11.

- Show that the punitive aspects of the existing regime reduce accessibility due to the quasi-criminal nature of the jurisdiction they establish and the level of technical and evidentiary rigour that is required to meet the potential criminal burden of proof (beyond reasonable doubt).
- Show that the punitive aspects of the regime are likely to operate as a disincentive for parties who need to seek safer and more appropriate parenting arrangements support changes that enable flexibility to adjust arrangements if changes in the needs and circumstances of the parties and specifically the children occur.[64]

90. Having regard to that summary of relevant findings, the Council supports the proposed re-drafting of Part VII, Division 13A of the Family Law Act in a manner that is consistent with the ALRC report by shifting the focus to attempting to resolve the underlying issue that gave rise to the non-compliance and with the issue of potential penalty be considered as a last resort.[65] In that respect we observe that this recent AIFS study identified the greater effectiveness of non-punitive measures such as variation of existing orders, orders for make-up time with the child and orders that parties attend post-order support programs or post-separation parenting programs can be more effective than punitive options such as fines, bonds and imprisonment.[66]

91. However, the Council questions the efficacy of removing the power to impose a community service order in circumstances where the imposition of a fine, bond or term of imprisonment is likely to impact a financially vulnerable parent more severely. The ALRC Report noted the broad range of options the Court has for making orders in contravention proceedings, which broadly speaking, escalate in seriousness as the contravention increases in gravity and according to whether or not there was a reasonable excuse for contravening the order.[67] Appendix G of the ALRC Report provides examples of redrafted provisions, including those relating to community service orders. Under both the recommended drafting and the current drafting in section 70NFC of the Family Law Act, the making of a community service order is conditional on an agreement under section 70NFI between the Commonwealth and the relevant State or Territory. In *Kalant & Jordain (No. 5)* [2020] Fam CA 812, the Court considered making a community service order, however noted that it was unclear whether there was a relevant agreement between the ACT and the Commonwealth to enable this to occur.

92. Consistent with the principle of flexibility, the Council also supports the proposed changes which would give Registrars of the Court, who are responsible for case management of the FCFCOA's National Contravention List, greater powers to vary orders that have become problematic and which have given rise to the underlying dispute that has resulted in non-compliance with the parenting orders. The Bill provides for registrars of the FCFCOA to be delegated the power to make a further parenting order for a child to spend additional time with a person (a 'compensatory time' or 'make-up time' order), thereby supporting future

[64] Carson et al, above n 30, 21.
[65] Rachel Carson, above n 30, parts 6.7 and 6.8.
[66] Ibid 139.
[67] ALRC, above n 1, para 11.63.

compliance with parenting orders. The Council notes this does not extend to Registrars in the FCWA at this time.

93. The Council also sees merit in the implementation of ALRC recommendation 42 that there should be a presumption that costs follow the event in circumstances where a contravention application is upheld and also in circumstances where the application is found to have been without merit. The Council would be concerned, however, if provision were to be made for costs orders to be imposed as a form of penalty against a party for conduct engaged in by that party that is unrelated to the proceedings.

94. In that context the Council notes that:

> **Costs are not awarded by way of punishment**, but are "compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings."[68] (Emphasis added)

95. A potential benefit of taking the approach recommended by the ALRC is that, even where a party is self-represented, the potential of an adverse costs order may cause reflection and re-examination of the merit of their application and/or response.

96. The Council is concerned that the simplified outline for clause 70NAA might, in this case, be too detailed. For example, by including reference to reasonable doubt but not the balance of probabilities it may give some litigants the impression that reasonable doubt is the standard for all contraventions. The Council therefore recommends its removal. The standard of proof is addressed in clause 70NAE.

97. With respect to note 1 to clause 70NBD post-parenting program orders, it is not necessary or practical for the Court to seek advice about the availability of appropriate services. Requiring the Court to do so may result in delay and additional expense while enquiries are made of suitable programmes that are accessible within a reasonable distance from the party's homes. Family Advocacy Support Services are able to provide those types of referrals and are probably better placed to provide this advice.

98. Subclause 70NBD(3), as drafted, is unenforceable, as it seeks to bind non-parties by requiring program providers to inform the Court and other parties of a person's unsuitability for or failure to attend such a program. The Court may request program providers to provide such information but the onus should be on the person ordered to attend the program to provide satisfactory evidence to the Court.

[68] *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2023] FCAFC 5 at [107] referring to *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 at 543 per Mason CJ, and see also at 562-563 per Toohey J and at 566-567 per McHugh J.

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

99. The Council supports the implementation of the ALRC Report recommendation 9 to amend subsection 4(1AB) of the Family Law Act to provide a definition of member of family that is inclusive of any Aboriginal or Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.

100. In that context, at its October 2022 meeting in Cairns, the Council received feedback from organisations representing Aboriginal and Torres Strait Islander peoples that Aboriginal kinship relations reflect a complex and dynamic system that defines were a child fits into their family and community. Feedback was received that Queensland Child Protection Legislation has been amended to reflect the fact that Aboriginal and Torres Strait Islander children have other family members who may be of equal importance in their lives as their biological mother and father.

101. The Attorney-General Department's Consultation Paper on the exposure draft of the Bill identified that the extended definition of relative could have implications for Aboriginal and Torres Strait Islander peoples. It is therefore important that stakeholders should be consulted to ensure that the reporting obligations with respect to sections 60CF, 60CH and 60CI of the Family Law Act to ensure there are not unintended consequences and further marginalisation of Aboriginal and Torres Strait Islander peoples. The reporting obligations could be recast so that reporting of child protection involvement is only required with respect to family members directly involved with the child subject to the family law proceedings.

102. While supporting the proposed amendments to the Family Law Act, the Council notes that care should be taken to ensure that the amendments to the Federal legislation do not have an unintended consequence of displacing or overriding those important reforms to State legislation.

Schedule 4: Independent Children's Lawyers

103. Article 12 of the of the CROC provides that:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

104. The role of an Independent Children's Lawyer (ICL) is to represent a child's best interests as opposed to representing the child in family law proceedings.[69] Nevertheless, they are vitally important in ensuring that the Court is made aware of the child's views. The Council has received feedback that it is generally the case that, consistent with national principles, ICLs usually meet with the children whose interests they are representing in the proceedings. The Council supports that obligation being mandated unless exceptional circumstances apply.

105. In that respect, the Council notes the findings of the AIFS 2018 report "*Children and young people in separated families: Family law system experiences and needs*" where children and young people indicated that they wanted family law system professionals to listen more effectively to their views and experiences, and to be provided with safe and effective options to participate in the decision-making process and to be kept informed of this process, the progress and of the outcomes:

> Participating children and young people described their experiences of the services that they accessed and their level of participation (and lack of participation) facilitated in the decision-making process. When asked what professionals could have done better, some children and young people had firm ideas regarding their interactions. Providing space for children and young people to speak their mind, and for professionals to actively listen to their views, emerged in the data explored in this chapter as key to meeting the needs expressed by children and young people participating in this research. One participant aptly articulated what was required: 'Give children a bigger voice more of the time' (Alana, F, 12–14 years).[70]

106. The Council also notes the earlier AIFS Independent Children's Lawyer Study described very uneven practices among ICLs in relation to meeting with children. The research demonstrated that a range of family law system stakeholders, including judges, parents and children, expressed significant disappointment in relation to lack of engagement with children and young people on the part of ICLs.[71] The research evidence establishes that a requirement for

[69] *Family Law Act 1975*, s 68LA.
[70] Rachel Carson et al., *Children and young people in separated families: Family law system experiences and needs* (Melbourne: Australian Institute of Family Studies, 2018) 68.
[71] Rae Kaspiew et al. (2014) *Independent Children's Lawyers Study: final report (*Canberra: AGD).

personal interaction with children is consistent with stakeholder needs and expectations and best practice, both in terms of meeting the forensic needs of the Court for evidence on the views of children and young people, and supporting their participation. Stakeholders meeting with the Council have indicated inconsistent practice on the level of personal interaction between ICLs and children.

107. The Council supports the mandating of an obligation on ICLs to consult with children other than in exceptional circumstances, but is concerned that the obligation for ICLs to approach the Court to obtain the Court's acknowledgment that exceptional circumstances exist. There is a concern about the potential for additional litigation and court events associated with the question of whether the ICL has appropriately discharged this duty in the circumstances of a particular matter. To require the Court's determination of the issue may be impractical and absorb unnecessary resources of the litigants and ICLs who already act in the public interest by taking work at a substantially reduced rate. In practice, judicial officers will be in a position to supervise these provisions when the issue arises at case management events.

108. The Council notes that there may be additional funding demands to attract appropriately qualified ICLs and to provide training to supplement the skills of existing ICLs to ensure they are sufficiently skilled in engaging with children. There may also be resource implications associated with the arrangements for meeting with children in regional and remote locations, particularly where video and or teleconferencing may be considered inappropriate.

109. In that respect, the Council has heard directly from stakeholders across the ACT, NSW, Queensland and Victoria that there is already a significant challenge in attracting and retaining appropriately qualified lawyers to act as ICLs. Stakeholders have observed that the role of the ICL has become more complex over time but this is not reflected in increased funding. This is also reflected in the academic research.[72]

110. The Council also observes reliance on ICLs alone is insufficient to enable children's meaningful participation in family law proceedings as ICLs are only appointed in a small number of cases which tend to be complex and comprise multiple risk factors.

111. The Council supports the removal of the exceptional circumstance requirement for ICLs to be appointed in cases brought under the *1980 Convention on the Civil Aspects of International Child Abduction*. The Council acknowledges there may be cases where, in the judge's discretion, the representation of children's best interests may be of assistance to the Court. It is noted that this is likely to have resource implications in respect of the appointment of ICLs in these matters. Council understands that the appointment of ICLs in Hague matters are not routinely made.

[72] Miranda Kaye (2019) 'The increasing demands on the role of children's lawyers in family law proceedings in Australia', *Child and Family Law Quarterly*, 31(2): 143-163.

Schedule 5: Case management and procedure.

Harmful proceedings orders

112. The Council supports the inclusion of harmful proceedings orders in the proposed amendments. The focus on the impact on the respondent rather than the intention of the applicant will enable the court to protect victim-survivor adults and children from further trauma. Recent research has reinforced longstanding recognition that litigation can be misused as part of a campaign of abuse. Concerningly, findings from the 'Compliance with and Enforcement of Family Law Parenting Orders' research showed that in a sample of 300 contravention matters, more than a quarter of matters involved litigation extending over 3-4 years and 30% extending for between 5 and 9 years.[73] Insights from parents highlighted the 'detrimental and pervasive effect of this violent, coercive and controlling behaviour' affecting children over a 'significant period of their childhood'.[74] The Council considers that strengthening Court powers to respond to the misuse of litigation is essential to protect parents and children from harm and ensure that publicly funded resources are not co-opted into campaigns of abuse.

113. The types of cases where harmful proceeding orders will be valuable will be in cases such as in the following scenario. A perpetrator commences proceedings seeking a location order or a Commonwealth information Order. In their supporting affidavit they complain that the other parent is preventing them from having a relationship with the children. They will often either fail to disclosure or greatly minimise their family violence history. The respondent is served but fails to engage in the proceedings. An order is made placing the respondent on notice that if they do not engage a warrant may issue for their arrest. After the respondent is arrested and brought to Court, they obtain legal representation who subpoenas the police and criminal records of the applicant showing that the applicant has failed to disclose serious violent offences against the applicant and in other relationships. The respondent also discloses a history of violence and abuse by the applicant directed to the applicant and the children. The applicant disengages for the proceedings, leaving the respondent to seek orders on an undefended basis. A harmful proceedings order would protect the respondent from being served with a further application unless the Court has been satisfied that the applicant should be granted leave.

114. A harmful proceedings order could also be made at the end of trial where the Court has found a party is an unacceptable risk to the children due to violence or abuse.

115. With respect to the drafting of subclause 102QAC(2) the words "including but not limited to" should be added as there may be other forms of harm. Consideration should be given to including any history of the misuse of other administrative processes such as those relating to child support and child protection, and also financial harm. This type of order is likely to be made after proceedings have been on foot where there may be evidence of a party using the proceedings to exert control through extending the proceedings by for example failing to comply with orders, refusing to provide disclosure, seeking adjournments. Research evidence

[73] Carson et al., above n 30, Table 15.
[74] Ibid.

shows that perpetrators not only use litigation, but a wide range of other processes to perpetuate abuse.[75]

116. There may be some concern about what evidence is required to establish psychological harm or major mental distress. In some cases, a trial will have taken place, in other cases the perpetrator may have stopped participating in proceedings and the victim-survivor's evidence is unchallenged. *Heydon & Lester (No. 2)* [2022] FedFamC2F 1394 is an example of a case where a harmful proceedings order could have been made after an undefended hearing.

Overarching Purpose

117. The Council notes that, consistent with the ALRC Report recommendation 30, it is proposed to amend the Family Law Act to include an "overarching purpose" of family law practice and procedure to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and in a manner that minimises harm to children and their families.

118. The practice and procedure provisions of the FCFCOA, contained within the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* and Central Practice Direction ("CPD"), note that they have been informed by the "overarching purpose" provisions currently set out in sections 67 and 190 of the *Federal Circuit and Family Court of Australia Act 2021*. The CPD notes that, in addition to efficiency, a core principle is that the Court's procedures are to be applied in a manner that "ensures the safety of families and children" (Paragraphs 1.1(b) and, further, that the overarching purpose is to be applied "subject only to ensuring the safety of parties and children" (paragraph 1.3). While proposed subclause 95(1) does not contain a similar qualification to the CPD, it provides in paragraph 95(1)(a) for the provisions to facilitate the just resolution of disputes "in a way that ensures the safety and families and children".

119. The FCFCOA by reference to comparable provisions in the *Federal Court of Australia Act 1976* has noted that the overarching purpose provisions are to be taken seriously and apply to parties, their legal representatives and to the Court. In that context, in *Adamo & Vinci* (No 3) [2022] FedCFamC1F 226, it was noted:

> [69] The overarching provisions … replicate those set out ss 37M and 37N of the Federal Court of Australia Act 1976 (Cth) ("the FCA"). As observed by Gray J in *Modra v Victoria (Dept of Education and Early Childhood Development and Dept of Human Services)* (2012) 205 FCR 445 at 455, [31], "the impact of those sections on the obligations of legal practitioners practising in this court is significant." It is clear those same obligations also apply to the litigants themselves including unrepresented litigants; *Camm v Linke Nominees Pty Ltd (No 4)* [2013] FCA 223, [52] ("Camm").
>
> [70] Justice Jagot noted in *Sklavos v Australasian College of Dermatologists* [2013] FCA 1065, at [35] the need for parties to be mindful of ss 37M and 37N of the FCA:

[75] Rae Kaspiew et al (2017) *Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report* (ANROWS Horizons 04/2017). Sydney: ANROWS.

> These provisions are not merely exhortatory. The duty is real and can be enforced, if necessary, by appropriate costs orders.
>
> [71] Justice Tracey in *Kiefel v State of Victoria* [2014] FCA 411, observed at [44]
>
> By s 37N(1) a party is required to conduct a proceeding in a way that is consistent with the overarching purposes identified in s 37M. By s 37N(2) the party's lawyer must take into account the overarching duty imposed by subsection (1) and assist his or her client to comply with that duty. A failure of either the party or the practitioner to comply with these obligations may have costs consequences.
>
> [72] In *Specsavers Pty Ltd v Optical Superstore Pty Ltd* (2012) 208 FCR 78 the Full Court of the Federal Court of Australia upheld the decision of Katzmann J, at first instance, where her Honour reduced the amount of costs they could recover as a result of the parties failure to comply with the overarching purpose obligations. The Full Court stated at 86, [57]:
>
> The power, indeed duty, of the Court to regard the failure of a party or its lawyer to comply with the s 37N duties constitutes a powerful mechanism to encourage compliance with those duties"
>
> [73] Significantly in Camm at [54], Tracey J held that:
>
> One element of the overarching purpose is "the efficient use of the judicial and administrative resources available for the purposes of the Court". Another is "the efficient disposal of the Court's overall caseload". Conduct on the part of a litigant or a practitioner which impacts adversely on the pursuit of these purposes may be taken into account when costs are awarded.

120. The Council supports the strengthening of the overarching purpose provisions to specifically include the obligation to consider the impact upon children and their family.

121. The Council also supports the inclusion of the overarching purpose provisions in the Family Law Act which will ensure that the obligation applies not only to proceedings in the FCFCOA but also to Family Law proceedings conducted in state and territory jurisdictions and in the FCWA.

Schedule 6: Communication of details of family law proceedings

Clarifying restrictions around public communication of family law proceedings

122. The Council has not been tasked with inquiring into this issue. We observe however that the proposed amendments appear to strike the right balance between protecting the privacy of litigants, witnesses and, most importantly, children, on the one hand while exempting from the prohibition of disclosure, information that could be vital to ensuring a person's welfare and safety.

123. The extension of the provisions to include publication on the social media recognises the reality of modern-day communication.

Schedule 7: Establishing regulatory schemes for family law professionals

124. The Council supports the proposal to amend the Family Law Act to allow Government, following consultation with relevant stakeholders, to make regulations that will set standards and requirements for family report writers.

125. As noted by Cashmore and Parkinson:

> There is no doubt that family reports are critical documents, and that their recommendations are influential and constitute an important form of evidence relied upon by judicial officers in their assessment and consideration of the legislative criterion.[76]

126. Family Reports provide a vitally important role in parenting proceedings including:

- assisting judges, lawyers, and families by providing expert opinion regarding the level of inter-parental conflict, parent functioning, child-parent relationships, and the children's developmental, social, emotional, and educational needs post separation and divorce[77]
- often providing the only social science evidence available in parenting matters[78]
- are important to pre-trial negotiations and family dispute resolution processes, as they are acknowledged to be a 'very powerful settlement tool'[79]
- assisting the Court's inquisitorial function with family report writers being able to observe parties, review court documents and consult with extended family, teachers, therapists, child protection workers, police, general practitioners and other significant people in the child's life.[80]

127. Having regard to the important role of family report writers in family law proceedings it is important that they are appropriately accredited and regulated. It is, however, important to distinguish between the various report writer cohorts, which can be grouped as follows:

- Family Consultants employed by the Courts, which are known as Court Child Experts in the FCFCOA
- Regulation 7 report writers and

[76] J Cashmore and P Parkinson, "Children's Participation in Family Law Disputes: The Views of Children, Parents, Lawyers and Counsellors" (2009) *Family Matters* 82; P Easteal and D Grey, "Risk of Harm to Children Exposed to Family Violence: Looking at How it is Understood and Considered by the Judiciary" (2013) 27 *AJFL* 59, 72; Moloney et al, n 3, 91

[77] Saini, M. A. (2008). *Evidence base of custody and access evaluations. Brief Treatment and Crisis Intervention*, 8, 111.

[78] Samantha Jeffries, Rachael Field, Helena Menih & Zoe Rathus, *Good Evidence, Safe Outcomes in Parenting Matters Involving Domestic Violence: Understanding Family Report Writing Practice from the Perspective of Professionals Working in the Family Law System*, 39 U.N.S.W.L.J. 1355 (2016).

[79] Ibid.

[80] Ibid.

- private family report writers also referred to as Single Expert Witnesses (Western Australia).

128. Court Child Experts employed by the Court are highly qualified and skilled, and must undertake regular professional development. The FCFCOA has similar measures to ensure the high quality of reports prepared by Regulation 7 report writers. The qualifications and experience requirements for Court Child Experts and Regulation 7 report writers are made public by the Court. It is important that differences in the skills, qualifications and training requirements of these two cohorts and those of private report writers are distinguished in the framing of this provision and any proposed regulations.

129. The proposed amendment may also assist in addressing issues identified in AIFS research based on data from family law system professionals, parents and carers and from children and young people in family law matters, regarding family law system professionals, including family report writers in relation to:

- their screening assessment and response to family violence, child abuse and other risk issues in family law matters
- their engagement with children and young people and responding to children and young people's safety concerns
- the need to strengthen training and monitoring mechanisms.[81]

130. The Council cautions, however, that feedback provided to the Council establishes that there is an acute shortage of persons who are qualified to fulfil the important responsibility of report writing. It is therefore important that the accreditation and regulatory regime is not so onerous that it is a disincentive for appropriately qualified people to become family report writers or for some professionals to continue to undertake family reports. This includes consideration of the appropriateness of the inclusion of penalty provisions as consequences for non-compliance with the regulations, noting there are a number of other proposed consequences for non-compliance in proposed subclause 11K(4), including suspension or cancellation of recognition of compliance, which are considered more appropriate.

131. The Council notes that subclause 11K(5) provides that civil penalty provisions prescribed by regulations for the purposes of clause 11K are enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act). An "authorised applicant" for the purpose of the exercise of powers under Part 4 of the Regulatory Powers Act, is defined to include "each regulator" (as defined in new paragraph 11K(2)(b)) and the Secretary of the Attorney-General's Department. Should a penalty regime be retained in the Bill, the Council supports the inclusion of both a 'regulator' and the Departmental Secretary of the Department. As provided in the Explanatory Memorandum to the Bill, this approach "will enable a targeted and fit for purpose approach to any future regulation, to account for the diversity of professionals preparing family reports, and the need to minimise additional regulatory burden where possible".

[81] Rae Kaspiew et al., above n 19; Rachel Carson et al., above n 71; Rae Kaspiew et al, above n 30.

132. For that reason, we endorse the stated intention of developing the regulatory framework in consultation with relevant stakeholders. The Council would welcome the opportunity to be consulted about the final form of any regulatory framework.

Schedule 8: Review of operation of the Federal Circuit and Family Court of Australia Act 2021

Schedule 9: Dual appointments

133. The Council makes no comment in relation to either Schedule 8 or Schedule 9 of the Bill.