National Women's Safety Alliance

Submission on the Family Law Amendment Bill 2023 to the Legal and Constitutional Affairs Legislation Committee

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Introduction

The National Women's Safety Alliance brings together brings together 308 individual and organisational members to provide policy guidance, lived experience and frontline expertise to inform national policy and reform on women's safety. We support the work of our members, including Full Stop Australia, and other frontline services who have made recommendations to this significant reform.

We welcome the opportunity to provide insight to and consult with our members on the *Family Law Amendment Bill 2023.* The Alliance notes that the extensive amendments to the *Family Law Act* (1975) to date have resulted in it being arguably incomprehensible to a lay user and contend that in its current format, the *Act* struggles to meet the contemporary needs of families, parties, and the evolved dynamics of violence and separation.

The *Family Law Act* operates from a premise that proceedings would be reasonable and largely devoid of acrimony, that domestic violence and child sexual abuse were hidden from public discourse and unlikely to be exposed in the court system, and that the court system was used for proper intent rather than to subject parties to a bind of systems abuse and processes.

In responding to this significant piece of reform the Alliance makes specific comments and reflections on elements of Schedules 1, 2, 4, 5, and 8. These Schedules were raised repeatedly in consultation with our members, some of whom consider reform to the *Act* as a decades long professional commitment. Further, this response reflects direct feedback provided by our members to the Attorney General's Department on the practical operation of the proposed legislation.

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Overarching considerations

While the submission makes direct comments on those Schedules outlined above, the Alliance urges that the following considerations must be front of mind in both the drafting and operation of the amended legislation.

1) Child safety and the safety of victim-survivors of family violence must be foundational in the legislation and must not be qualified by other objectives.
2) Improving the Federal Court and Family Court of Australia's (FCFCOA) understanding of and professional responses to domestic and family violence and child sexual abuse cannot be achieved through legislative reform alone but will require a whole-of-system reform agenda.
3) Systems-abuse is a significant issue but is not confined to the FCFCOA or other court systems. Rather, it permeates through other government systems including welfare support, Child and Youth Protective Services, and the Child Support Agency. The possibility of systems-abuse within the FCFCOA for survivors of domestic or family violence or child sexual abuse must be considered alongside the likelihood of other forms of systems-abuse not yet captured in the exposure draft.

Schedule 1 – Parenting Framework

How a court determines what is in a child's best interests

The amended section 60CC outlines the general considerations to be referred to in determining the best interest of the child. As we outlined in the above 'overarching considerations', the safety of the child must have primacy, without qualification, in establishing the best interests of a child. We note that the proposed amendments to 60CC are an attempt to centre the law around the safety of the child, noting that previous considerations qualified this by still providing scope to be given to "maintain a relationship with both parents" (60CC(2)(e)) in a way, that allowed relationships to effectively trump safety.

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In this regard, we note that the addition of 60CC(2)(e) includes the determining consideration of maintaining a relationship with both parents *where it is safe to do so*. As the Alliance advised to the Attorney General's Department during consultation, this equivocation "never works" because it has the potential to sideline safety in favour of maintaining relationships. It also relies on the subjectivity of presiding officers who, without adequate understanding of the dynamics of domestic and family violence and child sexual abuse, may downplay forms of abuse, such as coercive behaviours that can only be fully understood in the context of a given relationship. Our members have also noted there should be scope to include a reference to child sexual abuse as a unique form of violence at 60CC(2)(a).

Given this concern, we pose the question as to why *where it is safe to do so* has not been included in 60CC(3) which relates to additional cultural considerations for Aboriginal and Torres Strait Islander children. In this sub-section, the omission could result in an interpretation that safety is not a primary consideration in determining what is in the best interests of an Aboriginal and Torres Strait Islander child when weighed against their right to connect with their culture.

We also draw attention to concerns raised by Women with Disabilities Australia (WWDA) with regards to 60CC(2)(d), 'the capacity of each proposed carer'. Specifically, there is a concern that this wording could exacerbate the ableism parents with disabilities already experience when dealing with institutional systems such as courts and government services. Parents with disabilities, as well as First Nations parents, experience acute anxiety regarding their children possibly be removed due to assumptions about their parenting. Our members have also previously raised how protective parents who live with disability can be reticent to divulge abuse due to fear that their children will be removed. The generational trauma of child removal also impacts on First Nations parents and other kin who provide protection to children and family in cases of violence or abuse. Given the dynamics of family violence, child abuse, and trauma when it intersects with the identity of protective parents, there is the distinct possibility of ableism and other bias to cloud custody rulings. The potential for this

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consideration (60CC(2)(d)) to be misapplied in practice must be mitigated against in the drafting.

The presumption of equal shared parenting

Like other elements of the *Family Law Act*, the presumption of equal shared parenting gave primacy to relationships over child safety and reflects a period when the extent of violence and the dynamic forms of violence and child abuse throughout the court system was not well understood. Our members have highlighted how, over the course of its operation, the presumption has caused immense, unquantifiable, and lifelong trauma to protective parents and their children. The Alliance fully supports the removal of 61DA and 61DB, the presumption of equal shared parental responsibility, from the exposure draft.

61D Parenting orders and parental responsibility

In line with feedback provided to the Attorney General's Department, our members have also noted that need for the 'pattern of previous parenting' to be considered in how the court establishes parental responsibility under 61D. As it currently stands, there is no requirement under 61D[i] for the current or previous relationship between parent and child to be considered in establishing what parenting orders and parental responsibility might look like. Rather, the focus is forward-looking about what may be possible in the future; irrespective of what happened in the past. Alliance members who work as court advocates and domestic violence support workers have outlined circumstances where an offending or otherwise disengaged parent have been assigned parental responsibility that bears no

> *One of our clients was sexually assaulted and as a result became pregnant. When the baby was one year old, after a year of no-contact from the perpetrator during this period, they applied for shared care and was successful. The court did not believe our client had been sexually assaulted. The perpetrator continued to use supervised visits and drop offs as an opportunity to frighten our client and the child* – **NWSA member and frontline service provider.**

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reflection to their previous parenting relationship with the child.

Family violence is a significant feature in the family law system, yet the system is not set up to adequately protect the safety of children and women. Due to cultural factors and systemic failings within the court system, claims of domestic and family violence are often not believed, nor are they assigned the degree of severity that they warrant. In such a culture, a perpetrator can find a degree of immunity in the system. This occurs as the Family Court's involvement in a given matter is typically met with reticence on the part of police or child protection systems to intervene in breaches or other complaints by parties. This may be because they resource-shift to the Court, but also because of community myths that women lie about family violence and/or child abuse as a strategic tactic to obtain advantage in the Court.

> *"The court system provides its own degree of immunity to offending parents. When a child is not returned on time to the [protective parent] and they are very concerned and will go to the police to notify them, but the police will just say 'go back to the court, it's a Family Law matter'. Offending parents are able to rely on the "reasonable excuse" factor at 70NBE(1)(b)(ii) but in my experience this is not an option for protective parents. It doesn't work this way when [the protective parent] does not want to return a child because of genuine safety concerns, which the court has not taken seriously when presented, but she feels compelled to comply with legal advice about 'not looking bad in court' …"* **NWSA member and frontline service provider.**

Schedule 2 – Enforcement of child related orders

Alliance members with experience working with clients through the FCFCOA have repeatedly stated that enforcement of child related orders can be punitive and dismissive of protective parents and used by offending parents to prolong abuse. Perceptions of the 'perfect victim' permeate the system, influencing parties, officers, and outcomes. In practice, the court system is not keeping pace with the public's understanding of violence and how systems and institutions can be exploited to draw out abusive behaviours.

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As noted above in our 'overarching considerations', the repeated reference to delivering efficiencies in the exposure draft carries considerable concerns for our members and their clients. Given that 'efficiency' is to be held as an overarching principle of practicing family law (Schedule 5), survivors of violence and protective parents are under immense pressure to comply with orders and not raise safety issues where they might contribute to delays in the system.

The 'reasonable excuse' clause

> *"The worst aspect I have heard about is regarding an offending parent's access to children who do not want to go to them. Obvious and ongoing impacts on children during access are not considered by the court and the handover of children to supervised visits, through an agency, distressed and disrupted the children each time. Where the protective parent refuses to comply with orders for safety concerns, they run the risk of losing their children altogether by being deemed uncooperative by the court and there for unable to co-parent. Victims and protective parents can feel there is simply no point in reporting serious safety concerns."* ***NWSA member and frontline service provider.***

We note that under 70NAE of the current *Act*, a person can have a 'reasonable excuse' for contravening an order, which includes protecting the health and safety of a child. In practice however, because the court and its officers are often not fully cognisant, or trained, on the dynamics of domestic and family violence and how it intersects with child sexual abuse, protective parents find the reasonable excuse clause does not work as it is intended. Rather, protective parents who raise concerns of safety or abuse are turned away or disbelieved.

Alliance members working for frontline services have raised concerns about how courts and family law professionals, such as independent child lawyers, often fail to contact domestic and family violence support services to verify claims of abuse, believing that such services are unjustifiably biased towards women.

Given the prospect of cost orders under 70NBE and that 'efficiency' is to be an overarching principle of practicing family law (Schedule 5), survivors of violence and protective parents could be placed under immense pressure to comply and not raise safety issues.

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Schedule 4 – Independent Children's Lawyers (ICLs)

The Alliance acknowledges that the bill takes some steps toward improving the function of ICLs. In part, this reflects the Australian Law Reform Commission (ALRC) report which found that ICLs were "reluctant to meet with children", possibly due to a lack of clarity about the role or lack of training. Further to this, the ALRC noted that perceptions about the significance of the role were muted among ICLs.

While the new bill seeks to ensure that ICLs *must* meet with the child, it does little to address the systemic issues which influence the effectiveness of the role. While ICLs are appointed by the Legal Aid Commission in the relevant state or territory, from either their own in-house lawyers or selected from a panel of practitioners, the role is Legal Aid-funded and ICLs are often under-resourced in performing this valuable role. The proposed legislation also doesn't address the lack of trauma-informed training and skill that ICLs reported to the ALRC. It should be a requirement that ICLs are both resourced and trained to undertake their work in a professional manner, and that their appointment be subject to some degree of external approval, such as through recognition or support of a professional industry body.

Our members have also raised concerns regarding Children's Contact Centres, purpose-built venues allowing interaction between children and non-custodial parents, which are not addressed in the exposure draft nor in the existing legislation. Specifically, members have raised concerns that private Contact Centres that are not government funded are effectively self-governed entities without any oversight or regulation stemming from the *Family Law Act* or other judicial regulation.

> *I have had clients who have been using Contact Centres, where staff at the Centre have tipped off a respondent father, who was subject to a no-contact DVO. The staff alerted him to the time and location that my client would be attending an intake session. She was terrified that he knew where she was going to be as she had worked hard to keep her location unknown -* ***NWSA member and frontline service provider.***

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The absence of oversight of these venues has the potential to place women and children at extreme risk of violence, as there is no requirement for non-government funded Contact Centre staff to have skills or qualifications that relate to performing risk assessments or responding to trauma. Further, staff without adequate training who are spending significant time with an offending parent, may not have the skills to recognise when they themselves are being manipulated or subjected to coercive controlling behaviours. The Centres are therefore part of the matrix of problems related to, or intrinsic to, the *Family Law Act* and the family law system that can expose protective parents and children to high-risk situations because the full weight of domestic and family violence and child sexual abuse is not understood or appropriately responded to.

Schedule 5 – Case management and procedure

Part XIB – Decrees and orders relating to unmeritorious, harmful, and vexatious proceedings

We note that the exposure draft contains several welcome additions to determining vexatious and harmful proceedings. Specifically, where a party has been determined to be vexatious, the reform will force those parties to seek leave prior to making additional filings. We also welcome the inclusion that in making harmful proceedings orders, (102QAC ss. 3(b)), the court may take into consideration filings and proceedings by one party against another in *any Australian court or tribunal* and (c) *the cumulative effect* of harm from repeated proceedings.

These measures recognise that where the court is used to continue perpetrating violence, such behaviour is often not isolated to one court system and that without intervention by the court, targeted and deliberate systems-abuse will continue.

To adequately reflect the reality of systems-abuse however, there is a need for other institutions, outside the court system, to be considered in determining harmful or vexatious proceedings. This could include Australian Government

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welfare systems, state and territory police, and child and youth protective services, as well as child support obligations.

Division 1A Overarching purpose of the family law practice and procedure provisions

Members are extremely concerned by the emphasis on timeliness and efficiencies which are repeated throughout section 95. The need for timely resolutions is outlined in Section 95, ss. (1)(b) by 'quickly' and 'efficiently' and repeated at Section 95, ss. (2)(b)(c) and (d) where the objectives of timeliness and efficiency are outlined.[ii]

While efficiently disposing of proceedings is a worthy objective for the court and involved parties, the emphasis in Section 95 is so great that it swamps other objectives relating to the safety and interests of the child. Which, as we outline above, must be *the* primary objective throughout the reform. We urge Section 95, 22. (1) and (2) to be redrafted in such a way that child safety is given primacy, and efficiency is a secondary consideration and not the objective itself.

It is also worth considering how the abundant emphasis of efficiency may come to influence parties from raising genuine concerns regarding child safety and abuse, where claims may be seen to prevent timely resolution. In this we are concerned that achieving 'timeliness' and 'efficiencies' could become punitive objectives that deter protective parents or other parties from raising legitimate safety issues.

Schedule 8 – family report writers

Family report writers assist the court to determine what is in the best interests of the child, which may influence parenting arrangements and safety. We welcome the addition in Schedule 8 of the exposure draft which provides a legislative framework guiding the work and regulation of family report writers (Part IIIAA). Given the significant influence family report writers have had in past cases before

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the FCFCOA and their capacity to influence outcomes impacting on child safety, our members have a keen interest in this element of the reform.

We understand that these reforms are an initial step towards introducing a set of standards that could impact on the availability and resources of family report writers and that building an accredited workforce with capacity to meet the demands of the court system may take some time for full implementation.

While the standards and requirements for family report writers are outlined, (11K(2)) our members have raised an additional need for both a regular peer review process and a genuine character screening process to determine suitability. This is considered necessary as it would endeavour to avoid the scenario where a compliant and accredited report writer, possesses opinions or a world view that does not align with the trauma-informed and sensitive nature of the role. Were such an assessment to come into force, an individual's understanding of gender equality, violence against women and children, and child sexual abuse should be considered relevant.

As well as family report writers, members have also noted that some Family Dispute Resolution Professionals may not be trauma-informed, and that professional standards may need to be revisited in order to assess suitability for matters proceeding to family dispute resolution and mediation.

> *"I did not feel the mediators heard my concerns. Under pressure, I agreed to an arrangement I was uncomfortable with. I felt the mediators put pressure on me to allow my former partner much more time with the children than I was comfortable with"* – ***client of frontline service.***

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[i] **61D Parenting orders and parental responsibility**

(1) A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.

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(2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):

(a) expressly provided for in the order; or

(b) necessary to give effect to the order.

ii **Division 1A—Overarching purpose of the family law practice and procedure provisions**

95 Overarching purpose of the family law practice and procedure provisions

(1) The overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes:

(a) according to law; and

(b) as quickly, inexpensively, and efficiently as possible; and

(c) in a way that ensures the safety of families and children; and

(d) in relation to proceedings under this Act in which the best interests of a child are the paramount consideration—in a way that promotes the best interests of the child.

Note: For family law practice and procedure provisions, see subsection (4).

(2) Without limiting subsection (1), the overarching purpose includes the following objectives in relation to proceedings under this Act:

(a) the just determination of all such proceedings;

(b) the efficient use of the judicial and administrative resources available for the purposes of courts exercising jurisdiction in such proceedings;

(c) the efficient disposal of the overall caseload of courts exercising jurisdiction in such proceedings;

(d) the disposal of all such proceedings in a timely manner;

(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.