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Dr James Popple
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By email: [redacted]

Dear Dr Popple

Family Law Amendment Bill Exposure Draft and Consultation Paper

Thank you for the opportunity to provide feedback on the exposure draft Family Law Amendment Bill (**draft bill**) and consultation paper. The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

This response has been compiled by the QLS Family Law Committee and Domestic and Family Violence Committee, whose respective members are practitioners and academics with substantial expertise in family law.

At the outset, QLS makes the observation that many of the proposed changes are intended not only to improve the substantive law but to make it easier to understand for both self-represented litigants and for separating couples who are negotiating their own parenting arrangements without litigation (and likely without the assistance of any family law professional). While this is an important goal, QLS highlights that it must always be borne in mind that the matters which will come before a court are the most complex and difficult matters involving the most vulnerable children. The legislation must be able to appropriately respond to those cases, as well as being as accessible as possible to members of the public.

Schedule 1: Amendments to the framework for making parenting orders

Redraft of objects

1. *Do you have any feedback on the two objects included in the proposed redraft?*
2. *Do you have any other comments on the impact of the proposed simplification of section 60B?*

QLS agrees that the current interplay between the objects and the best interests provisions is suboptimal and that simplification is required. We note that the Australian Law Reform

Commission (**ALRC**) recommended that s 60B of the *Family Law Act* (**FLA/Act**) be repealed.[1] The proposal in the draft bill, however, is to retain s 60B as a simplified objects section providing that the objects of Part VII are to ensure that the best interests of children are met and to give effect to the Convention on the Rights of the Child.

We have received a range of views on the proposed redraft, including some members who take the view that the proposed drafting appropriately addresses the objects of Part VII, some who consider s 60B(a) unnecessary and some who consider s 60B(b) unnecessary.[2]

On balance, while there are alternative ways to approach this issue, QLS is content with the proposed drafting.

Best interests factors

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

QLS supports the simplification of the best interest factors, including removal of primary and additional considerations. QLS supports the continued application of the paramountcy principle in family law matters involving a determination of the arrangements for children.

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[1] Recommendation 4, Australian Law Reform Commission's Final Report No. 135: *Family Law for the Future - An Inquiry into the Family Law System* (**ALRC Report**)

[2] Some members are concerned that proposed s 60B(b) will not result in simplification for self-represented litigants as it may be viewed as a requirement to look beyond what is set out in the FLA, ie to the text of the Convention. The concern is that the raft of information and documents available in relation to the Convention may lead to confusion as to what parties are required to address when asking the court to determine the best interests of the child. We note that the ALRC, at 5.34 of its report, discussed that not referencing the Convention would not materially affect the interpretation of the provisions of Part VII, given that common law requires that where a statute is ambiguous, it should be interpreted in a manner consistent with Australia's international obligations.

On the other hand, other members consider that it is important to explicitly mention the Convention in the FLA but are of the view that the reference in proposed s 60B(a) to the best interests of children serves no purpose. A reference to the Convention is considered important to underline the rights of Aboriginal and Torres Strait Islander children to enjoy their culture (proposed s 60CC(3)), a right which has not always been given sufficient prominence in family law, as discussed in Kha and Ratnam The Right of Indigenous Children to Cultural Safety in the Family Laws of Australia and New Zealand 2022 45(4) *UNSWLJ* 1325.. Those members are of the view that the objects provision could be discarded and the Convention could be referenced in s 60CC.

We have, however, identified a number of potential issues with proposed paragraphs (a), (d) and (e) that warrant close examination.

Firstly, some members are concerned that the use of the word 'safety' in s 60CC(2)(a) implies physical safety (particularly where harm is not defined to include psychological and emotional harm). Secondly, there is a concern that considering what arrangements would best promote safety appears to be only a forward looking exercise that does not explicitly take into account history of family violence or abuse, neglect or other harm that has already occurred. While case law informs legal professionals and the court that what has occurred in the past can be used to inform decisions about unacceptable risk,[3] unrepresented members of the public may not read the provision in that way. QLS submits that the history of family violence, abuse, neglect, or other harm should be a consideration in deciding how to keep children safe in the present and future.

It is also essential that where there is a family violence order in place, the legislation specifically require the court to take into account the matters currently set out in s 60CC(3)(k) including: the nature of the order, the circumstances in which the order was made, any evidence admitted in proceedings for the order, and any findings made by the court in, or in proceedings for, the order. This additional requirement ensures that a court is required to "look behind" the family violence order and to specifically consider circumstances in which a family violence order is made, including where the family violence order is made by consent, and/or without admission.

We also recommend that the proposed provisions separately deal with the considerations of the safety of the child from family violence and the safety of the child from abuse, neglect or other harm. The proposed s 60CC(2)(a) as drafted requires the court to consider the safety of a child and each person who has parental responsibility for the child (**carer**) from family violence, abuse, neglect or other harm. This conflates the impact on a child's safety from family violence with the impact on a child's safety from abuse, neglect or other harm that does not fit within the definition of family violence.

QLS considers that the impact on a child's safety from abuse, neglect or other harm requires a distinct and separate examination of the circumstances and the needs of the individual child and what arrangements are required to protect the child from harm and risk of harm compared to the impact on the child from family violence. The specific examination of these matters, particularly in circumstances where there is cumulative harm, requires careful consideration when deciding what arrangements would best promote the child's safety.

QLS is concerned that paragraph (d) could have unintended consequences. We recognise that the provision has been drafted to counteract ableist beliefs about the parenting capacity of people with disabilities but consider that linking the capacity of a carer to their ability and willingness to get support may be interpreted in other ways and may be used against parents who do not need support or cannot access support due to lack of services. The drafting suggests

[3] *Isles & Nelissen* [2022] FedcFAMC1A 97

that the only proof of capacity to care is the ability and willingness to seek support, which was probably not intended by the drafters.

Regarding proposed paragraph (e), there is a concern that some of the problematic terminology from the primary considerations existing in the current FLA is carrying over to the draft bill. There is a risk that continued discussion of the 'benefits' of relationships will import old jurisprudence and continue to present difficulties in interpretation of the law and application to particular cases. Some members argue that the wording of proposed paragraph (e) can be read more as an ideological statement that there is benefit in maintaining relationships, rather than a factual matter for the judge to determine: arguably, paragraph (e) is of a different nature to the matters addressed in the other paragraphs of proposed s 60CC(2). We suggest that *whether* there is a benefit is an argument that should be made by counsel on behalf of their client based on the evidence, including evidence regarding family violence. QLS submits that s 60CC(2)(e) requires careful consideration, including in relation to:

- the possibility of rephrasing the paragraph such that the court must consider *whether* there is a benefit to maintaining existing relationships
- whether there should be separate paragraphs regarding relationships with parents/primary cares and other significant relationships
- whether there is a need to specify that 'where it is safe to do so' refers to safety of both the child and any carer (as in paragraph (a)).

QLS supports proposed s 60CC(3), and acknowledges the need for the court, when determining what is in the best interests of a child, to specifically consider a child's right to enjoy their Aboriginal or Torres Strait Islander culture, by having the opportunity to connect with, and maintain their connection with, their family, community, culture, country and language, together with consideration of the likely impact any proposed parenting order will have on that right. Given the structural racism that has permeated government interactions with First Nations people in Australia's history, it is essential that modern laws give proper weight to cultural considerations and uphold Australia's obligations under international law. There may even be scope to strengthen the wording of proposed s 60CC(3) to align with articles 9 and 11 of the United Nations Declaration on the Rights of Indigenous Peoples and we recommend further consultation with First Nations people on whether that would be desirable and effective.

In terms of children from other cultural backgrounds, QLS notes the ALRC's findings at 5.69 of its report that maintenance of cultural connections can be taken into account under the catchall provision as another relevant factor (proposed paragraph (f)). Nonetheless, we note that according to the Australian Bureau of Statistics, in 2021, just over 7 million people in Australia were born overseas, representing 27.6% of the population of Australia. Many of these people, and their descendants who were born in Australia, value and live by traditions and customs practised in their country of origin. Their culture is an integral part of their identity. On that basis, QLS recommends that an additional consideration be specifically included in the proposed legislative changes to require the court to consider a child's right to enjoy their culture by having the opportunity to connect with, and maintain their connection with, their family, community, culture, country of origin, and language, together with consideration of the likely impact any proposed parenting order will have on that right.

Removal of equal shared parental responsibility and specific time provisions

6. If you are a legal practitioner, family dispute resolution practitioner, family counsellor or family consultant, will the simplification of the legislative framework for making parenting orders make it easier for you to explain the law to your clients?

7. Do you have any comments on the removal of obligations on legal practitioners, family dispute resolution practitioners, family counsellors or family consultants to encourage parents to consider particular time arrangements? Will this amendment have any other consequences and/or significantly impact your work?

QLS supports removal of the presumption of shared parental responsibility and mandatory consideration of certain time arrangements.

The draft bill effectively removes the framework that was outlined by the Full Court in *Goode & Goode* [2006] FamCA 1346. It removes the requirement that the court must consider making an order for equal time or substantial and significant time if the presumption of equal shared parental responsibility is not rebutted.

QLS agrees that the existing provision created an expectation in the community that an order for equal time would be given. This incorrect understanding fuelled conflict. Obviously, shared parental responsibility requires the parties to co-parent. That parties are embroiled in disputes about time arrangements for children, including court proceedings, in and of itself indicates that they are having difficulty agreeing on issues relevant to the best interests of the child and that their interactions may be defined by conflict and a lack of trust.

By removing the presumption of equal shared parental responsibility, the expectation of equal time should dissipate and our members expect that they will be better able to focus advice on how orders for time will depend on evidence about what is in the best interests of the child, taking into account all relevant issues including family violence and the capacity of the parents to communicate and cooperate with each other regarding issues related to the child.

Overall, the simplification of the legislative pathway will make for simpler and clearer advices, with fewer 'if this, then that' type explanations and fewer different terms (eg 'reasonably practicable', 'substantial and significant') to explain to clients. On the other hand, given that this will be new law, it will take our members time to fully understand the implications of the amendments as case law around the new provisions develops.

8. With the removal of the presumption of equal shared parental responsibility, do any elements of section 65DAC (which sets out how an order providing for shared parental responsibility is taken to be required to be made jointly, including the requirement to consult the other person on the issue) need to be retained?

QLS supports retention of s 65DAC.

Other comments

As a result of the changes regarding the presumption of shared parental responsibility and time arrangements, there will be changes to advisers' obligations in ss 60D and 63DA. Some members feel that the changes to the latter provision do not go far enough and consider that s 63DA is inappropriate and unnecessary.

In so far as solicitors are concerned, rule 7 of the Australian Solicitors' Conduct Rules requires solicitors to properly advise clients on available options. Section 60D FLA makes it explicit that advisers must encourage the person to act in the child's best interests.

Section 63DA imposes additional obligations to advise about parenting plans, with no exception for matters where parenting plans are clearly inappropriate due to family violence. Consideration should be given to further amending or repealing s 63DA so that it is not mandated that solicitors advise their client on one particular issue (parenting plans) even where it is not appropriate to their circumstances. Where a parenting plan is or may be relevant, a solicitor should properly be expected to provide advice to their clients, just as they will in relation to other relevant ways in which arrangements can be formalised.

As to the other flow on effects of removing the presumption of equal shared responsibility and the mandatory consideration of certain time arrangements, we note that the draft bill would result in there being no specific guidance about what the court should consider when fashioning orders around parental responsibility.

Where there is no order, the position is that both parents have responsibility pursuant to s 61C. However, where it is necessary to make an order about shared responsibility, the draft bill would leave the court with no guidance. While the best interest considerations in s 60CC will of course apply, the court should be considering specific matters such as whether:

- there has been family violence
- the parents are able to effectively communicate about decisions
- one parent should have responsibility for certain types of decisions but be required to keep the other parent informed.

QLS recommends that the need for a new section be considered, with the section to address the different types of orders that can be made about parental responsibility. For example that the court may make an order:

1. That both parents have parental responsibility (ie the s 61C position);
2. That parents exercise parental responsibility in relation to major long term issues jointly (we submit that the word 'equal' must not be used because of the presumptions it can create around other matters, such as time); or
3. That one parent has sole responsibility, or sole responsibility for certain types of decisions.

In order to protect vulnerable parties from family violence, the proposed section should provide that shared responsibility should not be ordered where there has been family violence except in exceptional circumstances and that the court must give reasons for ordering shared parental responsibility.

QLS also notes the ALRC's comments at 5.119 regarding the legislative amendments being accompanied by extensive, evidence based resources to assist parents in working out arrangements that are in their child's best interests. QLS hopes to see these resources released contemporaneously with legislative change.

Reconsideration of final parenting orders (Rice & Asplund)

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

QLS considers that the proposed section reflects the main principles of the common law rule and the considerations set out in *Rice & Asplund*.

10. Do you support the inclusion of the list of considerations that courts may consider in determining whether final parenting orders should be reconsidered? Does the choice of considerations appropriately reflect current case law?

The list set out in the proposed section accurately summarises the considerations set out in *Rice & Asplund* (and the cases following, including *G & G* [2000] FamCA 12 and *Marsden & Winch* (2009) 43 FamLR 1). QLS agrees that inclusion of the list in the section should provide clarity for litigants and lawyers about when a final order may be 'reconsidered' by the court.

In circumstances where previous final orders are sought to be amended or changed by way of an application for consent orders, a mechanism may be required (amendment to the application for consent orders form, for example) to enable evidence about the matters set out in the proposed s65DAAA to be provided to the court.

Schedule 2: Enforcement of child-related orders

11. Do you think the proposed changes make Division 13A easier to understand?

Yes, QLS considers that the four proposed subdivisions improve readability of the provision by making it more streamlined. This will likely result in more consistent application by courts of Division 13A and greater understanding by parties as to the consequences of both non-compliance with an order and initiation of unmeritorious contravention applications.

12. Do you have any feedback on the objects of Division 13A? Do they capture your understanding of the goals of the enforcement regime?

The proposed objects of Division 13A encapsulate the articulated goals of the enforcement regime, save for proposed s 70NAB(e). QLS recommends that consideration be given to rewording this proposed principal object to provide words to the effect of "*providing for the*

imposition of appropriate sanctions on a complainant bringing a contravention proceeding without merit, or on a respondent for non-compliance with child-related orders without reasonable excuse". This recommendation reflects:

- the proposed amendments to the cost order provisions with the adoption of the central power to award costs,
- that the distinction between "more serious" contraventions and "less serious" contraventions will be removed; and
- the proposed wording of s 70NBE(4)).

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

The refinement of the existing four sections, some with various subsections, to one proposed provision is welcomed. However, the rationale behind the inclusion of proposed s70NBE(3)(b) is not understood. QLS is of the view that it should be open to a court to make a costs order, irrespective of the fact an order may be made or has been made for make-up time (under s 70NBB).

14. Should proposed subparagraph 70NBE(1)(b)(i) also allow a court to consider awarding costs against a complainant in a situation where the court does not make a finding either way about whether the order was contravened?

QLS submits that it would not be proper for a court to consider awarding costs against a complainant in a situation where a court does not make a finding either way about whether the order was contravened, given there ought to be proper consideration of, and a determination about, the respondent's behaviour that has given rise to the complaint prior to making a costs order. This comment does not apply to a situation where a contravention application is withdrawn or discontinued by a party with there being no resolution of the issue of costs as between the parties.

15. Do you agree with the approach taken in proposed subsection 70NBA(1) (which does not limit the circumstances in which a court may deal with a contravention of child-related orders that arises in proceedings) or should subsection 70NBA(1) specify that the court may only consider a contravention matter on application from a party?

QLS supports the approach taken in proposed subsection 70NBA(1). A court's ability to deal with a contravention of child-related orders that arises in proceedings ought not be limited to a contravention application from a party only.

Family law matters see a disproportionate number of cases where parties are self-represented or represented in a limited capacity due to financial constraints. A court ought to be able to address power imbalances and seek compliance with its own orders by exercising jurisdiction to intervene in matters before it where there is non-compliance with orders. Such approach would also likely assist in supporting litigants to understand their obligations, consistent with the objects of Division 13A. This would allow difficulties associated with child-related orders to be

resolved at an earlier juncture and deter non-compliance, such that future applications may not be required.

Further, it may be the case that a party does not, of their own motion, wish to positively agitate matters of non-compliance given the financial and emotional impost that such application may have on families. The need for such application is removed where a court recognises and calls out such conduct, which in turn further supports the objects proposed in s 70NAB.

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

The ability of a court to make orders addressing underlying issues which may have given rise to a contravention application, without necessarily making a finding on a contravention, is advantageous and may see the proceedings being withdrawn and behaviours modified, lessening the need for future applications.

The removal of the required distinction between "more serious" contraventions and "less serious" contraventions in the consideration of costs orders is also welcomed, noting that all contraventions are indeed serious for families and non-compliance can lead to detrimental outcomes. There ought properly to be an expectation that all orders are complied with to accord with the objects of proposed s 70NAB, and particularly the upholding of the authority of a court by enforcing compliance.

The delegation of powers to registrars of both Divisions of the FCFCOA is a welcome amendment and consistent with the operations of the FCFCOA's National Contravention List, although it is imperative that such delegation remains reviewable by a judge.

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

17. Do you have any feedback on the wording of the definitions of 'relative' and 'member of the family' or the approach to implementing ALRC recommendation 9?

18. Do you have any concerns about the flow-on implications of amending the definitions of 'relative' and 'member of the family', including on the disclosure obligations of parties?

19. In section 2 of the Bill, it is proposed that these amendments commence the day after the Bill receives Royal Assent, in contrast to most of the other changes which would not commence for 6 months. Given the benefit to children of widening consideration of family violence this is appropriate – do you agree?

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

QLS recommends close consultation with Aboriginal and Torres Strait Islander peoples regarding the drafting of the bill but otherwise does not have specific feedback on these issues at this time.

Schedule 4: Independent Children's Lawyers

Requirement to meet with the child

21. Do you agree that the proposed requirement in subsection 68LA(5A) that an ICL must meet with a child and provide the child with an opportunity to express a view, and the exceptions in subsections 68LA(5B) and (5C), achieves the objectives of providing certainty of an ICLs role in engaging with children, while retaining ICL discretion in appropriate circumstances?

QLS submits that the proposed subsection provides clarity about the requirement for an ICL to meet with the child and enable the child to express a view about matters in the proceedings. A number of reports and studies[4] have highlighted that children and young people seek to be heard in decision making about their care and safety when they are the subject of family court proceedings. Including the proposed requirement in legislation is a step toward achieving this.

It must be noted, however, that the proposed amendments may have practical and costs implications. ICLs take on onerous work and are funded very poorly. There are fewer available ICLs in regional areas in Queensland and regional ICLs tend to take matters across regional and circuit registries in the area they work. Meeting children by remote or electronic means is possible, but it is generally preferable to conduct face to face meetings with the children, which could involve significant travel and expense. This situation would be similar in other geographically large states in Australia. Depending on the case, an ICL may be required to meet with the children on a number of occasions during litigation, which could increase the amount of funding required to be allocated to ICL matters to ensure compliance with the requirements of the Act.

The amendments to s 68LA may also increase the likelihood of interlocutory applications brought by parents aggrieved by the ICL's decision to meet or not meet the child, or to prevent the ICL meeting the child pursuant to s 68LA(5B). Again, this would potentially increase the amount of funding required to be allocated to ICL matters.

22. Does the amendment strike the right balance between ensuring children have a say and can exercise their rights to participate, while also protecting those that could be harmed by being subjected to family law proceedings?

Yes. QLS considers that the draft provisions provide an adequate balance between ensuring children are given the ability to put forward any views they have, and to participate in decisions about the matters in dispute, with sufficient safeguards for those matters where doing so may create risk or be harmful to the child.

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

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[4] ALRC- https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/16-childrens-involvement-in-family-law-proceedings/family-court-practice-and-procedure-the-right-of-the-child-to-be-heard
AIFS- https://aifs.gov.au/research/commissioned-reports/independent-childrens-lawyers-study

No. The proposed subsection is sufficiently broad to deal with the potential risks or negative implications for the child in meeting the ICL and is expressed to be non-exhaustive in any event.

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

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

When an ICL is appointed in parenting matters, there is often a delay between the order being made for the ICL and the ICL actually becoming involved and getting 'up to speed' with the matter. If there is a similar delay when an ICL is appointed in Hague Convention proceedings, then that could be adverse to the overarching aim of having the child returned to the country/parent that they have been removed from.

Further, assuming that the criteria of *Re: K* (1994) FLC 92-46 would still need to apply when deciding whether to appoint an ICL, if a case does not satisfy that criteria it may result in an ICL not being appointed. In comparison, s 68L(3) requires there to be 'exceptional circumstances' for the appointment of an ICL. It may be, therefore, be that the repeal of s 68L(3) results in some cases not having an ICL appointed that would have ordinarily been appointed under s 68L(3).

From a structural point of view, some members have expressed the view that it would be preferable for all provisions related to Hague matters should be kept together rather than being spread across the FLA and the *Family Law (Child Abduction Convention) Regulations 1986*.

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

It may be that the appointment of an ICL in Hague Convention matters occur more frequently if s 68L(3) is repealed. If that is the case, then that may result in the parties legal fees being reduced as result of the ICL attending to more of the 'leg work' in providing the necessary evidence to the court (for example in the form of subpoenas and reports). Once again, however, the ICL work needs to be properly funded.

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

QLS has no further feedback or comments.

Schedule 5: Case management and procedure

Harmful proceedings orders

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

Over a period of around 10 years, the parties in *Marsden & Winch* engaged in litigation relating to the spending time arrangements for a child. The litigation included several hearings and appeals.

In the *Marsden & Winch* [2012] FamCA 577 proceedings, a vexatious litigant order was made against the father on the grounds that 1) there was a long series of litigation and 2) the cumulative effect caused the primary carer distress, such that it had a profound effect on their psychological health and ability to care for the child.

In *Marsden & Winch* [2013] FamCAFC 177 the Full Court overturned the vexatious litigant order against the father and held that to declare a person vexatious, the court is required to be satisfied that an applicant has frequently started a case or appeal that is frivolous, vexatious or an abuse of process. There was no evidence that the father had frequently started cases or appeals that were frivolous, vexatious or an abuse of process.

The ALRC identified that the court did not have sufficient powers to make orders where 'one party oppresses the other by repetitive filing of applications, particularly where the respondent is the primary carer of children and the misuse of the court processes has a deleterious effect on the health of that person and their parenting capacity.[5]

To address this issue, the ALRC recommended that:

> "the Family Law Act be amended to provide the family courts with a further power to make an order requiring a litigant to seek the leave of the court prior to making further applications and serving them on the other party, or to make any other order restraining the conduct of a litigant as the court sees fit".[6]

The proposed Division 1B does not go as far as contemplated by the ALRC, which proposed that the court be allowed to make any other order restraining the conduct of a litigant as the court sees fit. Providing this broader power could allow for the court to restrain a litigant from bringing further applications in relation to a specific issue (eg in relation to parenting but not property) or from making interlocutory applications while substantive proceedings are on foot.

QLS submits that the proposed provision should be broadened to reflect the ALRC's recommendation.

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[5] ALRC report, pp 307 and 309.
[6] Paragraph 10.44.

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

The proposed orders do not restrict the person subject to the order from accessing the court. It is simply proposed that the other party (or parties) to the proceeding need not be involved in litigation until leave is granted. Nevertheless, any order which reduces a person's legal rights or access to justice should not be made lightly.

Research shows that a lack of knowledge and experience of legal concepts and processes may be a contributing factor where a self-represented person frequently engages with the legal system.[7] It is recommended that Legal Aid should be made available to parties who are facing an application for a harmful proceedings order against them.

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

QLS has no feedback on this item.

30. Do you have any views about whether the introduction of harmful proceedings orders, which is intended to protect vulnerable parties from vexatious litigants, would cause adverse consequences for a vulnerable party? If yes, do you have any suggestions on how this could be mitigated?

Under the proposed provisions, proceedings that are instituted in contravention of s102QAD are stayed and the court has a broad power under subsection (3), including in regard to costs.

QLS is concerned, however, that this may not be a strong enough deterrent to prevent parties subject to harmful proceedings orders from serving their application on the other party. We recommend that consideration be given to making it an offence to serve material in contravention of a harmful proceedings order.

QLS is also concerned that there is a possibility of unintended consequences for vulnerable parties involved in applications for harmful proceedings orders, given that they may be required to prove harm to themselves in the course of the court considering an order under proposed s102QAC. That proof of harm may later damage their own case that it is in the best interests of the child to live with them. The drafters of the bill should be made alive to this issue and give careful consideration to how it could be addressed.

Overarching purposes of the family law practice and procedure provisions

[7] Dewar, John, et al, 'Litigants in Person in the Family Court of Australia: A report to the Family Court of Australia', (Research Report No. 20, 2000).

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

QLS offers the following observations regarding proposed s 95.

The purpose of resolving disputes as quickly, inexpensively and efficiently as possible (s 95(1)(b)) could be furthered by limiting the number of compulsory forms that must be filed in a matter.

The objectives in proposed ss 95(2)(a) to (d) are appropriate; the increased number of registrars now in the court will aid in achieving those objectives.

The objective in proposed s 95(2)(e) is difficulty to apply to directly child-related matters given the high importance and complexity of parenting matters that come before the court.

Proposed s 96(3) regarding estimate of costs will present difficulties in parenting matters, given that duration and costs are inherently related to the attitude of the other party and therefore outside the control and knowledge of the first party's lawyer.

Schedule 6: Protecting sensitive information

Express power to exclude evidence of protected confidences

32. Do you have any views on the proposed approach that would require a party to seek leave of a court to adduce evidence of a protected confidence?

QLS endorses the draft bill's adoption of recommendation 37 for the ALRC report but raises concerns about the implementation of the recommendation, which will require significant oversight at Registry level. It may be that multiple determinations about this type of evidence are required throughout litigation. Consideration will need to be given to appropriate court rules and practice directions to manage the process of these types of determinations.

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

QLS considers that the proposed definition is appropriate, having reviewed the definition of a health service pursuant to s 6FB of the *Privacy Act 1988.*

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

We note the similarities between the proposed protected confidence regime and the sexual assault counselling privilege framework in Division 2A of Part 2 of the *Evidence Act 1977* (Qld).

Recommendation 37 of the ALRC report proposed that courts have power to exclude evidence of protected confidences, with the court:

a. to be satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider and the nature and extent of the harm outweighs the desirability of the evidence being given; and
b. to ensure that in parenting proceedings, the best interests of the child is the paramount consideration when deciding whether to exclude evidence of protected confidences.

The ALRC recommendation does not provide for the court to consider the "public interest" if admitting the evidence outweighs the "public interest" in preventing harm that would or might be caused, directly or indirectly, to a protected confider or a relationship of which the protected confidence was made or relationships of that kind generally.

QLS notes that the draft imposes a consideration of public interest, which was not recommended by the ALRC, but which does reflect the general intent that there is a public interest in ensuring that parties receive therapeutic assistance as required (which is encouraged by the preservation of confidentiality).

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

QLS supports the inclusion of subsection (3)(a) which permits the protected confider consenting to evidence being admitted in the proceedings. QLS submits that it should also be made clear that no adverse inference can be made where a protected confider does not consent to evidence being admitted.

Schedule 7: Communication of details of family law proceedings

Clarifying restrictions around public communication of family law proceedings

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

The legislative provisions restricting the public communication of family law proceedings are crucial to maintaining the privacy of parties to family law proceedings, which often involve highly sensitive and personal matters. However, many parties have little awareness of these provisions, resulting in a dangerous environment where some parties wish to "share their stories" about their experience in the court system, particularly – in recent times - on social media, without knowledge of the potential ramifications of their actions.

Section 121 has been overlooked at times by litigants due to its complexity, numerous exceptions and difficulty to locate in the "Miscellaneous" part of the Act. Proposed Part XIVB seeks to change that by addressing the issue of public communication in its own part of the Act, being clearly labelled, easy to identify and simpler to navigate.

QLS considers that proposed Part XIVB is easier to understand as it separates the numerous subsections of s 121 into five sections, each with a clear purpose. The definition of "communicate" at s 114P(1) exemplifies the breadth of communications the provision covers and updates the provision to specifically include mention of the internet and social media services, which is important to modernise and update the provision. Section 114Q(3) now clearly achieves the true purpose of s 121(3), as it encapsulates any material that is sufficient to identify the person and provides examples of such material, which appears to be the purpose of the list of particulars in the current s 121(3) which are not intended to limit s 121(1). The examples are also much clearer and more concise than the particulars in the current legislation.

The inclusion of s 114S(2)(a) as the first exception to the operation s 114Q ensures that litigants feel at ease when privately communicating with their family or friends about the proceedings and seeking their support. Overall, Part XIVB achieves its goal of communicating clearly and concisely the regulation of parties' public communication about the proceedings, in order to ensure that parties have an increased awareness and understanding of this legislation.

Notwithstanding this, there are broader issues that need to be considered. For example, whether these provisions could be modified to strike a better balance between the need to protect the privacy of parties to family law matters and the need for accountability and transparency to enhance public confidence in the family law system. In order to address this, the LCA has previously recommended that the legislation be amended to place an obligation on any courts exercising family law jurisdiction to publish all anonymised reasons for judgment.[8] This, however, would need to be considered against the background of limited resources and government funding.

A further important issue to consider is access to information about family law matters by bona fide researchers conducting research with appropriate ethics approval. Academic research is essential to ensuring an evidence base for reforms to improve the family law system. Access to documents (de-identified) is critical to the quality of research. At present, researchers have limited access to material and are unable to view documents related to matters discussed in research interviews with court users. Research participants should be able to share their family law documents without the consent of the other party, provided ethics approval is given for the project.

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

Whilst Part XIVB particularises additional definitions than are currently provided in s 121 of the Act, it is noted that the term "account", which is frequently used throughout Part XIVB, has not been defined, although pleadings, transcripts of evidence or other documents appear to be referred to within the category of "account" in s 114S(2). For the purposes of the legislation, the word "account" seems to encompass both a description of the proceedings and documents

[8] Law Council of Australia, *Review of the Family Law System: Discussion Paper,* 16 November 2018, 81.

relating to the proceedings, which may not be plainly apparent to an unrepresented litigant. It is therefore recommended that "account" be defined in s 114(1), using wording such as:

> "***account*** means a description of an events or events of the proceedings or any document or recording (in whole or in part) filed by any party in the Court, issued by the Court, related to the proceedings or created for the purpose of the proceedings. Example: Orders of the Court"

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

Yes, the simplified outline at section 114N makes the offences easier to understand.

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

The LCA has previously recommended that for "*an avoidance of doubt provision should be inserted to clarify that government agencies, family law services, service providers for children, and family violence service providers are not parts of the 'public' for the purposes of the provision*".[9]

Similarly, the ALRC has previously recommended that s 121 should be redrafted to confirm that "*it is not an offence to provide an account of proceedings to a government agency or other organisation in connection with that agency's or organisation's role in providing a service to a particular family or family member*".[10]

As section 114S(2) of the draft bill is currently drafted, these recommendations either do not appear to have been incorporated or are not made clear.

QLS recommends that:

Option 1: a new sub-section be inserted which reads as follows:

> "(h) a communication of an account of proceedings to a member of an agency or other organisation providing a service to a party to proceedings or a person who is a member of the party's family in connection with the proceedings.
>
> Example: family violence service."

Option 2: section 114S(2)(a) be amended to read as follows:

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[9] Law Council of Australia, *Review of the Family Law System: Discussion Paper,* 16 November 2018, 81.

[10] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System*, March 2019, 436.

> "(a) a private communication between a party to proceedings and a person who is a member of the party's family or a friend of the party *or an agency or organisation providing a service to the party in connection with the proceedings.*"

Further, parties are often asked to provide interim and/or final parenting orders to relevant persons/entities for their children, such as their day care, school or medical practitioner. The provision of orders to these entities can ensure that they properly understand their obligations as to which parent they are to communicate with and what care arrangements are in place, particularly in circumstances where changeover is taking place on site. If the provision of such orders has not been included within the body of the order by accidental omission, this can create difficulty for the parents in providing these orders to these persons/entities as requested, as it could fall within the definition of public communication and be an indictable offence. Therefore, it is recommended that a new sub-section to s 114S(2) be inserted as follows:

> "(h) a communication of interim or final parenting orders to the relevant child's/children's day care, school or medical practitioner/s (where this communication has not otherwise been provided for in the body of the relevant orders)".

Other submissions regarding Schedule 7

The words "court etc" should be removed from the heading at section 114R. Throughout Part XIVB, reference is generally only made to a "list of proceedings" and not to a "list of court etc proceedings" as in this heading. The inclusion of the words "court etc" is unnecessary, and it could potentially obfuscate the meaning.

In addition, materials should be made available to litigants as to the restrictions that Part XIVB imposes, what the punishment is, how to report breaches of section 114R and to whom they may report this breach. QLS recommends that a brochure be prepared and made available on the FCFCOA's website which details this information in a simple, easy to read and concise manner, to ensure that all parties are aware of their obligations in relation to public communications about their proceedings.

Schedule 8: Establishing regulatory schemes for family law professionals

Family Report Writers schemes

40. Do the definitions effectively capture the range of family reports prepared for the family courts, particularly by family consultants and single expert witnesses?

Yes, the definitions adequately capture the range of reports prepared by Court Child Services and by external report writers for parenting proceedings.

41. Are the proposed matters for which regulations may be made sufficient and comprehensive to improve the competency and accountability of family report writers and the quality of the family reports they produce?

Yes, the matters set out should be sufficient to improve competence and accountability in report writing for the purposes of parenting proceedings.

One of the potential impacts of the proposed changes is that experienced 'private' (ie not employed by the court) report writers may increase their fees for the reports to cover the cost and administration required by the Regulations, which would be a cost borne by the parties in the proceedings. Some experienced report writers may elect not to continue with the work if the administrative and financial burden is onerous. The Court Children's Service has a finite capacity to provide reports, and private report writers are an important resource to obtain timely reports to assist the Court, the parties and the children in the litigation process. Further consultation around the regulations will be required, to achieve the appropriate balance.

Commencement of the changes

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

Yes, a six-month lead in time is appropriate for these changes. This is noting that the changes are not insignificant, it will take time for practitioners and self-represented litigants to familiarise themselves with the changes and their implications, and for the court forms to be updated (as required). A shorter lead-in time, for example, 3 months, could still allow for this, although is not necessarily recommended.

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

Yes, the application provisions seem appropriate in light of the proposed amendments.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted]

Yours faithfully

[redacted]

Chloe Kopilovic
President