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Submission on the *Family Law Amendment Bill 2023*

About Inner Melbourne Community Legal

Inner Melbourne Community Legal (**IMCL**) is an independent community legal centre that assists people experiencing chronic disadvantage, or with multiple barriers to access free legal help and access fair outcomes. This includes individuals experiencing: family violence, homelessness, mental illness, chronic illnesses, disability and substance dependency. We also prioritise First Nations people, LGBTIQA+ and culturally and linguistically diverse (**CALD**) communities. We recognise that legal issues often do not occur in isolation, but are inter-related with other non-legal issues, which can result in more frequent and/or adverse interactions with the justice system. We work holistically and tailor solutions to break this cycle and achieve sustained outcomes. As our catchment in the inner Melbourne area covers major metropolitan hospitals, public housing, homelessness services and specialist schools, IMCL works in integrated partnership. We aim to maximise access to assistance for clients when their need may be critical, but when they cannot otherwise access legal help.

IMCL family law assistance

We provide information, advice, casework and representation to clients with family law and other related legal matters. We are a member of the Victoria Legal Aid section 29A Practitioner Panels for Family Law, Summary Crime and Family Violence. We also provide legal education and advocate for systemic reform. Our lawyers provide family law assistance to clients with family violence and family law matters across all of our health justice partnerships; housing justice partnerships; outreach services in schools and maternal child health services; and as an adjunct to our family violence duty lawyer service at the Melbourne Magistrates' Court. The Beyond Survival partnership which is part of our Police Accountability Project, specifically assists clients alleging misidentification as perpetrators of family violence, as well as duty failures and harm related to the policing of family violence matters which most often have associated family law disputes.

Introduction

IMCL is supportive of the intention of the Exposure Draft of the *Family Law Amendment Bill 2023* (**Exposure Draft**) to ensure 'the best interests of children are prioritised and placed at the centre of the family law system' (Consultation paper, 3). In particular, we commend the Government for the removal of the presumption of equal shared parental responsibility. We

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anticipate that these changes will address significant issues relating to complex considerations of child and familial safety.

System-wide trends limiting access to justice

Reforms of the *Family Law Act 1975* (**FLA**) are long overdue, and we commend the Government for being 'committed to improving the family law system so that it is accessible, safer, simpler to use, and delivers justice and fairness for all Australian families' (Consultation Paper, 4). It is our view that to realise this ambition, the legislation must sit alongside an examination of, and ultimately reform of, the funding of community legal centres and the eligibility for grants administered by Legal Aid Commissions nationwide.

As private legal representation is increasingly beyond the reach of most parties in family law proceedings, there is both an increasing demand on community legal centres and more self-represented litigants. The latter struggle to navigate the FLA and particularly where it overlaps with other related jurisdictions. Moreover, they are rarely able to comply with Court procedures for the preparation of documents or have an appreciation for the complexities of case law. For litigants experiencing chronic disadvantage and/ or with multiple barriers, they cannot effectively or safely self-represent themselves.

The ability of community legal centres to provide free, discrete family law advice and ongoing representation is constrained by piecemeal and short-term funding, as well as the increased complexity of matters in part arising from the merger of the Family Court of Australia and Federal Circuit Court (**the Court**). Ensuring compliance with pre-action procedures before any initial filing, and later the preparation of documents at interim stages and for trial, require a significant investment in time and resources. As a result of these pressures, the number of family law matters that we can assist with has been greatly reduced. Coupled with the narrow eligibility for ongoing legal aid funding; the rigidity of s102NA (family violence cross-examination scheme) grants, and how late they come into effect in the lifespan of a matter before the Court; we consider that more and more litigants are unable to access legal help. Dedicated, sustainable funding is urgently needed for the Court, community legal centres, Legal Aid Commissions and all other family law services.

Removal of the presumption of equal shared parental responsibility

IMCL supports the removal of the presumption of equal shared responsibility.

The presumption of equal shared parenting responsibility does not prioritise the best interests of children in family law litigation, particularly in circumstances where there are

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allegations of family violence or other circumstances that prevent parents or carers from meaningfully and safely co-parenting. Perpetrators of family violence can still exert power and control over their victims by abusing these provisions. We support the submissions by Womens Legal Services Australia (**WLSA**) that parental responsibility should be considered on a case-by-case basis and consider what is in the best interests of children. It should promote the safety of children, and victim/ survivors of family violence.

Case study 1 -

Mariam is a CALD woman and the victim/survivor of sexual, religious and psychological abuse. She was isolated here in Australia and was visiting her only family overseas with her children, when she finally separated from the father. The father immediately made an application under the Hague Convention for the children to be returned to Australia. She could not access legal representation and the children were returned to Australia and placed in the father's care. When Mariam returned to Australia, she was forced to live in crisis accommodation and was unemployed. Mariam used her family violence flexible support package payments to pay for a private lawyer as she had no other income. We met Mariam when her money ran out and she could no longer pay for a lawyer. Over time she was able to resume spending time with her children, and the family consultant recommended that the children spend equal time with both parents. The parties resolved the matter prior to the final hearing. Mariam reluctantly agreed to equal shared parental responsibility but after the final orders were made the father has not consulted with her on major long-term decisions. He has changed the children's school, and refused to allow the children to access therapeutic counselling as recommended by the family consultant. He continues to use coercive control and threatens to reinstitute proceedings if she does not agree to his demands.

In light of the increasing number of self-represented litigants, IMCL proposes that Part 2 of the FLA includes a table similar to s70NAA of the Exposure Draft, that provides a simplified outline with examples of what may constitute a major long term-issues that should be made jointly and what constitutes day-to-day decisions that can be made by the person with whom the child is spending time without a need to consult the other person (s65DAC and s65DAE). IMCL anticipates that this will provide parties with some guidance and clarity and would reduce:

- Ongoing conflict once proceedings have concluded that risks implicating children
- The number of contravention applications made
- The number of variation applications
- Risk of family violence and children's exposure to abuse and neglect, and

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- Risk of coercive control particularly if definition of family violence is not expanded (see below).

Amendments to best interests principles

IMCL generally supports the amendment to s60CC. The provision could be improved by further clarifying considerations for determining the best interests of the child. IMCL welcomes the primacy given to the rights of First Nations children to connect with and maintain connections with their family, community, culture and language.

We recommend that the new provision retains the principle of the child's safety being the paramount consideration, and that it also prioritises the safety of parents and other carers that are victims/survivors of family violence, or are at risk of family violence. This can be achieved by using some parts of the provisions that are proposed to be repealed so that it includes: "the paramount consideration in determining the child's best interests is the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence".

While IMCL recognises the benefit in simplifying the additional considerations, we recommend that that some provisions are retained that are not included in the Exposure Draft, namely:

1. the extent to which each of the child's parents has taken, or failed to take, the opportunity:
    a. to participate in making decisions about major long-term issues in relation to the child
    b. to spend time with the child
    c. to communicate with the child (s60CC(c)(i)-(ii))
2. the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis (s60CC(3)(e)).

We also recommend the retention of a best interests consideration dealing with a child's right to enjoy their cultural background, language and community. This provision would be in addition to s60CC(1)(b) for First Nations children, and would apply to children from CALD backgrounds.

This recommendation is, in part, a response to a trend we have identified where women from CALD backgrounds who have experienced family violence, are limited in their ability to travel

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overseas to visit immediate family without the consent of the other parent. Often these women have little to no family support in Australia and can be isolated from their community because of their separation from the other parent. The purpose of the travel is inexorably tied to maintaining cultural and familial connections rather than a recreational holiday. It is our view that including this provision enables such issues to be addressed.

Case study 2 -

Abuk is from a refugee background, on a low income. She had experienced family violence from her ex-husband, in particular coercive control. After the father-initiated proceedings in the Court, she sought orders for sole parental responsibility because of the family violence she had experience and because she could not safely co-parent. The case took three years to resolve. Abuk was not able to obtain permission to travel with the children to visit family overseas, even though her ex-husband could not provide evidence that she was a flight risk and she gave significant evidence of her ties to Australia. As the children live with her, neither she nor her children, will be able to connect with their family and culture. This matter demonstrated that not only does the Court falls short in providing safe outcomes for predominantly mothers who have experienced and continue to experience family violence, but that there is a lack of visibility and acknowledgment of how this can in turn affect their connections with family and culture.

Amendments to s10PA of the Exposure Draft

IMCL welcomes the amendment to s10PA and recommends that the protection it affords children can be increased by amending the important exceptions in subsection 2. The Exposure Draft allows otherwise non-admissible evidence into evidence where:

(a) An admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse;

(b) A disclosure by a child under 18 that indicates the child has been abused or is at risk of abuse.

Unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

IMCL recommends that the term "has been abused or is at risk of abuse" is replaced by the term "*has been subjected to or is at risk of abuse, neglect, family violence or other harm*". This will ensure that critical information about risk and safety that is insufficiently available to the court from other sources is considered.

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IMCL also proposes that s10PA(2)(b) should be amended further, to allow admissions made by a child in relation to other children to be admissible where appropriate. A strict reading of this provision as it stands in the Exposure Bill may mean that actual harm or a real risk of harm to a sibling may not be admissible, because it is not an allegation about the child who made the disclosure. For example, an older sibling may disclose information about a sibling who may not be able to communicate what has happened to them for a myriad of reasons, including age or disability.

In light of these recommendations, IMCL proposes that s10PA(2) should be amended as follows:

(a) *An admission by an adult that indicates that a child under 18 has been subjected to or is at risk of abuse, neglect, family violence or other harm;*
(b) A disclosure by a child under 18 that indicates the child or another child has been subjected to or is at risk of abuse, neglect, family violence or other harm

unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

Harmful proceedings orders

IMCL is supportive of these provisions and expects that they will play an important role in curbing systems abuse.

IMCL understands that the party protected by the harmful proceedings order will not be made aware of the leave application made by the person subject to the order, unless an order is made at the first hearing requiring service. If leave is not granted and the application is dismissed, IMCL considers it to be of upmost importance that the protected party is notified of refusal of the application in a timely manner, as it may be indicative of a serious escalation of risk to the protected party and the subject children.

IMCL supports WLSA position - that protected parties are given the option to opt-in or opt-out of being notified of such applications being filed and that an *ex parte* hearing will occur in relation to the question of leave. It is also important that protected parties have a means to alter their position without notifying the prohibited party. IMCL suggests that this can be communicated directly with Registry.

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PROPOSED AMENDMENTS NOT INCLUDED IN THE EXPOSURE DRAFT

Amendment to section 69ZR of the FLA

IMCL's view is that s69ZR of the FLA is underutilised in its potential to allow the Court to make early findings of fact in relation to family violence, abuse and neglect, that often go to the core of the risk issues in family law matters. The Lighthouse Model allows for matters with the highest levels of risk to be triaged and placed on the Evatt List, and parties to matters that are assessed as being low to medium risk can receive safety planning and service referrals. However, in our experience the lack of early findings of fact on any allegations of family violence or other risk factors, undermines the safety of children and parties who are victim/survivors.

The victim/survivor's credibility, and often times their mental health, is assailed and any allegations are characterised as being false or exaggerated, throughout the entire proceedings. Experts that are tasked with assessing the parties and children, can often discount victim/survivor's experiences where allegations of family violence or child abuse have not been tested, and there is no additional proof of the allegations (for example there are no findings of guilt in relation to family violence offences). At times Judicial Officers will approach such allegations with hesitance as evidence has not been tested.

Case study 3 -

Janelle was in an incredibly violent relationship. She experienced extreme sexual and physical abuse, and felt she could not leave because the perpetrator often threatened to kill her and her children. After she was apprehended by Police, she was remanded in custody because of Victoria's strict bail laws that have disproportionately affected women. She was not accused of any violent offending. She agreed for her children to be cared for by a family member while she was on remand, because she felt she had no other choice. As a child she was removed from her parents and did not want her children to live in out of home care like she did. There were never any formal proceedings in the Children's Court of Victoria.

When she was released from custody and able to escape her violent partner, she was able to find housing, and obtained support to manage her past history of trauma and family violence. She attempted to regain care of her children and became more desperate after she learned that the carer was abusing and dealing drugs. She made numerous reports to child protection and police, but no formal action was taken. She felt stigmatised because of her criminal history. Her concerns for her children were documented in her Initiating Application, but the children remained with the carer. Orders for drug testing were made, which the carer largely did not comply with for over a year. After an expert witness that was ordered to prepare a report for the proceedings, observed the carer to be substance affected during interview, Janelle was able to regain care of her children. If the Court had made an earlier determination of the

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allegations of child abuse, Janelle's children would not have been living in an unsafe environment where her children were exposed to drug use. Janelle's case also demonstrates how much time and resources are wasted, because litigants often cannot afford hair follicle testing for drug use.

The current provision gives the Court the power to make determinations, findings, and orders at any stage of proceedings if the Court "considers that it may assist in the determination of the dispute between the parties". IMCL proposes that this provision should be amended to give the Court the same power where there is a substantial issue in dispute about interim arrangements where family violence, abuse or neglect has occurred or is at risk of occurring.

IMCL also proposes that Legal Aid Commissions receive further funding, so that the cost of hair follicle testing can be met by the litigants or Independent Children's Lawyer (if appointed).

Amendment to the definition of family violence

It is our view that the definition of family violence in s4AB of the FLA should be amended to provide clearer guidance to decision-makers, lawyers and parties (especially self-represented litigants).

The bulk of the current provision provides non-exhaustive examples of behaviour that may constitute family violence (s4AB(2)) and situations that may constitute a child being exposed to family violence (s4AB(4)). The balance of the provision provides the following substantive definition of family violence: *"violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful"*.

The concise approach taken by the FLA can be contrasted with the approach taken in Victoria where an expanded definition of family violence in provided in s5 of the *Family Violence Protection Act 2008* (Vic) and is followed by five sections that provide further definitions of key terms, namely:

1. The meaning of economic abuse (s6)
2. The meaning of emotional or psychological abuse (s7)
3. The meaning of family member (s8)
4. The meaning of domestic partner (s9)
5. The meaning of relative (s10).

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These provisions are included in Annexure 1.

We note that the increasing appointment of judicial officers with non-family law or family violence backgrounds would benefit from a detailed definition because there can often be a lack of acknowledgment and consideration of family violence generally, especially if it is not physical or sexual. If a similar approach were taken in the FLA, IMCL proposes that important terms such as coercive control should also be included. Furthermore, all professionals within the family law system and particularly the judiciary, should receive ongoing training on family violence and trauma informed practice. We support the recommendations of the WLSA that there is proper resourcing of the family law system so that all professionals receive training to provide culturally appropriate and safe outcomes for families and children.

Closing

The amendments as proposed are positive reforms in a jurisdiction that is confusing and traumatic for victim/survivors of family violence to navigate. The clients that we assist are struggling with serious obstacles to fair and just outcomes, and we welcome further opportunities to provide client-focused feedback in this review.

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APPENDIX 1: Recommendations

RECOMMENDATIONS Inner Melbourne Community Legal Centre:

1. To achieve the objective stated in the consultation paper to improve the 'family law system so that it is accessible, safe, simpler to use, and delivers justice and fairness for all Australians families', legislative reforms must sit alongside increased funding and resources for community legal centres and legal aid to provide legal representation for people in need.

2. Provide Legal Aid Commissions further funding to allow for cost of hair follicle drug testing to be met by the litigants or Independent Children's Lawyer (if appointed).

Recommended amendments to Exposure Draft of the Family Law Amendment Bill

3. To assist with parenting order issued in Part 2 of the Family Law Amendment Bill, include a table similar to s70NAA of the exposure draft to outline 'major long term-issue' to be made jointly and day-to-day decision that can be made by the parent the child spends most of their time with without needing to consult the other parent.

4. Amend the new section 60CC (s6 *Family Law Amendment Bill*) to:

    (a) Ensure: 'the paramount consideration in determining the child's best interests is the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence'

    (b) Retain s60CC(c)(i)-(iii) *Family Law Act 1975*: 'the extent to which each of the child's parents has taken, or failed to take, the opportunity:

        i. to participate in making decisions about major long-term issues in relation to the child
        ii. to spend time with the child
        iii. to communicate with the child'

    (c) Retain s60CC(3)(e) *Family Law Act 1975*: 'the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis'.

    (d) Add provisions for CALD children that recognise the children's right to enjoy their cultural background, language, and community to support the needs.

5. Amend s10PA(2) of the exposure draft to read:

   (a) 'An admission by an adult that indicates that a child under 18 has been ~~abused or is at risk of abuse~~ subjected to or is at risk of abuse, neglect, family violence or other harm;

   (b) A disclosure by a child under 18 that indicates the child or another child has been ~~abused or is at risk of abuse~~ subjected to or is at risk of abuse, neglect, family violence or other harm.

   Unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.'

Recommended amendments to Family Law Act 1975

6. Amend s69ZR of the *Family Law Act 1975* (Cth) so that the Court's current powers to make determinations, findings and orders during proceedings extends to circumstances where there are factual disputes relating family violence, abuse or neglect and the there is a substantial issue in dispute about interim arrangements where family violence, abuse or neglect has occurred or is at risk of occurring. This will increase utilisation of the provision for early determination and maximise the safety of children and parties who are victim/survivors.

7. Amend the definition of family violence in s4AB of the *Family Law Act 1975* (Cth) to be consistent with the definition of family violence provided in s5 *Family Violence Protection Act 2008* (Vic) including the following five section that provide further definition of key terms, namely:

   (a) The meaning of economic abuse (s6)
   (b) The meaning of emotional or psychological abuse (s7)
   (c) The meaning of family member (s8)
   (d) The meaning of domestic partner (s9)
   (e) The meaning of relative (s10).

   It is recommended that further terms also be included and defined such as coercive control.