SOUTH-EAST MONASH LEGAL SERVICE INC.

ADVOCACY COMMUNITY EMPATHY

SUBMISSION

Prepared by South-East Monash Legal Service Inc. for the

Senate Standing Committee on Legal and Constitutional Affairs

Senate Inquiry - Family Law Amendment Bill

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Our organisation

Established in 1973, South-East Monash Legal Service ('**SMLS**') is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community within the City of Greater Dandenong, the City of Casey and the Shire of Cardinia.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and Victims of Crime Assistance Tribunal.

For most of the 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree.

SMLS has an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in.

SMLS also has a significant policy, advocacy, and law reform program, contributing to reforms in family violence laws and practices, access to civil procedure reforms, employment law, sexual assault and victims of crime, youth law, gambling and electronic gaming machines and other legal topics relevant to our service delivery and the needs of our community.

Acknowledgement of Country

SMLS wishes to acknowledge the traditional custodians of this lands upon which our office are located, the Wurundjeri and the Boon Wurrung peoples. We pay our respects to the Elders past, present and emerging.

We acknowledge the people, traditions, culture and strength of Aboriginal and Torres Strait Islander peoples, and the fight for survival, justice and country that has taken place across Victoria and Australia.

We sincerely thank the Traditional Custodians for caring for Country for thousands of generations. SMLS recognises the ongoing impact of colonisation, dispossession and racism experienced by Aboriginal peoples. As a Community Legal Centre, we acknowledge the violence of Australian law and its ongoing role in processes of colonisation. We recognise that sovereignty was never ceded, and that this always was and always will be Aboriginal land.

SMLS and Family Law

SMLS has operated a dedicated family law clinic since 1989. Family law clients receive intensive advice, ongoing complex casework, and representation. SMLS family lawyers are highly experienced both in substantive considerations as well as process and procedure. Eight years ago, SMLS expanded our family Law service and began assisting vulnerable clients with property settlement, in response to a growing community need, and the absence of affordable legal assistance. We assist vulnerable clients to reach agreement about their property separation, through information, advice, case management, mediation and at court. Our staff have considerable expertise, appearing in the Federal Circuit Court, the Family Court and regularly instruct Barristers. We have had a dedicated focus on the management, structure, internal process and procedure, standard of skills and expertise and defined expectations of our family law staff. SMLS is a member of the VLA family law panel, assisting clients with complex and substantive family law matters. Over the past two years, 25% of our legal assistance was provided to family law clients and an additional 28% were family violence matters. We have also assisted our family law clients with mediation, including Family Dispute Resolution, being the providers of the FDRS program with VLA. When Child Support was a separately funded program several years ago, SMLS was funded as one of the providers, and we continue to provide this assistance today. We operate a fulltime family violence duty lawyer service at Dandenong Magistrates Court, the Early Resolution Service and many of these clients require family law advice. We also provide a duty lawyer at Dandenong Childrens Court each week.

Our family lawyers regularly negotiate with duty lawyers on the day to progress client matters including preparing proposed minutes of consent. We regularly represent our clients at mentions, directions and interim application hearings, undertaking complex and significant family law casework for clients experiencing family violence, from the commencement of the matter (negotiations/pre-action procedures) to its conclusion (settlement/trial) as solicitors on record.

Our family law team are experienced negotiating with clients and other parties. Our lawyers are skilled in gathering information and evidence about family law financial matters, including by assisting with drafting subpoenas and applications for family and expert reports. Our team is experienced providing Notices of Risk in relation to child abuse and family violence, and applications, responses, and affidavit material in relation to urgent family law orders including airport watch list orders, recovery orders and urgent injunctions.

Endorsements

SMLS endorses the submission from Associate Professor Becky Batagol, Dr Jess Mant and Dr Cate Banks

Introduction and scope of submission

We thank the Committee for the opportunity to provide feedback on the Family Law Amendment Bill.

SMLS has provided further comment to sections we addressed in our earlier submission regarding the exposure draft.

Schedule 1 – Parenting Framework
Part 1 – Parenting Framework

60B Objects of Part

We are supportive of the inclusion of the words "*including by ensuring their safety"* to section 60B and support inclusion of reference to the *Convention on the Rights of the Child.*

60CC How a court determines what is in a child's best interests

SMLS are supportive of the streamlining of this section, noting the simplicity will be of great benefit to self-represented litigants. However, we do have concerns that the safety and protection of a child lacks clarity and may not be supportive enough. The proposed changes remove the provisions around the consideration of current and previous family violence intervention orders, which we believe should still be given some weight. In addition to current family violence risks, we are of the view that previous risks and exposure to family violence should be given some consideration when determining what is in a child's best interests.

We support the recommendation made by Associate Professor Becky Batagol, Dr Jess Mant and Dr Cate Banks, that a history of family violence should be listed as a best interests factor to better enable consideration of the nature and impact of violence upon children in determining parenting arrangements after separation. We support the addition of an extra provision inserted into s60CC(2) Family Law Amendment Bill 2023 which states:

"any family violence involving the child and/or and each person who has care of the child (whether or not a person has parental responsibility for the child)."

This will better enable consideration of the nature and impact of violence upon children in determining parenting arrangements after separation.

60CC(1)(a)

We are supportive of this proposed change.

60CC(2)(a)(i) and (ii)

We note that the adapted working in 60CC(2)(a)(ii) allows for people who are significant to the child, whether they are a parent or have parental responsibility, to be captured by this amendment. SMLS are supportive of this broader wording, as our initial concern with the exposure draft was that the framing of the word 'carer' could exclude parties such as grandparents. We also note that in a diverse, multicultural society, it is imperative that our legal system understands and accommodates for family structures where children are cared for by more people than those with parental responsibility.

There should also be consideration of the safety of other children in the household who may not be part of the proceedings, but whose safety is relevant.

However, we do question whether the term "care" will be greater defined in the legislation. We note that what ultimately constitutes 'care' is a broad concept, and would suggest there be a definition, or a threshold of 'care' noted in the Act.

Reframe to make it clear that psychological and other non-physical forms of harm are captured by retaining similar phrasing to the existing provision - the need to protect each relevant person from "physical and psychological harm and from being subject to, or exposed to abuse, neglect or family violence".

It is important to ensure that the provision encompasses psychological and non-physical harm. Therefore, it should retain similar wording to the existing provision, emphasising the necessity to safeguard each relevant person from "physical and psychological harm and from being subject to, or exposed to abuse, neglect or family violence".

60CC(2)(b)

We note that this section should be worded similarly to the current wording in the Family Law Act, giving weight to a child's maturity or level of understanding.

60CC(2)(c)

We are supportive of the inclusion of the words '*cultural needs',* however question whether this goes as far as the current wording of the Family Law Act, specifically 60CC(2)(g) and explicit reference to lifestyle, culture and traditions, to represent children of culturally and linguistically diverse backgrounds as well as Aboriginal or Torres Strait Islander children.

60CC(2)(d)

We are supportive of the removal of the words "*having regard to the carer's ability and willingness to seek support to assist them with caring".*

60CC(2)(e)

We are supportive of the removal of the words "*maintain"* and replacing it with "*have".*

60CC(3)

We are supportive of the proposed changes to the wording of this section and welcome the change that the redrafting creates regarding greater recognition of Aboriginal and Torres Strait Islander children, and the right to enjoy their culture. We defer further comment on this to dedicated Aboriginal and Torres Strait Islander legal services and consultation groups.

60CC(4)

It is our view that even when making an order by consent, a court should consider the following:

(i) the safety of the child and other relevant people in the child's life, and

(ii) in matters involving Aboriginal and/or Torres Strait Islander children, ensuring the child's right to enjoy their Aboriginal and Torres Strait Islander culture.

Part 2 – Parental Responsibility

We stress that the removal of the presumption of equal shared parental responsibility is paramount and support the proposed changes that removes this presumption.

We are also supportive of the drafting under Part 2.

Part 3 – Child related proceedings

65DAA Reconsideration of final parenting orders

SMLS are supportive of an appropriate enshrinement of the principles that can usually be derived from *Rice vs Asplund*. We support the onus being enshrined, given that it is normally the person seeking to vary the final parenting orders who has the onus of demonstrating a substantial change in circumstances.

From a practical perspective, we note that these changes would make it easier for legal services such as SMLS to advise clients who are considering reopening final orders.

Schedule 2 – Enforcement of child related orders
Part 1 –Enforcement of child related orders

Subdivision B – Orders relating to contravention of child related orders

70NBA: Court may make orders in proceedings relating to contravention of child related orders

We are supportive of the proposed changes in 70NBA(1)(b) which notes "*a party to the proceedings makes an application for an order".* We are also supportive of the approach that allows the Court to intervene on an interim basis if there is a view there has been a contravention.

As noted in our exposure draft submission, we question in the absence of an application from a party, whether the Court would consider this an ordinary interim defended hearing or if the Court would instruct the non-contravening party to make the application. It is noted that contraventions are ordinarily dealt with by a judge or senior judicial registrar, separate to the substantive proceedings so that they are not influenced by the overall findings at a final hearing stage, so again question the practicality of this.

70NBE: Costs orders

We again use this opportunity to note that we are of the view that the current wording of the provisions still allows for perpetrators of family violence to 'abuse the system' to continue to perpetrate violence by making applications of alleged contraventions, and there needs to be greater clarify or transparency not to otherwise deter litigants from applying.

In our experience, most clients who contravene orders have serious concerns for their children's safety, and we believe they should not be penalised for trying to act protectively even though they may not meet the threshold of "*reasonable excuse"*.

We also believe the Court needs to have scope to order costs if they are of the view that the application warrants it – for instance, if they view the application as oppressive.

Schedule 4 – Independent children's lawyers
Part 1 – Requirement to meet with the child

65LA(5)

We again support the proposal for an ICL to meet with the child, unless there is a good reason otherwise or the child does not want to meet with the ICL. In our experience there is no consistency in the circumstances in which an ICL may or may not meet with a child.

The changes will reduce situations where ICLs only get involved late in the proceedings, and children can safely participate and express their views.

However, as noted in our exposure draft submission, there does not seem to be any changes as to timing – we suggest there needs to be further clarification about the timing of the ICL's meeting with the child.

We would also suggest a further amendment that an ICL meet with a child before and after a major court event to strengthen this obligation.

We also advocate for an ICL to meet with a child in Hague Convention related matters.

Part 2 – Convention on the Civil Aspects of International Child Abduction

65L (3)

While this section has been repealed in the current draft, we again wish to raise that a possible unintended consequence of this is that Hague Convention matters does not normally ask for a child's view when ascertaining whether a child should be returned to a country of ordinary residence. Introducing an ICL would help amplifying the child's voice heard and recognised in the proceedings.

It is of great concern that child abduction proceedings are frequently used violent partners as a tool to control and return parents/carers and their children who flee violence back into unsafe situations.

While it may result in an overcomplication for these matters before the Court, we support a system that allows for a greater exploration of factors and nuance, rather than a one-size-fits-all approach. This is particularly important in matters that involve family violence, and a parent fleeing a violent perpetrator.

Research indicates that many international child abductions under the Hague Convention are mothers, and that family violence is involved 90% of the time. [1]

SMLS has previously assisted in a matter where recovery orders were made for a 15-year-old girl, who escaped the proximity to the war in Ukraine with her mother. At the time, family law proceedings in a neighbouring country had not yet finalised. The child had not seen her father for 5 years, and wanted to stay in Australia, which was expressed to the family report writer and supported by the ICL. The client mother sought advice about a s102na order, due to a history of family violence allegations against the father. The client asked the court to exercise their discretion to make this order based on family violence allegations, however the Judge declined to make such orders, and final orders were made that the child be returned to the other country in late January 2023 (despite the child turning 16 in April). Further, the trial judge noted they did not need to consider s60CC factors but did so as a matter of course. SMLS is concerned about allegations of coercive control and the child's exposure to the parental conflict. There are extensive allegations of systems abuse that has not been taken seriously by the other countries authorities/courts. The child has threatened self-harm if returned.

We strongly recommend that further amendments to the Child Abduction Regulations are implemented. These changes should focus on how to ensure safeguards for a parent/carer fleeing violence across international borders with their child where family violence is a factor. The application for the return of the child to Australia is made by the government, and legal costs are

[1] See for example, Lower, N, Stephens, V (2018) Part I — A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Global report and Globalarrk 2014, Globalarrk.org, viewed 27 February 2023, <https://www.globalarrk.org/whats-the-problem-for-yp/>.

paid for by the Commonwealth. This results in one parent receiving free legal assistance, while the other does not. Considering the statistics mentioned above, victim/survivors in these cases should also be provided with funded legal assistance.

Schedule 5 – Case management and procedure

Part 1 – Harmful proceedings orders and colocation of sections 45A and 102!

Division 1B – Harmful Proceedings Orders

102QAC: Making harmful proceedings orders

As we addressed in our exposure draft submission, we are still concerned that these orders may not stop the vexatious litigant from pursuing applications in other jurisdictions and recommend adding an enhanced understanding of the definition of 'vexatious litigant' and 'vexatious proceedings' to include proceedings when, on the balance of probabilities, a person has engaged in systems abuse.

Currently, in our litigation process, the testing of evidence and findings of family violence generally does not take place until trial. Given the strong focus on reaching agreement before a trial, this can lead to a settlement that is harmful for victim/survivors due to emotional or economic attrition, fear, and inability to access legal assistance. For this reason, SMLS recommends that early determination of family violence in court proceedings occurs through a family violence expert case management and testing of evidence of family violence early. This would assist in informing the decision-making of both the court and the parties going forward, provide context for family report writers and other experts. It may facilitate earlier, safer settlements and address some forms of systems abuse.

In addition, we believe that the Bill does not go far enough to address the problem of legal systems abuse. As above, we support the recommendations from Associate Professor Becky Batagol, Dr Jess Mant and Dr Cate Banks, that legal systems abuse be explicitly listed as an example of family violence in s 4A(2)B Family Law Act 1975.

For example a new s4AB(2)(k) could read:

"Repeated and unreasonable commencement of, or participation in, or lack of participation in, legal processes under this Act in a manner that intentionally and maliciously causes emotional or financial harm to the family member."