ANROWS

AUSTRALIA'S NATIONAL RESEARCH
ORGANISATION FOR WOMEN'S SAFETY
to Reduce Violence against Women & their Children

Family Law Reform
Attorney-General's Department
3–5 National Circuit
Barton ACT 2600
By email: FamilyLawReform@ag.gov.au

Re: Exposure draft of the Family Law Amendment Bill 2023

Dear Secretariat

ANROWS thanks the Attorney-General's Department for the opportunity to respond to the exposure draft of the Family Law Amendment Bill 2023.

ANROWS is an independent, not-for-profit company established as an initiative under Australia's *National Plan to Reduce Violence against Women and their Children 2010–2022* (the National Plan). Our primary function is to build the evidence base that supports ending violence against women and children in Australia. ANROWS is embedded in the National Plan architecture and will continue to deliver and develop this function across the next decade under the *National Plan to End Violence against Women and Children 2022–2032*. Every aspect of our work is motivated by the right of women and children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and children and are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

Primary (core) funding for ANROWS is jointly provided by the Commonwealth and all state and territory governments of Australia. ANROWS is also, from time to time, directly commissioned to undertake work for an individual jurisdiction, and successfully tenders for research and evaluation work. ANROWS is registered as a harm prevention charity and deductible gift recipient, governed by the Australian Charities and Not-for-profit Commission (ACNC).

This submission addresses select questions from the consultation paper. It draws on evidence from rigorous peer-reviewed research, including relevant ANROWS research. We would be very pleased to assist the Committee further, as required.

Yours sincerely

[redacted]

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Overall comments

ANROWS supports the exposure draft of the Family Law Amendment Bill 2023 and its focus on ensuring the best interests of children are prioritised and at the centre of the family law system. ANROWS has previously made submissions to inquiries and reviews of the family law system, including the Joint Select Committee on Australia's Family Law System (ANROWS, 2020). We have also contributed evidence to reviews relating to the discrete aspects of the system, including improving the competency and accountability of family report writers (ANROWS, 2021). We commend the Australian Government for prioritising and taking evidence-based action in relation to 14 of the 60 recommendations stemming from the Australian Law Reform Commission report, *Family Law for the Future: An Inquiry into the Family Law System* (ALRC, 2019). We particularly support changes to make the Family Law Act clearer and more concise in plain language: our evidence shows this is particularly important for parents who self-represent themselves in court (Wangmann et al., 2020).

We are pleased to provide evidence in support of the proposed changes with the modifications as outlined below. In addition to this submission based upon our own evidence, ANROWS supports the recommendations in the submission of Women's Legal Services Australia which are informed by their practice-based expertise.

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?

ANROWS supports the new objects in the exposure draft of the Family Law Amendment Bill 2023 relating to the importance of children's best interests in making decisions about parenting arrangements and the United Nations Convention on the Rights of the Child (CRC). We support the move away from the existing object of children having a "right to know and be cared for by both of their parents" because misinterpretation of this policy intention has led to unsafe parenting orders. Our research has shown, for example, that self-represented litigants experiencing violence can take the existing object to mean they should agree to unsafe parenting orders:

> Sometimes women [SRLs who do not obtain legal advice] will agree to orders that they shouldn't. I see, particularly, young women who come in for advice, talking about horrendous family violence, allowing their children under one to spend equal time, week about with the other parent. Which is clearly not appropriate for children of that age. But they agree to it to make the other party happy, to stop the fighting or because they honestly believe that that's what a court's going to grant. And they have not had any advice. We see them sometimes and they've had these really inappropriate arrangements for months or even years and it's started to impact on the children because it's impacted on their attachment. (Legal professional respondent quoted in Wangmann et al., 2020)

The new object prioritising children's best interests is consistent with ANROWS's position that children living in homes where domestic and family violence (DFV) is present are not simply "exposed" to DFV – they are experiencing it. The evidence has shown that there are no circumstances in which children and young people are exposed to DFV are not also being impacted. Raising up children's voices and rights as

victims and survivors of DFV in their own right is supported by the *National Plan to End Violence against Women and Children 2022–2032* (the National Plan). In the recovery domain, the National Plan sets out the need to recognise "children and young people as victim-survivors in their own right, and establish appropriate supports and services that will meet their safety and recovery needs" (Commonwealth of Australia, 2022, p. 21). Including an object relating to the CRC should encourage family law actors to give "effect to the participatory rights" contained in Article 12 through the provision of safe, effective and genuine opportunities for children and young people to have a voice in matters that concern them (Carson et al., 2022, p. 147).

Recommendation 1: ANROWS supports the new objects in the exposure draft of the Family Law Amendment Bill 2023, and in particular, the removal of the existing object relating to a "right to know and be cared for by both of their parents".

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 consequence?

ANROWS research highlights the need to focus on the "psychological and emotional needs a child has as a consequence of exposure to family violence and abuse" alongside other health and developmental needs (Carson et al., 2022, p. 20). This research recommends that "family law system responses need to identify where children have experienced trauma and put in place parenting arrangements that centre the safety of children and support recovery" (Carson et al., 2022, p. 20).

The long-term benefits to focusing on the recovery needs of children who experience family violence as early as practicable (early intervention) are reinforced across the body of ANROWS research. For example, our research into complex trauma recommends making an investment in preventing and reducing the intergenerational impact of childhood trauma via early intervention for trauma-exposed children as a means of reducing future instances of complex trauma (Salter et al., 2020). Our research into male youths who had been referred to services after perpetrating sexual offences found adverse childhood experiences were common, and recommended policy responses drawing on this evidence should prioritise early intervention (Ogilvie et al., 2022).

Domestic and family violence (DFV) "is one of the most prevalent stressors children can experience" (Margolin & Gordis, 2000 as cited in Orr et al., 2022, p. 18). In research investigating the connection between DFV and children's mental health and wellbeing, we found children who had experienced DFV were almost five times more likely to receive treatment from a mental health service by the time they turned 18 than children who had not experienced violence (79% as opposed to 16%; Orr et al., 2022). On average, there was a six-year gap between children's experiences of DFV becoming known to police and health services and the children receiving a mental health response (Orr et al., 2022). Prioritising the recovery needs of children experiencing DFV in the family law system could help to bridge this gap between experiencing DFV and recovery.

While it could be broadly considered that supporting recovery from trauma for children is captured between the best interests factor relating to safety (including safety from family violence, abuse, neglect or other harm) and the best interests factor relating to developmental, psychological and emotional needs of the child, it is ANROWS's view that a specific reference to recovery needs to be added. This emphasis on

recovery is consistent with the *National Plan to End Violence against Women and Children 2022–2032* (the National Plan). The National Plan elevates recovery to one of four domains, indicating that it is an essential component of the holistic approach to ending violence against women and children. The National Plan states that victims and survivors "need additional, often lifelong, supports to recover and heal from trauma and the physical, mental, emotional and economic impacts of violence" (Commonwealth of Australia, 2022, p. 86).

Our research by Orr and colleagues into the connection between DFV and children's mental health and wellbeing also demonstrated a need to prioritise the non-offending parent's recovery. Almost half of the children in the study who had experienced DFV had a mother with a mental health service contact (45%), which was more than double the number of children with no known record of DFV (21%; Orr et al., 2022). This study highlights the need for a holistic response encompassing both safety and recovery needs for both children and non-offending parents experiencing DFV.

ANROWS research also suggests mothers

> may need referrals to programs and services that will support restoration of parenting capacity from a perspective of understanding the dynamics of DFV, including programs that offer services to mothers and children together. Children may also need assistance separately. (Kaspiew et al., 2017, p. 13)

By placing "recovery" needs into the best interests factor relating to safety, the court would be obliged to consider the recovery needs of both cohorts of victims and survivors of violence, that is, the child and the non-offending parent. For example,

> *(2) For the purposes of paragraph (1)(a), the court must consider the 13 following matters:*
> *(a) what arrangements would best promote the safety* **and recovery** *(including safety* **and recovery** *from family violence, abuse, neglect, or other harm) of:*
> *(i) the child; and*
> *(ii) each person who has parental responsibility for the child (the carer).*

ANROWS research indicates that diminished parenting capacity, including from mental health impacts relating to trauma, is often raised to challenge rather than support the parenting capacity of the non-offending parent (Carson et al, 2022; Salter et al., 2020). As one service provider interviewed for the study explained:

> The perpetrators may be presenting quite well and mum is not presenting well at all because of her own childhood trauma impacts and then the current domestic violence, and then also it impacts them by how they get treated by the system. (Manager/supervisor, migrant/refugee service respondent quoted in Salter et al., 2020, p. 69).

For women in our study into complex trauma, children were "a strong motivator to seek treatment, however they [the women] did not always feel that they had been supported in their parenting and caring responsibilities" (Salter et al., 2020, p. 7). This research recommends that women with experiences of complex trauma would benefit from a strengths-based approach that builds upon "the considerable strengths and skills that they have developed in the self-management of complex trauma" (Salter et al., 2020, p. 8). Taking a strengths-based approach that inclines the family law system to consider how parenting arrangements support the non-offending parent to recover their parenting capacity after

violence is consistent with one of the stated aims of the reform: to be more responsive to family violence. Rewording this provision to support recovery needs of victims and survivors would reflect the family law system taking a best practice, trauma-informed approach (Salter et al., 2020).

Recommendation 2: Consistent with the *National Plan to End Violence against Women and Children 2022–2032*, ensure the family law system prioritises the recovery needs of children and non-offending parents from domestic and family violence by using "recovery" in the best interests factor relating to safety.

Best interests of Aboriginal and Torres Strait Islander Children

In addition to the best interests factors, ANROWS supports specific consideration regarding culture being required for Aboriginal and Torres Strait Islander children. Our research strongly emphasises the importance of culture: "Culture is the core of Aboriginal society—as one senior woman in Fitzroy Crossing said, 'we live and breathe in a cultural world'" (Blagg et al., 2020, p. 9). Participants in this research identified that it is the discouragement of Culture, including the inability to carry out cultural obligations and the interruption of passing values and expectations down to younger generations, that causes social dysfunction and violence (Blagg et al., 2020).

ANROWS supports the vital importance of culture to Aboriginal and Torres Strait Islander children being best emphasised by a specific factor that sits outside of the list of best interests factors in 60CC. However, our research indicates that for this cohort of children there is a particular importance to embedding child-centred, trauma-informed and culturally safe approaches to ensure the voices of Aboriginal and Torres Strait Islander children and young people are heard (Morgan et al., 2023). There may be an unintended consequence of denying voice to Aboriginal and Torres Strait Islander children by not ensuring communication with them is child-centred, trauma-informed and culturally safe. ANROWS research with Aboriginal and Torres Strait Islander women has emphasised that the presence of Aboriginal service workers is critically important for accessibility, and fundamental to the success of making initial contact with often highly reluctant victims of violence (Langton et al., 2020). This research emphasises that "colour-blind" services and practices do not provide safety for Aboriginal and Torres Strait Islander victims and survivors. Separating voice and culture may have the unintended consequence of enabling a "colour-blind" approach to seeking the views of Aboriginal and Torres Strait Islander children, and inadvertently silencing this important cohort of children subject to parenting orders.

Recommendation 3: Put in mechanisms to ensure that Aboriginal and Torres Strait Islander children are not disadvantaged by the separate consideration of culture and language from the best interest factor in 60CC relating to the consideration of views expressed by the child.

Removal of equal shared parental responsibility and specific time provisions

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?

ANROWS evidence suggests that although DFV and child abuse concerns "are exceptions to the presumption of equal shared parental responsibility, the existing framework is not consistently operating in a way that produces safe and workable outcomes" (Carson et al., 2022, p. 20). This research highlighted

the way that DFV perpetrators use parenting orders based on this presumption to lock victims and survivors into a "cycle of violence" where they continue patterns of coercive control, drive non-compliance and utilise it to engage future litigation (Carson et al., 2022, p. 59). The research also showed this presumption can mean both victims and survivors, and children, comply with unsafe parenting orders. As one research participant explained, police would say:

> If I felt unsafe to not follow the orders as a [parent] I knew best, yet my lawyer would tell me the judge would punish me. This only added to my anxiety and fears of what would happen to me and/or my child. (Study participant quoted in Carson et al., 2022, p. 60).

Unsafe orders can exacerbate harm to victims and survivors and impact their ability to recover from DFV:

> I was ordered to have email contact with the father on a parenting app. [At] the thought of this I had panic attacks, I downloaded the app as ordered; however, I didn't open or respond to the emails, on some days I had notifications of him emailing three times. I ended up deleting the app as it was affecting my mental health. I was roasted in court; however, did not get "punished" as such. (Study participant quoted in Carson et al., 2022, p. 60).

The belief that the equal shared parental responsibility presumption still applies in parenting matters when DFV is present has endured since its introduction in 2006. The continued sway was reiterated most recently in the Queensland Women's Safety and Justice Taskforce's report, *Hear Her Voice*, which stated victims and survivors often wrongly "believe they are compelled to offer equal shared care of their children to abusive and coercively-controlling perpetrator parents" (Women's Safety and Justice Taskforce, 2021, p. xxv). In cases of entrenched conflict, a shift to the child's best interests may also support compliance with parenting orders. As one study participant explained, "Compliance would be easier if the orders were reasonable and GENUINELY in the interest of my daughter, rather than being insistent on ensuring the child's access to both parents" (Study participant quoted in Carson et al., 2022, p. 63). To this end ANROWS is strongly in support of the removal of the presumption of equal shared parenting orders, and the stronger focus on assessing the best interests of each child.

Recommendation 4: ANROWS supports the repeal of the presumption of equal shared parental responsibility and consideration of specific time arrangements in favour of the court assessing the best interests of the child using the list of factors in section 60CC.

Schedule 2: Enforcement of child-related orders

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

As noted in the consultation paper, research ANROWS conducted with the Australian Institute of Family Studies (AIFS) sets out that punitive responses to the contravention of parenting orders are not any more effective than non-punitive responses in reducing non-compliance (Carson et al., 2022). The research found:

> [The] dilemma that punitive responses raised was that they may adversely affect children and young people, either through diminishing the financial resources available to them or depriving them of a parent who is important to them. (Kaspiew et al., 2022, p. 13)

This tension between children's best interests and punitive responses was demonstrated by punitive responses for contravention achieving the lowest level of overall endorsement from respondents in the

survey of legal professionals. Of the seven options presented, variations of existing parenting orders were most favoured (Kaspiew et al., 2022, p. 55). While not increasing penalties and removing community service orders is in line with the research findings, the redraft of Schedule 3 may not go far enough toward resolving the tension between supporting child-focused decision-making and punitive responses that centre upon upholding the law (Kaspiew et al., 2022).

Recommendation 5: Give further consideration to how Schedule 3 could help family law system actors resolve the inherent tension between supporting child-focused decision-making and punitive responses to contravention.

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 ICL's role in engaging with children, while retaining ICL discretion in appropriate circumstances?

ANROWS research conducted with AIFS has indicated that a majority (56%) of cases resolved by litigation that reported the appointment of an Independent Children's Lawyer (ICL) also reported that the ICL did not speak with the children (Carson et al., 2022, p. 39). This sits alongside other AIFS research into children in separated families that indicated 76 per cent of children and young people wanted their parents to listen to them when making parenting arrangements (Carson et al., 2018). Most children and young people in this study also reported limited or no direct engagement with their ICL, and a level of dissatisfaction with their impact on final parenting arrangements (Carson et al., 2018). Alongside safety, dissatisfaction stemming from inadequate consultation with children can drive non-compliance with parenting orders, with the research finding "non-compliance was in some circumstances driven by children themselves, who were 'voting with their feet' or resisting compliance" (Carson et al., 2022, p. 64).

While we support the emphasis on ICLs seeking the child's views, our research stresses that to be effective for Aboriginal and Torres Strait Islander children and young people, it must be done in a trauma-informed and culturally safe way. As one study participant explained,

> It is appropriate for Indigenous children to have orders made which include their culture and how they will experience it. I have been continually ignored by two family report writers and the ICL on cultural inclusions. (Study participant quoted in Carson et al., 2022, p. 66)

To this end we support the proposed requirement that an ICL must meet with a child and provide the child with an opportunity to express a view, supplemented by mechanisms to make this process trauma-informed and culturally safe so it is accessible to all children and young people.

Recommendation 6: ANROWS supports the focus on Independent Children's Lawyers (ICLs) having to meet with children and young people with mechanisms to ensure this occurs in a trauma-informed and culturally safe way for Aboriginal and Torres Strait Islander children and young people.

Schedule 5: Case Management and Procedure

Harmful proceedings orders

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?

ANROWS strongly supports the Government's intent to improve responses to vexatious litigation/systems abuse with harmful proceedings orders. Systems abuse, where perpetrators control their current and former partners by manipulating definitions and available support systems, is prevalent across the body of ANROWS research (Kaspiew et al., 2017). Research shows that while victims and survivors who represented themselves in court struggled to adequately document DFV and felt pressure to settle for unsafe outcomes, perpetrators who self-represented used the court system as a mechanism to continue their abuse. They did this, for example, via "numerous applications in multiple jurisdictions, prolonging court proceedings, refusing to settle and bringing proceedings after final orders." (Wangmann et al., 2020, p.11). Not complying with court processes or taking an extensive time to comply were also "identified as deliberate strategies to prolong the process and lead to additional costs for the other party (Wangmann et al., 2020, p.52). This is supported by other ANROWS research that found perpetrators can use the cost of dealing with the family law system to create a financial strain on their victims (Cortis & Bullen, 2016). It is an injustice that individual victims and survivors of violence bear the economic burden of that violence (Cortis & Bullen, 2016).

ANROWS research indicates that the family law system needs to be better at identifying and supporting women experiencing financial abuse (Cortis & Bullen, 2016). It is also in children's best interests for the family law system to improve its response to financial abuse. For mothers, financial hardship is "a significant factor in the association between DFV and higher levels of parenting stress and lower wellbeing outcomes for children" (Kaspiew et al., 2017, p. 11). Recent research by Anne Summers points to a dire choice for women in violent relationships, where "as many as half the women who choose to leave will end up in poverty" (Summers, 2022, p. 12). By enacting financial harm through systems abuse, perpetrators can drive victims and survivors back to violence: "For around 15 per cent of these women (12,000) the reason for returning was that they had no money or nowhere else to go" (Summers, 2022, pp. 9–10). Returning can have fatal consequences: the Australian Domestic and Family Violence Death Review Network found that "economic or financial abuse" was present in more than one quarter (27.4%) of cases where a female victim was murdered by a male primary domestic violence abuser (2022, p.55). Considered as a whole, this body of research shows a vital need for courts to be cognisant of financial abuse as a means of exerting coercive control.

Recommendation 7: ANROWS recommends that vexatious litigation/systems abuse be understood and responded to in the broader context of coercive control.

Broadening and extending overarching purpose of "family law practice and procedure"

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

ANROWS research highlights that in situations with problematic interpersonal dynamics, including DFV, there is a tendency for intense and sustained litigation (Kaspiew et al., 2022). For example, court file analysis in family law parenting compliance matters showed the mean duration of matters was approximately 54 months, with a substantial proportion of cases extending beyond three years (Kaspiew et al., 2022, p. 14). This backdrop of extended conflict does not serve children's best interests or their safety, or the safety of their mothers (Kaspiew et al., 2022). ANROWS supports broadening the court's powers in a way that is consistent with resolving disputes as quickly, inexpensively and efficiently as possible, so long as this does not further compromise safety or just outcomes for victims and survivors of DFV. Alongside the primary concern of safety, courts must be cognisant that a drive toward fast resolution can create further barriers for victims and survivors to raise experiences of violence and child abuse.

Recommendation 8: Balance expanding the overarching purpose of family law practice and procedure with a clear mechanism that encourages and facilitates the raising of domestic and family violence and child abuse as required.

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