



Senate Legal and Constitutional Affairs  
Legislation Committee Inquiry into the  
Family Law Amendment Bill 2023

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## Acknowledgements

Youth Law Australia acknowledges the Traditional Owners and Custodians of Country and pays respect to the Elders, past and present. We acknowledge the strength, resilience and capacity of Aboriginal and Torres Strait Islander peoples from the many locations across Australia where we support children and young people in their journey for safety, dignity, equality and justice.

We also acknowledge the many children and young people who are courageous and hopeful in sharing their experiences with us.

## About Youth Law Australia

Youth Law Australia (YLA) (formerly the National Children’s and Youth Law Centre) is an accredited community legal centre dedicated to helping children and young people under the age of 25 years and their supporters to understand their legal rights and find solutions to their legal problems. YLA is Australia’s only national, technology-based community legal service, providing specialist child rights informed and trauma informed legal services through email, phone and live webchat.

## Our family law work

We have significant experience and expertise in advising children and young people and their advocates on family law matters, which also commonly intersect with safety concerns arising from sexual, domestic and family violence and abuse, child abuse, child sexual abuse, neglect, substance misuse, mental health conditions and poverty. We provide advice and assistance on issues including variations to live with and spend time with arrangements, leaving home, change of name, passports and travel arrangements, forced marriage, change of school, relocation, contact with siblings and other significant people, and understanding the effect of restraining orders.

Wherever possible we support Gillick competent young people<sup>1</sup> to make independent decisions and prioritise the direct participation of all children and young people in all matters that impact them where safe to do so. We have included deidentified case studies throughout this submission to reflect the voices of the children and young people we work with. To protect the identity of our clients, we have changed some details.

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<sup>1</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (“**Gillick**”).



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### Youth Law Australia

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## Introduction

1. YLA welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) in response to the Family Law Amendment Bill 2023 (the Bill).
2. We acknowledge that the focus of these proposed reforms is largely to enhance the safety of children and young people and adult victim-survivors in the family law system. We believe that the removal of the presumption of equal shared parental responsibility and the related requirement to consider specified time arrangements will directly improve safety and outcomes for children and young people.
3. We also acknowledge that many of the proposed amendments, if implemented, will assist parents, carers and the family law system to make safer arrangements for children and young people, and will provide additional safeguards to facilitate engagement with children and young people. However, it is our position that the Bill does not go far enough, and our submission is primarily focussed on the deficiencies in both the current family law system and the Bill regarding genuine, ongoing, direct and meaningful participation of children and young people in the family law processes and proceedings that are about them.
4. We note that the Explanatory Memorandum for the Bill states that:

*Consistent with Australia's obligations under Article 12 of the United Nations Convention on the Rights of the Child (CRC), the Bill will also seek to ensure the views of children are appropriately heard and considered in family law proceedings. Studies indicate that children have difficulty having their views properly understood or taken seriously in family law matters. The Bill will ensure that, in appropriate circumstances, and where they wish to, children can express their views to the Independent Children's Lawyer, providing an opportunity for their voice to be heard in family law matters affecting them.<sup>2</sup>*

5. Whilst we welcome the additional provisions regarding children and young people's access to an Independent Children's Lawyer (ICL) we believe that many additional amendments are required to make the family law system compliant with Australia's obligations under the *Convention on the Rights of the Child*. We provide further details about our concerns below and in our submission in response to the Consultation on Exposure Draft - Family Law Amendment Bill 2023 dated 27 February 2023.<sup>3</sup>

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<sup>2</sup> Family Law Amendment Bill 2023, Explanatory Memorandum, para 5.

<sup>3</sup> Available on our website: <https://yla.org.au/wp-content/uploads/2023/03/Youth-Law-Australia-submission-on-Consultation-on-Exposure-Draft-Family-Law-Amendment-Bill-2023-redacted.pdf>

6. The key principles that inform the reforms that we seek in the family law system are:
  - A. The safety of children and young people must be prioritised.
  - B. *The Family Law 1975 (the Act)* expects the direct participation of children and young people pursuant to sections 60B, 60CC and 65C of the Act, including via the intention to give effect to the *Convention on the Rights of the Child*.
  - C. The best interests of children and young people cannot be determined without hearing from them.
  - D. Children are not a homogenous group and any focus or commitment to the safety of children and young people requires a framework to assess the capacity of each individual child or young person to participate and to develop or adjust processes to ensure that all children and young people can participate directly at all stages of family law matters when they want to, and it is safe to do so.
  - E. Children and young people may also be parents and carers.
  - F. All organisations that provide services to children and young people under the Act must be committed to a child safe culture, including implementing the National Principles for Child Safe Organisations.

## Schedule 1: Parenting framework

### Redraft of objects

7. YLA supports the simplification of the objects of the Act in section 60B and the specific reference to the best interests of children and their safety.
8. We also support the continued intention of the Act to give effect to *Convention on the Rights of the Child*, though it remains unclear how much of an impact this will have without the *Convention on the Rights of the Child* being incorporated into domestic legislation.
9. We are hopeful that there will be increasing reliance on the *Convention on the Rights of the Child* as a guide in decision-making but believe that this will only occur in a comprehensive and consistent manner if a range of materials are made available to inform children and young people, their advocates, and the wider family law system that the *Convention on the Rights of the Child* is a relevant instrument. We note that the full text of the *Convention on the Rights of the Child* does not appear to be available on the Federal Court and Family Court of Australia (FCFCoA) website.

### Recommendation 1

That in addition to the full text of the *Convention on the Rights of the Child*, that the following materials be made available on the FCFCoA website to coincide with the commencement of the FLA reforms, and where new content is to be developed that this is done so in consultation with children and young people and child rights experts from a range of relevant disciplines:

- A new section of the FCFCoA website for children and young people including at a minimum:
  - information about parenting matters in the family law system;
  - an overview of the rights of children and young people, including a link to the *Convention on the Rights of the Child: The child-friendly version* available on the UNICEF website here: <https://www.unicef.org/sop/convention-rights-child-child-friendly-version>;
  - referral options including for crisis support, counselling and legal advice;
  - access to the National Enquiry Centre, ideally via a webchat interface designed for children and young people;
  - details about what to expect from and how to complain about the family law professionals they come into contact with including Independent Children’s Lawyers and Child Court Experts;
  - The National Principles for Child Safe Organisation; and
- A participation framework (for example in the form of a Practice Direction) for assessing the maturity and capacity of children and young people to participate more directly and meaningfully in family law processes and proceedings (this is discussed further below).

## Best interests of children

### *Prioritisation of safety*

10. YLA supports the introduction of a simplified, single list for section 60CC to determine what is in a child’s best interests. However, we strongly recommend an amendment to the Bill to continue the current requirement for the court to give greater weight to the safety of children and young people, and to the safety of adult victim-survivors with a caring role for the child.
11. Children and young people frequently contact YLA for advice and support about parenting arrangements. Some of the most common types of harm that they identify are emotional or psychological abuse, having a “*toxic relationship*” or experiencing “*love bombing*” with a parent, being manipulated by a parent or being exposed to verbal abuse or fighting in adult relationships, which may be described in ways like “*home is not ideal*” or “*home is not good for my mental health*”. We acknowledge that there has been significant progress in recognising and responding to the impacts on children and young people experiencing and exposed to abuse and family violence. However, we believe that the extent and effects of harm, particularly arising from the

coercive control of children and young people by parents and carers is often misunderstood, ignored, minimised, or obscured by a focus on abuse and harm in adult relationships.

12. We are very concerned that removing the prioritisation of safety will expose children and young people and adult victim-survivors to greater risk of psychological, physical and sexual harm, and create a perception that the court is retracting what has proven to be an effective protection.
13. The proposed wording of section 60CC(2)(a) also suggests that the taking of any steps to promote safety may be viewed as sufficient. We recommend that the wording be amended to read “*what arrangements would best promote the safety*” as was proposed in the Exposure Draft of the Bill.
14. Determining how to promote safety also requires specific consideration of which arrangements most effectively provide protection from psychological, physical or sexual harm from being subjected to or exposed to family violence, abuse or neglect. To do this effectively there must also be an assessment of the history of violence, abuse and neglect as currently required under section 60CC(3)(j). Section 60CC(2) of the Bill should be amended to provide requirements to undertake these additional considerations.

#### **Recommendation 2**

The court must prioritise safety when determining what is in the best interests of a child.

#### **Recommendation 3**

Consideration of safety must include an assessment of which arrangements provide protection from psychological, physical or sexual harm from being subjected to or exposed to family violence, abuse or neglect informed by the history of violence, abuse and neglect.

#### **Views expressed by the child**

15. We strongly support the inclusion of “*any views expressed by the child*” as a best interests factor. It is impossible to genuinely assess the best interests of a child or their developmental, psychological and emotional needs without their participation. The United Nations Committee on the Rights of the Child has stated that a best-interests analysis must incorporate the child’s own voice.<sup>4</sup>
16. In order to provide all children and young people with a genuine opportunity to express their views, it is vital to adopt developmentally appropriate communication options for children and young people of all ages, which is also a powerful educative and protective approach. This is particularly important for children and young people where all parents or carers may be a risk to the child and the child has not had an opportunity for any independent oversight or assessment of this risk.

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<sup>4</sup> United Nations Committee on the Rights of the Child. *General Comment No. 14* (2013).

17. To do this in a meaningful and safe manner the Act must recognise and respond to each child or young person in a way which respects and incorporates their capacity to participate. In addition to giving effect to the *Convention on the Rights of the Child* pursuant to section 60B, this would also reflect the National Principles for Child Safe Organisations, and in particular Principle 2 which requires that children and young people be informed about their rights, participate in decisions affecting them and are taken seriously. This opportunity to participate should also not be limited to only the children and young people where a direction is made to inform the court of the views expressed by a child pursuant to section 60CD of the Act, and must also extend to other family law processes, such as family dispute resolution.
18. We also encourage consultation on the development of an alternative decision-making pathway for discrete legal issues, such as change of name, change of school, issue of passports and international travel (for example, where the young person has an opportunity to travel for reasons such as a school excursion or representative sport, as opposed to travelling with the other parent). We are regularly contacted by children and young people who are unable to resolve one or more of these discrete issues, primarily due to the ongoing coercive control of a parent and believe that Gillick competent young people should be supported to make these applications on their own behalf via a simplified application and dispute resolution process.

#### **Recommendation 4**

A participation framework be developed and implemented for all children and young people informed by the articles of the *Convention on the Rights of the Child* and a Gillick assessment of maturity, and with guidance from children and young people.

#### ***The rights of Aboriginal and Torres Strait Islander children and young people***

19. We are concerned that the proposed section 60CC(3) provides less recognition of the rights of Aboriginal and Torres Strait Islander children and young people to be supported and encouraged to explore the full extent of their culture than the current provisions of the Act.
20. We are regularly contacted by Aboriginal and Torres Strait Islander children and young people about relationships with their families and kinship networks but are not in a position to provide culturally safe comments on this aspect of the Bill. We strongly encourage direct engagement with Aboriginal and Torres Strait Islander children and young people and their advocates about their preferred ways to explore and maintain connection with their culture.
21. We also endorse the comments and recommendations made in the submission by Women's Legal Services Australia in relation to the Bill with respect to better recognising the cultural rights of Aboriginal and Torres Strait Islander children by retaining the wording of current s60CC(6)(b) as follows: "*to have the support, opportunity and encouragement necessary: to explore the full*

*extent of that culture, consistent with the child's age and developmental level and the child's views; and to develop a positive appreciation of that culture."*

### **The cultural needs of the child**

22. The cultural rights and needs of children are currently directly identified in both the objects and the best interests determinative factors of the Act.<sup>5</sup> We welcome the inclusion in the Bill of specific direction to consider the *cultural needs* of the child in section 60CC(2)(c) and (d) but believe that further amendment is required.
23. We strongly support the acknowledgement and preservation of the specific cultural rights and needs of Aboriginal and Torres Strait Islander children and young people but believe that culture must also be interpreted broadly to include cultural and linguistic diversity, LGBTIQ+ communities and people with disability.
24. Giving effect to the *Convention on the Rights of the Child* is also integral to the Act, and the Bill maintains this objective. The *Convention on the Rights of the Child* recognises the "*importance of the traditions and cultural values of each people for the protection and harmonious development of the child*" and includes cultural rights; rights to identity, including nationality, name and family relations; freedom of expression; freedom of thought, conscience and religion; right to leisure, play and participation in cultural and artistic activities; and right to minority culture and language.<sup>6</sup>
25. Children have a right to develop a strong sense of cultural identity. To ensure that the cultural needs of children and young people are appropriately and fully considered, amendment to the Bill is required to direct the court to consider the rights of children and young people to enjoy and explore their cultures, languages, identities and connections with families and communities.
26. To be meaningful this must be more than just knowing what their cultures are, and parties should be required to provide a cultural support plan outlining how children and young people will be supported to engage in culturally relevant activities like language development, arts and sports, play, religious and spiritual practices, health and healing traditions and education from community members, consistent with the child's age and developmental level and the child's views.

#### **Recommendation 5**

Section 60CC(2) be amended to include a subsection directing the court to consider the rights of children and young people to enjoy and explore their cultures, languages, identities and connections with families and communities.

<sup>5</sup> Sections 60B(2)(e) and 60CC(3)(g) *The Family Law Act 1975*.

<sup>6</sup> United Nations, *Convention on the Rights of the Child*, 20 November 1989, articles 2, 4, 8, 13, 14, 30, 31.



### Consent orders

27. Given the known dynamics of family and domestic violence, particularly coercive and controlling behaviours used to pressure the other party to settle unsafe consent orders, it is clearly in the best interests of the child to have the safety of all parenting arrangements, including consent orders, considered by the court before finalisation.

#### Recommendation 6

Amend section 60CC(4) to include a requirement for the court to have regard to the safety of the child and other relevant people in the child's life when making consent orders.

### Removal of equal shared parental responsibility and specific time provisions

28. To assess best interests of the child, including safety of the child, parenting orders must be considered on a case-by-case basis. We strongly support the removal of the presumption of equal shared parental responsibility and specific time provisions. In our experience, the confusion surrounding the presumption and the link to section 65DAA has led to many families agreeing to unsafe care arrangements in cases resolved by consent. Given the high percentage of families who resolve matters by consent, and the high incidence of family and domestic violence in separating families, the removal of the presumption will particularly benefit matters that are resolved "in the shadow of the law."
29. It will be imperative to raise community awareness about this change, including specific training for legal practitioners, family dispute resolution practitioners, family counsellors and family consultants. This could also be a valuable opportunity for additional education on child abuse, neglect and family violence, including coercive control and other tactics used by perpetrators to dominate and manipulate outcomes in their favour.

### Reconsideration of final parenting orders (Rice & Asplund)

30. While we support the inclusion of section 65DAAA, we are concerned that the Act unnecessarily impacts children and young people who would be otherwise deemed as Gillick competent.<sup>7</sup>
31. When the Act was first enacted in 1975, it provided that once a child who was subject to family court orders attained the age of 14 years, an application could be made to discharge or vary the order in accordance with the child's views.<sup>8</sup> Since this section was removed in the *Family Law Amendment Act (1983)*, and despite the High Court's application of *Gillick v West Norfolk (1985)* in the case of *Marion (1992)*, young people who would otherwise be deemed as Gillick competent

<sup>7</sup> See for example, Young, L., 'Mature minors and parenting disputes in Australia: Engaging with the Debate on Best Interests v Autonomy' (2019) 42(4) *UNSW Law Journal* 1362 – 1365.

<sup>8</sup> *Family Law Act 1975 (Cth)* s64(8).

have been unnecessarily subject to orders until they reach 18 years old. Young people regularly contact YLA to seek legal advice about how to change family law orders:

*“I’ve never liked living with my dad and I don’t want to live there anymore. He knows that I’m dealing with stuff at school but he never listens. I spend half the time at Mum’s house and the other half at Dad’s. I want to live at Mum’s full time and visit Dad instead. Mum said I can’t because there is a Court Order and they have already been back to court once. I don’t understand why other people my age can leave home if they have somewhere safe to go, but I’m not allowed? When does the order stop? Will I get into trouble if I ignore it?”*

**16-year-old**

*“I live with split parents and I’m wondering if there is a certain age when you can change the time you spend with certain parents in the order? I spend half the week with Dad and half the week with mum, I then alternate weekends each week. I want to spend Sunday with mum. Dad is refusing to take me to rep soccer but Mum can take me. I want to play soccer so I need to be with mum on Sunday.”*

**16-year-old**

*“My mum is emotionally abusive to me and my brother and I want to live with my Dad. There are court orders that say where we have to be throughout the year, at the moment we spend half the time at dad’s and half the time at mum’s.*

*I am physically safe but not emotionally safe with Mum, but I am safe at Dad’s.*

**14-year-old**

32. By failing to recognise the evolving capacity of the child, the legislation constrains young people to arrangements that are unnecessarily restrictive or unsafe, and in most cases preferences one or more adult’s assessment of the significance of any changes over the views of the young person. Not only does this place young people at additional risk, young people subject to family court orders often also fear that if they choose where to live contrary to orders, their protective parent or carers will be subjected to further abuse, retaliation or more litigation.

#### **Recommendation 7**

That Division 5 of the Act be amended to state that parenting orders end when the child attains 16 years unless there are special circumstances as is the case in New Zealand (*Care of Children Act 2004, NZ, s50*). We do not propose change to the requirements to financially support or maintain a child until they turn 18 years or as otherwise ordered.

#### **Recommendation 8**

That if the expiry of parenting orders is not reduced to 16 years, the list of considerations in section 65DAAA(2) is amended to include “(e) any views expressed by the child”.

## Schedule 2: Enforcement of child-related orders

33. Despite regularly hearing from children and young people about significant breaches of the orders about them there appears to be limited use of the enforcement provisions in the Act. It is our position that the current provisions are not fit for purpose
34. Whilst we support the simplification of enforcement options for non-compliance with parenting orders, we do not believe that the proposed amendments will achieve the desired outcome and may lead to unsafe and unfair outcomes for children and young people and adult victim-survivors. We believe that in the absence of specific pathways to facilitate their meaningful participation in proceedings about them, children and young people will remain trapped in unsafe and unstable arrangements.
35. We are opposed to the introduction of an express power for the making of make-up time parenting orders without having to make a finding about the contravention, particularly in cases of persistent child refusal. The assessment of whether there is a reasonable excuse for contravening an order is an important safeguard for children and young people. The views of the child should also be sought before an order is made for make-up time.
36. We are also concerned that some children and young people reluctantly elect to continue a relationship with an abusive parent to avoid a contravention consequence for a protective parent or carer or their further abuse, or to protect a sibling from abuse and interference from a perpetrator parent. They will remain hidden victims unless their voices can be heard, and they have confidence that the system will listen and respond accordingly.
37. We believe that contravention proceedings involving the direct participation of Gillick competent young people, would be significantly simplified as the focus will be shifted to the views expressed by the Gillick competent young person rather than a detailed assessment of the behaviour of their parents or carers.

### Recommendation 9

- A. That children be supported to provide their views on non-compliance, particularly in cases of persistent child refusal; and
- B. That a child-friendly, developmentally appropriate summary of parenting orders and parenting plans and their effect be provided to all children and young people. This summary should include the details of services that can provide children and young people with crisis support, counselling, and independent legal advice. The summary should also be available on demand from the Children's Court Services, at any time until the orders cease to have effect.

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

38. YLA supports the expanded definitions of "*member of the family*" and "*relative*" to better recognise Aboriginal and Torres Strait Islander notions of family and kinship.

39. We note the potential for scrutiny of a wider group of individuals who have a role in the child's upbringing. It will be important to balance the child's right to cultural safety in decision making about their care arrangements with the potential for delay in proceedings. This may require preliminary identification of the people who are most significant in the child's care, welfare and development for the purposes of the disclosure requirements in sections 60CF, 60CH and 60CI.

## Schedule 4: Independent Children's Lawyers

### Requirement to meet with the child

40. While we agree with the proposed requirement in section 68LA(5A) that the ICL, must meet with the child, we are concerned that in practice, this will still not allow for adequate participation of children and young people. We would like greater transparency around how often ICLs should meet with a child or young person during proceedings, which at a minimum must be before and after each significant court event. We note that, particularly in cases where the young person has experienced trauma, it may also take multiple meetings with the ICL to build enough trust and rapport for the young person to feel safe to express their views.
41. Specific to section 68LA(5A)(b) there should be further clarification around different ways that children can safely express their views in family law proceedings, and these methods should be appropriate to the age, maturity and individual needs of the child. This information should also be available in the new content proposed for the FCFCoA website above in *Schedule 1: Amendments to the framework for making parenting orders*.

#### Recommendation 10

That the ICL is required to meet or speak to the child or young person before and after each significant court event (subject to the child's wishes) where a decision is made that impacts the child and when a child specifically requests to meet the ICL.

### Exceptions in sections 68LA(5B) and (5C)

42. Greater transparency is required around how ICLs and the courts will assess proposed sections 68LA(5B) and 68LA(5C), particularly sections 68LA(5C)(a) and (b) and what is perceived as harm or a "significant adverse effect". There has been a long-held belief that exposing children to family law proceedings is harmful and we are concerned that this section will be relied on to justify not meeting with the child. However, when children are not provided with an opportunity to express their views, not only does this potentially create unsafe situations for children, it can also result in decisions that go on to impact children throughout their adult life.<sup>9</sup>

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<sup>9</sup> Nelson, C. (2022) "They thought it was safe – but it wasn't" Recognising Children's Rights as a Means of Securing Children's Safety in Australia's Family Law System. Whitlam Institute Sydney.

43. To make a decision in the best interests of the child, the court must ensure that children and young people are provided with a safe space where they can express their views freely. To facilitate this, we believe that the ICL must specifically assess whether any risk of physical or psychological harm can be safely managed and whether the risk of not hearing from the child or young person may be a greater risk.
44. We are also concerned about what evidence the ICL can elect to rely upon to determine that meeting with the child may have a significant adverse effect. For example, we can imagine circumstances where a well-resourced and well presenting perpetrator of family abuse could convince the court of the potential for a significant adverse effect if the child were to meet with the ICL to be asked about their parents and parenting arrangements.
45. We recommend consideration be given to requiring independent medical or allied health evidence that there will be a significant adverse effect on the child, which clearly outweighs the benefit of the child speaking to an ICL, though we acknowledge the risk of litigation abuse and manipulation of this evidence by abusive parents and the potential for further harm from delay.
46. Many children also express that they are worried that if they talk to an ICL they will get in trouble from one or both of the parents, or other adults in their lives such as grandparents. Children who fear for their safety and do not speak to the ICL should still be provided with the right to participate in their legal matter, and referral to independent child safe lawyers, who are not mandatory reporters and do not have a duty to disclose information to the family law courts is an effective method to do this.

**Recommendation 11**

That if an ICL relies on proposed sections 68LA(5B) and 68LA(5C) and particularly sections 5C(a) and (b), the Court must examine the attempts made by the ICL to safely engage with the child or to manage the risk, including consideration of different methods to explore how the child can safely provide their views, and whether not hearing from the child is a greater risk.

**Recommendation 12**

That if a child does not wish to meet with an ICL or the ICL argues that performing their duty would expose the child to risk of physical or psychological harm, the child is referred to an independent child safe legal service, such as YLA, for independent advice.

**Ensuring children have their say**

47. As recommended above we believe that a participation framework is required for the safety and inclusion of all children and young people in the family law system. We also believe that the

current best interests approach is not only inadequate, but studies also suggest that children feel betrayed when they understand their views will not be represented.<sup>10</sup>

48. Direct legal representatives “receive and act on instructions from the child client, irrespective of what the representative considers to be the best interests of the child client.”<sup>11</sup> In NSW, the *Children and Young Persons (Care and Protection) Act* includes a rebuttable presumption that children who are 12 years or older are presumed as capable of giving proper instructions<sup>12</sup>, and a legal representative for a child or young person is to act as a direct legal representative if the child is capable of giving proper instructions.<sup>13</sup> The Representation Principles for Children’s Lawyers states that “*this model allows children to participate directly in proceedings if they are able and willing to do so, as required by international law*”.<sup>14</sup> Additionally, the UN Committee has recommended that wherever possible, children are given the opportunity to be directly heard in any proceedings.<sup>15</sup> Even where ICLs are appointed, many children still feel unheard and unsafe in family law proceedings.<sup>16</sup> There is also limited guidance regarding the use of litigation guardians in proceedings involving minors.<sup>17</sup>
49. While the proposed amendments in the Bill aim to facilitate greater participation for cases where an ICL is appointed, ICLs are only appointed for high-risk or complex matters. Further amendment is required to allow for greater participation for all children involved in family law proceedings, including orders made by consent. This includes giving children a choice as to whether they would like to participate, and how they would like to participate. We acknowledge that the inclusion of processes for increased participation may cause additional delay or harm to children arising from misuse of processes by abusive parents and caregivers, but it is their right to participate. The courts must also ensure that the child or young person receives all necessary information and advice that they need to inform their views. The validity of acting in a child’s best interests is called into question when family law actors haven’t met or heard from the child, especially where concerns about safety have been raised.
50. Ideally for all decisions, but particularly where a decision is made contrary to a child’s views, it is important to explain the decision to the child in a child friendly way that is age appropriate. In cases where an ICL is not appointed, this could include a child court expert writing a letter to the young person that is accessible to the child at an appropriate time. This is a common practice engaged in by Child Protection Practitioners known as Life Story work to “assist young people to explore significant events in their life in a safe and trauma informed way”.<sup>18</sup> YLA often observes

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<sup>10</sup> Carson, R., Dunstan, E., Dunstan, J., & Roopani, D. (2018). *Children and young people in separated families: Family law system experiences and needs*. Melbourne: Australian Institute of Family Studies, 52.

<sup>11</sup> Law Society of NSW, *Representation Principles for Children’s Lawyers*, 4<sup>th</sup> Edition.

<sup>12</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s99c.

<sup>13</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 99a, 99c

<sup>14</sup> Law Society of NSW, *Representation Principles for Children’s Lawyers* – 4<sup>th</sup> Edition.

<sup>15</sup> United Nations Committee on the Rights of the Child, General Comment No. 12 (2009): The Right of the Child to be Heard, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009), [35]–[36], p 12.

<sup>16</sup> As above at 4 (Nelson).

<sup>17</sup> *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, Part 3.5.

<sup>18</sup> Lucas, J. J., Velik, J., Matthews, L., Brady, K., Breguet, R., & Parson, J. (2022) *Therapeutic Life Story Work Barwon Pilot Program: Final Report 2022 (Research Report)*, Geelong, Victoria. Accessed at: <https://www.mackillop.org.au/about-mackillop/publications/therapeutic-life-story-work>

that children and young people are retraumatized by family law process where they feel that their voice hasn't been heard or where no one has explained to them why they can't live with a particular parent, for example, due to safety concerns.

*"I want my mum. I don't want to live with my Dad but the court says I have to, I told everyone that I don't want to live at my Dad's house, but nobody is listening to me. I can't even talk to mum because Dad won't let me call mum. Why can't I go home to my mum? It was my Dad that hurt me and not mum. I told my lawyer that I want my mum, but nobody cares. I hope someone sees this."*

**10-year-old**

51. It is important for the family law system to be responsive to the profound impact it has on children's lives and to be committed to trauma informed practices. Crucially, for the family law system to be trauma informed, it must consider the impact of vicarious trauma on family law professionals including judicial officers and legal practitioners.
52. We are concerned that by placing greater responsibility on ICLs, there is also a risk that less practitioners will be willing to act as an ICL and to undertake the ongoing training required to be trauma-informed, child safe, culturally safe, disability aware and LGBTIQ+ aware.

#### **Recommendation 13**

To allow for more effective participation of children and young people, in compliance with Article 12 of the *Convention on the Rights of the Child*, and to improve safety outcomes for children, a rebuttable presumption of capacity be inserted into the Act and a model of direct legal representation is adopted for children who are capable of giving proper instruction.

#### **Recommendation 14**

Ideally for all decisions, but particularly where a decision is made contrary to a child's views, the decision is explained to the child in a way that is age appropriate.

#### **Recommendation 15**

That mandatory training and support is available to judicial officers and others working in the family law system, so that practitioners are child safe and feel equipped to support children and young people to effectively participate.

#### **Recommendation 16**

That significant additional funding is provided to ensure that ICLs and direct legal representatives for children and young people can provide a more comprehensive service, as outlined above.

## Convention on the Civil Aspects of International Child Abduction

53. We welcome the expansion of the use of ICLs, and ideally direct legal representatives as outlined above, in cases brought under the *Convention on the Civil Aspects of International Child Abduction*. This will provide children and young people with an increased opportunity to provide first-hand accounts of their experiences and express their views during proceedings which typically involve allegations of abuse and risk, relocation and other complexities.

## Schedule 5: Case management and procedure

### Harmful proceedings orders

54. YLA supports the introduction of harmful proceedings orders to address the trauma and harm associated with unmeritorious, harmful and vexatious proceedings, often in the form of litigation and systems abuse.
55. We agree with the concerns raised by Women’s Legal Services Australia in their submission that a victim-survivor should not be required to prove that they or the child the subject of proceedings would actually suffer harm in order for the court to make a harmful proceedings order.

### Overarching purpose of the family law practice and procedure provisions

56. We support the inclusion of an overarching purpose for family law practice and procedure. However, we are concerned that safety and the best interests of children, whilst listed first in proposed section 95(1), are to be considered equally with the purpose of “*quickly, inexpensively and efficiently*” resolving disputes under the Act. Safety of children and young people and adult victim-survivors as well as the best interests of the child must always be prioritised.
57. As outlined above, we also believe that genuine commitment to safety and the best interests of the child requires a significant expansion and investment in the options for children and young people to participate directly in decision making about them. We anticipate that this could add additional steps in family law proceedings and are very concerned that a focus on efficiency and cost may undermine the rights of children and young people to participate.

#### **Recommendation 17**

In proposed section 95 safety and promoting the best interests of the child must be given greater weight than any consideration of efficiency or cost or other factors.

## Schedule 6: Communications of details of family law proceedings

58. While the purpose of Part XIVB is to protect the privacy of families, children involved in family law proceedings should not be prevented from sharing their experience of family law proceedings once they reach adulthood. We note that the cost of seeking approval from the Court is



prohibitive to many. We believe that the court will be limited in its ability to keep children safe if it does not listen to the experiences of children who felt unsafe or unheard during proceedings.<sup>19</sup>

59. The court needs to consider the potential impact that XIVB has on young people. For example, a young person (15-year-old) recently contacted YLA about their living arrangements but told us they were not allowed to talk about the court orders as they had been told they were not allowed to talk about what happened at court.

**Recommendation 18**

While Part XIVB is easier to understand than the current section 121, further amendment is needed to allow children to share their experiences once they turn 18.

**Recommendation 19**

The court must also inform children and young people about Part XIVB to ensure that children do not unknowingly commit an offence. This should include explaining to children that Part XIVB does not prevent them from seeking independent legal advice or seeking support from a counsellor or psychologist.

## Schedule 7: Family report writers

60. We welcome additional provisions to regulate family report writers, but do not believe that the proposed reforms in the Bill are sufficient.
61. Family reports are frequently the only mechanism by which the voice and views of the child or young person are heard in proceedings. The standards and requirements for family report writers must be included in the Act itself or failing that, at a minimum, section 11K be amended to state that the “*regulations must make provision for*” standards, requirements and consequences for family report writers, including mandating that the regulations deal with the standards and requirements set out in section 11K(2).
62. Family report writers must also be highly trained, nationally accredited, and proficient in trauma informed practice, with relevant expertise including in:
- understanding child abuse and neglect;
  - how exposure to sexual, family and domestic violence and abuse in adult relationships impacts children;
  - coercive control of children and young people;
  - child development; and
  - working with children and young people.

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<sup>19</sup> As above at 4 (Nelson).

63. Family report writers must also be subject to transparent accountability mechanisms, including a requirement to provide all children and young people with information about complaint processes and options for independent legal advice and support. Family report writers must also ensure that all engagement with children in physical and online spaces is safe, inclusive and accessible to all children and young people.

**Recommendation 20**

The requirements for ongoing training of family report writers must specifically require comprehensive and child rights informed training on talking to children and young people in a developmentally appropriate manner and how trauma impacts children and young people.

**Recommendation 21**

The FCFCoA engage in a co-design consultation process with children and young people to review both their physical and online spaces to ensure that they are safe, inclusive and accessible to all children and young people.

### Commencement of the changes

64. YLA believes that the safety of children and young people necessitates that the reforms commence as soon as possible after the passage of the legislation. The changes should also apply to all proceedings already filed at the time of commencement, excepting those awaiting a reserved judgment.

### Protecting sensitive information

65. We note that the proposed amendments in Schedule 6 of the Exposure Draft relating to protecting sensitive information have not been included in the Bill. The protection of sensitive information in family law proceedings must be addressed to ensure that children and young people and adult victim-survivors can participate safely and fully in family law proceedings and without compromising their therapeutic and health needs.
66. YLA is hopeful that the decision to not include the proposed amendments for protecting sensitive information is to allow time to further consult and develop those provisions. YLA would welcome the opportunity to work with the Government on this issue, particularly to address the need for provisions to be included in the Act that support Gillick competent young people to make an independent and informed decision about the admission of protected confidences arising from communications between that young person and a relevant professional.<sup>20</sup>

26 June 2023

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<sup>20</sup> For additional background information please refer to paragraphs 51-61 of our submission on the Consultation on Exposure Draft - Family Law Amendment Bill 2023 dated 27 February 2023, available on our website: <https://yla.org.au/wp-content/uploads/2023/03/Youth-Law-Australia-submission-on-Consultation-on-Exposure-Draft-Family-Law-Amendment-Bill-2023-redacted.pdf>