



27 February 2023

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Submission on the Family Law Amendment Bill 2023 (Exposure Draft)

Thank you for the opportunity to make this submission on the Exposure Draft of the Family Law Amendment Bill 2023.

This submission is made in my capacity as National Children's Commissioner (NCC), and therefore focuses solely on the rights and needs of children. I draw upon previous submissions to inquiries and reviews on the family law system made by the Australian Human Rights Commission (Commission), including:

- Submission by the Commission to the Australian Law Reform Commission (ALRC) Review of the Family Law System, Issues Paper, in 2018¹
- Submission by the former NCC to the Joint Select Committee on Australia's Family Law System in 2019.²

I welcome the proposed reforms aimed at ensuring the best interests of children are prioritised and placed at the centre of the system and its operation.

One of the key children's rights concerns raised in the Commission's previous submissions is the importance of safety and protection from violence, abuse and neglect. Child safety is one of the most commonly raised issues in family law proceedings. By clarifying and emphasising the centrality of the 'best interests of the child' principle in the *Family Law Act 1975* (Cth), children's right to safety will also be better addressed.

My comments on select provisions of the Draft Bill are set out below.

Schedule 1: Amendments to the framework for making parenting orders

Redraft of Objects

I welcome the simplification of the Objects and Principles in Part VII of the *Family Law Act*, and the inclusion of the 'best interests of the child' principle and the *UN Convention on the Rights of the Child* (CRC) in a shorter objects clause.

The 'best interests of the child' principle is one of Australia's fundamental international human rights obligations, and one of the four Guiding Principles in the CRC.³ These Principles are core requirements for all rights contained in the CRC:

- the right of all children to enjoy all the rights of the CRC without discrimination of any kind (article 2)
- respect for the best interests of the child as a primary consideration (article 3)
- the right to survival and development (article 6)
- the right of all children to express their views freely on all matters affecting them (article 12).

By including specific reference to the CRC as one of two objects, rather than as an 'additional object' in Part VII of the Act, the proposed amendments more comprehensively give effect to Australia's obligations to protect the rights of children and provide greater clarity and guidance on how this is to be achieved.

Best interests factors

The proposed rationalisation of best interest factors, and removal of a hierarchy of factors, more clearly reflects how the best interests of the child principle is interpreted under the CRC.

In its submission to the ALRC Issues Paper in 2018, the Commission explained the approach to the best interests principle by the UN Committee on the Rights of the Child (UN Committee), which focused on a consideration of the individual child's circumstances.

The concept of the child's best interests is complex and its content must be determined on a case-by-case basis. It is through the interpretation and

implementation of article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof. Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child.⁴

The UN Committee has stated that it is useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included by any decision-maker to determine the 'best interests' of the child. These must be taken into consideration and balanced in light of each situation.⁵

Following amendments to the *Family Law Act* in 2006, section 60CC drew a distinction between 'primary considerations' and 'additional considerations' when determining the best interests of the child. The Commission, in its submission to the ALRC review, recommended that the court should give greater weight to children's voices, within that hierarchical structure.⁶ This was in recognition of the importance of article 12 of the CRC, which provides for the child's right to express their views and have those views taken into account in decisions that affect them. However, an alternative approach suggested was to remove the hierarchy between primary and secondary factors completely.

In General Comment 14 on the best interests of the child, the UN Committee identified the key elements to be taken into account when assessing the child's best interests in all decisions as:

- the child's views
- the child's identity
- preservation of the family environment and maintaining relations
- care, protection and safety of the child
- situation of vulnerability
- the child's right to health
- the child's rights to education.⁷

The proposed list of best interests factors in the Draft Bill reflects many of these elements. It also reflects the UN Committee's insistence that the list be non-exhaustive, by the inclusion of the factor 'anything else that is relevant to the particular circumstances of the child'.

Best Interests of Aboriginal and Torres Strait Islander children

In addition to the proposed list of best interest factors to be considered, the Draft Bill includes a separate provision requiring a court to consider the importance of an Aboriginal or Torres Strait Islander child's connection to culture, language, community and country.

The inclusion of this factor is consistent with a child rights focus. Article 30 of the CRC explicitly recognises the right of Indigenous children to culture, language and religion, and states that:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

In its submission to the ALRC Issues Paper in 2018, the Commission outlined how, for Aboriginal and Torres Strait Islander children, a fundamental link exists between the ability to enjoy their own culture and growing up with continuity to their Indigenous culture.⁸ The importance of this link is the foundation of the Aboriginal and Torres Strait Islander Child Placement Principle, which 'was developed in recognition of the devastating effects of forced separation of Indigenous children from families, communities and culture'.⁹ When determining what is in the Indigenous child's best interests, regard should therefore be given to preventing the loss of cultural identity by ensuring that the child maintains connection with their Indigenous cultural identity.¹⁰

When assessing the best interests of an Indigenous child, the UN Committee has underlined that the child's best interests need to be conceived both as an individual and collective right. As a result, consideration needs to be given to the cultural rights of the Indigenous child and their need to exercise such rights collectively with members of their group.¹¹

In General Comment 14, the UN Committee specifies the child's identity as an important element to take into account when assessing the child's best interests.¹²

Removal of equal shared parental responsibility and specific time provisions

The Draft Bill proposes repealing both the presumption of equal shared parental responsibility under section 61DA of the *Family Law Act* and the mandatory consideration of certain time arrangements under section 65DAA.

In its submission to the ALRC Review, the Commission expressed its concern that the presumption of equal shared parenting responsibilities in the *Family Law Act* may lead judicial officers to automatically apply shared parenting at the expense of child safety or other important considerations, such as the views of the child.¹³

Evidence presented to House of Representatives Standing Committee on Social Policy and Legal Affairs (the Committee) Inquiry in 2017 found that the presumption was leading to unjust outcomes and compromising the safety of children, particularly where there is evidence of family violence.¹⁴ The Committee also heard concerns about misinterpretations of the presumption for equal shared parental responsibility as a presumption for equal shared time.¹⁵

The 2006 amendments to the *Family Law Act*, which introduced the presumption of equal shared parental responsibility, were evaluated by the Australian Institute of Family Studies (AIFS) in 2009, and again in 2015, when it reviewed reforms introduced in 2012. In both cases AIFS found that the provisions were not achieving their intended outcomes.¹⁶ It found that many separated parents continue to share parenting responsibility for their children despite allegations of family and domestic violence or child abuse.¹⁷

Submissions to the ALRC review from other parties also expressed concern that the mandatory consideration of equal time arrangements detracts from a focus on a child's best interests.

Article 9(3) of the CRC sets out the right of a child separated from their parents to 'maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'. However, there is no reference to *equal time* with both parents. The best interests factor concerning the benefit to the child in maintaining relationships with both parents, included in the Draft Bill, reflects article 9, albeit in broader terms than in the CRC. An assessment of the best interests of the child should depend on a holistic consideration of the individual child's

situation, taking best interest factors into account, rather than a mandatory consideration of equal time.

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

I welcome amendments to the definition of 'member of the family' and 'relative' to better reflect Aboriginal and Torres Strait Islander kinship systems.

In its submission to the ALRC Review Issues Paper, the Commission pointed out that:

In Indigenous communities, extended family members often play a central role in childrearing and often have significant responsibilities and obligations for the care, welfare and development of children. These arrangements often stand in contrast to Anglo-European understandings of family organisation, which emphasise the nuclear familiar paradigm.¹⁸ It is therefore important for the family law system to be aware of this distinction in order to avoid bias towards the nuclear family structure, which comes at the expense of Aboriginal and Torres Strait Islander peoples' understandings of childrearing, kinship systems and social and family organisations.¹⁹

Schedule 4: Independent Children's Lawyers

Requirement to meet with the child

I welcome the proposed amendments that require Independent Children's Lawyers (ICLs) to meet with children to seek their views. While this expectation is currently included in Guidelines for ICLs, embedding this requirement in the *Family Law Act* provides more certainty that this will occur in all but exceptional cases.

Children and young people consistently say that they would like to have more of a say in, and be informed about, legal decisions that affect them.²⁰

A child's right to participation, enshrined in article 12, is one of the four Guiding Principles of the CRC. As core principles, these rights must be considered in the interpretation and implementation of all other rights in the CRC.²¹

The CRC contemplates a child's right to participation as being especially relevant to judicial and administrative proceedings, such as those involving family law. Article 12 specifically states that opportunities to be heard must be provided 'in any judicial and administrative proceedings affecting the child'. It also specifies that their views should be given due weight, in accordance with the age and

maturity of the child. Note that a child's right to express views and for those views to be given due weight does not necessarily extend to adults making decisions consistent with those views.

Further, article 9, which refers specifically to parental separation and a child's place of residence, states that 'all interested parties shall be given an opportunity to participate in the proceedings and make their views known'. Children may be seen as parties with a keen interest in the outcome of such proceedings.

The UN Committee considers the seeking of a child's views as an important procedural safeguard to guarantee the implementation of the child's best interests.

A vital element of the process is communicating with children to facilitate meaningful child participation and identify their best interests. Such communication should include informing children about the process and possible sustainable solutions and services, as well as collecting information from children and seeking their views.²²

Hearing the views of children is considered so essential that it is described as a 'mandatory' step in a consideration of a child's best interests.²³ This reflects the interdependent and complementary relationship between the right to be heard and the consideration of the child's best interests.

I note that the proposed amendment is confined to requiring the ICL to 'meet with the child' and 'provide the child with an opportunity to express any views in relation to the matters to which the proceedings relate'. However, children's rights to be heard and to express a view are often contingent on their enjoyment of the right to seek, receive and impart information, as set out in articles 13 and 17 of the CRC. Children and young people have repeatedly emphasised the importance of being kept informed during court proceedings and being advised of the outcomes as a baseline level of involvement.²⁴

The UN Committee has also stated that children should be given feedback about how their views have been considered in the decisions made:

States parties are encouraged to introduce legislative measures requiring decision makers in judicial or administrative proceedings to explain the extent of the consideration given to the views of the child and the consequences for the child.²⁵

The Guidelines for ICLs include the expectation that, if submissions were made by the ICL that were contrary to the child's views, ICLs provide information to the child and explain to the child, or facilitate an explanation by another expert, the orders made by the court, and the effect of those orders.²⁶ I recommend adding these requirements into section 68LA(5). Children should also be informed of their rights in family law proceedings.

While I am supportive of the proposed amendments that require ICLs to seek the views of children, in all but exceptional cases, it is important to note that not all children in the Family Law System will have access to ICLs.

In its submission to the ALRC, the Commission made additional recommendations to embed child participation more fully throughout the system. These include that:

- any alternative dispute resolution processes for parenting matters provide children with the opportunity to express their views, in compliance with article 12 of the CRC (Recommendation 16)
- the *Family Law Act* is amended to require a judge to provide children with an opportunity to express their views in matters that affect their rights or interests. A child should not be compelled to express a view, but should be provided with the opportunity to do so in a manner appropriate to their age and maturity (Recommendation 18)
- children are informed of their rights in family law proceedings that affect them, including their right to be heard, in a manner appropriate to their age and maturity (Recommendation 20)
- children are informed of decisions made in relation to parenting arrangements that affect them, in a manner appropriate to their age and maturity (Recommendation 21)
- judicial officers and family law professionals, including ICLs, family consultants and mediators are provided with training and resources to assist them to engage and communicate effectively with children about family law matters that concern them (Recommendation 25).

The Commission also urged the ALRC to consider recommending the establishment of a children's board or committee similar to the Family Justice Young People's Board in the UK, to provide ongoing advice by children to the Family Court on how to better realise children's rights in the family law system. The ALRC also made this recommendation in its final report (Recommendation 50).²⁷ By listening to children with lived experience in the family law system, we will better understand how children's rights and interests can be protected in the family law system.

Schedule 8: Establishing regulatory schemes for family law professionals

Family Report Writers schemes

In its previous submissions on the family law system, the Commission has raised the need for greater training and resources to support family law professionals, including judges, family consultants, family report writers, ICLs, mediators and other professionals, to better understand the needs of children, how to communicate with them, and make decisions in their best interests.

The UN Committee has pointed out that qualified professionals are an essential safeguard to guarantee the implementation of the child's best interests:

Children are a diverse group, with each having his or her own characteristics and needs that can only be adequately assessed by professionals who have expertise in matters related to child and adolescent development. This is why the formal assessment process should be carried out in a friendly and safe atmosphere by professionals trained in, inter alia, child psychology, child development and other relevant human and social development fields, who have experience working with children and who will consider the information received in an objective manner. As far as possible, a multidisciplinary team of professionals should be involved in assessing the child's best interests.²⁸

In its submissions, the Commission recommended that family law professionals are provided with training and resources on the impacts of family and domestic violence and child abuse on children, child development and applying the best interests of the child principle in parenting matters.

It is also essential that family law professionals are able to communicate effectively with children in order to elicit their views and take them into consideration.

A child's ability to understand legal proceedings will be significantly influenced by the efforts made by courts to render the proceedings accessible and understandable to them. The UN Committee stated that legal proceedings should be 'both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information'.²⁹ Training and resources are needed to ensure that court officials have the means available to them to engage with children of all ages about difficult subjects, in a safe, appropriate and respectful manner.

Thank you again for the opportunity to comment on the Exposure Draft of the Family Law Amendment Bill. Please do not hesitate to contact me with any questions.

Yours sincerely



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¹ Australian Human Rights Commission, Submission No 217 to the Australian Law Reform Commission, *Review of the Family Law System—Issues Paper* (15 May 2018)
<https://www.alrc.gov.au/inquiry/review-of-the-family-law-system/submissions-7/>.

² Australian Human Rights Commission, Submission No 91 to the Joint Select Committee on Australia's Family Law System (2019)
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Family_Law_System/FamilyLaw/Submissions.

³ *UN Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), article 3 and, before that, the *United Nations Declaration of the Rights of the Child*, GA Resolution 1386 (XIV), 14 UN GAOR Supp No 16, UN Doc A/4354 (2 November 1959), principle 2.

⁴ UN Committee on the Rights of the Child, *General Comment No.14 on the rights of the child to have his or her best interests taken as a primary consideration*, UN Doc CRC/C/GC/14 (29 May 2013) [32].

⁵ UN Committee on the Rights of the Child, *General Comment No.14 on the rights of the child to have his or her best interests taken as a primary consideration*, UN Doc CRC/C/GC/14 (29 May 2013) [50].

⁶ Australian Human Rights Commission, Submission No 217 to the Australian Law Reform Commission, *Review of the Family Law System—Issues Paper* (15 May 2018) [113–118].

⁷ UN Committee on the Rights of the Child, *General Comment No 14 (2013) on the rights of the child to have his or her best interests taken as a primary consideration (art. 3, para.1)*, UN Doc CRC/C/GC/14 (29 May 2013) [52–79].

⁸ Australian Human Rights Commission, Submission No 217 to the Australian Law Reform Commission, *Review of the Family Law System—Issues Paper* (15 May 2018) [121].

⁹ Fiona Arney et al, 'Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle' (Paper No 34, Australian Institute of Family Studies, 2015) <https://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child>.

¹⁰ Department of the Prime Minister and Cabinet Office for the Arts, *Culture and Closing the Gap* (2013) http://iaha.com.au/wp-content/uploads/2013/03/000214_cultureclosinggap.pdf.

¹¹ UN Committee on the Rights of the Children, *General Comment No. 11 (2009): Indigenous children and their rights under the Convention*, Fiftieth session, 12–30 January 2009, UN Doc CRC/C/GC/11, [31].

¹² UN Committee on the Rights of the Child, *General Comment No.14 on the rights of the child to have his or her best interests taken as a primary consideration*, UN Doc CRC/C/GC/14 (29 May 2013) [56].

¹³ Australian Human Rights Commission, Submission No 217 to the Australian Law Reform Commission, *Review of the Family Law System—Issues Paper* (15 May 2018) [141].

¹⁴ House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence: recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence* (December 2017) x https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report.

¹⁵ House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence: recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence* (December 2017) [6.33].

¹⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence: recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence* (December 2017), 191.

¹⁷ Rae Kaspiew et al, *Evaluation of the 2012 family violence amendments* (October 2015) Australian Institute of Family Studies 66, 190 <https://aifs.gov.au/publications/evaluation-2012-family-violence-amendments>.

¹⁸ Secretariat of National Aboriginal and Islander Child Care, *Growing up our way—Aboriginal and Torres Strait Islander Child Rearing Practices Matrix* (2011) 31–45, 119–124.

¹⁹ Australian Human Rights Commission, Submission No 217 to the Australian Law Reform Commission, *Review of the Family Law System—Issues Paper* (15 May 2018) 17.

²⁰ Rae Kaspiew et al, *Independent Children's Lawyers Study: Final report—2nd edition* (June 2014) Australian Government Attorney-General's Department 121–123, 132–139; Office of the ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (August 2013) 17–28; Judy Cashmore & Patrick Parkinson, 'Children's participation in family law disputes: The views of children, parents, lawyers and counsellors' (2009) 82 *Family Matters* 15, 17–18; Australian Human Rights Commission, Submission No 217 to the Australian Law Reform Commission, *Review of the Family Law System—Issues Paper* (15 May 2018) 45–46.

²¹ UN Committee on the Rights of the Child, *General Comment No.10—Children's rights in juvenile justice*, 44th session, UN Doc CRC/C/GC/10 (25 April 2007) 5.

²² UN Committee on the Rights of the Child, *General Comment No 14 (2013) on the rights of the child to have his or her best interests taken as a primary consideration (art. 3, para.1)*, UN Doc CRC/C/GC/14 (29 May 2013) [89].

²³ UN Committee on the Rights of the Child, *General Comment No.12: The right of the child to be heard*, 51st session, UN Doc CRC/C/GC/12 (1 July 2009) [70].

²⁴ Rae Kaspiew et al, *Independent Children's Lawyers Study: Final report—2nd edition* (June 2014) Australian Government Attorney-General's Department, 121–122; Office of the ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (2013) 17.

²⁵ UN Committee on the Rights of the Child, *General Comment No.12: The right of the child to be heard*, 51st session, UN Doc CRC/C/GC/12 (1 July 2009) [33].

²⁶ Guidelines for Independent Children's Lawyers <https://www.fccoa.gov.au/fl/pubs/icl-guidelines>.

²⁷ Australian Law Reform Commission, *Family Law for the Future—An Inquiry into the Family Law System* (2019), Recommendation 50, 395 <https://www.alrc.gov.au/inquiry/review-of-the-family-law-system/>.

²⁸ UN Committee on the Rights of the Child, *General Comment No 14 (2013) on the rights of the child to have his or her best interests taken as a primary consideration (art. 3, para.1)*, UN Doc CRC/C/GC/14 (29 May 2013) [94].

²⁹ UN Committee on the Rights of the Child, *General Comment No.12: The right of the child to be heard*, 51st session, UN Doc CRC/C/GC/12 (1 July 2009) [34].