Consultation
Family Law Amendment Bill 2023

Response Summary[1]

Although this consultation process has requested responses to the drafting of proposed legislation, which we have addressed specifically elsewhere, it is impossible - given the stated aims of the proposed amendments - not to raise much broader issues in this response.

1) SOME IMPROVEMENTS

Many of the proposed changes will improve the existing legislation.

2) FAILURE TO ACHIEVE KEY OBJECTIVES

The proposed changes, however, almost completely fail to achieve the Government's stated objectives:

- The legislation will remain "overly complex and confusing";
- The proposed amendments fail to adequately address the "inconsistency in the competency and accountability of … family law professionals". The proposed amendments fail to introduce adequate levels of scrutiny, feedback and accountability into the family law system;
- The amendments fail to address the "hardship and financial burden" created by adversarial litigation. Family court proceedings will remain unaffordable to the overwhelming majority of Australians;
- There will still be a "lack of support for children" and families. Much earlier, more accessible support is needed for all children and families;
- The legislation will remain inaccessible and will not be simple for legal practitioners, let alone parents, to use. The proposed language and structure of the amended Act remains complex and open to highly subjective interpretation;
- The proposed amendments will do little to improve the delivery of justice and fairness for all Australian families. The Family Law Act will remain impenetrable to the average Australian and open to highly subjective interpretation by different judicial officers.

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[1] Our non-profit For Kids Sake, and international foundation Two Wishes, are not affiliated with any party, profession, religion, gender or ideology. Our members and representatives include, among others, scientists, health and legal professionals and senior family court judges. Our recommendations are based on current scientific evidence and world's best practices. We have no vested interests and gain no benefits from the positions we take or the recommendations we make.

Each of these stated objectives could have been achieved, we believe, by adopting recommendations made in For Kids Sake's 2020 submission to the Joint Select Committee, including specific recommendations regarding the accountability of family law professionals and the involvement of children.

Above all, because of these and other fundamental problems with the nature of the proposed amendments, the proposed Bill will fail "to make sure the best interests of children are prioritised and placed at the centre of the family law system".

The amended Act will continue to force many Australians to engage lawyers they cannot afford, or to represent themselves without adequate comprehension of family law.

Family courts will remain "a harming process" (Sir Andrew McFarlane, President, Family Division, UK), not "a healing process". Children will continue to die young, or suffer a lifetime of diminished health, as a result of their family's involvement in adversarial, legal processes. Families will continue to be harmed by a process that will remain unfit-for-purpose.

3) A DANGEROUS PREMISE

Government rhetoric continues to reiterate that only a "small percentage of matters … end up in court" and that "the vast majority of parents … cooperatively settle their own arrangements out of court."

This is a misleading, if not dangerous, premise upon which to be proposing changes to the Family Law Act.

For a start, the "small percentage" of families that land up in court include more than ten thousand children every year. "Huge numbers" of children are directly affected by our Family Law Act - according to the former Family Court CEO Richard Foster - and many more indirectly. (Extraordinarily, even the CEO of the Family Court had "no idea" exactly how many children were involved in family court proceedings when asked at Senate Estimates.)

Even more significant, though, is the supposed fact that the overwhelming majority of families of separating families do not go to the family court.

The Government suggests that this means that this overwhelming majority - including tens of thousands more children every year - are sorting out matters amicably or "cooperatively". Even more tenuously, and without evidence, it appears to be implied that the outcomes for these children are somehow, magically (and without assessment) "in their best interests".

The reality is that what the Government's own figures show is that, for the overwhelming majority of separating families - parents and children who are highly vulnerable - there is, quite simply, no proper system in place to look after them and to protect those children. Unless their parents are prepared to risk "the harming process" of the Family Court, they are essentially left to fend for themselves.

> "The current Government proposals do nothing to create the fresh approach to family separation - focused on education and early intervention - that all our families and children so desperately need."

4) KEY RECOMMENDATIONS MISSING

The COVID crisis has reminded us all how precious families and family relationships are. It's also reminded us how fragile they are, being exposed to financial and emotional stresses of all kinds. We believe this crisis has provided the Government with a once-in-a-lifetime opportunity to rethink and reset how we deal with families .

We highlight here just three of the many carefully considered recommendations made in our own original submission to the Joint Select Committee. If adopted, each of these would ensure an invaluable legacy.

MINISTER FOR CHILDREN/FAMILIES

This Government has the opportunity to prevent great harm to many children by triggering a long-overdue transformation: from too-late, reactive, financially unsustainable systems to safer, more cost-effective, early interventions and education for children and families.

If the Government is truly determined that "the best interests of children" should be at the forefront of its concerns, it should be looking much more broadly than at the Family Law Act (1975).

By advocating the creation of a holistic Child and Family Wellbeing Policy[2], under the remit of a Minister for Children/Families, to be placed at the centre of government policy, the Government would protect many of our most vulnerable citizens. Holistically. Pro-actively. Preventing harm before it starts and making sure that, when parents do break up in future, their families are better equipped to avoid the damaging outcomes of today.

PRODUCTIVITY COMMISSION REPORT

A second, critical recommendation is to establish a Productivity Commission investigation - into the financial costs to Australia of family breakdown. Much as its report into mental health showed a $220 billion/year cost to the economy, such a report would provide the launchpad, and financial incentive, for the introduction of progressive policies years into the future, by governments of all persuasions.

Without such hard, financial evidence, the debate will remain forever mired in such issues as how much money should go to family courts or judges or Legal Aid, while much better, safer interventions will forever struggle to get the investment their proven outcomes warrant in competition with the behemoth that is the pre-existing, Australian family law system.

PROMOTIONAL CAMPAIGN

Finally, but equally importantly, nothing will be able to compete with the family law system (and everything will continue to be described as "an alternative") until safer, earlier interventions and educational programs are heavily promoted - for instance, through advertisements in GPs surgeries and on television/online.

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[2] See, e.g. New Zealand's model for Child and Youth Wellbeing.

> If children are not to continue to be harmed in droves by the dominance of a system that increases risks of harm, it is essential that the Government not only invests in the safe, modern approaches to family breakdown that we have detailed in our prior submissions but that it invests, also, in providing substantial promotion for these to prevent them remaining forever as lesser "alternatives" to court systems that are massively funded by comparison.

5) A NEW ACT IS NEEDED

As former Chief Justice Pascoe said, "tinkering" with family law - as these amendments are essentially doing - is not enough.

In our January 2020 submission to the Joint Select Committee, we strongly advocated the creation of a new, streamlined and accessible Act:

> Create a new Act, the Australian Children and Families Act 2023, to replace the Family Law Act 1975 (Cth). This Act should be written succinctly in plain English, with key clauses and explanations up- front, and should, ideally, be drafted concurrently with a Royal Commission such that the Commissioners may provide explicit feedback into the redrafting process and contribute to the final version of the new Act.
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> Consideration should be given to the detailed recommendations for changes to the current legislation contained below and in For Kids Sake's "Childhood Matters: Beyond 2020" paper. In particular, the need to:
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> a) Adopt a rigorous, evidence-based approach as to what's best for children and ensure that institutional responses 'do no harm';
> b) Prioritise keeping children and their families out of adversarial, court proceedings, and not involving them more;
> c) Open up legal and court proceedings to much greater scrutiny and accountability.

While many of the proposed amendments to the Family Law Act represent valuable improvements to the current Act, they unfortunately fail to address fundamental problems with the Act, to achieve the Government's stated objectives, and to look after the best interests of our children.

STATEMENT

by
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This comment addresses the principle and process of amending the Family Law Act (1975) rather than specific, proposed amendments.

The Australian Government published the Family Law Amendment Bill in early 2023. The amendments proposed are contained in Schedules to the Bill, which refer to existing provisions of the Family Law Act 1975. Without quoting the existing provisions, the Bill with its schedules contains no less than 14,367 words.

It includes such text as, from Schedule 1:

> 11 Paragraph 68S(2)(a)
> Omit "60CC(3)(a) (about taking into account a child's views etc.)",
> substitute "60CC(2)(b) (about taking into account a child's views)".

Those who have drafted and redrafted the Family Law Act (which in 2016 ran to 200,000 words) have, it seems, forgotten the role of legislation: to reflect the norms of society, in language which is accessible and comprehensible to citizens with a reasonable standard of education, so that they can know what is expected of them in a given situation. The repeated redrafting of this Act, by patching and tinkering, dozens of times since it was passed, has led to it being described by senior Australian family judges as "prolix and unreadable" … "practically impenetrable for the average person and present[ing] serious challenges for any lawyer" … "labyrinthine".

Indeed, Part VII of the Act, which deals with parenting, contained 2,700 words when originally passed; in 2018 it contained over 48,000 words.

This inflation of verbiage results in uncertainty: ordinary parents who have issues relating to their children cannot access the criteria according to which society expects them to behave; they are forced to go to lawyers, who themselves have difficulty advising how a judge might decide the issue due to the many provisions in the statute.

The result is that many issues that, with simple provisions in the Law for the best interests of the child, would be resolved out of court are brought to the court for adjudication. This results in unnecessary pressure on the courts and in expensive

litigation that's beyond the financial reach of a majority of the population.

Worst of all is the uncertainty and stress for children, which may last months or years, while the parents are spending valuable time and emotional resources on the court proceedings, and may be so distracted as to be unavailable to look after their children at the very time when their children need the most support.

There is no justification for turning legislation relating to children into a Tax Code. The Law should set out the basic principles, based on societal consensus: for healthy development, for instance, children need to maintain and develop relationships with all who love and care for them - and that, in general, means keeping both parents and their extended family in their lives; that parents should be jointly responsible for a child's needs; or that the state should get involved only if, and to the extent, that the parents fail to provide adequately for the physical and emotional needs of the child.

With such principles in place, parents can have a reasonably good understanding of what is required of them. Only where there is a genuine dispute of fact as to the adequacy of a parent to fulfil their role need the matter be brought to the court. The judge who has the relevant experience and training can divert those issues to expert counsellors and therapists where needed, and only when this fails, can issue a judgment setting out the application of the basic principles to the individual case; this also enables the elaboration by case law of the principles, which then, according to the doctrine of precedent of the Common Law, become part of the law of the land.

There is therefore no need for the confusing list of criteria - 42 steps of the "legislative pathway" – when parents need to make arrangements for their children after separation.

In Israel the legislation relating to children whose parents separate are contained in about a dozen short provisions of a Law which has remained substantially unchanged since 1962. These are framed in plain language and are easily translated into practical arrangements. So the courts need to deal only with cases in which there are differences of opinion between the parents, and these are referred to ADR prior to the issue of formal pleadings.

The Australian legislature would do well to invest its efforts in passing a new Act that sets out basic principles, and to abolish the minefield of confusing sections and subsections and sub-sub-subsections e.g. section 60CC(3)(k)(i-iv). This would be a better way of protecting the best interests of children than being required to debate, every few years, complex proposals for amendment of a broken Family Law Act.