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3rd March 2023

The Hon Mark Dreyfus KC MP
Family Law Reform
Attorney-General's Department
3–5 National Circuit
Barton ACT 2600

Delivered by email: FamilyLawReform@ag.gov.au

Dear Attorney-General,

RE: Submission in relation to the Family Law Amendment Bill 2023

Thank you for the opportunity to provide comments on the Family Law Amendment Bill 2023 (**Bill**) which is proposed to amend the existing Family Law Act 1975 (Cth) (**Family Law Act**) and make consequential amendments to the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (**FCFCOA Act**). We understand that the Bill represents the first batch of proposed legislative amendments to address the Australian Law Reform Commission's Final Report No. 135, *Family Law for the Future – An Inquiry into the Family Law System* (**ALRC Report**) and implement parts of the Government Response to the Joint Select Committee on Australia's Family Law System (Joint Select Committee). While we support some of the changes that are proposed in the Bill, in particular, those that impact Aboriginal or Torres Strait Islander persons and families, we have identified some concerns which we have sought to outline in this submission.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (**ATSILS**), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the

leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by nearly five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Introductory comments

As part of the Australian Law Reform Commission (**ALRC**) Review of the Family Law System in 2018, ATSILS lodged the following submissions, which are referred to within this submission and attached for your convenience:

1. Response to ALRC Issues Paper 48: A Review of the Family Law System (**IP48 Response**); and
2. Response to ALRC Discussion Paper 86 – Review of Family Law System **(DP86 Response**).

We also make reference to the ALRC Family Law for the Future – An Inquiry into the Family Law System Final Report (**ALRC Report**).

In our response to this consultation, we have focussed on addressing the proposed amendments in the Bill which are particularly relevant to Aboriginal and/or Torres Strait Islander individuals and families.

Comments on the Bill

<u>Recommendation 5 of the ALRC Final Report</u>

We refer to proposed section 60CC(3) of the Bill, which provides as follows:

> *(3) For the purposes of paragraph (1)(b), the court must consider the following matters:*
>
> *(a) the child's right to enjoy the child's Aboriginal or Torres Strait Islander culture, by having the opportunity to connect with, and maintain their connection with, their family, community, culture, country and language;*
>
> *(b) the likely impact any proposed parenting order under this Part will have on that right.*

The introduction of the word "opportunity" in subparagraph (a) raises concerns as it appears to water down the significance of this requirement. Furthermore, the drafting could be open to the interpretation that merely spending time with an Aboriginal or Torres Strait Islander parent, for example, is sufficient. As set out in pages 11 to 13 of ATSILS' DP86 Response, for Aboriginal or Torres Strait Islander children, connection with their family, community, culture, country and language is integral to the best interests of the child and is essential to building and maintaining their identity.

There are many instances where a non-Indigenous parent has care of a child and the Indigenous parent has limited or no time with the child. Given the focus on parents or parties participating in court proceedings, in order for the courts to effectively put section 60CC(3) into practice, we are of the view that a set of guidelines or directions on the applicability of section 60CC(3) is essential.

This could include a cultural support plan, which is a means of supporting the child's connection with "family, community, culture, country and language" extending beyond the biological parents of the child. This could also include the assistance of an independent Elder, community member or other support person, as is the practice in the Child Protection System, to gather and provide information into the child's culture, family, community, etc.

Further, it is our view that it is essential that family report writers for Aboriginal and Torres Strait Islander children must have experience working with Aboriginal and Torres Strait Islander parties and, more importantly, that the services of cultural report writers are utilised.

In the absence of specific guidelines or directions or the requirement for a cultural support plan or similar, we see a risk of matters finalising with superficial or no provision to meet the requirements of proposed section 60CC(3)(a). This would be even more problematic for unrepresented parties.

The question also arises as to whether "opportunity to connect" will take the form of an enforceable order or be merely an arrangement that a party agrees to. Take the example of a situation where the court orders *no contact* with an Aboriginal and/or Torres Strait Islander parent and (or notes an agreement) for "opportunity for contact" with other family or community members. In the event that the primary carer fails to meet their obligations to provide the child with the opportunity to connect, what provision is in place to enforce such orders?

Under existing legislation, some reasons provided in instances where a court has not taken cultural factors into consideration are listed below. We are concerned about the extent to which these reasons will continue to be put forward, despite the proposed section 60CC(3), in matters involving Aboriginal and/or Torres Strait Islander parties:

1. insufficient or limited cultural information provided by the Aboriginal and/or Torres Strait Islander party;
2. affidavit focussing on Aboriginal identity as opposed to cultural practices;
3. the absence of anthropological evidence;
4. no evidence provided to show that a party is practising their culture;
5. the evidence provided is too general and does not relate to cultural practices of a party's specific clan or family group;
6. focus on primary considerations such as the safety and well-being of the child; and
7. scholarly articles are too general.

In this regard, we also refer to matters raised in ATSILS' IP48 Response at:

- pages 16-17 at paragraphs 73-79;
- pages 29-34 at paragraphs 143-153; and
- pages 36-37 at paragraphs 168-170; and

ATSILS' DP86 Response at pages 10-17.

<u>Recommendation 9 of the ALRC Report – Definition of "relative"</u>

The Bill proposes to add the following additional subparagraph at the end of paragraph (a) of the definition of the term "relative" (under section 4 of the Family Law Act):

> *(vii) for an Aboriginal child or Torres Strait Islander child-a person who, in accordance with the child's Aboriginal or Torres Strait Islander culture is related to the child;*

The Bill also proposes to add this extended definition to the end of section 4(1AC) of the Family Law Act.

Whilst we broadly support the extension of the definition of the term, we see an unintended consequence in the proposed drafting which is that the parties become subject to requirements to disclose information about the entire kinship group. In our view, extended family would be resistant to disclosing their personal information to a party for the purpose of family law proceedings that have no direct bearing on them. This could, in turn, place parties in breach of disclosure obligations.

Recommendation 44 of the ALRC Report – section 68LA of the Family Law Act (Role of independent children's lawyer)

The Bill proposes to amend the existing provisions in the Family Law Act relating to Independent Children's Lawyers (**ICLs**) including the insertion of an additional requirement at section 68LA(5) to meet with a child and give the child the opportunity to express their views, unless there are exceptional circumstances.

Existing legislation provides for a child to meet with report writers or family consultants who seek their views, provided they are of an age/level of maturity to do so.

The proposed legislation does not nominate a stage in the proceedings that an ICL is required to meet with a child to get his or her views. Should this requirement apply only if a family/child impact/specific issues report is not envisaged or in all instances?

Where Aboriginal or Torres Strait Islander children are concerned, our view is that a meeting with an ICL should also include an Aboriginal and/or Torres Strait Islander support person to avoid the danger of "gratuitous compliance" on the child's part or a very limited response due to confusion or mistrust or the possibility of an ICL's views being imposed on a child.

Cultural awareness training is also strongly recommended for ICLs that are required to carry out this function.

CONCLUSION

The Bill contains some important amendments to the Family Law Act to recognise the unique nature of family and extended family relationships within Aboriginal and Torres Strait Islander communities and, fundamentally, the critical importance of a child's need to have connection with their family, community, culture, country and language. In reviewing the Bill, we have identified some concerns which we have sought to address in this submission. We have also identified some opportunities to strengthen the proposed framework to ensure that the proposed amendments are realised to their full potential such that they have the most impact.

We thank you for the opportunity to provide feedback on the Bill.

Yours faithfully,

Shane Duffy
Chief Executive Officer