



Australian Government
Attorney-General's Department

Family Law Amendment Bill (No. 2) 2023

Consultation Paper

September 2023

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Overview

The Australian Government is committed to improving the family law system so that it is accessible, safer, simpler to use, and delivers justice and fairness for all Australian families. The Government wants to make sure that separating couples can better understand the decision-making framework used in family law to resolve their property and financial matters confidently and safely.

The release of the draft Family Law Amendment Bill (No. 2) 2023 (the exposure draft) is an opportunity to provide feedback on proposed amendments that seek to achieve this outcome.

The exposure draft would amend the *Family Law Act 1975* (Cth) (Family Law Act) and make some consequential amendments to the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (FCFCOA Act). This includes 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 to implement elements of the Government Response to the Joint Select Committee on Australia's Family Law System (JSC).

The exposure draft contains five schedules that thematically present the proposed amendments as follows:

1. Schedule 1: Property reforms
2. Schedule 2: Children's contact services
3. Schedule 3: Case management and procedure
4. Schedule 4: General provisions

The exposure draft does not include amendments regarding the use of protected confidences. Such amendments were included in the exposure draft of the Family Law Amendment Bill 2023, but not included as part of the Bill introduced to Parliament in March 2023. This was because a number of concerns were raised by stakeholders, including that the amendments as drafted could result in unintended operational consequences. The department intends to engage closely with the feedback already provided, and to seek your further views and undertake targeted consultation with key stakeholders in developing these amendments further. Any settled amendments may be included as part of a final Bill to be introduced to Parliament. This will be a matter for Government.

This consultation paper reflects the structure of the exposure draft. It provides an explanation of the proposed legislative reforms, the supporting policy rationale, and consultation questions. For members of the public who wish to understand the exposure draft, but may not wish to engage with the level of detail in this paper, a fact sheet is available on the Attorney-General's Department (department) webpage.

Please note that the contents of the exposure draft will not necessarily reflect the scope of a final Bill that the Government introduces to the Parliament following this consultation process.

Consultation process

The department welcomes feedback from all interested stakeholders, and appreciates the time and effort involved in considering draft legislation. Your feedback and perspectives are invaluable to ensuring the effective implementation and operation of the proposed reforms.

Written feedback on the exposure draft can be submitted via the department's Consultation Hub webpage at: www.consultations.ag.gov.au.

The deadline for submissions is **10 November 2023**.

Submissions are invited in response to the wording of the proposed amendments, and in particular, in response to the specific consultation questions set out in this paper. You can provide responses to as many or as few questions as you like. If you do not wish to respond to particular questions, please leave the response field blank (do not write "Not applicable", "N/A" or "Nil").

The department will only publish your submission if you advise us to do so. When making a submission through the Consultation Hub, you can indicate if you would like your submission published, or if you would like to make an anonymous submission.

Submissions must not directly or indirectly identify persons, associates of persons, or witnesses involved in family law proceedings. This means that submissions should not include details like a person's name (or their children), address, workplace, or school. Section 121 of the Family Law Act makes it an offence, except in very limited circumstances, to publish this information.

Please do not include any photographs as part of your submission. Photographs provided as part of the submission process will not be published. Further, the department will not review or publish submissions that are larger than 25MB, or are in a file type format other than PDF or Microsoft Word file (for example, Apple Pages, or locked in a password protected PDF file).

If you advise us to publish your submission, you will be required to acknowledge and agree that you have made all reasonable efforts to:

- clearly label material in your submission where the copyright is owned by a third party, and
- ensure that the third party has consented to this material being published.

Even if you advise the department to publish your submission, the department reserves the right to leave unpublished any submission or part thereof, in particular if the department considers that:

1. Publishing a submission or part of a submission would be in breach of subsection 121(1) of the Family Law Act
2. A submission or part of a submission contains copyright material, publication of which may be in breach of the *Copyright Act 1968* (Cth), or

3. A submission breaches the department's submission requirements set out, in particular, contains photos, file size (larger than 25MB), or file type requirements specified.

Submissions may be subject to freedom of information requests, or requests from Parliament, which the department will consider and respond to in line with regulatory requirements.

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Why is the Government pursuing these reforms?

While many separating families are able to resolve their disputes with minimal assistance, the family law system plays an important role in supporting families to reach agreement about property settlements and arrangements for children after separation. The Government is committed to making ongoing improvements towards achieving a safer, faster and less costly family law system.

The ALRC delivered a comprehensive review of the family law system in March 2019. The ALRC made 44 recommendations for legislative amendments to the Family Law Act and the *Family Law Regulations 1984* (Cth) (Family Law Regulations). The 2021 JSC inquiry on Australia's Family Law System delivered its final report in November 2021. The Government tabled its response to the JSC's four reports on 25 January 2023. The Government Response highlights a range of policy responses to long term and complex family law issues.

Submissions to the ALRC inquiry, the JSC and other similar inquiries, have consistently highlighted that the family law system faces significant challenges, including:

- the need to be more responsive to family violence, child abuse and neglect
- overly complex and confusing legislation that is a barrier to vulnerable users of the system and creates community misperceptions about the law
- inconsistency in the competency and accountability of various types of family law professionals
- hardship and financial burden caused by protracted and adversarial litigation, and
- non-compliance with, and ineffective enforcement of, disclosure obligations and property or financial orders.

The exposure draft proposes significant amendments to clarify and support the framework for making property and financial orders in the Family Law Act. This includes to:

- align the decision-making principles for property settlement in sections 79 and 90SM with existing case law with the aim of assisting separating parties, legal representatives and the courts to better understand and apply these principles
- introduce family violence as a new factor for consideration when determining property settlement orders, when relevant to the circumstances of the case. The recognition of the effect of family violence within the legal framework is intended to better support parties, both in and out of court, to understand the relevance of family violence to a property settlement.

- simplify the property decision-making principles by including the list of future considerations factors within the relevant provision, (rather than referring users to the list of factors in the spousal maintenance provisions). This will ensure all relevant considerations for property settlement orders are clearer and easier to understand by parties and legal advisers.
- extend the less adversarial trial procedures to property and financial matters, providing the court with the power to manage evidence where family violence is alleged or present between separating couples.
- insert a specific duty of disclosure in property and financial matters to the Family Law Act, that would apply during court proceedings or when a party is preparing to start a proceeding.

Other amendments would more clearly identify the categories of family law matters capable of arbitration and permit arbitrators to seek procedural orders from a court, redraft section 117 (costs orders) to identify when Independent Children’s Lawyers can recover their legal costs and strengthen Commonwealth Information Orders (section 67N).

The department welcomes feedback on whether the wording of the exposure draft would achieve these policy outcomes.

Amendments to the *Family Law Act 1975*

Schedule 1 – Property reforms

Part 1: Property framework

This schedule of the exposure draft contains amendments to specify the decision-making principles a court will take when considering whether to make an order altering the property interests of parties to a relationship. As part of these amendments, the Family Law Act will be amended to remove cross-referencing to spousal maintenance provisions and to insert the effect of family violence as a factor for consideration in determining a property settlement.

Property decision-making framework

The framework for determining property matters for married and de facto couples are captured within different Parts of the Act, but the provisions underpinning a property settlement for either type of relationship are broadly consistent. Provisions for married couples are contained within Part VIII, while provisions for de facto couples are contained in Part VIIIAB (and Part VIIIIC for superannuation splitting for WA de facto couples).¹

At present, the property decision-making principles, and the specific factors to be considered by a court, are scattered across different, non-sequential sections within both Parts VIII and VIIIAB of the Family Law Act and underpinned by case law, making the law difficult to understand.

Subsections 79(4) (married couples) and 90SM(4) (de facto couples) provide the factors to be considered by the court when making a property settlement order. This includes a list of specific ‘contribution’ factors and directs the court to a list of ‘future considerations’ factors at subsections 75(2) (married couples) or 90SF(3) (de facto couples) that are used to determine spousal maintenance applications. Cross-referencing to the separate spousal maintenance application factors within the property decision-making framework can be confusing and difficult to navigate for users of the legislation.

At present, Parts VIII and VIIIAB of the Family Law Act do not clearly prescribe the process the court takes to determine a just and equitable property division. The court’s approach in determining a property settlement is underpinned by case law and a multi-step framework within the Family Law Act, informally referred to as the decision-making steps. The intention of the amendments proposed in the exposure draft is to clarify on the face of the Family Law Act the decision-making principles that a court considers in determining a property division. This is to assist users, legal representatives, the dispute resolution sector and the courts to better understand and apply the

¹ With the exception of Part VIIIIC of the Family Law Act (which gives separated de facto couples in WA access to superannuation splitting), legislation governing family law disputes for separated de facto couples in WA is the *Family Court Act 1997* (WA). This legislation is exercised by the Family Court of WA which also has federal jurisdiction to determine family law matters under the Family Law Act for married couples and to make superannuation splitting orders for de facto couples.

property decision-making framework, and provide more certainty to those using the Family Law Act as guidance for settling their own property matters.

These amendments would partially implement recommendation 11 of the ALRC Report to amend the Family Law Act to specify the steps a court will take when considering whether to make an order to alter the interests of the parties to the relationship in any property.

Key changes

The amendments would clarify on the face of the legislation the decision-making principles as follows:

1. Identify the existing legal and equitable rights and interests, and liabilities, of the parties to any property.
2. Consider each party's respective contributions to the property of the relationship (current paragraphs 79(4)(a)-(d), (f)-(g) (for married couples); 90SM(4)(a)-(d) and (f)-(g)) (for de facto couples).
3. Consider the parties' current and future considerations (current subsections 75(2) (for married couples) / 90SF(3) (for de facto couples)).
4. Determine whether it is just and equitable to make any order to alter a party's interest in property (current subsections 79(2) (for married couples) / 90SM(3) (for de facto couples)).

We have used the term 'principles' rather than 'steps' in this paper, to emphasise that the principles do not need to be approached in any particular order. However, the principles would be co-located (and in this order) in the Family Law Act to assist users of the legislation navigate the provisions.

The first principle would codify in the Family Law Act a well-established practice; that the court is to ascertain the existing legal and equitable rights and interests, and liabilities, of the parties to any property. This is informally known as the 'Balance Sheet Step'.

The second principle requires the court to have regard to a list of factors to ascertain each party's contributions to the property pool during the relationship. As discussed below, the amendments propose four additional contribution factors to account for the effect of family violence, financial and economic abuse, debt and wastage on a party's contributions. These new factors are derived from case law, and are included within the second principle to clearly communicate, on the face of the legislation, their relevance to the assessment of each parties' contributions.

The third principle requires the court to have regard to a list of factors to assess a party's current and future needs. The proposed amendment would remove the cross-referencing to spousal maintenance factors, and provide for a separate, self-contained list of current and future factors for consideration. This would simplify the Family Law Act and partially implement ALRC

recommendation 18, by removing the current cross-referencing between the property provisions and the spousal maintenance provisions.

The proposed list of current and future considerations includes the effect of family violence that one party to the marriage or de facto relationship has subjected on the other party to the relationship. This new factor also enables the court to consider the effect of family violence when taking into account the other current and future consideration factors. This is because the effect of family violence may be relevant to the assessment of other current and future consideration factors.

Just and equitable

The fourth principle, currently contained in subsections 79(2) (for married couples) / 90SM(3) (for de facto couples), requires the court to determine whether it is just and equitable to make any order to alter the parties' property interests. It is open to the court to conclude that a just and equitable outcome would be to make no order. The determination of whether it is just and equitable to make any order altering property interests is an overarching principle which permeates the entire decision-making process. However, the court is unable to make an order until it has determined that it is just and equitable to do so.

It is intended that the court would retain flexibility about when (either at the outset, during or the end of the consideration of the decision-making principles) this is determined, consistent with current practice. This approach reflects the legal principle from *Bevan* that the just and equitable requirement in subsection 79(2) 'is not a threshold issue' and while it can be addressed at the outset in the vast majority of cases, consideration of whether it is just and equitable to make property orders permeates the decision-making process.² All that is required prior to making any order under current section 79 (or section 90SM), is a finding that it is just and equitable to do so.³ This requires the court to make a positive determination that it is just and equitable to make an order altering property interests (or a conclusion that such an order is not just and equitable), prior to the making of final property orders.⁴

The amendments include a minor re-ordering of the property provisions in Parts VIII (for married couples) and VIIIAB (for de facto couples) to co-locate and more clearly identify the process that a court will follow when considering whether to make an order altering the property interests of a party. This is intended to help clarify the property decision-making process within the Family Law Act, but not displace existing principles in case law or the discretion exercised by the court.

Family violence

The Family Law Act does not currently explicitly provide whether, or how, family violence is to be taken into account in determining a property settlement. At present, courts and parties rely on case

² *Bevan & Bevan* (2013) FLC 93-545, [86] (per Bryant CJ & Thackray J).

³ *Bevan & Bevan* (2013) FLC 93-545, [70] (per Bryant CJ & Thackray J).

⁴ *Bevan & Bevan* (2013) FLC 93-545, [86].

law principles about family violence to make adjustments to parties' contributions if a threshold test is met. In relation to married couples, courts or parties can also utilise the injury or health impact (paragraphs 75(2)(a), (b)) or catchall paragraph 75(2)(o)) current and future consideration factors to take family violence into account.⁵ However, there are limitations with this approach.

Key changes

The proposed amendments would implement recommendation 23 of the JSC in its Second Interim Report to better recognise the economic impacts of family violence in the Family Law Act. As outlined earlier, the amendments prescribe family violence as a factor which should be taken into account in determining a property settlement, where relevant to the circumstances of the case. Providing a clear legislative basis for the recognition of family violence is intended to better support parties, both in and out of court, to understand the relevance of family violence to property distribution following separation. This recognises that family violence is a significant community issue that carries real financial impact and is of increasing relevance to family law property matters.

It is proposed the effect of family violence perpetrated by one party to the relationship on the other party would be a new factor for the court to consider as part of assessing parties' contributions and current and future considerations. Introducing the effect of family violence in the assessment of a party's contributions enables the court to consider the impact of the conduct on a party's ability to contribute during the relationship, for example, through a reduced ability to engage in paid work and contribute financially. The effect of family violence would also be an overarching factor to be considered as part of the other specific contributions factors (for example, the effect of family violence could be relevant to understanding a party's non-financial, homemaker contributions).

The effect of family violence may also impact the party's current and future considerations, for example due to the need for ongoing medical care or therapy, or a reduced ability to engage in paid employment which would impact earning capacity and the accumulation of superannuation. The new future considerations factor would account for the current and ongoing effects of family violence which occurred during the relationship. This would enable a court to consider the financial impact of family violence on the party and ensure any property settlement makes provision for those ongoing costs and/or limited future earning capacity as appropriate.

Effect of family violence as part of contributions and current and future considerations

The proposed amendments focus on the effect of the family violence by relating it to a party's capacity to contribute and/or their current and future considerations. It is possible that the same conduct could be relevant to the assessment of contributions and current and future considerations. The proposed amendments do not curtail the court's discretion in making these assessments and to respond to the wide variety of factual circumstances that come before it.

⁵ Equivalent provisions for de facto couples are at s 90SF(3)(a), (3)(b) and (3)(r) of the Family Law Act.

The proposed amendments specify the *effect* of family violence to which one party to the relationship has *subjected* the other party. This approach is used in both the contributions and current and future considerations amendments to focus on the effect or impact of the relevant conduct parties have subjected each other to, rather than the conduct itself. This is intended to prevent consideration of fault by the court and avoid penalising or punishing conduct in the process of determining a property division.

The proposed amendments are not intended to displace the no-fault principles underpinning the Family Law Act. The ALRC recommended the Family Law Act be amended to include a statutory tort of family violence. This recommendation was ‘Noted’ in the former Government’s Response to the ALRC Report and concerns were identified that a tort ‘may increase conflict and acrimony between parties, with a subsequent impact on children, and have limited applicability due to the need to prove loss or damage...may be costly and result in lengthy hearings, potentially causing delays in the resolution of family law property matters’. A lack of stakeholder support for a tort was also noted. Consistent with this, the exposure draft has not proposed a tort-based approach to account for the financial impact of family violence. The proposed amendments seek to strike a balance by not requiring the court to focus on issues of fault or culpability concerning family violence behaviour, but to consider the effect of the conduct on a party’s capacity to contribute to the property pool and the ongoing effect of the conduct on a party’s future considerations.

Other new contributions factors: Financial and economic abuse, debt and wastage

As part of clarifying the decision-making steps, the proposed amendments introduce three new contributions factors to account for financial and economic abuse, debt and wastage, to be considered in assessing a party’s contributions to the property pool.

Accounting for the effect of economic and financial abuse

The proposed amendments would allow the court to consider the effect of financial and economic abuse perpetrated by one party to the relationship on the other party. This is intended to make expressly relevant the effect of this type of abuse, including coercive controlling behaviours, when the court assesses a party’s contributions during the relationship. Some elements of this type of abuse are reflected in the current definition of ‘family violence’ in subsection 4AB(2) of the Family Law Act. Using the term ‘economic and financial abuse’ is intended to capture a broad range of conduct. This would include controlling or denying access to money, finances or information about money and finances, and also undermining a party’s earning potential, for example, by limiting access to employment, education or training.

Accounting for wastage

The proposed amendments would enable the court to consider the effect of any wastage by a party to the marriage or de facto relationship, of property or financial resources held by either party or both of them. At present, the court considers the effect of wastage under paragraph 75(2)(o) (for married couples) or paragraph 90SF(3)(r) (for de facto couples) of the Family Law Act as a relevant fact or circumstance that may be taken into account. This approach is based in case law.

The proposed new wastage factor is intended to explicitly capture case law concerning wastage of property. That is, it would capture circumstances where a party has made a financial contribution which has wasted, rather than increased, the value of the property pool. Common examples of wastage include: where a party has followed a course of conduct designed to reduce the value of the parties' assets or engaged in reckless or negligent conduct, such as allowing a person to live in the parties' property rent free for a year;⁶ excessive gambling; or undermining the profitability of a business or investment, for example, by intentionally or recklessly undermining the goodwill of a business or damaging its reputation.

Accounting for debt

The current approach of the court in relation to financial losses is that, generally, they are shared by the parties to the relationship, although not necessarily equally.⁷ Whether a debt is the responsibility of one or both parties to the relationship, or only the party who incurred the debt, is a relevant issue that the court will take into account in considering whether the debt impacted a party's ability to make contributions to the property pool. For example, the effect of a large debt incurred may preclude a party from making financial or other contributions to the pool.

The proposed amendments would enable the court to consider any debts incurred by either of the parties to the relationship or both of them, as a negative financial contribution to the property pool, consistent with the current approach in case law. While some debt is undoubtedly incurred for a positive purpose (that is to obtain a house or a car for the benefit of the parties), other types of debt may be incurred for the benefit of one party only (for example, loans, gambling debts, taxation liabilities). Including debt as an explicit factor in the contributions assessment is intended to recognise that debt can create specific and ongoing challenges for the party who did not incur the debt, or who may have incurred legal liability for the debt. Legal liability for the debt may continue following a property settlement, even if the court orders require one party to indemnify the other against payment. An express debt factor in the assessment of contributions would provide clearer guidance for people referring to the Family Law Act to negotiate their own property settlements outside of court, that the law can, and does, factor in debts when dividing marital/de facto property.

For the avoidance of doubt, it is not intended that this factor displace existing case law concerning the treatment of debt. Rather, the court would continue to exercise its broad discretion in considering debt, including how and when a debt was incurred (that is, before, during or after the relationship), who incurred the debt and who it is owed to, and whether it was incurred with the awareness and/or consent of the other party to the relationship.

The proposed amendments are not intended to alter the existing property decision-making framework, but to simplify and increase usability and accessibility of the Family Law Act.

⁶ *Kowaliw & Kowaliw* (1981) FLC 91-092.

⁷ *Kowaliw & Kowaliw* (1981) FLC 91-092

Questions:

Codifying the property decision-making principles

1. Does the proposed structure of the property decision-making principles achieve a clearer legislative framework for property settlement?
2. If not, please expand on what changes you think are required and why.

Just and equitable

3. Do you agree with the proposed framing of the just and equitable requirement as an overarching consideration through the decision-making steps?
4. If not, please expand on what changes you think are required and why.

Effect of family violence

5. Do the proposed amendments achieve an appropriate balance in allowing the court to consider the relevance and economic impact of family violence as part of a family law property matter, without requiring the court to focus on issues of culpability or fault?
6. Do you agree with the proposed drafting, which requires the court to consider the *effect* of family violence to which one party has *subjected* the other?

New contributions factors

7. Do you agree with the proposed amendment to establish a new contributions factor for the effect of economic and financial abuse?
8. Do you agree with the proposed amendments to establish new separate contributions factors for wastage and debt?

Part 2: Principles for conducting property or other non-child-related proceedings

Part 2 of Schedule 1 of the exposure draft contains amendments to establish ‘Less Adversarial Trial’ (LAT) processes for conducting property or other non-child-related proceedings. The amendments are modelled on, and adapt the existing LAT processes for child-related proceedings under Division 12A, Part VII of the Family Law Act to be fit-for-purpose in property or other non-child-related proceedings.

For brevity, ‘property or other non-child-related proceedings’ are referred to as ‘non-child-related proceedings’ throughout this section of the Consultation Paper.

Background

Existing LAT processes under Division 12A, Part VII of the Family Law Act establish duties and powers for courts to manage and control child-related proceedings in a way that gives effect to predominately child-focussed principles for conducting these proceedings. The principles:

- require the court to consider the needs and impact of the conduct of proceedings on children
- require the court to actively direct, control and manage proceedings
- aim to safeguard children and parties from family violence
- promote cooperative and child-focussed parenting, and
- reduce delay, formality and legal technicality in proceedings.

Parties may currently access the Division 12 LAT processes in relation to their non-child-related proceedings (including financial proceedings), only where both parties consent,⁸ and only if they have or have had proceedings under *Part VII—Children* or if they have mixed proceedings (that is, the proceedings are under Part VII but there are also non-child-related proceedings under another Part of the Family Law Act). LAT processes are otherwise currently not available in non-child-related proceedings.

The ALRC recommended that the Family Law Act be amended to extend the court’s general duties and powers relating to evidence in Part VII child-related proceedings under section 69ZX to property settlement proceedings (recommendation 20). The ALRC concluded that “the insidious features of family violence that arise in the context of child-related proceedings are also present in the context of property division.”⁹ In making this recommendation, the ALRC endorsed recommendation 18 of the Henderson Inquiry,¹⁰ which called for the statutory safeguards under sections 69ZN and 69ZX to

⁸ Subsections 69ZM(2), 69ZM(3), *Family Law Act 1975*.

⁹ Subsections 69ZM(2), 69ZM(3), *Family Law Act 1975*.

⁹ Recommendation 20, ALRC Report 135, [Family Law for the Future – An Inquiry into the Family Law System](#), March 2019, at [7.118].

¹⁰ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, [A Better Family Law System to Support and Protect Those Affected by Family Violence](#) (2017).

be extended to property division proceedings where allegations or findings of family violence are present.

Section 69ZX of the Family Law Act enhances the court's powers to manage evidence in child-related proceedings. The court may, for example, give directions about matters that parties are to give evidence on, who is to give evidence, how evidence should be given and the length of written submissions, oral arguments or affidavit evidence. A range of *Evidence Act 1995* (Cth) provisions do not apply to child-related proceedings, unless the court considers there are exceptional circumstances.¹¹ Section 69ZN contains the *Principles for conducting child-related proceedings* described above and that underpin Division 12A. The court is required to give effect to these principles in exercising the duties and powers under Division 12A (including the duties and powers relating to evidence under 69ZX) and when making other decisions about the conduct of child-related proceedings.¹²

Approach to establishing LAT processes for property or other non-child-related proceedings — a new Division in Part XI

The exposure draft contains amendments that would insert a new Division within Part XI— *Procedure and evidence* of the Family Law Act to establish LAT processes for conducting non-child-related proceedings. This new Division would be underpinned by a set of principles adapted from existing section 69ZN so as to be relevant to non-child-related proceedings. The new Division is located within Part XI, as it would apply to proceedings across multiple Parts of the Family Law Act and is relevant to procedure and evidence.

While the ALRC and Henderson Inquiry recommended an approach to amending the Family Law Act that would extend discrete provisions (sections 69ZX and 69N) to property proceedings, establishing a new Division is considered a necessary and appropriate approach. This is because:

- the principles underpinning the operation of the new Division have been tailored for non-child-related proceedings, and
- a new Division would help provide clarity for courts and parties about which LAT processes apply to which type of proceedings — provisions related to child-related-proceedings within Part VII — *Children* and new provisions related to non-child related proceedings in Part XI of the Family Law Act.

The substance of the new Division largely mirrors provisions within Division 12A concerning the court's general duties and powers, the court's evidentiary duties and powers, including how the *Evidence Act 1995* (Cth) is to apply to the proceedings, and when the powers under the Division may be exercised. Division 12A provisions which relate exclusively to children's matters and are not relevant to non-child-related proceedings, such as section 69ZS— *Use of Family Consultants*,

¹¹ Section 69ZT, *Family Law Act 1975*.

¹² Subsection 69ZN(1), *Family Law Act 1975*.

section 69ZU — *Evidence of Family Consultants*, and section 69ZV — *Evidence of Children*, are not part of the new Division.

Principles underpinning the new Division

The exposure draft proposes three principles that would apply to LAT processes for non-child-related proceedings and underpin the operation of the new Division. These principles reflect principles 2, 3 and 5 of the seven principles that underpin existing Division 12A and have been selected because they are not child-focussed principles. Principle 3 has also been adapted for the new division by removing reference to safeguarding children from family violence.

The principles include:

1. that the court is to actively direct, control and manage the conduct of the proceedings
2. that the proceedings are to be conducted in a way that will safeguard the parties to the proceedings against family violence, and
3. that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

Application of the new Division vs existing Division 12A

The new Division would apply to proceedings between parties that involve the court exercising jurisdiction under the Family Law Act and that are not child-related proceedings within the meaning of amended section 69ZM (see discussion on *Changes to the current application of Division 12A* below).

Whether the new Division or the existing Division 12A will apply is based on whether child-related proceedings are relevant or not to the disputes between the parties. If child-related proceedings are, or were relevant, then Division 12A applies. If child-related proceedings are not, or were not, relevant, then the new Division applies. This approach is consistent with the principles underpinning each Division. Division 12A is underpinned by child-focussed principles, and the new Division would rely on a set of principles adapted from existing section 69ZN—*Principles for conducting child-related proceedings* that are not child-focussed (discussed above).

The inclusion of parties who *had* child-related proceedings within the application of Division 12A is consistent with the current law, and the scope of parties who are currently captured by Division 12A under subsection 69ZM(3).¹³

¹³ The explanatory memorandum to the *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (which established the Division 12A LAT processes for childrens matters) explains that 69ZM(3) provides that the meaning of ‘child-related proceedings’ under Division 12A applies to proceedings that involve the court exercising jurisdiction under the Family Law Act and that arise from the breakdown of the parties marital relationship or are a de facto financial cause, ‘...where the parties are also parties to proceedings under Part VII of the Family Law Act, or have been parties to such proceedings’.

While the exposure draft includes amendments to repeal section 69ZM(3), the aspect of section 69ZM(3) which captures those who *had* Part VII proceedings within the application of Division 12A, is reflected at new section 69ZM(2)(b) of the exposure draft. From a policy perspective, even where parties' Part VII proceedings have concluded, a child-focussed approach to the resolution of the same parties' non-child-related proceedings may remain relevant and be beneficial.

The intention is for the court to exercise discretion to determine whether, on a case-by-case basis, it is appropriate for parties who *had* child-related proceedings to fall within Division 12A or under the new Division for their non-child-related proceedings. For example, there may have been a long period of time between the finalisation of the parties' child-related proceedings and the non-child-related proceedings. In exercising its discretion, the court may consider how remote the Part VII proceedings are from their current non-child-related proceedings.

A discretion-based approach is considered appropriate and consistent with the approach under existing Division 12A, section 69ZP which provides that the court may exercise a power under Division 12A of its own initiative, or at the request of one or more parties to the proceedings.¹⁴

Changes to the current application of Division 12A

In order to establish a new division, and for both divisions to operate concurrently, changes to the current application of Division 12A (set out in section 69ZM of the Family Law Act) are required.

Under the amended section 69ZM, Division 12A applies to:

1. proceedings wholly under Part VII
2. proceedings that are partly under Part VII, and
3. any other proceedings between the parties involving the court exercising jurisdiction under the Family Law Act *if the parties are, or were parties to proceedings under Part VII* (non-child-related proceedings).

This reflects the current law, but removes the current requirement within subsections 69ZM(2) and 69ZM(3) for parties to consent to the application of Division 12A to their non-child-related proceedings. This is necessary and appropriate because consent would not be required for the application of the new Division to non-child-related proceedings.

In the department's view, it is important there is consistency in the approach to the application of LAT processes to non-child-related proceedings under each division.

Consent is not proposed to be a requirement for the new division to apply to non-child-related proceedings. This is because of the challenge in obtaining consent from parties where there are allegations of family violence or safety risks. One party would be able to block access to LAT

¹⁴ Section 69ZP, new section 102NG.

processes in circumstances where LAT processes may provide safeguards and be beneficial to the resolution of the matter for the party impacted by, or the victim of, family violence.

Further, without the best interests of children for parties to focus on, it may be more difficult or even unlikely to achieve consent from both parties.

It would not be appropriate to continue to require consent to access LAT processes for those who have, or have had, Part VII proceedings and who also have non-child-related proceedings. While a consent requirement was appropriate when there were no LAT processes available for non-child-related proceedings, this approach is no longer considered appropriate in the context of the proposed reforms.

Lastly, for both existing Division 12A and the new Division, the duties and powers under each Division can be exercised on the court's own initiative or at the request of one or more parties to the proceedings.

Scope of proceedings within the new Division

An intentionally broad approach is proposed in relation to the scope of proceedings that are defined as *'property or other non-child-related proceedings'* and to which the new Division would apply. The new Division would apply to all proceedings where the court is exercising jurisdiction under the Family Law Act, *other than child-related-proceedings* (defined in section 69ZM). This scope ensures that LAT processes may apply to all types of non-child-related proceedings where it may be beneficial.

The department has not proposed an approach that replicates the current description of proceedings in subsection 69ZM(3), which makes Division 12A apply (with consent) to proceedings between parties that (1) arise from the breakdown of the parties' matrimonial relationship, or that are (2) a de facto financial cause. This is to avoid the risk of potentially excluding some types of proceedings that do not necessarily arise from, or that may not be sufficiently connected to, the breakdown of a marriage or a de facto financial cause from the application of the new Division. The department considers this could include, for example, proceedings relating to contempt or involving vexatious litigants, or alleged breaches of section 121 of the Family Law Act.

The broad approach is considered consistent with the current scope of subsection 69ZM(2). This allows parties who have proceedings partly under Part VII to also access Division 12A for proceedings *to the extent that they are not proceedings under Part VII*, which incorporates proceedings under the remainder of the Family Law Act.

Questions:

9. Do you agree with the proposed approach to establish less adversarial trial processes for property or other non-child-related proceedings?
10. If not, please expand on what you do not agree with and why. What would you propose instead?

11. Do you agree with the scope of proceedings proposed to be within the meaning of ‘property or other non-child-related proceedings’?
12. If not, please expand on what you do not agree with and why. Should any specific types of proceedings under the Family Law Act be excluded?

Part 3: Duty of disclosure and arbitration

Part 3 of Schedule 1 of the exposure draft contains amendments relating to the duty of disclosure and family law arbitration. These amendments would:

- establish the disclosure requirements for people with financial matters within the Family Law Act, and
- implement changes to reduce the complexity of family law arbitration provisions.

Establish the disclosure requirements for people with financial matters

Complete and ongoing disclosure of relevant financial information is fundamental to the fair and timely resolution of disputes about the division of property and finances after separation. Non-disclosure of this information can be associated with financial abuse and misuse of systems and processes.

The duty of disclosure for parties to court proceedings is currently provided for in the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Family Law Rules). This duty applies in all matters, with additional disclosure obligations for property and financial matters.¹⁵ Disclosure obligations are also referenced in the FCFCOA's *Central Practice Direction – Family Law Case Management*, which commenced on 1 September 2021.

The ALRC and JSC recommendations

The ALRC recommended that the Family Law Act should be amended to clearly set out the disclosure obligations of parties and the consequences of breaching those obligations (recommendation 25).¹⁶ The ALRC further recommended that disclosure obligations be extended to apply in the context of facilitative dispute resolution processes, and that legal practitioners and family dispute resolution practitioners (FDRPs) be required to advise parties of their disclosure duties.¹⁷ Application of the duty in facilitative dispute resolution was also recommended in the JSC's Second Interim Report (recommendation 22). The JSC also recommended the amendments refer to cost consequences, and the court's ability (underpinned by case law) to account for non-disclosure in the division of the property pool.¹⁸

However, since the ALRC reported (March 2019), there have been significant changes to the Family Law Rules and the implementation of the FCFCOA's Central Practice Direction and new case management approach.

¹⁵ See generally Part 6.1 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Family Law Rules).

¹⁶ ALRC Report 135, [Family Law for the Future – An Inquiry into the Family Law System](#), March 2019, at [8.131].

¹⁷ *Ibid* at [8.133].

¹⁸ Senate Joint Select Committee on Australia's Family Law System, Parliament of Australia, [Second Interim Report Improvements in family law proceedings](#), March 2021, at [4.118].

Key amendments

The exposure draft contains amendments to the Family Law Act that would provide for a duty on parties to financial and property matters to disclose all relevant financial information to the other party and, in relation to proceedings, to the court, the other party and any relevant third parties. The duty would not apply to respondents in contravention and contempt applications, consistent with the existing disclosure duty for financial matters under the Family Law Rules.

The proposed amendments would apply the disclosure duty in financial and property matters to parties when they are preparing to commence proceedings, supporting the early resolution of disputes. Currently, the pre-action procedures within the Family Law Rules require parties to give disclosure as they prepare to file with a court. Parties may complete facilitative dispute resolution processes at this time in an effort to resolve their dispute without needing to commence proceedings.

The proposed duty would not apply in the context of facilitative dispute resolution processes unless the parties are preparing for proceedings or the court has referred parties to these processes. There would be practical and constitutional limitations associated with such an expansion. The new practitioner obligation to inform parties about the duty (detailed below), would support early disclosure.

The proposed duty would be located in Part VIII of the Family Law Act to apply to property and financial disputes arising from the breakdown of a marriage, Part VIIIAB to apply to property and financial disputes for de facto relationships, and Part VIIC to apply to superannuation matters for de facto relationships in Western Australia. This will ensure that the duty of disclosure applies equally to financial, property and superannuation matters that arise from the breakdown of a marriage or a de facto relationship.

The amendments in Parts VIII and VIIIAB would apply to ‘financial matters’, as defined in section 4 of the Family Law Act, and matters that are, or might become, the subject of proceedings about:

- the property, spousal maintenance and maintenance agreements of the parties to a marriage or a de facto relationship
- applications for orders to set aside or terminate a financial agreement under sections 90K and 90UM
- applications relating to child maintenance, child support (under the *Child Support Assessment Act 1989* (Cth))
- applications relating to transactions to defeat a claim (section 106B), and
- applications relating to vested bankruptcy property of a bankrupt party of the marriage or a de facto relationship.

In Part VIIC, the amendments would apply to superannuation agreements made by Western Australian de facto couples or orders made in Western Australian courts exercising family law jurisdiction with respect to superannuation interests.

Application of the duty to third parties and litigation guardians

The amendments would provide for the duty to apply to third parties only to the extent that their financial circumstances are relevant to the issues in dispute. This means third parties are only required to comply with the disclosure duty when the financial information in their possession or control is relevant to resolve the proceeding. Third parties would not be subject to the duty of disclosure that will apply to parties preparing for proceedings.

The department is aware that litigation guardians can experience challenges accessing documents on behalf of a party to a proceeding. A litigation guardian does not have the same ability to access and compel information that the party does (or that the party's power of attorney has, if relevant). To address this, the amendments propose that litigation guardians be required to comply with the duty to the extent they are capable of doing so. This mitigates potential non-compliance arising when litigation guardians are unable to obtain documents because they do not have a legal right to obtain those documents. For example, a litigation guardian is unable to access bank account statements unless they are the account holder or the account holder's power of attorney, limiting their ability to provide full financial disclosure.

Leave of the court is required before third parties and litigation guardians can be involved in a proceeding.¹⁹ Therefore, the duty of disclosure in financial matters would only apply to these cohorts when court proceedings are underway.

The court's powers in relation to non-compliance with the duty

To improve compliance with, and the enforcement of, the duty of disclosure in financial and property matters, the proposed amendments identify some of the more serious consequences that a court may apply to address non-disclosure in proceedings. This is through the inclusion of notes under proposed subsections 71B(2), 90RI(2). These notes reference existing powers in the Family Law Rules and the Family Law Act, including: punishing a person for contempt; staying or dismissing all or part of proceedings; making costs orders; and taking the failure to disclose into account when making property division orders. A similar note is proposed under subsection 90YJA(2) of the exposure draft, which refers separating Western Australian de facto couples to the *Family Court Rules 2021 (WA)* for potential consequences.

The failure of a party to provide disclosure when they are preparing for proceedings may be relevant to how a court manages the case where proceedings are later commenced. The notes under proposed subsections 71B(5)-(6), 90RI(5)-(6) and 90YJA(5)-(6) seek to highlight this. The court has an existing broad discretion in the Family Law Rules to consider whether the requirements of the pre-action procedures, including disclosure obligations, have been met in a particular case, and whether any consequences should follow for non-compliance.

¹⁹ See Parts 3.1-3.2 and 3.5 Family Law Rules.

Legal practitioner’s and Family Dispute Resolution Practitioner’s (FDRPs) obligation to inform about disclosure duties

The proposed amendments would require legal practitioners and FDRPs to inform parties who are, or might be subject to the disclosure duty, about the duty, the circumstances when it applies and the potential consequences for breaches. They would also be required to encourage parties to take all necessary steps to comply with the duty. This obligation is intended to improve the awareness of, and compliance with, the disclosure duties, including when parties are preparing for proceedings. The intention is that these practitioners actively facilitate compliance by parties as a result of this obligation.

The interaction of the duty with other family law legislation

It is proposed the Family Law Rules would continue to prescribe some detail about the obligations, including information and documents that must be disclosed. The proposed amendments would not prevent additional obligations or matters regarding the duty from being prescribed in the Family Law Rules. It is intended that the proposed amendments operate alongside existing disclosure duties within the Family Law Rules which apply generally or to parenting matters.

The amendments focus on promoting disclosure in the context of property and financial matters as the disclosure of financial information is crucial to the fair and timely resolution of disputes.

Questions:

13. Do the amendments achieve a desirable balance between what is provided for in the Family Law Act and the Family Law Rules?
14. If not, please expand on what changes you would propose and why.
15. Do the definitions of ‘property and financial matters’ in proposed subsections 71B(7) and 90RI(7) capture all matters when financial information and documents should be disclosed? If not, what should be changed and why?

Removing the distinction between court-ordered arbitration and private arbitration

The exposure draft proposes to amend sections 10L and 13E of the Family Law Act to provide for one consolidated list of matters that may be arbitrated, irrespective of whether arbitration is court-ordered or privately arranged. The list of matters which may be arbitrated will be contained in new subsection 10L(3) of the Family Law Act. This amendment is intended to assist in reducing the complexity of the arbitration provisions in the Family Law Act, and promote the uptake of arbitration to resolve property settlement disputes. This amendment would partially implement recommendation 26 of the ALRC Report.

The Family Law Act provides for two different types of arbitration. The first relates to arbitration upon referral from a court under section 13E ('court-ordered arbitration') and the second relates to arbitration not referred by a court under section 10L, known as relevant property or financial arbitration ('private arbitration').

Currently, the scope of matters which may be arbitrated privately under subsection 10L(2) of the Family Law Act is more extensive than under section 13E court-ordered arbitration. Private arbitration may determine matters instituted under Parts VIII, VIIIA, VIIIAB, VIIIB, VIIIC and section 106, while court-ordered arbitration is confined to matters instituted under Parts VIII and VIIIAB, excluding Part VIIIAB financial agreements. This distinction was created in 2005 and 2008 when legislative amendments to the Family Law Act expanded the matters that could be dealt with by private arbitration, but not court-ordered arbitration. Consistent with the ALRC Report,²⁰ the department considers that these changes had a historical basis when they were legislated, but there is no longer a purpose for maintaining this distinction.

Question:

16. Do the proposed provisions achieve the intention of simplifying the list of matters that may be arbitrated?

²⁰ ALRC Report 135, [Family Law for the Future – An Inquiry into the Family Law System](#), March 2019, at [9.10].

Empowering a court to make orders about the conduct of arbitration on application by an arbitrator

The exposure draft proposes amendments to section 13F of the Family Law Act to provide for a court to make directions regarding the effective conduct of an arbitration on application by an arbitrator. It also proposes amendments to provide an explicit power for the court to terminate an arbitration process in certain circumstances, regardless of whether the arbitration is court-ordered or privately arranged.

The aim of these amendments is to protect parties from being compelled to proceed with flawed or unfair arbitration by allowing an arbitrator, in addition to the parties, to apply to the court for directions, including to terminate the arbitration, at any stage of an arbitration process. This will assist in circumstances where an arbitrator considers court directions are required and either party is unable or unwilling to apply to the court for directions. This amendment intends to implement recommendation 29 of the ALRC Report.

Key changes

The proposed amendments extend the ability of arbitrators to make an application for court orders to either terminate, or facilitate the effective conduct of, family law arbitration. Currently, the Family Law Act does not provide for directions about the conduct of the arbitration to be made on application by an arbitrator. Rather, subregulation 67E(2) of the Family Law Regulations provides that an application may be made by a party or jointly by all parties to the arbitration only.

The proposed amendments to section 13F will also include an explicit power for the court to terminate arbitrations if it is satisfied that there has been a change in circumstances and it is no longer appropriate to arbitrate the matter.

Once a court has made an order by consent under section 13E, the parties are committed to the arbitration and one party cannot simply change their mind. This is because the referral to arbitration is made by order of the court. It can only be revoked if the court has power to do so. However, there is currently no explicit power in the Family Law Act for a court to terminate an arbitration process once it has commenced.

The amendment is drafted such that a court would be able to make an order terminating an arbitration where it is satisfied that there has been a change in circumstances. Requiring a party or arbitrator to show a change in circumstances is intended to provide the court with wide discretion to consider a range of circumstances where it may be appropriate to terminate an arbitration, but not simply because a party has changed their mind about wanting to arbitrate the dispute. This approach seeks to balance the need to protect parties against being compelled to proceed with a flawed or unfair arbitration, without undermining the binding nature of arbitration once the process has been consented to.

Question:

17. Do you have any concerns with the proposed arbitration amendments, including with empowering a court to terminate arbitrations when there is a change in circumstances?

Schedule 2 – Children’s contact services

This schedule of the exposure draft contains amendments that would enhance the operation of children’s contact services (CCS) by:

- implementing a regulatory scheme for government-funded and private CCS, and
- introducing penalties associated with non-compliance with standards.

Background

CCS provide a safe and child-focused place for separated parents to facilitate changeover or complete supervised contact. This is relevant where there are concerns that children cannot safely spend time with the parent that they do not live with, or where parents are not able to manage their own parenting time arrangements. CCS are currently available in all states and territories, through a combination of government-funded or private providers. CCS are broadly defined as a service which facilitates contact between a child and a member of the child’s family with whom the child is not living, subject to some exceptions where the contact between the child and parent(s) is occurring in a child welfare context. CCS will typically be providing supervised change-over between parents, or supervised time with a parent or family member.

There are currently no mandated operating requirements for CCS, however government-funded services are required to comply with the [Guiding Principles Framework for Good Practice](#) in accordance with their funding agreements. Submissions to the ALRC inquiry and the JSC raised concerns about the safety and quality of unregulated CCS. Both the ALRC and the JSC recommended introducing an accreditation scheme for CCS. This was intended to ensure that safe and high-quality services are provided across the entire sector, by both government-funded and private providers. The ALRC also recommended that it be an offence to provide children’s contact services without accreditation, given the important role that CCS play in ensuring the safety of at-risk children. The implementation of a regulatory scheme is a response to these recommendations and aims to create regulations and accountability across the sector to ensure best practice servicing.

Key changes

The amendments in the exposure draft would allow Government to develop regulations which provide standards and requirements for CCS and enhance consistency across the sector. This replicates the current provisions for accreditation of certain professionals in the family law services sector (for example Family Dispute Resolution Practitioners- section 10A(b) of the Family Law Act). The exposure draft also introduces the ability for regulations to prescribe any penalties associated with non-compliance with the standards.

The exposure draft provides the parameters and boundaries of the scope of a potential regulatory scheme, but does not prescribe a specific regulatory scheme or approach. Rather the amendments will establish the framework to allow the government to set out more detailed accreditation rules in regulations. For example, the evidence required to demonstrate eligibility for accreditation.

In recognition of the range of business structures which may be involved in the delivery of CCS, the provisions enable a wide range of organisations/businesses to seek accreditation.

The amendments also provide an offence to provide children’s contact services without accreditation. Where the relevant provider of a CCS is not an independent legal entity (for example is not incorporated or a natural person), the amendments would require the CCS to identify an ‘accountable person’ who is effectively in charge of the provision of the services. The accountable person would become the responsible person and would be subject to any penalties. This is to ensure that the penalties can operate effectively as a deterrent to operating in contravention to the accreditation requirements by being applicable regardless of the legal status of the provider.

In order to support the operation of this measure, a number of new definitions have been proposed.

The amendments will also impose restrictions so that Courts can only order families to attend an accredited CCS (that is, one that has met the standards enacted by future regulations).

The amendments extend the principles of confidentiality and admissibility of communications to any communications which occur during CCS intake process(es). This replicates other similar provisions in the Family Law Act and, by restricting the future use of these materials, supports open exchanges of information in the intake process, which is important in delivering services appropriate to the particular circumstances of each client.

The amendments also establish an additional duty for CCS and CCS Practitioners to report suspicions of child abuse or violence to the relevant authorities, as well as requiring CCS Practitioners to inform families that the best interest of the child(ren) should be the paramount consideration when giving advice or assistance to a person in matters concerning a child.

Questions:

18. Does the definition of Children’s Contact Service (CCS) (proposed new section 10KB) sufficiently capture the nature of a CCS, while excluding services that should not be covered by later regulation?
19. Does the definition of CCS intake procedure effectively define screening practices for the purposes of applying confidentiality and inadmissibility protections?
20. Will the proposed penalty provisions be effective in preventing children’s contact services being offered without accreditation?
21. Are there more effective alternatives to the penalty provisions proposed?

Schedule 3 – Case management and procedure

Part 1: Attending family dispute resolution before applying for Part VII order

Section 60I of the Family Law Act requires parties to attempt to resolve parenting disputes through Family Dispute Resolution (a specialised form of mediation) before they can file an application for parenting orders in court. An applicant must either provide a certificate from an accredited FDRP, or satisfy one of the legislative exemptions to that requirement. Exemptions include circumstances such as where the parties are seeking consent orders, there is a risk of family violence or the application is urgent.

Currently, a court must accept an application for filing even if it does not comply with the section 60I requirements, and cannot deal with issues arising from non-compliance until the matter commences. The exposure draft includes amendments to section 60I that would provide that the courts must not accept an application for filing if it does not meet the exemption criteria. In effect, this allows the courts to consider the exemption criteria prior to accepting filing of an application. This measure would support the courts to uphold the pre-filing requirements for parenting applications; to expeditiously consider whether an exemption applies; and refer applicants that have not complied with section 60I to family dispute resolution services.

As the proposed amendments to section 60I would allow a court to reject an application before proceedings commence, those involved will not technically be parties to proceedings. Therefore, they cannot apply for review under the existing powers in the FCFCOA Act. The department is considering a further amendment to the FCFCOA Act to allow affected persons to seek a review of a decision made by a registrar to reject filing of their application, or a request for an exemption, before a judge. The department welcomes views on this matter, including on whether any such power should extend to persons affected by all pre-filing decisions made by those delegated judicial power in both Division 1 and 2 of the Federal Circuit and Family Court of Australia.

Questions:

22. Do you have any comments on the drafting of the proposed amendments to section 60I, or are there any unintended consequences that may result from the amendments proposed?
23. Do you have any views on the inclusion of a further provision allowing review of pre-filing decisions in the FCFCOA Act?

Part 2: Amending the requirement to attend divorce hearings in person and delegations

Part 2 of Schedule 3 of the exposure draft includes amendments to section 98A of the Family Law Act that would allow all divorce applications to be heard in the absence of the divorcing parties and their legal representatives, unless their attendance is requested by the court.

The federal family law courts hear approximately 49,000 divorce applications each year, the majority of which are sole applications. The intent of this measure is to minimise unnecessary attendance at court hearings.

As amended, section 98A would provide that parties are not required to attend the divorce hearing when there are children of the divorcing parties' marriage who are aged under 18 years and where there is a sole applicant. This procedure is already in place for sole applicants where there are no children of the marriage (subsection 98A(1)) and for joint applicants with or without children under 18 (subsection 98A(2)). This amendment seeks to align the court attendance requirements for divorcing parties, regardless of whether parties file solely or jointly, and whether there are children of the marriage.

The court's discretion to require attendance by one or both parties as necessary has been preserved and no changes are proposed to the safeguards in subsections 98A(2A), 55A(1) and 55A(2) of the Family Law Act, which will ensure consideration is given to the care and welfare of children affected by divorce.

The department understands that current administrative requirements would equip the courts to obtain information about arrangements made for any children of the marriage through the relevant court forms. A respondent may also file a response to any statement contained in a sole application for divorce, including about the arrangements in place for the care and welfare of any children of the marriage.

Question:

24. Do you have any comments on the proposed amendments for divorce hearings?

Part 3: Commonwealth Information Orders

Section 67N of the Family Law Act empowers the family law courts to make Commonwealth Information Orders (CIOs) that compel a Commonwealth department or agency to provide information concerning the location of a missing child. This includes any information held concerning actual or threatened violence against the child, a parent or another person whom the child lives with. This information can facilitate the court making further orders for the recovery of a child, or to allow for the service of a parenting application.

The current provisions of the Family Law Act that govern CIOs are unclear about whether violence related information must be provided in the absence of location information, and whether other secrecy provisions apply if it is not mandatory to provide violence information.

Part 3 of Schedule 3 of the exposure draft proposes to make clear that violence related information must be provided even if a department or agency does not have location information and that CIO obligations apply regardless of other laws that may prevent information disclosure. These amendments would ensure that the court has access to critical information about a risk of or actual violence to a child, even where there is no available information about the location of a child.

The exposure draft also proposes to amend subsection 67N(8) to expand the category of persons that a department or agency may need to provide violence related information about under CIOs, if ordered to do so by the court. The amendments would ensure that departments and agencies who are subject to CIOs must provide information about actual or threatened violence to a child's relative, including relatives, such as parents, siblings, grandparents, uncles and aunts, nieces and nephews, cousins, step-relatives, foster relatives, and any other person the court deems relevant and who has a connection to the child (for example, a person with whom the child lives, or a person who has care of the child).

The proposed amendment to subsection 67N(8) addresses an issue with an existing provision which could mean that a department or agency is required to provide information about violence to a child but is barred by other secrecy laws from providing information about the same risk of violence to, for example, the child's sibling who does not reside with the child. The amendments will ensure that critical information about risks of violence, including family violence, can be provided to the court in relation to a broader class of family members and can assist the court in understanding and responding to known risks to a child and their family.

The department is considering the inclusion of kinship relationships in the expanded category of persons under subsection 67N(8). The department welcomes views on this matter, including suggestions on the drafting of the provision to ensure that kinship relationships can be appropriately recognised and that departments and agencies can operationalise such provisions.

The proposed amendments also make clear that a CIO applies to persons connected to the child, but not in relation to others who reside with a child but do not have any relationship with that child. This is beyond the scope of family law related matters (for example where the child and parents live

with a third party who is at risk of violence that is in no way connected to the child or family law proceedings).

Questions:

25. Do you have any comments about the proposed amendments to clarify section 67N?
26. Do you have any comments in relation to the categories of family members proposed to be included in subsection 67N(8)?
27. Do you have views about including kinship relationships in subsection 67N(8)?

Part 4: Operation of section 69GA

Part 4 of Schedule 3 of the exposure draft contains amendments to section 69GA of the Family Law Act which concern the jurisdiction of courts that have been prescribed under the Family Law Regulations for the purpose of that section. Section 69GA was inserted into the Family Law Act through the *Family Law Amendment (Family Violence and Other Measures) Act 2018* (Cth) to remove some of the existing barriers to state and territory courts exercising family law jurisdiction. This was intended to ensure that courts prescribed for the purpose of section 69GA could exercise the same jurisdiction under Part VII (Children) as courts of summary jurisdiction.

The only court that has been prescribed under section 69GA was the Local Court of the Northern Territory (prescribed for the purpose of a pilot with the prescription expiring on 31 December 2020). There are no current plans to prescribe any state or territory court in the Family Law Regulations under section 69GA.

This amendment seeks to clearly specify that a court that is prescribed in the Family Law Regulations for the purpose of section 69GA is invested with federal jurisdiction for matters arising under Part VII of the Family Law Act (other than section 60G). This amendment is consistent with the original intention of section 69GA.

Background

The inclusion of section 69GA in the Family Law Act implemented recommendation 1 of the Family Law Council's 2015 *Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*. This recommendation requested that *“(i) Section 69J and 69N of the Family Law Act be amended to remove any doubt that children’s courts, no matter how constituted, are able to make family law orders under Part VII of the Family Law Act in the same circumstances that are currently applicable to courts of summary jurisdiction....”*

Section 69GA implemented this recommendation by enabling children’s courts, or courts whose status as a ‘court of summary jurisdiction’ is unclear, to be prescribed as an equivalent court of summary jurisdiction for the purpose of Subdivision C of Division 12 of Part VII of the Family Law Act. However, it has been identified that section 69GA needs to be read with section 69J of the Family Law Act when determining the source of jurisdiction of a prescribed court and this may cause uncertainty. The proposed amendment intends to make clear that, consistent with courts of summary jurisdiction, state or territory courts prescribed under section 69GA are ‘expressly’ vested with jurisdiction under Part VII of the Family Law Act.

Questions:

28. Do you have any concerns about the proposed amendments to clarify the operation of section 69GA?

Schedule 4 — General provisions

This schedule of the exposure draft contains amendments of general applicability to family law proceedings:

- redrafting of the provisions relating to cost orders, and
- clarifying the inadmissibility provisions.

Part 1: Costs orders

The law relating to costs in family law proceedings is largely set out in section 117 of the Family Law Act, with a number of related provisions in the Family Law Rules. The exposure draft would repeal and remake the cost provisions in new Part XIVC of the Family Law Act, incorporating further details that are presently confined to the Family Law Rules. The objective is to provide greater clarity about the scope and application of the courts' power to order costs, without limiting the breadth of the existing power. This will assist parties, including self-represented litigants and non-parties associated with family law matters, such as practitioners, to understand those powers.

This would be achieved by collating the courts' power to make costs orders, the potential applications of that power, and the matters to which the court should consider when making cost orders into one section or division. Currently these powers and considerations are located under sections 117-117C of the Family Law Act and in the Family Law Rules at rules 6.19, 12.13, 12.15 and 12.17.

The proposed amendments also seek to clarify the circumstances in which a court is permitted to make an order for a party to contribute towards the cost of an Independent Children's Lawyer (ICL). The law does not currently allow a court to make an order with respect to ICL costs against a party who 'has received legal aid', or who would suffer financial hardship if they had to bear a portion of those costs.

Due to the emergence of forms of assistance provided by legal aid commissions that are not subject to a means test for eligibility, such as assistance under the Family Violence and Cross-Examination of Parties Scheme, the department considers that it would be useful to clarify the law for the avoidance of doubt. Accordingly, a new defined term 'means-tested legal aid' has been proposed. The intended policy is to allow courts the power to order parties to make reasonable contributions towards the cost of ICL appointments, unless this would cause financial hardship.

Questions:

29. Are there likely to be any unintended or adverse consequences from incorporating aspects of the Family Law Rules into legislation? If so, outline what these would be.
30. Are there any means-tested legal service providers that would not be captured by the new definition of 'means-tested legal aid'?
31. Are there any unintended consequences from the introduction of the new term 'means-tested legal aid'? If yes, please outline what these consequences would be.

Part 2: Clarification of inadmissibility provisions

The exposure draft includes amendments to the admissibility protections in sections 10E, 10J, 10V and 70NEF of the Family Law Act relating to family counselling, family dispute resolution, risk screening and post-separation parenting programs. The proposed amendments seek to clarify the Commonwealth's intent that evidence of anything said in these confidential contexts is inadmissible before *any* court – including state and territory courts. The existing exceptions relating to disclosures of child abuse or risk of abuse, remain unchanged. The exposure draft also contains clarifying amendments to sections 67ZB and 56.

Background

The wording 'whether exercising federal jurisdiction or not', has been interpreted by some courts to mean that the inadmissibility provisions only relate to courts exercising jurisdiction under the Family Law Act. For instance, in *R v Liddy* (No. 2) (2001) 79 SASR 401, the Supreme Court of South Australia held that the predecessor to section 10E (section 19N) did not apply to state criminal proceedings, as it considered that where the word 'court' is used in the Family Law Act it is restricted by the definition in section 4 and is therefore intended to be limited to a court exercising jurisdiction in proceedings instituted under the Family Law Act. This interpretation was followed by the Supreme Court of Queensland in *R v Baden-Clay* [2013] QSC 351.

The proposed amendments clarify that the admissibility protections under the Family Law Act are intended to apply to any court proceedings, with appropriate exceptions.

Proposed amendments

The exposure draft includes amendments to sections 10E, 10J, 10V and 70NEF to expressly state that 'court' includes any court of the Commonwealth, a State or a Territory – whether exercising jurisdiction under the Family Law Act or any other law of the Commonwealth, a State or a Territory.

For consistency, section 67ZB (which concerns the liability of people who make allegations or suspect child abuse) would be similarly amended to clarify that evidence of the relevant notifications and disclosures related to child abuse and family violence would not be admissible in proceedings before any court, unless the evidence is given by the person who made the notification or disclosure.

It is not proposed that the admissibility protections outlined above would apply to coronial inquiries or inquests. As such, the proposed amendments include an express exception to ensure that such proceedings can investigate the manner or cause of a death or suspected death with the fullest evidence available, including evidence from confidential family law services. The proposed amendments would place the public interest in enabling coronial courts to perform their functions unimpeded above the potential harm caused by evidence from confidential family law processes being considered. This new exception is aimed at maintaining consistency with the rationale for coroner's courts to not be bound by the usual rules of evidence due to the inquisitorial nature of proceedings.

Section 56 of the Family Law Act provides for certificates verifying that a divorce order has taken effect to be used as evidence in other court proceedings. The wording of this section would also be amended to clarify that the certificates can be used as evidence in proceedings before *any* court.

Contingent amendments

The Family Law Amendment Bill 2023 contains changes to the numbering and organisation of the Family Law Act, to make it simpler and easier to apply. Subject to that Bill becoming law, section 70NEF will be replicated by new section 10PA. Division 2 of this schedule of the exposure draft contains contingent amendments to new section 10PA, which replicate the amendments to 70NEF stipulated above, and will commence only subject to the Family Law Amendment Bill 2023 becoming law (as per the commencement table for this schedule).

Questions:

32. Do you have any concerns with the proposed amendments, including the new exemption to the inadmissibility of evidence for coronial proceedings?
33. If yes, please expand on what your concerns are and why.

Overarching Question for Schedules 1-4:

34. Based on the draft commencement and application provisions, when should the proposed amendments commence?

Protecting sensitive information in family law matters (‘protected confidences’)

The exposure draft does not include proposed amendments to the Family Law Act regarding protected confidences. Schedule 6 of the exposure draft of the *Family Law Amendment Bill 2023* contained amendments to introduce an express power for courts to exclude evidence of ‘protected confidences’ in family law matters (that is, evidence relating to the provision of health services, such as medical or counselling records).

Schedule 6 was removed from the Bill prior to its introduction into Parliament. While stakeholder feedback largely demonstrated support for the underlying policy intent of this measure, it was removed from the Bill as a result of feedback that the provisions may cause unintended consequences, and would not achieve the policy objective of protecting parties from harm caused by having their personal information used improperly. Specifically, stakeholders raised concerns about the definition of ‘protected confidence’, the scope of the protection, the practical impact on hearings, including length, costs and increased litigation, and the risk of critical information not being made available to the court and court resourcing implications.

Background

The proposed provisions in Schedule 6 were intended to give effect to recommendation 37 of the ALRC Report; that the Family Law Act should be amended to provide courts with an express statutory power to exclude evidence of ‘protected confidences’.

The ALRC Report recommended that the Family Law Act should give courts discretion to exclude evidence of protected confidences if harm would, or might, be caused by allowing those records into evidence, and the nature and extent of that harm outweighs the desirability of the evidence being given.

ALRC recommendation 37 sought to recognise a number of key public policy concerns relating to protected confidences, including:

- people who need therapeutic assistance may be deterred from seeking it because their confidentiality may not be maintained
- the misuse of subpoenaed documents by perpetrators as a means of perpetuating further abuse, and
- professionals and organisations who maintain such records may not be aware that they can object to the production of the material.

Recommendation 37 related to the adducing of evidence in family law proceedings, rather than addressing procedural matters relating to the production, inspection or copying of documents produced under subpoena.

However, most stakeholders observed that, while the potential inadmissibility of protected confidences may have some deterrent effect, this would not prevent harm from occurring on

inspection of the documents. This is because under the proposed Schedule, the subpoena would be issued and a review of the material would still occur (whether or not it was then admitted into evidence).

Effect of the Family Law Amendment (Information Sharing) Bill 2023

Subsequent to the release of the exposure draft of the Bill, the Government introduced the *Family Law Amendment (Information Sharing) Bill 2023* (Information Sharing Bill) into the House of Representatives on 29 March 2023.

On commencement, the Information Sharing Bill would establish a court-driven framework for information sharing, enabling the family law courts to seek information relating to family violence, child abuse and neglect directly from State and Territory child protection, policing and firearms agencies in parenting proceedings.

Operation of the Information Sharing Bill will be supported by amendments to the Family Law Regulations, including the prescription of safeguards which will provide a minimum standard for the protection of sensitive information when it is used, shared and stored under the Information Sharing Bill. Implementation will also be supported through the development of practical guidance documents and the delivery of training materials for court and agency staff to embed culturally safe and trauma-informed information sharing practices.

Although not directly applying to ‘protected confidences’, it is noted these changes will impact the way the family law courts seek and manage sensitive information relating to family violence, child abuse or neglect risk. A 12-month statutory review provision in the Information Sharing Bill will provide a further opportunity to review the information sharing/gathering landscape following operation of the enhanced information sharing framework.

Further views being sought

The department is seeking your further views to help develop an approach that protects parties’ personal information, while making sure the court has all relevant evidence before it to make an appropriate decision in parenting and property settlement matters. Some of the options suggested by stakeholders to address issues related to protected confidences include:

- **Better protections relating to the production of protected confidences:**
 - leave of the court should be required for a legally-represented party to issue a subpoena that relates to ‘protected confidences’ records (noting existing rule 6.27(1) of the Family Law Rules that a self-represented party must not request the issue of a subpoena without the permission of the court), and
 - section 131A of the *Evidence Act 1995* (NSW) could be used as a model of legislative protections regarding preliminary proceedings of the court.
- **More awareness of the existing powers of the Court:** Some stakeholders expressed the view that the court already has sufficient discretionary powers in the Family Law Rules (including rules

6.27, 6.37 and 6.38) to protect confidential information and better awareness of these powers amongst lawyers and litigants is required.

- **Changes to Court rules:** ‘Counselling records’ (and other types of protected confidences records) could be included in the list of documents prohibited from being copied under rule 6.37(2)(b) of the Family Law Rules (along with child welfare records, criminal records, medical records and police records’).

The draft Family Law Amendment Bill 2023 containing the initial proposed amendments on protected confidences, and the consultation paper that accompanied it, can be viewed on the department website [here](#). Relevant feedback provided in the initial consultation on the *Family Law Amendment Bill 2023* will be taken into account as part of this process – it is not necessary to resubmit your feedback if it has not changed.

Questions:

35. Should there be additional safeguards in the Family Law Act to prevent initial access to protected confidences and how would this be balanced with procedural fairness requirements?
36. Are the discretionary powers of the court in Part 6.5 of the Family Law Rules sufficient to protect confidential information, and if so what could be done to ensure litigants are aware of these powers? For example, is the advice in the ‘Subpoena – Family Law’ form adequate regarding the process to object to producing subpoena material?
37. Are there any other legislative or non-legislative approaches you would propose to ensure protected confidences are accessed and used appropriately in family law proceedings?