



# Consultation on Exposure Draft – Family Law Amendment Bill (No. 2) 2023

## The Australian Government is consulting on draft changes to the Family Law Act to make the law simpler and safer for separating couples dividing property

There have been major inquiries into the family law system by the Australian Law Reform Commission (the ALRC) in 2019 (see [Review of the family law system](#)) and the Joint Select Committee (the JSC) in 2021 (see [Family Law for the Future](#)). Both inquiries identified there should be a clear and easily understood framework in the Family Law Act setting out how property settlements are determined. The JSC also recommended that the economic impact of family violence on property settlements be recognised in the Family Law Act.

The Government is committed to improving the family law system so that it is accessible, safer and delivers justice and fairness for all Australian families. The Government has considered the recommendations of the recent inquiries and the views of many individuals and groups. On 29 March 2023, the *Family Law Amendment Bill 2023* was introduced into the Australian Parliament to progress important children and parenting related reforms to the family law system. The exposure draft *Family Law Amendment Bill (No. 2) 2023* (the exposure draft) contains a second tranche of reforms focussed on improving the law for parties with family law property disputes, and in particular to expressly recognise family violence as part of a property settlement. The exposure draft also proposes a range of amendments to improve and enhance other areas of family law.

The Australian Attorney-General's Department (the department) is consulting publicly on these reforms until 10 November 2023. The department has prepared a factsheet to help you understand the issues in the consultation paper and the most significant changes proposed in the exposure draft. You can access a detailed consultation paper, a full copy of the exposure draft and information on how to share your views on the department's website: <https://consultations.ag.gov.au/families-and-marriage/exposure-draft-family-law-amendment-bill-no-2>.

# The proposed law will clarify the principles courts may consider when dividing property following separation

The majority of separating couples in Australia successfully and cooperatively make their own agreements about their property division, sometimes with assistance from family lawyers and financial professionals. If the Bill becomes law, these arrangements will not change, but it will be clearer for separating couples looking to the Family Law Act for guidance, and lawyers and other family law professionals, who advise them, to understand what must be considered.

If separating couples cannot reach agreement, they can choose to go to court. Cases that end up in court often involve concerns about family violence, financial and economic abuse or management of debts. These are complicated matters which the court must consider carefully, often relying on case law as guidance to resolve these issues.

The current property decision-making principles are scattered across different sections in the Family Law Act and in case law. Part 1 of Schedule 1 of the exposure draft makes sure all these principles are located together in the Family Law Act. The proposed amendments also identify how debt is treated in a property settlement, consistent with existing case law.

## Recognising the financial impact of family violence in property settlements

Currently, the Family Law Act does not identify how the financial impact of family violence can be considered in property settlements. This is left to case law, which says the financial impact of family violence is only considered when it makes it very difficult for a person to contribute to the property pool.

Part 1 of Schedule 1 of the exposure draft introduces new principles that would enable the court to consider the effect of:

- family violence, economic or financial abuse on each party's ability to contribute to the property pool, and
- family violence on the current and future circumstances of a party (such as the need for a party to access ongoing medical care or therapy, or limited income earning capacity).

It is important to understand that, if these principles become law, it will mean that the financial impact of conduct involving family violence, economic abuse and financial abuse may be considered in the process of determining how property should be divided between the parties. It does not mean that family law courts will punish the conduct, rather that they may account for the impact of the conduct in determining a just and equitable property split.

## New principles for conducting property or other non-child-related proceedings

The Family Law Act currently contains principles, duties and powers to help the courts manage and control children's cases safely, fairly and with reduced delay and legal formality where appropriate. These are called 'Less Adversarial Trial' (LAT) principles and are set out in Division 12A, Part VII of the Family Law Act. There are currently no equivalent LAT provisions for property or other non-child-related proceedings. The ALRC recommended that such principles, duties and powers should be available to courts to manage property settlement proceedings. They considered this would provide safeguards where there are allegations or findings of family violence between separating parties.

Part 2 of Schedule 1 of the exposure draft establishes new LAT principles available to the court for use in property and other non-child-related proceedings under the Family Law Act. These principles require the court to actively direct, control and manage proceedings in a way that protects the parties from family violence. For example, the court may make directions about how evidence is to be provided and on what issues. The exposure draft proposes the LAT principles be available in proceedings either on the court's own initiative or at a party's request. It is up to the court to decide if a particular proceeding would benefit from the new LAT principles. Every matter is different and this is a case by case decision.

## **A duty in the Family Law Act for parties to provide relevant financial information**

Parties in court proceedings have a duty in a property or financial case to provide relevant financial information to each other and to the court. These duties are currently in court rules.

The ALRC identified that one of the most important issues in a property division is identifying what property can be divided between separating couples. It recommended that the disclosure duties be set out transparently and accessibly in the Family Law Act. The JSC's Second Interim Report recommended for the duty of disclosure in property and financial matters to be specifically identified in the Family Law Act.

Part 3 of Schedule 1 of the exposure draft introduces a duty on separating couples to provide information and documents about their financial circumstances to each other. The proposed changes make it clear that parties are required to follow this duty when they are preparing to start a court proceeding, or during a court proceeding, about property and financial arrangements. To encourage compliance, the proposed amendments explain what possible consequences might apply if a party does not disclose their financial information or documents.

The draft also introduces an obligation on lawyers and family dispute resolution practitioners to tell parties about the duty, the consequences that may apply if the duty is not followed and encourage them to comply with it. The aim is to make sure separating couples are aware of, and comply with the ongoing duty to disclose all relevant information when they negotiate, or have a court case about, property and financial arrangements.

## **Simplifying the family law arbitration framework for separating couples**

Separating couples can use arbitration to determine their property and financial arrangements. This could be done where separating couples privately arrange an arbitration, or when court proceedings are underway. Currently, different issues can be arbitrated depending on how the arbitration was arranged. The ALRC considered there was no need for this distinction.

Part 3 of Schedule 1 of the exposure draft makes the list of issues that can be dealt with in either type of arbitration the same. The draft also allows arbitrators to apply to a court for orders to keep the arbitration progressing, or to end the arbitration if there has been a change in circumstances. This will make sure that separating couples who agree to arbitration are not forced to proceed with an unfair process.

# The proposed law will enhance other aspects of family law

## Providing a regulatory framework for Children’s Contact Services (CCS)

CCS provide a safe, neutral venue for children to have contact with their separated parents where families are unable to safely manage contact arrangements on their own. CCS are provided by a mix of private and government-funded organisations. There are currently no mandated operating requirements for private or funded services. The ALRC and JSC recommended that accreditation and qualification standards be introduced to promote consistent service delivery across all providers.

Schedule 2 of the exposure draft provides a framework to enable the Government to make Accreditation Rules for the operation of private and government-funded services. The exposure draft will not create the new rules. Specific details about the scope and content of any rules will be developed following further consultation and established in Regulation.

The proposed amendments also provide protection against the sharing of certain confidential information, introduce penalties for non-compliance with the Accreditation Rules and establish a new duty on children’s contact services to report child abuse or violence to relevant authorities. These changes aim to encourage child focussed and high-quality contact services to children.

## Extending the court’s case management and procedure powers

One aim of the exposure draft is to make key sections of the Family Law Act clearer to understand. Schedule 3 includes a range of amendments to improve how the court can manage family law cases. They include allowing the court to reject applications for parenting orders when compulsory family dispute resolution requirements are not complied with (unless the applicant has a valid exemption), and allowing the court to determine an application for divorce without the parties attending a hearing.

## Clearer operation of Commonwealth Information Orders

The Family Law Act empowers courts to make orders requiring a Commonwealth department or agency to provide information about the location of a child and can also require the provision of information about actual or threatened violence against the child, a parent of the child or a person who resides with the child. The Bill proposes to make two changes:

1. The current law is unclear about whether a department or agency must provide information about violence if that department or agency does not have information about the location of the child. Part 4 of Schedule 3 of the exposure draft clarifies that violence information must be provided even where a department or agency does not have information about the location of a child to ensure that a court is aware of any actual or threatened risk of violence to a child and other family members.
2. Part 4 of Schedule 3 of the exposure draft also proposes to expand the category of family members about which a department or agency must provide information about actual or threatened violence to a court to ensure that a court is aware of violence relating to other members of the child’s family. This includes biological relatives, step-relatives, foster relatives, and other people the court deems relevant. Consideration is also being given to the inclusion of kinship relationships.

These amendments help to strengthen and clarify the existing Commonwealth Information Order powers and ensure that a court has all relevant information when determining the location of children and risk to them or other family members.

## **A clear framework for costs orders in family law matters**

There are many provisions across the Family Law Act and court rules about costs in family law matters. Part 1 of Schedule 4 of the exposure draft contains proposed amendments that put these provisions into one place in the Family Law Act. The proposed changes also clarify when the court can order a party in a parenting matter to contribute towards the costs of an Independent Children's Lawyer (ICL). This ensures parties should make a reasonable contribution to the ICL's costs, unless this would cause financial hardship.

## **Clarifying when information in family counselling, family dispute resolution, risk screening and post-separation parenting programs can be shared in court proceedings**

The Family Law Act prohibits people from sharing information provided in family counselling, family dispute resolution, risk screening and post-separation parenting programs in court proceedings, unless a party or a child is at risk of abuse or harm ('inadmissibility provisions'). The legislation has been interpreted by some courts to mean that the inadmissibility provisions only apply when a proceeding is started under the Family Law Act. This means that information from these confidential family law processes may be shared in proceedings (including non-family law proceedings) in State and Territory courts. This could cause unintended harm to people who assumed their disclosures were made confidentially.

Part 2 of Schedule 4 of the exposure draft clarifies that any information shared from these processes cannot be used in Commonwealth or State or Territory court proceedings unless a party or child is at risk of abuse or harm. An exception would be in State or Territory coronial courts, to recognise the unique role they have in the justice system.

## **Excluding evidence of protected confidences to protect sensitive information**

Schedule 6 of the exposure draft of the *Family Law Amendment Bill 2023* proposed an express power for the court to exclude records relating to the provision of health services, such as medical or counselling records ('protected confidences') in family law matters.

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.

The department is now seeking 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. Specifically, the consultation paper asks:

- whether there should be additional safeguards in the Family Law Act to prevent initial access to protected confidence

- whether there should be greater awareness of the Court’s discretionary powers in Part 6.5 of the Family Law Rules, and
- what is the best way to ensure protected confidences are used appropriately in family law proceedings.

Because the department is considering this reform further, there are no proposed amendments in the exposure draft about protected confidences. Subject to approval from the Government, the department will consider further opportunities to progress this reform area.