



Australian Government  
Attorney-General's Department

# **Exposure Draft - Family Law Amendment Bill 2023**

## **Consultation Paper January 2023**

## Contents

<b>Overview</b> .....	<b>3</b>
<b>What is the purpose of these reforms?</b> .....	<b>4</b>
<b>Consultation process</b> .....	<b>7</b>
<b>Consultation questions</b> .....	<b>7</b>
<b>Proposed amendments to the Family Law Act</b> .....	<b>11</b>
Schedule 1: Amendments to the framework for making parenting orders .....	<b>11</b>
Principles and objects of Part VII.....	<b>11</b>
Best interests of the child factors.....	<b>12</b>
Best Interests of Aboriginal or Torres Strait Islander Children .....	<b>15</b>
Repeal of the presumption of equal shared parental responsibility and consideration of specific time arrangements .....	<b>16</b>
Reconsideration of final parenting orders ( <i>Rice &amp; Asplund</i> ).....	<b>18</b>
Schedule 2: Enforcement of child-related orders .....	<b>19</b>
Division 13A redraft.....	<b>20</b>
Allowing registrars to be delegated the power to make make-up time parenting orders .....	<b>25</b>
Schedule 3: Definition of ‘member of the family’ and ‘relative’ .....	<b>25</b>
Definitions of ‘member of the family’ and ‘relative’ .....	<b>26</b>
Schedule 4 – Independent Children’s Lawyers .....	<b>27</b>
Requirement to meet with the child .....	<b>27</b>
Expansion of the use of Independent Children’s Lawyers in cases brought under the Hague Convention .....	<b>29</b>
Schedule 5: Case Management and Procedure .....	<b>30</b>
Harmful proceedings orders.....	<b>30</b>
Broadening and extending overarching purpose of ‘family law practice and procedure’ .....	<b>33</b>
Schedule 6: Protecting sensitive information .....	<b>34</b>
Express power to exclude evidence of protected confidences .....	<b>34</b>
Schedule 7: Communications of details of family law proceedings .....	<b>36</b>
Clarifying restrictions around public communication of family law proceedings (section 121) .....	<b>36</b>
Schedule 8: Establishing regulatory schemes for family law professionals .....	<b>38</b>
Family Report Writers .....	<b>38</b>
Commencement of the changes .....	<b>40</b>

# Overview

The Australian Government wants to make sure the best interests of children are prioritised and placed at the centre of the family law system. The release of the draft Family Law Amendment Bill 2024 (the exposure draft) is an opportunity for the community to provide feedback on the proposed amendments that aim to achieve this outcome. The Bill will primarily amend the *Family Law Act 1975* (Cth) (Family Law Act), with some consequential amendments to the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (FCFCOA Act).

The exposure draft proposes a first tranche of legislative reform addressing 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 implementing elements of the Government Response to the Joint Select Committee on Australia's Family Law System (Joint Select Committee).

The exposure draft also includes other amendments to clarify various aspects of family law or to better support the Federal Circuit and Family Court of Australia's (FCFCOA) new approach to Case Management.

The exposure draft contains 8 schedules that thematically present the proposed amendments as follows:

1. Schedule 1: Amendments to the framework for making parenting orders
2. Schedule 2: Enforcement of child-related orders
3. Schedule 3: Definition of 'member of the family' and 'relative'
4. Schedule 4: Independent Children's Lawyers
5. Schedule 5: Case management and procedure
6. Schedule 6: Protecting sensitive information
7. Schedule 7: Communications of details of family law proceedings
8. Schedule 8: Establishing regulatory schemes for family law professionals

This consultation paper reflects the structure of the exposure draft. It provides a detailed explanation of the proposed legislative reforms, the supporting policy rationale, and targeted consultation questions. For members of the public who wish to understand the Bill, but may not wish to engage with the level of detail in the consultation materials, a fact sheet and FAQ document are available on the Attorney-General's 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.

The Government appreciates the time and effort involved in considering draft legislation. Your feedback and perspectives are invaluable to ensuring the effective operation of the proposed reforms.

## What is the purpose of these reforms?

Submissions to the ALRC inquiry, the Joint Select Committee 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
- a lack of culturally appropriate court processes and services for Aboriginal and Torres Strait Islander families
- hardship and financial burden caused by protracted and adversarial litigation
- lack of support for children, including to express their views, and
- non-compliance with, and ineffective enforcement of, parenting orders.

The 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. In particular, with this Bill and other reforms the Government is seeking to ensure that the best interests of children are prioritised and placed at the centre of the system and its operation.

The exposure draft proposes significant amendments to streamline the framework for making parenting orders in the Family Law Act. This includes:

- refining the list of ‘best interests’ factors at section 60CC with the aim of reducing the complexity and repetition of the section identified by stakeholders, and enhancing the focus on the needs of individual children
- including a separate subsection (s60CC(3)) requiring a court to consider the right of an Aboriginal or Torres Strait Islander child to have opportunities to connect with, and maintain their connection with, their family, community, culture, country and language, and
- repealing the presumption of equal shared parental responsibility and the related equal time and substantial and significant time provisions.

The proposed repeal of the presumption of equal shared parental responsibility in section 61DA, and its associated provisions to consider the practicality of equal time, or substantial and significant time in section 65DAA, is a response to substantial evidence of community misconception about the law - that is, that parenting arrangements after separation are based on a parent's entitlement to equal time, rather than an assessment of what arrangements serve the child's best interests.<sup>1</sup> This misunderstanding may lead parents to agree to unsafe and unfair arrangements, or encourage parties to prolong litigation based on the incorrect expectation of equal time. These provisions also increase the length of judgments and the time spent in court resolving these matters.

The change is aimed at ensuring that the law operates in a manner that properly addresses the small percentage of matters which end up in court and commonly involve allegations of family violence or other complex issues. In these cases, any presumptions about parental responsibility or shared time can take the focus away from the child's needs.

These changes will not directly affect the vast majority of parents who cooperatively settle their own arrangements out of court.<sup>2</sup> However, they will ensure that parents settling matters between themselves are able to more accurately and easily navigate the law, and can make decisions informed by a better understanding of the purpose of the parenting framework. The changes will help to ensure out-of-court settlements place the best interests of the child at the forefront, and that decisions about parenting arrangements are not influenced by misunderstandings about parental rights and responsibilities.

Importantly, both parents will continue to have parental responsibility for their children, and courts will continue to have the ability to make orders for shared parental responsibility, as appropriate to the circumstances of the particular case.

One of the aims of the exposure draft is to make key sections of the Family Law Act easier for parties to understand and for the courts to apply. Division 13A of Part VII of the Act, which provides for the enforcement of parenting orders and other orders affecting children, has been identified by stakeholders and the ALRC as needlessly complex. The proposed redraft simplifies Division 13A to make the consequences of non-compliance with parenting orders clearer and more straightforward. These changes are designed to help parties understand the importance of complying with parenting orders unless there is a reasonable excuse not to, and in turn, to help protect the best interests of children. Similarly, provisions relating to the prohibition on publication of accounts of family law proceedings (section 121) have been restructured and simplified to make the prohibition easier to understand.

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<sup>1</sup> See ALRC (Australian Law Reform Commission), *Family Law for the Future – An Inquiry into the Family Law System* (2019), para 5.80.

<sup>2</sup> Numbers based on a AIFS study of a parenting cohort of around 9000 parents in 2012 see [Post-separation parenting, property and relationship dynamics after five years \(ag.gov.au\)](https://www.ag.gov.au/australian-family-law-reform/2019/04/23/post-separation-parenting-property-and-relationship-dynamics-after-five-years).

The exposure draft also proposes amendments to the Family Law Act to enhance the power of the courts to protect parties, and their children, from the harmful effects of litigation. These seek to address the ALRC's and stakeholders' concerns about the misuse of the family law system by perpetrators of family violence, to achieve ends other than those for which family law processes are designed. This includes:

- an express statutory power to exclude evidence of protected confidences, which would provide clarity to parties, lawyers, judicial officers and protected confidants about the scope of the court's power to exclude, in certain circumstances, records relating to the provision of health services such as medical or counselling records, and
- a power for the court to make harmful proceedings orders, in circumstances where repeated applications are likely to be harmful to a respondent or a child.

The Bill also includes measures that will enhance the voices of children in family law proceedings, including codifying a requirement for Independent Children's Lawyers (ICLs) to meet with children, and increasing judicial discretion to appoint ICLs in proceedings under the Hague Convention on the Civil Aspects of International Child Abduction.

Additionally, the proposed amendments also aim to strengthen the case management powers of the family law courts, to complement the transformative new approach to family law case management implemented by the FCFCOA.

The Government welcomes feedback from interested stakeholders on whether the wording of the exposure draft would achieve these policy outcomes.

# Consultation process

Written feedback on the exposure draft can be submitted via the Attorney-General's Department Consultation Hub webpage at: <https://consultations.ag.gov.au/>.

The deadline for submissions is 27 February 2023.

Enquiries about the consultation process can be directed to [FamilyLawReform@ag.gov.au](mailto:FamilyLawReform@ag.gov.au) and, if needed for accessibility reasons, verbal submissions can be provided.

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.

The department intends to publish submissions, but reserves the right to leave unpublished any submission, or part thereof (in particular, if the Attorney-General's Department considers that publishing the submission would be in breach of section 121(1) of the Family Law Act which prohibits the publication of specific details of family law proceedings). When making your submission on the Consultation Hub, please indicate whether you do not want your submission published, or would like to make an anonymous submission.

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.

## Consultation questions

For ease of reference, below is a list of the questions asked in this consultation paper.

### **Schedule 1: Amendments to the framework for making parenting orders**

#### ***Redraft of objects***

1. Do you have any feedback on the two objects included in the proposed redraft?
2. Do you have any other comments on the impact of the proposed simplification of section 60B?

#### ***Best interests factors***

3. Do you have any feedback on the wording of the factors, including whether any particular wording could have adverse or unintended consequences?
4. Do you have any comments on the simplified structure of the section, including the removal of 'primary considerations' and 'additional considerations'?
5. Do you have any other feedback or comments on the proposed redraft of section 60CC?

### ***Removal of equal shared parental responsibility and specific time provisions***

6. If you are a legal practitioner, family dispute resolution practitioner, family counsellor or family consultant, will the simplification of the legislative framework for making parenting orders make it easier for you to explain the law to your clients?
7. Do you have any comments on the removal of obligations on legal practitioners, family dispute resolution practitioners, family counsellors or family consultants to encourage parents to consider particular time arrangements? Will this amendment have any other consequences and/or significantly impact your work?
8. With the removal of the presumption of equal shared parental responsibility, do any elements of section 65DAC (which sets out how an order providing for shared parental responsibility is taken to be required to be made jointly, including the requirement to consult the other person on the issue) need to be retained?

### ***Reconsideration of final parenting orders (Rice & Asplund)***

9. Does the proposed section 65DAAA accurately reflect the common law rule in *Rice & Asplund*? If not, what are your suggestions for more accurately capturing the rule?
10. Do you support the inclusion of the list of considerations that courts *may* consider in determining whether final parenting orders should be reconsidered? Does the choice of considerations appropriately reflect current case law?

### **Schedule 2: Enforcement of child-related orders**

11. Do you think the proposed changes make Division 13A easier to understand?
12. Do you have any feedback on the objects of Division 13A? Do they capture your understanding of the goals of the enforcement regime?
13. Do you have any feedback on the proposed cost order provisions in proposed section 70NBE?
14. Should proposed subparagraph 70NBE(1)(b)(i) also allow a court to consider awarding costs against a complainant in a situation where the court does not make a finding either way about whether the order was contravened?
15. Do you agree with the approach taken in proposed subsection 70NBA(1) (which does not limit the circumstances in which a court may deal with a contravention of child-related orders that arises in proceedings) or should subsection 70NBA(1) specify that the court may only consider a contravention matter on application from a party?
16. Do you have any other feedback or comments on the amendments in Schedule 2?

### **Schedule 3: Definition of ‘member of the family’ and ‘relative’**

17. Do you have any feedback on the wording of the definitions of ‘relative’ and ‘member of the family’ or the approach to implementing ALRC recommendation 9?
18. Do you have any concerns about the flow-on implications of amending the definitions of ‘relative’ and ‘member of the family’, including on the disclosure obligations of parties?



19. In section 2 of the Bill, it is proposed that these amendments commence the day after the Bill receives Royal Assent, in contrast to most of the other changes which would not commence for 6 months. Given the benefit to children of widening consideration of family violence this is appropriate – do you agree?
20. Do you have any other feedback or comments on the amendments in Schedule 3?

#### **Schedule 4: Independent Children’s Lawyers**

##### ***Requirement to meet with the child***

21. Do you agree that the proposed requirement in subsection 68LA(5A) that an ICL must meet with a child and provide the child with an opportunity to express a view, and the exceptions in subsections 68LA(5B) and (5C), achieves the objectives of providing certainty of an ICLs role in engaging with children, while retaining ICL discretion in appropriate circumstances?
22. Does the amendment strike the right balance between ensuring children have a say and can exercise their rights to participate, while also protecting those that could be harmed by being subjected to family law proceedings?
23. Are there any additional exceptional circumstances that should be considered for listing in subsection 68LA(5C)?

##### ***Expansion of the use of Independent Children’s Lawyers in cases brought under the 1980 Hague Convention***

24. Do you consider there may be adverse or unintended consequences as a result of the proposed repeal of subsection 68L(3)?
25. Do you anticipate this amendment will significantly impact your work? If so, how?
26. Do you have any other feedback or comments on the proposed repeal of subsection 68L(3)?

#### **Schedule 5: Case management and procedure**

##### ***Harmful proceedings orders***

27. Would the introduction of harmful proceedings orders address the need highlighted by *Marsden & Winch* and by the ALRC?
28. Do the proposed harmful proceeding orders, as drafted, appropriately balance procedural fairness considerations?
29. Do you have any feedback on the tests to be applied by the court in considering whether to make a harmful proceedings order, or to grant leave for the affected party to institute further proceedings?
30. Do you have any views about whether the introduction of harmful proceedings orders, which is intended to protect vulnerable parties from vexatious litigants, would cause adverse consequences for a vulnerable party? If yes, do you have any suggestions on how this could be mitigated?

### ***Overarching purpose of the family law practice and procedure provisions***

31. Do you have any feedback on the proposed wording of the expanded overarching purpose of family law practice and procedure?

### **Schedule 6: Protecting sensitive information**

#### ***Express power to exclude evidence of protected confidences***

32. Do you have any views on the proposed approach that would require a party to seek leave of a court to adduce evidence of a protected confidence?
33. Does the proposed definition of a protected confidence accurately capture the confidential records and communications of concern, in line with the ALRC recommendation?
34. What are your views on the test for determining whether evidence of protected confidences should be admitted?
35. Should a person be able to consent to the admission of evidence of a protected confidence relating to their own treatment?

### **Schedule 7: Communication of details of family law proceedings**

#### ***Clarifying restrictions around public communication of family law proceedings***

36. Is Part XIVB easier to understand than the current section 121?
37. Are there elements of Part XIVB that could be further clarified? How would you clarify them?
38. Does the simplified outline at section 114N clearly explain the offences?
39. Does section 114S help clarify what constitutes a communication to the public?

### **Schedule 8: Establishing regulatory schemes for family law professionals**

#### ***Family Report Writers schemes***

40. Do the definitions effectively capture the range of family reports prepared for the family courts, particularly by family consultants and single expert witnesses?
41. Are the proposed matters for which regulations may be made sufficient and comprehensive to improve the competency and accountability of family report writers and the quality of the family reports they produce?

### **Commencement of the changes**

42. Is a six-month lead in time appropriate for these changes? Should they commence sooner?
43. Are the proposed application provisions appropriate for these changes?

# Proposed amendments to the Family Law Act

## Schedule 1: Amendments to the framework for making parenting orders

This schedule of the exposure draft contains important changes to the legislative framework for making parenting orders, including changes to the section which covers the factors to be considered when making parenting arrangements in the best interests of the child.

The changes are:

- a redraft of the principles and objects section for Part VII
- significant amendments to the list of ‘best interests factors’
- a best interests factor specifically relating to the best interests of Aboriginal and Torres Strait Islander children
- removal of the presumption of equal shared parental responsibility and the linked consideration of specific care-time arrangements, and
- amendments to codify the rule in *Rice & Asplund* in relation to reconsideration of final parenting orders.

### Principles and objects of Part VII

Section 60B provides four objects and five underlying principles relating to Part VII of the Family Law Act. In general, objects clauses operate as a useful statement of policy intention, particularly for self-represented litigants.

The existing objects in Part VII emphasise the importance of both parents playing an active role in the lives of their children after separation. The underlying principles focus on the rights of children, including the ‘right to know and be cared for by both of their parents’ and a ‘right to enjoy their culture’.

Section 60B also contains an object relating to the United Nations Convention on the Rights of the Child (CRC) (subsection 60B(4)), which reinforces that the courts may refer to the CRC to assist in interpreting Part VII of the Family Law Act. The reference to the CRC can also be viewed as guiding the courts to consider the articles of the CRC when of particular relevance to a matter, noting that where the Family Law Act departs from the CRC, the Family Law Act will prevail as international treaty obligations cannot override the plain words of a statute.

The ALRC found that many people misunderstood the interaction between the objects and principles and the substantive law, incorrectly assuming that the principles would directly affect decision making. In addition, section 60B also contains significant overlap with the factors for determining the best interests of children (section 60CC). The ALRC considered that removal of the

objects and principles in section 60B of Part VII of the Family Law Act would reduce confusion and enhance the clarity of Part VII (recommendation 4).

### ***Proposed changes***

The proposed redraft replaces the objects and principles with a much shorter objects clause that refers to:

- the importance of children’s best interests in making decisions about parenting arrangements
- intent to give effect to the CRC.

This option eliminates confusion about the interaction of section 60B and section 60CC, while still capturing the primary policy objective of Part VII and making it clear that Part VII is to be interpreted in a way that is consistent with Australia’s international obligations.

#### ***Questions:***

- Do you have any feedback on the two objects included in the proposed redraft?
- Do you have any other comments on the impact of the proposed simplification of section 60B?

### **Best interests of the child factors**

Section 60CC, which outlines factors that a court must consider when determining the best interests of a child, is central to the operation of the family law system.

Existing section 60CC comprises two primary considerations, 13 additional considerations, and ‘any other fact or circumstance that the court thinks is relevant’. Submissions to the ALRC review raised a range of concerns about the best interests factors, including that the factors are confusing, contribute to unnecessary costs and delays and do not necessarily capture the issues that are particularly relevant to a case. Other submissions argued that it was unhelpful for the law to create a hierarchy of primary and additional considerations, when all the relevant circumstances need to be considered and evaluated in each case.

In proposing a redraft of section 60CC, the ALRC considered the most commonly raised issues in family law proceedings from the Australian Institute of Family Studies’ *Court Outcomes Project*.<sup>3</sup> This study showed that the most commonly raised issues in judicially determined matters were those related to the safety of the child, issues relating to a parent/child relationship and parenting capacity. The ALRC also considered a position paper from the Australian Psychological Society that lists considerations that provide conditions for promoting child wellbeing during and after parental separation, and the priorities expressed by participants in a 2018 AIFS study of children and young

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<sup>3</sup> Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments) Australian Institute of Family Studies, 2015 see tables 3.14 and 3.15.

people from separated families. The ALRC selected factors that it considered would best serve consideration of a child's welfare and development.

The proposed list of new best interests factors is:

- what arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, neglect or other harm
- any views expressed by the child
- the developmental, psychological and emotional needs of the child
- the benefit of being able to maintain relationships with each parent and other people who are significant to them, where it is safe to do so
- the capacity of each proposed carer of the child to provide for the child's developmental, psychological and emotional needs, having regard to the carer's ability and willingness to seek support to assist them with caring, and
- anything else that is relevant to the particular circumstances of the child.

Unlike existing 60CC, the proposed amendment would remove the two-tier structure of 'primary' and 'additional' considerations and focus on a core list of considerations that are likely to be relevant to a large majority of matters.

Each factor is further detailed below.

***What arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, neglect or other harm***

Proposed paragraph 60CC(2)(a) more succinctly and broadly captures this crucial factor relating to child safety, as well as the safety of the child's carers. Existing paragraph 60CC(2)(b) specifies 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence' as one of the two primary considerations. Subsection 60CC(2A) requires this factor to be given greater weight than children having a meaningful relationship with both parents. Paragraphs 60CC(3)(j) and (k) contain further references to family violence considerations.

***Any views expressed by the child***

Proposed paragraph 60CC(2)(b) is a simplification of existing paragraph 60CC(3)(a) which also refers to any factors relevant to the weight a court should give to the child's views, such as the child's maturity or level of understanding. As is the case for all of the best interest factors, the courts would have discretion around how much weight to place on the child's views in the circumstances of the case.

***The developmental, psychological and emotional needs of the child***

Proposed paragraph 60CC(2)(c) is a new factor which would allow consideration of a broad range of evidence in each case. It is likely to allow a rounded social science analysis of a particular child's needs. It will also support a child-focused approach, allowing potential coverage of the previous element of 'the likely effect of any changes in the child's circumstances' (paragraph 60CC(3)(d)). It is

further envisaged that a range of the other existing paragraph 60CC factors could be considered by a judge under this heading in addition to other more specific headings. For example, the attitude to the responsibilities of parenthood and the extent to which the parents have previously participated in decisions about the child; the nature of the child's relationship with their parents or others; the lifestyle, culture and traditions of the child and/or parent may all fit under this heading.

***The capacity of each proposed carer of the child to provide for the child's developmental, psychological and emotional needs, having regard to the carer's ability and willingness to seek support to assist them with caring***

Proposed paragraph 60CC(2)(d) reflects current paragraphs 60CC (3)(ca), (f) and (3)(i), and also relates to paragraph 60CC(3)(b). Capacity is a crucial element and would allow the court to consider a range of factors. The ALRC's inclusion of 'or willingness to seek support to assist with caring' is particularly relevant to parents with disability, who may otherwise face assumptions about their capacity to provide care, and should allow a full assessment of their capacity. It is also intended to address 'the perverse situation where a person who has experienced family violence is considered to have lower parenting capacity due to unresolved trauma from family violence'.<sup>4</sup>

***The benefit of being able to maintain relationships with each parent and other people who are significant to them, where it is safe to do so***

Proposed paragraph 60CC(2)(e) focuses on the importance of maintaining existing relationships. The equivalent factor is currently included as one of two primary considerations in paragraph 60CC(2)(a) – 'the benefit to the child of having a meaningful relationship with both of the child's parents'. The proposed section would continue to highlight the importance of a child maintaining a relationship with both parents and other significant persons in their lives, such as grandparents, as part of determining living arrangements that are in the best interests of the child.

Many of the submissions to the ALRC argued that there is a clear need to emphasise safety over maintaining a dangerous and harmful relationship with a parent. The words 'where it is safe to do so' seek to achieve this legal effect. The ALRC has also deliberately emphasised 'maintaining a relationship' rather than 'having a meaningful relationship with both of the child's parents' so that it is not presumed that a relationship with a parent is necessarily in the child's best interests, even when the child has had no relationship with the parent to that point. This will allow an examination of the history of care of the child to determine what is in their best interests.

***Anything else that is relevant to the particular circumstances of the child***

Proposed paragraph 60CC(2)(f) replicates an existing feature of section 60CC that allows for 'any other fact or circumstance that the court thinks is relevant' to be considered. A factor along these lines is necessary to account for the myriad of circumstances that arise in family law proceedings.

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<sup>4</sup> ALRC report paragraph 5.64.

**Questions:**

- Do you have any feedback on the wording of the factors, including whether any particular wording could have adverse or unintended consequence?
- Do you have any comments on the simplified structure of the section, including the removal of the ‘primary considerations’ and ‘additional considerations’?
- Do you have any other feedback or comments on the proposed redraft of section 60CC?

## **Best Interests of Aboriginal or Torres Strait Islander Children**

The Family Law Act currently recognises the importance of Aboriginal and Torres Strait Islander cultural considerations in a number of sections, including section 60B (objects and principles), section 60CC (best interests consideration) and section 61F (application to Aboriginal or Torres Strait Islander children).

The ALRC recommended that, in addition to the new simplified best interests factors, specific consideration regarding culture should be required for Aboriginal and Torres Strait Islander children (recommendation 6). Accordingly, it recommended that the Act include a separate provision, requiring a court to consider ‘the child’s opportunities to connect with, and maintain the child’s connection to, the child’s family, community, culture and country’, when determining what arrangements best promote the best interests of an Aboriginal or Torres Strait Islander child.

Stakeholders such as the National Family Violence Prevention Legal Services and the Aboriginal Justice Caucus Working Group on Family Violence have noted the importance of connection to culture as a significant protective factor for the wellbeing of Aboriginal and Torres Strait Islander children and their families.<sup>5</sup> Creating a specific provision for Aboriginal and Torres Strait Islander children, rather than including it in the list of additional considerations in new section 60CC(2), is intended to ensure that the particular needs and cultural rights of Aboriginal and Torres Strait Islander children are acknowledged and focused on specifically when considering their best interests.

### **Key changes**

The proposed amendments consolidate existing subsections 60B(3), 60CC(3)(h) and 60CC(6) into proposed subsection 60CC(3). The wording of the proposed clause aligns with the expanded definition of ‘relative’ and ‘member of the family’ outlined above.

The current provision at paragraph 60CC(3)(h) of the Family Law Act only uses the term ‘culture’. Following initial consultations, connection to ‘language’ has been included in the exposure draft in addition to the expanded wording recommended by the ALRC.

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<sup>5</sup> ALRC report para 5.68.

The exposure draft would also add a note to section 61F directing the court to the definition of ‘Aboriginal and Torres Strait Islander culture’ in section 4 of the Family Law Act when considering the kinship obligations and child-rearing practices relevant to the child.

### ***Interaction with other ALRC recommendations***

The new specific factor for considering the best interests of Aboriginal and Torres Strait Islander children will complement and sit alongside the other factors in simplified section 60CC. Schedule 3 (below) also contains amendments to the definition of ‘member of the family’ which are relevant to Aboriginal and Torres Strait Islander peoples.

## **Repeal of the presumption of equal shared parental responsibility and consideration of specific time arrangements**

### ***The presumption of equal shared parental responsibility – what will change?***

This schedule proposes the repeal of the presumption of equal shared parental responsibility (section 61DA). The House of Representatives Standing Committee on Social Policy and Legal Affairs in their 2017 Report ‘a better family law system to support and protect those affected by family violence’ recommended the ALRC develop amendments to Part VII of the Family Law Act, and ‘specifically, that it consider removing the presumption of equal shared parental responsibility’.

The ALRC recommended this section be clarified, noting that it has been the subject of confusion and misconception since its introduction in 2006. However, repealing the presumption, and its associated provisions relating to consideration of particular time arrangements, would have the advantage of significantly simplifying the legislative framework for making parenting orders, a primary policy aim of the government. Further, the law would become more child-focused as it would no longer presume a particular outcome, with the court simply assessing the best interests of the child in each case using the list of factors in section 60CC (including the child’s safety and the importance of maintaining a relationship with each parent).

If the presumption is removed, separated parents will each retain parental responsibility, which can be exercised jointly or separately, unless this is varied by a court order (section 61C). Because of this provision, each parent automatically has a role in deciding what is reasonable in looking after a child, for example to authorise medical treatment. This is in contrast to an order for equal shared parental responsibility which imposes requirements about the need to consult the other parent on ‘major long-term issues’. Although parents will normally want to consult each other when making major decisions about their child, unless a court makes an order requiring them to cooperate there will be no legal obligation to do so. That is, where no order is made, parental responsibility can be exercised solely by the person who has the physical care of the children at the time in relation to day-to-day matters.



If the concept of ‘equal shared parental responsibility’ was removed, the court (under section 64B) would continue to have the discretion to make parenting orders that provide for the form of consultation between persons sharing parental responsibility about decisions relating to the care of the child, as well as the process for resolving any disputes. The court would still be required to consider the allocation of parental responsibility requiring joint decision-making for all major long-term issues or particular issues whenever this is raised by one of the parties, or on its own motion (with due procedural fairness accorded).

### ***Removal of mandatory consideration of certain time arrangements – what will change?***

When an order for ‘equal shared parental responsibility’ is made under existing section 61DA, section 65DAA requires courts to consider making an order that the child spend equal time with the parents, unless it is contrary to the child’s best interests or impracticable. If equal time is found not to be in the child’s best interests, then the court must consider making an order that the child spend substantial and significant time with each of the parents.

Many submissions to the ALRC review were supportive of removing section 65DAA, arguing that the requirement to consider equal time, or substantial and significant time with each parent:

- is an unnecessary additional step in the decision-making framework
- detracts from a focus on what is in a child’s best interests, and
- provides scope for exacerbating conflict.

The ALRC found that this provision, in combination with the presumption of equal shared parental responsibility, causes confusion as to whether the law provides for a presumption of equal time.

After the repeal of this section, it would still be open to the court to consider equal time arrangements, or arrangements that give substantial or significant time with each parent, when deciding parenting arrangements in the best interests of the child in accordance with the new section 60CC.

### ***Changes to advisers’ obligations when working with parents to reach parenting arrangements***

The schedule also contains amendments to advisers’ obligations in sections 60D and 63DA. These sections outline the obligations on advisers when working with parents to reach parenting arrangements for their children. ‘Advisers’ is defined as legal practitioners, family counsellors, family dispute resolution practitioners and family consultants.

Section 60D states that these advisers must advise their clients of the paramountcy of the best interests of the child, including the two primary considerations in existing 60CC (the importance of the child having a meaningful relationship with both parents and being protected from physical or psychological harm). Where there is inconsistency in applying the primary considerations of a child’s right to a meaningful relationship with each parent and the child’s right to be protected from harm, advisers are required to encourage parents to prioritise a child’s safety. With the proposed

amendments to section 60CC simplifying the list of best interest factors and removing the distinction between the ‘primary’ and ‘additional’ considerations, this section is amended to simply reflect that advisers must note to their clients that the best interests of the child are paramount.

Section 63DA contains additional obligations for advisers working with parents to develop parenting plans. The schedule would amend this section by removing the obligation to advise parents to consider the possibility of the child spending equal time with each parent or, if that is not reasonably practicable, substantial or significant time. This amendment reflects the repeal of section 65DAA.

**Questions:**

- If you are a legal practitioner, family dispute resolution practitioner, family counsellor or family consultant, will the simplification of the legislative framework for making parenting orders make it easier for you to explain the law to your clients?
- Do you have any comments on the removal of obligations on legal practitioners, family dispute resolution practitioners, family counsellors or family consultants to encourage parents to consider particular time arrangements? Will this amendment have any other consequences and/or significantly impact your work?
- With the removal of the presumption of equal shared parental responsibility, do any elements of section 65DAC (which sets out how an order providing for shared parental responsibility is taken to be required to be made jointly, including the requirement to consult the other person on the issue) need to be retained?

## **Reconsideration of final parenting orders (*Rice & Asplund*)**

The Family Law Act provides two mechanisms for existing parenting orders to be varied or replaced—either the parents can make a parenting plan that overrides the existing order, or they can seek to have the orders amended through the courts. The latter scenario is governed by case law with the case of *Rice & Asplund*<sup>6</sup> specifying that for a court to reconsider a previous order, there needs to have been a significant change in circumstances.

The exposure draft intends to codify the common law rule established by *Rice & Asplund* and elaborated in subsequent cases.<sup>7</sup> In considering whether to alter final parenting orders, a court must have regard to the best interests of the child as the paramount consideration (section 65AA). This is the foundation of the common law rule, as re-litigation of a matter before the courts would generally not be in a child’s best interests, unless there has been a significant change in circumstances that would warrant reconsideration of the final orders.

<sup>6</sup> *Rice and Asplund* (1979) FLC 90-725.

<sup>7</sup> *SPS & PLS* [2008] FamCAFC 16; *Marsden & Winch* (2013) 50 Fam LR 409.

### ***What led to the measure?***

The measure is intended to implement recommendation 41 of the ALRC report, which provided that the Family Law Act should be amended to explicitly state that when a new parenting order is sought, and there is already a final parenting order in force, the court must consider whether there has been a significant change of circumstances and if it is in the best interests of the child for the order to be reconsidered.

The reasons for the recommendation are that, firstly, such a fundamental rule should be clearly stated in the legislation, and secondly, that the current test is open to misinterpretation by self-represented litigants and others in both its application and what may constitute a ‘significant change in circumstances’ to justify a rehearing of a resolved parenting dispute.

### ***Key changes***

Where a final parenting order is in place, new section 65DAAA would require the court to consider whether there has been a significant change in circumstances since the final order was made. The court would then take this into account in considering whether, in all the circumstances, it would be in the best interests of the child for the final order to be reconsidered.

At subsection 65DAAA(2), the exposure draft includes a list of matters that a court may have regard to in weighing up whether it would be in the child’s best interests to reconsider a final parenting order. This list is modelled on the case law and is intended as additional guidance for litigants and the courts about the sorts of matters that may be relevant, without being limiting.

A note is included in the redraft of Division 13A at new section 70NBC, referencing new section 65DAAA, with respect to a variation of parenting orders made in the context of a contravention matter.

### ***Questions:***

- Does proposed section 65DAAA accurately reflect the common law rule in *Rice & Asplund*? If not, what are your suggestions for more accurately capturing the rule?
- Do you support the inclusion of the list of considerations that courts *may* consider in determining whether final parenting orders should be reconsidered? Does the choice of considerations appropriately reflect current case law?

## **Schedule 2: Enforcement of child-related orders**

This schedule of the exposure draft contains:

- a redraft of Division 13A of Part VII (compliance with parenting orders) to make it simpler and easier to apply, and

- amendments to allow registrars to be delegated the power in Rules of Court to make ‘make-up time parenting orders’ (currently referred to as an ‘order compensating person for time lost’).

## **Division 13A redraft**

Non-compliance with parenting orders is a common issue, causing distress for many families. The ALRC identified Division 13A, which provides for the enforcement of parenting orders and other orders affecting children, as an area of the Family Law Act which would benefit from simplification.

The Joint Select Committee on Australia’s Family Law System similarly identified issues with non-compliance as a key theme arising during its inquiry. The Committee recommended that the Government review Division 13A to simplify its operation and consider additional penalties to deter contravention of orders.<sup>8</sup>

The exposure draft redrafts Division 13A of Part VII of the Family Law Act to make the consequences of non-compliance with parenting orders clearer and easier for court users to understand and for the courts to apply. The simpler provisions will make the full scope of the courts’ powers to enforce orders and impose appropriate sanctions in more serious cases clearer to parties.

The proposed redraft of Division 13A is informed by Professor Richard Chisholm AM’s suggestions for a conservative redraft, which was endorsed by the ALRC in Appendix G (‘examples of redrafted provisions’) of the ALRC Report.<sup>9</sup>

### **Key changes**

The redraft incorporates the minor policy changes recommended by the ALRC, but does not significantly change the underlying principles of the compliance and enforcement provisions. The existing provisions provide courts with a range of options for addressing issues of non-compliance, from ordering attendance at parenting programs and varying parenting orders, through to the imposition of penalties for more serious and repeated instances of non-compliance. The existing law relating to reasonable excuse for contravention of orders, including in circumstances where there are safety concerns, has also been retained.

The broad range of sanctions available to the court will also remain (excluding Community Service Orders), including:

- attendance at a post-separation parenting program
- varying a parenting order
- a make-up time parenting order
- compensation of expenses

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<sup>8</sup> Joint Select Committee on Australia’s Family Law System, *Improvements in family law proceedings*, Second Interim Report, Recommendation 20.

<sup>9</sup> ALRC report pp 531-547.

- an order that the respondent enter into a bond
- costs against the respondent or applicant
- a fine, and
- imprisonment.

The redraft will clarify that the courts' powers to order that a child spend additional (make up) time with a person, vary a parenting order, or order parties to attend parenting programs may be used at any stage of a contraventions proceeding, without necessarily making a finding on a contravention. Flexibility to order these measures is intended to complement the operation of the National Contravention List established by the FCFCOA, where the court works to resolve the underlying issues in disputes that lead to the contravention.

While the sanctions available to courts to enforce orders and the circumstances in which costs may be ordered would remain substantially the same, the redrafted Division includes a presumption in favour of a cost order being made against a person found to have contravened an order without reasonable excuse, as recommended by the ALRC. This presumption is slightly broader than the existing presumption that only applies if a 'more serious' contravention is found as a result of the distinction between 'less serious' contravention and 'more serious' contravention being removed. The presumption means that the Court must make a cost order, unless the court is satisfied that it is not appropriate to do so in the circumstances.

### ***New structure***

The Division would be divided into four subdivisions, reduced from six in the Division's current form. The four new subdivisions are:

- **Subdivision A** – Preliminary
- **Subdivision B** – Orders relating to contraventions of child-related orders
- **Subdivision C** – Further provisions relating to bonds and imprisonment
- **Subdivision D** – Miscellaneous

Subdivision A contains an 'Objects' provision (new section 70NAB) which provides five principal objects of the Division. This provision was added to clarify that the compliance regime serves a number of different objectives, including supporting parties to comply with parenting orders and to resolve any difficulties that have contributed to non-compliance. Other objectives of the Division include upholding the authority of the court and imposing appropriate sanctions on a person who seriously or repeatedly contravenes child-related orders without having a reasonable excuse. Consistent with section 60B, which provides the objects of Part VII (Children) as a whole, the overarching object of Division 13A is to meet the best interests of children.

Sections 65M to 65P of the Family Law Act, which set out general obligations created by parenting orders, would be replaced by new section 70NAC. This new section would perform an equivalent function in describing the circumstances in which a person contravenes a child-related order, such as by hindering or preventing another person from spending time with a child, or failing to return a child to the care of another person, contrary to an order. New section 70NDA in Subdivision D (Miscellaneous) replaces existing section 65Q, which provides that the court may issue a warrant for the arrest of an alleged offender.

In order to simplify the structure of the Division, it would no longer separately provide for circumstances where the court considers the contravention to be ‘less serious’ or ‘more serious’. Instead, the court would have discretion to tailor its response to match the gravity of the contravention, while still being required to consider a number of factors in weighing up the seriousness of any given contravention, including the current and previous behaviour of the parties. This approach was taken to simplify the law, while retaining the court’s discretion to consider the circumstances of each case. The court would be required to take into account the seriousness of the contravention when considering whether to order any of the more punitive sanctions available (i.e. fines and imprisonment). Under the Division’s new structure, the penalties and costs provisions would be centralised to improve readability. Currently these provisions are repeated throughout the Division against the different outcomes that can result from a contravention matter.

The court would still need to be satisfied beyond reasonable doubt that the person contravened the child-related order when making an order for the most serious sanctions, i.e. fines and imprisonment (new sections 70NAE and 70NBF(1)(d)).

### ***When the Division applies***

The existing Division 13A does not detail, or seek to limit, the circumstances in which a court may deal with a contravention of child-related orders that arises in proceedings. The proposed redraft retains this approach at proposed new subsection 70NBA(1). An alternative approach would be to specify that the court may only consider a contravention matter on application from a party. The department is interested in stakeholder views on this issue.

### ***Cost orders***

At present, under the following sections the court may (or must, under section 70NFB) make an order that:

- **70NCB** – the applicant pay some or all of the costs of another party (or parties) where there was a contravention that was alleged but not established
- **70NDC** – the applicant pay some or all of the costs of another party (or parties), where there was a reasonable excuse for the contravention
- **70NEB** – the contravener pay some or all of the costs of another party (or parties) costs (where a less serious contravention is established)

- **70NFB** – the contravener pay the costs of the other party, unless this would not be in the child’s best interests (where a more serious contravention is established)

Proposed section 70NBE contains a central power to order costs which can be made at any stage during proceedings. This section is divided into two subheadings which consolidate the existing costs provisions while retaining the existing underlying policies, namely that the court should consider:

- a costs order against the complainant where there are unsubstantiated allegations of contravention, and
- a costs order against the respondent where there has been a contravention without reasonable excuse.

### ***Removal of Community Service Orders as an enforcement measure under the Family Law Act***

The proposed redraft of Division 13A would remove reference to Community Service Orders from Division 13A, including from existing sections 4, 70NFC, 70NFD and 70NFF.

Community Service Orders (CSOs) are one of the more serious sanctions available under the Family Law Act in response to serious contraventions. Their use by the courts has been limited. Research by AIFS (commissioned by ANROWS) suggests that punitive responses to the contravention of parenting orders are not more effective than non-punitive responses at reducing the incidence of non-compliance with parenting orders.<sup>10</sup> Removing the provisions relating to this sanction would allow Division 13A to be even further simplified.

### ***Summary of clauses***

Each provision in the redraft is outlined and summarised below, placed alongside the existing equivalent provisions of the Family Law Act, for ease of reference.

<b>Proposed section</b>	<b>Summary</b>	<b>Existing provision in the Act</b>
<b>70NAA</b>	Provides a simplified outline of Division 13A	70NAA
<b>70NAB</b>	Outlines the objects of Division 13A	N/A
<b>70NAC</b>	Outlines the meaning of to ‘contravene’ an order	70NAC, 65M, 65N, 65P
<b>70NAD</b>	Provides the meaning of ‘reasonable excuse’ for contravening an order	70NAE
<b>70NAE</b>	Provides the standard of proof to be applied in determining matters in proceedings	70NAF

<sup>10</sup> ANROWS (Australia’s National Research Organisation for Women’s Safety Limited), *Compliance with and enforcement of family law parenting orders: Final report*, Issue 20, (October 2022) 17-20.

<b>Proposed section</b>	<b>Summary</b>	<b>Existing provision in the Act</b>
<b>70NBA</b>	Outlines when orders can be made under this Division	70NBA(2) is based on the definition of <b><i>order under this Act affecting children</i></b> in section 4
<b>70NBB</b>	The court may make a make-up time parenting order at any time	70NDB, 70NEB, 70NFB
<b>70NBC</b>	The court may vary or suspend a parenting order at any time	70NBA
<b>70NBD</b>	The court may require one or more parties to attend a post-separation parenting program, or other specified program	70NEB(1)(a), 70NED
<b>70NBE</b>	The court may make a costs order against the complainant where the contravention allegation is not substantiated or against the respondent where a contravention is established without reasonable excuse	70NCB, 70NDC, 70NEB(1)(e), (f) and (g), 70NFB(2)(f), (g) and (h)
<b>70NBF</b>	Outlines orders the court can make where a contravention is established without a reasonable excuse	70NEB(1), 70NFB(2).  No equivalent of subsection (3) of new provision
<b>70NCA</b>	Provides conditions for the court to require a person to enter into a bond	70NEC, 70NFE
<b>70NCB</b>	Outlines the procedure for the court to enforce a bond	70NECA
<b>70NCC</b>	Provides conditions for the court to make an order imposing a sentence of imprisonment	70NFG
<b>70NCD</b>	Outlines the powers of court in relation to the imprisoned person, including release and suspension of sentence	70NFG
<b>70NCE</b>	Outlines the rules relating to contravention of child maintenance orders and child support	70NFB(4)
<b>Removed</b>	Provisions relating to the making, enforcement, variation and discharge of community service orders	70NFB, 70NFC, 70NFD, 70NFF
<b>70NDA</b>	Outlines the circumstances where the court may issue a warrant for the arrest of an alleged offender	65Q



Proposed section	Summary	Existing provision in the Act
70NDB	Outlines the relationship between Division 13A and other laws	70NFH
70NDC	Nothing in this Division limits the operation of section 105, which deals with enforcement generally	70NFJ

## Allowing registrars to be delegated the power to make make-up time parenting orders

This measure would amend the FCFCOA Act so that registrars of both Divisions of the FCFCOA could be delegated the power to make a further parenting order for a child to spend additional time with a person (commonly referred to as a ‘make-up’ time or ‘compensatory time’ order). This refers to the power under existing paragraphs 70NDB(1)(c), 70NEB(1)(b) and 70NFB(2)(c) of the current Family Law Act and under proposed section 70NBB of the redraft.

This change is intended to support the operation of the FCFCOA’s National Contravention List that commenced on 1 September 2021. The List aims to help achieve timely outcomes in contravention proceedings and support future compliance with parenting orders. Orders made by registrars are reviewable by a judge.

### Questions:

- Do you think the proposed changes make Division 13A easier to understand?
- Do you have any feedback on the objects of Division 13A? Do they capture your understanding of the goals of the enforcement regime?
- Do you have any feedback on the proposed cost order provisions in 70NBE?
- Should proposed subparagraph 70NBE(1)(b)(i) also allow a court to consider awarding costs against a complainant in a situation where the court does not make a finding either way about whether the order was contravened?
- Do you agree with the approach taken in proposed subsection 70NBA(1) (which does not limit the circumstances in which a court may deal with a contravention of child-related orders that arises in proceedings) or should subsection 70NBA(1) specify that the court may only consider a contravention matter on application from a party?
- Do you have any other feedback or comments on the amendments in Schedule 2?

## Schedule 3: Definition of ‘member of the family’ and ‘relative’

This schedule of the exposure draft contains amendments to provide definitions related to the concept of family in the Family Law Act that are more inclusive of Aboriginal and Torres Strait Islander culture and traditions.

The Government appreciates that these matters require specific consideration on a case-by-case basis, due to the diversity of Aboriginal and Torres Islander cultures. This can only be meaningfully achieved with the involvement of those with relevant cultural knowledge from within the community concerned.

## **Definitions of ‘member of the family’ and ‘relative’**

The amended definition of ‘relative’ would implement ALRC recommendation 9.

Subsection 4(1AB) of the Family Law Act contains a definition of ‘member of the family’ that is broad and encompasses a wide range of family relationships. However, unlike similar definitions in state and territory legislation, it does not incorporate Aboriginal and Torres Strait Islander kinship systems. The ALRC noted that there is a long-standing recognition that Aboriginal and Torres Strait Islander notions of family and kinship encompass a wider range of individuals and obligations than are presently recognised in the definition of family member in the Family Law Act, and recommended that subsection 4(1AB) be amended to provide a definition that is inclusive of any Aboriginal and Torres Strait Islander concept of family that is relevant in the particular circumstances of the case.

The proposed amendments to the definition of relative would, in effect, extend the meaning of ‘member of the family’ in section 4(1AB) to recognise Aboriginal and Torres Strait Islander notions of family and kinship. The wording of the redrafted definition was developed following preliminary consultation with peak Aboriginal and Torres Strait Islander organisations.

### ***Impact of Changes***

Amending the definition of ‘relative’ and the effective extension of ‘member of the family’ would have a number of flow-on effects throughout the Family Law Act, including in relation to:

- the definition of step parent (subsection 4(1))
- the definition of family violence (section 4AB)
- requirements for parties to notify the court of any family violence order, child protection orders, or child protection notifications (sections 60CF, 60CH, and 60CI).

The extension of the meaning of ‘member of the family’ means that, for the purposes of the definition of ‘family violence’ in section 4AB of Family Law Act, a person may be engaging in family violence if the violence is directed towards a member of the person’s kinship group, however defined. This could have implications where these terms are used in the Family Law Act for matters involving Aboriginal and Torres Strait Islander children.

The amendment to the definition of ‘relative’ and the resulting extended meaning of ‘member of the family’ would have implications for the obligations imposed on parties by sections 60CF, 60CH and 60CI of the Family Law Act. Specifically, a party to proceedings would also be required to inform the court:

- a. of any family violence order that applies to a member of the kinship group of a child who is the subject of proceedings (section 60CF)
- b. if they are aware that another child, who is a member of the kinship group of a child who is the subject of proceedings, is under the care of a child welfare law (section 60CH), and
- c. if another child, who is a member of the kinship group of a child who is the subject of proceedings, were subject to a notification, investigation, inquiry or assessment by a prescribed State or Territory agency and the party to the proceedings was aware of this (section 60CI).

While the definitional changes would not alter *who* has an obligation to disclose this kind of information to the court, the scope of these obligations to inform the court would be expanded for many Aboriginal and Torres Strait Islander families as there would be an expanded number of people considered ‘a family member’ in line with specific cultural notions of ‘family’.

The department notes that failure to inform the court of such matters does not affect the validity of any order made by the court and there are other mechanisms available in family law proceedings for such information to come before the court to inform its decisions.

The broadened application of sections 60CF, 60CH and 60CI reflects the ALRC’s anticipated approach. We invite stakeholder views about the expanded operation of these provisions.

**Questions:**

- Do you have any feedback on the wording of the definitions of ‘relative’ and ‘member of the family’ or the approach to implementing ALRC recommendation 9?
- Do you have any concerns about the flow-on implications of amending the definitions of ‘relative’ and ‘member of the family’, including on the disclosure obligations of parties?
- In section 2 of the Bill, it is proposed that these amendments commence the day after the Bill receives Royal Assent, in contrast to most of the other changes which would not commence for 6 months. Given the benefit to children of widening consideration of family violence this is appropriate – do you agree?
- Do you have any other feedback or comments on the amendments in Schedule 3?

## Schedule 4 – Independent Children’s Lawyers

This schedule of the exposure draft contains amendments to provisions about Independent Children’s Lawyers (ICLs), including a requirement for ICLs to meet with children and give the child an opportunity to express a view, and to expand the use of ICLs in cases brought under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention).

### Requirement to meet with the child

The proposed amendments include a requirement that an ICL must meet with the child whose best interests they have been appointed to represent, and provide the child with an opportunity to

express a view. This amendment clarifies the role and duties of ICLs and ensures that ICLs engage children in matters affecting them, giving effect to recommendations of the ALRC (recommendation 44) and Joint Select Committee (second interim report, recommendation 18).

While an ICL is required by the Family Law Act (section 68LA(5)(b)) to convey the child's views to the court if they have been expressed, at present there is no legislative obligation for an ICL to meet with or seek a child's views unless this is ordered by a judge (section 68L(5)). While many ICLs do frequently meet with children and seek their views as this is an expectation of ICLs expressed in the Guidelines for ICLs, this amendment legislatively clarifies the role and duties of an ICL to ensure this engagement with a child occurs in every appropriate case. These amendments will better facilitate the participation of children in family law proceedings, consistent with children's rights under Article 12 of the United Nations Convention on the Rights of the Child, while safeguarding their safety and wellbeing.

### ***Key changes***

Section 68LA(5) of the Family Law Act sets out the specific duties of an ICL. The Bill amends section 68LA(5) to require the ICL to meet with the child and provide the child with the opportunity to express any view in relation to the matters to which the proceedings relate. This requirement would apply in all cases where an ICL is appointed, including parenting matters, welfare matters or where ICLs are appointed for children in Hague matters.

The Bill provides exceptions to these duties. An ICL is not required to comply with either of these duties if the child is under 5 years of age, or the child does not wish to meet with an ICL or express their views. Further, to ensure the safety or wellbeing of the child, the Bill provides that there may be exceptional circumstances when an ICL is not required to meet with the child or seek their views. These circumstances include, but are not limited to, if the ICL in performing the duty would expose the child to the risk of physical or psychological harm, or would have a significant adverse effect on the wellbeing of the child.

This definition of exceptional circumstances seeks to balance the need for retaining ICL discretion in individual cases while also providing limitations on that discretion by focusing on a genuine risk to that specific child. The amendment also balances the rights of the child to participate in proceedings, while ensuring that adequate safeguards are in place to protect their safety and wellbeing. The drafting of the proposed amendment reflects that the ICL retains discretion to determine the timing or frequency of meetings with the child, as appropriate.

If a judge determines that the threshold for exceptional circumstances is not met, the judge may order that the ICL meet with the child and/or seek their view. Existing subsections 68L(5) and (6), which provide that the court may make an order that the ICL should seek the child's views, will therefore be repealed to avoid duplication. The intention of the proposed amendments would not be to unnecessarily prolong proceedings or introduce additional court events.

**Questions:**

- Do you agree that the proposed requirement in subsection 68LA(5A) that an ICL must meet with a child and provide the child with an opportunity to express a view, and the exceptions in subsections 68LA(5B) and (5C), achieves the objectives of providing certainty of an ICL's role in engaging with children, while retaining ICL discretion in appropriate circumstances?
- Does the amendment strike the right balance between ensuring children have a say and can exercise their rights to participate, while also protecting those that could be harmed by being subjected to family law proceedings?
- Are there any additional exceptional circumstances that should be considered for listing in subsection 68LA(5C)?

## **Expansion of the use of Independent Children's Lawyers in cases brought under the Hague Convention**

### ***Key changes***

This schedule of the exposure draft contains amendments which will remove the requirement that the appointment of Independent Children's Lawyers (ICLs) in cases brought under the Hague Convention, only be made in 'exceptional circumstances'.

Judges are currently only permitted to appoint Independent Children's Lawyers (ICLs) in cases brought under the Hague Convention where there are exceptional circumstances that justify doing so (subsection 68L(3) of the Family Law Act). The proposed amendment would repeal subsection 68L(3), removing the restriction on the appointment of ICLs in these cases. Subsection 68L(1) will also be repealed and replaced to express that section 68L applies to proceedings where a child's best interests are paramount or a relevant consideration.

The amendments clarify beyond doubt that Hague Convention proceedings fall within the scope of section 68L. Under the amended section 68L, ICLs would be appointed by the Court for Hague Convention proceedings under the same circumstances as other family law matters under the Act

### ***Supporting safer implementation of the Hague Convention in Australia***

This change will support safer implementation of the Hague Convention by expanding judicial discretion to appoint ICLs in appropriate cases. Where appointed, the use of ICLs may also provide a greater opportunity for the child to express a view during proceedings, and offer additional assurance that all available evidence relating to the child is introduced.

Originally, the restrictions on the use of ICLs through subsection 68L(3) were introduced to ensure that cases were as expeditious as possible, and that the use of ICLs did not unnecessarily complicate or prolong proceedings. However, Hague Convention proceedings are lengthier today than at the time this restriction was introduced and proper judicial consideration of the matters will often involve consideration of extensive evidence, and the cross examination of witnesses. ICLs can

facilitate more efficient resolution in complex matters including pre-trial resolution, active case management, compensation for deficiencies in parties' cases<sup>11</sup>, and expedited return processes<sup>12</sup>.

The removal of the restrictive requirement for the appointment of ICLs aims to support safer implementation of the Hague Convention by expanding judicial discretion to appoint ICLs in appropriate cases. This amendment will further support recent changes to the *Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022*. These changes include clarifying that the 'grave risk defence' can include consideration of family violence risks, as well as a new provision stating that the courts must consider whether to include protective conditions where raised by ICLs and parties to proceedings. These changes aim to improve the safety of women and children in Hague Convention matters and ultimately improve outcomes of Hague Convention proceedings in Australia.

**Questions:**

- Do you consider there may be adverse or unintended consequences as a result of the proposed repeal of subsection 68L(3)?
- Do you anticipate this amendment will significantly impact your work? If so, how?
- Do you have any other feedback or comments on the proposed repeal of subsection 68L(3)?

## Schedule 5: Case Management and Procedure

This schedule of the exposure draft contains amendments to the Family Law Act and the FCFCOA Act relating to family law case management and procedure, specifically:

- introducing new 'harmful proceedings orders' to prevent a vexatious litigant from filing and serving new applications without first obtaining leave from the court, and
- broadening and extending the 'overarching purpose of family law practice and procedure' and the accompanying duty, to all proceedings instituted under the Family Law Act.

### Harmful proceedings orders

The exposure draft includes amendments to provide courts with a new power to restrain a person from filing any further family law applications and serving them on the respondent without first obtaining leave of the court.

The intent is to allow the court to prevent harm to the intended respondent resulting from continuous litigation by making a 'harmful proceedings order'. Once this order is in place, further applications would first be assessed by the court to ensure that they are not vexatious, frivolous or an abuse of proceedings and have reasonable prospects of success before they can be filed and served.

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<sup>11</sup> *Department of Communities and Justice v Ruiz* [2021] FamCA 98.

<sup>12</sup> *State Central Authority v Muteki* [2018] FamCA 820.

### ***What led to the proposed measure?***

The current vexatious proceedings powers focus on the intent of the applicant rather than the effect that further proceedings may have on the respondent. This provision seeks to implement recommendation 32 of the ALRC Report, which referred to the case of *Marsden & Winch*<sup>13</sup> as an example of a gap in the courts' powers to scrutinise the institution of further proceedings. *Marsden & Winch* involved protracted and persistent litigation over many years, which a judge found substantially led to the mother developing post-traumatic stress disorder.

The ALRC concluded that the courts' existing vexatious proceedings and summary dismissal powers do not provide sufficient scope for courts to make appropriate orders in cases where one party oppresses the other by repetitive filing of applications and the serving of those applications on the other party. Currently, the power to prevent a party from instituting further proceedings is only exercisable where the court is satisfied that a person has *frequently* instituted or conducted vexatious proceedings in Australian courts or tribunals (section 102QB(1)). Section 102Q(1) specifies that vexatious proceedings include those that are conducted in a court in a way so as to harass, annoy, cause delay or detriment, or achieve another wrongful purpose (as well as a range of other considerations).

In considering options to address the identified gap, the department is mindful of the procedural fairness issues associated with constraining a person from filing new applications. In line with the ALRC's recommendations, the approach proposed is that a meritorious application made for a proper purpose should be allowed to proceed, regardless of the impact that it might have on the respondent.

The department also seeks views on any unintended consequences that may negatively impact vulnerable parties by introducing this provision, for example, where a vulnerable party has filed a poorly self-prepared application, and later files a subsequent application upon seeking legal representation and advice on the merits of their case.

### ***Key changes***

The new provisions would be located in Part XIB of the Family Law Act. As suggested by the ALRC, the court's summary dismissal powers (presently at section 45A) would also be relocated to Part XIB so that all of the court's powers relating to vexatious, harmful or unmeritorious proceedings are located together.

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<sup>13</sup> (2013) 50 Fam LR 409.

The power to make a harmful proceedings order would be exercisable by the court on its own initiative, or on application by a party to the proceedings, at any time while the proceedings are on foot. The court would need to be satisfied that there are reasonable grounds to believe that further proceedings would be harmful to the respondent. Harm may include psychological harm or oppression, major mental distress, or behaviour which causes a detrimental effect on the other party's capacity to care for a child. The new power is not intended to limit the court's other powers, including those relating to vexatious proceedings orders and summary dismissal.

To ensure procedural fairness to the applicant, a provision will be included similar to subsection 102QB(4) to provide that the court must not make this order in relation to a person without hearing the person or giving the person an opportunity of being heard.

Once the order is in place, the exposure draft provides for the affected party to make an application for leave to institute proceedings (similar to section 102QE of the Family Law Act relating to vexatious litigants). Consistent with the ALRC's recommendations, applications for leave would be made *ex parte* – without serving documents on the respondent. This is in line with the policy objective to minimise risk of further harm to the respondent by exposing them to unnecessary proceedings.

The department appreciates that *ex parte* applications are a rare occurrence and a decision to exclude a party from participation should not be taken lightly. This consideration has been balanced with the objective of harm minimisation and the reasoning outlined by the ALRC.

When considering whether to grant leave for further proceedings to be instituted, the provisions will mirror the scope of the court's summary dismissal powers. If the court is satisfied on the evidence before it that the application is frivolous, vexatious or an abuse of process, or does not have reasonable prospects of success, the application for leave should be refused. Otherwise, the court should grant leave for the application to be served on the other party.

Should a court grant leave, this would not prevent the respondent from applying for summary dismissal of the application once served and making submission to the court in that context. However, should leave be denied, the respondent would not need to concern themselves at all and would be spared the stress and expense of providing submissions or instructions to their legal representative. The department has been unable to identify an alternative approach that would not undermine the intent of the ALRC's recommendation and the utility of harmful proceedings orders.



**Questions:**

- Would the introduction of harmful proceedings orders address the need highlighted by *Marsden & Winch* and by the ALRC?
- Do the proposed harmful proceeding orders, as drafted, appropriately balance procedural fairness considerations?
- Do you have any feedback on the tests to be applied by the court in considering whether to make a harmful proceedings order, or to grant leave for the affected party to institute further proceedings?
- Do you have any views about whether the introduction of harmful proceedings orders, which is intended to protect vulnerable parties from vexatious litigants, would cause adverse consequences for a vulnerable party? If yes, do you have any suggestions on how this could be mitigated?

## **Broadening and extending overarching purpose of ‘family law practice and procedure’**

The ALRC Report, in addition to multiple other inquiries, have highlighted that the adversarial nature of courts operating within the family law system have led to escalated hostility, legal costs and drawn out proceedings, resulting in potentially negative consequences for parties to proceedings and their children, including the interests of children often getting lost between litigating parties.<sup>14</sup> The ALRC recommended that the Family Law Act be amended to strengthen the family law court’s case management powers to ensure that matters were conducted in a way that that is consistent with facilitating the just resolution of the dispute according to law, as quickly and efficiently as possible, and with the least acrimony.

The exposure draft inserts a new Division 1A at the outset of Part XI, which aims to broaden and extend the ‘overarching purpose of family law practice and procedure’ and the associated duty on parties to act consistently with the overarching purpose, to all proceedings instituted under the Family Law Act, fully implementing recommendations 30 and 31 of the ALRC Report.

The Government’s court reform legislation established an overarching purpose of family law practice and procedure in the FCFCOA Act, which is to facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible.<sup>15</sup> This is accompanied by a statutory duty on litigants and their legal representatives to conduct proceedings in a way that is consistent with the overarching purpose.<sup>16</sup>

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<sup>14</sup> Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001); House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Commonwealth of Australia, 2003); 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).

<sup>15</sup> See sections 67 and 190, *Federal Circuit and Family Court of Australia Act 2021* (Cth).

<sup>16</sup> See sections 68 and 191, *Federal Circuit and Family Court of Australia Act 2021* (Cth).

By inserting the new definition of ‘overarching purpose of family law practice and procedure’ in section 96B of the Family Law Act, it is intended that family law proceedings have a focus on ensuring the safe resolution of disputes in a manner consistent with the best interests of the child or children involved, in addition to the existing elements of the overarching purpose in the FCFCOA Act. The draft amendments do not incorporate the phrasing of ‘with least possible acrimony’ suggested by the ALRC on the basis that this may unintentionally discourage parties from raising issues of family violence or other safety concerns in proceedings.

Inserting an overarching purpose provision in the Family Law Act will extend its applicability to proceedings under the Family Law Act heard by other courts, such as the Family Court of Western Australia when exercising its federal family law jurisdiction.

The exposure draft would resolve the overlap with the existing overarching purpose and duty provisions in the FCFCOA Act, by confining their application to civil proceedings other than those under the Family Law Act (see proposed new sections 68A and 191A). The defined term ‘civil practice and procedure provisions’ is used with respect to both Divisions of the FCFCOA, to distinguish the scope of sections 68, 69, 191 and 192 of the FCFCOA Act from the new overarching purpose of family law practice and procedure and associated duty on parties to be inserted at sections 96B and 96C of the Family Law Act.

**Question:**

- Do you have any feedback on the proposed wording of the expanded overarching purpose of family law practice and procedure?

## **Schedule 6: Protecting sensitive information**

This schedule of the exposure draft contains amendments to introduce an express power for courts to exclude evidence of protected confidences.

### **Express power to exclude evidence of protected confidences**

The exposure draft proposes amendments to the Family Law Act to provide courts with an express statutory power to exclude evidence of protected confidences. This is intended to give effect to the ALRC’s recommendation 37 and seeks to provide clarity to parties, lawyers, judicial officers and protected confidants about the scope of the court’s power to exclude, in certain circumstances, records relating to the provision of health services (including records generated when a person attends a medical, counselling or psychological service).

## ***Key changes***

‘Protected confidences’ is defined in proposed subsection 99(2) and refers to communications made in the course of a relationship in which one of the persons is acting in a professional capacity to provide a health service (within the meaning of the *Privacy Act 1988* (Cth)) to the other person, and where the person providing the service ordinarily owes confidentiality to the person receiving the service. Parties to family law proceedings may seek to subpoena records of another party’s protected confidences to obtain them and have them admitted into evidence.

The *Evidence Act 1995* (Cth) does not recognise any privilege relating to medical practitioners, therapists or counsellors, nor are there general provisions in the Family Law Act or court rules which comprehensively deal with these therapeutic records or services. While specific protections in relation to ‘family counselling’ are found in Part II Division 2 of the Family Law Act, outside of these narrow exceptions, medical practitioners, therapists and counsellors – and their records – are compellable witnesses with admissible testimony in family law proceedings. Accordingly, the courts have discretion as to whether and how these records are admitted.

In deciding upon the structure and substance of these amendments, a range of domestic and international legislative models were examined. Proposed section 99 of this exposure draft was modelled on section 69 of the New Zealand *Evidence Act 2006* and section 126B of the *Evidence Act 1995* (NSW), adapted to the context of family law proceedings in Australia.

Proposed subsection 99(1) requires the court to grant leave for a party to adduce evidence subject to a protected confidence. The approach taken in proposed section 99 presumes that disclosure of the confidential material will have a harmful impact and places the onus on the party issuing the subpoena to prove otherwise in each particular instance.

This particular approach is in contrast to section 126A of the *Evidence Act 1995* (NSW), which places the onus on patients and treating practitioners to prove that disclosure would be harmful. The proposed approach in the exposure draft assumes a baseline level of harm to both patients and public confidence resulting from admitting evidence from confidential therapeutic settings. This approach is intended to better support self-represented litigants through the court process as each time evidence of a protected confidence is raised, it would automatically be subject to court scrutiny without relying on the affected party to raise an objection.

Proposed subsection 99(7) sets out the factors the court must have regard to in deciding whether to grant leave to admit evidence of protected confidences. By requiring the court to consider these factors, this measure seeks to equip the court to strike an appropriate balance between protecting the sensitive nature of therapeutic records and ensuring that parties can effectively secure evidence that may be of relevance to their family law matter. Further, proposed subsection 99(6) enshrines in the Family Law Act that the best interests of the child is the paramount consideration when the court is determining whether or not to exclude evidence of protected confidences in parenting proceedings.

Proposed subsection 99(3) provides an exception for consent. There may be a variety of reasons why a person involved in family law proceedings may wish to have their own therapeutic records adduced into evidence. For example, evidence of protected confidences may assist victims of family violence by providing corroborative evidence and reducing the need to keep telling their story. Accordingly, proposed subsection 99(3) would allow a person to consent to the admission of such evidence.

**Questions:**

- Do you have any views on the proposed approach that would require a party to seek leave of court to adduce evidence of a protected confidence?
- Does the proposed definition of a protected confidence accurately capture the confidential records and communications of concern, in line with the ALRC recommendation?
- What are your views on the test for determining whether evidence of protected confidences should be admitted? Should the onus be on the party seeking to admit the evidence?
- Should a person be able to consent to the admission of evidence of a protected confidence relating to their own treatment?

## **Schedule 7: Communications of details of family law proceedings**

### **Clarifying restrictions around public communication of family law proceedings (section 121)**

The exposure draft includes a redraft of section 121 of the Family Law Act, intended to clarify its scope and modernise its language. The amendments are not intended to alter the underlying policy of the provision, but rather to address misconceptions about its operation.

The purpose of section 121 is to protect the privacy of those involved in family law proceedings. While court proceedings are generally open to the public, section 121 restricts the public communication of information or accounts of family law proceedings that would identify a party to the proceedings, or a person associated with the proceedings, without court authorisation.

The current wording of section 121 reflects the historical dominance of traditional forms of media, such as television, radio and newspapers. Due to the growth of social media as a dominant form of communication, the section is now just as relevant to court users as it is to journalists and media organisations.

The ALRC recommended that the section be redrafted to make it easier to understand (recommendation 56). The ALRC also identified that there is confusion about whether communicating identifying accounts of proceedings with relevant government bodies, professional services or professional regulatory bodies is permissible.

## ***Key changes***

The redraft creates a new Part XIVB. Section 121 has been separated into a number of sections within Part XIVB. This is intended to make the provision clearer by separating the offence provisions and creating shorter sections that are easier to read.

A simplified outline at the beginning of the Part explains the two offences in simple terms.

The redraft uses the phrase ‘communicates to the public’ in place of ‘publishes or otherwise disseminates to the public’. This is intended to better articulate that the restrictions apply to public communications beyond what might be traditionally understood by the term ‘publication’.

A definition of ‘communicate’ is provided at proposed new section 114P that includes communication ‘by means of the internet’ and uses social media as an example.

The redraft makes it clearer at proposed subsection 114Q(2) that the communication of identifying information relating to family law proceedings that has been directed or otherwise approved by a court, is an exception to the offence.

The redraft aims to better articulate what is meant by a communication to the public (or a section of the public) at subsection 114S(1). The department considers that it would be challenging, and perhaps undesirable, to attempt to comprehensively define what constitutes public communication. Instead, the new subsection picks up the approach that has been taken to this issue under existing case law.<sup>17</sup> Courts have concluded that a communication to the public does not capture a communication to persons who have a significant and legitimate interest that is substantially greater than, or different from, members of the general public. As with the current section 121, proposed subsection 114S(2) provides common examples of permissible communications, to provide greater certainty.

For the benefit of court users, the redraft makes it clear that a private communication with a family member or a friend is not captured by the offence provisions. It is not intended for Part XIVB to be so strict as to deprive persons of the freedom to communicate with their support network. Rather, the intent is to discourage broader communications to the wider public that would impact the privacy of the parties and others involved in proceedings.

The redraft also clarifies that it is not an offence to provide an account of proceedings to any professional regulator, nor for a regulator to use such accounts in connection with their regulatory functions. Similarly, for Government agencies or other organisations to obtain and use information in the course of their professional duties.

New sections 114Q and 114R retain the existing penalty for contravention of the two offences under current section 121, being up to one year imprisonment.

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<sup>17</sup> See *Donnelly v Edelsten* (1998) 12 Fam LR 294; and *Winters v Winters* [2015] FamCA 195.

**Questions:**

- Is Part XIVB easier to understand than the current section 121?
- Are there elements of Part XIVB that could be further clarified? How would you clarify them?
- Does the simplified outline at section 114N clearly explain the offences?
- Does section 114S help clarify what constitutes a communication to the public?

## Schedule 8: Establishing regulatory schemes for family law professionals

The Exposure Draft includes amendments to establish a new power for Government to make regulations that would provide standards and requirements to be met by family report writers who prepare family reports. This is similar to the powers enabling the establishment of a regulatory scheme for family dispute resolution practitioners and family counsellors (section 10A of the Family Law Act). The regulations would be developed following further consultation with stakeholders and consideration of the impacts of particular regulatory options.

### Family Report Writers

#### *What led to the proposed measure?*

Successive reports and public inquiries have raised concerns about the quality and reliability of family reports and the competency and accountability of professionals who prepare them. These reviews, which include the ALRC, the Joint Select Committee and the House of Representatives Standing Committee on Social Policy and Legal Affairs report 'A better family law system to support and protect those affected by family violence', have recommended the establishment of a regulatory scheme for family report writers (recommendations 53, 9 and 30 respectively).

Family report writers are social science experts, primarily from the professions of social work, psychology or psychiatry. They perform an essential role in family law parenting matters before the family law courts by preparing reports that provide judges, lawyers and parties with information and recommendations about parenting arrangements following separation that are in the best interests of the child or children.

The Attorney-General's Department consulted the public in late 2021 seeking views on how the competency and accountability of professionals who prepare family reports could be improved, and the entities and mechanisms that could be engaged to achieve this. Ninety-six submissions were received from a broad range of stakeholders including legal organisations, family violence prevention advocates and services, industry associations, family and relationship services organisations, Children's Commissioners, Aboriginal and Torres Strait Islander organisations, academics, family report writers and individuals with experience in the family law system. The consultation canvassed a range of issues and approaches relating to establishing regulatory

standards and requirements for family report writers. Almost all submissions supported improved competency and accountability requirements.

This amendment is the first step to addressing the recommendations of the successive inquiries into the family law system and views of stakeholders. Further work is required to develop the regulations that would establish a regulatory scheme that can be efficiently and effectively implemented.

### ***Key changes***

The new provisions would allow Government to develop regulations which provide standards and requirements for family report writers. The Bill details the parameters and boundaries of the scope of a potential regulatory scheme, but does not prescribe a specific regulatory scheme or approach.

The Bill creates definitions to identify who the regulations would apply to, as ‘family report’ and ‘family report writer’ are not currently defined terms in the Family Law Act. The definitions include references to provisions in the Family Law Act which provide the powers under which the family law courts order family assessments and reports.

The Bill provides that the regulations can establish expectations and duties of family report writers, for example qualifications, competency and training requirements, and the processes and information family report writers need to address to demonstrate compliance with requirements. The regulations may establish relevant entities and processes to recognise, monitor and enforce requirements and standards, and the consequences for non-compliance. If a family report writer is not recognised as compliant, or has recognition of their compliance suspended or cancelled, the regulations may provide that the family report writer cannot write family reports or that the court must not have regard to the report. Offences and penalty provisions are included so that the regulations can address more serious issues, such as the making of false or misleading claims. The Bill also provides that certain information may be made public or shared between relevant authorities to support a regulatory scheme.

The development of the regulations, including any transitional arrangements, will be undertaken in consultation with stakeholders.

### ***Questions:***

- Do the definitions effectively capture the range of family reports prepared for family courts, particularly by family consultants and single expert witnesses?
- Are the proposed matters for which regulations may be made sufficient and comprehensive to improve the competency and accountability of family report writers and the quality of the family reports they produce?

## Commencement of the changes

As set out in proposed section 2 of the Bill, most of these changes would commence in 6 months' time unless a day is set by proclamation. For most of the changes, the new law would only apply to new proceedings or breaches that occur after the Act commences. This means that if there are court proceedings already in progress, the new law would not apply in those proceedings. They would apply to proceedings that begin after the Act commences.

**Questions:**

- Is a six-month lead in time appropriate for these changes? Should they commence sooner?
- Are the proposed application provisions appropriate for these changes?