



30 January 2023

# Consultation on Exposure Draft – Family Law Amendment Bill 2023

## Frequently Asked Questions

### **How will these proposed changes impact the way the court determines care arrangements?**

Recent inquiries have shown that the list of factors that have to be considered in making parenting arrangements is overly long and complex. At the moment, this includes considering two primary factors and thirteen additional factors. Decision-making is also guided by four objects, five principles, the presumption relating to sharing parental responsibility and specific considerations about possible time arrangements. This complexity can be confusing and can detract from the focus on the best interests of the child.

These inquiries have also found that the current presumption of ‘equal shared parental responsibility’ and associated requirements for the courts to consider specific time arrangements in the Family Law Act are commonly misunderstood as providing parents with an entitlement to spend equal time with a child. This is incorrect. The presumption is actually about parents having an equal share in making decisions about major long-term issues in relation to their children. Many family law practitioners report that they spend considerable time explaining this to their clients.

The draft Bill aims to make determining parenting arrangements simpler for separating parents and the courts by decreasing the number of steps in the decision-making process. To do this, the draft Bill reduces the ‘best interests’ factors to a list of six, with an additional best interests factor included for Aboriginal and Torres Strait Islander Children (explained on page 2). It also removes the presumption and the associated requirement for the court to consider specific time arrangements if the presumption applies.

The draft Bill continues to recognise the importance of children maintaining a relationship with both parents, as part of the assessment of a child’s best interests. It will remain open to a court to make orders for equal time arrangements, where this is in best interests of the child.

## **How will this change the way separated parents share decision-making about their children?**

If these proposed changes become law, parents will continue to each have parental responsibility for decisions after separation, meaning they can make decisions jointly or independently unless a court orders otherwise (section 61C). Where an order for shared parental responsibility is made by a court or agreed by the parties, parents will continue to share responsibility for decision making on important matters (for example, schooling, health and religion).

Most separated parents will continue to co-parent cooperatively and have their own arrangements agreed outside of the family law system. These families will not be directly impacted by these proposed changes. However, parents agreeing arrangements in future will benefit from a less complicated, more child-focused framework for decision-making, when looking to the law for guidance.

## **How will this impact my existing parenting orders?**

If you have an existing parenting order, and the proposed changes become law, nothing will change. As is the case now, an existing order can only be varied by a new parenting plan made by the parties or by a court. The draft Bill will include a new section making clear the existing case law that parenting orders can only be varied if there has been a significant change in circumstances since the final order was made.

## **If I have an application before the court, will these proposed changes impact me?**

For most of the proposed 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.

## **What does in the 'best interests of the child' mean?**

The law provides the court with some guidance on what to consider when assessing the best interests of a particular child. This guidance is also useful for the majority of parents who make their own arrangements outside of court. At the moment, when the court is asked to consider the 'best interests of the child', it must consider a lengthy list of factors, including two primary factors and thirteen additional factors. This is confusing and leads to lengthy court judgments. The draft Bill simplifies this list of 'best interest factors' to six factors for all children, and an additional factor specifically for Aboriginal and Torres Strait Islander children. This provides a contemporary framework for courts and for separating families to use as a guide when making their own arrangements.

The proposed new factors would be:

- 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.

The proposed additional best interests factor for Aboriginal and Torres Strait Islander children recognises the importance of children staying connected to their culture, family, community, country and language.

### **Will these proposed changes lead to better compliance with existing parenting orders?**

One of the aims of the draft Bill is to make key sections of the Family Law Act easier for parties to understand and for the courts to apply. Part VII, Division 13A, which provides for the enforcement of parenting orders and other orders affecting children, has been identified by the Australian Law Reform Commission as being overly complex. The proposed redrafted law makes the consequences of not complying 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.

### **How will these proposed changes help those in situations of family violence?**

The draft Bill responds to calls from a range of experts, as well as women’s and children’s safety advocates, for repeal of the ‘presumption of equal shared parental responsibility’ and associated consideration of equal or substantial and significant time. Misinterpretation of these provisions means that parents may go into negotiations based on incorrect assumptions about their entitlements, leading to inappropriate arrangements for children.

The draft Bill continues to emphasise that protecting the safety of children when making parenting arrangements is the key consideration in the wording of the new best interests’ factors. Other proposed changes are aimed at protecting victims of family violence through the court process, including improved case management procedures and new rules about admitting evidence of a sensitive nature.

### **What is a harmful proceedings order? Is it going to be harder for me to make an application?**

The draft Bill includes a new power for the courts to restrain a person from filing further family law applications without leave of the court in circumstances where it would be harmful to the other party or the children involved. The focus of the proposed new power is on the protection of the other party and the children and the potential harm that protracted proceedings may have on them, including the detrimental effect on the other party’s capacity to care for a child. This proposed new power differs from the court’s current power to dismiss vexatious proceedings as a harmful proceedings order can be made in circumstances where the applicant does not necessarily have a history of frequently instituting court proceedings that abuse the court process or are without reasonable grounds.

Under the proposed new law, if the court is satisfied that a party's further application may cause harm to the other party, the court is able to make an order that any future applications will be first assessed to ensure that the application is not vexatious, frivolous or an abuse of process, and has reasonable prospects of success, before the application can be filed and served on the other party. If dismissed, the other party will not be made aware of the application, therefore minimising their exposure to further harm.

It will not be harder to make further applications unless the court has made a harmful proceedings order to protect the other party and children regarding further applications. Even where that order is made, the application will still be considered by the court.

### **What is a 'protected confidence'? Can what I say in a private therapy session be used in court?**

'Protected confidences' are records relating to the provision of health services, including records generated when a person attends a medical, counselling or psychological service such as a private therapy session. Currently, 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 proposed change would mean that these records could still be used in court, but only in certain circumstances. The responsibility will be on the party issuing the subpoena to demonstrate that the disclosure of the information would not have a harmful impact, and the court will be required to consider a list of factors, including the potential for them to have a harmful impact, when making the decision whether to admit them or not.

There may be a variety of reasons why a person involved in family law proceedings may wish to have their own therapeutic records entered into evidence. Therefore, the proposed new laws would allow a person to consent to the admission of such evidence.

### **Aren't details of family law proceedings private? What is proposed to change here?**

In most cases, it is illegal to share details that identify the parties and others involved in family law proceedings, and this will continue to be the case. However, there are currently misunderstandings about the scope of this prohibition due to the complex drafting of this section of the law.

The draft Bill redrafts section 121 of the Family Law Act to make it simpler and easier to understand. It makes it clear that a private communication with a family member or a friend, who might be an important part of someone's support network, is not captured by the offence provisions. Rather, the intent is to discourage broader communications to the public that would impact the privacy of the parties and others involved in proceedings. It also makes it clear that communicating identifying accounts of proceedings with relevant government bodies, professional services or professional regulatory bodies (such as child welfare authorities or legal assistance providers) is permissible in certain circumstances.

### **When will these proposed changes happen?**

As these proposed changes are substantial, if the draft amendments become law, there will be a 6-month lead time before most of the changes come into effect. This is to allow family law professionals and the courts to become familiar with the changes. The draft Bill also includes provisions that will allow Government to set standards and requirements to be met by family report writers, but these will commence once the regulations themselves are developed, in consultation with relevant stakeholders, and enter into force.

### **When will a regulatory scheme for family report writers commence?**

These proposed changes are just the first step in moving towards improving and ensuring the competency and accountability of family report writers. The Government will need to establish the details of the proposed regulatory scheme in Regulations, and this cannot occur until the proposed changes to the Family Law Act have been made. Further consultation will occur in order to progress the making of Regulations to support this change.

### **What are you consulting on?**

The consultation is particularly focused on the details of the draft legislation to ensure that the changes proposed to the Family Law Act are as clear and easy to understand as possible and achieve their intended purpose. If you have any comments on the proposed changes, please consider completing the consultation survey or making a submission.